

APPELLATE UPDATE

34TH ANNUAL GENE F. ANDERSON
MEMORIAL CLE
ELLIS COUNTY BAR ASSOCIATION

MAY 2, 2024

PRESENTED BY:



Judge Sarah E. Warner



Judge Lesley Ann Isherwood



Judge Angela D. Coble



“Grain is like quicksand.”

ARBITRATION AWARD AS TO ONE TORTFEASOR DOES NOT PREVENT LITIGATION AGAINST ANOTHER TORTFEASOR

- Under Kansas law, an arbitration action does not qualify as a judicial determination of comparative fault.
- Under Kansas law, the confirmation of an arbitration award by a state court judgment does not qualify as a judicial determination of comparative fault for purposes of invoking the one action rule.

Hodges v. Walinga, 317 Kan. 535 (July 21, 2023).

THIRD PARTY INTEREST IN MARITAL PROPERTY



- Third parties asserting an interest in property of a marital estate can intervene or be joined as parties in a divorce action. The court has the power to determine the third party's interest in the marital property and to what extent that interest may be superior to the interest held by either spouse.
- A debtor who owes a creditor multiple debts may direct how repayments should be applied; otherwise, the creditor may elect to apply any payment as the creditor chooses

In re Marriage of Martin, 63 Kan.App.2d 509 (June 16, 2023).

PUT YOUR RECORDS ON



- Roe resigned as Board Member of Hospital and then sent them a KORA request seeking production of several public records (and there is no dispute they were public records) “in their native-based electronic format. “ Issue is whether requester can demand records be provided in a particular format.
- The answer is yes, in that an accurate reproduction of a public record must mirror the content of that record

JAIL CREDIT

- A defendant is entitled to jail time credit against his or her sentence for all time spent incarcerated while the defendant's case was pending disposition. Overruling *Campbell v. State*, 223 Kan. 528 (1978).



State v. Hopkins, 317 Kan. 652 (October 20, 2023).

PRESCRIPTIVE EASEMENTS

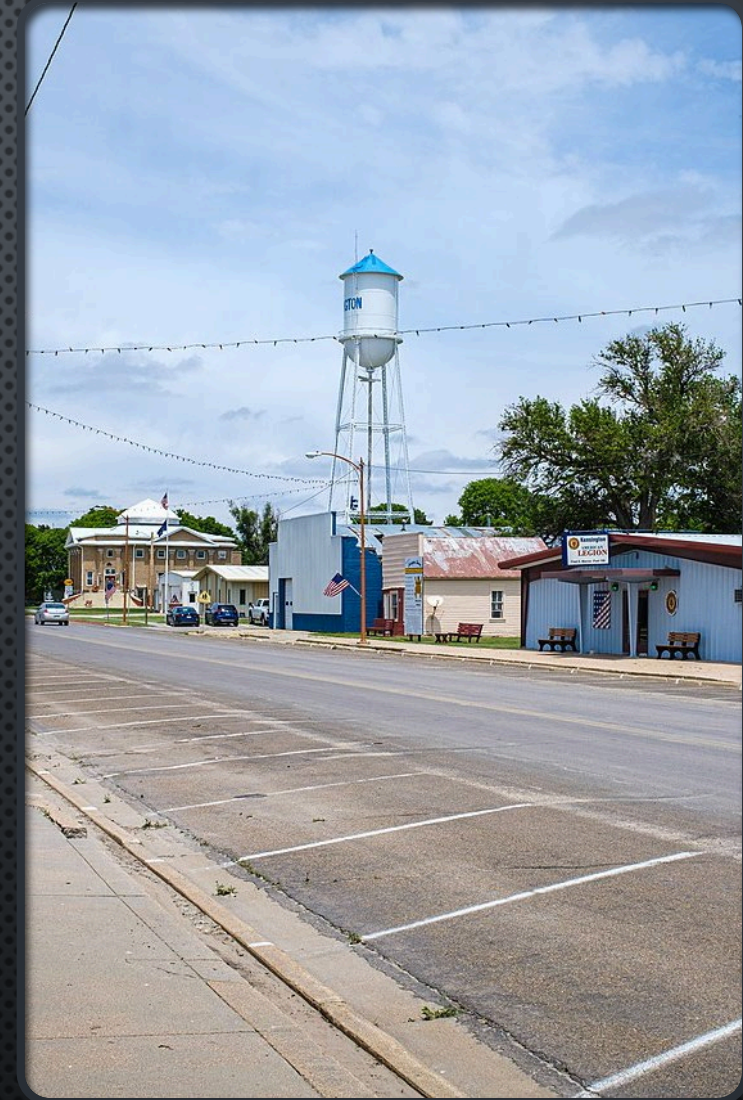
- A prescriptive easement is established by the use of a private way that is (1) open; (2) exclusive, meaning unique to the prescriptor; (3) continuous; (4) set for a prescriptive period; and (5) adverse.
- The exclusivity requirement for a prescriptive easement is met if the landowner's actions fail to substantially interrupt the prescriptor's use of the land for the prescriptor's specific purpose during the prescriptive period.



Pyle v. Gall, 317 Kan. 499 (July 7, 2023).

DAMAGE DONE TO NEIGHBORING HOME WHEN WATER TOWER PAINTED-EXPERT NEEDED

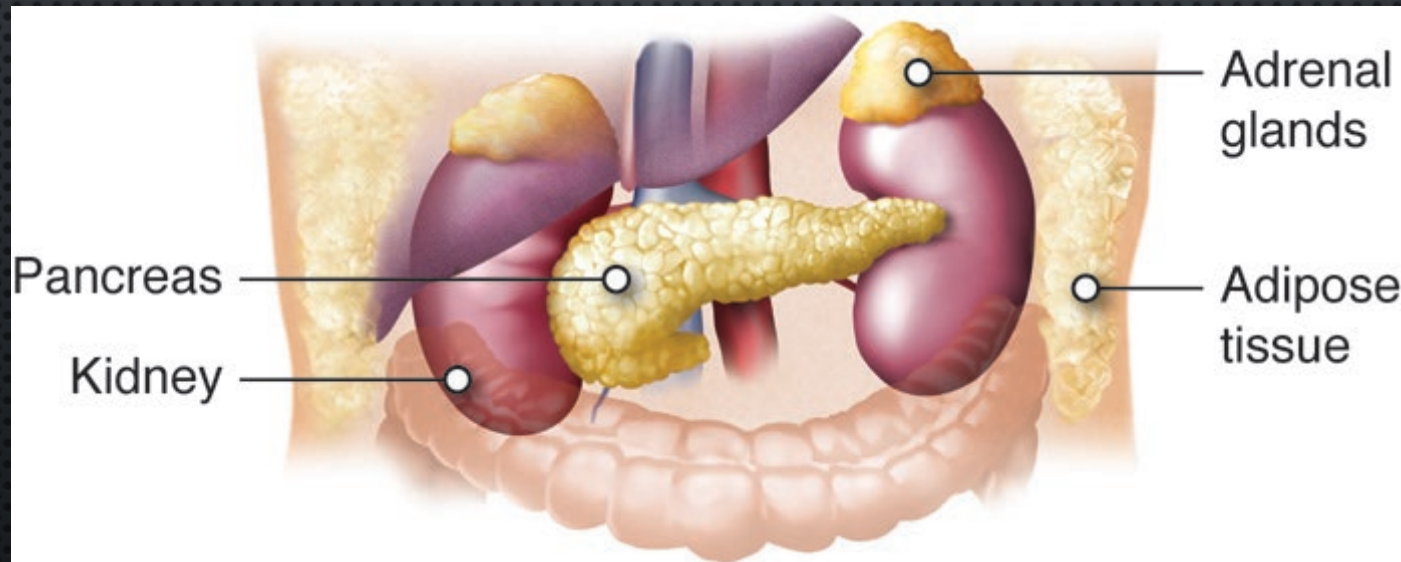
- Expert witness testimony is necessary to show that an independent contractor hired to brush blast and paint a city's water tower should have used different materials or a protective curtain to protect an adjacent landowner from injury. The standard of care for that work is outside the ordinary experience and common knowledge of a juror.



Corbett v. City of Kensington, 63 Kan. App. 2d 466 (May 12, 2023).

THE COMMON KNOWLEDGE EXCEPTION

- When the surgeon misidentifies and removes all or part of a healthy organ, leaving the organ the surgeon intended to operate on untouched, the common-knowledge exception alleviates the need for expert testimony to establish the standard of care or a breach of that standard.



Williams-Davidson v. Lui, 2023 WL 4832666 (July 28, 2023) (unpublished COA opinion); affirmed by an equally divided Kansas Supreme Court in 2024 WL 995874 (March 8, 2024), so COA opinion stands.

HOG WASTE SPRAYED FROM AN IRRIGATION SYSTEM ALONG RIGHT OF WAY IMPACTING HOMES



- Fee owners of real property containing a public roadway have a possessory right to use, control, and exclude others from the land, as long as they do not interfere with the public's use of the road.
- The public has an easement over the property to use the road as a road—but no other rights beyond those purposes. Any further use by members of the public may be authorized through state action, provided the landowner is compensated for the diminished property rights, or through the landowner's consent.
- If a private person wants to install a pipeline in the right-of-way of a public highway, that pipeline must serve a public purpose.

Ross v. Nelson, 63 Kan.App.2d 634 (August 25, 2023); review granted December 22, 2023.

NEGLIGENCE USE OF FORCE V. INTENTIONAL TORT OF BATTERY

- Negligent use of force was claimed but cause of action was for battery. Discussion of negligence v. battery in caselaw.
- Claim for negligent training of Cassius, the police dog, alleging he attacked without a command.
- Plaintiffs may plead a negligence claim for conduct that is independent of the intentional use of force or plead negligence and battery as alternate theories if the evidence supports each theory," but they "cannot assert a negligence claim based solely on an officer's intentional use of physical force.

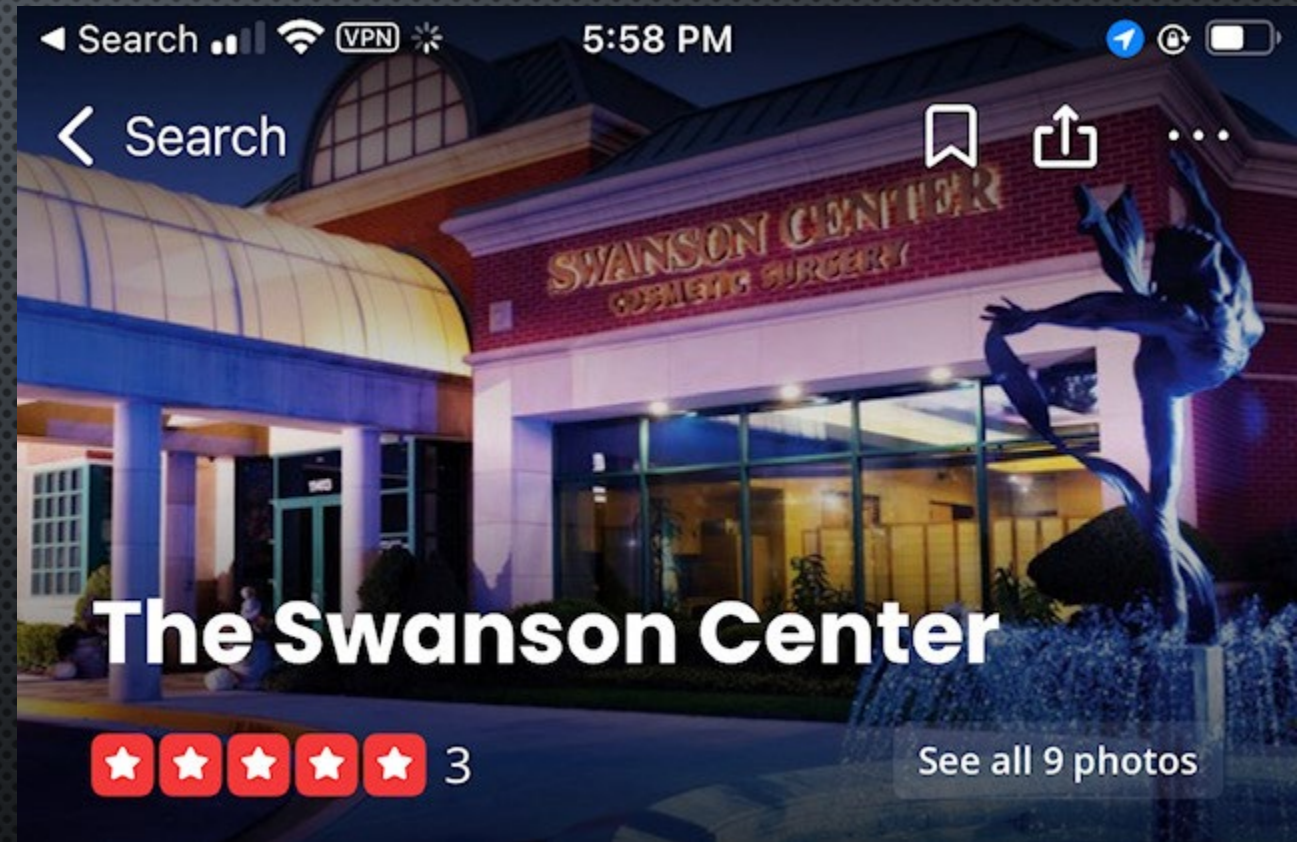


Officer Weidner and Cassius after announcing Cassius' retirement 30 days after this incident and Officer Weidner's promotion to Detective.

Unruh v. City of Wichita, 124,254, ___ Kan. ___, 2024 WL 57470 (January 5, 2024).

DEFAMATION FOR BAD REVIEW ON YELP—ONLY

- Defamation per se and presumed damages have been abolished in Kansas
- Unless injury to reputation is established by the evidence in a defamation cause of action, no other damages are recoverable.



Marcus v. Swanson, 317 Kan. 752 (December 8, 2023).

NONCOMPETES AND TORTIOUS INTERFERENCE



- Continued employment can be sufficient consideration to support an employment contract, including one that adds a covenant not to compete.
- Interference with a contract may be justified—and thus not tortious—in certain instances, including if the interference occurs for a legitimate business purpose.
- The Kansas Tort Claims Act applies to a claim of tortious interference with a contract against a county hospital.
- Damages need to be established with absolute certainty.
- The Kansas Tort Claims Act's damages limitations, (including the cap on total damages and the prohibition of punitive damages, do not violate the right to a jury trial enshrined in section 5 of the Kansas Constitution Bill of Rights.



Ashley Clinic, LLC v. Coates, et al., 2024 WL 1123199, ____ Kan.App.2d ____ (March 15, 2024).



Overview | The Mandt System



KANSAS EMPLOYEE AT-WILL DOCTRINE

- Neither the Freedom from Unsafe Restraint and Seclusion Act (FURSA) nor the Paul D. Coverdell Teacher Protection Act of 2001 (Coverdell Act)—20 U.S.C. § 7941 et seq., create a public policy that would warrant an exception to Kansas' at-will employment doctrine.
- King was fired for failing to follow the Mandt system and failed to establish that his firing was pretextual. As an at-will employee he could be fired for any reason.

King v. Unified School Dist. 501, 63 Kan.App.2d 758 (November 9, 2023).



SELF-INSURED SCHOOL AND SUBROGATION RIGHTS

- K.S.A. 40-202(b) does not exempt self-insured school districts from regulation under the Code.
- An entity that chooses to self-insure under K.S.A. 72-1891 can still be said to offer a "health benefit plan," as that statute plainly contemplates.

Towne v. USD 259, ___ Kan. ___, 2024 WL 57113 (January 5, 2024).

RIGHT TO CONSULT WITH COUNSEL PRIOR TO BREATH TEST

- **K.S.A. 2019 Supp. 8-1001(c)(1)**
 - “(c) When requesting a test or tests of breath or other bodily substance other than blood or urine, under this section, the person shall be given oral and written notice that:
 - (1) There is no right to consult with an attorney regarding whether to submit to testing, but, after the completion of the testing, the person *may request and has the right to* consult with an attorney and may secure additional testing.”
 - To properly invoke the right to post-evidentiary breath test counsel, the plain language of the statute requires the person to make the request after administration of the evidentiary test.



State v. Kerrigan, 317 Kan. 683 (November 17, 2023).

WHEN IS A FIFTH-WHEEL CAMPER A MOTOR VEHICLE?

- Exigent circumstances justifying the warrantless search of motor vehicles extends to a fifth-wheel camper attached to a vehicle traveling on a public roadway when an objective observer would conclude that it was not being used as a residence at the time of the search.

State v. Crudo, __ Kan. __, 541 P. 3d 67 (January 12, 2024).





NO TIMELY OBJECTION = NO REVERSAL

- The contemporaneous objection rule under K.S.A. 60-404 requires a party to make a timely and specific objection at trial to preserve an evidentiary challenge for appellate review. The statute has the practical effect of confining a party's appellate arguments to the grounds presented to the district court.

State v. Scheetz, 124,054, ___ Kan. ___, 2024 WL 132989 (January 12, 2024).



EDPA DOES NOT PROVIDE A PRIVATE RIGHT OF ACTION

Kansas Fire & Safety, et al v. City of Topeka, 317 Kan. 418 (June 30, 2023).

NEWS

**22 people without homes
after two-alarm blaze
destroys Overland Park
apartment building**



ONE CHARGE FOR EACH APARTMENT?

- Not multiplicitous to charge a separate act of arson for each apartment in the building, although he only set the fire once.

State v. Buchanan, 317 Kan. 443 (June 30, 2023).

**THANK YOU
FOR INVITING US TO SPEAK**



**Kansas
Court of Appeals**

RECENT DECISIONS AND HOT ISSUES: CIVIL CASES

Cases: April 1, 2023-April 1, 2024

The following are summaries of case highlights from opinions filed in the last 12 months by the Kansas Supreme Court or the Kansas Court of Appeals. They have been prepared by staff attorneys for the two courts and are not to be used as an authoritative reference regarding the cases described. Only the portion of each case related to the topic noted is discussed. You are encouraged to read the entire case before relying upon it.

The effect of a petition for review: Pending determination of the Supreme Court on a petition for review and during the time in which a petition for review may be filed, an opinion of the Court of Appeals is not binding on the parties or on the district courts. If a petition for review is granted, the decision or opinion of the Court of Appeals has no force or effect, and the mandate will not issue until disposition of the appeal on review. If review is denied, the decision of the Court of Appeals is final as of the date of the denial. A denial of a petition for review expresses no opinion of the Supreme Court on the merits of the case. See Kan. Sup. Ct. R. 8.03

ADMINISTRATIVE LAW

TAKINGS CLAUSE. The Kansas Universal Service Fund (KUSF) subsidizes rural local exchange carriers (RLECs) so that they may have an opportunity to earn a reasonable rate of return on their investments. The Legislature placed a \$30 million cap on annual KUSF support. A group of RLECs challenged implementation of the cap, arguing that it created an unconstitutional taking. The Court of Appeals rejected the RLECs argument, holding that the RLECs failed to provide sufficient evidence to show that any lost profits rose to the level of an unconstitutional taking.

Blue Valley Tele-Comm. v. Kansas Corporation Comm'n, 63 Kan. App. 2d 381, 528 P.3d 1054 (Apr. 21, 2023).

ARBITRATION

ONE-ACTION RULE. In Kansas, an arbitration action does not qualify as a judicial determination of comparative fault. Moreover, the confirmation of an arbitration award by

a state court judgment does not qualify as a judicial determination of comparative fault for purposes of invoking the one-action rule.

Hodges v. Walinga USA Inc., 317 Kan. 535, 532 P.3d 440 (July 21, 2023).

ATTORNEY FEES

STATUTORY INTERPRETATION. After finding the City of Manhattan was liable for damages to private property, the district court awarded attorney fees to the petitioners under K.S.A. 60-2006. On appeal, the City argued the district court erred in awarding attorney fees on an issue of first impression and K.S.A. 60-2006 did not apply to municipalities or to hit-and-run cases. The Court of Appeals disagreed, finding nothing within the plain and unambiguous statutory language barred application of the attorney fee statute. The panel also ordered the City to pay appellate attorney fees.

Wickham v. City of Manhattan, 63 Kan. App. 2d 294, 528 P.3d 996 (Apr. 7, 2023).

CONSTITUTIONAL LAW

FIRST AMENDMENT. Wichita's ordinance criminalizing "noisy conduct tending to reasonably arouse alarm, anger or resentment in others" is unconstitutionally overbroad under the First Amendment. Using dictionary definitions to construe "noisy conduct," the ordinance criminally punishes a person who makes disagreeable, unpleasant, or loud sounds. Because many instances of disagreeable, or unpleasant speech are constitutionally protected, the ordinance is overbroad.

City of Wichita v. Griffie, __ Kan. __, __ P.3d __, 2024 WL 1123460 (Mar. 15, 2024).

CONTRACTS

NONCOMPETE CLAUSES; DAMAGES. A jury found that Dr. Scott Coates violated a noncompete clause with Ashley Clinic, LLC, by going to work for Labette County Medical Center. On appeal, the Court of Appeals concluded that Coates breached a valid and enforceable employment agreement that Ashley Clinic's unjust-enrichment claim

failed because the clinic did not confer a benefit on Labette, and that the damage cap did not violate the Kansas Constitution's right to jury trial.

Ashley Clinic, LLC v. Coates, __ Kan. App., __ P.3d __ 2024 WL 1123199 (Mar. 15, 2024).

ATTORNEY FEES. Stephen Moore was an attorney/owner at Shank & Heinemann. Moore withdrew from Shank and went to work for Krigel & Krigel. Moore took a contingency fee case with him to Krigel which then settled. Shank made a quantum meruit claim for attorney fees earned from the settlement. Krigel argued that Shank waived its right to quantum meruit recovery because Shank's operating agreement, which was used to value Moore's interest in the firm when he withdrew, valued in-process contingency fee cases at zero. The district court granted summary judgment to Krigel. The Court of Appeals reversed, holding that the district court's interpretation of the operating agreement was unreasonable and did not constitute a waiver of Shank's right to quantum meruit recovery.

Krigel & Krigel, P.C. v. Shank & Heinemann, LLC, 63 Kan. App. 2d 344, 528 P.3d 1030 (April 21, 2023), *petition for rev. filed* (May 22, 2023), *petition for rev. denied* (Aug. 25, 2023).

EMINENT DOMAIN

REVIEW OF RELOCATION FEES. The EDPA neither provides a private right of action to recover relocation benefits nor authorizes judicial review of relocation-benefit determinations in eminent-domain appeals. Recovery of such benefits under Kansas statutory law emanates from the administrative procedures described in the Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act (KRA). After exhausting administrative remedies under the KRA, a district court then has jurisdiction to review the administrative determination.

Fire & Safety Equip. v. City of Topeka, 317 Kan. 418, 531 P.3d 504 (June 30, 2023).

EMPLOYMENT AND LABOR

TRADE SECRETS. Aeroflex Wichita, Inc. and Tel-Instrument Electronics, Corp. were competitors for an Army contract. Tel-Instrument recruited and hired two Aeroflex employees. Tel-Instrument then won the contract. Aeroflex filed suit claiming misappropriation of trade secrets, tortious interference, and breach of contract. A jury found in favor of Aeroflex on the latter claims. Tel-Instrument appealed. The Court of Appeals affirmed, holding that the district court properly allowed Aeroflex, a licensee, standing to sue; properly placed the statute-of-limitations issue before the jury; and properly admitted the

prior confidentiality agreement. The Court of Appeals acknowledged that the district court committed some instructional and evidentiary errors but ruled the errors harmless.

Aeroflex Wichita, Inc. v. Filardo, 63 Kan. App. 2d 588, 534 P.3d 610, 2023 WL 4671961 (July 21, 2023).

FAMILY LAW

PRESUMPTIONS OF PARENTAGE. When conflicting presumptions of parentage arise under the Kansas Parentage Act, weighing the conflicting presumptions and determining the best interests of the child involve judgment calls that are for a district court judge to make. On appeal, the judge's determination of parentage in such a situation will be reviewed for an abuse of discretion.

In re R.R., 317 Kan. 691, 538 P.3d 838 (Nov. 22, 2023).

JURISDICTION. X.L. lived with a foster family after the district court terminated her biological parents' rights. The Department for Children and Families found an adoptive family for X.L. together with her siblings. X.L.'s foster parents attempted to adopt X.L. alone, but the district court denied this plan. In response, the Department Secretary personally directed that the foster parents should adopt X.L. The prospective adoptive parents challenged the Secretary's plan, and the district court placed X.L. with them. The Department appealed that decision. This court dismissed the appeal because it is an appeal of a district court's post-termination decision which this court lacks appellate jurisdiction to review under the Revised Kansas Code for Care of Children.

In re X.L., 63 Kan. App. 2d 853, 540 P.3d 369 (Dec. 22, 2023) 2023 WL 8853357.

DIVORCE DECREES—DORMANCY. In general, a judgment that is not executed within five years of entry of judgment becomes dormant. After becoming dormant, a judgment remaining dormant for 2 years must be released by a district court upon request. But the time within which action must be taken to prevent dormancy does not run during any time in which enforcement by legal process is stayed or prohibited. This tolling provision prevents a divorce decree dividing the parties' interests in a retirement account with KPERS from becoming dormant until benefits become payable to the plan member.

In re Holliday, 317 Kan. 469, 531 P.3d 1216 (June 30, 2023); see also *In re Shafer*, 317 Kan. 481, 531 P.3d 524 (June 30, 2023).

COLLATERAL ATTACKS ON PARENTAGE. E.L. and M.S., a same-sex couple, were in a same-sex relationship when E.L. had twins via artificial insemination. After they separated, E.L. married and later divorced C.L. M.S. filed a parentage action seeking to

have herself declared the twins' legal mother, which was ultimately granted after a procedural tangle. When C.L. later filed a separate parentage action, E.L. and M.S. successfully moved to dismiss for failure to state a claim. The Court of Appeals affirmed, holding that C.L. failed to show she was a necessary party in M.S.'s parentage action or that the district court otherwise lacked jurisdiction and thus the prior decision was determinative for all purposes.

In re W.L. and G.L., 63 Kan. App. 2d 533, 532 P.3d 447 (June 16, 2023).

EQUITABLE LIENS ON MARITAL PROPERTY. Kansas Wound Specialists, P.A., and Emergency Services, P.A. intervened in the divorce action between Thomas A. Martin and Nancy J. Martin to seek equitable liens against marital property traceable to money that Nancy had embezzled from the two businesses. The district court granted the equitable liens and found that the assets were not part of the marital estate. The Court of Appeals affirmed the district court's judgment granting equitable liens against the assets, but reversed the decision to remove the property from the marital estate.

In re Marriage of Martin and Martin, 63 Kan. App. 2d 509, 532 P.3d 814 (June 16, 2023).

GARNISHMENT

CONFLICT OF LAWS. M & I Bank received a judgment against Kevin Higdon in Missouri. It registered that judgment in Kansas, and the district court ordered garnishment. The order was served on the Higdon's account at a bank, which had branches in Kansas and Missouri. When the Higdon's opened the account, the bank only had Missouri branches, where the couple lives. Under Missouri law, the account was not subject to garnishment because the account was held as tenancy by the entirety. Kansas does not recognize tenancy by the entirety. The Higdon's argued because of the Missouri exemption the account was not subject to garnishment in Kansas. The Court of Appeals disagreed, applied Kansas garnishment law, and held that Kevin's portion of the funds were properly garnished.

M & I Marshall & Isley Bank v. Higdon, 63 Kan. App. 2d 668, 536 P.3d 898, 2023 WL 5988082 (Sept. 15, 2023), *petition for rev. filed* (Oct. 13, 2023), *petition for rev. granted*.

IMMUNITY

LIABILITY IMMUNITY FOR VACCINE ADMINISTRATION. M.T. sued Walmart Stores, Inc. after a Walmart pharmacist administered a Pfizer COVID-19 vaccine to her minor child without parental consent. The district court dismissed most of M.K.'s claims as barred by the Public Readiness and Emergency Preparedness (PREP) Act but certified for interlocutory appeal the question of whether the Act applies to claims based

on the failure to secure parental consent. The Court of Appeals found the district court erred in not dismissing all claims, holding that failure to obtain parental consent has a causal relationship with the administration of the vaccine and the remaining claims were covered under the PREP Act.

M.T. ex rel. M.K. v. Walmart Stores, Inc., 63 Kan. App. 2d 401, 528 P.3d 1067 (Apr. 28, 2023), *petition for rev. denied* (Aug. 25, 2023).

INSURANCE

SELF-INSURED SCHOOL DISTRICTS. An insurance statute provision that exempts the "employees of a particular person, from, or corporation" from regulation under the Insurance Code does not exempt self-insured school districts from regulation under the Code. The contrary holding of *U.S.D. No. 259 v. Sloan*, 19 Kan. App. 2d 445 (1994) is overruled.

Towne v. U.S.D. No. 259, __ Kan. __, 540 P.3d 1014 (Jan. 5, 2024).

PRISONERS

FORCED SAVINGS; GOVERNMENT BENEFITS. Stephen Alan Macomber, a prisoner, received federal funds as the result of various pandemic relief acts. Per prison regulations, 10 percent of those funds were deposited into Macomber's forced savings account. Macomber argued that the funds were a government benefit and, thus, should have been exempt from forced savings. The Court of Appeals disagreed and held that the funds were advances of income tax credits, not a government benefit. Thus, the funds were subject to forced savings.

Macomber v. State, 63 Kan. App. 2d 846, 540 P.3d 409, No. 126,356, 2023 WL 8656566 (Dec. 15, 2023).

REAL PROPERTY

PRESCRIPTIVE EASEMENT. Establishing a prescriptive easement requires use of a private way that is (1) open; (2) exclusive, meaning unique to the prescriptor; (3) continuous; (4) for a set prescriptive period; and (5) adverse. Exclusivity in the context of adverse possession is different than exclusivity in the context of prescriptive easements. The prescriptor meets the exclusivity requirement for a prescriptive easement if the landowner's

actions fail to substantially interrupt the prescripitor's use of the land for the prescripitor's specific purpose.

Pyle v. Gall, 317 Kan. 499, 531 P.3d 1189 (July 7, 2023).

PARTITION; DEFAULT. The Mog Trusts filed to partition property rights to oil, gas, and other minerals. An interested party, the McEwen Trust, was served with notice of the partition action but never filed an answer. Its non-attorney trustee-beneficiary appeared at the hearing and declined to hire counsel. Because an individual cannot represent a trust pro se, the district court held the McEwen Trust defaulted and the case proceeded without its involvement. On appeal, the Court of Appeals affirmed, holding that a partition case determines parties' interests in property and provides the only opportunity for interested parties to challenge the partition. When an interested party fails to respond to the petition, that party defaults and is no longer entitled to participate in the case. A defaulting party is not entitled to notice of filings or rulings in the case.

Mog v. St. Francis Episcopal Boys' Home of Salina, 63 Kan. App. 2d 579, 534 P.3d 604, 2023 WL 4536163 (July 14, 2023), *petition for rev. filed* (Aug. 14, 2023), *petition for rev. denied*.

STATUTES OF LIMITATION

WRONGFUL CONVICTION. K.S.A. 60-5004 creates a civil action for persons wrongfully convicted and imprisoned. The subsection referring to, "A claimant convicted, imprisoned and released from custody before July 1, 2018" refers to the imprisonment for which a claimant is seeking compensation, rather than some other, unrelated imprisonment.

In re Bell, 317 Kan. 334, 529 P.3d 153 (May 19, 2023).

TORTS

EXCESSIVE USE OF FORCE. A negligence claim alleging excessive force by a police officer requires the plaintiff to show that the officer owed that plaintiff a legally recognized duty of care that arose independent of the force the plaintiff alleges to be excessive. A court must be able to analyze the distinct elements of negligence separately from the distinct elements of battery and its associated defense of privilege. Language in *Dauffenbach v. City of Wichita*, 233 Kan. 1028 (1983), suggesting an officer owes a special duty anytime "there is an affirmative act by the officer causing injury" is disapproved.

Unruh v. City of Wichita, __ Kan. __, 540 P.3d 1002 (Jan. 5, 2024).

CIVIL CONSPIRACY. Steven K. Brinker sued his former business partner, Robert J. McCaslin, McCaslin's new business partner, Jack Muhlstein, their new joint business and

several of Muhlstein's companies under several business tort theories, including civil conspiracy. The district court granted summary judgment against Muhlstein and his companies. On appeal, the Court of Appeals affirmed summary judgment as to the businesses but reversed the summary judgment ruling as to Muhlstein, concluding that genuine disputes of material fact precluded summary judgment on Brinker's claims against Muhlstein for civil conspiracy, tortious interference with a business expectancy, tortious interference with contract, and violations of the Kansas Uniform Trade Secrets Act.

Brinker v. McCaslin, 63 Kan. App. 724, 538 P.3d 1101, 2023 WL 6934505 (Oct. 20, 2023).

RETAILIATORY DISCHARGE U.S.D. 501 terminated Johnny King's employment as a paraprofessional after King used physical force to stop a student from being disruptive. King sued for retaliatory discharge, claiming that the school district's stated reason was a pretext for punishing him for the exercise of a right set out by statute. The school district moved for judgment as a matter of law, arguing that King failed to show that U.S.D. 501 knew King had exercised that right. On appeal, the Court of Appeals affirmed the ultimate decision but held that the district court erred by finding King was required to prove that he advised U.S.D. 501 of the legal basis for his claim that his actions were protected.

King v. Unified School District 501, 63 Kan. App. 2d. 758, 539 P.3d 1045 No. 125,117, 2023 WL 7393145 (Nov. 9, 2023).

WRONGFUL DEATH. Candice White sued Bryan Koerner for wrongful death after their son died by suicide in Koerner's home. Koerner's home insurer agreed to settle without his consent. The district court denied Koerner's subsequent request to participate in the apportionment of the settlement funds, reasoning that Koerner's negligence had been determined by settlement and that allowing him to participate would permit him to profit from his own wrongdoing. The Court of Appeals reversed, holding that the district court erred in relying upon the settlement agreement to determine Koerner's negligence. The court also held that the Kansas Wrongful Death Act does not disallow recovery by an heir who has negligently contributed to the death of the decedent.

White v. Koerner, 63 Kan. App. 2d 622, 533 P.3d 314, 2023 WL 4832093 (July 28, 2023).

TRESPASS AND NUISANCE. Terry Nelson installed pipes to carry hog waste in the right-of-way abutting his neighbors' properties. Rodney and Tonda Ross sued Nelson for trespass and nuisance. The Rosses obtained judgment on both claims, and Nelson appealed. The Court of Appeals affirmed the judgment, ruling that Nelson did not have a right to use the right-of-way for private purposes, that the Right to Farm Act did not shield Nelson from

the nuisance claim because his activities did not conform with state law, and that the Act did not preclude the punitive damage award under these facts.

Ross v. Nelson, 63 Kan. App. 2d 634, 534 P.3d 634, 2023 WL 5491862 (Aug. 25, 2023), *petition for rev. filed* (Sept. 21, 2023), *petition for rev. granted*.

PREMISES LIABILITY. Guy Corazzin was injured when he sat on a chair that collapsed at an Edward Jones office. On Corazzin's premises liability claim, the district court granted summary judgment for Edward Jones because Corazzin failed to show Edward Jones knew the chair was defective or dangerous. The Court of Appeals affirmed, holding that the warning label explaining that the chair was intended for residential use was not enough to give Edward Jones notice that the chair was dangerous.

Corazzin v. Edward D. Jones & Co., 63 Kan. App. 2d. 489, 530 P.3d 445 (May 19, 2023).

MUNICIPAL IMMUNITY; STANDARD OF CARE & CAUSATION. Corbett sued Cunningham and the City for personal injury and property damage allegedly caused by Cunningham when completing maintenance on a water tower near Corbett's property. The Court of Appeals held the district court did not err in granting summary judgment to the defendants, finding the City is immune from tort liability because Cunningham is an independent contractor. The court further ruled that Corbett's personal injury and property damage claims against Cunningham could not proceed without expert opinion testimony because questions about the proper procedures for brush blasting and painting an elevated water tower and about causation from lead contamination are beyond a juror's common knowledge.

Corbett v. City of Kensington, 63 Kan. App. 2d. 466, 530 P.3d 750 (May 12, 2023).

WORKERS COMPENSATION

CALCULATION OF IMPAIRMENT RATING; REDUCTION OF AWARD.

Weaver appealed from his workers compensation award where the Board interpreted K.S.A. 44-510d(b)(23), which dictates the calculation of scheduled injuries, to not require the use of competent medical evidence when assessing an impairment rating. Rather, the Board held that only utilization of the Sixth Edition of the AMA Guides is statutorily required. The Court of Appeals disagreed with the Board, holding the Guides should be used as a starting point in calculating impairment ratings and then competent medical evidence should be used to modify or confirm the rating. Wyandotte County cross appealed, in which it argued that Weaver's award should have been reduced for his preexisting impairments to his right arm and hand, in accordance with K.S.A. 44-510(e). The Court disagreed and held that no reduction for preexisting impairment is appropriate when the evidence showed that

Weaver's impairment resulting from his current injury was different from his previously compensated impairments.

Weaver v. Unified Government of Wyandotte County, 63 Kan. App. 2d 773, 539 , P.3d 617, No. 125,592, 2023 WL 7931280 (Nov. 17, 2023).

WRIT OF MANDAMUS

DUTIES OF COUNTY SHERIFF. The City of Atchison filed a petition for writ of mandamus seeking to compel Atchison County Sheriff Jack Laurie, to accept detainees committed to him by city police as required by K.S.A. 19-1930(a). Laurie alleged the city police were bringing detainees to the jail without assessing their medical needs, unlawfully shifting the associated treatment expenses to the County. He argued that K.S.A. 19-1930(a) afforded him discretion to reject detainees if he believed they required medical evaluation. The Court of Appeals disagreed, holding that K.S.A. 19-1930(a) is mandatory and requires a county sheriff to accept detainees without exceptions.

City of Atchison v. Laurie, 63 Kan. App. 2d 310, 528 P.3d 1007 (Apr. 14, 2023).

WRONGFUL CONVICTION

"IMPRISONMENT." When a claimant is wrongfully convicted of a felony crime and sentenced to jail time under K.S.A. 21-6603(g)—which permits a sentencing court to impose up to 60 days "imprisonment" in county jail as a condition of probation in felony cases—the claimant is "imprisoned" for the purposes of K.S.A. 60-5004(c)(1)(A) (civil actions for persons wrongfully convicted and imprisoned).

In re Baumgarner, 317 Kan. 662, 537 P.3d 92 (Oct. 20, 2023).

RECENT DECISIONS AND HOT ISSUES: CRIMINAL CASES

Cases: April 1, 2023-April 1, 2024

The following are summaries of case highlights from opinions filed in the last 12 months by the Kansas Supreme Court or the Kansas Court of Appeals. They have been prepared by staff attorneys for the two courts and are not to be used as an authoritative reference regarding the cases described. Only the portion of each case related to the topic noted is discussed. You are encouraged to read the entire case before relying upon it.

The effect of a petition for review: Pending determination of the Supreme Court on a petition for review and during the time in which a petition for review may be filed, an opinion of the Court of Appeals is not binding on the parties or on the district courts. If a petition for review is granted, the decision or opinion of the Court of Appeals has no force or effect, and the mandate will not issue until disposition of the appeal on review. If review is denied, the decision of the Court of Appeals is final as of the date of the denial. A denial of a petition for review expresses no opinion of the Supreme Court on the merits of the case. See Kan. Sup. Ct. R. 8.03

ALTERNATIVE MEANS

FLEEING AND ELUDING. K.S.A. 8-1568(b) sets out two ways someone commits the crime of fleeing and eluding. Subsection (1) defines the crime based on committing certain acts during police pursuit. Subsection (2) defines the crime based on eluding capture for commission of a felony. The Kansas Supreme Court has previously held that these two subsections create alternative means. See *State v. Davis*, 312 Kan. 259, 474 P.3d 722 (2020). Although the subsections create alternative means, a jury instruction listing two different felonies that would satisfy subsection (2) does not create a nested alternative means issue. Listing two possible felonies the defendant was eluding creates options with a means.

State v. Jordan, 317 Kan. 628, 537 P.3d 443 (Oct. 20, 2023).

COMPUTER CRIMES. K.S.A. 21-5839(a)(2) does not contain alternative means of committing a computer crime because both clauses in it—executing a scheme "with the intent to defraud" and obtaining money "by means of false or fraudulent pretense or representation"—require an individual to engage in fraudulent behavior to induce a condition to facilitate theft.

State v. Smith, 317 Kan. 130, 526 P.3d 1047 (Apr. 7, 2023).

CAPITAL MURDER

STATE V. FLACK. The Kansas Supreme Court affirmed Kyle Flack's conviction for capital murder and accompanying death sentence on direct appeal. Of note, the court held that, on the facts of the case, the trial court acted within its discretion when it denied the defense's second and third motions for a continuance after a change in defense counsel.

State v. Flack, __ Kan. __, 541 P.3d 717 (Jan. 19, 2024).

CONSTITUTIONAL LAW

STANDING. When the Legislature criminalizes speech and does not—within the elements of the crime—provide a high degree of specificity and clarity demonstrating that the only speech being criminalized is constitutionally unprotected speech, the law is sufficiently unclear to confer pre-enforcement standing on a plaintiff challenging the law.

League of Women Voters of Kansas v. Schwab, 317 Kan. 805, 539 P.3d 1022 (Dec. 15, 2023).

DEFAMATION

REPUTATIONAL HARM. To prove defamation, one of the elements a plaintiff must prove is reputational harm to the person defamed. Speculation about reputational harm is not sufficient. Such harm may be shown by reasonable inferences, but these reasonable inferences must be tethered to a fact in the world, whether it be declining revenue, decreased professional opportunities, or some other indicator of reputational harm that is unique to the case at hand.

Marcus v. Swanson, 317 Kan. 752, 539 P.3d 605 (Dec. 8, 2023).

DOUBLE JEOPARDY

ARSON. A defendant charged with aggravated arson upon a property in which there is a person does not suffer a double jeopardy violation when convicted on multiple counts arising from damage by fire to separate apartments, each with a person inside.

State v. Buchanan, 317 Kan. 443, 531 P.3d 1198 (June 30, 2023).

DRIVING UNDER THE INFLUENCE

REQUEST FOR ATTORNEY. Under the implied consent DUI statutes, a person does not have a statutory right to consult an attorney about whether to submit to an evidentiary breath test. The required implied consent advisory informs the person that after the EBT they have the right to consult an attorney and obtain additional testing. Under the plain language of the 2018 amendments to the statute, a pre-test request for an attorney is not sufficient to invoke the statutory right. The statute requires the person to make the request after the EBT has been administered. This holding distinguishes the court's previous holding in *Dumler v. Kansas Dept. of Revenue*, 302 Kan. 420 (2015).

State v. Kerrigan, 317 Kan. 683, 538 P.3d 852 (Nov. 17, 2023).

DUE PROCESS

COERCED CONFESSION. Neither K.S.A. 60-460, a hearsay exception, nor the reliability standard it incorporates apply when a court decides whether an accused's statements to law enforcement officers violate the Due Process Clause of the Fourteenth Amendment. The purpose of the Due Process Clause is not to exclude presumptively false evidence, but

to prevent fundamental unfairness in the use of evidence whether true or false. Holdings to the contrary in *State v. McCarther*, 197 Kan. 279 (1966), and its progeny are overruled.

State v. G.O., __ Kan. __, 543 P.3d 1096 (Mar. 1, 2024).

ELEMENTS OF CRIMES

"OVERCOME BY FORCE OR FEAR." Aggravated criminal sodomy requires the State prove three elements: (1) sodomy occurred; (2) the victim did not consent; and (3) the victim was "overcome by force or fear." Although not previously analyzed in the context of the criminal sodomy statute, it has been analyzed and defined in the context of the rape statute. The phrase has the same meaning in the criminal sodomy statute as it does in the rape statute.

State v. Pepper, 317 Kan. 770, 539 P.3d 203 (Dec. 8, 2023).

2ND-DEGREE MURDER—FAILURE TO ACT. A person may be held criminally liable for a failure to act if that person owes a legal duty of care. A duty of care may arise out of either common law or legislative enactment. Failure to properly care for a dependent adult—including providing sufficient food and water to survive—can support a conviction for second-degree murder.

State v. Burris, __ Kan. __, __ P.3d __ 2024 WL 1123442 (Mar. 15, 2024).

FELONY THEFT OF UNREMITTED SALES TAXES. For the purposes of criminal theft statutes, the Kansas Department of Revenue does not have an "interest" in, nor is it the owner of, unremitted sales taxes collected by a retailer under the Kansas Retailers' Sales Tax Act. As such, a retailer does not exert unauthorized control over collected sales taxes by failing to remit them at the mandated time. The duties imposed by the Retailers' Sales Tax Act and the State's remedies for violation of those duties are self-contained in the Act.

State v. Ruiz, 317 Kan. 669, 538 P.3d 828 (Nov. 17, 2023).

STIPULATIONS. When requested by a defendant charged with unlawful possession of a weapon, a district court must approve a stipulation that the defendant had committed a prior felony that prohibited the defendant from owning or possessing a weapon on the date in question.

State v. Guebara, __ Kan. __, __ P.3d __, 2024 WL 996174 (Mar. 8, 2024).

POSSESSION. Randy Ballantyne was convicted of 26 counts of sexual exploitation of a child for possession of child pornography. The Court of Appeals held that possession of

child pornography includes knowingly accessing and viewing child pornography on the internet and does not require an additional affirmative act of control over the pornography.

State v. Ballantyne, __ Kan. App. __, 543 P.3d 1152, 2024 WL 388161 (Feb. 2, 2024).

KIDNAPPING. Under Kansas law, a person who confines someone with the intent to facilitate the commission of another crime has committed a kidnapping. But some crimes, such as rape and robbery, by their nature may involve the confinement of a victim. In *State v. Buggs*, 219 Kan. 203 (1976), the court crafted a 3-part test to ensure that a defendant is not convicted of two crimes for identical conduct in these circumstances. The *Buggs* test does not apply, however, to kidnapping committed with the intent to inflict bodily harm or terrorize a person.

State v. Butler, 317 Kan. 605, 533 P.3d 1022 (Aug. 11, 2023).

ATTEMPTS—SPECIFIC INTENT. If the State charges an attempted crime it must prove specific intent for each element of the target crime, even those elements of the target crime without a specific intent requirement. This means the State must prove a defendant charged with attempted aggravated burglary specifically intended to enter a dwelling in which there was a person, overruling *State v. Watson*, 256 Kan. 396, 401, 885 P.2d 1226 (1994).

State v. Larsen, 317 Kan. 552, 533 P.3d 302 (Aug. 4, 2023).

AIDING AND ABETTING; CONTRIBUTING CAUSE OF DEATH. Brian A. Spilman, Jr. challenged his conviction for involuntary manslaughter, arguing that the district court improperly instructed the jury on aider-or-abettor liability because he could not intend to commit a reckless act. Spilman also contended the jury lacked sufficient evidence to convict because his conduct was not the proximate cause of Jason Pantle's death. The Court of Appeals rejected both arguments, holding that Kansas allows a person to intend to assist a person in a reckless act and that Spilman is legally liable for Pantle's death because his conduct contributed to that death.

State v. Spilman, 63 Kan. App. 2d, 550, 534 P.3d 583, 2023 WL 4376272 (July 7, 2023), *petition for rev. filed* (Aug. 7, 2023).

EVIDENCE

OATH OR AFFIRMATION. The first witness at Dianna Clingerman's trial for misdemeanor disturbing the peace had audio issues when testifying over Zoom. The court did not hear him swear or affirm to tell the truth. Clingerman did not object to the admission of testimony and cross-examined the witness. On appeal, the Kansas Court of Appeals held

that Clingerman could not raise the issue on appeal because she failed to make a timely objection at trial.

State v. Clingerman, No. 125,695, 2023 WL 5986955, 63 Kan. App. 2d 682, 536 P.3d 892 (Sept. 22, 2023).

PRIOR CRIMES. PIK Crim. 4th 57.040 states that a defendant's use of a controlled substance is a factor the jury can consider in a nonexclusive possession case. But the instruction fails to adequately summarize the nuances of the caselaw on the issue and allows a jury to consider the prior drug use for any reason, including propensity. A defendant's use of a controlled substance is not a factor that is automatically admissible; such evidence must survive analysis under K.S.A. 60-455. To the extent PIK Crim. 4th 57.040 suggests otherwise, the instruction is disapproved.

State v. Campbell, 317 Kan. 511, 532 P.3d 425 (Jul. 14, 2023).

UNAVAILABLE WITNESS; CONFRONTATION CLAUSE. The State brought this interlocutory appeal after the district court suppressed the preliminary hearing testimony of a witness who refused to testify at trial. The Court of Appeals reversed the district court's suppression of the evidence, holding that a witness who refuses to testify because he claims his trial testimony might subject him to a charge of perjury is an unavailable witness for purposes of the Confrontation Clause.

State v. Martinez-Diaz, 63 Kan. App. 2d 363, 528 P.3d 1042 (April 21, 2023).

INEFFECTIVE ASSISTANCE OF COUNSEL

CONFLICT FREE COUNSEL. After being convicted, Brian Waterman moved for a new trial alleging that his trial counsel was ineffective. On appeal, the Kansas Court of Appeals held that Waterman was erroneously denied the appointment of conflict-free counsel to argue his motion for new trial and remanded the case to the district court. The court reasoned that a criminal defendant's timely pro se motion for new trial alleging ineffective assistance of trial counsel necessitated the appoint of conflict-free counsel to assist the defendant in arguing the motion.

State v. Waterman, 63 Kan. App. 2d 799, 540 P.3d 378 No. 124,725, 2023 WL 8102827 (Nov. 22, 2023).

ILLEGAL SENTENCE

APPLICABLE LAW. To determine the legality of a sentence, a reviewing court is limited to the legal framework available to the district court on the date it pronounced sentence. In other words, which case in the line of cases interpreting the statutes that govern scoring

out-of-state convictions for criminal history depends on which case was applicable when sentence was pronounced.

State v. Johnson, 317 Kan. 283, 528 P.3d 258 (Apr. 28, 2023).

OFFENDER REGISTRATION

DUTY TO REGISTER. Austin Wayne Detimore was convicted of aggravated indecent liberties with a child and therefore ordered to register as a sex offender pursuant to the Kansas Offender Registration Act. Detimore appealed, arguing his conviction satisfied the exception to the definition of a sexually violent crime established in K.S.A. 2022 Supp. 22-4902(c)(19). The Court of Appeals affirmed, holding that the exception in K.S.A. 2022 Supp. 22-4902(c)(19) applies only to convictions for crimes not otherwise enumerated in K.S.A. 2022 Supp. 22-4902(c)(1)-(18). Aggravated indecent liberties with a child is an enumerated crime.

State v. Detimore, 2023 WL 6323436, 63 Kan. App. 2d 691, 537 P.3d 853, (Sept. 29, 2023).

VIOLENT OFFENDERS. Benjamin Buzzini pleaded guilty to involuntary manslaughter while driving under the influence of alcohol pursuant to K.S.A. 21-5405(a)(3). The district court did not discuss offender registration at sentencing, but the journal entry reflected that Buzzini had to register as a violent offender under KORA based on his crime of conviction. The Court of Appeals reversed the registration order, holding that KORA exempted violations of K.S.A. 21-5405(a)(3) from the list of offenses requiring automatic registration as a violent offender.

State v. Buzzini, 63 Kan. App. 2d 335, 528 P.3d 1024 (Apr. 21, 2023).

PROBATION

PROSECUTORIAL ERROR. Ralston challenged his probation revocation, arguing that the State committed prosecutorial error at the probation violation hearing. The Court of Appeals ruled that prosecutorial error applies to probation revocation proceedings and found the prosecutor erred, but held the error was harmless because it did not influence the district court's decision.

State v. Ralston, 63 Kan. App. 2d 447, 529 P.3d 1275 (May 5, 2023), *petition for rev. denied* (Aug. 25, 2023).

PROSECUTORIAL ERROR

BURDEN SHIFTING. When discussing the defense's subpoena power, the State crosses the line into prosecutorial error when it suggests the defendant must disprove the State's case or offer evidence to support a finding of reasonable doubt.

State v. Anderson, __ Kan. __, 543 P.3d 1120 (Mar. 1, 2024).

POSTCONVICTION MOTIONS

ILLEGAL SENTENCE CLAIMS. A claim challenging the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward departure aggravating factors falls outside the statutory definition of an illegal sentence. Thus, an appellate court lacks jurisdiction to review such a claim within a K.S.A. 22-3504 motion. This decision expressly overrules *State v. Duncan*, 291 Kan. 467, 243 P.3d 388 (2010).

State v. Johnson, 317 Kan. 458, 531 P.3d 1208 (Jun. 30, 2023).

SEARCHES & SEIZURES

VEHICLE SEARCH. For probable cause purposes, a trailer hitched to a vehicle is considered together with the vehicle as one unit.

State v. Crudo, __ Kan. __, 541 P.3d 67 (Jan. 12, 2024).

WARRANTLESS SEARCHES—EMERGENCY AID EXCEPTION. A police officer found Jessica Marie Dixon semi-conscious and unresponsive on the floor of a convenient store bathroom. The officer found a hypodermic needle next to her and, while searching for identification in Dixon's purse, he found drug paraphernalia. On appeal, Dixon challenged the search. The Court of Appeals held that the search of her purse was justified by the emergency aid exception to the warrant requirement because it was intended to provide

emergency aid by providing medical personnel information to properly render treatment to Dixon.

State of Kansas v. Jessica Marie Dixon, ___ Kan. App. ___, 543 P.3d 556, 2024 WL 294671 (Jan. 26, 2024).

SENTENCING

JAIL CREDIT. A defendant is entitled to jail time credit against his or her sentence for all time spent incarcerated while the defendant's case was pending disposition. The contrary holding of *Campbell v. State*, 223 Kan. 528, 528-31, 575 P.2d 524 (1978), is overruled.

State v. Hopkins, 317 Kan. 652, 537 P.3d 845 (Oct. 20, 2023).

CRIMINAL HISTORY. Jason Phipps appealed his sentence, arguing the district court improperly included a prior conviction for criminal threat. Phipps argued that the Kansas Supreme Court, in *State v. Boettger*, 310 Kan. 800, 823, 450 P.3d 805 (2019), held that reckless criminal threat was unconstitutionally overbroad and that the State failed to show that his prior conviction for criminal threat was intentional. The Court of Appeals affirmed, finding that *Boettger* was effectively overruled by the United States Supreme Court in *Counterman v. Colorado*, 600 U.S. 66, 69, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023).

State v. Phipps, 2023 WL 6933818, 63 Kan. App. 2d. 698 , 539 P.3d 227, 2023 WL 6933818 (Oct. 20, 2023), *petition for rev. filed* (Nov. 20, 2023), *petition for rev. granted*.

CRIMINAL HISTORY SCORE. Cody Degand challenged his criminal history score at sentencing because the presentence investigation report classified a prior criminal threat conviction as a person felony without specifying that the conviction was for intentional criminal threat. In 2019, the Kansas Supreme Court struck down the reckless criminal threat crime as unconstitutional but left intentional criminal threat intact. The district court found the State failed to carry its burden and excluded the conviction from Degand's criminal history score. The Court of Appeals affirmed, concluding the State failed to prove whether Degand was convicted of intentional or reckless criminal threat.

State v. Degand, 63 Kan. 2d 457, 530 P.3d 439 (May 5, 2023), *petition for rev. filed* (Jun. 5, 2023).

SEXUALLY VIOLENT PREDATORS

LIFETIME POSTRELEASE SUPERVISION. Joseph James Conkling challenged the lifetime postrelease supervision imposed as part of his sentences for rape and aggra-

vated indecent liberties with a child. He claimed the district court engaged in unconstitutional judicial fact-finding—finding he was over the age of 18 when he committed his sexually violent crimes—to extend his postrelease supervision in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Court of Appeals affirmed as the district court relied on Conkling's own admissions regarding his age.

State v. Conkling, 63 Kan. App. 841, 540 P.3d 414, No. 126,093 (Dec. 15, 2023).

TRIAL RIGHTS

JURY TRIAL WAIVER—STIPULATIONS. The Kansas Supreme Court has previously held that sufficient jury trial waivers are required with equal force before a defendant stipulates to an element of the crime. Since that time, the Court of Appeals has generally reversed convictions without waivers as structural error. The Supreme Court has now clarified that harmless error is applicable to the stipulation issue. But where the stipulation relates to prior convictions and there is no other evidence admitted of the prior convictions, the failure to secure a constitutionally sufficient waiver "clearly affected the verdict, because the jury had to rely on that stipulation to find that the State proved the element of the crime."

State v. Bentley, 317 Kan. 222, 526 P.3d 1060 (Apr. 14, 2023).

STANDING. K.S.A. 2022 Supp. 21-5705(e) creates a mandatory presumption of an intent to distribute various controlled substances based on a specified quantity of the substance. Recognizing the likely unconstitutionality of such a presumption due to burden shifting, the PIK committee drafted a model instruction that changed the mandatory presumption to a permissive inference. Defendants whose jury was instructed in accordance with the PIK instruction lack standing to challenge the constitutionality of the statute because there is no injury in fact caused by the allegedly unconstitutional statute.

State v. Martinez, 317 Kan. 151, 527 P.3d 531 (Apr. 14, 2023); *State v. Strong*, 317 Kan. 197, 527 P.3d 548 (Apr. 14, 2023); *State v. Slusser*, 317 Kan. 174, 527 P.3d 565 (Apr. 14, 2023).

Corporate Transparency Act

Created by






Let me introduce myself, my name is...

Julie Grabbe

- ✓ Solo practitioner, Hays KS
- ✓ JD St. Louis University School of Law;
BA University of WI-Eau Claire
- ✓ 20+ years of experience in all areas of law
- ✓ Practice areas-Trademarks + Business!
Legal and Diversity Counsel FHSU, 23rd
and 24th JD Court Trustee
- ✓ Fun Facts: EDM beats, homeschool
feats, teacher reach, farm wife,
inspired life.



Table of Contents

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CORPORATE TRANSPARENCY ACT

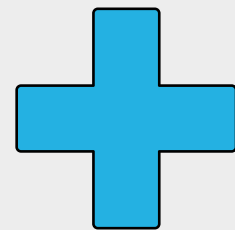
a brief HISTORY of federal legislation*

- To combat terrorism, money laundering and other financial misconduct by getting Beneficial Ownership Information (BOI)
- June 2006 Financial Action Task Force (FATF) issues report criticizing US failure to comply with FATF standard on need for collecting BOI, urges correction by 2008
- May 2008 Incorporation Transparency and Law Enforcement Assistance Act (no action)
- 2016 Closing Loopholes Against Money-Laundering Practices ("CLAMP") Act (no action)
- 2017 True Incorporation Transparency for Law Enforcement ("TITLE") Act (no action)
- 2017 Corporate Transparency Act (2017) (died)
- 2018 Counter Terrorism and Illicit Finance Act (died in House)
- 2019 Transparency Proposal (2019) - basis of today's CTA- introduces
 - reporting to FinCEN + federal database.



Corporate Transparency Act (CTA) - Authority

**Title LXIV of the 2021
NDAA
(National Defense
Authorization Act)**



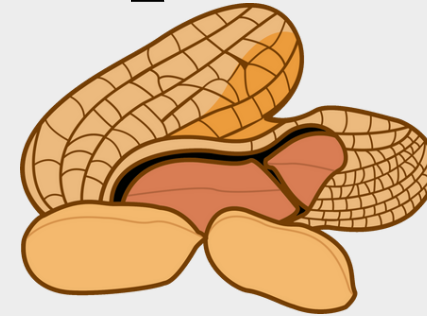
**Corporate Transparency Act
(CTA)**

31 USC §5336

31 CFR §1010.380

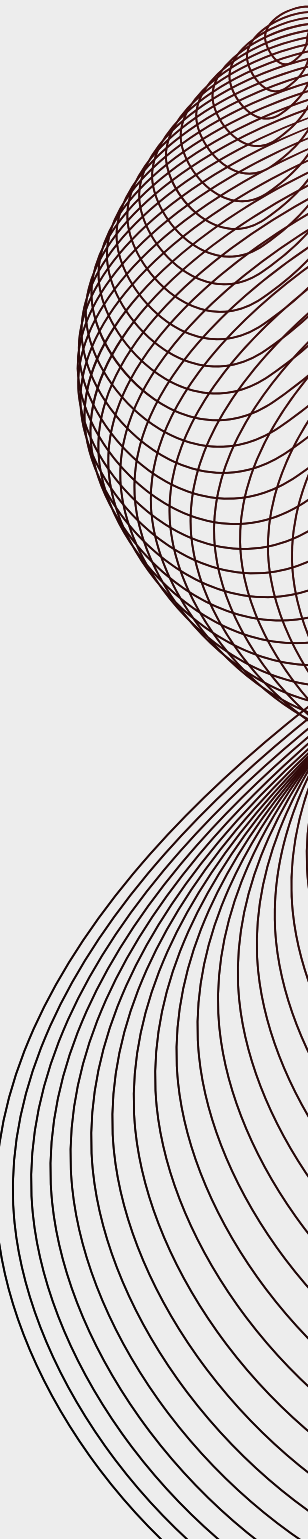
Corporate Transparency Act

PURPOSE in a...



As of January 1, 2024, beneficial owners and applicants of qualifying reporting companies will be required to report identifying information to the federal government.

Stated purpose: The federal government can identify corporate owners and control illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption.



Requirements:

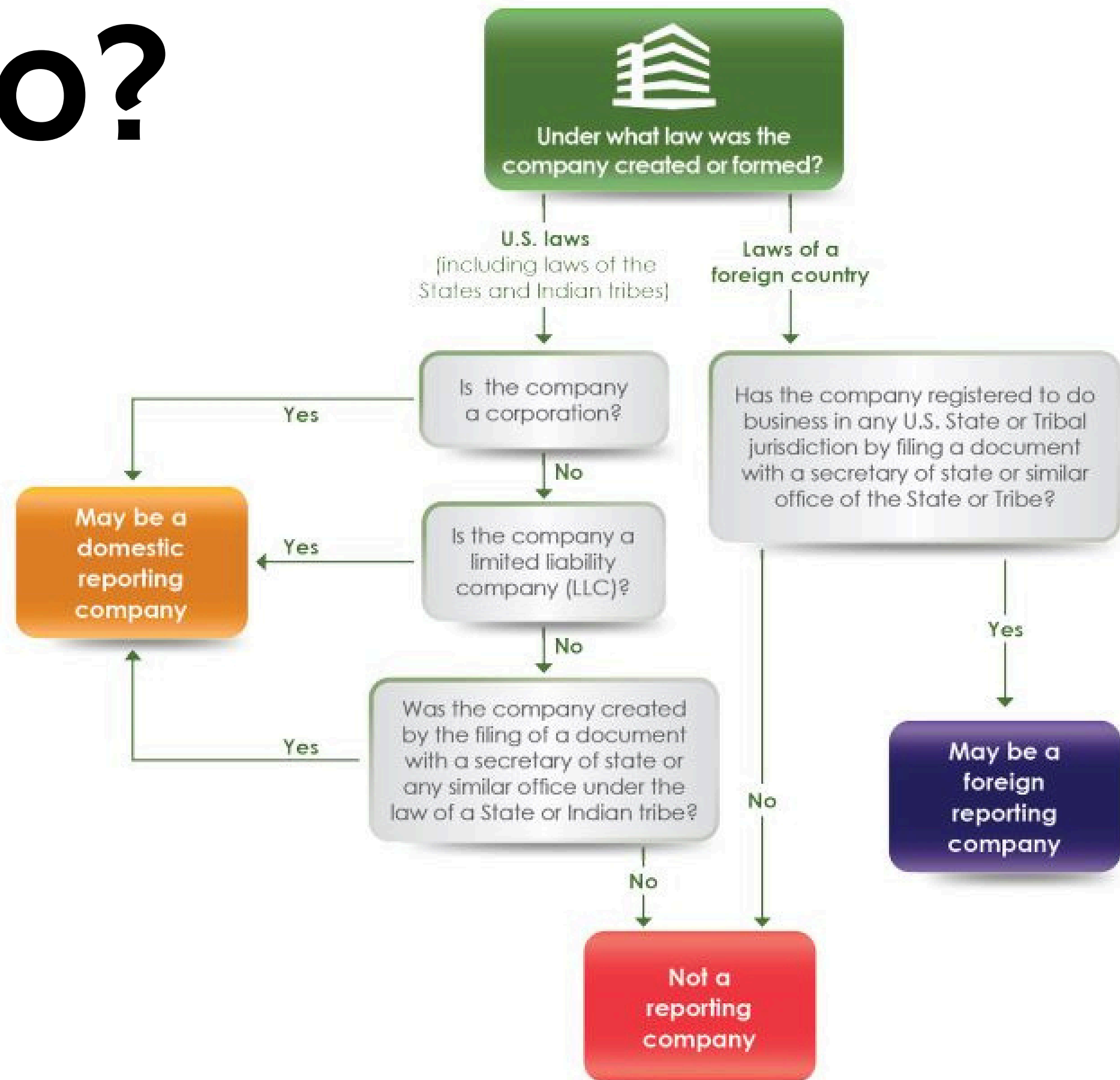
- Reporting Companies (RC) are required to file a report with the Department of Treasury, Financial Crimes Enforcement Network (FinCEN) giving Beneficial Owner and Applicant information
- When?
 - RCs created before January 1, 2024 will have one year (January 1, 2025) to file their initial report
 - RCs registered or created after January 1, 2024 but before January 1, 2025 will have 90 days after receiving notice of their creation or registration to file their initial reports.
 - RCs registered or created after January 1, 2025 will have 30 days after receiving notice of their creation or registration to file their initial reports.
- Not annual! Ongoing duty to update within 30 days of change in company or BO information. NO requirement to report termination or dissolution of company, or to update personal information for company applicants.

Who's who?

➤ REPORTING COMPANY

Easy definition:

Did the entity file
incorporation (or foreign
registration) paperwork with
the SOS?



But: 23 Exemptions

Exemption No.	Exemption Short Title
1	Securities reporting issuer
2	Governmental authority
3	Bank
4	Credit union
5	Depository institution holding company
6	Money services business
7	Broker or dealer in securities
8	Securities exchange or clearing agency
9	Other Exchange Act registered entity
10	Investment company or investment adviser
11	Venture capital fund adviser
12	Insurance company
13	State-licensed insurance producer
14	Commodity Exchange Act registered entity
15	Accounting firm
16	Public utility
17	Financial market utility
18	Pooled investment vehicle
19	Tax-exempt entity
20	Entity assisting a tax-exempt entity
21	Large operating company
22	Subsidiary of certain exempt entities
23	Inactive entity

Beneficial Owners

➤ 25% or more of ownership interests in RC-may include unrealized interests

1. Equity, stock or voting rights (or similar)-even if transferable
2. Capital or profit interest-any interest in assets/profits of an LLC RC (“unit”)
3. Convertible instruments-any instrument convertible into 1 or 2 - regardless if payment is required to exercise the conversion and includes futures on convertible instruments and warrants or rights to purchase/sell/subscribe to 1. or 2, even if it’s a debt.
4. Option or Privilege to a put/call/straddle/other option to buy or sell 1, 2 or 3.
5. Catch All: anything else used to establish ownership

Beneficial Owners



Exercises “substantial control” over the RC—any one of the following:

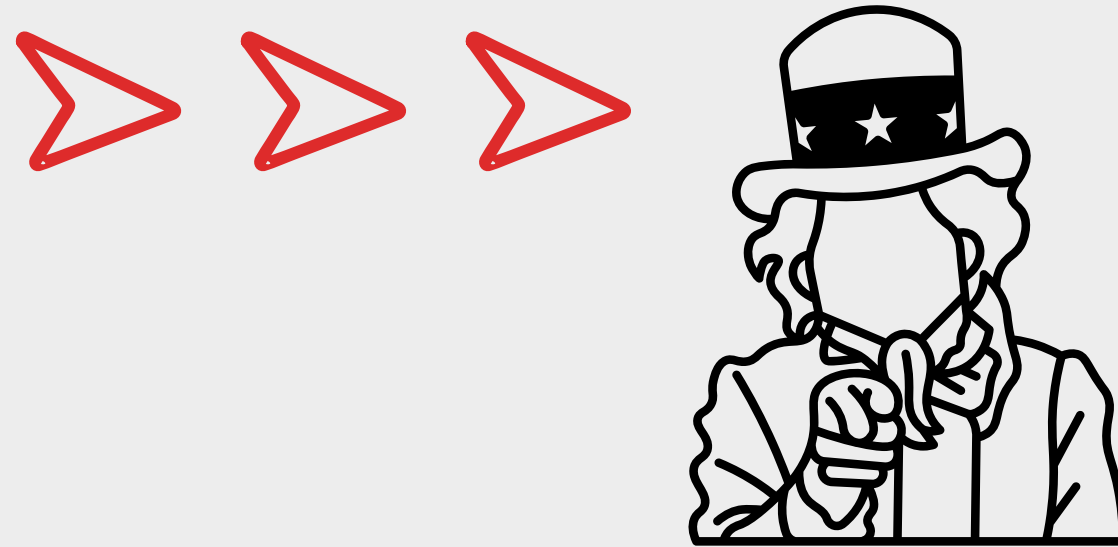
1. Senior officer (President, CFO, GC, CEO, COO or anyone performing similar functions regardless of title)
2. Authority to appoint/remove senior officers or majority of board of directors (or similar body)
3. Is an “important decision maker”
 - directs determines or has substantial influence over RC’s important decisions, ex. include business, finances, structure.
4. Any other form of substantial control over RC (Catch all)

Company Applicants



Only required to report this if RC is created/registered
AFTER 1/1/2024.

Hey Attorneys! That means if you file formation paperwork for your clients....



- a person
- the direct filer AND the person who directs/controls the filing

What are we reporting?



For RCs:

- Legal Name
- Trade names and DBAs
- Complete current US Address
- Formation (or foreign registration) State
- TIN/EIN



For BOs and Applicants:

- Legal Name
- DOB
- Complete current US Address
- image of identifying document (.pdf or .jpg of Passport, state DL, or state ID)
- Identifying number on that document

Process

- www.fincen.gov/boi
- File online directly or file using fillable .PDF
- 5 minutes
- Image: 4 MBs or under, .jpg/jpeg .pdf or .png ONLY
- Download filing receipt + save it



+2 pages

FILING SUCCESSFUL - Beneficial Ownership Information Report (BOIR) Status

Submission Information	
Status	FILING SUCCESSFUL
BOIR ID	50000001601146
Submission Tracking ID	BOIRRR4ZVLVpeaxZnATz
Received Timestamp (UTC)	2024-04-22T18:47:52Z
Reporting Company FinCEN ID	

Submitter Information	
First name	Julie
Last name	Grabbe
E-mail address	julie@grabbelaw.com

Validation Information	
Code	Description
No validation errors	

Failure to Comply




Civil + Criminal Penalties




for both individuals and corporations



knowing or willful or failure to report: up to \$500 per day for each day of non-compliance, up to 2 years of imprisonment and a fine of up to \$10,000.



knowing and unauthorized disclosure: up to \$500 per day for each day, up to 5 years of imprisonment and a fine of up to \$250,000.



knowing and unauthorized disclosure while violating another federal law or as part of a pattern of activity involving over \$100k in a 12 month period: up to 10 years of imprisonment and a fine of up to \$500,000.

current case law

National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.)

- NSBA-Ohio non-profit representing 65,000 small businesses in all 50 states
- Plaintiff Winkles is a NSBA member and owner of 2 small businesses < \$20M
- Suit alleges CTA exceeds Constitutional authority under Article 1 and violates the 1st, 4th, 5th, 9th and 10th Amendments
- Court decides Winkles has standing-
 - Gov't argues no standing because no injury (he's already disclosed BOI to the federal gov't through other means).
 - Court points out that gov't agency still must follow judicial procedures when obtaining individual information disclosed to other gov't entities.
 - Court focuses on the mandatory disclosure of information for law enforcement purposes-if he fails to disclose, he will be subject to penalties
 - NSBA has standing through Winkles since he has or will suffer harm.

current case law

National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.)

- Court decides the CTA is not authorized by the Constitution
- Gov't argues Congressional authority under:
 - Foreign Affairs Power -cites interest in curbing foreign money laundering, other issues of national security (terrorism)
 - Commerce Clause - state entities engage in acts that affect commerce; a formation itself invokes Congress' commerce powers
 - Taxing Power - purpose is efficient tax administration-collecting information and allowing tax officials access to it to ensure proper reporting

current case law

National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.)

- Foreign Affairs Power - national security and “necessary and proper”
 - Gov’t argues rational relationship between collection of BOI and national security interests (using congressional findings)
 - Constitution limits Congress’ power to those specifically granted or those “necessary and proper” to carry out specifically granted powers.
 - Court points out that states, not federal gov’t, have authority to regulate domestic corporations
 - federal gov’t cannot regulate state domestic corporations using the CTA because that regulation is not an exercise of Congress’ foreign affairs powers, and that the national security interests are not enough to justify federal regulation of state entities.
 - Is there a “regulation” vs “reporting” distinction?

current case law

National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.)

- Commerce Clause - power to regulate “in commerce” and “substantially affecting commerce”
 - channels of interstate + foreign commerce
 - transportation routes, telecommunication networks, national securities markets
 - instrumentalities of, and things and persons in interstate + foreign commerce
 - people and things themselves moving in commerce (boats, shipments, mobile phones)
 - activities that have a substantial effect on interstate + foreign commerce
- Court holds RCs are not channels, instrumentalities, or activities and thus are not in commerce and Congress can’t regulate
- Incorporating is not economic in nature, thus doesn’t substantially affect interstate commerce what about (non-commercial intrastate entities)
- Missing jurisdictional language-“affecting commerce”

current case law

National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.)

- Taxing Power and necessary and proper
 - Gov't argues that by simply collecting BOI and allowing tax enforcement officials access is necessary and proper to ensure taxable income is appropriately reported
 - Court: overbroad interpretation - any information collection where tax officials could see would suffice as "taxing power"
 - maybe necessary but not proper
- Declines to address violations of the 1st, 4th and 5th Amendments

what does it all mean?

- The federal district court in the Northern District of Alabama, Northeastern Division, issued an injunction to the Department of the Treasury and FinCEN from enforcing the CTA against Plaintiffs.
- Plaintiffs = Winkles, any RCs he is the Beneficial Owner or Applicant of, NSBA, members of the NSBA as of 3/1/2024
- Notice of Appeal to US District Court of Appeals 11th Cir. was filed March 11, 2024
- When?
- For everyone else...the CTA still applies.

Practice Tips

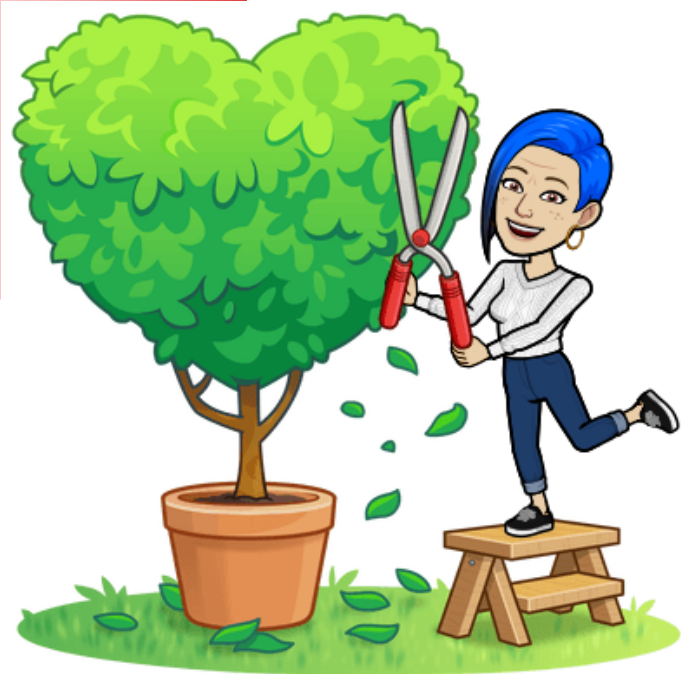
- Would a client reasonably believe FinCEN filing is part of formation? Be clear in your Agreements for Representation and scope of representation docs if you are providing this service or not.
- As a firm, would the attorney do this? A paralegal? Whose personal information is going in the federal database?
- “Willful violations” and your liability– Making sure you get accurate information – What are they certifying to you and how? Where are you keeping this information and for how long?
- As an attorney, if you file BOIs for your clients, you can get an [system to system API](#) to automate the process.
- Data considerations–to use or not to use the API, PII and requirements for your systems, internal protocols, staff training, etc.

Practice Tips

- As an individual or RC, you can get a **FinCEN ID** (unique identifying number). Once you have it, you can use that, instead of the personal information you would otherwise enter into the BOI report (Then you aren't providing your personal information to any client who is filing their own BOIR, but you incorporated as an applicant)
- **Check with your clients** – do they think their accountants are taking care of this? Are they?
- **Updates** to governing documents to confirm principal's obligations, updates to employee handbooks for information and filing procedure
- **Scam alerts** to your clients: Let them know that if they get QR codes or emails with URLs or anything unsolicited...it's a scam. FinCEN is not sending out any forms to complete or any clickable links, etc.
- **Don't forget to file yours!**
- [Video Tutorial](https://www.youtube.com/watch?v=K8Wnv13b4g0&t=139s) (7 minutes)
<https://www.youtube.com/watch?v=K8Wnv13b4g0&t=139s>
- **While you are at it:** Be the bearer of even more bad news and let your clients know that the FTC just banned non-competes!

The bonus bad news section

- Section 5 of the Federal Trade Commission Act (15 USC 45) bans unfair or deceptive acts or practices in or affecting commerce.
- FTC put out a final rule that noncompetes constitute unfair competition in violation of the Act and bans employers from entering into noncompetes AND from enforcing certain noncompetes
- Existing noncompetes for senior executives may remain in force
 - Senior executive = \$151,164 annually and who are in policy-making positions.
- Employers banned from entering into any new noncompetes EVEN with senior executives
- Applies to businesses and workers: Workers = full-time or part-time, including employees, independent contractors, interns, externs, volunteers, apprentices, and others
- Carve outs for franchisee/franchisor contracts; buyer/seller contracts pursuant to sale of business
- Affirmative duty for employers to provide notice to employees that they will not enforce noncompete clauses (a form is provided)
- FTC points to trade secret laws and non-disclosure agreements (NDAs) as providing employers with well-established means to protect proprietary and other sensitive information.
- Effective 120 days after publication in the Federal Register. Sept 2024-ish



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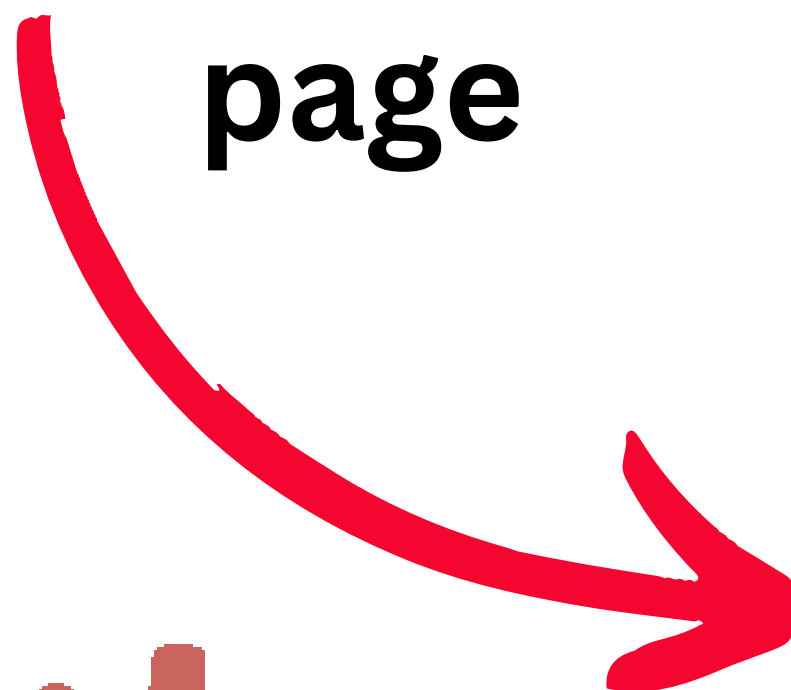
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THANKYOU

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Judge Karen Arnold-Burger is a 1981 graduate of the University of Kansas School of Law. She was appointed to the Kansas Court of Appeals in 2011. She was appointed Chief Judge in 2017. Prior to that she served as Assistant United States Attorney for the District of Kansas and Presiding Municipal Judge for the City of Overland Park, Kansas. She has presented programs throughout her career to judges, lawyers and community groups around the state and the country on a wide range of topics. For the last 24 years she has been primarily speaking and writing on issues related to explicit and implicit bias in our legal system, bail reform, and Kansas legal history with an emphasis on courageous Kansas attorneys. She is actively involved volunteering with groups that are working to preserve the history of the Quindaro area of Kansas City, Kansas and she will talk your ear off about it if you give her half a chance!



Kansas
Judicial Branch

Pretrial Justice Task Force

Report to the

Kansas
Supreme
Court



November 6, 2020

Pretrial Justice Task Force
Report to the Kansas Supreme Court

November 6, 2020

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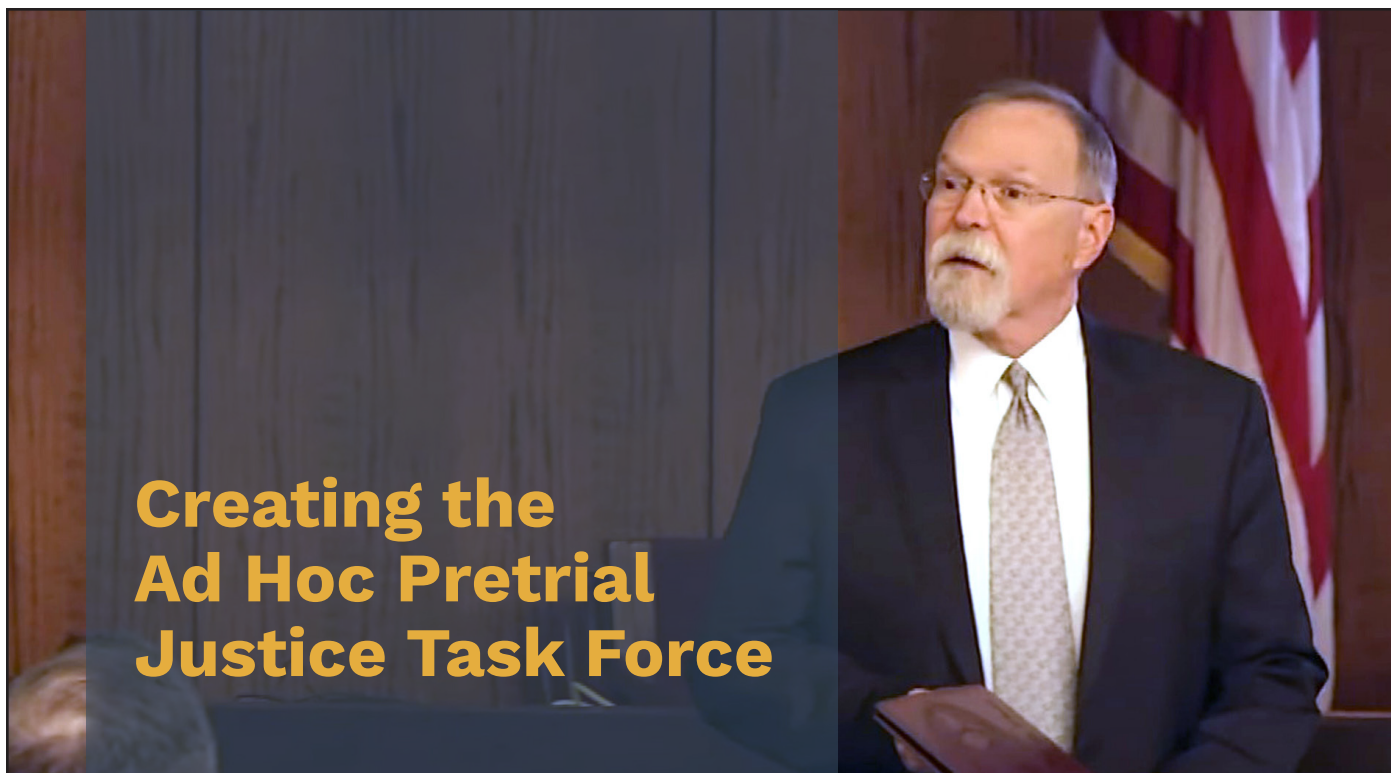
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Former Chief Justice Lawton Nuss of the Kansas Supreme Court speaks to the Ad Hoc Pretrial Justice Task Force at its first meeting.

Supreme Court Charge

Due to several high-profile incidents, television exposés, national surveys, and lawsuits around the country that successfully challenged pretrial release as a wealth-based discriminatory practice, the issue of pretrial release was brought to the forefront of national attention. Of primary concern are individuals detained in jail due solely to the lack of resources to post money bond as a condition of release. In 2013, the Conference of Chief Justices adopted a resolution endorsing the 2012 Policy Paper on Evidence-Based Pretrial Release published by the Conference of State Court Administrators. The resolution urged court leaders to:

[P]romote, collaborate, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of nonfinancial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes.²

The Kansas Supreme Court entered an Order on November 7, 2018, creating the Ad Hoc Pretrial Justice Task Force (“Task Force”).³ The Task Force was charged by the Court to review Kansas pretrial detention policies and procedures. The Court also prompted the Task Force to remember the important constitutional presumption of innocence as well as the impact of pretrial detention on both the accused and the community. The Court also reaffirmed its commitment to the belief that no person should be deprived of liberty unnecessarily or unconstitutionally.

The Court specifically asked the Task Force to:

1. Examine current pretrial detention practices for criminal defendants in the Kansas district courts.
2. Examine methods, other than pretrial detention, currently used in Kansas district courts to ensure public safety and encourage the accused’s appearances at court proceedings.

3. Compare effective pretrial detention practices and detention alternatives identified by other courts with those currently used in Kansas and use these comparisons to help develop a best practices model for Kansas district courts.
4. Identify any statutory impediments to implementing any Task Force recommendation.
5. Identify any issues that may require further research, data compilation, or both, before a recommendation can be made to the Court.
6. Identify and prioritize topics that the Office of Judicial Administration can include in training for Kansas trial court judges in Kansas on best practices for pretrial detention procedures and policies, and alternatives to pretrial detention.

The Task Force was also directed to seek and consider input from various stakeholders in Kansas and to prepare a written report of findings and recommendations for the Kansas Supreme Court.⁴

Members

Task Force members were selected based upon their varied positions within the Kansas judicial system and include district court and magistrate judges, criminal defense attorneys, prosecutors, and members of the court administration system. Geographic diversity was also a factor that was considered by the Court. The Task Force size was limited so that it could work more efficiently and its members were selected because they had extensive knowledge of the system. The Chair then reached out to a wide range of stakeholder groups and invited them to participate, provide input, and follow the workings of the Task Force.

Guiding Principles

Because the Task Force believed it was important to approach its task with an open mind free of

preconceived ideas, the Task Force set forth guiding principles to govern its research, deliberations, and recommendations. These guiding principles include:

1. Find an appropriate balance between a defendant's liberty interests and the presumption of innocence versus the risk of flight and public safety. Avoiding unnecessary pretrial incarceration must be done in a way that maintains Kansans' faith in their justice system.
2. Seek out all sides of an issue, examine the issue, and confront the pros and cons with an open mind. The varied backgrounds and experiences of Task Force members along with the input of stakeholders throughout the process ensured that all viewpoints were heard and considered by the Task Force.
3. Encourage input from stakeholders. This was extremely important to the Task Force because members recognized that their daily exposure to the Kansas justice system gave them a perspective different from those with other experiences. The faith of all Kansans in their justice system was important to the Task Force as they did their work. To foster open discussion of the issues facing the group, the Chair reached out personally to various stakeholder groups and asked for their input throughout the process. The Chair also authorized creating a webpage located at www.kscourts.org/About-the-Courts/Court-Administration/Court-Initiatives/Pretrial-Justice-Task-Force. The webpage has links to presentations made by speakers to the Task Force as well as reports of meetings and other resources reviewed by the Task Force.
4. Address measurable problems with measurable solutions. Strong feelings, passions, and personal biases too often lead to well-meaning but ineffective solutions, at best, and sometimes result in even greater problems. As a result, the Task Force wanted to limit its work to problems that

are measurable and to recommend changes with potential impacts that can be measured. The scientific approach called “developing evidence-based practices” was considered by the Task Force to create the most reliable recommendations.

5. Certain topics and approaches were considered taboo. These topics were deemed outside the scope of the charge given the Task Force, or not helpful to the open dialogue the Task Force sought. These included:
 - a. Post-trial incarceration.
 - b. Reducing jail costs.
 - c. Elimination of or the continued viability of the commercial bonding industry.
 - d. Blaming groups for the problems found around the country with pretrial incarceration, including judges, prosecutors, defense attorneys, bonding agents or legislators.

Process

The Chair concluded that the first few months of the Task Force’s existence would be spent:

- educating the Task Force members on the history of bail, bond and pretrial detention;
- examining approaches taken by other jurisdictions to the same issues confronting this Task Force;
- reviewing the lessons learned by actions taken by other jurisdictions; and
- listening to the perceived problems and concerns of stakeholders.

In addition to quarterly meetings in Topeka, Task Force members were grouped into subcommittees to examine certain topics in greater depth and to

report findings to the Task Force as a whole. To make the Task Force’s work “evidence-based,” judges, prosecutors and sheriffs were surveyed regarding pretrial detention issues and statistical evidence was collected from other jurisdictions.

The Task Force had its first meeting on December 14-15, 2018. The goal of the first meeting was to learn about the various approaches to pretrial detention and release issues tried around the country to date. Three speakers on December 14 addressed approaches taken by various state executive branches,⁵ legislatures,⁶ and judicial systems.⁷ The second day, the Task Force heard from four speakers on reforms already taken at the local level in Kansas.⁸ The Chair assigned members of the Task Force to one of three subcommittees so additional research could be conducted between Task Force meetings.⁹

Following the first Task Force meeting, the Chair undertook a survey of chief judges in the 31 judicial districts in Kansas regarding the use of bond schedules, availability of bond agents, use of pretrial detention, and alternatives to detention being used within their districts.

With the assistance of Ed Klumpp,¹⁰ Kansas sheriffs were surveyed regarding the average make-up of their jail populations to compare how Kansas counties differed and to compare the statistics with those reported in other states. Of particular interest was the percentage of jail populations incarcerated prior to trial on any given day.

The March 8, 2019, Task Force meeting allowed representatives of two groups heavily involved in the pretrial detention reform movement to make their case to the Task Force.¹¹ The Task Force spent the afternoon reviewing the results of the chief judges and jail surveys and hearing subcommittees reports to the Task Force as a whole.

The June 14, 2019, Task Force meeting followed a similar format. The morning was spent listening to criminal justice reform initiatives proposed by Koch Industries¹² and how other states have approached reform.¹³ Finally, the Task Force was

introduced to the federal court approach to pretrial detention and monitoring.¹⁴ The remainder of the day was devoted to reports from the subcommittees to the Task Force as a whole. As the meeting concluded, the focus of the Task Force shifted from education to developing recommendations for this report. As a result, the Chair reorganized the make-up and focus of the various subcommittees for future work on recommendations.¹⁵

The Task Force recognized that pretrial practices and procedures varied greatly among Kansas' 105 counties. As a result, the Chair authorized another survey of district and magistrate judges in Kansas. Much of the survey concerned the timing of certain events prior to the criminal trial, the causes of pretrial delays, and the concerns of state trial judges regarding pretrial detention procedures as they now exist. Survey results were made available to Task Force members at the next meeting.

The morning of September 12, 2019, was devoted to hearing from stakeholders who wanted to share with Task Force members their information, concerns, and suggestions. Four stakeholders took the opportunity to address the group.¹⁶ The remainder of September 12 and all day September 13 was devoted to presentations by the five subcommittees of proposed recommendations for the Task Force to consider, discuss, and vote upon. The recommendations considered by the Task Force were posted on the Task Force's webpage.

The December 13, 2019, meeting began with a discussion of comments made by stakeholders regarding recommendations considered at the prior meeting. The five subcommittees then made further presentations to the Task Force as a whole. A report on the Task Force's actions was sent to stakeholders for comment.

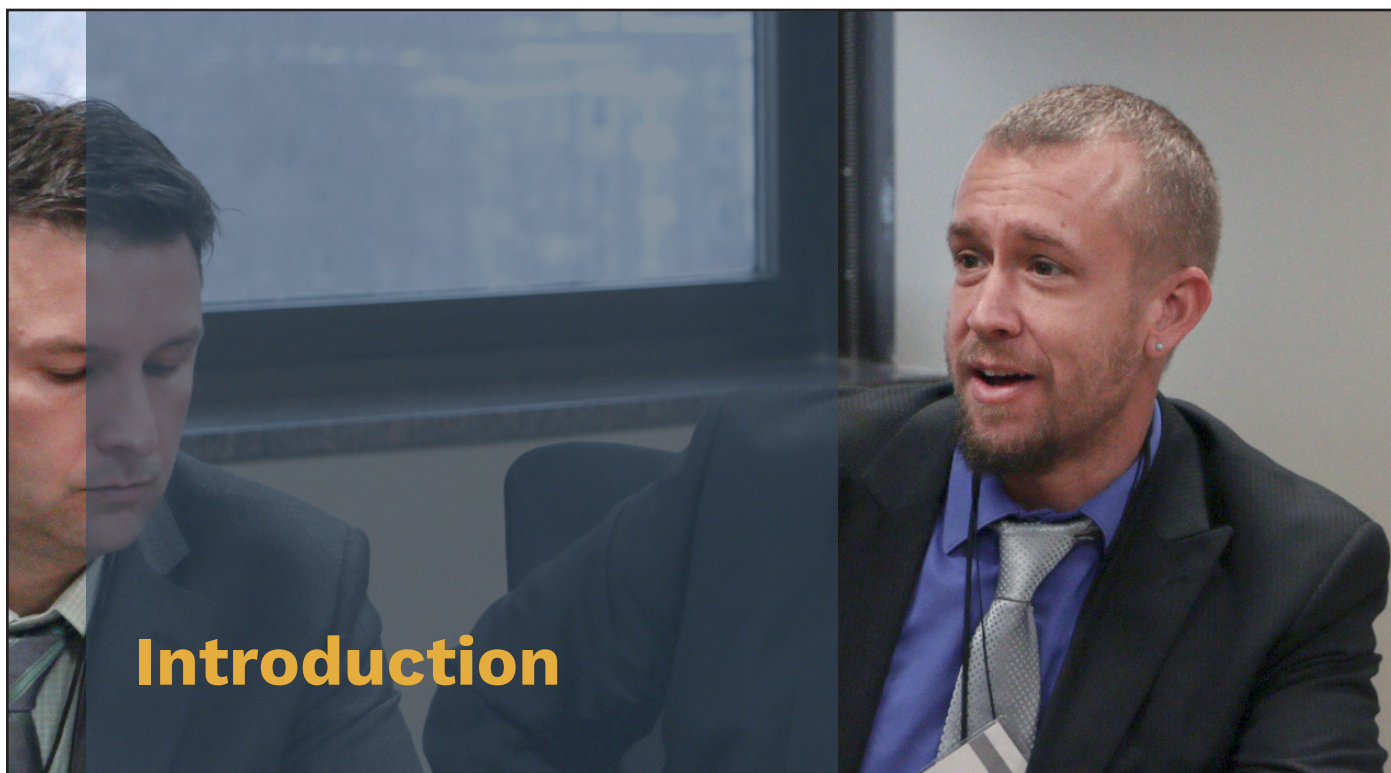
With several recommendations tentatively approved by the Task Force, the Chair made the first two hours of the February 7, 2020, meeting available to stakeholders to air any concerns they had regarding the direction being taken by the group. While no stakeholders made a formal presentation, a two-hour long informal discussion between

Task Force members and stakeholders in the room helped clarify issues and address concerns. The remainder of the meeting was spent primarily on a recommendation to change the Kansas Constitution and certain Kansas statutes to allow judges to deny bond in cases not involving capital crimes. A report from this meeting was made available to stakeholders and the Chair again requested feedback on the Task Force's proposals.

At the March 6, 2020, meeting, the Chair scheduled the first two hours of the meeting to receive feedback from stakeholders on the Task Force's proposed recommendations. Given the number of stakeholders present who wanted to speak, the Chair, with the approval of the Task Force, devoted the entire morning to stakeholder comments. The remainder of the meeting was devoted to making modifications to proposed recommendations and discussing "best practices" guides for judges.

Due to the COVID-19 pandemic, the April 4, 2020, meeting was cancelled. Realizing the COVID-19 pandemic would hinder the Task Force's ability to complete its report by the original deadline, the Supreme Court granted the Task Force an additional six months to finish its work in Administrative Order 2020-CM-039. The new deadline for the report was set at November 6, 2020.

In the ensuing months, the Task Force continued work on its report and best practices guides by circulating these documents via email for review and comment. Drafts were posted on the Task Force website and copies were sent to all stakeholder groups. On September 9 and September 24, 2020, the Task Force conducted a two hour Zoom public forum on the draft documents. In addition, several stakeholder groups submitted written comments. These oral and written comments were taken into consideration in preparation of the final report which was delivered on time to the Kansas Supreme Court.



Task Force members Leavenworth County Attorney Todd Thompson, left, and Justin Barrett, a Colby lawyer.

It is no secret that the United States incarcerates more people per capita than any other country in the world.¹⁷ Yet few Americans believe we have the most dangerous and irresponsible people living here. Nationally, almost two-thirds of local jail inmates have not been convicted of a crime.¹⁸ The number of people held pretrial in county jails around the country has far outpaced that of the number being sentenced to prisons, with the pretrial population increasing by over 470% since 1977.¹⁹

In Kansas, 53% of those detained in our county jails are not serving a post-conviction sentence, nor are they being held to answer to a motion to revoke their probation. These inmates are simply awaiting disposition of a current charge against them.²⁰

They are commonly referred to as “pretrial detainees.” For the majority, the only way they could gain their pretrial release is by posting a cash or surety bond with the court to guarantee their

future appearance. In some cases, they may be released to a pretrial supervision program, but this also carries costs. If the cost of the bond or pretrial supervision exceeds the person’s means, they remain in pretrial detention.

Most Americans would be surprised by this reality of our criminal justice system and would not be supportive of a system that detains so many people without a conviction, particularly for misdemeanor and low-level felony offenses. We know this from the results of at least three national surveys conducted in the last two years.

In a November 2018 survey by The Pew Charitable Trusts, most Americans reported that they favor pretrial release, believing strongly in the presumption of innocence. Eighty percent believe that nonviolent or misdemeanor crimes do not warrant pretrial incarceration, and 58% also supported releasing people accused of violent crimes who do not have serious criminal histories, if the release is accompanied by pretrial supervision. For low-level violent crimes, 85% supported release with an order requiring the



Chief Judge Karen Arnold-Burger, center right, spoke to members of the Governor’s Commission on Racial Equity and Justice to gain their input on the Task Force report.

defendant to stay away from the victim or with pretrial supervision. Finally, two-thirds of the respondents believed that crimes driven by addiction or mental illness should be met with treatment, not jail.²¹

Just six months prior to release of the Pew survey, another survey was conducted by the Charles Koch Institute in partnership with the Pretrial Justice Institute. This survey reported similar results from a group of registered voters. Seventy-three percent of voters favored reducing the number of arrests for low-level, nonviolent offenses. Seventy-two percent of respondents wanted to limit how many days people not charged with serious violent crimes could remain in jail before trial. Fifty-eight percent of voters said they favored the use of unsecured bond (where arrested persons are released without posting a monetary bond but are liable to pay the bond amount if they do not return for trial) instead of secured money bond (an amount paid up front by the arrested person). An overwhelming majority of Americans—across all partisan, regional, and demographic divides—wanted the criminal justice system to

reduce the use of pretrial incarceration, except when it is necessary to protect public safety. Only 10% believed failure to appear for trial should be the deciding factor whether to incarcerate someone.²²

Finally, in February 2018, RTI International and Zogby Analytics conducted a poll funded by the John D. and Catherine T. MacArthur Foundation in which 60% of Americans believe “rehabilitating or treating the person” is the most appropriate response to nonviolent offenses, as opposed to “punishing the person for committing the crime” or “keeping the person off the street so they can’t commit more crimes.” Support for rehabilitation rises to 71% for nonviolent offenders who suffer from mental illness. Of Americans familiar with pretrial services, 73% support their use. And finally, 84% agreed that local governments should devote more resources to substance abuse treatment.²³

American opinions seem to be well-grounded in the research associated with pretrial release. Pretrial incarceration not only undermines the core American principle of the presumption of

innocence, but also results in significant negative socioeconomic impacts.

Pretrial detainees may lose their jobs, be forced to abandon their education, and be evicted from their homes. They are exposed to disease and suffer physical and psychological damage that lasts long after their detention ends. Their families also suffer from lost income and forfeited education opportunities, including a multi-generational effect in which the children of detainees suffer reduced educational attainment and lower lifetime income. The ripple effect does not stop there: the communities and States marked by the over-use of pretrial detention also must absorb its socioeconomic impact. Around the world, excessive pretrial detention prods people toward poverty. It pushes working class people toward unemployment, uncertainty, and the edge of poverty. It tips those on the edge of privation into poverty and plunges the already poor into even worse destitution. It limits the development of whole communities, wastes human potential, and misdirects State resources.²⁴

The impact on the detainee's family has been the subject of several recent studies, primarily related to financial hardship. One study noted that women in a defendant's life, whether it be grandmother, mother, sister, aunt, wife, or girlfriend, are often strategically targeted to post any necessary money bond. Men in a defendant's life are not as likely to bond out a friend, relative, or partner. Accordingly, money bond requirements disproportionately impact the financial health of women.²⁵

Pretrial detention also has a significant correlation to criminal justice outcomes. In 2012, the Conference of State Court Administrators published a white paper that noted several counterintuitive results of pretrial detention.

Numerous research projects conducted over the past half century have shown that defendants who are held in pretrial detention have less favorable outcomes than

those who are not detained —regardless of charge or criminal history. In these studies, the less favorable outcomes include a greater tendency to plead guilty to secure release (a significant issue in misdemeanor cases), a greater likelihood of conviction, a greater likelihood of being sentenced to terms of incarceration, and a greater likelihood of receiving longer prison terms. Data support the commonsense proposition that pretrial detention has a coercive impact on a defendant's amenability to a plea bargain offer and inhibits a defendant's ability to participate in preparation for a defense. In summarizing decades of research, the federal Bureau of Justice Assistance noted that research has demonstrated that detained defendants receive more severe sentences, are offered less attractive plea bargains and are more likely to become reentry clients because of their pretrial detention – regardless of charge or criminal history.” (internal citations and quotation marks omitted)²⁶

A recent study published in the Stanford Law Review reported that defendants who are detained pretrial on a misdemeanor charge are 25% more likely to be convicted and 43% more likely to be sentenced to jail compared to similarly situated releasees. In addition, pretrial detainees are more likely than similarly situated releasees to commit future crimes. “Although detention reduces defendants' criminal activity in the short term through incapacitation, by eighteen months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges, a finding consistent with other research suggesting that even short-term detention has criminogenic effects.”²⁷

In Kansas, pretrial detainees are held in county jails. Although our state prisons offer healthcare, vocational, therapeutic, and other activities geared at reducing recidivism and increasing potential productivity upon release, our county jails—with a few limited exceptions—do not. Jail population is viewed as “temporary” even though we know

that some defendants end up spending their entire sentence or longer in the county jail before their case is resolved. In addition, the loss of a job, interruption in education and other negative consequences of incarceration can occur after as little as three days of incarceration.²⁸

The law presumes releasing people awaiting trial. So how is it that 53% of county jail detainees are not being released prior to trial? To answer that question, we need to look at the current status of both the federal law and the law in Kansas.

The Law

METHODS OF ARREST

There are two ways people are arrested for crimes.

With a warrant. A prosecutor presents information to a judge and asks that a warrant for an individual's arrest be issued. If the judge finds that there is probable cause to believe that a crime has been committed and the person in question is the one who committed it, the judge may issue a warrant for the person to be arrested and held to answer for the charges filed by the prosecutor. The warrant includes a bond amount. The arrestee is required to post the bond amount listed on the warrant, either by cash or through a commercial surety bond company. The person is taken before a judge, usually within 48 hours, at which time the judge could decide to reduce the bond amount or determine alternative or additional conditions of release.

Without a warrant. Often, people are arrested at or near the scene of an alleged crime. Due to the immediacy of the situation, no warrant is obtained. When a person is arrested, several options are available to law enforcement depending on the alleged crime and the law governing it. But generally, an officer may release the person at the scene by simply giving the person a date to appear in court to answer the charges, if and when they are filed. Or an officer may take the arrestee to the police station, obtain fingerprints, a

photograph, and either: release the arrestee and give them a court date to appear; or, require that the defendant post a monetary bond under a fixed bond schedule that is based on the charged crime. The officer is required within 48 hours to have a judge determine whether there is probable cause to believe the person committed the crime and what the conditions of release will be. Those conditions could include a monetary bond, no contact with the victim, pretrial supervision, and a limitless number of other conditions.

CONDITIONS OF RELEASE OR BAIL

The term “bail” refers to the release of the defendant and the term “bond” refers to conditions of release—often monetary. This report deals with both.²⁹ How the bail (or release) decision is made is at the heart of any discussion of pretrial release. As Justice Jackson stated in *Stack v. Boyle*,

*Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice.*³⁰

There are several conditions imposed by judges to increase the chances that a person will return to court when ordered without committing a new offense. If a defendant violates the conditions of release, they are arrested and returned to jail to see the judge about modifying the conditions of release. Following are the most common bail requirements, which may be imposed exclusively or in combination.

Release with no conditions. A person can be released from a custodial arrest by signing a promise to appear in court that has no conditions attached to it.

Release with conditions. A person can be released only upon agreeing to certain conditions. Those could include:

A monetary bond. A defendant can be required to post an amount of money with

Pretrial decision points

Law enforcement can:	The prosecutor can:	The judge can:
<ul style="list-style-type: none">• take no action• take no action, but send reports to prosecutor for consideration of charges;• issue a citation; or• arrest and take into custody for hearing before judge.	<ul style="list-style-type: none">• charge the person or decline prosecution;• offer a diversion from prosecution;• accept a plea bargain;• take the case to trial; or• dismiss the charge.	<ul style="list-style-type: none">• determine if there was probable cause to arrest;• set bail (conditions of release) which can range from no conditions to numerous conditions;• order the person detained without bail (capital murder only in limited circumstances); and• review conditions of release upon request.

Source: Kansas statutes

the court to guarantee future appearance. This can be posted by cash or through a commercial surety company. If it's through a surety or bonding company, the person or their friends or family usually pay 10% of the bond amount to the bond agent as a fee for the service. The person who pays it never gets their money back. If the defendant fails to appear, the bonding company will pay the full bond amount or surrender the defendant.³¹ If the person posts a cash bond with the court, they get the money back at the end of the case if they appear in court as ordered. If the defendant is convicted, however, the court may deduct any outstanding restitution, costs, fines or fees.³²

Money bonds only guarantee against the risk of the defendant failing to appear. Failure to appear is the only reason a bonding company would ever have to pay the full monetary bond amount into the court. Monetary bonds are unrelated to public safety concerns.³³ Reliance on monetary bond has come under scrutiny in recent years as opponents argue that it creates a wealth-based system of justice and point to various studies indicating

that money does not motivate defendant behavior.³⁴ On the other hand, proponents argue that monetary conditions increase the likelihood of appearance in court.³⁵ Furthermore, they point to the added benefit of fugitive apprehension by bond agents who have an incentive to make sure the defendant makes the court date. This provides savings to law enforcement.

A personal recognizance bond. This is also tied to a monetary sum, but a defendant can simply sign a piece of paper promising to pay a certain amount if they fail to appear. No money is required up front. This is sometimes referred to a PR bond (personal recognizance), an OR bond (own recognizance), or an unsecured bond.

Pretrial Supervision. A court can require a defendant be placed on pretrial supervision. This often involves reporting to a pretrial supervision officer who monitors the defendant's compliance with court orders—like drug and alcohol screening and mental health evaluations and related treatment recommendations. The defendant is also generally required to notify the pretrial

Release or detain?

Citation	Personal recognizance	Cash or surety bond	No bail
Person released by law enforcement with a notice to appear in court.	Person released after promising to pay the bond amount if he or she fails to appear in court. No money is required at time of release. The court may impose other conditions.	Money bond set for sole purpose of incentivizing the person to appear in court. May be paid to the court in cash or as a fee for service to a commercial surety company to file paperwork with the court to guarantee full payment if defendant fails to appear.	Incarceration, with no possibility of release pending trial, is only allowed in Kansas for capital murder and then only where the proof is evident or the presumption great.

Source: Kansas statutes

supervision officer of their residence and employment, and any changes to either. Pretrial supervision is frequently used if the defendant is believed to be at risk of committing another crime. There are often weekly or monthly fees associated with pretrial supervision. Similar conditions of release can be imposed without pretrial supervision monitoring.

Electronic or GPS monitoring. A defendant may be released with the requirement that they wear an electronic or global positioning system (GPS) monitoring device. These track the defendant's whereabouts and can also alert the victim if the defendant comes within range. There are fees associated with this monitoring. These types of monitoring devices are often cited as a method to increase safety to the victim and the community.

No-contact order. It is very common for a court to enter a condition of release that the defendant has no contact directly or indirectly with the victim, the victim's family, or named witnesses from the complaint or information.

Drug or alcohol testing. If the offense was alcohol or drug related, judges often believe that providing incentives for sobriety through drug and alcohol tests will increase the likelihood that a person will appear in court with no new arrests.³⁶

Mental health or alcohol or drug evaluations. If it is clear that the offense for which the defendant is charged related to a mental health or substance abuse issue, the court may require, as a condition of release, that the defendant obtain a mental health or a substance abuse evaluation³⁷ and comply with recommendations from that evaluation, such as classes or treatment.

There are an endless number of conditions a judge may place on a defendant's release,³⁸ and they often are very similar to conditions of probation. For example, a judge may order a defendant to obtain employment or maintain current employment; refrain from violating the law and report any police contact; and pay any ordered child support, etc. The conditions must be tailored to the defendant and the offense. But there are fundamental differences between probation and pretrial release.³⁹

Pretrial release conditions are often criticized as punishing a defendant before conviction, an affront to the presumption of innocence at the heart of our criminal justice system. On the other hand, some praise such conditions as the only effective way to address community safety concerns while allowing a defendant to avoid incarceration and continue to support his or her family.

Although the public surveys referenced above have indicated that Americans believe defendants should be released before trial, if a defendant is released and commits a violent crime pending trial, blame is often focused on the judge who allowed the defendant to remain free. Most defendants appear in court as ordered⁴⁰ with no new offenses. But judges do not possess an Infinity Time Stone.⁴¹ They cannot predict future behavior. So, when faced with 100 defendants, only 20 of whom may *either* fail to appear in court or commit a crime before their trial date, judges have a difficult time identifying which 20 to target for meaningful conditions of release. As a result, judges tend to place conditions, either monetary or nonmonetary, on everyone even though there is little or no risk they will fail to appear or commit a new crime. Thus, the use of risk assessment tools—based on criminogenic algorithms—has become a popular method to aid judges in setting conditions of release. These will be discussed in more detail later in this report.

FEDERAL LAW

Our United States Constitution has very little to say about bail. The only discussion is in the Eighth Amendment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

For context, for the majority of our history, the sole consideration when deciding bail was the risk of failure to appear in court.⁴² The United States Supreme Court has consistently held that the purpose of setting conditions of release or bail is to secure the appearance of the person at trial.

*Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.*⁴³

Later Congress adopted the Bail Reform Act of 1984 (Act). The Act required courts to detain defendants charged with certain serious felonies until their trial if the Government was able to establish, by clear and convincing evidence at a hearing, that no conditions of release “will reasonably assure...the safety of any other person and the community.”⁴⁴ Defendants detained under this provision challenged its constitutionality. *U.S. v. Salerno*⁴⁵ became the first case in which the United States Supreme Court examined public safety as a consideration in the bail decision.

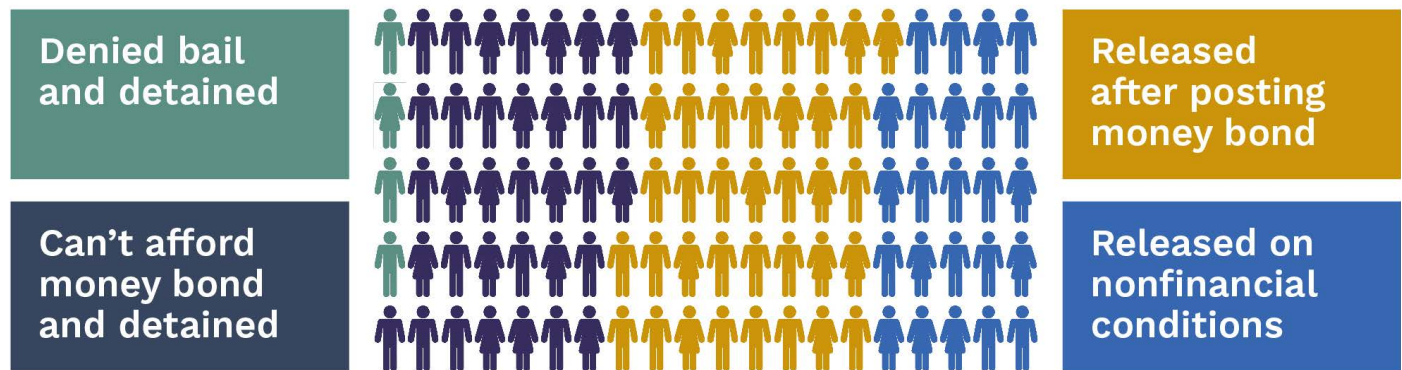
Salerno argued that the Eighth Amendment granted him a right to bail based solely on considerations of risk of flight. The *Salerno* court rejected his claim. It found nothing in the Eighth Amendment granted a defendant a right to bail. Rather, the Court found that when bail is granted, the bond shall not be excessive “in light of the perceived evil.”⁴⁶

*[When] the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.*⁴⁷

The Court found that the Act was not a punitive measure, but a regulatory one. It found that preventing danger to the community was a legitimate regulatory goal.⁴⁸ As further evidence that the provision was not punitive, the Court noted that the Act requires detainees be housed in a “facility separate, to the extent practicable, from

The path from arrest to pretrial detention

Nationally, 34% of people who are arrested, charged and booked, and held on bail can't afford to be released from jail and are detained.



Source: Prison Policy Initiative and U.S. Department of Justice, 2009, 75 largest counties

persons awaiting or serving sentences or being held in custody pending appeal.”⁴⁹

Moreover, the Court noted that the procedure applied only to a select list of extremely serious crimes and the numerous procedural safeguards in place were the key to the Act’s constitutionality. The procedural safeguards went beyond simply demonstrating that there was probable cause to believe the charged crime was committed by the defendant. The Act required a full adversary hearing. At the hearing, the Government bears the burden of proving by clear and convincing evidence that the defendant presents an identified and articulable threat to an individual or to the community. The defendant has a right to counsel, can testify on their own behalf, and can cross-examine the Government’s witnesses. At the conclusion of the hearing, the judge is required to make a written statement of reasons for the decision to detain and the defendant has the right to an immediate appeal of the detention decision.⁵⁰

The Court ended with the following, the first sentence of which is often quoted when discussing bail reform.

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the

*detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing.*⁵¹

Salerno marked a major shift in how judges, prosecutors, and legislatures viewed pretrial release. Public safety, rather than just risk of flight, became a factor in release decisions—even if states did not adopt the procedural safeguards required by the Act that the *Salerno* court noted as critical to its decision. Kansas was one such state.

Although “liberty is the norm” from the above quote is often the focus of the Supreme Court’s holding in *Salerno*, detention as the “carefully limited exception” is also important. The key is that detention decisions are to be made very carefully and should be based on an individualized determination of the risks involved—risks that the court is constitutionally allowed to address.

Since *Salerno*, pretrial release—albeit with strict pretrial supervision—is the norm in the Kansas federal criminal justice system. The use of money bond as a condition of pretrial release is only allowed to address a risk of nonappearance and “it should not result in the detention of a defendant

solely for financial reasons.”⁵² Federal courts use an instrument called the Pretrial Risk Assessment Tool (PTRA) to evaluate risk. It is described as “an objective, quantifiable instrument that provides a consistent and valid method of predicting risk of failure to appear; new criminal arrest; and technical violations.”⁵³ As with many risk assessment tools, even defendants who score in the highest risk category “have a 65% likelihood of success when released utilizing alternatives to detention.”⁵⁴ In Kansas, very few defendants on federal pretrial supervision either fail to appear (1.5%) or commit new crimes (1%).⁵⁵ Of the 205 defendants released on bond in the District of Kansas in 2019, 97% were released on an unsecured bond. Of the six people released on a secured bond, only two used a commercial surety.⁵⁶

KANSAS LAW

When Kansas adopted its Constitution and Bill of Rights in 1861, the language regarding bail varied from that contained in the United States Constitution and that language has not changed.

*All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.*⁵⁷

This language, or something very similar, was common in state constitutions when Kansas joined the union.⁵⁸ Yet, there are only a few Kansas Supreme Court cases interpreting it.

As to the first sentence, in *In re Schneck*,⁵⁹ the Kansas Supreme Court found that the term “capital offenses” referred to offenses punishable by death. The theory was that if a person faced death, they would be more likely to flee and forfeit bond than if they were merely facing life in prison.⁶⁰ This first sentence is also routinely interpreted as establishing a right to bail, or a right to release pending trial.

As to the second sentence, in *State v. Foy*,⁶¹ the Supreme Court opined that:

*Generally, no hard and fast rule can be laid down for fixing the amount of bail on a criminal charge, and each case must be governed by its own facts and circumstances. The amount of bail rests within the sound discretion of the presiding [judge]. The purpose of the statutes requiring bond from persons accused of crimes is to assure their presence at the time and place of the trial. (internal citations omitted)*⁶²

This corresponded with the purpose of bail set out by the United States Supreme Court in *Stack v. Boyle*.⁶³ It also corresponds with the language of K.S.A. § 22-2802 at the time, which was void of any language indicating that pretrial conditions of release were to be based on victim or public safety concerns. In fact, the statute highlighted that the conditions of release needed to be geared to assuring the defendant’s appearance at trial.⁶⁴

Then, eight years after *Foy*, and a year before the U.S. Supreme Court decision in *Salerno*, the Kansas legislature amended K.S.A. § 22-2802 to allow the judge to consider public safety in setting the conditions of release.⁶⁵

The amended statute still does not allow a judge to detain a defendant based on public safety concerns. It simply requires public safety and risk of flight be considered in establishing the conditions of release.

It did not set forth a list of criminal offenses in which release could be denied altogether, as did the federal statute discussed in *Salerno*. It did not adopt any procedural safeguards for mandatory detention required by the court in *Salerno*. Courts have generally not been supportive of “preventive detention” for “anticipated but as yet uncommitted crimes.”⁶⁶ So Kansans still have a right to bail (or release) except in the case of capital offenses—first-degree murder being the only one at this time.

The Kansas Legislature has clearly stated its intentions when it comes to pretrial conditions of release.

*The purpose of [Article 28-Conditions of Release] is to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges or to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.*⁶⁷

The Kansas statute regarding conditions of release reads the same now as it did in 1986. It requires that the judge set conditions of release that will reasonably assure appearance and public safety. Based upon whether the information is available, the judge must consider:

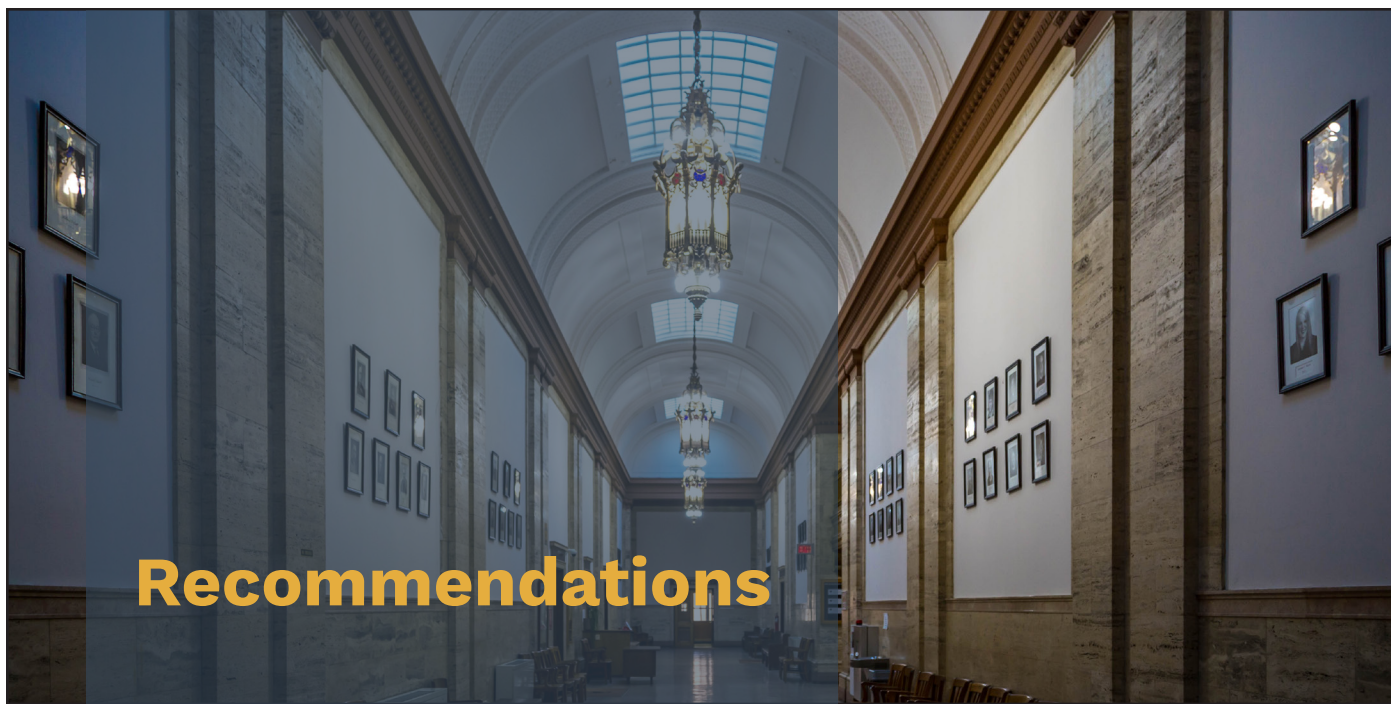
- the nature and circumstances of the crime charged and the weight of the evidence against the defendant;
- whether the defendant is lawfully present in the United States;
- the defendant's family ties and length of residence in the community;
- the defendant's employment and financial resources;
- the defendant's character, and mental condition;
- the defendant's record of convictions, record of appearance or failure to appear at court proceedings or of flight to avoid prosecution;
- the likelihood or propensity of the defendant to commit crimes while on release; including whether the defendant will be likely to threaten, harass or cause injury to the victim of the crime or any witness thereto; and

- whether the defendant is on probation or parole from a previous offense at the time of the alleged commission of the subsequent offense.⁶⁸

The judge has broad discretion in making a release decision, although conditions of release must necessarily be individualized. The Kansas Supreme Court has yet to be faced with a case challenging conditions of release under this statute.

As you will see in examining the recommendations that follow, sometimes the issues before the Task Force led to a desire to see statutory changes enacted. But these discussions, in turn, led the Task Force to think about the myriad of other statutory provisions that might not currently seem to be what anyone would call "best practices." Many states that have studied both bail and bond have come away realizing that a complete statutory and constitutional overhaul is necessary. But, to the extent possible, the Task Force tried to work within the confines of the current law, except in those cases in which a statutory change was viewed as necessary to comport with existing practices or to provide consistency in approach in areas it was lacking.

With this foundation in mind, our recommendations follow.



Recommendations

Each recommendation put forward to the Task Force includes, as part of the Task Force report, a statement of existing research or best practices that supported the recommendation, the cost associated with the recommendation, the entity which would be charged with implementing the recommendation, related recommendations that were rejected and why, what—if any—additional steps are needed before implementation, what stakeholder concerns about the recommendation could be identified, and how those stakeholder concerns could be addressed.

After each meeting, recommendations that had been tentatively adopted by the Task Force were sent out to all stakeholders for comment. Stakeholders were encouraged to contact the Chair or any member to relay concerns or support. Many did. Half of the meetings began with at least two hours of open communication with stakeholders and Task Force members to address concerns.

General

1. EDUCATION

The Kansas Supreme Court should provide pretrial release education to all district and municipal courts that emphasizes:

- 1. liberty is the norm and detention is the carefully limited exception;**
- 2. judges should first consider nonmonetary forms of release; and**
- 3. release should be under the least restrictive conditions to assure a defendant's appearance while protecting the public.**

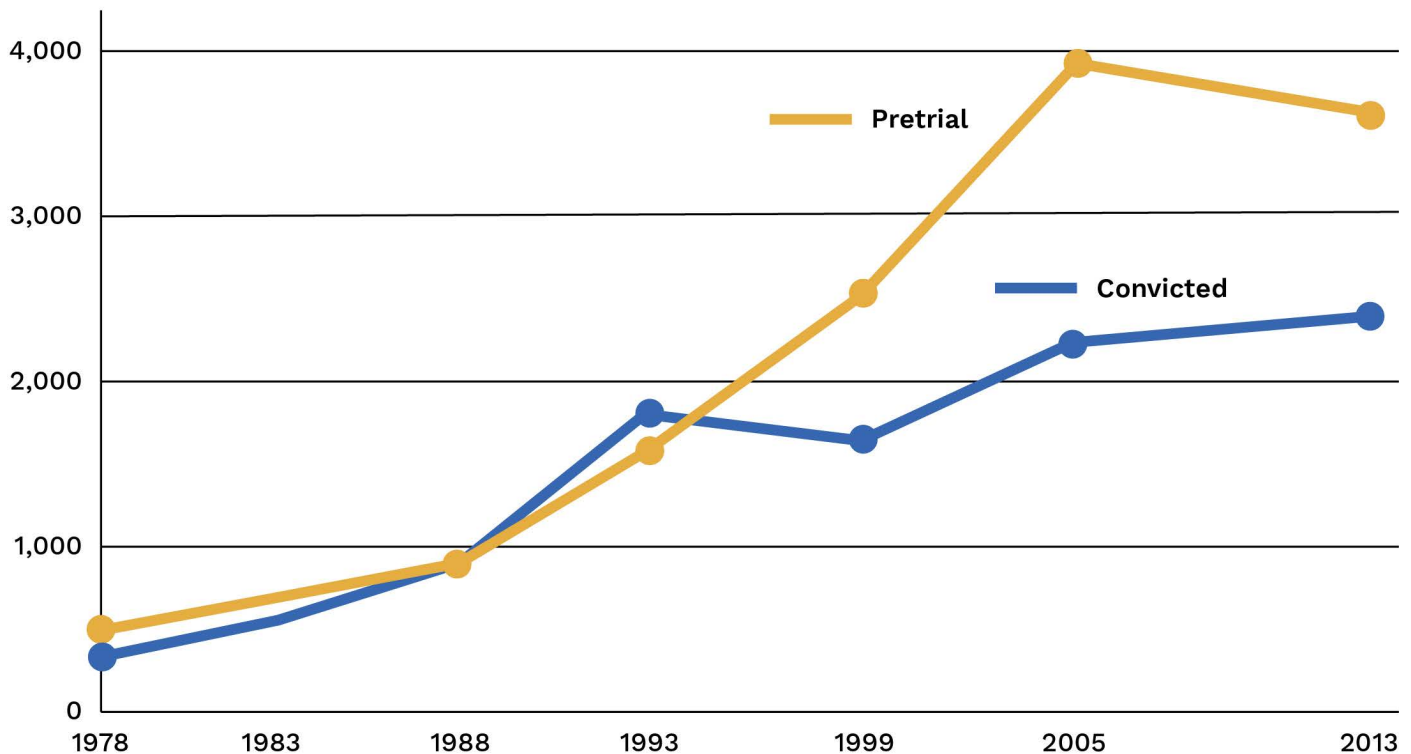
It should also encourage providers of continuing legal education to offer educational opportunities to attorneys regarding pretrial release.

Existing research or best practices that support this recommendation

In the last 10 years, research in the area of pretrial release has exploded. Computerized research has allowed data collection in the area of effective practices for minimizing failure to appear and maximizing public safety. Social science researchers have measured things such as societal impacts of incarceration, effectiveness of money bond, risk assessment tools, and racial and socioeconomic bias in the system. Long held beliefs about what works and what does not in the criminal justice system have been questioned by this

Pretrial policies drive recent jail growth in Kansas

The number of people incarcerated in local jails by conviction status, 1978-2013



Jail populations were adjusted to remove people being held for federal and state authorities. Bureau of Justice Statistics data sources are described at <https://www.prisonpolicy.org/reports/jailovertime.html#methodology>

SOURCE: Prison Policy Institute

research. At the same time, it is undisputed that the steady increase in pretrial incarceration has resulted in unprecedented growth in our jail populations.⁶⁹

In Kansas, it is estimated that 53% of detainees in county jails are there solely because they are awaiting trial or sentencing.⁷⁰ Nationally the figure is about 66%, although this number includes additional holds on other charges or probation violations.⁷¹ Many remain behind bars because they cannot afford to post a monetary bond⁷² and recent federal court cases have raised serious constitutional questions about such a system.

As a result, judges and lawyers need to have access to educational programming that will update them on this new research and the reasons why pretrial release issues are being given attention nationwide. Legal education programs

often simply focus on the substantive law, but the area of pretrial release raises issues of statewide policy as well. Lawyers and judges need to be up to date on these topics, which impact the practice of law, to better advise policymakers on the legal challenges.

A survey of 117 judges conducted by the Task Force indicated that judges were open to improving their pretrial process and felt additional education would be helpful.⁷³

The United States Supreme Court, the Kansas Supreme Court and the Kansas Legislature have all recognized the importance of liberty and the presumption of innocence.

- “In our society, liberty is the norm and detention prior to trial...is the carefully

limited exception.” *United States v. Salerno*, 481 U.S. 739, 754–55 (1987).

- “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U. S. 432, 453 (1895).
- “[T]he presumption of innocence, although not explicitly stated in the United States Constitution, is a basic component of our criminal justice system that is founded on the principle that a criminal accused is entitled to have his or her guilt or innocence determined solely on the basis of trial evidence and not upon “grounds of official

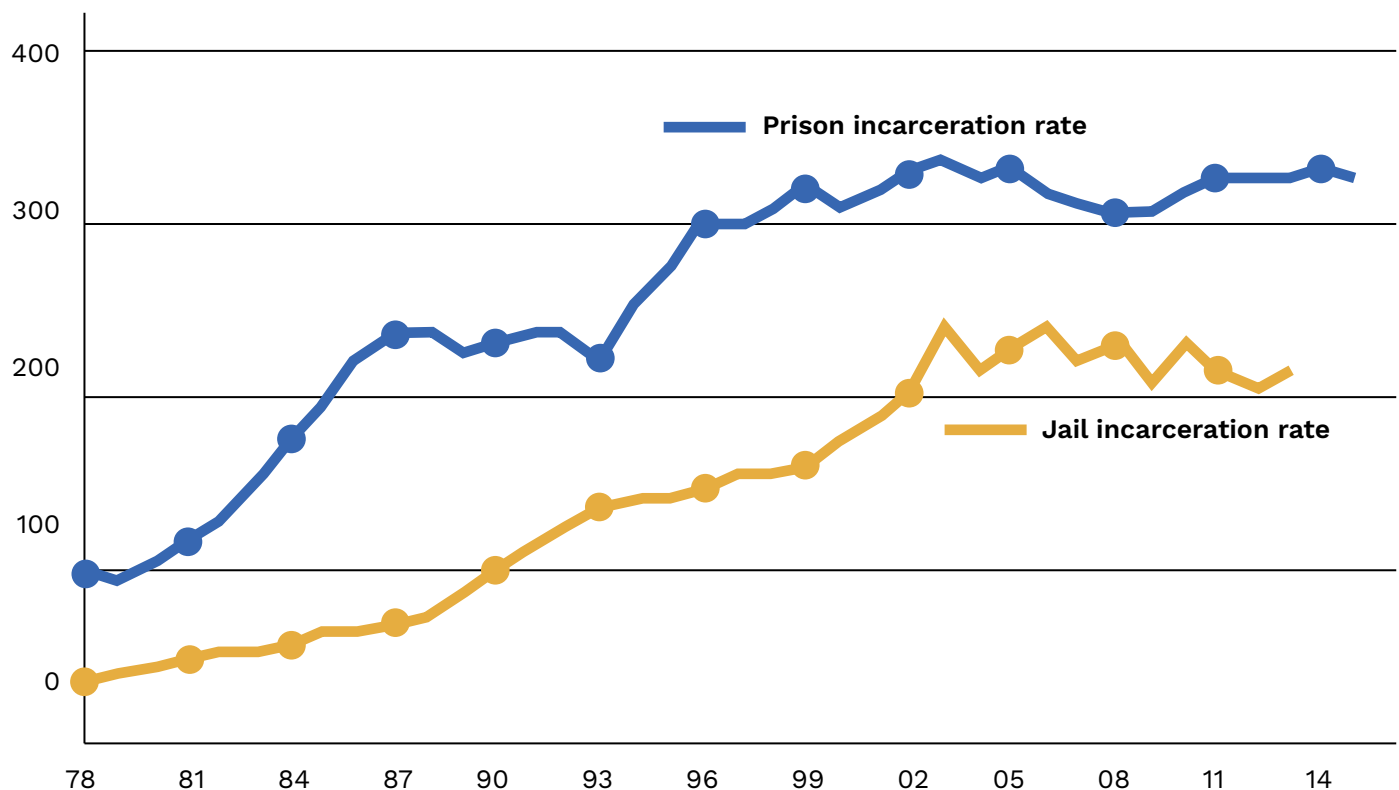
suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.” *State v. Miller*, 308 Kan. 1109, 1142 (2018).

- “The purpose of this article is to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges or to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.” K.S.A. § 22-2801.

Several courts around the country have found it important to remind the trial level courts of these basic principles by stressing the importance of pretrial release and recognizing the strain that monetary conditions place on individuals,

Prison and jail incarceration rates in Kansas

The number of people incarcerated in state prisons and local jails per 100,000 people

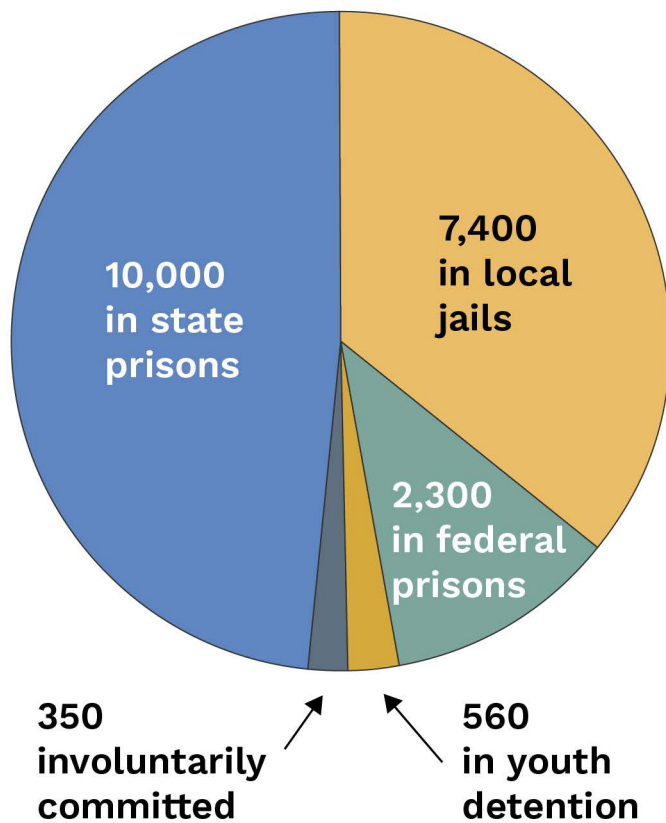


Jail populations were adjusted to remove people being held for federal and state authorities. For full sourcing see <https://www.prisonpolicy.org/reports/jailsovertime.html#methodology>

SOURCE: Prison Policy Institute

Incarcerated Kansans

21,000 Kansans are locked up in various kinds of facilities.



www.prisonpolicy.org/reports/correctionalcontrol2018.html

SOURCE: Prison Policy Institute

particularly those of limited resources, by mandating pretrial release procedures by way of court rule.⁷⁴

As highlighted by several current federal cases that have examined pretrial release in terms of the equal protection and due process clause of the Fourteenth Amendment to the United States Constitution, courts must be vigilant about protecting the rights of those who, for no other reason than lack of resources, cannot post a monetary bond. In addition, any conditions of release should be narrowly tailored to address the risk a defendant presents, and the conditions imposed should be evidence-based.

The Task Force believes educational opportunities would be the best approach in Kansas to remind district court judges, magistrates, prosecutors,

and defense attorneys of the core constitutional principles at the heart of our criminal justice system and the allegiance of the Kansas judicial branch to those core principles.

Costs and funding associated with this recommendation

Although there will be some costs associated with training judges, the Office of Judicial Administration (OJA) already trains judges on a wide variety of topics. Since the appointment of this Task Force, judges have received training on these topics at regional trainings and at the Fall judicial conference in 2019. We do not anticipate any additional funding necessary for judicial education. As for legal education for attorneys, those programs are usually presented by organizations in a cost-neutral manner, in that fees are charged for attorneys to attend that, in turn, cover the costs of delivering the program. Accordingly, we view it as cost neutral.⁷⁵

Implementation

The Kansas Supreme Court provides education for judges through OJA. For attorneys, organizations around the state provide continuing legal education to their members or attorneys at large.

Stakeholder concerns

The only stakeholder to express concern about this recommendation was the Kansas Bail Agents Association.

*The Kansas Supreme Court should not get into the business of prematurely issuing edicts as to what the law is and how local judges should exercise their discretion, particularly since the Kansas Supreme Court is the court of last resort and will be tasked with deciding the contours of the constitutional right to bail in Kansas if and when it reaches them as a justiciable issue.*⁷⁶

In addition, it noted:

We do not disagree in principle with this recommendation. However, we don't see the

need for “educational opportunities on legal issues” concerned with “pretrial detention decisions.” Such cases are infrequent in Kansas and the law is settled on these issues.⁷⁷

The ACLU supports this recommendation and believes education should include encouraging judges to create a wide net of people eligible for mandatory release and presumptive pre-booking release with no conditions.⁷⁸

The Pittsburg State University student collective⁷⁹ did not object to this recommendation but was concerned that it did not go far enough.

There must be a suggestion that endorses the removal of cash bailout for low-level, nonviolent crimes. Not just as a first consideration as mentioned in Recommendation 1 within the 2020 Summary for Stakeholders, but outright. This practice is horribly discriminatory to lower class people as seen in obvious cases where the wealthy, who commit the same crime and can quickly pay their way out of jail, are released while the poor person may lose their home, job, and family waiting for trial because they cannot afford bail. On top of this, bail for African-American men on average is 35% higher and often is arbitrarily set. In California, a person can receive a \$75 bail to a \$10,000 bail for public intoxication.⁸⁰

2. PUBLIC OUTREACH

The Office of Judicial Administration should incorporate educational materials detailing the issues involved in pretrial release decisions in its public communications.

Existing research or best practices that support this recommendation

A recent study by The Pew Charitable Trust found that most Americans favor release from incarceration prior to trial because of the strongly held belief in the presumption of innocence. Although 80% believe that nonviolent or misdemeanor crimes do not

warrant pretrial incarceration, 58% of respondents supported releasing people accused of violent crimes who do not have serious criminal histories if the release is accompanied by pretrial supervision. For low-level violent crimes, 85% supported release with an order requiring the defendant to stay away from the victim or with pretrial supervision. Finally, two-thirds of the respondents believed that crimes driven by addiction or mental illness should be met with treatment, not jail.⁸¹

That said, our discussions with judges, prosecutors, and law enforcement reflect a real concern that those beliefs may not hold much sway with a local community when a judge releases a person prior to trial and that person commits a violent offense or flees the jurisdiction while awaiting trial. Some officials answer to an electorate that may tend to classify the release as evidence of poor decision-making by the judge. It is hard to explain that the increased risk of a rare event is still a rare event.

Similarly, an elected district or county attorney who acquiesces in a request for a personal recognizance bond or no conditions of release consistent with a risk assessment tool or other evidence may be perceived as being soft on crime.

But judges, attorneys, and the public are equally concerned about the harm that results when defendants are unnecessarily required to stay in jail pending trial. A tragic and well publicized example is that of 17-year-old Kalief Brown who spent three years at Rikers Island Prison in New York City—two of which were in solitary confinement—for allegedly stealing a backpack, a charge that was subsequently dismissed.⁸² Programs like 3DaysCount™—a campaign founded by the Pretrial Justice Institute⁸³—stress that even three days in jail is enough for people to lose their housing, lose their job, and strain family connections.⁸⁴

As Harvard Law Professor and legal scholar Laurence Tribe opined:

The pretrial misconduct of [released] persons will seem to validate, and will indeed

*augment, the fear and insecurity that the system is calculated to appease. But when the system detains persons who could have safely been released, its errors will be invisible. Since no detained defendant will commit a public offense, each decision to detain fulfills the prophecy that is thought to warrant it, while any decision to release may be refuted by its results.*⁸⁵

In other words, “*the degree to which judges wrongfully detain defendants is unknowable because their decisions are ‘unfalsifiable.’*”⁸⁶

Moreover, even though it seems counter-intuitive, research has shown that, particularly with low- and medium-risk offenders, longer periods of pretrial detention correlate with an *increased* likelihood of failure to appear for court, and an *increased* likelihood of new criminal activity pending trial and post disposition examined at both 12 months and 24 months.⁸⁷

The Task Force believes that providing the public and the media with information about how and why decisions are made regarding pretrial release would instill confidence in the process. Our review of best practices in other states revealed that several states provide websites with information about the pretrial process.⁸⁸ We were particularly impressed with Kentucky’s virtual tour of pretrial services which contains a section regarding the judicial decision to release with flow charts and interviews with judges.

Likewise, we were impressed by the value that could be achieved through online tools that put the reader in the shoes of the judge or the defendant. There are several such online tools that illustrate different approaches.

First, Brave New Films has a website called The Bail Trap Game.⁸⁹ It allows the player to pick an arrestee and walk through the decisions the arrestee must make to get out of jail. Second, Detain/Release is another simulation tool that puts the reader in the position of the judge making the release decision.⁹⁰ The person is provided the results of a risk assessment. Finally, the

Movement Alliance Project and MediaJustice have collaborated to launch a website called Mapping Pretrial Injustice, which allows users to try the Public Safety Assessment Simulator based on New Jersey’s risk assessment tool. Again, users can experiment with various charges and historical data for an offender to map their movement through the pretrial system.⁹¹

Costs and funding associated with this recommendation

This recommendation will require staff resources and will require outside assistance from public relations or media professionals, as well as the hard costs associated with filming or printing the media created.

Implementation

The Kansas Supreme Court and the Office of Judicial Administration’s Public Information Officer would be responsible for implementation.

Stakeholder concerns

The Kansas Sheriffs’ Association supports this recommendation, stressing the importance of education to the public:

*The general public does not have a good understanding of pretrial release and sentencing. An education platform should be introduced before any changes occur or at the time changes do occur.*⁹²

The Kansas Bail Agents Association objected to this recommendation:

Kansas does not have a system of ‘pretrial detention decisions.’ The use of preventative detention is rare; there is no need to incorporate this concept into communications materials of the State Judiciary. When the Court’s communication experts need to discuss bail in a capital case, it is an uncomplicated inquiry—point to the constitutional language and whether or not the prosecutor is requesting bail or filing

a motion for remand. An area of education relevant to the public could address: ‘Excessive bail shall not be required’⁹³

The Pittsburg State University student collective noted that the use of the phrase “educational materials detailing the issues involved” was too vague.

Due to the vagueness of Recommendation 2, it should be explained what the “issues involved in pretrial release decisions” are. If the word ‘issues’ means the ramifications and negative consequences of pretrial release, this should be explicitly stated in the recommendation for people to see that this is what the task force is suggesting that the OJA should be educating others on.⁹⁴

3. DATA COLLECTION

The Office of Judicial Administration should collect criminal case data contained within its legacy case management system (FullCourt®) and its new case management system (Odyssey Case Manager™) related to types of pretrial release, change to and revocation of those types of release, and failure to appear. OJA should design reports containing relevant data to aid in the understanding of pretrial detention issues and the effect of changes made to the pretrial justice system.

OJA should support designing data collection, carrying out data collection, and data reporting in a manner that fosters understanding of pretrial release through appropriate staffing within OJA.

Existing research or best practices that support this recommendation

A common hurdle encountered by most states that have embarked on studying pretrial practices is the lack of data or the inability to access existing data in an efficient manner.⁹⁵ Scientific best practices call for data collection to determine a baseline and to enable statistical analysis of change over time. Just as we stress the need for evidence-based

practices in the area of probation and parole, we must also stress evidence-based practices for any modifications in our pretrial practices in Kansas. Without a baseline of information regarding appearance rates or re-arrest data, it is difficult to determine the effectiveness of text notifications, risk assessment tools, money bond, electronic monitoring, and any other conditions of release. Data can help tell the story of pretrial justice in Kansas and show where change may be needed.

To address this concern, President Barack Obama launched the “Data Driven Justice Initiative” in 2016. It consisted of a bipartisan coalition of 67 city, county, and state governments—one of which was Johnson County, Kansas. Coalition members committed to using:

data-driven strategies to divert low-level offenders with mental illness out of the criminal justice system and change approaches to pretrial incarceration, so that low-risk offenders no longer stay in jail simply because they cannot afford a bond. These innovative strategies, which have measurably reduced jail populations in several communities, help stabilize individuals and families, better serve communities, and often save money in the process.⁹⁶

Of course, different states have taken different approaches. For example, Connecticut⁹⁷ passed a comprehensive data collection statute that requires data collection from several different agencies. The Virginia Legislature⁹⁸ has considered a similar bill for each of the last two years but, as of this writing, has pushed it over to 2021 primarily due to the lack of resources.⁹⁹ A recent amendment has limited the bill to require a pilot program of the required data collection to get a better idea of costs and resources needed for full implementation. Massachusetts also has a data collection statute as part of its justice reinvestment policies.¹⁰⁰

We were also impressed with the work of the University of North Carolina School of Government Criminal Justice Innovation Lab and its work related to bail reform.¹⁰¹ The studies it has done

related to using a summons instead of a warrant for misdemeanor offenses, measuring on a per county basis the rate of issuance of citations in lieu of arrest on nonviolent charges, and a statistical look at the role money plays in the North Carolina criminal justice system. This program can serve as a template, among others, for data collection in Kansas.¹⁰²

Some states, like Missouri, have sought the services of data collection companies, an example of which is Measures for Justice.¹⁰³ In February 2020, a report was released that looked at incarceration rates for felonies and drug possession in Missouri that revealed “notable differences between how counties across the state handle these cases.”¹⁰⁴ Other states have developed what they call data dashboards, integrating data across numerous criminal justice decision points and other nonjustice systems. This allows real-time data to inform decision making.¹⁰⁵

Challenges for pretrial data collection in Kansas include the many ways there are to measure the various factors related to pretrial release and the effect that justice system changes may have on it. Also, data points may need to be revised or expanded over time based on statistical needs. Data quality will depend on accurate input from all actors in the system. Common definitions will need to be established. For example, is “failure to appear” defined as one missed hearing or after a warrant is issued for a missed hearing? Decisions must also be made regarding what kinds of reports will be needed to elicit useful information.

The National Institute of Corrections has published a monograph entitled “Measuring What Matters,”¹⁰⁶ that provides excellent guidance on collecting consistent, meaningful data. We are also encouraged by the recently released Kansas Sentencing Commission data dashboard portal, developed in 2019 with grant funding from the U.S. Department of Justice. It provides various analytics concerning post-conviction data for felons in Kansas that could serve as a template for pretrial data collection. Ten years of data is sorted by gender, race, age, crime, sentence, and county and is available to the public on the KSSC website.¹⁰⁷

The Task Force was able to determine that much of the data identified as important to measuring appearance rates and conditions of release will be available in Odyssey Case Manager™ and is largely available in FullCourt®. There is, however, a cost to developing and running reports as well as performing statistical analyses and reporting information. FullCourt® information, while incomplete, is available now, provided that judicial branch staff is available to access it. Odyssey Case Manager™ implementation is occurring over an extended period, so this data will be collected gradually across the state. Track 1 (6 counties) is currently live. Track 2 (4 counties including Sedgwick County) is scheduled to go live at the end of the first quarter of 2021. Track 3 (17 counties in the southeast portion of the state) is scheduled to go-live by the end of 2020. Track 4 (11 counties including Wyandotte, Leavenworth, Shawnee and Douglas counties) will go live by the end of the second quarter of 2021. Track 5 (34 counties largely in the NW) will go live by the end of the third quarter of 2021. Track 6 (32 counties largely in the SW) is scheduled to go live by the end of 2021. Track 8, which was added recently to the rollout plan and is composed of Johnson County, by the end of the first quarter, 2022.¹⁰⁸

But this recommendation only deals with court data. To obtain a comprehensive view of pretrial justice, coordination with sheriffs, other law enforcement, prosecutors and public defenders is crucial.

Costs and funding associated with this recommendation

A spreadsheet was developed regarding what can currently be collected and what OJA anticipates can be collected in the new case management system, although there will be a cost associated with developing specialized reports to mine that data. The judicial branch does not currently have enough staffing to perform the work contemplated by this recommendation. Accordingly, there will be a cost associated with hiring additional staff or contracting for these services.

Implementation

The Kansas Supreme Court through OJA would be responsible for implementation. Implementation will require obtaining additional funding, creating a job specification, and recruiting new judicial branch employees.

Stakeholder concerns

The Kansas Bail Agents Association expressed some concern with these recommendations.

We support this recommendation to OJA and suggest it be broadened to include not only ‘pretrial release’ but those who are held in jail due to unposted bonds, probation violations, types of holds, or other reasons. The question of what data to collect should be left to OJA upon notice and comment opportunity to stakeholders. It would seem that establishing baseline data would be important to conduct prior to implementing any changes, else how does one measure the effectiveness of any changes?’¹⁰⁹

The Kansas Bail Agents Association supported data collection regarding issuing citations in lieu of arrest.¹¹⁰

The Kansas NAACP, LULAC and ACLU stakeholders stressed the importance of including data collection related to race to measure any disproportionality that may be present. The Pittsburg State University student collective agreed, suggesting that a racial impact statement be created from this data focusing on how pretrial justice reform affects people of color populations in Kansas. The Task Force agrees that data collected should include the examination of racial differences in charging, release, conviction and sentences.¹¹¹

The ACLU supports this recommendation and believes data should be collected about the use of bond, pretrial supervision and pretrial detention for each judicial district.¹¹²

Americans for Prosperity Kansas viewed this recommendation as “a vital step forward to ensure that our state can critically evaluate its policies and craft evidence-based practices.” It went on to suggest that it be part of more comprehensive reform.

Legislatively, AFP recommends including this reform within a comprehensive uniform criminal justice data collection and reporting bill, covering information across the breadth of the justice system from arrest to post-conviction recidivism information. An effective example of this approach is outlined in the American Legislative Exchange Council’s Criminal Justice Data Transparency model policy. Packaging pretrial data collection within a comprehensive reporting effort will expand the scope, accessibility, and integration of Kansas’ current criminal justice data collection systems such as FullCourt, Odyssey, and Kansas Bureau of Investigation Crime Index reporting.¹¹³

Pre-Charging

4. NOTICE TO APPEAR

Kansas statutes should be amended to facilitate using a notice to appear rather than arrest for nonviolent misdemeanor offenses. In addition, law enforcement agencies are encouraged to adopt uniform standards for using notices to appear and citations for nonviolent crimes in lieu of arrest.

Existing research or best practices that support this recommendation

The Vera Institute estimates that only 4.83% of arrests made in the United States are for violent offenses.¹¹⁴ Many states have increased the use of summonses, citations, or notices to appear in lieu of arrest for nonviolent offenses or are currently considering doing so. By diverting defendants charged with nonviolent crimes from the arrest and jail process, officers and courts can spend more time dealing with defendants charged with violent offenses.

The Task Force reviewed materials on existing and planned “cite and release” programs, including programs in Texas, Louisiana, North Carolina, and Tennessee, among others.

The International Association of Chiefs of Police has been a leader in examining this option.

*Many believe that as a practical solution to some of these issues, the use of citation in lieu of full custody arrest, particularly for nonviolent misdemeanors, can improve criminal justice efficiency, cutting costs and leaving officers with more time for more pressing duties. Potential reduction in jail population also serves as incentive for use of citation. Additionally, in this time of increased community scrutiny of law enforcement practices, use of citation can show law enforcement’s commitment to preservation of individual rights, and interest in the well-being of the community.*¹¹⁵

The National Conference of State Legislatures has also recommended this approach.

*Citations divert lower risk people from detention, reserving limited space and resources for more dangerous people. By providing an alternative to pretrial detention and release processes for certain defendants, citation in lieu of arrest can be considered a component of state pretrial policies.*¹¹⁶

Other groups recommending this approach include the Presidential Task Force on 21st Century Policing, which described citations as a “least harm” resolution that promotes effective crime reduction while building trust in the community,¹¹⁷ and the American Bar Association in its publication “Standards for Criminal Justice-Pretrial Release” recommends the use of citations for minor offenses.¹¹⁸

The Criminal Justice Innovation Lab at the University of North Carolina School of Government has studied the use of citations in lieu of arrest through pilot programs across North Carolina. As part of the study, a Cite or Arrest

Pocket Card was created to encourage use of citations.¹¹⁹ The project was funded by the Charles Koch Foundation.¹²⁰ Citation in lieu of arrest programs have been supported by both Americans for Prosperity¹²¹ and the ACLU.¹²² On a related topic, the American Bar Association Standards for Criminal Justice also encourages judges to fully use the authority to issue a summons in lieu of an arrest warrant.¹²³ Kansas judges currently have such authority for misdemeanor crimes or for any crime upon the request of the prosecuting attorney.¹²⁴

In addition, the Task Force reached out to local stakeholders and considered current practices in Kansas across a variety of demographics. We asked both state and municipal law enforcement agencies to respond to a survey sent by the Sheriffs’ Association—at the request of the Task Force—inquiring about the frequency of use of citation in lieu of arrest for certain charges. The results led us to the conclusion that officers are using their discretion to arrest or issue a citation. The most frequent reasons noted for arrest rather than citation were repeat offenders, prior failures to appear, or lack of identification. The Task Force believes that charges such as driving on a suspended license, driving without a license, minor in possession of alcohol, possession of marijuana, possession of drug paraphernalia, theft, and all other nonperson misdemeanor offenses should be considered for citations in lieu of arrest, unless specifically excluded by statute.¹²⁵

The Task Force identified the following statutes that would require amendment to facilitate the use of citations or notices to appear in situations in which they are not currently allowed.

1. Amend K.S.A. § 22-2202(h):

(h) “Complaint” means a written statement under oath of the essential facts constituting a crime, ~~except that a~~ A citation or notice to appear issued by a law enforcement officer pursuant to and in compliance with K.S.A. 8-2106, and amendments thereto, or a citation or notice to appear issued pursuant to and in compliance with K.S.A. 32-1049, and

amendments thereto, or a notice to appear issued pursuant to and in compliance with K.S.A. 22-2408, and amendments thereto, or a citation issued by an agent of the division of alcoholic beverage control under the authority of K.S.A. Chapter 41, are also considered to be complaints for purposes of initiating prosecution. A complaint shall be deemed a valid complaint if it is signed by a law enforcement officer for any offense for which a citation or notice to appear may be written or by an agent of the division of alcoholic beverage control for violations of misdemeanor offenses in K.S.A. Chapter 41.

2. Amend K.S.A. § 22-2408 (5):

(5) Such law enforcement officer shall cause to be filed, without unnecessary delay, the a complaint in the court in which a person released under subsection (4) is given notice to appear, charging the crime stated in said notice. If the person released fails to appear as required in the notice to appear, a warrant shall be issued for his or her arrest.

Costs and funding associated with this recommendation

The study conducted by the International Association of Chiefs of Police found that citations result in a time savings to law enforcement.¹²⁶ Accordingly, it appears this would be a cost-reduction strategy.

Implementation

Law enforcement officers and prosecutors would have to work together to implement a more robust citation (or notice to appear) in lieu of arrest program than currently exists in Kansas. The Kansas Supreme Court may also consider encouraging judges to actively use their discretion, when appropriate, to order summonses in lieu of warrants.

Stakeholder concerns

The Kansas Bail Agents Association expressed its support of this recommendation.¹²⁷

The Kansas Association of Criminal Defense Lawyers also supports this recommendation.

KACDL supports a statutory amendment to favor citations in lieu of arrest. However, as the majority of misdemeanors resolve through probation, KACDL believes that all misdemeanor offenses should be eligible for citation in excess of the list currently proposed. For example, misdemeanor marijuana possession is on the list, but misdemeanor paraphernalia is not. Similarly, prostitution or lewd behavior is also a misdemeanor offense that typically results in probation and does not warrant detention. Prostitution in particular would benefit from a citation-based policy to build a relationship with law enforcement that could assist in reaching human trafficking victims.

In order to favor a citation-based policy, discretionary arrest should require a specific documented reason for detention that mirrors those factors considered by the Court in assessing detention such as flight or risk to the community. In regard to other issues such as identification, fingerprints, and DNA concerns identified by law enforcement, many municipal courts operate under citation-based systems and fingerprints, etc. are collected at the time of sentencing. Similarly, at the time of citation technology would enable a picture, a body cam video or car video to assist in identification matters.

The Kansas Sheriffs' Association did not comment on this recommendation but stated generally:

Bonding is a necessary tool to ensure compliance with pretrial stipulations. The suspect/family understand they could lose money or belongings if the suspect violates the bond or does not attend a court date which increases compliance. Too many NONVIOLENT OFFENDERS are released from jail immediately after the offense has occurred and re-offend while waiting on the disposition of the first case. These

*same offenders are often on pretrial release monitoring or have conditions placed on them that are disregarded.*¹²⁸

After attending several Task Force meetings, the Kansas Sheriff's Association submitted the following:

*KSA understands the reasoning behind this proposal. Example: first time offender for simple possession of marijuana. We would like to point out that we would like the language to stay as written, (encourage and facilitate). We do not support a mandated (shall) on this recommendation. We believe there are too many times we have a need to remove the offender from the environment they are in when we encounter them such as trespassing. We also believe this should only apply to [nonperson] misdemeanor crimes and not to person misdemeanor crimes. An example would be window peeping.*¹²⁹

Stakeholders representing minority communities, particularly LULAC, the Urban League, and NAACP, have indicated support for increased use of citations and notices to appear. But they expressed concern that the decision to arrest or cite can result in discrimination, either based on explicit or implicit bias. They would prefer to see a mandatory citation program for nonviolent misdemeanor offenses.¹³⁰

The ACLU supports this recommendation but agrees with the stakeholders representing minority communities that “*some felonies, misdemeanors, and municipal ordinance violations should never result in arrest; rather, for many offenses, citations in lieu of arrest and summonses should be the norm and requirement.*”¹³¹

The Kansas Association of Chiefs of Police, the Kansas Peace Officers Association and the Attorney General's Office want to make sure public safety is front and center in any release determination:

Public safety concerns must remain the number one consideration. Persons whose

*identity are in question should be held until the identity is confirmed. Persons who have provided false identity or attempted to flee or resist arrest should not be eligible for an OR bond, based on a demonstration of a flight risk. Certain cases should be exempt from immediate bonding, especially an OR bond. For example, persons who are intoxicated (drugs or alcohol); persons who are making threats to victims, witnesses, or public safety; persons already on bond for similar offenses or the same victim; and domestic violence cases.*¹³²

The Task Force independently recognized some stakeholder concerns that may arise with increased use of citations or notices to appear in lieu of arrest.

1. Judges and law enforcement groups may be concerned that this will result in an increase in failure to appear rates.¹³³ But the Task Force believes that with proper implementation, these concerns could be overcome. These could be remedied with additional information gathering, such as cellphone numbers and contact information at the time of arrest. They also could be alleviated in conjunction with electronic notification procedures outlined in Recommendation 14. But the Task Force agrees that appearance rates should be monitored in conjunction with any concerted effort to increase the use of citations and notices to appear.
2. Victims have reportedly been frustrated with law enforcement when an offender is simply cited and released. The victim perceives a failure to arrest and jail as a lack of support. But even under this recommendation, the officer would still have discretion to arrest, particularly in any case involving violence or threats.
3. Law enforcement officers may feel frustrated if an offender is cited or booked and released and the offender is back on the street before the officer is done generating

a report. Officers often speak negatively of “catch and release” procedures, and this could be classified as such. This can be addressed through education. The research is clear that the longer a person remains in jail pretrial, the more likely they are to reoffend in the future. With low-level offenders, arresting everyone results in increasing crime instead of reducing it. An arrest and an inability to post bond results in loss of job, loss of benefits, and the many other collateral consequences already addressed in this report.

4. Law enforcement officers have expressed concern about obtaining appropriate identification if the person is not processed through a fingerprint and booking system. Of course, if the authority to arrest remains, the person could still be taken to the station for fingerprints, but then released with a notice to appear or citation. The Kansas Association of Criminal Defense Lawyers points to the ease today of taking a picture of the defendant with body cam, in car video, or cell phones. Some city officers currently obtain a thumb or fingerprint on the original complaint or citation as a method of future identification.¹³⁴

5. MENTAL HEALTH IDENTIFICATION

Law enforcement agencies are encouraged to work with community mental health organizations, either live or virtually, for quickly identifying and referring offenders with mental health and substance abuse issues to appropriate resources.

Existing research or best practices that support this recommendation

Many sheriffs around the state and country indicate that jails have become the new community mental health institutions.¹³⁵

Recognizing the importance of determining whether calls for service are criminal behavior

or simply manifestation of mental illness, many local law enforcement agencies around the state are now conducting initial screenings of those with whom they come into contact. In Kansas, Crisis Intervention Teams have been established in Johnson, Leavenworth, Douglas, Reno, Lyon, Shawnee, Ellis, and Sedgwick counties.¹³⁶ These teams of law enforcement officers are specially trained to interact with persons who exhibit mental illness. At least 13 of the cities in Johnson County have partnered with Johnson County Mental Health Center and created a mental health co-responder program. Overland Park reported that in 2013, the year following institution of the program, mental health-related calls for service were 15 to 16 times less likely to result in an emergency room referral and four to five times less likely to result in an arrest when compared to data from the year prior to the program.¹³⁷

The Topeka Police Department has a Behavioral Health Unit which partners with Valeo Behavioral Health Care. TPD states the unit “[r]educes recidivism and arrests by diverting individuals with a mental illness to appropriate community mental health providers.”¹³⁸

In July 2019, Sedgwick County and Wichita law enforcement agencies launched a pilot program establishing an Integrated Care Team to address concerns related to police calls involving the mentally ill and drug addicted. As Sheriff Jeff Easter said:

Mental health and the methamphetamine problem here [are] driving over 70% of our calls. The response to the mental health calls involves a law enforcement officer being dispatched to make sure that it’s a safety issue, fire department, EMS being dispatched, and then it involves law enforcement if we have to take custody of that individual because they’re a threat to themselves or others. Then we have to involve Comcare and we have to involve Via Christi. By placing a qualified EMT, law enforcement officer and a social worker from Comcare we have it all there at the same time.”¹³⁹

In 2017, Douglas County established the Douglas County Behavioral Health Court. Its mission “is to connect defendants with community support services and reduce criminal involvement of defendants who suffer from serious mental illness and co-occurring disorders thereby enhancing public health and safety.”¹⁴⁰

Barton County has also been bringing community members together to discuss such a program in Barton and surrounding counties.¹⁴¹ And Ellis County has established a Critical Incident Team, and all law enforcement officers in the county participated in Mental Health First-Aid training.¹⁴²

Recognizing that many rural areas do not have easy access to behavioral health specialists, let alone the availability to co-respond onsite with police, the Task Force examined best practices around the country for deflecting the mentally ill from our jails.

The Task Force was particularly impressed by a program in Springfield, Missouri connecting law enforcement and behavioral health professionals to curb incarceration of the mentally ill. In 2010, the Chief of Police Paul Williams, discovered that:

*[A]bout 85 percent of the people who had been incarcerated were diagnosed with mental illness and/or drug and alcohol addiction. And the problem was exacerbated by the fact that the jail was at capacity, without room for more inmates. We know that people are better off getting treatment to help them stay out of trouble than they are going into the criminal justice system. Diverting these nonviolent or persistent offenders from jail and emergency rooms became our two primary goals.*¹⁴³

First, Chief Williams made sure his officers received Crisis Intervention Training (CIT) so they can better respond to calls involving a person with mental illness. Recognizing that they did not have the resources to have mental health professionals respond onsite, he launched a small pilot program in 2012 that equipped 16 officers with tablets

they could take on patrol. The tablets had Skype installed on them, and on the other end of the Skype connection was round-the-clock access to a mental health clinician employed by Burrell. By Skype, these clinicians could help de-escalate situations involving a mentally ill person in crisis.

At first, we didn't know how folks experiencing a mental health episode would react to being handed a tablet. Would they want to talk to the clinician on the other end, or would they throw it across the room? I'm pleased to report that the tablets were a big success. Not only did individuals want to talk to the clinicians, the clinicians were able to help us de-escalate the situation and identify whether this was a person who truly needed immediate care, whether they could be connected to outpatient treatment the next day, or whether they were not experiencing a mental health issue and could be treated like any other offender.

*All of this resulted in fewer folks being taken to the emergency room or the jail. In a study we conducted in 2017, of the people who received access to the tablets, 87 percent were diverted from inpatient psychiatric hospitalization, only 16 percent were referred to an emergency department, and none were incarcerated. That is a massive improvement over the status quo, when the default outcome was taking them to jail or the hospital.*¹⁴⁴

Of course, Springfield is roughly the same size as Topeka. A concern was raised regarding some rural areas that only have one mental health professional available, and 24-7 access to that person would not be possible. Recognizing this, rural areas should consider regional partnerships or contracting for providers outside the county, since remote technology will be used. The feasibility of such partnerships was not fully examined.

Costs and funding associated with this recommendation

Programs like those in Springfield began with grant funding. But as the need outstripped the grant

funds available, the local behavioral health center became a Certified Community Behavioral Health Clinic (CCBHC). CCBHCs were established under the federal Excellence in Mental Health Act and “are designed to provide a comprehensive range of mental health and substance use disorder services to vulnerable individuals. In return, CCBHCs receive an enhanced Medicaid reimbursement rate based on their anticipated costs of expanding services to meet the needs of these complex populations.”¹⁴⁵ One of the keys of certification is the availability of services 24-7. Only a limited number of states are part of the CCBHC program right now, and Kansas is not one of them.¹⁴⁶

In Johnson County, memorandums of understanding are entered between Johnson County Mental Health and local law enforcement agencies, with local law enforcement paying a proportionate share. In June 2016 an article in the Kansas City Star about the program starting in Prairie Village, Kansas reported the costs as follows:

*The program is expected to cost \$94,664 a year, not including overtime, with each city’s share based on population. Prairie Village, with roughly 23 percent of population, would pay \$22,055. Leawood, with 36 percent, would pay the most at \$34,452 while Westwood Hills, with less than 1 percent of total population would pay \$370.*¹⁴⁷

Implementation

The Kansas Supreme Court should publicly indicate, on the behalf of the judicial branch, its support of these collaborative programs that can lead to a decrease in pretrial incarceration.

Stakeholder concerns

We cannot identify any stakeholders in opposition to this recommendation. Funding sources, not only for partnership programs, but for the availability of treatment resources in the community is the only identifiable issue facing law enforcement and mental health stakeholders. In fact, even the American Bail Coalition (ABC) recognizes that the

drug addicted and mentally ill are not bondable. Jeff Clayton, executive director of ABC agrees that diverting some detainees to drug and mental health treatment is the way to go. “People with mental health and drug issues and all these problems, nobody’s going to post bond for them,” says Clayton. “Does it mean that we need to keep all these people in jail? No.”¹⁴⁸

The Kansas Sheriffs’ Association supports improvement in mental health services but noted three concerns: 1) service capacity in rural areas; 2) determining whether the person is in a mental health crisis or is committing a crime unrelated to his or her mental health; and 3) funding.¹⁴⁹

The Pittsburg State University student collective would like to see referrals to homeless services and homeless organizations included in this recommendation. The Task Force believed that these resources are included in referrals to “appropriate resources” already noted in the recommendation.¹⁵⁰ Although the Task Force was also cognizant of the fact that some communities in Kansas have been unable to fund homeless services.

6. CRISIS INTERVENTION CENTERS

The Kansas Department for Aging and Disability Services (KDADS) should issue regulations under the Crisis Intervention Act, K.S.A. § 59-29c01 et seq., so that crisis centers can be licensed around the state. This will allow law enforcement the ability to immediately connect individuals to effective care, in lieu of incarceration, when appropriate.

Existing research or best practices that support this recommendation

In July 2017, the Kansas Legislature adopted the Crisis Intervention Act. The Act defined a crisis intervention center as any entity licensed by KDADS that is open 24 hours a day, 365 days a year, equipped to serve all individuals in crisis due to mental illness, substance abuse, or a co-occurring condition, and that uses certified peer specialists.¹⁵¹

Any law enforcement officer who takes a person into custody pursuant to K.S.A. § 59-2953 [harm to self or others involuntary mental commitment] or 59-29b53 [involuntary commitment for substance abuse], and amendments thereto, may transport such person to a crisis intervention center if the officer is in a crisis intervention center service area. The crisis intervention center shall not refuse to accept any person for evaluation if such person is brought to the crisis intervention center by a law enforcement officer and such officer's jurisdiction is in the crisis intervention center's service area.¹⁵²

The head of the center is required to evaluate a person admitted under the Act within four hours of admission to determine whether the person is likely to be mentally ill or a person with an alcohol and substance abuse problem subject to involuntary commitment under the care and treatment acts. Also, a determination must be made whether the person is likely to cause harm to self or others if not immediately detained. The Act requires a person admitted under the Act to be evaluated by a behavioral health professional not later than 23 hours after admission and again not later than 48 hours after admission.

The Task Force views this as an important intermediate step to divert individuals into an immediate evaluation process rather than officers taking them to jail because there are no other alternatives. But to date, KDADS has not adopted draft regulations and accordingly has not licensed any crisis intervention centers. We recommend that the department complete the regulation adoption and licensing process. By drafting regulations, the state would free additional beds at the state hospital for those regions not covered by a crisis center.

Costs and funding associated with this recommendation

According to a 2019 Mental Health Task Force Report to the Kansas Legislature, KDADS can develop regulations within existing resources. It estimated additional licensure FTEs at \$60,000 to \$80,000 per FTE.¹⁵³

The 2019 report indicated that RSI in Wyandotte County, which provides these types of services:

saved about \$4 million in state hospital costs, \$2 million in emergency room visits, and \$75,000 in jail costs. In Sedgwick County, COMCARE anticipated saving \$4 million after it opened its crisis center. However, a recent report indicates a savings of \$8.1 million.¹⁵⁴

Implementation

Kansas Department of Aging and Disability is the implementing agency.

Both the 2018 and 2019 Mental Health Task Force Reports to the Kansas Legislature recommended adopting regulations and licensing procedures.¹⁵⁵ As of the date of this report, no regulations have been adopted.

Stakeholder concerns

The Kansas Bail Agents Association objected to this recommendation, although it appears to be an objection to the Crisis Intervention Act itself rather than the recommendation by the Task Force that the regulations required by the existing Act be promulgated.

There are already laws governing the involuntary housing of persons. We would question the need for 'new regulations' but for the extension of time to 72 hours to 'immediately connect,' would mean deliver the defendant to a Crisis Intervention Center without his consent.¹⁵⁶

The Kansas Association of Criminal Defense Lawyers expressed its support of this recommendation although it was concerned about funding.

While the goal of diverting individuals from the criminal justice system to the care and treatment system is shared by [this] organization, the funding for such services remains an ongoing issue for both crisis and

*pretrial related concerns for our clients. Frequently mental health facilities are understaffed such that there is a substantial wait for bed space or an appointment, even for those who truly need the care. As such the funding for such services should be considered a priority.*¹⁵⁷

The Kansas Sheriffs' Association supports this recommendation.¹⁵⁸

However, the Johnson County Sheriff's Office expressed concerns—particularly related to the Act.

*We have no objection to licensing regulations, but we do have an objection to regulations that specify law enforcement actions or policy. Our objection is not so much to the concept but to the potential for abuse with a 'regulation' rather than a statute. Even the statute, in light of recent events, is troubling. For example, K.S.A. § 59-29c03 states, '(a) The fact that a person has been detained for emergency observation and treatment under this act shall not be construed to mean that such person shall have lost any civil right such person would otherwise have as a resident or citizen, any property right or legal capacity, **except** as may be specified within any court order or as otherwise limited by the provisions of this **act or the reasonable policies which the head of a crisis intervention center may, for good cause shown, find necessary to make for the orderly operations of that facility.**' There have clearly been overreaches by public health officials during the current stay-at-home orders, which one could reasonable argue do not meet the definition of powers of a public health official as described in K.S.A. § 65-129b. Our concern is there may be overreaches that result in the violation of civil rights by health officials in these facilities.*

As to actions for law enforcement our position is that K.S.A. § 59-29c05 and K.S.A. § 59-29c06 already describes procedures for law enforcement. We follow those procedures as outlined in statute.¹⁵⁹

7. LARNED STATE HOSPITAL

The Kansas Legislature should provide adequate funding to the Larned State Hospital (LSH) to allow timely admission of defendants for competency evaluation, restoration, and treatment pursuant to K.S.A. § 22-3303.

Existing research or best practices that support this recommendation

Prosecutors, judges and defense attorneys expressed their frustration with the added length of pretrial detention experienced by persons waiting to have their competency evaluated or restored at LSH.

Any time after a defendant is charged with a crime, either the defendant, defense counsel, or the prosecutor can request a determination of the defendant's competency to stand trial. An initial competency determination is made locally and usually done quickly.¹⁶⁰ If, based on the initial determination, the judge has reason to believe the defendant is incompetent to stand trial, the case is stayed or suspended until competency can be determined. The court then orders the defendant to the state hospital at Larned for an evaluation of competency.¹⁶¹ The defendant cannot be committed for more than 90 days, but the 90 days does not start to run until the defendant is accepted at Larned.¹⁶² Until a decision is made regarding the defendant's competency, no plea can be entered. The problem is the very long wait time to be accepted at Larned under normal circumstances. This problem has been further compounded by Larned's inability or refusal to accept new court referrals during the COVID-19 pandemic. It is reported as not unusual (during normal times) for a person to spend more time waiting to go to Larned than the entire sentence the defendant would have been given if the defendant had pled guilty, which is something they are not permitted to do until the competency evaluation is completed at Larned.

The following example was provided and discussed as a common occurrence.

Defendant was arrested on August 19, 2019, and charged with aggravated assault on a

law enforcement officer (felony), fleeing and eluding (felony), and DUI (misdemeanor). He had only one prior arrest, so his criminal history score was at the lowest level. At the time of his Preliminary Hearing on October 3, defense counsel requested a competency hearing. The local mental health center was ordered to do the evaluation. The local center completed the evaluation and forwarded its report to the court on November 4. The court conducted a formal hearing on November 22, at the end of which the court declared the defendant incompetent.

As required by K.S.A. § 22-3303(1), the court next committed the defendant to Larned for evaluation and treatment (known as “competency restoration”). On January 16, 2020, the court inquired as to why there had been no acceptance to Larned yet and was told that the defendant was #95 in line.

On March 5, almost four months later, the defendant had progressed to #63 in line to get into Larned under K.S.A. § 22-3303 for the competency restoration and treatment program. Given that timeline it is anticipated the defendant will not be accepted until September 2020¹⁶³ having been confined in the county jail, which has no resources to provide mental health treatment, over ten months since being found to be incompetent. Once accepted, Larned has 90 days to conduct the evaluation. If he is convicted of the charge, and receives the maximum sentences, to be served consecutively, and receives his 20% good time credit, he will have served all of his time on October 14, 2020, at which time he will probably be in Larned having his competency evaluated. Of course, his attorney cannot plead him guilty until he has been determined competent to stand trial. The failure of the state to adequately fund Larned has resulted in the local county jail housing a defendant for over a year and potentially several months longer than he would have had to stay in jail but for the wait for the competency restoration and treatment.

This is not a problem unique to Kansas. Several states have been examining the issue. “Many states, including Arizona, California, Colorado, Florida, Georgia, Louisiana, Tennessee, Texas, and Virginia provide jail-based competency restoration treatment in some jurisdictions. Texas uses video-conferencing to expedite the process. Most states allow for outpatient competence restoration, but some believe this option is underutilized.”¹⁶⁴

The Kansas Sheriffs’ Association has been working with the Kansas Department for Aging and Disability Services on the issue of delays. It indicated that an additional issue for it is the additional delays that occur once a prisoner is returned from Larned and is awaiting trial. The prisoner often lapses back into incompetency during the wait. This was anecdotal information only. The Sheriffs’ Association indicated that KDADS is trying some new programs to shorten the wait times.

The issue of the competency statutes was recently part of a year-long study by the Kansas Judicial Council. In December 2019, the Judicial Council Advisory Task Force on Commitment of Incompetent Defendants Under K.S.A. § 22-3303 submitted a report to the Kansas Legislature along with some recommended statutory changes.¹⁶⁵ Changes were meant to address the situation where a defendant is incompetent solely because of conditions that cannot be improved through psychiatric treatment in the mental health system, such as organic brain injury. A bill was introduced in Kansas concerning competency determinations in 2020, SB 333. The bill would, among other things, require the court to dismiss the criminal proceedings, without prejudice, if the defendant is incompetent but not a danger to self or others and charged with a misdemeanor offense or nonperson felony offense. It also provided a system of conditional release.¹⁶⁶ The bill died on Senate general orders.

Task Force members met by Zoom with personnel at LSH to discuss this issue. On the call were Task Force Members: Judge Jared Johnson, Tom

Drees, Chief Judge Karen Arnold-Burger, and for LSH: Lesia Dipman, LSH Superintendent, Scott Brunner, Deputy Secretary of Hospitals and Facilities, Sherry Diel, Chief Legal Counsel KDADS, Chianna Hemken, SSP Administration Program Director and David Barnum, SSP Clinical Program Director. They advised us regarding their efforts to perform initial competency evaluations onsite in the local jails. They are also evaluating ways to do restoration evaluations in cases where it is appropriate onsite as well. They have contracted with Clinical Associates, P.A. to provide these services.

Costs and funding associated with this recommendation

The Task Force is not aware of the cost, although it assumes it to be substantial. The Fiscal Note for the changes outlined in SB 333 estimated costs to be well over \$60 million over the first three years.¹⁶⁷

Implementation

The Kansas Legislature would need to implement this by statute.

Stakeholder concerns

The Kansas Sheriffs' Association supports this recommendation.¹⁶⁸

8. PRE-CONVICTION TREATMENT

State funds earmarked for drug treatment and evaluation should be available for use by persons in diversion programs for drug-related offenses.¹⁶⁹

Existing research or best practices that support this recommendation

Several professionals we spoke with indicated that as many as 80% of the defendants in the criminal justice system in Kansas are there because:

1. their crime is related to the consumption, possession or distribution of illegal drugs;

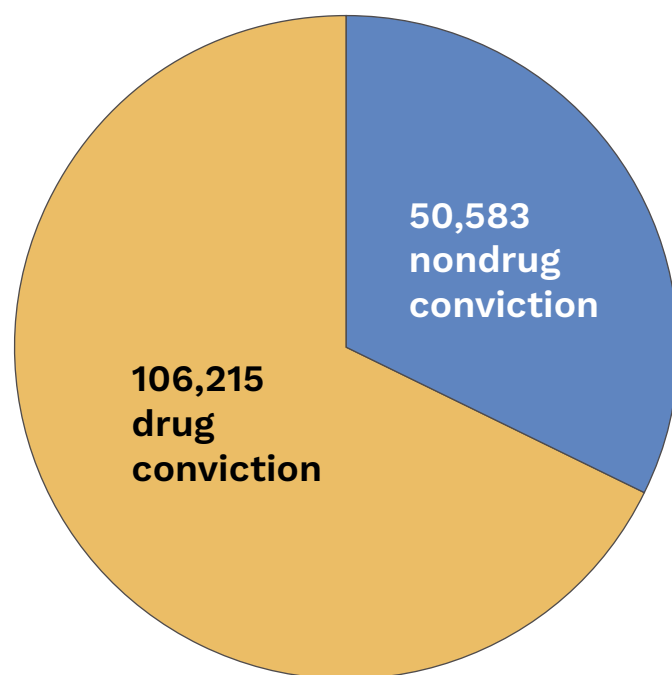
2. they were under the influence of alcohol or drugs at the time they committed their crime; or
3. they committed their crime to get money to support their addiction to alcohol or drugs.

Many who are addicted to alcohol or drugs are using substance abuse to self-medicate underlying or undiagnosed mental illness.¹⁷⁰

Kansas law allows for state-funded treatment, as an alternative to incarceration, for some individuals who are convicted of drug crimes. This is commonly referred to as SB 123 treatment, named after the Senate bill creating it in 2003.¹⁷¹ Codified at K.S.A. § 21-6824, the legislature created an alternative sentencing policy for first-time, nonviolent drug offenders. The Kansas Supreme Court explained the goal of SB 123:

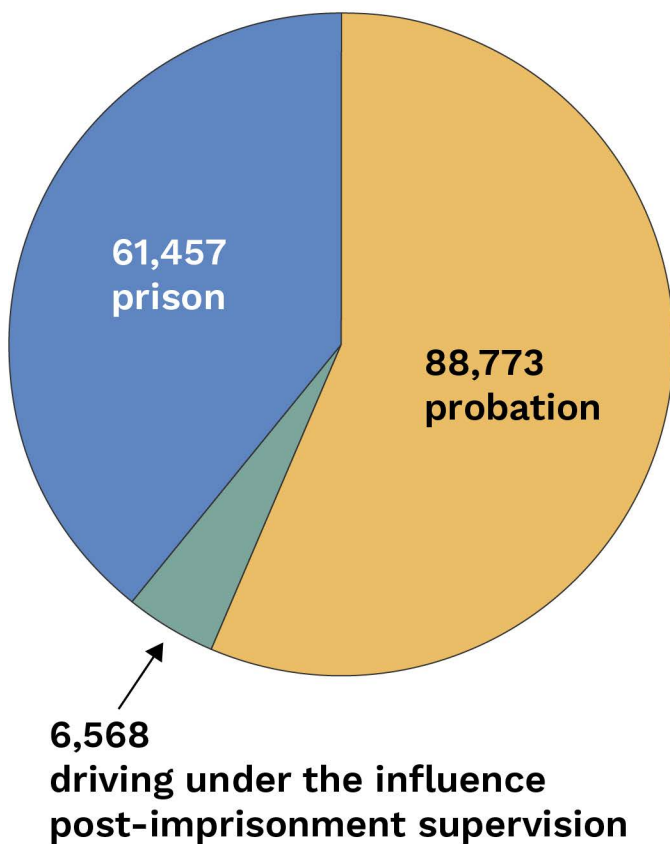
[T]he Kansas Sentencing Commission identified the goal of the alternative drug policy (S.B. 123) as: 'to provide community punishment and the opportunity

Kansas felons, 2009-2019



SOURCE: Kansas Sentencing Commission

Types of felony sentences in Kansas, 2009-2019



SOURCE: Kansas Sentencing Commission

for treatment to nonviolent offenders with drug abuse problems in order to more effectively address the revolving door of drug addicts through the state prisons, which should be reserved for serious, violent offenders.¹⁷²

The Task Force believes that diverting or deflecting defendants early in their careers into the treatment they need may prevent future recidivism in the same way that SB 123 assists those convicted of the same crimes. Diversion programs incentivize both prosecutors and offenders to avoid costly trial proceedings by using pretrial diversion agreements. They also have the potential for shortening the time from arrest to treatment which allows for quicker intervention. This frees up limited court resources to spend on higher risk violent offenders. We have been told that some defendants, although diversion eligible, may have to forgo diversion and enter a

guilty plea just to be allowed to enter an otherwise unaffordable treatment program.

In the 2020 legislative session, HB 2708 was introduced. It would allow prosecutors' offices to enter into agreements for supervision of people on diversion and allow people on diversion to participate in the certified drug treatment program.¹⁷³ We find Sedgwick County District Attorney Marc Bennett's testimony on a similar bill, HB 2292 introduced in the 2019 Session, compelling:

According to the Kansas Department of Corrections, in 2018, 39% of KDOC adult inmates had a serious mental illness. If even a small portion of those folks committed diversion-eligible crimes, then by expanding access to supervision of diversion, we create an opportunity at least to offer assistance without a felony conviction that has not previously existed.

Further, according to the Kansas Department of Corrections FY 2018-2019 KDOC Budget (page 15), 21% of inmates in KDOC prisons as of July of 2018 had a term of confinement of 6 months or less. The term for 12% of inmates was 12 months or less and the term of confinement for 15.5% of inmates was less than 2 years. Meaning, 48.5% of inmates were serving terms of confinement of less than 5 years and the percentage leapt to 69.8%. Those receiving terms of confinement of over 5 years made up just 29.7%.

If we really want to stop the revolving door at Kansas prisons, we need more access to community-based drug and mental health treatment programs to afford more opportunities for folks committing low-level crimes to be successful probationers and parolees. These stats, coupled with the well-documented issues of overcrowding and understaffing currently afflicting the prison system in Kansas, strongly suggest that it's time for a full assessment of our approach to

*criminal justice in Kansas and the manner in which we allocate resources for the same. HB 2292 can be a small, first step in this process.*¹⁷⁴

In testimony the following year on HB 2708 Bennett highlighted that

Nearly every subcommittee of the Kansas Criminal Justice Reform Commission identified the issues raised in last year's HB 2292, as "low hanging fruit." Meaning the concepts expressed in that bill afforded an easily identifiable opportunity to the legislature to expand the availability of an alternative to incarceration for Kansans entering the criminal justice system. As such the Reform Commission made this proposal a priority for the 2020 legislative session."¹⁷⁵

While the Task Force agrees with the use of SB 123 funds to cover treatment related to diversion, we have identified two concerns.

First, although court services officers and community corrections officers provide similar services for those convicted of a crime, diversion programs are entirely prosecutor-approved and supervised. As such, some question whether court services officers, who are employed by the judicial branch, should be the supervising entity. The only role the court has in a prosecutor-offender diversion contract is continuing the case upon joint request to allow for compliance with the terms. These programs would be more appropriately supervised through local county and district attorney offices or community corrections—both executive branch agencies. But we also recognize that the judicial branch has not presented opposition testimony on the bill.

Second, we agree that appropriate funding is critical to supervise those offenders placed on diversion as well as assuring adequate funds for treatment and evaluation are available. The Fiscal Note for HB 2708, noted that the cost of SB 123 treatment per defendant is \$3,143.¹⁷⁶ The Kansas Sentencing Commission testified in strong support of the bill indicating that at most it would require an

additional \$472,000 which is only an additional 5% on top of current expenditures of \$9 million.¹⁷⁷ This should be in addition to existing funding.

Costs and funding associated with this recommendation

Although HB 2708 anticipates that some fees will be recouped from participants for diversion programs, the Fiscal Note for 2020 Session HB 2708 by the Kansas Division of Budget indicated:

*The Kansas Sentencing Commission estimates enactment of HB 2708 would have no effect on prison admissions or prison beds. However, the Commission estimates enactment of the bill could increase the number of SB 123 drug treatment offenders by either 50, 100, or 150 persons in FY 2021. The Commission's estimates are based on three different scenarios. Because of the potential increase of SB 123 drug treatment offenders, the Commission estimates additional State General Fund expenditures of \$157,150, \$314,300, or \$471,450 in FY 2021, depending on which scenario occurs. The Commission reports the average cost of treatment in the SB 123 Drug Treatment Program was \$3,143 per offender in FY 2019. The Department of Corrections indicates it does not have the ability to estimate the number of divertees that may require community corrections supervision.*¹⁷⁸

Implementation

Because this recommendation would require legislative change, the Kansas Legislature would be responsible for implementation.

Stakeholder concerns

The Kansas Sheriffs' Association supports this recommendation.¹⁷⁹

The ACLU supports the liberal use of diversion and encourages alternatives to pretrial detention.¹⁸⁰

The Release Decision

9. PRETRIAL RELEASE DECISION PROCEDURES

The Supreme Court should require each judicial district to adopt pretrial procedures that provide for:

1. a timely judicial determination of probable cause and conditions of release upon warrantless arrest;
2. the opportunity for timely judicial hearing for review of conditions of release; and
3. the release of arrestees when a complaint is not “filed forthwith.”

Existing research or best practices that support this recommendation

The Task Force has developed and recommended a set of procedures that are attached to this report as Appendix A. The research associated with each recommended practice is noted in the annotations of the appendix. And, the Best Practices are based on existing law, so they do not incorporate changes recommended in this report.

Costs and funding associated with this recommendation

The Task Force has been advised, anecdotally, that persons in some Kansas judicial districts are kept in jail pending the filing of charges for longer than necessary or constitutionally allowed due to the lack of adequate staff in local prosecutor offices. Moreover, public defenders, who are already carrying what are sometimes unmanageable caseloads, cannot be available for bond review hearings when they are already trying to cover a multi-county district. There is simply insufficient capacity. Likewise, overburdened courts may have difficulty scheduling frequent bond review hearings due to inadequate staffing. Accordingly, we anticipate that compliance with constitutionally and

statutorily mandated procedures will result in costs related to additional staffing of prosecutors, public defenders, and court personnel.

Implementation

This recommendation could be implemented either by the Kansas Supreme Court adopting a court order establishing the process for all judicial districts, or each judicial district could be required to adopt its own local administrative order based on district circumstances.

Stakeholder concerns

Koch Industries indicated that:

[W]henver possible, we favor a strong presumption of pretrial release, strict timeliness and procedural protections, and the least restrictive and onerous conditions of pretrial release. It is going to be up to states to decide whether and what role money bail plays; for now our position is that judges should be empowered to make the best decisions possible based on a number of factors such as the findings of a risk assessment, and there may be a role for money bail in that consideration. We do firmly believe that access to cash, or lack thereof, should not be the only factor in determining pretrial release decisions.¹⁸¹

The Kansas Association of Counties was supportive of pretrial release due to costs:

Cost is a big concern for counties as jails drive a large portion of the budget. Breaking it down further, there are two separate issues with pretrial holds.

1. Cost of jail space. Holding individuals pretrial takes away from jail space used to hold individuals post-conviction, requiring some counties to send prisoners to other counties due to overcrowding.
2. Medical care. Local government is responsible for the medical care of

individuals that are being held. This is potentially a large expense.”¹⁸²

The ACLU is in favor of pretrial release. Cash bail is over-relied upon in the system and punishes individuals for being poor. For-profit bail, or commercial sureties can exacerbate that issue with pretrial profiteering that places low-income people and their families in untenable positions. We urge the Task Force to consider this issue in deliberations [related to all the recommendations].¹⁸³

Some prosecutors expressed concern.

Select prosecutors around the state expressed concern about their ability to get charges on file within 72 hours of arrest. For minimally staffed offices, prosecutors are frequently in court and finding time for staff to review charges for filing sometimes takes several weeks. They would be more comfortable with a requirement that charges be filed within 3 business days of the probable cause hearing rather than within 72 hours of arrest. The Task Force discussed the practical problems associated in those counties, but the Task Force was guided by the statutory language of K.S.A. § 22-2901. If the arrest has been made on probable cause without a warrant, the defendant must be taken without unnecessary delay before the nearest available judge and “a complaint shall be filed forthwith.”¹⁸⁴

10. DEFENSE COUNSEL

Increase access to appointed defense counsel after arrest for timely review of release conditions.

- 1. Counsel should be appointed to qualifying defendants at first appearance.**
- 2. Judges should require a financial affidavit to be filled out at the jail or in the courtroom before the first appearance. It should be presented to the judge for review, not only for appointment of counsel but for consideration of financial conditions associated with release.**

Existing research or best practices that support this recommendation

The U.S. Supreme Court’s Sixth Amendment jurisprudence is clear. “A criminal defendant who is entitled to counsel but goes unrepresented at a critical stage of prosecution suffers an actual denial of counsel and is entitled to a presumption of prejudice.”¹⁸⁵ With this standard firmly in mind, the Task Force reviewed scholarly articles, caselaw, and practices in other states to inform its recommendations regarding appointment of counsel. It found the following sources particularly compelling.

1. A blog post entitled “Guaranteeing Representation at First Court Appearances May be Better for Defendants and Cheaper for Local Governments,”¹⁸⁶ which was based on a scholarly article entitled “What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small-Town Courts.”¹⁸⁷ The authors examined whether defendants who are represented by counsel at first appearance (CAFA), are more likely to be released on recognizance, are less likely to have a high bond set, and are consequently less likely to be jailed pending disposition. They concluded that they were.

Our results suggest two things. First, having counsel present at first appearances can change the pattern of decisions judges make. Judges may release more people with fewer conditions and impose fewer financial barriers upon those from whom they demand bail, with the cumulative result that fewer people will be detained pretrial. Second, having counsel present may ultimately save incarceration costs—often rated at over a hundred dollars per inmate per day—which could save counties and other local governments money.

A similar study was conducted in Baltimore, with similar results:

[N]onviolent criminal suspects [the only group studied] who were provided lawyers at their bail review hearings fared substantially better than those without lawyers. Although comparable before the bail review hearing, suspects who were represented by [an attorney]:

- *were substantially more likely to be released on their own recognizance;*
- *were more likely to have their initially set bail reduced at the hearing;*
- *had their bails reduced by a greater amount;*
- *were more likely to have affordable bails (\$500 or under) set;*
- *served less time in jail; and*
- *had longer bail review hearings.*¹⁸⁸

2. The Task Force also found *Rothgery v. Gillespie Cty*¹⁸⁹ instructive and controlling. In *Rothgery*, the United States Supreme Court recognizes a right to counsel at the initial bail hearing.

The issue argued before the U.S. Supreme Court was whether Rothgery's right to court appointed counsel attached at the first appearance when he was brought before the magistrate for a probable cause determination, even though no indictment had been filed and no prosecutor was present. The Court did not mince words:

[A] criminal defendant's initial appearance before a judicial officer,

where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

Justice Thomas was the only dissenter and confirms that the majority meant what it said.

The Court holds today—for the first time after plenary consideration of the question—that a criminal prosecution begins, and that the Sixth Amendment right to counsel therefore attaches, when an individual who has been placed under arrest makes an initial appearance before a magistrate for a probable-cause determination and the setting of bail. Because the Court's holding is not supported by the original meaning of the Sixth Amendment or any reasonable interpretation of our precedents, I respectfully dissent.

The majority noted that “[w]e are advised without contradiction that not only the Federal Government, including the District of Columbia, but 43 States take the first step toward appointing counsel before, at, or just after initial appearance... And even in the remaining seven States (Alabama, Colorado, Kansas, Oklahoma, South Carolina, Texas, and Virginia) the practice is not free of ambiguity.”¹⁹⁰

The Supreme Court refers to the Kansas law on this topic as “unclear.” The Court refers the reader to the following statement in an amicus brief filed by the National Association of Criminal Defense Lawyers.¹⁹¹

Kan. Stat. § 22-4503 states that once a defendant is charged with a complaint by the State, he is entitled to appointed counsel. Kan. Stat. § 22-2901 suggests that a complaint must

*be filed at approximately the same time as an initial appearance before a magistrate following a warrantless arrest. Combined, these statutes suggest that Kansas provides counsel to indigent defendants upon initial appearance. However, State v. Waugh [238 Kan. 537, 545-46 (1986)], suggests that in some instances, a defendant will appear before a magistrate for initial appearance before a complaint is filed. Erring on the side of caution, we have deemed Kansas's law unclear.*¹⁹²

In a 2011 law review article, “Prosecution Without Representation,” the author lists Kansas among the 10 states that do not provide counsel at first appearance.

*Indigent defendants in Alabama, Kansas, Maryland, Michigan, Mississippi, New Hampshire, Oklahoma, South Carolina, Tennessee, and Texas appear alone and represent themselves at the initial bail hearing before a judicial officer. Within these ten ‘No, We Don’t’ [provide a lawyer] states, many defendants unable to afford bail remain in jail for prolonged periods, often many weeks beyond the forty-eight-hour initial appearance, until their next court date when they finally receive in-court representation.*¹⁹³

The Task Force shares the concerns noted by the author.

Simply stated, a municipality that ignores the Rothgery Court’s concerns, risks liability and economic peril. Failing to provide counsel at an accused’s first appearance before a judicial officer may expose a municipality to costly compensation where a defendant can establish that the delay ‘cause[d him or her]

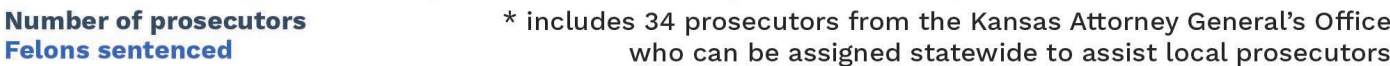
*to be subjected’ to injury, including loss of liberty. A court’s granting of declaratory or injunctive relief would increase a municipality’s vulnerability against similar claims. Municipalities could gamble that the Supreme Court ultimately will rule that a ‘reasonable’ delay justifies appointing counsel sometime after a bail proceeding for a detained or released defendant. But the longer the municipality delays appointing counsel, particularly for an incarcerated defendant, the more financial risk the municipality will face. Additionally, a municipality invites further exposure when it appears ‘indifferent’ toward monitoring the timing of counsel’s actual appearance.*¹⁹⁴

3. Federal public defenders appear with the defendant at his or her first appearance. Because charges are filed by indictment, there is no requirement for a 48-hour probable cause hearing. Investigators assist in gathering necessary information for a bail review hearing that is set within three days.¹⁹⁵
4. The Task Force conducted a survey of judges and magistrates in the state who hear first appearances and criminal cases. One hundred seventeen judges responded. Almost two-thirds (64%) indicated that they conduct first appearance hearings every day court is in session. Fifty-five percent of reporting judges indicated that it was their practice to discuss appointment of counsel at the initial hearing. However, 68% of the Kansas judges surveyed indicated there was no attorney present at the first appearance.¹⁹⁶ Requiring the court-appointed attorney affidavit to be submitted at the first appearance would encourage judges to appoint counsel at the earliest stage possible. Moreover, the same information could be examined when considering whether a money bond is necessary to guarantee appearance and in

Fewer than 100 public defenders represent indigent parties in trial courts in Kansas. There also are 22 public defenders devoted to appellate cases and six to habeas actions. Nonsupervisory public defenders earn an average annual salary of \$62,401.



The number of prosecutors and the average number of felons sentenced each year from 2009 to 2019.



Source: Kansas Sentencing Commission, Kansas Association of County and District Attorneys, and survey

what amount, considering the defendant's financial situation as required by statute.¹⁹⁷

The Task Force would like to see some changes made to the Financial Affidavit to make it more user friendly and have it collect additional information, still related to appointment of counsel, which will further assist in an indigency determination for both counsel and bond.

5. Finally, the Task Force was impressed with some programs used in other states to assist the court, the defendant, the prosecutor, and the public defender in fulfilling the goal of having an attorney with the defendant **at** the first appearance.

Use of video technology. Many jurisdictions currently use secure video technology to communicate with doctors at the state hospitals for care and treatment cases. The Task Force recommends exploring whether it is feasible to use a remote system to allow public defenders access to incarcerated subjects to assist them with bond arguments.

With the help of Heather Cessna, Executive Director of the Kansas State Board of Indigents' Defense Services,¹⁹⁸ we located one such program in Idaho. Idaho currently uses a video system to connect the defendant, public defender, court, and prosecutor. Their legal standard requires counsel **at** the first appearance. Lifesize¹⁹⁹ video communication software is being used by 43 counties connecting the courtroom, public defender, and the jails. All may be connecting virtually in from various locations. This software is also designed to allow secure conversations between the defendant and his or her attorney. Documents are exchanged via scanning and distribution through email or text. This program complies with government security protocols and appearance can be accomplished through a smart phone, tablet, or computer.²⁰⁰

To comply with Idaho's standard to have an attorney at the first appearance, some counties have hired a part-time public defender to be at every first appearance. Those counties have found it cost-effective to do so because it has resulted in a higher incidence of pretrial release. The attorney's representation is limited to first appearance. A different attorney is appointed for the remainder of the case. But such a practice has also drawn criticism.

With the advent of COVID-19 court closures and limits on in-person hearings, video appearances via any number of technologies—primarily ZOOM—are now commonplace. Attorneys are able to communicate with their clients via these technologies. Defendants can even be placed in chat rooms to privately discuss their case with their attorney during the course of a court's docket.

In March 2017, Maine's legislature commissioned a study by the Sixth Amendment Center²⁰¹ regarding legal services provided by the Maine Commission on Indigent Legal Services.²⁰² Included in its recommendation was:

Finding 4: *MCILS' "lawyer of the day" system primarily serves the need to move court dockets, while resulting in a lack of continuous representation to the detriment of defendants. There is often a critical gap in representation while a substantive lawyer is identified and appointed.*²⁰³

Idaho currently is in the midst of class action litigation initiated on behalf of indigent defendants through the ACLU over whether the defendants are constitutionally entitled to "vertical" representation, meaning the same attorney from first appearance until the end of the defendants' cases. The ACLU alleges that failure to provide "vertical" representation results in

the “constructive” denial of counsel. Since the first litigation,²⁰⁴ Idaho has adopted statutory standards for defense counsel requiring vertical representation whenever “reasonably practicable.”²⁰⁵ But the case has returned to the Idaho Supreme Court and is in the briefing stage as of this writing.²⁰⁶

Task Force members did discuss the problem with “limited representation” in a small county. Attorneys could easily be conflicted out of the case or conflicted out of an upcoming case based on representing the defendant at the first appearance hearing. There was some discussion about whether law schools could provide this service by video. There are many unknowns about this approach, but the Task Force thought it was a pretrial practice that merits review given the lack of public defenders in some parts of the state.

The following example was provided by a criminal defense attorney from Western Kansas:

I will frequently have a three-courthouse day. Because of the travel involved, my secretary knows the approximate travel times for each courthouse. Because of this, she will have me scheduled in one location in the morning and a following location in the afternoon. For example, last Monday, I was scheduled to be in Norton (70 miles away) for a morning docket. Upon completing that morning's hearings, I would return to my home base of Colby (where my actual office is located) for 1:30 hearings. Assuming these hearings are short in nature, we will often times have late afternoon hearings in Goodland (where fortunately we have the benefit of being able to litigate for an additional hour due to the time zone change—Sherman and Wallace county are on Mountain time.

As far as additional difficulties that are presented, there are jails in Colby, Goodland, Hoxie, Norton, Atwood, and Oberlin. Counties without their own jail include Cheyenne, Logan, and Wallace (although Wallace can hold 1-2 inmates for a short time. When those are full, we must sometimes travel over 2.0 hours round trip to visit with a client in Scott City. Frequently, the inmates are shuffled from one county to another, based on capacity. Although I may have a client with a case in my home county (where the jail is across the street from my office) he may be housed 27 miles, 36 miles, or 60 miles away based on where he may have been farmed out to.

The furthest I have traveled in a single day would be a three-hour round trip to Hays or Garden City for a docket, to turn around and once I return home, travel a two-hour round trip to Cheyenne County for an additional docket. This is not uncommon for most of the attorneys in this area, although I do travel a bit further than most, given that I have narrowed my practice to focus mostly on criminal defense. Many of these attorneys practice in at least two districts, although I practice in four different districts, based on the judge's need.

Although we get paid travel time, it makes scheduling nearly impossible.

That includes all combination of clients, retained and court appointed. The court appointment lists are sparse and some counties will only have 1-2 attorneys who agree to accept court appointments. Some counties have none that live or office within that county. For example, just nearby,

Cheyenne County, Decatur County, Sheridan County, Wallace County, and Logan County do not have someone within their county to take court appointments. This requires travel from, at a minimum 20-30 miles away for EVERY attorney who practices within that county. If for example, there is a CINC case, requiring 3-4 attorneys, they are traveling 30-90 miles for each hearing.

Again, with the 2020 court closures related to COVID-19, courts and attorneys have become accustomed to using platforms like Zoom, Microsoft Teams, BlueJeans, and other virtual meeting software. These have included meetings between the defendant, who is in a local jail, and the attorney. Security issues seem to have been resolved by those involved.

Investigators to assist public defenders.

Adding paralegals, social workers, or investigators to public defender offices has been shown to help with collecting data from defendants regarding bond status and with connecting defendants to social services that will help them in make court appearances and comply with pretrial conditions. A good example is the process used by the Bail Project. Although not a legal defense entity, the Bail Project²⁰⁷ posts cash bonds for indigent defendants that are set at \$5,000 or less. Defendants pay nothing, so they have no “skin in the game” as far as financial consequences if they fail to appear. Yet despite that, they report 97% appearance rates. The Brooklyn Community Bail Fund reports similar results.

In a visit to the Bail Project in St. Louis, Judges Karen Arnold-Burger and Wendall Wurst met with the site director, Mike Milton. He explained the process that he credits as the key behind their clients’ appearance in court. The Bail Project staff (some paid, some volunteer) ask clients

questions about obstacles to court return (e.g. transportation, unstable housing, health concerns) and design a support plan to help overcome these barriers through ongoing communication, effective court notifications, and voluntary referrals to social services and community-based programs.²⁰⁸

Federal public defender offices around the country have investigators or social workers on staff. They are tasked with interviewing and assessing public defender clients “in order to develop a re-entry service plan or referrals to substance abuse and mental health programs, as well as vocational training programs. Social workers play an important role in the defense team, providing attorneys with the means to advocate for alternatives to incarceration and sentence mitigation.”²⁰⁹

In Kansas, this role is taken on by an “investigator” in the public defender’s office. They have six investigators across the district who work for the 12 lawyers who cover district court cases, a 2:1 ratio. The investigators have a great deal of training concerning both mitigation and access points to substance abuse and mental health treatment. They develop release plans that link clients with community resources. The investigators have developed relationships with agencies in the community that can help with residence plans, job training, and treatment. The investigator collects all necessary records and conducts a pretrial interview to target client needs. They use a standardized, PDF fillable intake form that ensures they have asked all questions relevant to the release plan.²¹⁰

This is also consistent with the theory of a holistic defense. Holistic defense is a philosophy that believes that to fully represent and help the client, the attorney must address a whole range of needs: drug treatment, access to mental health

care, maintaining employment, preserving housing, filing immigration applications, or helping with other issues that impact the client's life and future actions. The office consists of an interdisciplinary team that may include social workers, immigration lawyers, and housing specialists.

Holistic defense, then, may function as a superior information gathering mechanism, helping defense attorneys to identify mitigating features of their cases and then convey these in a convincing manner to prosecutors, judges, and juries.²¹¹

Participatory defense program:

Closely related to having an investigator, social worker, or paralegal on staff to assist public defenders is a program of community involvement—developed by community organizer Raj Jayadev—called Participatory Defense.²¹² In these programs “family members and friends of defendants come together to work with public defenders on their cases. They analyze documents and create social biography packets that include photos, character letters, videos, grades, certificates, pay stubs—anything that reveals the defendant's good qualities, the support of loved ones, and ties to the community. The packets enable judges, prosecutors, probation officers, and the public to see a human being rather than merely a case number or a list of charges.”²¹³ The program measures success in term of “time saved” instead of “time served.” They keep track of how many years they have been able to get sentences reduced and whether pretrial detention changed to pretrial release.

Costs and funding associated with this recommendation

There may be some financial and procedural hurdles if this recommendation is adopted.

Additional public defenders—either staff attorneys or contract counsel—may have to be recruited and paid. In addition, prosecutors would be required to cover hearings they may not have attended in the past, perhaps requiring extra staffing as well. However, outsourcing limited representation by teleconference connections like Zoom, BlueJeans, and Microsoft Teams is something at which most Kansas judges and attorneys have now become adept. Moreover, with the implementation of a new statewide case management system, judges, court staff, and attorneys will participate in job sharing with little concern about distance from the courthouse. During remote operations that were necessitated by the COVID-19 pandemic, judges found that most of the court's business could be done remotely.

But costs associated with this recommendation remain a concern of stakeholders. Heather Cessna, Executive Director of the Kansas State Board of Indigent Defense Services provided a rough estimate of \$2.8 million in additional funding to adequately cover first appearance and bond hearings around the state.²¹⁴

Not only are there not enough attorneys currently on staff with public defender offices around Kansas, there is concern that there is not an adequate pool of qualified hires in the state.²¹⁵ Law schools have reduced enrollment in the last several years, and current public defender wages are not competitive with the private sector. Accordingly, recruitment is difficult.

Moreover, public defender pay is significantly less than prosecutor pay throughout the state even though there are no significant differences in legal responsibilities to support such a pay differential. Overwhelmed public defenders trying to juggle multiple cases and court dates often require continuances to fully prepare, causing a delay in case processing and continued pretrial incarceration. So, although there is a cost associated with hiring enough public defenders to meet the demand, there is a greater cost in failing to have adequate staffing levels in terms of case delays and extended incarceration.²¹⁶

Although the costs may be great, the Task Force believes that early appointment of counsel may be one of the best investments that can be made to reduce pretrial incarceration and assure individual constitutional rights are honored.

Implementation

Statutory change could be sought. Several states require counsel at the first appearance by statutes,²¹⁷ others by Court Rule.²¹⁸ In addition, we believe the Kansas judicial branch should be supportive of requests for adequate funding for public defenders and prosecutors to fulfill their constitutional duties.

Stakeholder concerns

The Kansas Association of Criminal Defense Lawyers supports this recommendation.

KACDL supports the requirement for appointment of counsel as soon as possible. KSA § 22-4502 provides for an ability to obtain appointed counsel services even prior to a court appearance. However, this provision is not implemented in any way in any part of the State. Establishing procedures to allow for appointment of counsel immediately, even during interrogations, would facilitate issues related to pretrial release as well. This would allow counsel to demand judicial review or even intervention where necessary in counties where there is a 'gap' between arrest and charging decisions. Even though, this 'gap' frequently leaves counsel without any recourse or ability to seek judicial review of the matter as there is no case to enter or set, if the Court appointed an attorney it is at least has been subject to some level of immediate judicial review.

Further, early appointed counsel could address additional issues where the bond is subject to conditions, such as on a clean UA,

a task which can take 30 days or more in the case of some substances, or arranging mental health or substance abuse treatment. This would also facilitate access to evidence and discovery so that preliminary hearings could proceed more quickly and evidence that could be destroyed is able to be preserved by quick assistance of counsel.²¹⁹

Koch Industries supports this recommendation:

Robust and early access to counsel can improve outcomes for defendants, the courts, and the system overall. Ideally defendants would have access to robust counsel throughout their case; but at a minimum, when conditions of pretrial release or detention are being made, when someone's liberty is at stake, we feel strongly they ought not to simply be at the mercy of the court and the prosecutor.²²⁰

The Kansas Sheriffs' Association supports this recommendation.

The KSA agrees with this recommendation. However, in larger jurisdictions, we know there are not enough public defenders and they already carry a high case load which might impede this process. Just suggest reaching out to those jurisdictions, if you haven't already, and get their input.²²¹

The ACLU supports this recommendation.²²²

11. PRETRIAL RISK ASSESSMENT

The Supreme Court should initiate a pilot program of a representative cross-section of jurisdictions across the state, with some jurisdictions utilizing a scored and validated pretrial risk assessment tool, and others using a form with the same information but no algorithm-based score. The Task Force believes that the pilot program should include formation of a stakeholder's group, training, and a designated coordinator. It should include a comparison of data from the jurisdictions that use the scored

tool to like-sized jurisdictions that do not use a scored pretrial risk assessment tool. At the conclusion of the pilot program, the participants should be required to make recommendations to the Supreme Court regarding statewide adoption of a uniform, pretrial risk assessment process.

Existing research or best practices that support this recommendation

When trying to make an individualized determination of the release conditions necessary to reduce risk of flight or protect public safety, courts are automatically involved in a form of risk assessment. The goal is to help the judge determine which 20 of the 100 defendants brought before the court after arrest are likely to fail to appear in court or reoffend before their trial date—thus requiring conditions placed on their release.

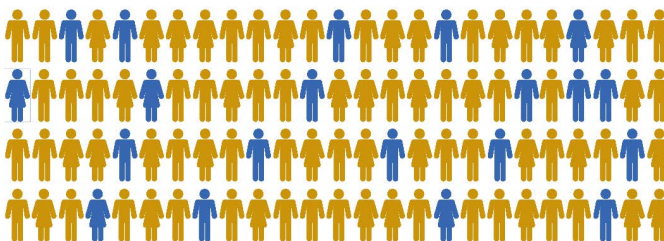
Statutory lists of factors to consider, like those set out in K.S.A. § 22-2802(8), are simply a method of gauging the risks of a defendant failing to appear or risk of violating the law before trial on the current charge. They may or may not be predictive of future behavior. Bail schedules (risk based on charge), statutory factors (risk based on factors legislators believe have some predictive ability), and subjective notions (risk based on, say, how someone looks or where someone lives) are giving way to the more evolved notions found in risk assessment tools. These tools “are designed to inform not replace the exercise of judicial decision-making and discretion.”²²³

They usually include some combination of the following: defendant age, substance use, criminal history, including violence and failure to appear, active community supervision, pending/current charge(s), employment stability, education, housing/residential stability, family/peer relationships, and community ties. The tool assigns points to each factor and based on the final point total, the defendant is assigned to a category of low, medium, or high risk.

Risk factors are characteristics of a defendant, their environment, or their circumstances that are associated with increased likelihood

Risk assessment

Of 100 people who appear before a judge, 20 may either fail to appear in court or commit a crime before their trial date. Judges have a difficult time identifying which 20 to target for meaningful conditions of release.



SOURCE: *Defining Flight Risk*, 2018, Lauryn P. Gouldin

of failure to appear and/or rearrest, whereas protective factors are characteristics that are associated with decreased likelihood of failure to appear and/or rearrest. Although protective factors are not included in many pretrial risk assessment tools, there is more and more research showing the value they add to the risk assessment process. In particular, studies show that protective factors are not just the absence of a risk factor, but rather that they reduce the likelihood of recidivism among offenders exposed to risk factors. In this way, consideration of protective factors can increase the accuracy with which we estimate the likelihood of pretrial outcomes.

*The ultimate description of a defendant's risk as low, moderate, or high in a given jurisdiction is a policy decision, not a scientific one... For instance, a defendant may receive a score that indicates a 20% likelihood of failure to appear. Stakeholders must decide what this 20% likelihood means for pretrial decision-making in that jurisdiction.*²²⁴

One of the most evolved is a recent tool created for the New York City Criminal Justice Agency, which assessed 2,000 potential predictive factors, the number due to adding and testing varying levels of granularity (such as specific charge type), count of events when appropriate, time windows (such

as prior convictions within 1, 2, 3, 4, and 5 years separately) and recency (such as comparing prior bench warrants within 1 year versus 2 years, 3 years, etc.).²²⁵

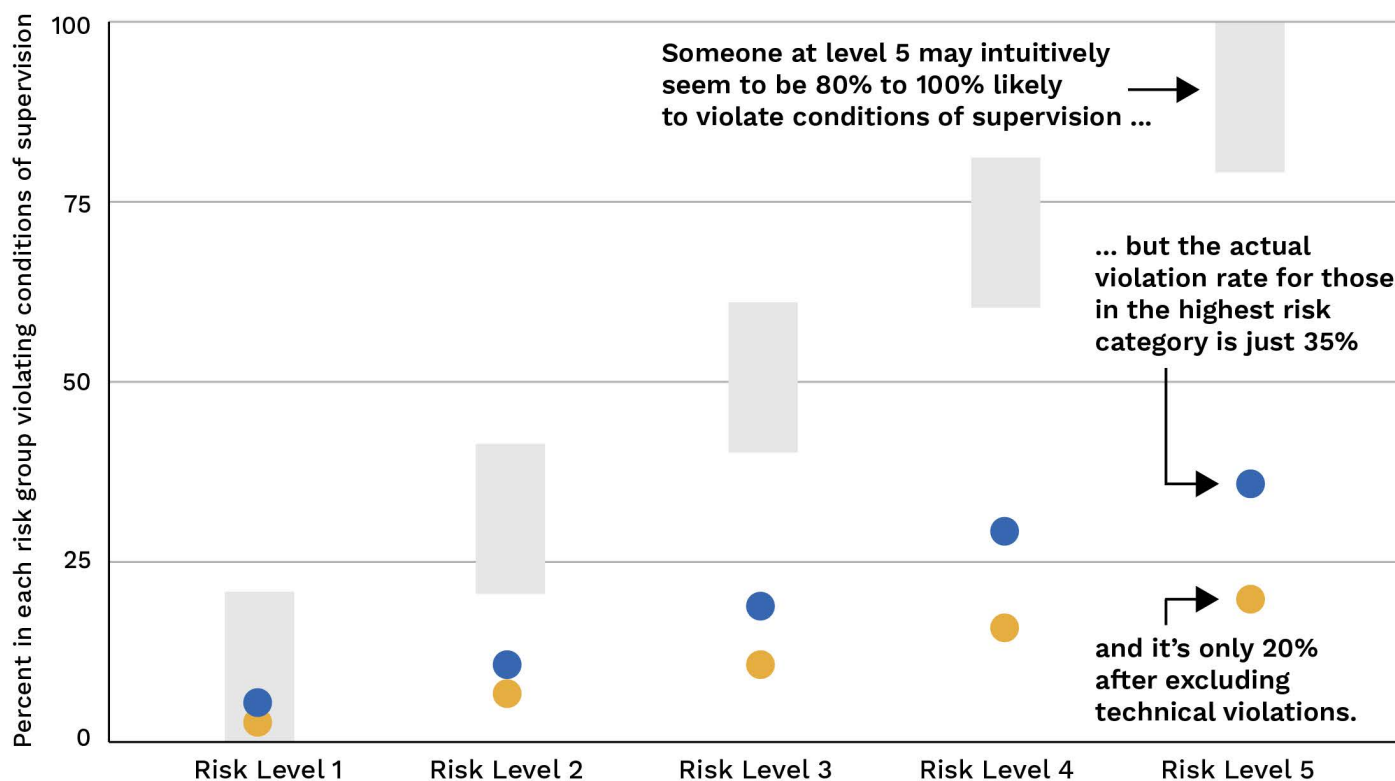
Some states also use a more targeted tool known as the Domestic Violence Lethality Assessments (DVLA). It is an actuarial risk assessment tool used by law enforcement to evaluate cases of intimate partner violence. Based upon the victim's responses to those questions, the situation can be deemed high-risk. If high-risk, the law enforcement officer places a call to the domestic violence hotline and puts the victim on the phone. In some cases, victims seek immediate shelter. Others may seek it later. All high-risk assessment scores trigger a follow-up by law enforcement within two or three days. If the perpetrator is there when follow-up is done and there is a Protection of Abuse order, arrest of the perpetrator and higher bond are likely. In

Johnson County, for example, completed DVLA's are included in police reports which are available to judges hearing domestic violence cases. DVLA's are also available to Court Service Officers who supervise domestic violence offenders on probation and to Court Service Officers who provide pretrial services, as well as Department of Corrections Officers who provide supervision.²²⁶

The Task Force recognizes that one of the primary goals for making pretrial release decisions is to ensure release decisions are made objectively and are based on reliable information. After careful consideration and review of the pretrial literature and research, and in consultation with Dr. Alex Holsinger, a well-respected researcher and frequent author on the topic, the Task Force believes a pretrial risk assessment, used in conjunction with a judge's professional judgement, is one effective way to accomplish this goal.

Intuitive risk and actual risk

Intuitive interpretations of risk groupings drastically overestimate actual risk of violation



SOURCE: *Layers of Bias: A Unified Approach for Understanding Problems with Risk Assessment*, November 2018, Laurel Eckhouse, Kristian Lum, Cynthia Conti-Cook, Julie Ciccolini. <https://theappeal.org/risk-assessment-explained/>

As a starting point, the Task Force recommends initiating a pilot program in select urban, suburban, and rural jurisdictions across the state, with a focus on piloting the tool in varied locations so data on a representative cross-section of the population can be collected. Participation in the pilot would be voluntary. As part of the process, we recommend each participating jurisdiction use the same validated tool and gather the same measures to ensure uniform application. This will foster an evaluation to determine the tool's effectiveness and whether its application (or impact) is equitable. The discussions and resulting tool must be fully transparent and include justification for its use by having adequately addressed discriminatory bias in any actuarial instruments using relevant fairness metrics.²²⁷ Additionally, each participating jurisdiction should receive adequate training prior to the implementation of the pilot program.

The goal of the pilot program is to decide whether a new or borrowed tool would be helpful to judges in making objective, reliable, and unbiased release decisions.

The Task Force relied on the following information in formulating its recommendation:

1. Practices currently being used in other states, including:
 - a. Delaware: requires the use of a risk assessment tool by statute but emphasizes that the risk assessment is nonbinding on the court;²²⁸
 - b. Idaho: requires full transparency in the tool and its outcomes;²²⁹
 - c. West Virginia: requires a risk assessment tool be completed within three days of arrest and mandates that oral and written statements made by the defendant while answering the questions asked by the tool are not admissible in court.²³⁰
2. The analysis from *Beyond the Algorithm*²³¹ indicating that disparate pretrial outcomes

can be perpetuated by pretrial risk assessment tools if they are not properly validated or designed to consider the issues plaguing the criminal justice system.

3. Dr. Alex Holsinger's recommendation that a pretrial risk assessment tool be mandated statewide. Dr. Holsinger also recommended performing an assessment on the chosen tool across varied jurisdictions in Kansas to verify whether any biases are occurring in implementation.
4. When using a tool developed outside a given jurisdiction, it is important to validate the tool locally—and across jurisdictions with different populations—to ensure it predicts well for the population served in all communities.²³²
5. Pretrial risk assessments (PRA) are not new. PRA have been developed and tested in different jurisdictions across the country dating to at least 1961.²³³
6. In November 2018, The Pew Charitable Trusts published results from a national survey that provided information about how the public thinks pretrial justice should work. The survey found substantial support for pretrial release for people whose likelihood of completing the pretrial period without a new arrest is as low as 70%. Risk assessment tools would generally categorize these individuals as being at moderate or high risk for re-arrest before trial.²³⁴

That said, the Task Force is aware of the national debate that is currently taking place regarding the use of risk assessment tools. Objections are being expressed by many stakeholder groups around the country about the discriminatory impact of risk assessment algorithms. On the day of our February Task Force meeting, the Pretrial Justice Institute (PJI) reversed its decade-long position in support of these assessments and instead recommended against their use in making detention decisions.²³⁵ Since its release, the National Association of

Pretrial Services Agencies (NAPSA), the JFA Institute, and the Center for Effective Public Policy's Advancing Pretrial Policy and Research project (funded by Arnold Ventures—which offers a pretrial assessment tool) have released statements reaffirming the use of these tools as one component of pretrial reform.²³⁶ The Conference of State Court Administrators (COSCA) also notified its members about the change in position by PJI and stressed the importance of a large toolbox for judges:

*COSCA will continue to monitor responses to PJI's changed position. However, at this point, our position continues to recognize that pretrial reform is multifaceted, and no one approach or solution can be expected to provide a singlehanded remedy. All potential solutions should remain on the table, including the use of evidence-based pretrial risk assessment tools, and future decisions about the best ways to achieve reform should be guided by ongoing research and data.*²³⁷

The Task Force agrees with the COSCA position to examine all options. That is why we believe there should be a control group of like-sized jurisdictions that do not use a scored pretrial risk assessment tool but instead use an unscored tool collecting the same information to compare results.

Finally, we discovered at least one state that takes a slightly different approach that we believe is worthy of further examination. North Carolina uses an unstructured approach to help a judge make a professional judgement regarding release.

Through the Criminal Justice Innovation Lab at the University of North Carolina, eight North Carolina counties decided against implementing actuarial risk assessment, opting instead for a tool that is a written decision tree for the judge. Generally, the tool creates presumptions of nonfinancial conditions for certain low-level offenses and requires consideration of specified factors and circumstances for others. Only if the decision maker documents the presence of those circumstances and factors can a secured bond be imposed. In all counties, the generalized bond

table was repealed and replaced with a maximum bond table. But again, that table does not apply unless the decision-maker goes through the process and documents reasons for imposing a secured bond. Forms were created for this purpose. The factors specified in the tool are ones that the judge can verify immediately after arrest.²³⁸

The outcomes of this type of unstructured approach must be evaluated not only for its accuracy in predicting appearance in court with no new arrest during the pretrial period, but also for bias.

In conclusion, we cannot lose sight of the fact that the majority of people involved in the criminal justice system across this country appear in court as ordered and do not commit new offenses.²³⁹ Even at the highest risk levels established by the most frequently used pretrial risk assessments, the majority will not be arrested for any new offense while on pretrial release, let alone a violent crime.²⁴⁰

Costs and funding associated with this recommendation

There will undoubtedly be some costs associated with implementation, including staff training and resources. But the Task Force recommends using a tool that is available in the public domain such as the PSA.²⁴¹ Dr. Holsinger indicated that grants might be available to help defray the costs of implementation and training associated with piloting this program, although no research has occurred regarding funding to date.

Efforts to adapt and validate a pretrial risk assessment tool for a specific jurisdiction take time and resources. And, validation efforts and ongoing monitoring of pretrial outcomes require jail and court data systems to interface, often necessitating a minimum level of shared technological infrastructure.

...[The key to ensuring the utility of a given pretrial risk assessment tool in a given jurisdiction is to tailor risk estimates and pretrial decision-making policies to jurisdiction-specific failure rates over relatively recent timeframes].²⁴²

The lack of comparable and robust data collection methods may present an obstacle to implementation in some judicial districts.

Implementation

A review of jurisdictions that have implemented pretrial risk assessment tools indicate that, in most cases, the state either amended or added a new statute. In this case, a note added to the bail statute in Kansas may be enough to start a pilot program, like Pennsylvania.²⁴³ Alternatively, each jurisdiction chosen to participate in the pilot program could create a local court rule authorizing and mandating the tool's use.

The steps required for implementation include:

- Soliciting jurisdictions that are willing to participate in a pilot program, including both risk assessment sites and control group sites.
- Formation of a pretrial stakeholder's group to oversee the creation, implementation, and analysis of results.
- Choosing the tool to be used and obtaining it. We recommend that stakeholders have input into which tool is used for the pilot program.
- Arranging training for those administering the tool. The Task Force suggests each jurisdiction decide how they will administer the tool locally (e.g., use dedicated court staff or ask jail staff to conduct the assessment at the time of booking). We would also suggest training judges to use the tool.
- Selecting a coordinator—or designating a task force—to conduct oversight and data collection during the piloting process.

The Task Force recommends appointing a statewide coordinator and a pretrial stakeholders group to advance this effort.

Stakeholder concerns

The Kansas Bail Agents Association (KBAA) strongly opposes using pretrial risk assessments. It argues that these tools do not achieve their goals and are not transparent. It provided a list of numerous organizations—including many civil rights organizations—that have criticized assessments based on computer algorithms as inherently biased.²⁴⁴

Americans for Prosperity Kansas “supports the use of scientifically validated risk assessments, which when properly constructed and objectively applied, can help reduce racial and economic biases in our justice system.” It further stresses that assessments should be developed with input from diverse stakeholders, subject to periodic review and never replace judicial decision making.²⁴⁵

The ACLU is unequivocally opposed to the use of risk assessment tools.²⁴⁶ It referred us to several research studies and reports and the Task Force found one, “Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys,”²⁴⁷ to be particularly informative and balanced. It highlights that even a well-validated risk assessment tool will not produce accurate estimates of risk for failure to appear or re-arrest if it is not used correctly. It also points out the need to have the infrastructure and financial resources to collect the data necessary to validate the tool locally.

One example of a consideration that is scored and strongly weighted against defendants is their prior criminal history. It is hard to dispute the theory that past behavior predicts future behavior. But a concern of many civil rights groups is the fact that in virtually every community in the United States that has compiled the information, people of color are stopped and arrested more frequently and in disproportionate numbers than white people.²⁴⁸ This is not to say that a person's criminal history should

not be considered. However, care must be taken in predicting future behavior on past criminal behavior evidenced by arrest. Otherwise, the bias becomes even more entrenched in the system.

Given the nature of prediction, a racially unequal past will necessarily produce racially unequal outputs. To adapt a computer-science idiom, “bias in, bias out.” [the equivalent of ‘garbage in, garbage out’] To be more specific, if the thing that we undertake to predict—say arrest—happened more frequently to black people than to white people in the past data, then a predictive analysis will project it to happen more frequently to black people than to white people in the future. The predicted event, called the target variable, is thus the key to racial disparity in prediction.²⁴⁹

The Kansas Coalition Against Sexual and Domestic Violence is supportive of the use of pretrial risk assessment tools in the case of domestic violence and sexual assault. It believes in the importance of an individualized assessment prior to setting the bond amount or conditions. It believes the assessment should be done by a trained court services officer who has access to prior convictions, protection orders (current and past), and police reports, and who has a conversation with the victim regarding the context of the violence. Any conditions should include a no-contact order for the victim. It believes the defendant should be closely monitored with the ability to take quick action to immediately revoke the conditions of release if they are violated. It supports the process set out in Chapter 7 of the Blueprint for Safety out of Praxis in Minnesota.²⁵⁰

The Kansas Sheriffs’ Association supports this recommendation, “but do not want that burden placed on the Sheriff’s Office or jail personnel.”²⁵¹

While pretrial risk assessment tools provide an objective, standardized way of assessing the likelihood of pretrial success, they cannot predict a specific individual’s future behavior. Even with the aid of a validated risk assessment, there will be

low-risk defendants who fail during pretrial release and high-risk defendants who succeed.²⁵²

As already noted, there is skepticism among some stakeholders of pretrial risk assessment tools, and some evidence that they only perpetuate injustices faced by minority groups. The Task Force is cognizant of these concerns. The Task Force believes transparency is the best way to address these and other concerns and suggests the court make the tool, along with the input data, accessible to the public. The Task Force recommends creating a webpage containing the tool, validation information, and data collected. The tool would be regularly and frequently evaluated for biased outcomes and only if the instrument has been shown to be bias-free and more effective than those procedures used in the control group will its use be endorsed.

Another challenge that must be considered is the local legal culture governing how cases are handled in each of the Kansas’ 31 judicial districts. Some districts have already embraced pretrial risk assessments and incorporated them into their pretrial practices while others have yet to begin the conversation.

Post-Charging Procedures

12. TIMELY HEARING PROCEDURES

The Supreme Court should require each judicial district to adopt post-charging procedures for timely judicial hearings to review conditions of release.

Existing research or best practices that support this recommendation

The Task Force has developed a recommended set of procedures that are attached to this report as Appendix B. The research associated with each recommended practice is noted in the annotations for that appendix. The Task Force notes that courts should not impose conditions of release without studying whether the conditions improve pretrial outcomes, i.e., increase appearance rates along with no new charges.

Costs and funding associated with this recommendation

Like Recommendation 9, the Task Force anticipates that compliance with constitutional and statutorily mandated procedures will result in costs related to additional staffing of both prosecutors and public defenders.

Implementation

Either the Kansas Supreme Court by adoption of a uniform court order for all judicial districts, or each judicial district based on their own circumstances.

Stakeholder concerns

Koch Industries indicated that:

*[W]henver possible, we favor a strong presumption of pretrial release, strict timeliness and procedural protections, and the least restrictive and onerous conditions of pretrial release. It is going to be up to states to decide whether and what role money bail plays; for now our position is that judges should be empowered to make the best decisions possible based on a number of factors such as the findings of a risk assessment, and there may be a role for money bail in that consideration. We do firmly believe that access to cash, or lack thereof, should not be the only factor in determining pretrial release decisions.*²⁵³

The Kansas Association of Counties was supportive of pretrial release due to costs:

Cost is a big concern for counties as jails drive a large portion of the budget. Breaking it down further, there are two separate issues with pretrial holds.

- *Cost of jail space. Holding individuals pretrial takes away from jail space used to hold individuals post-conviction, requiring some counties to send prisoners to other counties due to overcrowding.*

- *Medical care. Local government is responsible for the medical care of individuals that are being held. This is potentially a large expense.*²⁵⁴

The ACLU is in favor of pretrial release.

*Cash bail is over-relied upon in the system and punishes individuals for being poor. For-profit bail, or commercial sureties can exacerbate that issue with pretrial profiteering that places low-income people and their families in untenable positions. We urge the Task Force to consider this issue in deliberations [related to all the recommendations].*²⁵⁵

*The ACLU also expressed concerns that best practices should not be defined as the minimum afforded under the United States Constitution, should contain more specific information about determining the affordability of bond, and should prohibit the use of fixed crime-based bond schedules.*²⁵⁶

The Kansas Bail Agents Association has expressed several concerns about the recommended Best Practices Setting Conditions of Release.²⁵⁷ A summary follows²⁵⁸.

1. *Overarching Principle #2, “[l]iberty is the norm and detention should be the exception,” conflates bail and preventive detention. The Salerno case, from which this quote originates, was actually saying that detention without bail is the exception. But because of the procedural safeguards in the Bail Reform Act of 1984 detaining someone without bond for public safety reasons represented a carefully limited exception to detention without bail. Detention with bail, was not even an issue in the case and detention with bail falls on the liberty side of the equation. To interpret this to mean liberty with bail should always be favored over detention is an inaccurate interpretation.*

2. *Overarching Principle #3, “[j]udges should first consider whether nonmonetary conditions of release are sufficient before requiring a monetary bond,” reverses the statutory order of operations in setting bond. K.S.A. § 22-2802(1) requires that any person charged with a crime shall be ordered released at their first appearance upon execution of an appearance bond.” It is not until subsection 22-2802(6) that the statute discusses the judge’s discretion to release on personal recognizance. To consider a recognizance bond first is out of statutory order.*

[The Task Force notes that it does not assign any significance to the order the items are listed in K.S.A. § 22-2802(1) and (6).]

3. *The KBAA does not agree with the contention that money bond relates solely to risk of flight. K.S.A. § 22-2802(1) requires a judge to set an appearance bond in an amount “sufficient to assure the appearance of such person and to assure the public safety.” [Emphasis added]. Although the Task Force points to State v. Foy to support its position,²⁵⁹ Foy predates the addition of the public safety language to the statute. Judges cannot be advised to disregard the statutory language. KBAA also cites two cases in support of its position that public safety is a valid government interest in establishing bond amounts. Valdez-Jimenez v. Eighth Judicial District, 460 P.3d 976, 985, 136 Nev. Adv. Op. 20 (2020) (“bail must relate to one of these two purposes—to ensure the appearance of the accused—or to protect the safety of the victim and the community”);²⁶⁰ Torgerson v. State, 444 P.3d 235 (Alaska Court of Appeals 2019) (“a judge may not set bail in an amount that goes beyond that which is reasonably necessary to fulfill the purposes of bail, i.e. to reasonably assure the defendant’s*

*appearance and the safety of the alleged victim, other persons, and the community.”).*²⁶¹

The KBAA also seems to challenge the Task Force’s site to Brangan v. Commonwealth,²⁶² in footnotes 23 and 29 of Appendix B, although the KBAA cites to a different provision than that addressed by the Task Force: “a judge may not consider a defendant’s alleged dangerousness in setting the amount of bail, although a defendant’s dangerousness may be considered as a factor in setting other conditions of release.” 477 Mass. at 706. It asserts that Brangan is an outlier opinion and relies on a different statutory scheme than Kansas.²⁶³

And finally, KBAA challenges the Task Force’s reliance on K.S.A. 22-2807(2), which provides that a bond may only be forfeited for failure to appear, to support its position that money bond relates only to risk of flight. It asserts that this ignores the bonding company’s ability to surrender a defendant to the court and its responsibility to do so if the defendant fails to appear on a revocation motion for a new crime or other violation of a nonmonetary condition of release. It also emphasizes that a defendant who is viewed as a public safety risk, is also a flight risk. It asserts that by taking the position that money bond relates only to failure to appear and not public safety, the Task Force is advocating a position and as such it should not be part of Best Practices.

4. *The KBAA agrees that a judge should gather as much information as possible to make an individualized determination of bond, but when information is lacking the judge should err on the side of caution in terms of appearance risk and public safety concerns.*

5. *The KBAA agrees that fixed, crime-based bond schedules should not be used after the first 48 hours. It believes that bond schedules should err on the side of caution by setting a “meaningful” bond until such time as judicial review can occur. It does not support fixed bond schedules with only unsecured bonds listed. It believes that K.S.A. 22-2802(4) the default is a surety bond and that it takes an act of individual discretion on the part of the judge to convert that to a recognizance bond. So, a bond schedule could not default to unsecured bond. It also asserts that recognizance bonds are a less secure method of release and if there are no constitutional problems with using secured bail, there should be no reason to turn to a less secure method.*

[Again, the Task Force does not assign any significance to the order the items are listed in K.S.A. § 22-2802. Under subsection (3), a judge has the discretion to find that sureties are not necessary to assure the appearance of the accused.]

13. MISSED COURT APPEARANCES

Courts are encouraged to give offenders an opportunity to voluntarily report after a missed court date, before a bench warrant is served, to avoid unnecessary arrest.

Existing research or best practices that support this recommendation

The Task Force recognizes that there are some defendants, although we believe it is a small percentage of the total, who intentionally abscond to avoid or delay consequences of criminal activity.²⁶⁴ We do not know exactly what our appearance rates are in Kansas, so we cannot make reasoned decisions about how to best address them. But it was agreed by the members, at least anecdotally, that after an initial failure to appear, defendants often panic, and the fear of

consequences keeps them from reporting again until arrested on a warrant.

In addition, defendants may appear at the first or second court setting but as the case drags on, it becomes more difficult to miss work, get babysitters, obtain transportation, etc. When that happens, providing a defendant an opportunity to appear without fear of re-arrest allows the case to quickly get back on track. It also allows recall of the bench warrant without taxing law enforcement and jail resources which would be involved in arresting the defendant on a nonappearance bench warrant. A block of court time could be provided on a weekly or monthly basis for this second chance docket for people to report who have missed a prior court date without fear of arrest.

Several other courts around the country have what our Task Force called “oops” court dates. They believe it saves time in the long run. Moreover, it shows the court’s willingness to accommodate some personal problems that arise in the lives of defendants. At least one study supports the reduction in failure to appear using such an approach.²⁶⁵

Costs and funding associated with this recommendation

The Task Force has no information regarding the cost of this recommendation. It is anticipated that in most jurisdictions this would present little or no cost and would be absorbed into normal court activities. The same amount of time or more would be required to address the situation once a defendant is arrested on a failure-to-appear warrant. There would also be the costs associated with issuing and serving warrants that could be eliminated. Failure to appear itself carries a cost to the administration of justice and perhaps, in some circumstances, to public safety, so the Task Force views this as a cost-avoidance measure.

Implementation

District court judges and district magistrate judges would have to adopt such procedures in their respective courts by local rule.

Stakeholder concerns

The Kansas Bail Agents Association objects to this recommendation:

Encourage the defendant to voluntarily appear-yes, delay and avoid the issuance of a warrant-no. When a person flees justice, there is a crucial time where the failure to issue an arrest warrant may allow that person to slip through the hands of the police or bail recovery agents. To remove the warrant as a necessary tool for the police and the courts and create some other process is inappropriate and allows for an easy escape by defendants who know they can use this “free pass” to get a head start. This also has the practical effect of encouraging failure to appear, particularly at times that would allow the defendant to manipulate the system [for instance when 100+ potential jurors have been called for a trial only to be dismissed upon the defendants failure to appear, then the defendant appears the following day and the trial process has to begin anew, weeks or months later, only to repeat itself ad infinitum, as there is no consequence for this failure to comply].

Defendants should absolutely have an opportunity to informally resolve their failures to appear, and most courts are already willing to do so, depending on the situation. However, making a recommendation that the courts should or must recall warrants or render failure to appear inconsequential is an unnecessary infringement on the discretion of the Courts.²⁶⁶

The Kansas Association of Criminal Defense Lawyers was supportive of this recommendation.

KACDL highly encourages the task force to adopt this recommendation. This would eliminate violations related to miscalendarling, transportation issues, or employment or childcare issues, which are an unnecessary use of the court’s resources and jail space.²⁶⁷

The ACLU is in support of programs that help defendants appear for court. It does not believe that warrants should be issued for a defendant’s first failure to appear. “The pretrial system should allow for as much flexibility and support in rescheduling without burdensome procedures as possible. As with all elements of the process, this system should be accessible to people with disabilities and people who speak languages other than English.”²⁶⁸

The Task Force identified that prosecutors, law enforcement, and judges may object to this recommendation as relaxing accountability and consequences for defendants, encouraging them to put little stock in the court date.

14. TEXT MESSAGE REMINDERS

The Supreme Court should implement a text message reminder system.

Existing research or best practices that support this recommendation

Many state and local courts around the country have turned to court reminders to improve court appearance rates. Currently, text reminder systems are used frequently by doctors’ offices, dentists, and other service providers. In medical settings, no-show rates have been reported to range from 15%-30% in general medical clinics, with some primary care offices reporting rates as high as 50%.²⁶⁹ Missed appointments cause a significant financial burden on health care systems as well as negatively impact patient care.

Likewise, court no-shows represent a cost to the judicial branch of government, both in money and in the integrity of the court system. For a defendant to avoid justice by failing to appear in court is seen as an affront to the entire system. High levels of nonappearance cause the system to lose legitimacy in the eyes of the public. These are no less detrimental than the monetary costs.

Many have tried to quantify the monetary cost of failure to appear and compare it to the cost of a robust reminder system. In Multnomah County

Oregon in 2006, officials noted that in cases with a hearing but no warrant, the cost is \$694.94 and in cases where a warrant is issued, apprehension, booking, jail for one day, and a hearing, the cost is \$1,319.78.²⁷⁰ This is consistent with an estimate provided by Kansas Bail Agents Association of \$1,500 per occurrence, although we are not aware of the source of the data.²⁷¹ Text reminders or robocalls are commonly used by bonding agents as one tool to ensure defendants appear in court and reduce nonappearance.²⁷² Douglas County reported in 2017 that failure to appear was the top charge for people booked into the county jail.²⁷³

In an article published by the National Center for State Courts' Pretrial Justice Center for Courts, the authors found that the four most common methods of notification included use of: a mailing, a live phone call, an automated phone call, or a text message.²⁷⁴ The number of notifications and the success at reducing failure to appear rates vary greatly around the country. Some authors have expressed a strong preference for live telephone call reminders.²⁷⁵ Nebraska conducted a pilot project using postcard reminders.²⁷⁶ With the advent of text notification systems many courts have instituted such systems.²⁷⁷ "In Arizona, after court administrators started a pilot program [in 2018] the text reminders for criminal court hearings helped to reduce the number of failure to appear warrants issued in Scottsdale Municipal Court by 51.9% in the first three months."²⁷⁸ New York City not only redesigned their summons form but crafted a series of text messages and tested their effectiveness before²⁷⁹ and after²⁸⁰ the court date. They were able to reduce failure to appear by 36%.²⁸¹

To gather some local information, Task Force member Robert Sullivan agreed to collect self-reported data from defendants arrested on failure to appear warrants in Johnson County. By April 1, 2020, he had collected the information for just over a year. He gathered information from over 5,000 arrestees. The most common reason reported, at 36%, was "forgot." Next, at 22% was "didn't know my court date." Almost 10% indicated they lacked transportation as the reason for nonappearance and 8% were incarcerated somewhere else on their

court date. He estimated that almost 59% of failure to appear could have been mitigated by a text reminder.²⁸²

These results highlight the difference between simple nonappearance and flight risk. The number of defendants who leave their home jurisdiction is relatively small. It takes resources for a person to flee their home and support system, resources that many people do not have. Although their return is more expensive, increased use of technology and police communication make it much easier to apprehend true fugitives.²⁸³ The fact remains that most people who fail to appear are still living locally and fail to appear for reasons other than attempting to abscond.

Costs and funding associated with this recommendation

The Odyssey Case Manager™ system has the capability to provide text reminders. The current cost estimate is \$125,000 to implement the software, \$21,000 annually for a license fee, and \$.0075 per text charge. In the most recent fiscal year, there were 103,862 misdemeanor, felony, and criminal traffic cases filed statewide. Estimating that each case might have three hearing events where a reminder text would be sent, and that it would be sent to the defendant only, that would total 311,586 text messages, or a total of \$2,336.90. If more texts were sent, such as a seven-day reminder and a one-day reminder, that total would double. If all traffic infraction cases received notifications, the number of texts would increase by nearly 100,000 per year.

The judicial branch would have to determine if the Odyssey Case Manager™ notification system could be funded with its existing budget. If not, additional funding sources would have to be located and secured. Tyler Technologies would also have to be engaged to activate this part of the software.

While this report was being finalized, the Kansas judicial branch received grant funding from the State Finance Council. A portion of these grant funds was designated for "the purchase a text

notification system that will interface with the new centralized case management system to send court participants, including parties and jurors, text notifications when certain events occur in a case. Notice could be a newly scheduled hearing, a hearing date reminder, or a payment notification. Notices can be programmed remotely and run automatically.”²⁸⁴

Implementation

Kansas Supreme Court through OJA would be responsible for implementing a statewide reminder system. The Court would have to select the text messaging feature available under the Tyler Technologies contract, budget funds to pay for text messaging, and document business processes to be adopted (e.g., which cases, which events, timing, number of reminders). Decisions would have to be made regarding timing and frequency of text messages. The feature would be active only in those counties that have shifted to Odyssey Case Manager™. A method for collecting cellphone numbers and inputting them into Odyssey Case Manager™ would have to be created and implemented.

Stakeholder concerns

The Kansas Association of Criminal Defense Lawyers was generally supportive of this recommendation but had some requests regarding implementation.

*Concerns regarding text reminders are related to potential communications outside of the presence of an attorney. As such, KACDL would recommend that such communication be one way only or that any responses not be available as evidence or used against the client similar to Juvenile Intake and Assessment Reports. KACDL would also suggest that the notice include an advisement to contact one’s attorney with any questions regarding court.*²⁸⁵

The Pittsburg State University student collective did not want the Task Force to lose sight of the benefits of “live” phone calls.

*[T]he option for live calls should be added to the possibly automated text message reminder. Simply calling people to remind them of their court dates in Jefferson County, Colorado increased appearances from 79% to 92% all because the court official or representative made direct contact with the person involved. Texting may have the same effect, however, having someone who can reply and answer questions on a call, an alternative to simply having an automated text with no ability to reply, will help remind the person that they have an appearance to maintain and allow the person to ask questions before they arrive at their first appearance to be better prepared.*²⁸⁶

The Task Force considered live telephone calls and determined that although that may be possible in some smaller judicial districts, most judicial district districts do not have the staffing resources to make live calls. That said, we encourage courts to review the study done regarding live versus text reminders in Jefferson County, Colorado, noted by the student collective.²⁸⁷

15. PRETRIAL SUPERVISION

The Supreme Court should encourage local jurisdictions to examine whether a pretrial supervision program will reduce unnecessary pretrial detention.

Existing research or best practices that support this recommendation

The use of pretrial supervision programs either in addition to or in lieu of bond have been growing around the country. By setting appropriate conditions of pretrial release, courts can address the risk of flight and the risk to public safety without unnecessarily incarcerating a defendant pretrial. But pretrial supervision is still a restriction of a defendant’s liberty. “Pretrial conditions—especially when multiple conditions are imposed—can unnecessarily burden a defendant’s ability to work, care for children, and meet financial obligations. Most pretrial interventions restrict a defendant’s freedom.”²⁸⁸

The question at the heart of pretrial supervision is how to determine a Goldilocks Rule. In other words, how much is too much, not enough, and just right? Just as studies have shown that one can over-supervise low-risk offenders on probation and make them more likely to reoffend or violate probation, the same holds true for pretrial supervision. An oft-cited study done in 2009 found that “when required of lower-risk defendants, i.e., risk levels 1 and 2, release conditions that included alternatives to detention were more likely to result in pretrial failure. These defendants were, in effect, over-supervised given their risk level.”²⁸⁹

Our research led us to the conclusion that the best practice is not to be overly invasive. This was emphasized by Kurt Level with the Koch Foundation in his presentation to the Task Force. And the position is supported by research.

Pretrial services agencies should avoid resorting to probationary tactics because they risk setting defendants up for failure. In the probation context, supervision has been shown to increase recidivism among individuals who have an otherwise low risk of reoffending. This is in large part because ‘the sheer number of [probation] requirements imposes a nearly impossible burden on many offenders.’ A similar consequence can result in the pretrial context. When a defendant violates a condition of release, he or she may be subject to rearrest, detention, and prosecution for contempt of court—even though, in most cases, the conduct would be legal absent the release condition. To avoid triggering these consequences, pretrial services agencies should attempt to handle [technical] violations of conditions of release administratively and invoke revocation proceedings only when the conduct actually interfered with the court’s function or presented a risk to public safety.”²⁹⁰

Just because the court can impose a wide range of pretrial conditions, does not mean it should do so. Pretrial supervision should not serve as pretrial probation. The purposes are completely different.

Pretrial supervision has only two goals: get the defendant to court and put conditions in place that protect the public. A pretrial supervision program has the potential to either lower or increase the local jail population based on the local judicial culture and philosophy. Resorting to probationary tactics risks setting the defendant up for failure. Pretrial supervision should be reserved for individuals who pose a flight and public safety risk. Those who do not, should be released with no conditions.

And some promising news has been reported regarding virtual pretrial reporting. With the increasing reliance on virtual hearings in the face of COVID-19, some jurisdictions around the country have seen significant decreases in failure to appear by using virtual check-ins for defendants on pretrial supervision.²⁹¹ Anecdotal reports by Task Force members suggest that similar results have occurred in Kansas, though no data is available at this time.

The rigor with which jurisdictions supervise pretrial defendants varies around the state. The judges in at least one Kansas judicial district we spoke to do not revoke pretrial supervision if the defendant tests positive for drugs while on bond. These judges told us it is not realistic to expect changes in behavior immediately. Their philosophy is to connect the defendant to services so the defendant can aid in his or her own defense.

However, judges in another Kansas judicial district we spoke to take the opposite approach. They conduct routine drug testing, impose strict reporting requirements, and do not connect individuals to care during the pretrial phase of the case. The only resource they provide is a substance abuse evaluation. Not surprisingly, this judicial district sees many individuals returning to jail.

There was consensus that conditions of pretrial supervision should be a local decision based on each jurisdiction’s resources with broad discretion to determine the supervising agency. However, the Task Force felt strongly that whoever the supervising agency is, it be well-trained to mitigate the risk of over-supervising people. The Task Force also recommends the use of *The*

*Pretrial Justice Planning Guide for Courts*²⁹² for those courts that adopt a pretrial supervision program. It is designed specifically for judges and court managers interested in improving their jurisdiction's pretrial practices. The worksheets are designed as templates that can be modified to reflect the context in which each jurisdiction's pretrial system functions (e.g., court structure, legal authority, use of money bond, existence of pretrial services). It provides a step-by-step process aimed at a wide range of challenges and stakeholders engaged in reform efforts.

Some judicial districts regularly use commercial bonds in conjunction with pretrial supervision. There is a widely held belief within those judicial districts, albeit anecdotal, that bonds tend to be lower in judicial districts with pretrial supervision programs. The belief is that both are needed, and that commercial bonds and pretrial supervision cannot be decoupled completely due to the need to monitor the more serious offenses. Money bond addresses the risk of flight, while other conditions address public safety.²⁹³

Our survey of judges revealed that 67% had some sort of pretrial supervision program with 78% of them using court services to supervise defendants pretrial. And 69% believe that lack of access to pretrial services impacts the ability to set appropriate bond conditions.²⁹⁴ A survey conducted of prosecutors confirmed that most jurisdictions have a pretrial supervision program. Most use court services officers to monitor compliance, but some use commercial house arrest program staff, the sheriff's department, or community corrections staff.²⁹⁵

Costs and funding associated with this recommendation

It is clear to the Task Force that most judges in Kansas want to have a robust pretrial supervision program. They recognize that bond does not increase public safety, supervision increases public safety. But it comes with a cost. Judicial districts that do not have such programs point to their lack of resources. Funding for an adequate number of staff is lacking, so funding will be needed

to increase staff or provide other resources to adequately conduct a pretrial supervision program. For a benchmark, as of FY 2019, the Kansas Criminal Justice Reform Commission estimates that it costs the State \$7.52 per day to supervise a defendant on court services, probation, or parole.²⁹⁶

Implementation

Local jurisdictions already possess the authority to implement pretrial supervision programs should they choose to do so.

Stakeholder concerns

Koch Industries indicated that:

*Whenever possible, we favor a strong presumption of pretrial release, strict timeliness and procedural protections, and the least restrictive and onerous conditions of pretrial release. In far too many jurisdictions we have seen 'pretrial services' which amount to monitoring and unnecessary supervision, sometimes coupled with fees and check-in requirements. This presents myriad opportunities for innocent people to fail to comply with the terms of their pretrial release, leading to problematic outcomes. Washington D.C. provides a good example of how the balance can be struck, and pretrial services that exist are focused on addressing underlying mental health and addiction issues.*²⁹⁷

Sarah Mays, Chief Court Services Officers in Shawnee County noted:

*The questions and recommendations the Task Force have wrestled with are not foreign to us. We too have questioned and revised how we handle pretrial offenders, in particular those deemed dangerous. The people we have on pretrial supervision are not the ones we had 10-15 years ago or even a year ago. Increased drug usage, mental health issues, socioeconomic issues, and declining resources have changed how we work with pretrial offenders.*²⁹⁸

CCSO Mays also relayed some thoughts from her staff when they were asked about this recommendation.²⁹⁹

One court services officer from the 24th Judicial District appeared to bolster some of the concerns of Koch and others about over-supervision of pretrial detainees.

We do a lot of bond supervisions in the 24th. We supervise murderers, sex offenders, drug offenses, anything the judge wants to put on. If the county attorney feels like there is a safety issue, they report more than once a week or get a GPS and I can track them. The only difference in probation is discretion. On probation, I have discretion in meetings, if someone comes up dirty on a drug test, I have discretion in what intervention to handle it with. On bonds, we see this as the most vulnerable time for them because of the unknown, so I don't have discretion. If they miss an appointment, it's a violation. If they have a dirty drug test, it's a violation. I have even had judges revoke bond because they moved and the address on the bond order didn't match the address the offender was currently living at. If they need or want to go out of state for any reason, they have to contact their attorney to contact the judge to get an order to be allowed to do that. I can't give them permission. If the defendant wants to vary anything on the bond order from what the judge initially ordered in court, they will have to have it in writing from the judge before it will happen. Like over-the-road truck driving, living out of state, being allowed to call in for reporting. It has to be in writing before we will allow it to happen and we don't facilitate those orders, we will tell them to contact their attorney to contact the judge. This works for us.³⁰⁰

Joyce Grover, Director of the Kansas Coalition Against Sexual and Domestic Violence, echoed the concerned expressed by the Battered Women's Justice Project, a national technical assistance provider on criminal justice issues.

Domestic violence cases present several unique challenges when determining bail/PTR (pretrial release) for offenders. The first issue comes with the label of the pending charge. Too often, very serious or chronic violence is charged as a misdemeanor level "assault" or the possibility of enhanced charges due to prior convictions was not investigated or known before the bail-PTR hearing. Thus, it is vital that courts obtain full criminal histories of all offenders, but that there is also some mechanism for looking beyond the labels—both the presenting charge and any prior convictions—to get a more accurate picture of the severity or chronicity of an offender's violence, which can then be reflected in safety provisions for the victim.

Many jurisdictions have implemented a variety of risk assessment tools to assist courts in their determinations of the danger of re-offending posed by a particular offender. There are, of course, many critiques of these various tools, their supporting algorithms and the information collected to complete them. It is important, however, that should a court choose to use a risk assessment tool in domestic violence cases, it should be one that particularly measures the risk of DV re-offending and not just a general re-offense factor.

With the national conversation encouraging jurisdictions to move away from money bail, courts must think creatively and expansively about various conditions that can be imposed on an offender to ensure his return to court as well as the safety of the public and victim. Some states do not include the safety factor in their statutory list of what courts can consider at bail-PTR hearings—hopefully, Kansas does (I haven't been able to verify yet). The following is a list of the most commonly used conditions (and note, some of these should be ordered as conditions even if an offender is not released or cannot post bail):

- *No-contact orders with the victim, children, immediate family, and other witnesses (this does bring up a larger issue about victim autonomy when the victim does not want a no contact order imposed, but that is beyond this email);*
- *Reporting to and supervision by a court or pretrial agency, which can include phone and in-person reporting of varying frequency;*
- *Electronic monitoring to keep an offender physically out of identified exclusion zones. Electronic monitoring comes in various forms—from real-time, 24-7 monitoring and reporting to daily activity reports and may also include automatic notifications to victims of violations;*
- *Substance abuse or mental health evaluations and treatment, and no use of alcohol or drugs (unless prescribed). Unlike batterer intervention programs, substance abuse or mental health treatment will likely not involve any discussions about the facts of a pending charge and thus avoid any potential self-incrimination issues;*
- *Weapons surrender, even if firearms were not used in the presenting case. Firearms pose a significant lethality risk for victims of domestic violence. It is imperative the court consider ordering the surrender of all firearms owned by or accessible to an offender, and (if applicable) any permits to carry or purchase. Finally, the court must spell out a specific enforcement mechanism should the offender fail to comply.*

For conditions that indicate ongoing violence or danger, the court must also have a process for rapid reporting and enforcement of violations of such conditions (as opposed to technical violations, like being late for

a check-in). Research shows that it is the swiftness of imposed consequences that has a greater impact on offender behavior, rather than the length of any jail sentence.

The Kansas Association of Criminal Defense Lawyers is generally supportive, but with some limitations. It expressed its belief that pretrial supervision should not be used in addition to monetary bond, should not be overly burdensome, and should not be overused.³⁰¹

The Kansas Sheriffs' Association was supportive of pretrial services programs but expressed a concern for costs associated with such programs.³⁰²

And finally, Americans for Prosperity Kansas, is supportive of pretrial services programs. In fact, it expressed its desire that this recommendation be strengthened to require every jurisdiction to establish such a program within five years.³⁰³

16. EXPAND PRETRIAL SUPERVISION PROVIDERS

The Kansas Legislature should amend K.S.A. § 22-2802(1)(e) to allow entities or programs other than court services to supervise defendants pretrial and to authorize waiving supervision costs.

Existing research or best practices that support this recommendation

Not all judicial districts have court services officers monitoring defendants on pretrial release. By adding “or pretrial supervision program” brings the statute in line with current practices in some districts where supervision programs exist outside of court services. Court services officers are employees of the judicial branch and are under extreme workload pressures due to lack of adequate funding.³⁰⁴ So, the Task Force believes judges should have the ability to assign or seek resources in their districts as they see fit. Accordingly, we recommend expanding K.S.A. § 22-2802(1)(e) to allow other options for supervision.

Also, adding a provision to waive the supervision fee brings the statute in line with other statutory provisions which require consideration of a defendant's financial obligations.³⁰⁵

We were also guided by the recent Kansas Supreme Court decision in *Creedy v. Kansas Department of Revenue*.³⁰⁶ In *Creedy*, K.S.A. § 8-1020(d)(2) was found to be unconstitutional because it required paying a fee to obtain the procedural due process a driver is entitled to before driving privileges are suspended and did not provide for waiver of the fee due to indigency.

A suggested amendment follows:

Amend K.S.A. § 22-2802(1)(e)

(e) place the person under the supervision of a court services officer or a pretrial supervision entity or program responsible for monitoring the person's compliance with any conditions of release ordered by the magistrate. The magistrate may order the person to pay for any costs associated with the supervision ~~provided by the court services department office~~ in an amount not to exceed \$15 per week of such supervision. The magistrate may also order the person to pay for all other costs associated with the supervision and conditions for compliance in addition to the \$15 per week. The defendant may petition the court for waiver of the costs of supervision if the payment of costs would result in manifest hardship for the defendant.³⁰⁷

Although this is the only amendment necessary for purposes of this recommendation, we would like to draw the legislature's attention to seemingly inconsistent provisions at K.S.A. § 22-2802(7) (prohibiting the imposition of any administrative fee)³⁰⁸ and K.S.A. § 22-2802(15) (allowing magistrate to order the person to pay any costs associated with the supervision of conditions of release of the appearance bond not to exceed \$15 per week of such supervision.)

Costs and funding associated with this recommendation

This recommendation does not create any new programs or positions. The sole purpose of this recommendation is to recognize current practices in some districts.

Implementation

This recommendation requires action by the Kansas Legislature.

Stakeholder concerns

The Kansas Bail Agent Association is the only stakeholder group that has expressed an objection to this recommendation.

*It might appear to some that this recommendation is an attempt to provide 'legal cover' to those pretrial supervision programs which are currently operating beyond the statutory pale. If there are court sanctioned programs operating in Kansas that are not in statutory compliance that information is outside of the ability of stakeholders to fully investigate but it is well within the purview of the Task Force. The Task Force and all the stakeholders have a duty to adhere to the current law and if the Task Force and or stakeholders become aware of practices that violate current state statutes, they would have an ethical responsibility to report them.*³⁰⁹

The Kansas Association of Criminal Defense Lawyers was supportive of the recommendation but was concerned about other costs indigent clients are expected to pay for services.

KACDL supports the language which would allow for limitations to the costs of pretrial supervision. However, as noted above, additional conditions requiring access to services such as substance abuse treatment or mental health treatment will result in significant additional costs to

clients. Those who cannot afford care are those most affected by waiting lists for community, grant, or sliding-scale beds. As such, it would be urged that where additional conditions for treatment are imposed that monetary bond not be required, as that would allow additional funds to be available for compliance with court-ordered conditions.

It is also concerning that the cost of complying with conditions can be so expensive as to render this cost ceiling meaningless. House arrest fees, GPS fees, urinalysis fees, RBU or SCRAM fees for remote alcohol monitoring, etc., are all in excess of the \$15 per week contemplated by statute. For example, house arrest in Johnson County costs a minimum of \$140, which must be paid prior to starting house arrest for 10 days or less on the program. From there the costs go up to \$5 per day or \$14 per day. UAs range from \$16 to \$25 per sample. The amendment does not indicate that the court can waive the costs of compliance such as UAs, house arrest, etc., merely the \$15 per week.

17. EXPAND ELIGIBILITY FOR PRETRIAL SUPERVISION

The Kansas Legislature should amend K.S.A. § 22-2814, K.S.A. § 22-2816, and K.S.A. § 22-2817 and repeal § 22-2815 to eliminate existing restrictions on who may qualify for pretrial supervision and allow supervision by any pretrial supervision entity or program designated by the judge.

Existing research or best practices that support this recommendation

To protect public safety and promote court appearance, as noted in Recommendation #16, courts often turn to some form of pretrial supervision. Under the existing statute in Kansas, K.S.A. § 22-2816, pretrial supervision is not allowed if the defendant is not a resident of Kansas or is a person in need of physical or mental care or treatment,

including care or treatment for any chemical dependency or intoxication. The Task Force can see no valid reason for excluding those groups—particularly, persons in need of physical or mental care or substance abuse treatment. The earlier they can be referred to necessary treatment services with compliance monitoring from the court, the better the outcome. Accordingly, we recommend a change to the statute to eliminate the prohibition. A judge would still have complete discretion whether to release any person on pretrial supervision.

In addition, the same statute requires court services officers to serve the role of pretrial supervision officer. Court services officers are employees of the judicial branch and are under extreme workload pressures due to lack of adequate funding. So, the Task Force believes judges should have the ability to assign or seek resources in their districts as they see fit. Accordingly, we recommend the following statute be expanded to allow other options for supervision, like Recommendation 16.

And finally, the Task Force recommends eliminating references to release on recognizance programs which, as currently used, are no different than supervised release programs. Using separate terms increases confusion.

K.S.A. § 22-2814. ~~Release on recognizance and~~ Supervised release.

Each district court may establish, operate and coordinate ~~release on recognizance programs and~~ supervised release programs which provide services to the court and to persons who are, or are to be, charged with crimes. ~~Release on recognizance programs and~~ supervised release programs, which includes participation by those person's released on a cash or surety bond, a personal recognizance bond, or no bond, shall be administered by a court services officers ~~and~~ or other personnel of the district court pretrial supervision entity or program. ~~Participation by defendants in such programs shall be on a voluntary basis.~~ Nothing in K.S.A. 22-2814 through 22-2817, and amendments thereto, shall affect the right of any person to seek

or obtain release under K.S.A. 22-2802, and amendments thereto, regardless of participation or nonparticipation in ~~release on recognizance programs or a supervised release programs.~~

~~K.S.A. § 22-2815. Release on recognizance; procedures; criteria. [REPEAL]~~

~~(a) Release on recognizance programs shall consist of initial interviews with persons who are being detained and are, or are to be, charged with crimes, to obtain (1) information about certain basic criteria closely related to the likelihood that the persons will appear in court if released, (2) an objective analysis of such information and (3) submission of such information and analysis to the court regarding those persons who are recommended to be released on their personal recognizance under K.S.A. 22-2802.~~

~~(b) Among other criteria, the following basic variables shall be determined for each person interviewed under a release on recognizance program in ascertaining the likelihood that the person will appear in court if released:~~

- ~~(1) Length of residence in the local community;~~
- ~~(2) nature and extent of local family ties;~~
- ~~(3) time in the local area;~~
- ~~(4) stability of employment; and~~
- ~~(5) extent of prior criminal history.~~

K.S.A. § 22-2816. Supervised release; eligibility; agreement; elements of program

~~(a) Supervised release programs shall consist of extensive interviews with defendants who have been denied release on personal recognizance to select those~~

~~defendants who under some form of supervised release are~~ When placing a defendant in a supervised release program, the judge may consider whether the defendant is likely to appear in court when required, is likely to cooperate with and benefit from supervised release and is willing to actively participate therein and remain crime free.

~~(b) In ascertaining the likelihood that if released the person will appear in court without obtaining any new crimes the court should consider:~~

- (1) length of residence in the local community;
- (2) nature and extent of local family ties;
- (3) time in the local area;
- (4) stability of employment;
- (5) extent of prior criminal history and
- (6) any other relevant information.

~~(c) Defendants who are not residents of Kansas; who are the subject of specific detainer orders of other state or federal law enforcement agencies or who are in need of physical or mental care or treatment, including care or treatment for any chemical dependency or intoxication; shall not be eligible for a recommendation for supervised release or to participate in a supervised release program.~~

~~(d) Upon the basis of interviews and other available information, court service officers or other pretrial supervision programs designated by the judge shall prepare and submit, in proper cases, recommendations to the court for supervised release of defendants and shall include suggestions for appropriate conditions for the release of the~~

defendants. If the court orders the release of the defendant with the condition of specific participation in the supervised release program, the court services officer or other pretrial supervision program designated by the judge shall prepare and the defendant shall sign a written agreement containing

- (1) an acknowledgment of the relationship between the supervised release program and the defendant,
- (2) the details of the conditions of release and
- (3) a statement of the consequences of any breach of the agreement by the defendant.

- (e) The supervised release program for each defendant shall be compatible with all required court appearances and shall include appropriate programs for diagnostic testing, education, skills training, employment and counseling. Each defendant under supervised release shall be closely supervised by a court services officer or other pretrial supervision program designated by the judge and may be terminated from the supervised release program by court order revoking the release order or by final disposition of the charges against the defendant.

K.S.A. § 22-2817. ~~Release on recognizance and supervised release; powers of court~~

- (a) For all purposes of ~~release on recognizance programs and supervised release programs~~, each district court may contract for services and facilities; receive property by gifts, devises and bequests; and sell or exchange any property so accepted and use in any manner the proceeds or the property received in exchange.

- (b) To the extent feasible, each district court establishing, operating or coordinating ~~release on recognizance programs and supervised release programs~~ shall arrange, by contract or on such alternative basis as may be mutually acceptable, for utilization of existing local facilities and treatment and service resources, including but not limited to employment, job training, general, special or remedial education, psychiatric and marriage counseling, and alcohol and drug abuse treatment and counseling. Each such district court shall approve the development and maintenance of such resources by its own staff only if the resources to be so developed and maintained are otherwise unavailable to the court within reasonable proximity to the community where these services are needed in connection with the release on recognizance programs or supervised release programs. Each such district court, to the extent feasible and advisable under the circumstances, may use the services of volunteers for such programs and may solicit local financial support from public, private, charitable and benevolent sources therefor.

The amendments noted above are “fixes” to the current statutes that were originally adopted in 1981.³¹⁰

The Task Force would prefer to see a more comprehensive approach to pretrial supervision programs as a condition of release and was particularly impressed with the approach taken by Colorado.³¹¹ That program establishes a community advisory board to be appointed by the chief judge in any judicial district establishing a pretrial services program, which includes representatives from local law enforcement, the district attorney’s office, the public defender’s office, a citizen at large, and—although not required—a member of the bail bond industry who conducts business in that district. The board would formulate a plan, based on certain statutory criteria, to be submitted to the chief judge

for approval. This would create stakeholder buy-in and support for any program established. It also requires the implementation of an empirically developed pretrial risk assessment tool to assesses pretrial risk. That said, there are several other states that have adopted robust pretrial release programs with varying approaches. Any comprehensive approach would benefit from reviewing alternative approaches.

But in the absence of a major overhaul, the specific Kansas statutory amendments recommended here will conform with current practices and not serve as impediments to pretrial supervision programs.

Costs and funding associated with this recommendation

This recommendation does not create any new programs or positions.

Implementation

This recommendation requires action by the Kansas Legislature.

Stakeholder concerns

No concerns were expressed or noted concerning this statutory change.

18. ADDITIONAL FUNDING FOR PRETRIAL SUPERVISION

Adequate funding should be provided at the state or local level so that jurisdictions are not required to charge fees for conditional release, pretrial services, or pretrial monitoring.

Existing research or best practices that support this recommendation

As more and more jurisdictions around the country are questioning the legality and effectiveness of using money as a motivator during pretrial release, the Task Force believes we have to examine and potentially guard against relying on money elsewhere, such as through a fee-based pretrial

supervision program. Although supervision programs that include supervision fees, electronic monitoring fees, interlock devices, regular drug and alcohol screens, educational programs and evaluations have been seen as a panacea for saving counties money by releasing people from jail and back to their jobs and community, are we simply requiring pretrial defendants—people who are presumed innocent—to pay for their release in another way? Are we replacing one money-based system with another?

This concern was raised by several stakeholders. For example, assume it costs \$150 a day to house someone in the local jail. And assume it costs \$15 per day to have a house arrest monitor, \$15 per week for supervision fees, and \$17 for each urinalysis ordered. If a person is unable to pay these fees, his or her supervision will be revoked and the person will return to jail at a cost to the county of \$150 per day. If we believe, as some studies suggest, that pretrial supervision is effective at preventing pretrial criminal activity and ensuring that defendants make all their court appearances, then isn't it worth the state or local subdivisions' absorbing the costs to make sure no one is denied the opportunity to participate due to the lack of financial resources?³¹²

Anecdotally, the Task Force was told that it is not rare for defendants who cannot post bond to also be unable to obtain release onto pretrial supervision because they do not have the money to pay for an electronic monitor or weekly drug tests or supervision fees. So they remain in jail—under either money-based system.

A survey of prosecutors indicated that some pretrial supervision programs in Kansas are completely free to the defendant, while others have several fees that the defendant is required to pay. It is totally dependent on the resources available in each of Kansas' 31 judicial districts.

In its presentation to the Task Force, the Federal Public Defender's Office commented that federal pretrial supervision is provided at virtually no cost to the defendant. The costs are born entirely by the government including entry to inpatient

and outpatient treatment programs and electronic monitoring. Although a copay for treatment and electronic monitoring is requested, it is rarely collected or enforced.

Costs and funding associated with this recommendation

The Task Force believes that the cost of pretrial supervision programs would be less than the cost of incarceration.³¹³ A robust data collection system could test this hypothesis. In the 23rd, 17th and 15th judicial districts, Northwest Kansas Community Corrections (that does pretrial supervision and parole supervision in addition to Kansas Department of Corrections supervision) has been able to fund treatment, house arrest and other services through grant funding, when necessary.

Implementation

This recommendation would be implemented either by statutory change by the Kansas Legislature or by local government units by agreement.

Stakeholder concerns

This recommendation was brought to the Task Force's attention by stakeholders. The Kansas Bail Agents Association properly noted what they deemed to be the hypocrisy in requiring judges to consider nonmonetary forms of release while requiring monetary conditions of pretrial supervision.³¹⁴ The Kansas Association of Criminal Defense Lawyers also indicated its concern about the costs clients are expected to pay for pretrial services.³¹⁵

The ACLU agrees with this recommendation, also stating its objection to fees that can have a disproportionate burden on the poor.

People must not be forced to bear the cost of their own pretrial supervision. Regardless of the type of supervision required, the associated costs should be carried by the government. These government fees are a form of wealth-based discrimination,

*and they exacerbate racial disparities and systemic racism in the criminal legal system.*³¹⁶

The Kansas Sheriffs' Association expressed its fear that the cost of release would be shifted to local governments as an unfunded mandate.³¹⁷

The Task Force is again moved by the cornerstone of our criminal justice system that all people are presumed innocent until they are found guilty by a judge or jury. Requiring people to pay anything prior to conviction chips that bedrock.

Constitutional Amendment

19. EXPLORE AMENDMENT TO CONSTITUTION

The Kansas Legislature should consider exploring whether a judge should be allowed to detain persons not accused of capital offenses without bond until trial, by convening appropriate stakeholders to discuss amending the Kansas Bill of Rights. It is the Task Force's position that such an amendment would be necessary to allow a judge to intentionally detain a defendant who has been determined—after a full due process hearing—to be a danger to self or others or presents such a serious risk of flight that no condition of release could adequately address either risk.

Existing research or best practices that support this recommendation

We have discovered that it is not unusual for a judge in Kansas (or anywhere in the country for that matter), frustrated by the risk to public safety or flight that a defendant may pose, to set a bond at an amount that will guarantee continued detention until trial. We believe that §9 of our Kansas Constitution Bill of Rights does not allow such detention, because it provides a right to bail (release)—either secured or unsecured.

The Kansas Bill of Rights authorizes courts to use money bond to address only the risk of flight. We know this not only because of caselaw, but also

because the only time a court can forfeit a money bond is for failure to appear. In all other situations, the court revokes the bond and new conditions are put in place. There is no impact on the money posted. If someone commits a new crime while on bond, there is no impact on the money. In addition, money cannot guarantee public safety, it only allows those with the means to arrange bond to be released, and those who cannot to be detained. Dangerousness has nothing to do with a release decision based on money. In other words, bond does not increase public safety.

But we also realize that some defendants do pose a real danger to either their victim(s) or the community and there may be no condition of release that could adequately address the danger. The Task Force struggled with how to deal with this situation in Kansas.

Based on the United States Supreme Court decision in *United States v. Salerno*³¹⁸ we know that when a state constitution does not provide a right to bail and instead has language identical to the Eighth Amendment to the United States constitution, some defendants may be denied bail based on dangerousness and flight. But the courts must vigilantly honor the right against excessive bail [which might be violated through on-purpose detention], due process, and equal protection. To satisfy procedural due process, denying one's liberty triggers a more rigorous hearing than most of the bail hearings we see today.

Some states have done this by developing a “detention eligibility net”³¹⁹ in their constitution identifying certain crimes that create a presumption of detention without bail. But these have historically assumed a further limiting process requiring judges to make some additional finding that would allow detention for those listed crimes—like the United States Supreme Court required in *Salerno*. So, there is no “automatic” detention based on charge alone. In Kansas, the net only allows the detention of defendants facing capital offenses, and the limiting process requires that detention, even in the case of capital offenses, be based on a finding that the proof is evident or the presumption great.

The Task Force was advised that some states, with bail provisions like the one in Kansas, who want to widen their detention eligibility net find it difficult to change the crimes listed because it requires a constitutional amendment. As an alternative, some have attempted to avoid this by a general provision in their constitution with more detail adopted legislatively. The Task Force is unaware of any state supreme court that has definitively ruled on this issue yet.³²⁰ There have been some successful legal challenges to crime-based constitutional provisions particularly when they provide an absolute denial of bail based on the crime charged as opposed to a consideration or a rebuttable presumption.³²¹

We obtained a lot of valuable input from stakeholders on this topic. It led us to the conclusion that this is an issue that deserves much more in-depth research with varied stakeholders to find the right fit for Kansas. This topic deserves its own task force, one appointed by some entity other than the judicial branch that may have to rule on the constitutionality of any approach taken. We identify the constitutional issue in this report because the current Kansas constitutional language directs much of our discussion regarding pretrial detention in Kansas.

We share here only some of the approaches we discussed, although we do not make any recommendation. We provide this only to help any group that examines this issue to see what ground we have plowed—to the limited extent we have plowed any.

1. Our first approach was very simple, adopt identical language to the Eighth Amendment as well as an accompanying statutory procedure guaranteeing due process. We felt that if our Constitution were changed to mirror the Eighth Amendment, we would have the benefit of a wealth of case law interpreting the procedures we must follow in bonding.

Amend Article 9 of the Kansas Bill of Rights as follows:

~~§9. All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.~~

Although we also discussed a companion statute that would set out the due process required to impose a preventive hold (no bond allowed), we quickly realized that it would need to be closely tied to the federal statute and felt uncomfortable making any specific recommendations about the form of the statute without more input. And because this meant actually eliminating an expressly articulated right to bail, we recognized the potential for opposition from virtually all persons in and out of the criminal justice system.

2. Our second approach was equally as simple. Although it maintained the existing language regarding a right to bail, it specifically speaks to dangerousness. Again, any amendment would have to be accompanied by statutory provisions guaranteeing due process whenever the state requests preventive detention. But this approach would create an unlimited eligibility net that could subject it to challenge.

Amend Article 9 of the Kansas Bill of Rights as follows:

§9. All persons shall be bailable by sufficient sureties except for capital offenses and for any offense where the person is found to be a danger to self or others and no conditions of release can adequately address the risk, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

3. Our final approach was the result of a review of the Ohio³²² and New Mexico constitutions. The Kansas Constitution was based on Ohio's constitution, so it seemed natural to look to Ohio. We also examined the New Mexico constitution which reads the same as ours, but has two additional paragraphs that we found would work well for Kansas:

Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.

A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.³²³

But what we initially saw as “simple” solutions, were all very complex, including this last option we examined. Like the famous game of whack-a-mole, each suggestion created new concerns. The Task Force believes that the scope of this issue and the rapidly developing caselaw requires a much more in-depth review with key stakeholders and legislators devoted solely to this issue.

We conclude by noting that this is a common issue being addressed in states all over the country. Since 1979, 19 states that had constitutional provisions similar to the Kansas Constitution have changed their constitutions to allow more expansive pretrial detention for certain crimes.³²⁴ The National Center for State Courts released a White Paper in February 2020 examining Pretrial Preventative Detention in the District of Columbia, New Jersey, New Mexico, and Arizona. It expressed caution in establishing preventive detention in state constitutions.

*Experts express the need for caution and careful consideration of the potential consequences of expanding the authority to detain defendants pretrial. Their concerns arise from potential use of overly expansive categories of persons and classes of crimes subject to preventive detention, as well as the potential absence of rigorous due process safeguards. They fear these changes may lead to even greater numbers of people being detained under the guise of pretrial justice reform.*³²⁵

Costs and funding associated with this recommendation

It is anticipated there would be some costs associated with detention hearings that would be required to hold anyone without a bond for public safety reasons.

Implementation

This recommendation would require action by the Kansas Legislature. Both the Kansas Legislature and the Kansas electorate would ultimately have to vote to change the Kansas Constitution.

Stakeholder concerns

The Kansas Bail Agents Association is opposed to any change in the Kansas Constitution right to bail.

*[W]e do not think the Kansas Supreme Court or agencies or Task Forces operating at its direction or judges of the Kansas court system should get into the business of calling for changes to the Kansas Constitution. Obviously, given what happened in New Mexico and New Jersey, we would be opposed to any constitutional changes that would infringe upon the right to bail.*³²⁶

The Kansas Association of Criminal Defense Lawyers is opposed to this recommendation:

KACDL is opposed to changes that would allow the Court to hold an individual without a bond. However, should such change be adopted by the Task Force, an evidentiary hearing where in the burden to demonstrate dangerousness or risk of flight is on the prosecution should be required in order to exercise such an infringement of pretrial liberty.

*KACDL would support a definition of pretrial detention in order to facilitate consistency throughout the state.*³²⁷

The owner of Owens Bail Bonding, State Rep. Stephen Owens, submitted a nine-point objection to adopting a constitutional amendment, objecting particularly to any recommendation that allows for preventive detention.³²⁸

The Kansas Sheriffs' Association supports exploration of a constitutional amendment to enable a holding a person without bond when they exhibit a risk to public safety.³²⁹



VICTIM NOTIFICATION

Local detention facilities and law enforcement agencies should implement victim notification systems that notify victims whose public safety may be at risk when offenders are released pretrial, either by jail release or release on site by law enforcement. In addition, whatever entity provides pretrial supervision should have a system in place to notify victims of any pretrial behavior that may pose a risk to the safety of the victim.

The two main purposes of pretrial detention are risk of flight and risk to public safety. Regarding public safety, victims' groups expressed their concern that if more people are released pretrial it is essential that victim notification systems are in place to protect them. The Kansas Coalition Against Sexual Assault and Domestic Violence expressed concern that victim safety be the primary consideration when the detention decision is made. Victims need to be notified of release and advised of protective measures they can take. The Attorney General's Office expressed concern that if people are placed on pretrial supervision rather than detained, there

must be a system in place to notify victims if an offender's behavior while on supervision has the potential to present a risk to the victim. Likewise, the Kansas Peace Officers Association and the Kansas Association of Chiefs of Police both expressed its concern for the safety of victims as it relates to the detention decision. The Kansas Bail Agents Association also expressed a concern for victim safety. It noted that a high failure-to-appear rate would inconvenience the victim and raise anxiety. Systems with poor accountability tend to revictimize and increase the possibility of victim intimidation.

A review of current state statutes revealed that several statutory provisions already deal with victim notification in Kansas.

- “Victims of crime, as defined by law, shall be entitled to certain basic rights, including the right to be informed of and to be present at public hearings, as defined by law, of the criminal justice process, and to be heard at sentencing or at any other time deemed appropriate by the court...” Kan. Const. art. XV, § 15.

- The Kansas Bill of Rights for Victims of Crime provides that “(7) Measures may be taken when necessary to provide for the safety of victims and their families and to protect them from intimidation and retaliation.” K.S.A. § 74-7333.

Offenders in State Prison System or Juvenile System:

- For those offenders in the state prison system, state law requires that except for notifications of releases due to a court order, escape or death, victims must be notified by the secretary of corrections in writing at least 14 days before an inmate is released. K.S.A. § 22-3727.
- The county or district attorney is required under certain circumstances to provide notice to victims of the escape or death of a committed defendant while in the custody of the secretary for aging and disability services. K.S.A. § 22-3727a.
- Prior to the release of a person committed under this sexually violent predator act, the secretary of the department of aging and disability services shall give written notice of such placement or release to any victim of the person’s activities or crime who is alive and whose address is known to the secretary. K.S.A. § 59-29a13.
- The county or district attorney shall give written notice to any victim at least seven days prior to the release of a juvenile offender. K.S.A. § 38-2374. But see K.S.A. § 38-2379 (alludes to at least 30 days’ notice).

Offenders in Local Jails:

The statutory requirements are more limited when it comes to local jails. Jails have a much higher volume of intake and releases and releases occur more randomly. Jail releases happen any time of day, unlike prison releases. It creates a serious

administrative challenge for local jails to keep track of the victims, their contact information, and their notification preferences for the high volume of intake and releases.

The Sheriffs Association advised the Task Force that it has been working to develop an automated system for notification of jail releases for approximately five years. It has partnered with the Kansas Department of Labor for a grant to implement such a system. Through a competitive bidding process the Appriss VINE System was selected. VINE (Victim Information and Notification Everyday) is currently in use in 48 states.

With the VINE system, the victims decide if they want notice and, if so, the victims can select multiple methods of receiving the notice (text, e-mail, phone, etc.). The victims can also decide when notices should be received (24-7, only during specific times of day, etc.). VINE also keeps the victims’ notification request in the system for up to one year providing notification if the offender re-enters any jail using the VINE system. Notification is generally made within 15 minutes of the intake or release of the offender. VINE also provides help to the victims through a 24-7 help line if they have difficulty signing up for notices, do not have access to electronic signup, want to change notification preferences, or have other issues with the system. That support line can also refer the victims to local services as well.

The grant provided funding to place the VINE system in 80 of the 97 county jails in Kansas. (Eight counties do not have a county jail and one county jail is currently not in use. Those counties contract with neighboring counties.) Implementation of the VINE system in those 80 counties was completed at the end of 2018. In 2019 the Sheriff’s Association received additional funding to implement VINE in the remaining 17 county jails. By the end of March 2020, 92 of the 97 counties had implemented the VINE system. Four additional counties are actively engaged in VINE implementation and the Stevens County jail is still deciding whether it will implement VINE.

In the VINE system, the victim is responsible for requesting the notification while law enforcement is responsible for providing victims information on how to request notification. The Office of the Attorney General Victim Services Unit is now responsible for the statewide coordination of the VINE system, through creating the position of VINE Coordinator under K.S.A. § 75-711. The VINE coordinator is required to “work with interested parties, including, but not limited to, the sheriffs throughout the state, to oversee the implementation and operation of the VINE system throughout the state.”³³⁰

The Sheriffs’ Association provides information to all Kansas law enforcement agencies about providing the proper information to all crime victims for the VINE service.

Notification by Law Enforcement:

As amended in 2019, K.S.A. § 22-2307 contains requirements for law enforcement to have policies that include advising **victims of domestic violence** of how they can be alerted to a person’s release from jail. This is not limited to sheriff’s deputies but includes all law enforcement agencies.

“(c) Such written [domestic violence] policies shall provide that when an arrest is made for a domestic violence offense as defined in K.S.A. § 21-5111, and amendments thereto, including an arrest for violation of a protection order as defined in K.S.A. § 21-5924, and amendments thereto, **the officer** shall provide the victim information related to:

- (A) The fact that in some cases the person arrested can be released from custody in a short amount of time;
- (B) the fact that in some cases a bond condition may be imposed on the person arrested that prohibits contact with the victim for 72 hours, and that if the person arrested contacts the victim during that time, the victim should notify law enforcement immediately; and

(C) any available services within the jurisdiction to monitor custody changes of the person being arrested, including, but not limited to, the Kansas victim information and notification everyday service if available in such jurisdiction.

- (d) All law enforcement agencies shall provide training to law enforcement officers about the policies adopted pursuant to this section.”³³¹

Notification by Pretrial Supervision Program:

There are no current requirements for pretrial supervision programs to provide any notice to victims whose public safety may be at risk from an offender.

Reason for rejection

The Task Force believes there are sufficient notification processes in place. All the entities noted in the recommendation have some form of statutory duty to notify victims now, with the exception of pretrial supervision programs. A pretrial supervision officer who believes a victim may be at risk is able to quickly notify police and allow law enforcement to handle the situation. No stakeholders raised this as a concern, nor were pretrial supervision officers aware anecdotally of any issues related to victim notification.

SPECIALTY COURTS

Grant funding from the state should be used to provide incentive to establish specialty courts.

Specialty courts, also known as problem-solving courts or therapeutic courts, can take many forms. The most common specialty courts are drug courts, DUI courts, mental health courts, veterans’ courts, and domestic violence courts, although this list is not exclusive. They use “therapeutic or problem-solving procedures to address underlying factors that may be contributing to a party’s involvement in the criminal justice system, i.e., mental illness or drug, alcohol, or other addiction. Procedures may

include treatment, mandatory periodic testing for a prohibited drug or other substance, community supervision, and appropriate sanctions and incentives.”³³² Duration and result, whether it be dismissal of the charges or diminished charges or something else, varies widely.

Specialty courts claim to reduce recidivism and therefore increase public safety. More than 80% of persons charged with a crime in the United States misuse illicit drugs or alcohol, and nearly one-half have a moderate-to-severe substance use disorder.³³³ Continued substance use is associated with a two- to four-fold increase in the likelihood of criminal recidivism. Studies show that adult drug courts significantly reduce criminal recidivism³³⁴—typically measured by re-arrest rates over at least two years—by an average of approximately 8% to 14%.³³⁵ “A national study of 23 adult drug courts—the Multisite Adult Drug Court Evaluation (MADCE)—examined a wide range of outcomes in addition to criminal recidivism. Not only did adult drug courts in the MADCE reduce crime, they also significantly reduced illicit drug and alcohol use, improved participants’ family relationships, reduced family conflicts, and increased participants’ access to needed financial and social services.”³³⁶ Some studies have found them cost effective, producing an average return on investment of approximately \$2 to \$4 for every \$1 invested—a 200% to 400% return on investment. This translated into net economic savings for local communities of approximately \$3,000 to \$22,000 per participant.³³⁷ However, the methodology for such assessments varies across the country, with no standard method to analyze the costs.

Mental health courts were created to improve outcomes for justice involved individuals with serious mental health disorders or co-occurring substance use and mental health disorders. “Evidence is convincing that MHCs significantly reduce criminal recidivism compared to probation and other community-based dispositions for offenders with mental health disorders... [but] [c]ost-effectiveness analyses have produced mixed findings.”³³⁸ At least one study found that “treatment costs were approximately \$4,000

more per participant per year than probation or adjudication as usual, and the higher treatment costs were not recouped over a six-year follow-up period.”³³⁹

In 2012, the Blue Ribbon Commission presented its report to the Kansas Supreme Court recommending, among other things, that “[t]he Supreme Court and its Office of Judicial Administration should continue examining the efficacy of specialty courts, including veterans’ courts.”³⁴⁰

One year later, the Supreme Court established the Specialty Courts Commission to study the status of specialty courts in Kansas and to suggest procedures for judicial districts to consider when establishing a specialty court. In its December 2013 report to the court, the Commission recommended, among other things, that mandatory statewide specialty court standards be adopted and that a more broadly representative group prepare the standards. It also recommended that the court require, by rule, that specialty courts be certified periodically by the Office of Judicial Administration, that education about issues addressed by specialty courts be offered, and that judicial districts refer to the National Center for State Courts Problem Solving Justice Toolkit.³⁴¹ Finally, the Task Force recommended a statutory change to K.S.A. § 21-6610 to allow a resident defendant convicted of an offense in another Kansas county to participate in the offender’s home county drug court. To date, said amendment has not been adopted.

In 2014, the Kansas Supreme Court appointed the Specialty Courts Standards Task Force to recommend mandatory statewide standards for specialty courts, identify the likely costs and benefits of the adoption of these standards, identify how the standards would likely impact the development of specialty courts in urban and rural areas, and make any other necessary recommendations.³⁴² In 2017, the Kansas Supreme Court adopted one of the rules recommend by the Task Force, which set voluntary uniform standards for operation.³⁴³ The new standards include a recommendation that the court establish measurable

goals and objectives, use evidence-based practices, and have trained, knowledgeable judges overseeing the specialty court.³⁴⁴

That said, specialty courts cannot be sustained without interdisciplinary teams of court employees, judges, prosecutors, social workers, treatment professionals and others. Accordingly, additional resources are needed in terms of staff and the availability of treatment at no cost if necessary. Studies seem to indicate that with most specialty courts there is a consistent return on investment of 100% to 200% in terms of reduced recidivism and the return of the offender as a productive member of the community. But without adequate resources, the benefits of specialty courts cannot be realized.

Reason for rejection

Judicial districts have the complete discretion to establish specialty courts in their jurisdictions now. One issue is funding. The Task Force concluded that recommending a grant funding process through the legislature would put another layer of state reporting and accountability on programs that are already accountable to the Supreme Court. Judicial districts are free to seek out grant sources for funding or request funding, if available, from the judicial branch or their counties if they can establish the need in their community and the anticipated outcomes.

TRANSPORTATION

Develop programs providing transportation assistance to defendants to promote court appearance.

Task Force members were informed by groups such as The Bail Project in St. Louis that providing public assistance vouchers or Uber rides in metropolitan areas was a substantial benefit in getting city defendants to make court appearances. Task Force members also contacted ministerial alliances in the McPherson and Manhattan areas and found that churches provided some assistance in getting people to court in those communities.

Reason for rejection

The Task Force recognizes the difficulty in getting to court in most small and rural Kansas communities; the difficulty in administering an effective ride program provided by churches or charities; and the difficulty in funding and administering a ride program by a government agency. Some urban jurisdictions do provide limited public transportation voucher assistance, but only for post-conviction probationers or parolees. It has not been extended to defendants in pretrial status.

The Task Force concluded that more data would need to be gathered regarding the prevalence of transportation being the primary reason for failure to appear before it could justify that funding or resources be provided for such a program. In Johnson County, it was listed as the third most frequent reason defendant's stated for not appearing in court.³⁴⁵ We do not know if it would rank that high in other jurisdictions. But the Task Force was encouraged by recent adjustments made by courts around the state related to remote appearances. These successes convinced us that the ability to appear remotely was a simpler and proven approach to facilitate court appearance and its continued use should be considered even after all court users can return to courthouses around the state.

ELECTRONIC MONITORING

Require all high-risk defendants be placed on electronic monitoring.

Some courts around the country place people at high risk for failure to appear on electronic monitoring so their whereabouts are always known.

Reason for rejection

Because the research the Task Force reviewed³⁴⁶ indicated use of electronic monitoring had not been shown to improve public safety or court appearance rates, was costly, carried a stigma, and was a heavy restriction on liberty, the Task Force was wary of its widespread use and was not prepared to recommend mandatory placement of pretrial

defendants on house arrest. This is best left to the judge's discretion. Moreover, federal courts in Kansas have found that house arrest is a deprivation of liberty and as such it cannot be imposed as a condition of release without due process of law and a finding that less restrictive alternatives are ineffective.³⁴⁷

AMEND K.S.A. § 22-2802(10)

Amend K.S.A. § 22-2802(10) as follows:

- (10) A person for whom conditions of release are imposed and who continues to be detained as a result of the person's inability to meet the conditions of release shall be entitled, upon application, to have the conditions reviewed without unnecessary delay by the magistrate who imposed them. If the magistrate who imposed conditions of release is not available, any other magistrate in the county may review such conditions. No defendant shall be detained solely because the defendant is unable to meet the financial conditions set by the magistrate for release.

The Task Force reviewed numerous cases nationwide that have challenged pretrial detention practices under the Equal Protection Clause and the Due Process Clause of the U.S. Constitution.³⁴⁸ One case typical of the others is *Pierce v. City of Velda City*.³⁴⁹ It was a declaratory judgment action from the United States District Court, Eastern District of Missouri:

The use of a secured bail schedule to set the conditions for release of a person in custody after arrest for an offense that may be prosecuted by Velda City implicates the protections of the Equal Protection Clause when such a schedule is applied to the indigent. No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest

upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.

In addition, the ABA Pretrial Release Standard 10-1.1(e) instructs "The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay."³⁵⁰ The federal statute regarding conditions of release contains similar language—"(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C.A. § 3142(c)(2).

The Kansas Bail Agents Association advised the Task Force during its presentation that our jails are not full of people who are only there because they cannot post bond. The sheriffs we spoke with disputed that claim.

Reason for rejection

The Task Force concluded that a statutory amendment was not necessary for several reasons.

First, the legislative preference for release regardless of financial status is clearly set out in K.S.A. § 22-2801.

The purpose of this article is to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges or to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

Second, a judge is not required to impose a money bond at all.³⁵¹

Third, K.S.A. § 22-2802(8) already requires a judge to consider the defendant's financial resources when determining the conditions of release.

Finally, financial inability to post bond is addressed in the Best Practices-Conditions of Release:

*A review of these cases leads us to conclude that until either the Kansas Supreme Court or the United States Supreme Court rules on this issue, the best approach is the conservative one—begin with the assumption that bond must be affordable and when a person is a flight risk set bond at the minimum amount necessary to achieve the goal of appearance in court given all the circumstances. This position is bolstered by the language of K.S.A. § 22-2802(8) requiring the judge to take into account the defendant's financial condition in determining conditions of release.*³⁵²

It is anticipated that financial inability to post bond will also be a necessary part of any discussion of a constitutional amendment as outlined in Recommendation 19, above.

SPEEDY TRIAL CLOCK

K.S.A. § 22-3402 should be amended to roll back the changes made in 2014 increasing the speedy trial clock from 90 to 150 days for those in custody.

Stakeholder Cal Williams, retired attorney and bond agent, made a persuasive presentation to the Task Force³⁵³ reminding us that the ultimate responsibility for managing the trial calendar rests with the trial court.³⁵⁴ Accordingly, judges are the gatekeepers who can reduce pretrial detention by strictly monitoring the progression of a case. The Task Force was cognizant of this role in developing best practice procedures. We recommended that conditions of bond be examined for persons being detained pretrial whenever a continuance is requested by either party. Just as judges are anxious that a person released pretrial will reoffend in a serious and violent manner, judges are also concerned that a defendant has languished in jail pretrial with no one monitoring as to the length of or reasons for it.

We believed his suggestion to examine the unintended consequences related to pretrial detention by increasing the speedy trial clock

by 60% merited review. Unfortunately, because we do not have a statewide database to mine for the information, we had no easy way to measure his hypothesis. Besides talking to judges and prosecutors, we looked at time to disposition reports before and after the legislative change and did not notice any appreciable difference. In other words, general case resolution was not taking longer. But that did not answer the question regarding whether defendants were remaining incarcerated longer.

The Task Force believes this question merits further review once we have data collection systems in place to accurately measure the impact of the 2014 legislation.³⁵⁵ In the meantime, we believe we have focused on the judge's role in moving cases quickly through the system to avoid long periods of pretrial incarceration in our Best Practices recommendations.³⁵⁶



DIVERSION OR DEFLECTION PROGRAMS

Diversion is defined by Kansas statute as “referral of a defendant in a criminal case to a supervised performance program prior to adjudication.”³⁵⁷ This referral occurs post-charging, but pre-adjudication. If the diversion program is successful, the prosecutor generally agrees—by contract—to dismiss the charges against the defendant with prejudice. It is a means to avoid a judgment of criminal guilt.³⁵⁸ State statute requires prosecutors to notify defendants of the availability of diversion in writing, along with policies and guidelines for its use.³⁵⁹

Deflection programs, on the other hand, reroute individuals with behavioral health needs before arrest or before contact with the criminal justice system. One of the most well-known deflection programs, and the one examined by the Task Force, is called the Law Enforcement Assisted Diversion Program or LEAD. These programs began in 2011 in Seattle, Washington and have since been replicated in several states. In the program, “police officers exercise discretionary authority at point of

contact to divert individuals to community-based, harm-reduction intervention for law violations driven by unmet behavioral health needs.”³⁶⁰ In 2015, an evaluation of the Seattle program found that LEAD participants were 58% less likely to be arrested after enrollment in the program than the control group.³⁶¹

One Task Force member spoke to Emily Richardson, manager, Co-Responder Services at the Colorado Department of Human Services, about their LEAD program. They have been piloting a program in four sites around the state that has produced promising results.³⁶²

Although it was raised as a “parking lot”³⁶³ issue, both diversion programs and deflection programs were viewed favorably by the Task Force. But the Task Force decided not to pursue a recommendation regarding diversion or deflection programs. These are prosecution and law enforcement programs and offered solely at their discretion. The lack of resources to pursue both programs was considered a major deterrent in some parts of the state. Some prosecutors have no way to supervise people on diversion, nor

are behavioral health units and law enforcement present in adequate numbers in much of the state.

The Task Force supports any program that defers or deflects an offender from pretrial arrest or detention as quickly as possible. But it was also informed that the Criminal Justice Reform Commission³⁶⁴ is currently considering diversion programs as part of its recommendation. The Commission was also examining mental health issues statewide. Moreover, in the 2020 legislative session, HB 2708 was introduced that would “[a]llow prosecutor’s office to enter into agreements for supervision of people on diversion and allowing people on diversion to participate in the certified drug treatment program.”³⁶⁵ The Task Force has already included support for this legislation in a prior recommendation.

MANDATORY JAIL DATA COLLECTION AND PROSECUTOR DATA COLLECTION

A recommendation was not made in this area, but it was raised as a “parking lot” issue. A majority of the Task Force believed this would be a significant hardship for some jails in the state as well as prosecutors’ offices. Although it was recognized that many evidenced-based practice studies will require information from these groups, it is best to try voluntary methods of collection rather than statutory mandates. Evidenced-based practices that keep people out of jail while maintaining the integrity of the court system and public safety should be supported by both these groups, so collecting needed data should be a cooperative endeavor.

EXPANDING COURT HOURS

A recommendation was not made in this area, but it was raised as a “parking lot” issue. The suggestion was that courts be encouraged to provide some court times after normal business hours to accommodate the working community and decrease failures to appear. A majority of the Task Force felt that this was not possible given current resources and staff shortages. Some counties have only one or two clerks and struggle to keep up during normal

business hours. One judge reported anecdotally that his jurisdiction had tried this and did not get enough people to take advantage of it to make it worthwhile. One Task Force member mentioned that even municipal courts that have offered amnesty days do not get much business after normal work hours even though they operate under extended hours for such programs. It was agreed that this option should be a part of overall training on pretrial justice for judges to consider whether this option would be possible in their districts, decrease failure to appears, and be a benefit to court users. In some jurisdictions this will be impossible due to staffing resources. In others it may work well. The Task Force believed it was best to educate judges on this option but not make it a separate recommendation.

POSTSCRIPT

Immediately prior to publication of this report, but too late for discussion by the Task Force, two concerns were raised with the Chair by Kansas public defenders that bear mentioning.

First, they believe a clear process needs to be in place to timely appeal the district judge’s bond decision. This is discussed briefly in Appendix B, Best Practices-Conditions of Release, Section IV. There is no direct appeal right and if raised after conviction, the defendant is required to show that the unlawful pretrial confinement hampered his or her defense. Although briefly discussed by the Task Force, no recommendation regarding a right to appeal was addressed one way or the other.

Second, they believe the practices throughout the state related to the revocation of bail should be examined. These practices result in significant pretrial detention. They expressed concern that defendants have very little opportunity to contest the basis for the revocation. Instead, they are arrested on a warrant and held in jail with no advance notice of the reason. They stressed the importance of a hearing in advance of revocation where an attorney is present, the prosecution bears the burden of proof, and the rules of evidence apply. Revocation of bail was not examined by the Task Force.



Task Force members Sal Intagliata, left, a Wichita lawyer, and Salina Municipal Judge Brenda Stoss.

[A]s we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don’t know we don’t know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.³⁶⁶

We started our first meeting of this two-year journey with several guiding principles that we believe we have been true to throughout the process.

- Find an appropriate balance between a defendant’s liberty interests and the presumption of innocence versus the risk of flight and public safety.

- Seek out all sides of an issue, examine the issue, and confront the pros and cons with an open mind.
- Encourage input from stakeholders.
- Address measurable problems with measurable solutions.
- Avoid focus on topics and approaches the Task Force considered taboo.

The members of the Task Force came to work with an in-depth knowledge of the workings of the criminal justice system in Kansas. There was not much its members did not know. But we found ourselves reviewing what seemed like millions of pages of literature, research, and case law. We met with stakeholders all over the state to learn what was happening from their points of view. We reached out to groups that we knew had varied perspectives. We welcomed experts from outside of Kansas to help educate us on the issues. We traveled to different states to see programs in action and meet with groups of experts. We were sponges.

And the more we thought we knew, the more we discovered. New studies and position papers were coming out every week. New lawsuits were being filed all over the country. We were quickly approaching the danger zone described by Secretary Rumsfeld as the unknown unknowns.

Many times, during our discussions, members would “throw the flag”—and yes we did use actual flags—and point out that the arrestee and the defendants we were talking about were entitled to a presumption of innocence and liberty pending trial, not a presumption of guilt and preventive detention. There was not a meeting in which this was not stressed. But we also weighed this against risk of flight and public safety, which require different approaches. Many government officials argue that a defendant’s appearance in court is important, but that it pales in comparison to the public’s safety.³⁶⁷ We were frustrated by an inability to detain the dangerous offender without bond. But our Kansas Constitution clearly does not allow it.

We encouraged input from stakeholders, those listed in the Supreme Court Order and many others. Members made presentations to Kansas judges at regional trainings seeking their input. We attended annual meetings of the Kansas Chapters of the League of United Latin American Citizens (LULAC) and the National Association for the Advancement of Colored People (NAACP). We attended a meeting in Topeka in advance of Mother’s Day of the group Free Black Mamas. We met individually with several judges, district attorneys, and sheriffs around the state. We spoke to pretrial inmates at the Sedgwick County Jail. We spoke at Continuing Legal Education programs for the Kansas County and District Attorneys Association (KCDA), the Federal Public Defenders Conference, and Kansas Association of Criminal Defense Lawyers. We spoke to the Johnson County Chiefs of Police, the Young Women’s Christian Association (YWCA), and visited the Bail Project in St. Louis. We conducted two surveys through the Kansas Sheriffs’ Association; two surveys of judges in Kansas; and one survey of the KCDA. We met with the facilitator of the Kansas Criminal Justice Reform

Commission before their first meeting. We met with members of Americans for Prosperity and the Kansas Chamber of Commerce. We exchanged information with Heather Cessna, Executive Director of the Kansas Board of Indigent Defense Services (BIDS) and we spoke with individual public defenders around the state. And we presented at a meeting of the African American Affairs Commission in July 2020.

We confronted stakeholder fears head-on. An expressed concern at the beginning of this process from law enforcement groups was that we would pursue a “catch and release” program for most crimes, which would adversely affect the public safety of Kansans. We have recommended increased use of citations and notices to appear for misdemeanor offenses—which could be classified as “catch and release” programs—but we were impressed with research done by national law enforcement groups that these programs do not result in less safe communities, but promote good relationships with the community. When residents are not arrested and taken to jail, it is a law enforcement time saver. Overburdened police departments can focus resources where they are most needed to protect the community. It also assures there will be space in our jails for the serious offenders serving their sentences.

We also recognized that law enforcement personnel were the appropriate experts to evaluate how to exercise their discretion. But based on our discussions with minority groups around the state, we hope their voices will be heard. Many described devastating impacts on their families and communities of the failure to exercise discretion when an “arrest all” policy is followed, no matter how minor the offense.

We learned that three out of four criminal cases in state trial courts are for misdemeanors that, if proved, would result in fines or less than a year in jail.³⁶⁸ We learned that bond amounts and release practices vary greatly between judicial districts in Kansas.³⁶⁹ We learned that once arrested, four out of ten Americans do not have as much as \$400 in ready cash to post a surety bond.³⁷⁰ We learned

that as few as two days of “no-call, no-show” often causes job loss. We learned that once in jail, childcare, child custody, elder care, employment, government benefits, and even pet care can suffer. One stakeholder noted that pretrial detainees should not be effectively denied the right to vote due to their incarceration.³⁷¹ Stakeholders impressed upon us that for people living in poverty or on the edge of poverty, the decision to arrest on a nonperson misdemeanor can cause the defendant’s support system to collapse.

We have not suggested that officers have any less discretion than they do now, but that it would be beneficial for prosecutors, defense counsel, community groups, and law enforcement entities around the state to establish uniform standards so that a person will not be treated differently based on where they are in the state when they are stopped or the color of their skin. If those cannot be established, we would recommend statutes that mandate the use of citations for select crimes.

We have noted that person misdemeanors such as domestic battery or assault, violation of a protective order, or other person crimes would not be appropriate for anything other than arrest and hold until a judge can decide the appropriate conditions of release. This determination must be made within 48 hours or less. And unless requested by the prosecutors, we have not recommended any felony offenses in the citation-notice to appear calculus. From what we have learned of the experience in other states, we anticipate some prosecutors and law enforcement may want to expand the program to low-level nonperson felonies in the future, but that will be a decision made between members of those groups, with input from the community.

Commercial bond agents were concerned that we would recommend abandoning commercial surety bond by following the lead of several other states without fully considering perceived or documented failures of such an approach. We hope we have alleviated those concerns with this report. We certainly examined the approaches of other states but found we simply did not have enough data to recommend the elimination of money bond from a judge’s toolbox at this time. But we do believe data should be collected to determine if money bond results in increased appearance rates.

For example, at the March 2019 Task Force meeting the Kansas Bonding Agents Association asserted that “[n]o other form of pretrial release guarantees appearance better than surety bail.” We do not know if this is or is not true in Kansas.³⁷² We know that some studies in other parts of the country have concluded otherwise.³⁷³ But until we can collect the data to support the most effective and constitutional pretrial practices in Kansas, we cannot confirm or deny such statements, nor remove that tool from the judge’s toolbox. We were also advised that “Kansas jails are not full of people who are being held ‘solely because they cannot buy their freedom.’”³⁷⁴ But anecdotally, many sheriffs we have spoken with have disputed that claim. We have also spoken to inmates who dispute that claim. But again, until we can collect the data to identify the people we have in our local jails, their reason for being there, and reasons they have not been released, we cannot confirm or deny such statements. But we do trust that armed with enough information, our judges, prosecutors, defense counsel, and community activists will do all they can to make sure no one is kept in jail in Kansas for the sole reason they cannot post bond.

Currently, the commercial surety business is a legal and viable business in Kansas and our focus was not on ways to abolish commercial surety in Kansas. Nor did we focus on finding ways to guarantee its future existence. We understand the overwhelming fear bond agents have for the continued viability of their industry and their personal livelihood.³⁷⁵ But our goal was always to focus on evidence-based methods that will increase the likelihood that a defendant

will appear in court, without a new arrest, while protecting the defendant's constitutional rights to liberty and counsel.

Our charge from the Supreme Court also asked us to suggest a best practices approach that is true to Kansas statutes and evolving caselaw. We did so, by drafting detailed, annotated procedures that we believe are constitutionally and statutorily supportable. We highlighted concerns from prosecutors, defense attorneys, and judges about their implementation.

We have emphasized the need for measurement or data collection before changes are implemented. The only procedural change that we were willing to recommend without supporting Kansas data was instituting a text reminder system. We believe the data across the country universally points to such programs increasing court appearance rates. We believe we should move toward that goal with the Odyssey Case Manager™ system even without state-specific data at this time. We do hope to be able to collect that data in the future.

We have avoided placing blame on any person or entity. Fair and just treatment in our criminal justice system is a goal common to all Kansans. Just as no one wants to see someone released from jail only to commit another crime, we also do not want to see people unjustly jailed pending their trial when their guilt or innocence has yet to be determined. We found complete and even enthusiastic cooperation in seeking ways to achieve this goal from all groups. Even when we disagreed, we discussed the issues in a civil manner. There were no hidden agendas. We have made sure in the format of this report that conflicting viewpoints are stated.

The Task Force believes that while the protection of public safety is paramount, the integrity of our pretrial justice system demands that people are not unnecessarily detained pretrial in Kansas jails. Despite all our work, there is still much we do not know and will not know until we have resources in place for meaningful data collection. Although the issue had not been widely discussed in Kansas before the Task Force was appointed in

November 2018, we believe through discussions and presentations, we have brought necessary stakeholders to the table to continue to discuss these issues in the coming months and years. We hope this report will serve as a resource for those discussions, and for positive change.

Accordingly, it is with great pride that we submit this report to the Kansas Supreme Court. Dated this 6th day of November, 2020.



Chief Judge Karen Arnold-Burger
Chair, Ad Hoc Pretrial Justice Task Force

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Magistrate Judge Daniel Vokins, 10th Judicial District, Johnson County

Kate Zigtema, Kansas Association of Criminal Defense Lawyers

Endnotes

- 1 Judge Stoss also served as Chair of Ad Hoc Task Force on Bonding Practices, Fines, and Fees in Municipal Courts which produced the following report: <https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/AdHocCommitteeMunicipalCourtsReport.pdf>.
- 2 Conference of Chief Justices, Resolution 3, Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release, adopted as proposed by the CCJ/ COSCA Criminal Justice Task Force at the Conference of Chief Justices 2013 Midyear Meeting on January 30, 2013.
- 3 2018 SC 90; <https://www.kscourts.org/Rules-Orders/Orders/SC-Orders/2018-SC-90>.
- 4 The stakeholders identified in the Order include: the Kansas Peace Officers Association, Kansas Sheriffs' Association, Kansas Association of Counties, Kansas County and District Attorneys Association, Kansas Association of Criminal Defense Lawyers, Kansas Association of Court Services Officers, Kansas Community Corrections Association, Kansas Correctional Association, and Kansas Bail Agents Association.

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- 5 Dr. Edward Latessa, University of Cincinnati, <https://researchdirectory.uc.edu/p/latessej>.
- 6 Amber Widgery, National Conference of State Legislators, <https://www.ncsl.org/>.
- 7 Professor Jeffrey Jackson, Washburn University School of Law, <http://washburnlaw.edu/profiles/jackson-jeffrey.html>.
- 8 Speakers included: Hon. Brenda Stoss, Municipal Court Judge from Salina and Chair of the Ad Hoc Task Force on Bonding Practices, Fines, and Fees in Municipal Courts; Tom Struble, Sedgwick County Criminal Justice Alternatives Administrator; Robert Sullivan, Director of Johnson County Department of Corrections; and, Ellen Mitchell, Saline County Attorney.
- 9 Appearance, Public Safety, and Alternatives subcommittees.
- 10 Legislative Liaison for the Kansas Sheriff's Association, <https://www.kansassheriffs.org/>.
- 11 Austin Spillar, Policy Associate, and Zal Shroff, Staff Attorney, for the ACLU of Kansas, <https://www.aclukansas.org/>, appeared along with Jeffrey Clayton, Executive Director/Policy Director of the American Bail Coalition, <http://www.americanbailcoalition.org/team/>, and Representative Stephen Owens, Kansas 74th District and owner of Owens Bonding, Inc., <https://www.owensbonding.com/>.
- 12 Kurt Level, Deputy General Counsel, and Monica Roth, Public Policy Specialist, of Koch Industries.
- 13 Presentation by Timothy R. Schnacke, Executive Director, Center for Legal and Evidence-Based Practices. <http://clebp.org/aboutus.html>.
- 14 Trey Burton, Chief U.S. Probation Officer, and Sara Veldez Hoffer, Senior U.S. Probation Officer. <http://ksp.uscourts.gov/>.
- 15 Pretrial delays and appointment of counsel, Data collection, Pretrial risk assessments, Statutory changes, and Arrest/Citation subcommittees.

16 Sedgwick County Sheriff Jeff Easter for the Kansas Sheriff's Association, <https://www.kansassheriffs.org/>, Johnson County Special Deputy Greg Smith, Representative Stephen Owens, and Cal Williams, bail agent for Cal-Kan Bail Bonds <https://bailbonds.com/sherman-county-kansas/>.

17 Roy Walmsley, World Prison Population List (Twelfth Edition), World Prison Brief, Institute for Crime & Justice Policy Research, at 2, https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf (data current to end of September 2018).

18 Jacob Kang-Brown & Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America*, Vera Institute of Justice, June 9, 2017, <https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf> (Published through a Safety + Challenge Grant from the John D. And Catherine T. MacArthur Foundation); Leon Digard & Elizabeth Swalola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice, Apr. 2019, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>, citing Zhen Zeng, *Jail Inmates in 2016* (Washington, DC: Bureau of Justice Statistics, 2018), at 1 & 9, <https://perma.cc/5A4W-XCS5>. Zeng estimates the total local jail population for June 30, 2016, as 740,700.

19 *Id.*

20 Kansas Local Jail Survey, questions propounded by the Task Force in partnership with the Kansas Sheriff's Association, Dec. 20, 2018. Sixty-three of the 97 jails in Kansas responded.

21 *Americans Favor Expanded Pretrial Release, Limited Use of Jail: National poll finds strong support for alternatives to detention*, Pew Charitable Trust, Nov. 21, 2018 (Issue Brief): <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/11/americans-favor-expanded-pretrial-release-limited-use-of-jail>.

22 *New Survey: With Increased Understanding of Current Practices, Americans Support Reforms to Pretrial and Money Bail Systems* Charles Koch Institute, July 12, 2018, <https://www.charleskochinstitute.org/news/new-survey-americans-support-reforms-pretrial-money-bail-systems/>; *Support Grows for Pretrial Justice Reform "National Poll Shows Voters Want Safety, Limited Use of Detention, and Assistance to Ensure Court Appearance*, Pretrial Justice Institute Website: <https://higherlogicdownload.s3-external-1.amazonaws.com/PRETRIAL/Support%20Grows%20For%20Pretrial%20Justice%20Reform%20-%20PJ%202018.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1604507719&Signature=yS%2BThj0Kwk664fiVJefyMAJDeWo%3D>.

23 *Public Opinion Poll Findings on Jails and Local Justice Systems*, Zogby Analytics, Feb. 13, 2018, http://www.safetyandjusticechallenge.org/wp-content/uploads/2018/02/RTI_MacArthur_Local_Criminal_Justice_Memo-2018.pdf.

24 *The Socioeconomic Impact of Pretrial Detention*, Open Society Foundation, Aug. 2011, at 12. <https://www.justiceinitiative.org/uploads/84baf76d-0764-42db-9ddd-0106dbc5c400/socioeconomic-impact-pretrial-detention-02012011.pdf>.

25 Joshua Page, Victoria Piehowski, & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 2019 Russell Sage Foundation, RSF: The Russell Sage Foundation Journal of the Social Sciences Feb. 2019, 5 (1) 150-172; DOI: <https://doi.org/10.7758/RSF.2019.5.1.07> <https://www.rsfjournal.org/content/5/1/150>.

26 2012 Policy Paper: Evidence-Based Pretrial Release, 5, Conference of State Court Administrators, https://cosca.ncsc.org/data/assets/pdf_file/0019/1639/evidence-based-pre-trial-release-final.ashx.pdf.

27 Paul Heaton *et al.*, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 717–18 (2017):

These results raise important constitutional questions and suggest that with modest changes to misdemeanor pretrial policy, Harris County could save millions of dollars per year, increase public safety, and reduce wrongful convictions.

See also, Christopher T. Lowenkamp, et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation, at 4 (2013) (finding that, “[l]ow-risk defendants who are detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to low-risk defendants who are released at some point before trial or case disposition. Moderate and high-risk defendants who are detained for the entire pretrial period are approximately 3 times more likely to be incarcerated than similar defendants who are released at some point.”); Gerald

R. Wheeler & Gerald Fry, *Evaluation of Effects of Pretrial Status on Case Disposition of Harris County Felony & Misdemeanor A/B Defendants Project Orange Jumpsuit*, at 4 (2013) (finding that in Harris County, Texas “[s]tatistically identical defendants who make bond experience: 86% fewer pretrial jail days; 33% better chance of getting deferred adjudication; 30% better chance of having all charges dismissed; 24% less chance of being found guilty; and 54% fewer jail days sentenced.”).

28 3DaysCounty™ program founded by the Pretrial Justice Institute. <https://www.pretrial.org/what-we-do/plan-and-implement/3dayscount-for-state-level-change/>.

29 Over the years, the terms bond and bail have been used interchangeably by many commentators, studies, and even state law but we have tried to remain true to this distinction throughout this report.

30 *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

31 Kansas bonding companies testifying before the Task Force indicated “actual loss rates” of a high of 3.2% from Shane’s Bonding, to a low of .7% from both B & K Bonding and Owens Bonding. See, Bonding Agent’s presentation before Task Force on March 8, 2019. https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/Pretrial_Justice_Task_Force/Owens_presentation.pdf.

32 K.S.A. § 22-2802(4).

33 See Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 Berkley J. Crim. L. 1 (2008); *See also*,

“By statute, defendants do not forfeit the bail money they have put up solely by virtue of committing a new offense while out on bail. It follows, then, that it is illogical for a California court to set bail in an effort to mitigate the threat a defendant poses to public safety... The clear import of this scheme is that, except on this narrow range of charges, it is pointless for a court to consider whether someone who has the means to make bail represents a threat to public safety. A person who can afford bail is released, notwithstanding that he may pose an appreciable risk to public safety. The court may impose additional, nonmonetary conditions of release to address that risk. But the bail the person posts does nothing to incentivize him not to commit crimes.” *Reem v. Hennessy*, 17-cv-06628-CRB, (N.D. California), *Order Granting Motion to Withdraw Stay and Imposing New Stay*, U.S. District Judge Charles R. Breyer, Dec. 21, 2017. <https://docs.justia.com/cases/federal/district-courts/california/candce/3:2017cv06628/319513/26>.

34 *See* fn. 373, *supra*.

35 In fact, the seriousness of the alleged offense is often the sole factor that determines money bond on pre-fixed bond schedules. The theory underlying this practice is that the more serious the potential penalties the more incentive a person has to flee the jurisdiction to avoid prosecution.

36 Brook Hopkins, Chiraag Bains, and Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 698 (2019).

Pretrial drug testing has not been shown to increase appearance rates or decrease pretrial arrest. Randomized control trials have shown that pretrial drug testing made no difference in either metric. Indeed, one study actually found that for high risk defendants, drug testing made no difference in pretrial success rates, but for lower risk defendants, pretrial drug testing actually lowered pretrial success. Another study found drug testing to be effective in reducing reincarceration of people on probation, but subsequent studies have not been able to replicate those findings.

37 *See* K.S.A. § 22-2802(2).

38 *See* K.S.A. § 22-2802.

39 Timothy R. Schnacke, *Pretrial Release and Probation: What is the Same and What is Different?* National Association of Pretrial Services Agencies, 2018; <https://s3.amazonaws.com/static.nicic.gov/Library/033085.pdf>.

40 *Defining Flight Risk*, Lauryn P. Gouldin, 85 U. CHI. L. REV. 677, 689 (2018).

[D]ata from 2009 indicate that the vast majority (83 percent) of felony defendants who are released before trial appear

for all scheduled court appearances. The remaining 17 percent missed at least one scheduled court appearance, with 13 percent (of the total number) returning to court within one year. Only 3 percent of all released felony defendants remained a “fugitive” after a year...Nonappearance rates for those charged with lower-level felonies and misdemeanors are typically higher than for defendants charged with higher-level felonies. In 2009, for example “failure-to-appear rates were lowest for murder (5%) and rape (7%) defendants, and highest for those released after being charged with motor vehicle theft (28%).

41 The Infinity Stones are six gems appearing in Marvel Comics that are the cosmic source of power in the universe. The Time Stone (green) allows its holder to manipulate time and thus predict the future.

42 Marie VanNostrand, Gena Keebler, & Luminosity, Inc., *Pretrial Risk Assessment in the Federal Court*, Vol. 73 Federal Probation Number 2, at 3, https://www.uscourts.gov/sites/default/files/73_2_1_0.pdf.

43 *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

44 18 U.S.C. § 3142(e).

45 *United States v. Salerno*, 481 U.S. 739 (1987).

46 481 U.S. at 754.

47 481 U.S. at 754-55.

48 481 U.S. at 747.

49 481 U.S. at 748.

50 481 U.S. at 751-52.

51 481 U.S. at 755.

52 Slide Show presented to Task Force on June 14, 2019 by Trey Burton and Sara Veldez Hoffer from the U.S. Probation Office. https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/Pretrial_Justice_Task_Force/Federal_Pretial_Task_Force_Presentation_6-14-19.pdf.

53 *Id.*

54 *Id.* See also, Public Safety Assessment (PSA), Arnold Foundation, PSA Fact Sheet, May 10, 2019 <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/05/PSA-Sheet-CC-Final-5.10-CC-Upload.pdf> (highest risk category, 60% appear as ordered, and 45% have no new criminal activity) ; Colorado Pretrial Risk Assessment Tool (CPAT); CPAT Fact Sheet, May 6, 2019, <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/05/Colorado-CPAT-CC-Final-5.10-CC-3.pdf> (highest risk category, 51% appear as ordered and 58% have no new criminal activity) ; Ohio Risk Assessment System-Pretrial Assessment Tool (ORAS-PAT). <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/05/ORAS-Sheet-Final-5.10-CC-Upload.pdf> (highest risk category, 85% appear as ordered, and 83% have no new criminal activity). All Fact Sheets compiled by the Stanford Pretrial Risk Assessment Project.

55 <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>.

Table H-15.
U.S. District Courts ---- Pretrial Services Violations Summary Report
For the 12-Month Period Ending March 31, 2019

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misdemeanor	Other			
10TH	12,069	2,924	24.2	404	13.8	12	6	1	49	374	534
CO	1,253	410	32.7	36	8.8	0	0	0	15	36	42
KS	1,199	410	34.2	89	21.7	5	3	0	6	80	137
NM	6,173	895	14.5	109	12.2	0	0	0	20	105	121
OK,N	480	191	39.8	38	19.9	0	0	0	2	31	54
OK,E	246	50	20.3	4	8.0	0	0	0	1	3	4
OK,W	1,149	485	42.2	67	13.8	4	1	1	2	63	96
UT	1,204	378	31.4	54	14.3	3	2	0	2	49	72
WY	365	105	28.8	7	6.7	0	0	0	1	7	8

56 Email from Trey Burton, Chief U.S. Probation Officer April 30, 2020.

57 Kan. Const. Bill of Rights §9.

58 *Ex parte Ball*, 106 Kan. 536, 537 (1920). *See also*, Matthew Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 934-39 (2013) for a lengthy discussion of the development of what he calls “consensus right to bail” provisions like the one in Kansas. *See also*, Appendix C.

59 *In re Schneck*, 78 Kan. 207 (1908). *See also*, *State v. Christensen*, 165 Kan. 585, 593 (1948) (“A capital offense is one for which the penalty of death may be inflicted.”).

60 *Commonwealth v. Truesdale*, 449 Pa. 325, 336-37 (1972).

61 *State v. Foy*, 224 Kan. 558, 562 (1978). *See also*, *State v. Burgess*, 205 Kan. 224, 226. (1970) (“As we understand the purpose of our statutes requiring bond from persons accused of crime, it is to assure their presence at the time and place of trial.”); *Craig v. State*, 198 Kan. 39, 41. (1967) (“The purpose of bail is to insure the presence of the prisoner at a future hearing.”); *State v. Dunnan*, 223 Kan. 428, 430 (1978) (“The bond fixed [\$250,000 for charge of 2nd degree murder] was indeed high, but the offense was most serious...In the case before us we cannot say that the court below abused its discretion at the time bail was fixed.”).

62 *See also*, *State v. Ruebke*, 240 Kan. 493, 498 (1987) (“Bail is excessive when it is set at an amount higher than necessary to insure appearance of the accused at trial.”).

63 *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

64 K.S.A. § 22-2802 as it existed until 1986:

In determining which conditions of release will reasonable assure appearance the magistrate shall, on the basis of available information, take into account the nature and circumstances of the crime charged, the weight of the evidence against the defendant, the defendant’s family ties, employment, financial resources, character and mental condition, the length of said defendant’s residence in the community, said defendant’s record of convictions, and said defendant’s record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

It was only after conviction *that* conditions of release could be based on whether the defendant posed a danger to another person or to the community. K.S.A. § 22-2804:

A person who has been convicted of a crime and is either awaiting sentence or has filed a notice of appeal may be released by the district court under the conditions provided in K.S.A. § 22-2802, and amendments thereto, if the court or judge finds that the conditions of release will reasonably *assure that the person will not flee or pose a danger to any other person or to the community*. (Emphasis added).

65 1986 Session Laws, Ch. 230, Section 1, K.S.A. § 22-2802(4):

In determining which conditions of release will reasonable assure appearance *and the public safety*, the magistrate shall, on the basis of available information, take into account the nature and circumstances of the crime charged, the weight of the evidence against the defendant, the defendant's family ties, employment, financial resources, character and ~~mental condition, the length of said defendant's residence in the community, said defendant's record of convictions, and said defendant's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings~~ *mental condition, length of residence in the community, records of convictions, records of appearance or failure to appear at court proceedings or of flight to avoid prosecution; the likelihood or propensity of the defendant to commit crimes while on release, including whether the defendant will be likely to threaten, harass or cause injury to the victim of the crime or any witnesses thereto; and whether the defendant is on probation or parole from a previous offense at the time of the alleged commission of the subsequent offense.*

66 *Williamson v. United States*, 184 F.2d 280, 282 (2nd Cir. 1950). Mr. Justice Jackson, of the United States Supreme Court, sitting as a circuit justice, pointed out the danger of such an approach:

[I]t is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it. . . .

67 K.S.A. § 22-2801.

68 K.S.A. § 22-2802 (8).

69 Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE, (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> (citing statistics compiled by the Bureau of Justice Statistics, Prison and Jail Inmates Midyear, Correctional Populations in the United States and Jail Inmates).

70 Survey conducted by Kansas Sheriff's Association at the request of the Task Force in the Fall of 2018 asking the number of people in their jails with no other holds.

71 Zhen Zeng, *Jail Inmates in 2018*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, March 2020 at 6. <https://www.bjs.gov/content/pub/pdf/ji18.pdf>.

72 A variation on this statement: "Poor people are languishing in jail for the sole reason that they cannot afford a bail bond" is highly contested by the American Bail Coalition:

This single phrase has become the mantra of the Bail Reform movement relying on empathy for the defendant as punctuation to further the cause to end the judicial discretion of using financial conditions as a form of pretrial release.

First, not a single person is sitting in jail because of the size of their wallet. The reason why any person is in jail is because they were accused of a crime based on probable cause determined by a law enforcement officer.

Second, there are a number of reasons that a person might be in jail who has no yet been convicted of a crime. This may include:

- Probation hold – bail set, but not bailable
- Immigration hold – bail set, but not bailable
- Awaiting transfer to another jail – bail set, but not bailable
- Already convicted with a secondary open charge – bail set, but not bailable
- Awaiting hearing on new charges

For example, in the 2013 JFA Institute study looking on the Los Angeles County Jail population, it was determined while 70% of the defendants were in pretrial status, only 12% were actually bailable. That is a far cry from the claims being made by bail reform proponents that 70% of people sitting in jail are there because they can't afford a bail bond.

Lastly, and perhaps most important, the defendant has family and friends unwilling to post his/her bond for a variety of reasons – none of which have to do with the size of their wallet. They may include:

- Defendant has already been released and failed to appear with a bondsman. In this case, the Indemnitor may be unwilling to post another bond out of fear that the defendant may again fail to appear.
- Defendant may have a substance abuse problem that the Indemnitor fears, if released, would cause harm to the defendant or another person.
- “Tough Love” – the family and friends of a defendant know them best...not the court system. In many cases, the decision to keep someone in jail due to issues spiraling out of control for the defendant is a reality. These decisions often coincide with having the time to arrange for the necessary help a defendant really needs – such as enrolling in a drug treatment facility.

FACT OR MYTH, American Bail Coalition Website, <http://ambailcoalition.org/fact-or-myth/>.

73 Survey of Judges, Regional Training, April 2019.

74 See, e.g.,

Maryland: Md. Rule 4-216.1 Pretrial Release: Standards Governing; See also, Brian Saccenti, Pretrial Release & Detention in Maryland After the 2017 Amendments to the Pretrial Release Rules, 17 U. MD. L.J. RACE RELIG. GENDER & CLASS 307 (2017). Available at: <http://digitalcommons.law.umaryland.edu/rregc/vol17/iss2/5>.

Minnesota: Minn. R. Crim. P. 6.02 (a person must be released on personal recognizance or an unsecured appearance bond unless a court determines that release will endanger the public safety or will not reasonably assure the defendant’s appearance.).

Washington: Washington Supreme Court Rule 3.2 Release of the Accused: http://www.courts.wa.gov/court_rules/?fa=court_rules_display&group=sup&ruleid=supCrR3.2.

Missouri: Missouri Supreme Court Rule, 33.01. Misdemeanors or Felonies - Right to Release – Conditions: <https://casetext.com/rule/missouri-court-rules/missouri-rules-of-criminal-procedure/rule-33-misdemeanors-or-felonies-release-pending-further-proceedings/rule-3301-misdemeanors-or-felonies-right-to-release-conditions>.

Louisiana: Order from federal district court in eastern district of Louisiana in *Caliste v. Cantrell*, 329 F. Supp. 3d 296 (E.D. La. 2018), *aff’d*, No. 18-30954, 2019 WL 4072068 (5th Cir. Aug. 29, 2019). https://www.macarthurjustice.org/wp-content/uploads/2018/08/Caliste-v-Cantrell_Decision.pdf.

Broward County, Florida Administrative Order No. 2019-57-Crim (“for those persons who do not pose a threat to public safety, all judges shall first consider nonmonetary release conditions”) <http://www.17th.flcourts.org/wp-content/uploads/2019/08/2019-57-Crim.pdf>.

See also, Appendix D.

75 The Office of Judicial Administration also provides training to municipal court judges and has incorporated training regarding similar issues at these events recently.

76 The full objection continues:

In particular the Kansas Supreme Court should not take a premature position that is counter to the *Kansas Bill of Rights* § 9. *Bail; fines; cruel and unusual punishment. All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 48.*

1) emphasizes that liberty is the norm and detention is the exception;

To emphasize that liberty is the norm and detention the exception is to inappropriately lift a line from *Salerno* and apply it to what is already settled constitutional law in Kansas. Also, if *Salerno* is to be quoted, it should be quoted correctly “*In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.*” The line from *Salerno* is the majority’s comment on the fact that **preventative detention** is the regulatory exception to bail, which the majority called a regulatory exception to the 8th Amendment right to bail and was to be rarely used. In short, *Salerno* was

contrasting bail and preventative detention, not conflating the two, as appears to be the case in this recommendation.

In Kansas, “*preventative detention*” is already more strictly limited than the Bail Reform Act of 1984, and thus to issue an edict that “*liberty is the norm*” is to issue an edict that not only proved false in the federal system over time (pretrial detention of 72% of all defendants) it suggests to judges that there is somehow a more expansive grant of the power to preventative detention than we already understand to be extremely circumspect pursuant to the Kansas Constitution; that preventative detention is only allowable in “capital offenses, where proof is evident or the presumption great.” Thus, by default, liberty is more than a mere “norm” in Kansas. All noncapital cases are bailable by sufficient sureties. Nothing else needs to be said.

2) Judges should first consider nonmonetary forms of release;

To create presumptions in favor of one type of bail or condition of release over another is also inappropriate since each case turns on its own facts and any combination of bail or other conditions may in fact be the appropriate bail and least restrictive form of release under the statutory and constitutional considerations. This recommendation incorrectly assumes that all supervision by pretrial agencies will be less restrictive and less financially onerous than posting a secured bond, an assumption not backed up with fact or history. Again this frustrates the constitutional provision that all noncapital cases are bailable by sufficient sureties.

Quite frankly, this recommendation is nonsensical. **Every bond** has a financial condition. K.S.A 22-2802 states: “(1) Any person charged with a crime shall, at the person’s first appearance before a magistrate, be ordered released pending preliminary examination or trial upon the execution of an appearance bond **in an amount** specified by the magistrate...” In other words, the very first action the magistrate is supposed to take under statute is to determine the monetary amount of bail that is to be required. And there is currently a preference in statute for surety bail. If, however, upon consideration, the magistrate determines in the exercising of his individual discretion, that requiring sureties is not necessary, then the statute indicates in subsection (6) that: “In the discretion of the court, a person charged with a crime may be released upon the person’s own recognizance by **guaranteeing payment of the amount of the bond** for the person’s failure to comply with all requirements to appear in court. The release of a person charged with a crime upon the person’s own recognizance shall not require the deposit of any cash by the person.” So, even a personal recognizance bond has a monetary condition to the bond. In short, there is no such thing as a bond with nonmonetary conditions, only that there are bonds with meaningless, uncollectable monetary conditions.

Therefore, in truth, this provision is really just a way to state that the judges should consider personal recognizance bonds before considering cash or surety bonds, despite the fact that this is the exact opposite of the language of the statute [K.S.A. 22-2802 at Subsection (3) “The appearance bond shall be executed with sufficient solvent sureties who are residents of the state of Kansas, **unless the magistrate determines**, in the exercise of such magistrate’s discretion, that requiring sureties is not necessary to assure the appearance of the person at the time ordered”]. This recommendation then suggests that the Supreme Court should order every lower court judge in the state to do the exact opposite, to functionally grant every defendant a personal recognizance bond unless the magistrate determines that requiring sureties is necessary.

It has always been our understanding that both local court rules and Supreme Court Administrative Rules – which is what such an order would be – are required to comply with statute. An order of this type, inasmuch as it turns the statute completely upside down, as it were, certainly would be extra-statutory.

3) release should be under the least restrictive conditions to assure defendant’s appearance and the protection of the public.

Least restrictive or least onerous pretrial release has been the constitutional standard on this continent for hundreds of years. The fact that there are now also other conditions, invented as a result of technological advancements, doesn’t change the law. Also, “*nonmonetary conditions*” is a false construct since most “*nonmonetary*” conditions are paid for by defendants or a nonjudicial branch agency. Unless the Court is prepared to order that no “*nonmonetary*” conditions of release may cost the defendant money, then issuing such a blanket order risks forcing courts to consider and potentially unconstitutionally impose “*nonmonetary*” conditions that might be more onerous, financially costly, and restrictive than a bail would have been. To the absolute contrary, such as when the court specifically allows a flat charge of \$15, but then also allows courts to require a defendant to pay “all” costs of pretrial supervision and other so-called “*nonmonetary*” conditions. As an example, a condition that we are seeing more often is a requirement that the defendant enter into an in-patient treatment program as a “*nonmonetary*” condition of their bail. However, that treatment is not provided by the State and, depending on the defendant’s health insurance, could cost tens of thousands of dollars in out of pocket medical expenses. This is certainly a

financially burdensome “nonmonetary” condition that many, if not most, defendants would be unable to comply with for purely financial reasons.

Unfortunately, this recommendation seems to be directed at getting the Supreme Court to pressure local judges to move away from using secured bail. We do not feel that such a wholesale alteration of a millennium of pretrial release practices should be enacted by judicial fiat and is instead the province of the Legislature.

Letter dated Oct. 31, 2019 from the Kansas Bail Agents.

77 The full objection continues:

The federal standard in detention decisions is driven by the United States Supreme Court’s decision in *U.S. v. Salerno*, 481 U.S. 739 (1987). There, the Court held that if “*the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.*” When addressing such provisions, a federal prosecutor bears the burden of proof by clear and convincing evidence. There is no need for this education, as the provisions found in *Salerno* do not exist under Kansas law and Kansas State Prosecutors and Kansas State Judges lack such authority.

The Kansas Constitution, however, is crystal clear regarding the cases for which preventative detention may be sought: “*All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great.*” To call the setting of reasonable bail in a noncapital offense a “*detention decision*” is to concede on its face all bail that is not posted is per se unconstitutional. Instead, a judge is tasked with setting a bail that is otherwise not “*excessive*” pursuant to the Kansas and Federal constitutions recognizing that all persons shall be “bailable” by sufficient sureties. Legal education opportunities may exist regarding setting bail that is not “*excessive*”; which obviates any need for training on preventative detention.

Letter dated Oct. 31, 2019 from the Kansas Bail Agents.

78 Written testimony of Austin Spiller before Task Force on Mar. 6, 2020.

79 This references several groups at Pittsburg State University that collaborated and signed off on a letter of recommendations submitted to the Task Force. The signatories to the document were the Pittsburg State University Campus Democrats, Pittsburg State University Student Government Association President, Pittsburg State University Black Students Association (BSA), Pittsburg State University Hispanics of Today (HOT), Pittsburg State University People for Respect, Integrity and Support Movement (PRISM), and Q Space, Pittsburg, Kansas.

We have noted throughout this report the collective’s concerns about several recommendations proposed by the Task Force in an email dated July 11, 2020, but we also want to note a few other suggestions the students made that the Task Force deemed outside the scope of its charge from the Supreme Court but worthy of consideration. The introduction to their suggestions was powerful in itself:

As Martin Luther King Jr. said, “Our lives begin to end the day we become silent about things that matter.” In carrying on the spirit of Dr. King’s message, we feel that it is best to tackle racism and unfair policies that directly and disproportionately affect people of color (POC) and those who live in poverty. As of 2017, roughly seven percent of Kansans were African-American, however, the prison population comprised 28 percent African-American people. * <https://www.census.gov/quickfacts/KS> and <https://www.vera.org/downloads/pdffdownloads/state-incarceration-trends-kansas.pdf>. This overwhelmingly shows that even though African-Americans make up a small percentage of the population, they are imprisoned at ludicrous and insensible rates compared to their fellow Kansans. In fact, African-Americans are 5.6 times more likely than white people to be imprisoned. * <https://www.pretrial.org/get-involved/learn-more/how-to-fix-pretrial-justice/>. This issue is largely affected by the policy, procedure, and effects of pretrial detention. Currently, 6 out of every 10 people in jails are awaiting trial, and 95% of all US jail population growth between 2000 and 2014 were people who had not yet been proven guilty. Arnold Ventures estimates that 14 billion dollars are spent housing and caring for people in jail who have not been convicted yet. * <https://www.arnoldventures.org/work/pretrial-justice/>.

They went on to make the following suggestions for additional recommendations:

- More research should be done as to investing and suggesting that a period be given to detainees during the first

few days of pretrial detention, as well as for nondetained people who are facing more serious crimes to make such decisions in case of detention, which would allow them to handle arrangements for their expenses such as utilities, rent, care of family, and other expenses or matters that, if left unchecked, can cause a person to accrue debilitating debt that prevents their future success upon release and possibly causes them to lose their children and homes.

- Create a system where people can donate clothes through to those detained, jailed, or imprisoned so they have a fighting chance in court to counter the stereotype and effect of wearing jumpsuits and uniforms.
- A new recommendation should be included that offers suggestions which state that judicial districts and law enforcement agencies should create third-party outlets for people being arrested, in custody, or awaiting trial to report or make a complaint if they feel that they are being discriminated against.

80 Email from Pittsburg State University student collective dated July 11, 2020.

81 *Americans Favor Expanded Pretrial Release, Limited Use of Jail: National poll finds strong support for alternatives to detention*, Pew Charitable Trust, Nov. 21, 2018 (Issue Brief), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/11/americans-favor-expanded-pretrial-release-limited-use-of-jail>.

82 Michael Schwartz, Michael Winerip, & Kalief Brower, *Held at Rikers Island for 3 Years without Trial, Commits Suicide*, New York Times, June 8, 2015. <https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html>.

83 <https://www.pretrial.org/what-we-do/plan-and-implement/3dayscount-for-state-level-change/>.

84 *See Barker v. Wingo*, 407 U.S. 514, 532–533 (1972).

The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

85 Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Virginia Law Review, 371, 375 (Apr. 1970); www.jstor.org/stable/1071797. Accessed 27 Sept. 2020.

He described this as like an episode from Alice in Wonderland: “an experiment that can only confirm and never rebut the experimenter’s hypothesis.” *Id.*

His comments that followed proved to be profound.

The inevitable consequence is a continuing pressure to broaden the system in order to reach ever more potential detainees. Indeed, this pressure will be generated by the same fears that made preventive detention seem attractive in the first place. What begins as an ounce of detention, therefore, may well become the first step of a profound shift in our system of criminal justice—a system that, at least until now, has operated on the premise that crime should normally be prevented by the threat of subsequent punishment rather than the imposition of prior imprisonment. *Id.*

86 Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. of Crim. L. and Criminology 415, 428 (1996). <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=6866&context=jclc>. *See also* Harvard Law School Criminal Justice Policy Program, *Moving Beyond Money: A Primer on Bail Reform*, (2016) at 19 (“[I]f . . . almost all ‘high risk’ defendants are detained, it becomes impossible to test whether individuals who receive that designation actually have high rates of pretrial failure.”), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

87 CHRISTOPHER T. LOWENKAMP, ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION, 3-4 (2013). https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf.

88 *See* Kentucky Supreme Court, <http://icmelearning.com/ky/pretrial/KY-Pretrial-VirtualTour/>; New Jersey Supreme Court, <https://njcourts.gov/courts/criminal/reform.html>; New Mexico, <https://www.nmcourts.gov/pretrial-release-and-detention-reform.aspx>. We note the California Supreme Court for its extensive use of video to increase the

transparency of the court operations and process, although it does not have anything currently on the site about pretrial detention. <https://www.youtube.com/watch?v=ktOsD5c0MCw&list=PLE5350C442AB073B6>.

89 <https://www.bravenewfilms.org/bailgame>. “We’re taking it back to the old school with this 8-bit game! Select a character, get arrested, and see how the consequences of money bail play out! Disclaimer: Mass incarceration is NOT a game. For many, it’s life altering affects make access to basic needs a real hurdle.”

90 Keith Porcaro, *Detain/Release: simulating algorithmic risk assessments at pretrial*, Jan. 8, 2019, <https://medium.com/berkman-klein-center/detain-release-simulating-algorithmic-risk-assessments-at-pretrial-375270657819>. (“The risk assessment provides a low/medium/high likelihood that a defendant will fail to appear, commit a crime, or commit a violent crime. Under the hood, it uses U.S. Census and Bureau of Justice Statistics data to generate defendants and alleged offenses. The simulation can generate millions of unique defendants. We added additional mechanics to make the world of the simulation more complete. Detained defendants are placed in a county jail with limited capacity and stay there for a period of time, depending on their charge. Released defendants may commit a violation or new crime while on release, which appears in the form of a (sometimes histrionic) local newspaper article [headlined: Violent Suspect at Large Thanks to Activist Judge]”).

91 *Public Safety Assessment Simulator*, <https://pretrialrisk.com/the-basics/simulator-for-tools/>.

92 Email dated Mar. 7, 2019 from Sheriff Jeffrey Easter, Sedgwick County, stating position of the Kansas Sheriff’s Association.

93 Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

94 Email from Pittsburg State University student collective dated July 11, 2020.

95 Recommendations of the Criminal Pretrial Task Force to the Thirtieth Legislature of the State of Hawaii, December 2018, at 7.

Data regarding pretrial decisions and outcomes is limited. Collecting such data and developing metrics requires deep understanding of the interactions of the various agencies in the system. A Criminal Justice Research Institute should be created under the office of the Chief Justice. The Institute should collect data to monitor the overall functioning of the criminal justice system, monitor evidence-based practices, conduct cost benefit analysis on various areas of operation and monitor national trends in criminal justice. The Institute should further develop outcome measures to determine if various reforms, including those set forth herein, are making positive contributions to the efficiency of the criminal justice system and the safety of the community.

This Task Force recommends that a centralized statewide criminal pretrial justice data reporting and collection system be created. A systematic approach to gathering and analyzing data across every phase of our pretrial system is necessary to assess whether reforms, suggested by this group or others, are effective in improving the quality of pretrial justice in Hawaii.

Ohio Sentencing Commission Ad Hoc Task Force on Bail and Pretrial Services, June 2017, at 26.

Recent trends in criminal justice reform, including bail and pretrial service reform, call for the use of evidence-based practices. Evidence-based practices and decision making require a strategic and deliberate method of applying empirical knowledge and research-supported principles to justice system decisions. In order to adequately determine the current state of pretrial services in Ohio and measure outcomes of any implemented reforms, the General Assembly and the Supreme Court of Ohio must require the collection of robust and useful data.

96 *Fact Sheet: Launching the Data-Driven Justice Initiative: Disrupting the Cycle of Incarceration*, June 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-launching-data-driven-justice-initiative-disrupting-cycle>. Johnson County, Kansas was one of the participating counties. See also: <https://www.naco.org/resources/signature-projects/data-driven-justice>; Lynn Overmann, Angela LaScala-Gruenewald, & Ashley Winstead, *Modern Justice: Using Data to Reinvent America’s Crisis Response Systems*, the Laura and John Arnold Foundation, May 2018, <http://craftmediabucket.s3.amazonaws.com/uploads/PDFs/DDJ-MODERN-JUSTICE-Short.pdf>.

97 2019 Conn. Legis. Serv. P.A. 19-59 (S.B. 880) (Signed into law July 1, 2019) (Titled: AN ACT INCREASING FAIRNESS AND TRANSPARENCY IN THE CRIMINAL JUSTICE SYSTEM; <https://www.cga.ct.gov/2019/ACT/pa/pdf/2019PA-00059-R00SB-00880-PA.pdf>). The act requires the Division of Criminal Justice, in consultation with the Judicial Branch, the Department of Correction (DOC), and the Criminal Justice Information System Governing Board, to (1) collect disaggregated, case-level

data by docket number on defendants who are age 18 or older at the time of committing an alleged offense and (2) starting by February 1, 2021, annually provide the data collected for the previous calendar year to OPM. The data must be collected under the following categories:

1. arrests, including data on citations, summonses, custody arrests, warrants, and on-site arrests;
2. arraignments of individuals in custody;
3. continuances;
4. diversionary programs, including data on (a) program applications, diversions, and participants' successful completions and failures and (b) people in diversion programs on the first of each month;
5. contact between victims and prosecutorial officials, including data on cases involving victims;
6. dispositions, including data on pending cases and cases disposed of;
7. nonjudicial sanctions, including data on (a) sanctions applied, successfully completed, and failed and (b) individuals on nonjudicial sanction status on the first day of each month;
8. plea agreements, including data on the total number of plea agreements, agreements involving probation or prison, other agreements, and prosecutor's last best offer;
9. cases going to trial, including data on cases added per month, pending trial cases, plea offers accepted and rejected by the court per month, disposition by trial, disposition involving probation or prison, and other dispositions;
10. demographic data, including race, sex, ethnicity, and age;
11. court fees or fines, including those imposed by the court at the disposition of the defendant's case and any outstanding balance the defendant may owe;
12. restitution amounts ordered at sentencing, including any amount (a) collected by the court and (b) paid to a victim; and
13. the zip code of the defendant's primary residence.

The act prohibits disclosing any collected information that personally identifies a victim.

The fiscal note for the legislation estimated costs at just over \$1 million per year due to additional staff needed to assist in data collection in each of 13 judicial districts. <https://www.cga.ct.gov/2019/FN/pdf/2019SB-00880-R000836-FN.pdf>. See also, [Connecticut PA 19-59 Presentation](#) (slide show dated July 14, 2020 analyzing implementation) at <https://portal.ct.gov/OPM/CJ-About/CJ-SAC/SAC-Sites/SAC-Homepage>.

98 Virginia, 2020 Legislative Session, SB 723. The legislation requires the Department of Criminal Justice Services (DCJS) to create uniform reporting mechanisms for appropriate criminal justice agencies, in every locality to collect data relating to bail determinations made by judicial officers conducting hearings. The collected data must be disaggregated by locality and by individual. In order to maintain anonymity of the individual, localities must use a unique identifier for each individual. At the minimum, the data collected by DCJS must include the following:

- The hearing date of any hearing conducted and the date any individual is admitted to bail;
- Information about the individual, including the individual's year of birth, race, ethnicity, gender, primary language, and residential zip code;
- The determination of the individual's indigency;
- Information related to the individual's charges, including the number of charges; the most serious offense with which the individual is charged; the code section for such offense; the general description of such offense; whether such offense is a felony, misdemeanor, civil infraction, or other type of offense; and the specific classification of any felony or misdemeanor offense;
- If the individual is admitted to bail, information related to the conditions of bail and the bond, including (i) whether the bond was secured or unsecured; (ii) all monetary amounts set on the bond, including amounts set on both secured and unsecured bonds; (iii) any initial nonmonetary conditions of release imposed; (iv) any subsequent modifications; and (v) whether the individual utilized the services of a bail bondsman;
- If the individual is not admitted to bail, the reason for the denial;
- Any outstanding arrest warrants or other bars to release from any other jurisdiction;
- Any revocation of bail due to a violation of such individual's conditions of release, failure to appear for a court hearing, or the commission of a new offense by such individual;
- The date the individual is sentenced to an active term of incarceration and the date such individual begins serving such active term;
- All dates the individual is released or discharged from custody, including release upon satisfaction of the terms of any recognizance, release upon the disposition of any charges, or release upon completion of any active sentence;
- The reason for any release or discharge from custody, including whether the individual posted a bond, was released

on a recognizance, or was released under terms of supervision, or whether there was a disposition of the charges that resulted in release of the individual. If the reason for release is due to a court order or a disposition of the charges resulting in release, the data collected must include the specific reason for release, including the nature of the court order or, if there was a conviction, the particular sentence imposed. The data must also include a list of definitions of any terms used by the locality to indicate reasons for release or discharge; and

- The average cost for housing the individual in the local correctional facility, for one night.

<http://lis.virginia.gov/cgi-bin/legp604.exe?201+oth+SB723FES1122+PDF>.

99 <http://lis.virginia.gov/cgi-bin/legp604.exe?201+oth+SB723FES1122+PDF>.

100 Mass. Gen. Laws Ann. ch. 6A, § 18 3/4 and Mass. Gen. Laws Ann. ch. 7D, § 11. *See also*, Florida Statute § 900.05-Criminal Justice Data Collection <https://casetext.com/statute/florida-statutes/title-xlvi-criminal-procedure-and-corrections/chapter-900-general-provisions/section-90005-criminal-justice-data-collection>; Colorado data collection legislation for jails, https://leg.colorado.gov/sites/default/files/2019a_1297_signed.pdf; and pending legislation in Arizona, <https://legiscan.com/AZ/text/HB2156/2020>.

101 <https://cjl.sog.unc.edu/areas-of-work/bail-reform-2-0/>.

102 *See*, Jessica Smith & Ross Hatton, *Use of Summons v. Arrest in North Carolina Misdemeanor Cases: A County-Level Analysis*, Sept. 2019, <https://cjl.sog.unc.edu/files/2019/09/Summons-v.-Arrest-for-North-Carolina-Misd.-Cases-9.13.2019.pdf> ; Jessica Smith & Ross Hatton, *Citation Versus Arrest by North Carolina Law Enforcement Officers: A County-Level Analysis*, <https://cjl.sog.unc.edu/files/2019/09/Prevalence-of-Citation-Use-in-North-Carolina-2.pdf> ; Jessica Smith, *How Big a Role Does Money Play in North Carolina's Bail System?*, UNC School of Government, July 2019, <https://cjl.sog.unc.edu/files/2019/07/How-Big-a-Role-Does-Money-Play-in-North-Carolina.pdf> . The Task Force was also impressed with the comprehensive data collection related to the role race plays at every stage of the criminal justice system found in a report issued in November 2019 by the W. Haywood Burns Institute for Justice Fairness and Equality, *Racial and Ethnic Disparities in Multnomah County*, <https://multco.us/file/84525/download>. This too should be a template for multijurisdictional and multiagency reports in Kansas.

103 <https://measuresforjustice.org/about/overview#what-we-do>.

104 <https://measuresforjustice.org/news/2020-02-11-mfj-releases-data-from-missouri>.

105 Megan Russo, Jesse Jannetta, & Marina Duane, *Developing Data Dashboards to Drive Criminal Justice Decisions: An Innovation Fund Case Study from Allegheny County, Pennsylvania, and San Francisco, California*, Urban Institute, Oct. 2018, https://www.urban.org/sites/default/files/publication/99171/developing_data_dashboards_to_drive_criminal_justice_decisions_0.pdf (published with funding by the John D. and Catherine T. MacArthur Foundation under the Safety and Justice Challenge Network).

106 National Institute of Corrections, *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field*, August 2011, <https://s3.amazonaws.com/static.nicic.gov/Library/025172.pdf>.

107 <https://www.sentencing.ks.gov/statistical-analysis/dashboards/annual-report-analysis>.

108 The go-live dates may be impacted the COVID-19 pandemic and may be adjusted.

109 The full objection continues:

Data collection should not be for the purposes of “fostering an understanding of pretrial release and detention” since Kansas does not have a system of “pretrial release and detention.” Kansas has a system of bail and excessive bail. Preventative detention is narrowly limited, “All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great,” and otherwise all persons shall be bailable by and a nonexcessive setting of bail and sufficient sureties. “Excessive bail shall not be required.” To design the data collection system to inform a change in practices or procedures that would warrant a constitutional change (New Jersey, New Mexico, etc.) is inappropriate since it presumes that the legislature and the voters would approve such a change when one is not before them.

- 110 Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.
- 111 Email from Pittsburg State University student collective dated July 11, 2020.
- 112 Written testimony of Austin Spiller before Task Force on Mar. 6, 2020.
- 113 Americans for Prosperity Kansas, Pretrial Justice Task Force Report Recommendations, Sep. 18, 2020. See also, *Criminal Justice Data Transparency Model*, American Legislative Exchange Council, 2020.
- 114 Vera Institute website, Arrest Trends, <https://arresttrends.vera.org/arrests>.
- 115 <https://www.theiacp.org/sites/default/files/all/c/Citation%20in%20Lieu%20of%20Arrest%20Literature%20Review.pdf>.
- 116 *Use of Summonses and Custodial Arrests for Municipal Offenses*, Criminal Justice Leadership Alliance, Apr. 7, 2010, <http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx>. See also, National Conference of State Legislatures website on pretrial release: <http://www.ncsl.org/research/civil-and-criminal-justice/pretrialrelease.aspx>; See also, *DUE SOUTH: New Orleans, Louisiana: Reforming Arrest and Pretrial Practices*, Justice Policy Institute, May 2011, http://www.justicepolicy.org/uploads/justicepolicy/documents/duesouth_-_new_orleans.pdf.
- 117 *Final Report of the President's Task Force on 21st Century Policing*, President's Task Force on 21st Century Policing, Office of Community Oriented Policing Services, (2015) https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.
- 118 ABA Standards for Criminal Justice: Pretrial Release, Standard 10-1.3, https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf (3d ed. 2007).
- 119 <https://nccriminallaw.sog.unc.edu/10723-2/>.

Cite or Arrest?

Best practices call for “least harm” resolutions, including using citations instead of arrests, when appropriate. ***Whether to cite or arrest is always in your discretion.*** However, you are encouraged to issue citations for misdemeanors unless one of the following circumstances exists:

- ☐ Defendant poses a danger of continuing criminal activity if not arrested
- ☐ Defendant poses an immediate danger to himself and assistance without arrest is not an option
- ☐ Defendant poses a danger to others
- ☐ Pretrial restrictions are required (e.g., stay away from victim)
- ☐ Offense involved physical harm to a person (as opposed to property)
- ☐ Offense involved deadly weapon
- ☐ Domestic dispute
- ☐ Defendant has more than 2 prior FTAs within the past 2 years
- ☐ Defendant has prior violent crime convictions
- ☐ Defendant committed offense while on probation/pretrial release
- ☐ Cannot confirm Defendant’s identity or physical address
- ☐ Defendant has no local address or connections and thus is a FTA risk
- ☐ Defendant also arrested for a felony
- ☐ Statute requires arrest

120 “We are excited to support the Citation Project,” said Charles Koch Foundation Executive Director Ryan Stowers. “The Project’s research will help law enforcement develop best practices to improve public safety, increase trust between police and communities, and ensure that the criminal justice system offers alternatives to arrest that allow nonviolent offenders a second chance.” <https://www.sog.unc.edu/about/news/cite-or-arrest-school's-new-innovation-lab-will-research-options-1>.

121 <https://americansforprosperity.org/afp-tennessee-has-most-productive-session-ever/>.

122 <https://www.aclu-tn.org/2019-tga-legislative-review/>.

123 American Bar Association Standards for Criminal Justice, Pretrial Release (3rd ed. 2007), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc/.

124 K.S.A. § 22-2302.

125 For example, K.S.A. § 22-2401 allows an officer discretion to make an arrest if there is probable cause to believe the person will not be apprehended, or evidence of the crime will be irretrievably lost unless the person is immediately arrested; or the person may cause injury to self or others or damage to property unless immediately arrested; or the person has intentionally inflicted bodily harm on another person. In these specific situations a notice to appear may not be appropriate. There may be other circumstances, but the Task Force believes that stakeholders are in a better position to determine those exceptions.

126 <https://www.theiacp.org/projects/citation-in-lieu-of-arrest>.

127 Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

128 Email dated Mar. 7, 2019 from Sedgwick County Sheriff Jeffrey Easter on behalf of the Kansas Sheriff’s Association.

129 Email dated Mar. 4, 2020 from Kansas Sheriffs’ Association.

130 Email dated Mar. 5, 2019 from Melody Miller, Kansas Urban League; Anecdotal information provided by members of minority communities expressed a concern that officers often choose to arrest minorities while giving whites a ticket or summons. These concerns were relayed from LULAC and many members of the black community. The ACLU also alerted the Task Force to several studies that would support a concern regarding discriminatory enforcement practices in Kansas. For example, the Manhattan Alliance for Peace and Justice reported that in 2014 black persons in Riley County were 6.8 times more likely than white persons to be arrested for marijuana possession (a nonperson crime): <https://mapj.org/2017/02/23/cej-leaflet-on-rcpd-drug-law-enforcement-2010-2014/>. See also, Kelsey Ryan and Amy Renee Leiker, *Ballot Issue Invites Look at Marijuana Use in Wichita*, The Wichita Eagle, Mar. 28, 2015, <https://www.kansas.com/news/politics-government/election/article16705595.html> (“Nationally, blacks were 3.7 times more likely than whites to be arrested for marijuana, even though black people and white people use marijuana at roughly the same rates, according to an ACLU analysis of millions of marijuana arrests between 2001 and 2010.”).

The Task Force was also impressed with the work done by Professor Michael Birzer, Wichita State University, regarding minority experiences with law enforcement throughout the state and the response from law enforcement to those concerns. See, Birzer, Michael, *Racial Profiling: Perspectives of Kansas Law Enforcement*, Kansas Department of Transportation, May 2015; Birzer, Michael, *Racial Profiling: They Stopped me Because I’m ---*, CRC Press, 2013; Birzer, Michael, *The Phenomenology of Racial Profiling in Kansas Technical Report*, Kansas Department of Transportation, December 23, 2010.

131 ACLU, Feedback on Draft Pretrial Task Force Report, Sep. 18, 2020; Written testimony of Austin Spiller before Task Force on Mar. 6, 2020. The ACLU also recommended “[in] addition, policymakers should seriously consider decriminalization of certain offenses, to reduce increasing system costs and burdens.” The Task Force viewed issues of decriminalization as beyond the scope of its charge from the Supreme Court, but we note its concern here.

132 Email dated Mar 7, 2019 from Ed Klumpp on behalf of the Kansas Association of Chiefs of Police, with letter attached from President, Chief Mike Keller and email from Chief Stu Hite, Kansas Peace Officers Association dated Mar. 5, 2019.

133 Email dated Nov. 22, 2019 from Tenth Judicial District Magistrate Judge Daniel Vokins.

I know there is a push to perhaps issue more citations rather than an arrest. I would be interested to know what

the FTA percentage is with citations in City Courts where they are commonly used. I bet the percentage is high. In addition, how do you handle the fingerprint and DNA sample issue. I can guarantee that if I tell the defendant at first appearances/arraignments to go across the street to the jail to submit the fingerprints/DNA, they will not go. Therefore, something would have to be set up right outside the courtroom and that raises space and manpower resources for the Sheriff.

- 134 A few Kansas legislators have supported legislation to allow undocumented workers to obtain driver's licenses, with one goal to provide identification. This request was renewed recently by the Kansas Commission on Racial Equity appointed by Gov. Laura Kelly. In addition, as to undocumented Mexican workers, the Mexican Consulate presented testimony to the legislature about a new Consular ID Card for Mexicans living abroad. Fifteen states and the District of Columbia have enacted laws to allow unauthorized immigrants to obtain driver's licenses. Noah Taborda, *Attorney: Driver's License for undocumented immigrants key to safer roads in Kansas*, Kansas Reflector, Sep 17, 2020, <https://kansasreflector.com/2020/09/17/attorney-drivers-license-for-undocumented-immigrants-key-to-safer-roads-in-kansas/>.
- 135 Matt Ford, *America's Largest Mental Hospital is a Jail*, The Atlantic, June 8, 2015, <https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/>.
- 136 Kansas Law Enforcement, Crisis Intervention Team website, Sept. 6, 2019, www.kansascit.org/about-us.html.
- 137 Ashleigh Fryer, *Eleven Johnson County KS Cities to Partner a Mental Health Co-Responder with Law Enforcement*, Council of State Governments-Justice Center, July 21, 2016, <https://csgjusticecenter.org/states/kansas/>.
- 138 Topeka Police Department Website <https://www.topeka.org/tpd/cit/>.
- 139 Matthew Kelly, *Integrated Care Team Launches with focus on Mental Healthcare*, The Wichita Eagle, Aug. 2, 2019, <https://www.kansas.com/news/local/crime/article233183986.html>.
- 140 Douglas County Kansas website, <https://douglascountyks.org/depts/district-attorney/behavioral-health-court-information>.
- 141 Susan Thacker, *Crisis Team Looks at Jail Overcrowding and Mental Health: Community hopes to form crisis intervention team*, Great Bend Tribune, August 20, 2019, <https://www.gbtribune.com/news/local-news/crisis-team-looks-jail-overcrowding-and-mental-health/>.
- 142 Oral report to Task Force from Ellis County Attorney Thomas Drees.
- 143 Paul Williams, *Law Enforcement & Certified Community Behavioral Health Clinics: Increasing Access to Treatment, Decreasing Recidivism*, Dec. 4, 2018, <https://www.thenationalcouncil.org/wp-content/uploads/2018/12/Paul-Williams-statement-FINAL-PRINT-VERSION.pdf>.
- 144 *Id.*
- 145 *What is a CCBHC?*, National Counsel of Behavioral Health, <https://www.thenationalcouncil.org/wp-content/uploads/2017/11/What-is-a-CCBHC-11.7.17.pdf>.
- 146 *See* National Council for Behavioral Health Website for information about the CCBHC program, <https://www.thenationalcouncil.org/topics/certified-community-behavioral-health-clinics/>.
- 147 David Twiddy, *Nine Johnson County Cities to Share Costs for Mental Health Professional*, The Kansas City Star, June 7, 2016, <https://www.kansascity.com/news/local/community/joco-913/northeast-joco/article82298477.html>.
- 148 [Dave Roos](#), *Cash Bail Punishes Poor; But What's the Alternative?*, HowStuffWorks.com, Feb. 14, 2018, <https://money.howstuffworks.com/cash-bail-punishes-poor-but-whats-alternative.htm>.
- 149 Kansas Sheriffs' Association, Comments on Pretrial Justice Task Force Draft Report, Sep. 15, 2020.

Our association continues to support improvements to appropriate diversion to mental health services where possible. We believe it is important to note the problem we encounter in pretrial or pre-arrest mental health diversion is three-fold. The

largest obstacle is mental health service capacity in Kansas. The further away from the mid to large size metropolitan areas the more capacity becomes an issue. This often is not a matter of just funding, but also the lack of qualified mental health professionals within the given area and transportation issues to access what is available. The second concern is the ability to determine, and who is qualified to make the determination, whether the crime is committed as a result of a person's mental health crisis or if a person committing a criminal act just happens to also have a mental health issue. These determinations cannot generally be made quickly and are often long debated in court. The more serious the crime the more difficult this decision is. The third is the funding for those services. When this recommendation is viewed along with Recommendation #18, it could quickly become a funding issue especially if mental health treatment is a condition of pretrial release. Funding for mental health services, especially for many people involved in the justice system, will fall mainly on the Community Mental Health Centers. Training law enforcement to arm them with better mental health expertise becomes challenging for small agencies in rural Kansas. Another challenge for rural agencies is partnering with local mental health experts for Mental Health Crisis teams due to the lack of mental health services. Mental health resources are scarce in rural Kansas. The now five-year-old plus moratorium on admissions to Osawatimie State Hospital, and new restrictions on admissions to Larned State Hospital are continuing examples of the crisis for health care capacity for those Kansans in a mental health crisis.

150 Email from Pittsburg State University student collective dated July 11, 2020.

151 K.S.A. § 59-29c02.

152 K.S.A. § 59-29c05.

153 Mental Health Task Force Report to the Kansas Legislature, Recommendation 1.2, Jan. 14, 2019, at 13, https://www.kdads.ks.gov/docs/default-source/csp/bhs-documents/final-mental-health-task-force-report---january-2019.pdf?sfvrsn=4dac04ee_0.

154 *Id.* at 14.

155 See https://www.kdads.ks.gov/docs/default-source/csp/governor's-mental-health-task-force/mental-health-task-force-report.pdf?sfvrsn=462106ee_2, p. 13 and http://www.kslegislature.org/li/b2019_20/committees/ctte_spc_2020_ks_mental_health_modern_1/documents/testimony/20200827_05.pdf, at 16.

156 The full objection continues:

However a review of the definition at K.S.A. 29-59c02(f): [*“Crisis intervention center service area” means the counties to which the crisis intervention center has agreed to provide service*], indicates that there are counties, including numerous rural counties, which do not have Crises Intervention Centers available. Such regulations would only serve limited areas of the state. The laws which currently allow for involuntary committal by law enforcement are a convoluted and complicated patchwork procedure. Is this Task Force willing to suggest regulatory revisions of the Crises Intervention Act and the nightmare of statutory revisions of K.S.A. 59-2945, *Care and Treatment, et seq.* The suggestion from the Task Force is a laudable and much needed proposition but it is of limited application. This problem highlights the problems endemic to our rural state with its urban centers. Last but not least expect pushback to regulation changes from mental health, poverty, and civil rights special interests asking what procedural safeguards will there be to protect the rights of defendants facing 72 hours?

If this is to be used as a *de facto* method a preventative detention in criminal cases, we would be opposed as would, we suspect, other civil rights groups more familiar with mental health and committals.

Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

157 Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

158 Letter dated Mar. 5, 2020 from Kansas Sheriffs' Association.

159 Email dated Apr. 30, 2020 from Special Deputy for Government Affairs, Johnson County Sheriff's Office, Greg Smith.

160 K.S.A. § 22-3302(3)(A)(b).

161 K.S.A. § 22-3302.

162 K.S.A. § 22-3303.

163 Assumes pre-COVID-19 pandemic shutdown.

164 Policy Research Associates, Inc. (2020). *Quick fixes for effectively dealing with persons found incompetent to stand trial* (2nd ed). Delmar, NY: Author. <https://www.prainc.com/wp-content/uploads/2020/09/ISTRebrand-508.pdf>.

165 <https://www.kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2019%20Reports/Report%20on%20Commitment%20of%20Incompetent%20Defendants%20-%20JC%20Approved.pdf>.

166 Full text of most recent version of SB 333 can be found here: http://www.kslegislature.org/li/b2019_20/measures/documents/sb333_01_0000.pdf.

167 Supplemental Note on SB 333; http://www.kslegislature.org/li/b2019_20/measures/documents/supp_note_sb333_01_0000.pdf.

168 Kansas Sheriffs' Association, Comments on Pretrial Justice Task Force Draft Report, Sep. 15, 2020.

We agree addressing the long waiting list for competency determination and restoration is an immediate need to assure justice is served when competency is questioned. This has been a priority concern of our association for several years. We appreciate the recognition of the impact of this crisis on pretrial defendants and on county jails.

169 See HB 2292 introduced in the 2019 Kansas Legislative Session.

170 See Ram Subramanian, *et. al.*, *Incarceration's Front door: The Misuse of Jails in America*, Vera Inst. of Justice, Feb. 2015 at 12, <https://www.vera.org/downloads/publications/incarcerations-front-door-summary.pdf> (reporting that 60% of jail inmates report having had symptoms of a mental health disorder in the prior twelve months and 68% of jail inmates have a diagnosed substance abuse disorder).

171 2003 Kan. Sess. Laws Ch. 135 (S.B. 123).

172 *State v. Preston*, 287 Kan. 181, 185 (2008) (quoting a 2003 memorandum from Kansas Sentencing Commission to the Senate Judiciary Task Force).

173 http://www.kslegislature.org/li/b2019_20/measures/hb2708/.

174 http://www.kslegislature.org/li/b2019_20/measures/HB2292/testimony.

175 Testimony of Sedgwick County District Attorney Marc Bennett on HB 2748, Feb 19, 2020: http://www.kslegislature.org/li/b2019_20/committees/cte_h_corr_juv_jus_1/documents/testimony/20200220_09.pdf.

176 http://www.kslegislature.org/li/b2019_20/measures/documents/fisc_note_hb2708_00_0000.pdf.

177 Testimony of Scott Schultz, Executive Director, Kansas Sentencing Commission, before the House Corrections and Juvenile Justice Committee, Feb 20, 2020; http://www.kslegislature.org/li/b2019_20/committees/cte_h_corr_juv_jus_1/documents/testimony/20200220_08.pdf.

178 http://www.kslegislature.org/li/b2019_20/measures/documents/fisc_note_hb2708_00_0000.pdf.

179 “The KSA understands that a bill was recommended by the Justice Reform Commission. But it did not pass the House. HB2708 passed the House 125-0. We are in favor of these funds being earmarked for drug treatment and evaluation.” Letter sent by email from Kansas Sheriff’s Association dated Mar. 4, 2020.

180 Written testimony of Austin Spiller before Task Force on Mar. 6, 2020.

181 Emails from Silas Horst, Koch Industries, dated March 1, 2019 and March 7, 2019. In addition, Mr. Horst recommended a publication that he found compelling: Marc Levin and Michael Haugin, *Open Roads and Overflowing Jails: Addressing High*

Rates of Pretrial Incarceration, published by the Texas Public Policy Foundation-Right on Crime, May 2018: <http://rightoncrime.com/2018/05/open-roads-and-overflowing-jails-addressing-high-rates-of-rural-pretrial-incarceration/>.

182 Email dated Feb. 22, 2019 from Jay Hall, Legislative Policy Director and General Counsel, Kansas Association of Counties.

183 Written testimony of Austin Spiller before Task Force on Mar. 6, 2020.

184 The issue comes down to what is meant by the term “forthwith.” We have outlined the respective positions in fn. 10 of the Best Practices for Pretrial Arrest and Charging, attached hereto as Appendix A.

185 See *United States v. Cronin*, 466 U.S. 648, 658–60 (1984).

186 Davies, Shteynberg, Morgan & Wordon, *Guaranteeing Representation at First Court Appearances May be Better for Defendants and Cheaper for Local Governments*,” LSE US Centre Daily Blog, <https://blogs.lse.ac.uk/usappblog/2018/08/28/guaranteeing-representation-at-first-court-appearances-may-be-better-for-defendants-and-cheaper-for-local-governments/>.

187 Davies, Shteynberg, Morgan & Wordon, *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 CRIMINAL JUSTICE POLICY REVIEW 710 (2018).

188 Douglas L. Colbert *et. al.*, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1741–42 (2002); See also, Gerald R. Wheeler & Gerald Fry, *Project Orange Jumpsuit: Evaluation of Effects of Pretrial Status on Case Disposition of Harris County Felony & Misdemeanor A/B Defendants*, at 4 (2013) (finding that in Harris County, Texas, “[s]tatistically identical defendants who make bond experience: 86% fewer pretrial jail days; 33.3% better chance of getting deferred adjudication; 30% better chance of having all charges dismissed; 24% less chance of being found guilty; and 54% fewer jail days sentenced.”).

189 554 U.S. 191 (2008). See also, Sara Sapia, *Access to Counsel at Pretrial Release Proceedings*, by of the National Center for State Courts’ Pretrial Justice Center for Courts (www.ncsc.org/pjcc), Pretrial Justice Brief 7, Nov. 2016, https://www.ncsc.org/_data/assets/pdf_file/0020/1577/pretrial-counsel-brief-7.ashx.pdf.

190 554 U.S. at 203–04.

191 554 U.S. at 205.

192 But see, *Roeder v. State*, unpublished, 2019 WL 3242198, 444 P.3d 379 (Kan. Ct. App. 2019) (discussing *Rothgery* by way of LaFave’s interpretation of it).

Roeder complains the district court violated his Sixth Amendment right to counsel by failing to provide him an attorney at his first appearance, a hearing at which the court determined Roeder should be held without bond. But the Sixth Amendment right to counsel applies only at “critical stages” of the criminal proceeding, and Roeder’s first appearance and initial bail hearing was not a critical stage of his criminal proceeding. See *Craig v. State*, 198 Kan. 39, 41, 422 P.2d 955 (1967) (noting that counsel need not be appointed for initial appearance before judge at which bail is determined); see 3 LaFave, Israel, King, & Kerr, *Criminal Procedure* § 11.2(b), p. 702 (4th ed. 2015) (noting that while United States Supreme Court left open question of whether first appearance in criminal case is critical stage requiring counsel in *Rothgery v. Gillespie County*, 554 U.S. 191, 128 S. Ct. 2578, 171 L.Ed. 2d 366 [2008], statements in Court’s opinion and concurring opinion suggested that the standard first appearance ordinarily would not be a critical stage).

193 Douglas L. Colbert, *Prosecution Without Representation*, 59 Buff. L. Rev. 333, 396 (2011). He provides the following survey results related to delays in appointment of counsel in Kansas.

Location City (County)	Represented at Initial Bail Hearing?	If No, Days of Delay?	Attorney Providing Information
KANSAS			
Salina (Saline County)	No	2 - 7	Mark J. Dinkel
Wichita (Sedgwick County)	No	2	Steve Osburn
Topeka (Shawnee County)	No	7	Tom Bartee
Liberal (Seward County)	No	14-30	Razmi Tahirkheli

194 Douglas L. Colbert, *Prosecution Without Representation*, 59 Buff. L. Rev. 333, 413–14 (2011).

195 18 U.S.C.A. § 3142(f).

The hearing shall be held immediately upon the person’s first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday).

196 Judges Pretrial Arrest and Detention Survey, conducted by Task Force.

197 K.S.A. § 22-2802(8).

198 Ms. Cessna oversees 16 public defender offices and facilitates the representation of over 400 appointed private counsel in 105 different counties across the state of Kansas on behalf of indigent adult clients charged with felonies.

199 <https://www.lifesize.com/>.

200 Although costs vary based on each county’s needs, a camera--which includes a microphone and television—was roughly \$3,000. Yearly maintenance and technology support add about \$650, not including the cost of a cloud subscription and then additional costs for multiple locations (beyond the basic three). One small county was paying about \$750 per hosting location. There is unlimited use between the courtroom and the jail and it can be installed with web conferencing capabilities. Because some counties are extremely rural and have no technology support, the indigent defense services agency pays to get the video technology up and working. It has been highly praised by those who use it. Anecdotally there is a belief that it has resulted in lower bonds—getting back to family and jobs—while still addressing public safety.

201 <https://sixthamendment.org/>.

202 https://www.maine.gov/mcils/document_library/index.html.

203 https://sixthamendment.org/6AC/6AC_me_report_2019_execsumm.pdf.

204 *Tucker v. State*, 162 Idaho 11 (2017).

205 <https://legislature.idaho.gov/statutesrules/idstat/Title19/T19CH8/SECT19-850/>.

6. The defending attorney assigned to a particular case should, to the extent reasonably practicable, continuously oversee the representation of that case and personally appear at every substantive court hearing.

Idaho Code Ann. § 19-850.

- 206 Telephone discussion with Kathleen Elliott, Executive Director, Idaho State Public Defense Commission on Feb. 28, 2020. It was also brought to the Task Force’s attention that the Deason Center, established in 2017 as part of the Southern Methodist University Dedman School of Law may soon be working on data driven comparisons of vertical v. horizontal representation in indigent defense representation. <https://deasoncenter.smu.edu/about/> Conversation with Director, Pamela R. Metzger.
- 207 <https://bailproject.org/>.
- 208 <https://bailproject.org/after-cash-bail/>.
- 209 <http://sfpublicdefender.org/careers/employment/>.
- 210 Email conversation with Melody Brannon Federal Public Defender and Kirk Redmond, First Assistant Federal Public Defender, District of Kansas, on Mar. 2, 2020. <https://ks.fd.org/>.
- 211 James Anderson, Mary Buenaventura, & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, <https://www.law.upenn.edu/live/files/8282-holisticdefensev201>. See also. Robin Steinberg, *Heeding Gideon’s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 Wash. & Lee L. Rev. 961, 962 (2013).
- 212 Ted Talk on Participatory Defense: Raj Jayadev: https://www.ted.com/talks/raj_jayadev_community_powered_criminal_justice_reform#t-211004.
- 213 <https://www.foolsmisson.org/programs/participatory-defense/> ; See also, Maura Ewing, *How Prisoner’s Family Members Can Assist Overworked Public Defenders*, The Atlantic, July 5, 2017, <https://www.theatlantic.com/politics/archive/2017/07/a-replacement-for-overworked-public-defenders/532476/>; Thomas Fox Perry, *Ideas We Should Steal: Participatory Defense*, The Philadelphia Citizen, Nov. 29, 2017, <https://thephiladelphiacitizen.org/ideas-we-should-steal-participatory-defense/>.
- 214 Email from Heather Cessna, Sep. 28, 2020. See also, Board of Indigent Defense Services, *A Report on the Status of Public Defense in Kansas*, Sep 2020. <http://www.sbids.org/>. The report notes that
- 85% of adults charged with felonies in Kansas are indigent and qualify for court-appointed counsel;
 - It costs \$175 more per case when private counsel has to be appointed than when a public defender handles the case;
 - That national standard for public defenders is no more than 150 felonies per year. Many public defenders exceed that limit.
 - In FY 2020 four offices had to refuse to take new cases for over 35% of the calendar year due to turnover and high caseloads.
 - In FY 2020, trial level public defenders only had, on average, 10 hours per case to spend defending their clients.
- 215 Nomin Ujyediin, *One in Four Public Defenders in Kansas Quit Last Year Leaving Agency in Crisis*, NPR in Kansas City, Apr. 8, 2019, <https://www.kcur.org/post/one-four-kansas-public-defenders-quit-last-year-leaving-agency-crisis#stream/0>.
- 216 *Id.* The Task Force estimates the statewide average salary of public defenders to be \$62,400 and prosecutors, \$75,000.
- 217 According to a 2008-2009 survey, ten states ensure representation with the 48 hour initial bond hearing; California, Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, North Dakota, Vermont, Wisconsin, and the District of Columbia. See Douglas L. Colbert, *Prosecution Without Representation*, 59 Buff. L. Rev. 333, 389 (2011).
- 218 Examples: Del. Super. Ct. Crim. R. 44; W. Va. R.Crim.P., Rule 44 ; Fla. R. Crim. P. 3.130 (also allows for limited representation: “If necessary, counsel may be appointed for the limited purpose of representing the defendant only at first appearance or at subsequent proceedings before the judge.”).
- 219 Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.
- 220 Email from Silas Horst, Koch Industries, March 24, 2019. Also referred the Task Force to: Davies, Shteynberg, Morgan & Wordon, *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 CRIMINAL JUSTICE POLICY REVIEW 710 (2018).

221 Letter sent by email from Kansas Sheriff’s Association dated Mar. 4, 2020.

222 ACLU, Feedback on Draft Pretrial Task Force Report, Sep. 18, 2020. Testimony of Austin Spillar, Policy Associate, ACLU-Kansas, Mar. 6, 2020 Task Force Meeting.

223 Sarah L. Desmarais and Evan M. Lowder, *PRETRIAL RISK ASSESSMENT TOOLS: A Primer for Judges, Prosecutors, and Defense Attorneys*, Feb. 2019, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/Pretrial-Risk-Assessment-Primer-February-2019.pdf>.

224 *Id.*

225 *Updating the New York City Criminal Justice Agency Release Assessment*, Luminosity & the University of Chicago’s Crime Lab New York, Sep. 2020. <https://www.nycja.org/publications/cjas-updated-release-assessment>.

226 *An Analysis of the Domestic Violence Lethality Assessment in Johnson County, Kansas*, Presented by United Community Services of Johnson County January 17, 2014, p. 3. <http://ucsjoco.org/wp-content/uploads/2018/05/Domestic-Violence-Lethality-Assessment-Report.pdf>.

227 Kleinberg, et al., *Discrimination in the Age of Algorithms*, Journal of Legal Analysis, Volume 10, 2018, Pages 113–174, <https://doi.org/10.1093/jla/laz001>.

228 11 Del.C. § 2104 (e)(1):

When making a release determination, or imposing conditions set forth in § 2108 of this title, the court shall use an empirically developed risk assessment instrument, if available, designed to improve pretrial release decisions by assessing defendant’s likelihood of pretrial success. In circumstances involving suspected domestic or intimate partner violence, the judicial officer shall also consider the results, if available, of an instrument designed to assess the likelihood or predicted severity of future violence against the alleged victim. Any such risk assessment tools are not binding on the court. They are factors to be considered in the totality of the circumstances in determining the conditions of release imposed upon the defendant. The judicial officer may consider any other facts and circumstances regarding a defendant’s likelihood of pretrial success and the protection of the victim, witnesses, and any other person.

(2) The Statistical Analysis Center shall provide the court with a report of rates of re-arrest and failure to appear as required by defendants released by the court.

229 Idaho Code Ann. § 19-1910:

(1) All pretrial risk assessment tools shall be transparent, and:

- (a) All documents, data, records, and information used by the builder to build or validate the pretrial risk assessment tool and ongoing documents, data, records, and written policies outlining the usage and validation of the pretrial risk assessment tool shall be open to public inspection, auditing, and testing;
- (b) A party to a criminal case wherein a court has considered, or an expert witness has relied upon, a pretrial risk assessment tool shall be entitled to review all calculations and data used to calculate the defendant’s own risk score; and
- (c) No builder or user of a pretrial risk assessment tool may assert trade secret or other intellectual property protections in order to quash discovery of the materials described in paragraph (a) of this subsection in a criminal or civil case.

(2) For purposes of this section, “pretrial risk assessment tool” means a pretrial process that creates or scores particular factors in order to estimate a person’s level of risk to fail to appear in court, risk to commit a new crime, or risk posed to the community in order to make recommendations as to bail or conditions of release based on such risk, whether made on an individualized basis or based on a grid or schedule.

230 W. Va. Code Ann. § 15A-5-7:

- (a) Within three calendar days of the arrest and placement of any person in a jail, the division shall conduct a pretrial risk assessment using a standardized risk assessment instrument approved and adopted by the Supreme Court of appeals of West Virginia. The results of all standardized risk and needs assessments are confidential and shall only be provided to the court, court personnel, the prosecuting attorney, defense counsel, and the person who is the subject of the pretrial risk assessment. Upon completion of the assessment, the Division of Corrections and Rehabilitation shall provide it to the magistrate and circuit clerks for delivery to the appropriate circuit judge or magistrate.
- (b) The pretrial risk assessment and all oral or written statements made by an individual during risk assessment shall be inadmissible evidence at any criminal or civil trial.

231 Sarah Picard, Matt Watkins, Michael Rempel, & Ashmini Kerodal, *Beyond the Algorithm: Pretrial Reform, Risk Assessment and Racial Fairness*, Center for Court Innovation, 2019. https://www.courtinnovation.org/sites/default/files/media/document/2019/Beyond_The_Algorithm.pdf.

232 *Pretrial Implementation*, Public Safety Risk Assessment Clearinghouse, <https://psrac.bja.ojp.gov/implementation/structured-decision/pretrial>.

233 Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment*, Pretrial Justice Institute, Mar. 2011, https://www.bja.gov/Publications/PJI_PretrialRiskAssessment.pdf.

234 *Americans Favor Expanded Pretrial Release, Limited Use of Jail*, Pew Charitable Trust, Nov. 2018 (Issue Brief), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/11/americans-favor-expanded-pretrial-release-limited-use-of-jail>.

235 <https://www.pretrial.org/wp-content/uploads/Risk-Statement-PJI-2020.pdf>.

236 NAPSA: <https://napsa.org/eweb/startpage.aspx> ; JFA Institute: <http://www.jfa-associates.com/publications/NewReleases/TheValueofPretrialRiskAssessmentInstruments.pdf> ; CEPP: <https://cepp.com/a-statement-from-advancing-pretrial-policy-and-research-appr/>.

237 Email dated Feb. 25, 2020 to members. See also, 2013 position paper supported by the Conference of Chief Justices: <https://ccj.ncsc.org/policy-resolutions>.

238 <https://cjl.sog.unc.edu/files/2020/01/Project-Report-JD-21.pdf>.

239 Brook Hopkins, Chiraag Bains, & Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 683 (2019) (“In jurisdictions that have implemented reforms that result in releasing most people on recognizance, the overwhelming majority of those people have shown up for court dates and have not committed crimes on release.”).

240 Sandra Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 514 (2018). See also Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, (2012) (“We also show that though defendants with drug felonies are presumed to be dangerous, they are among the least likely to be rearrested for a violent crime. In fact, people charged with drug felonies are about as likely to be rearrested as those brought in on driving-related offenses.”); DeMichele, Matthew and Baumgartner, Peter and Wenger, Michael and Barrick, Kelle and Comfort, Megan and Misra, Shilpi, *The Public Safety Assessment: A Re-Validation and Assessment of Predictive Utility and Differential Prediction by Race and Gender in Kentucky* (April 25, 2018), at 30 available at <http://dx.doi.org/10.2139/ssrn.3168452> (pretrial risk assessment tools that flag cases that may result in new violent criminal activity (NVCA) note that only 3% of those defendants given a NVCA flag are actually arrested for a new violent crime.); In other words, as noted by Dr. Stephen Demuth, Associate Professor of Sociology, Bowling Green State University, “if a judge decides to detain someone because of the NVCA flag, 97% of the time they’d be detaining someone who would not have been arrested.” Comment on Pretrial Justice Institute blog, September 14, 2020.

241 <https://www.psapretrial.org/about>.

242 Sarah L. Desmarais & Evan M. Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense*

243 234 Pa. Code Rule 523. <https://www.pacode.com/secure/data/234/chapter5/s523.html>.

244 The full response from the Kansas Bail Agents Association:

The Supreme Court should not get into the business of approving risk tools, piloting risk tools, or doing anything in terms of supervising the use of such tools in the system. In addition, consideration must be given to whether the rules of evidence should be changed regarding the proprietary trade-secret allegation and evidentiary privileges that proprietors of such risk assessments enjoy. To deny defendants and their defense attorneys the information as to how and why a defendant has a high bond or was denied release by application of a supposed “*uniform, validated pretrial risk assessment tool*” is an anathema to the American system of justice. How can a defendant properly represent his own interests if now allowed access to challenge the assertions made against him?

Pretrial risk assessments are sold as an easy way to get everything we want: make the communities safer, reduce jail populations, increase appearance rates, solve racism, and fix many other issues in the system. The problem is that in practice that has simply not occurred. Civil rights groups, academia, legislators, policy-makers and others are now asking not should we simply fix the issues with these pretrial risk assessment tools but should we use them at all?

The following is a list of recent criticisms of such pretrial risk assessment tools:

- In August 2019, twenty-seven prominent academics from prominent universities issued a statement that jurisdictions must stop using pretrial risk assessment tools because they do not accurately predict, they are racially biased, and they cannot be fixed. <https://ambailcoalition.org/download/24/risk-assessments/4956/technical-flaws-of-pretrial-risk-assessments.pdf>. The same researchers then sent letters to three jurisdictions demanding that they cease using the tools. <https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/4976/california-researchers-rat-warning.pdf>.
- In 2018, 100 national civil rights groups, including the NAACP and ACLU, issued a statement cautioning jurisdictions to not use the tools due to concerns of racial bias and validity, and then demanding transparency if the tools are to be used. <https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/>.
- Academic research indicates that proprietors of these tools pursuant the common law are able to shield the underlying mathematics and data of these tools not only from the public but from criminal defendants who seek to expose the ineffectiveness of these tools at the margins when it means jail or freedom. <https://www.stanfordlawreview.org/print/article/life-liberty-and-trade-secrets/>.
- Over 100 civil rights groups in New York State opposed the expansion or use of pretrial risk assessment tools. <https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/864/new-york-100-community-leaders-bail-reform-letter.pdf>.
- The ACLU of Kansas issued a powerful rebuke of risk assessment tools to a judiciary led task force looking at bail reform https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/4646/aclu_presentation-kansas.pdf.
- Eighty digital groups, including Google, Facebook, IBM, Samsung, etc. issued a statement saying that they believe the assessments potentially bake-in existing bias into the system and prevent real change. <https://ambailcoalition.org/download/24/risk-assessments/4766/report-on-algorithmic-risk-assessment-tools.pdf>.
- One scholar’s research shows that risk assessment algorithms have contributed to generational mass incarceration, rather than the suggestion that these algorithms actually reduce it. <https://ambailcoalition.org/download/24/risk-assessments/835/performance-effects-risk-tech-robert-werth-rice-university.pdf>.
- The legislature of the State of Iowa passed legislation that ended a pilot project of the Arnold Foundation PSA in Iowa, which was endorsed by the Governor, due to concerns which we have seen coast-to-coast that the tool is too soft on gun cases, is not transparent and may be potentially biased.
- In a landmark peer-reviewed study, Professor Megan Stevenson of George Mason University School of Law, after reviewing significant data from various jurisdictions, concluded that in practice the tools had a negligible if any effect on jail populations and increased slightly the risk of failing to appear in court as required and the risk of committing new crimes while on bond. <https://ambailcoalition.org/download/24/risk-assessments/828/assessing-risk-assessment-in-action.pdf>.
- The Idaho Legislature passed legislation, Idaho House Bill 118, <https://legislature.idaho.gov/wp-content/uploads/>

[sessioninfo/2019/legislation/H0118.pdf](#) that Governor Little signed into law, to require the pretrial risk assessments to be fully transparent and to eliminate the ability for the algorithms to be proprietary and enjoy the ability to quash discovery requests in a criminal case. John Arnold, of the Arnold Foundation, in fact supported that legislation, and yet states and jurisdictions like Michigan, New Jersey, Toledo, Ohio, etc. all have contracts that still maintain and allow the proprietary protections. No other legislature in the nation has yet to act on this.

- A recent article on Wired.com noted that the Kentucky experiment with the use of the Arnold Foundation algorithm based on empirical research has failed. <https://www.wired.com/story/algorithms-shouldve-made-courts-more-fair-what-went-wrong/>.
- The ACLU of Colorado at a recent legislative hearing in the House Judiciary Task Force considering the statewide expansion of risk assessments in H.B. 19-1226, testified that the Colorado CPAT tool violated the Americans With Disabilities Act because it scored those with current or previous mental health or substance abuse disorders as higher risk, increasing the chances they would stay in jail or face greater supervision by county agencies. Many of the existing tools suffer from the same issues.
- 50 Civil Rights groups, including the ACLU and San Francisco public defender, opposed the passage of California's Senate Bill 10, largely on grounds of opposition to the risk assessment and expansion of preventative detention.
- New Jersey claims the success of the Arnold Foundation Public Safety Assessment algorithm, but even if the jail population drop could be attributed to bail reform, there is no indication that the use of the algorithm is the reason versus the forcing of prosecutors to prove that detention is justified has driven more releases.

No one has been able to demonstrate that the investment of government resources into the risk assessment process has resulted in any savings, much less savings significant enough to offset the cost of doing the risk assessment in the first place. In short, there is no reason at this point to believe that pretrial risk assessments will reduce jail populations, save money, make the system more fair (largely due to inherent bias issues), reduce crimes while on release, or reduce failures to appear in court as required. In practice, the risk assessment era has failed over the last decade to deliver on its promises, and we believe it is time for it to come to an end.

For these reasons, the Supreme Court should allow the other branches of Government to deal with issues related to pretrial risk assessments and should not get into the business of approving tools via court rules. The Supreme Court of Ohio recently, decided not to issue rules that would over-rule the legislature's enactment of ORAS, rules recommended by a judicial Task Force would have done just that.

Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

245 Americans for Prosperity Kansas, Pretrial Justice Task Force Report Recommendations, Sep. 18, 2020.

In implementing recommendation #11 on risk assessment pilot studies, AFP-Kansas supports the use of rigorously scrutinized factors which can be shown to predict risk without functioning as a proxy for race or class. Some examples of factors that better reflect this approach include an individual's attitudes about crime, having aggressive personality traits or poor family and marital relationships, having friends involved in criminal activity, or their age. We recommend that Kansas looks to states like New Jersey and Virginia as models of effective design and implementation of pretrial risk assessments.

AFP-Kansas also believes that all risk assessment pilots and any eventual statewide risk assessment tool that results should be developed through a comprehensive group of stakeholders including the courts, community leaders, academia, and law enforcement. Risk assessments should also be subject to regular, periodic review to incorporate new evidence and continually assess accuracy and potential bias. Finally, AFP-Kansas also believes that risk assessments should inform, but never replace judicial decision making, though differing opinions should still be recorded and explained.

246 ACLU, Feedback on Draft Report, Sept. 18, 2020.

There is no role for algorithmic risk assessment tools in our pretrial vision. We oppose their use, and we do not believe they are used correctly or in a way that mitigates bias.

In many ways, the data and feedback collected by the ACLU of Kansas during COVID-19 reaffirmed our previous positions and testimony to the task force. The COVID-19 pandemic highlights the disproportionate economic and health impacts on Black and Brown people in Kansas and across the country. This is further evidence that the data fed into risk assessment tools is tainted by systemic racism. Your draft report accurately reflects where we agree and where we have concerns with your recommendations. We appreciate your willingness to make our concerns part of the public record.

See also, Presentation to Task Force in Mar. 2019. Written testimony of Austin Spiller before Task Force on Mar. 6, 2020. https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/Pretrial_Justice_Task_Force/ACLU_presentation.pdf.

247 Sarah L. Desmarais & Evan M. Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys*, Safety and Justice Challenge, Feb. 2019, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/Pretrial-Risk-Assessment-Primer-February-2019.pdf>.

248 Radley Balko, *There's overwhelming evidence that the criminal justice system is racist. Here's the proof*, The Washington Post, June 10, 2020, <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/>.

Ruth Marcus, *If you don't believe systemic racism is real, explain these statistics*, The Washington Post, June 12, 2020, https://www.washingtonpost.com/opinions/if-you-dont-believe-systemic-racism-is-real-explain-these-statistics/2020/06/12/ce0dff6e-acc7-11ea-94d2-d7bc43b26bf9_story.html.

249 Sandra G. Mayson, *Bias In, Bias Out*, 128 Yale L.J. 2218, 2224 (2019).

250 Email from Joyce Grover, Executive Director of the Kansas Coalition Against Sexual and Domestic Violence on Mar. 2, 2020. <https://praxisinternational.org/wp-content/uploads/2016/02/BlueprintChapter7.pdf>.

251 Kansas Sheriffs' Association, Comments on Pretrial Justice Task Force Draft Report, Sep. 15, 2020.

Our association agrees that we should use available validated tools to assess risk to public safety in the pretrial release decision. However, as we have voiced before, we are opposed to placing the task of conducting pretrial release assessments on jail staff. We are aware the accuracy of risk assessment tools is highly dependent on well trained personnel completing the assessment tool. The workload and high turnover rate in local jail staff makes it doubtful we could attain the level of expertise needed to assure accurate application of the tool. This would be especially challenging in small jurisdictions (rural jails).

252 *Pretrial Risk Assessment 101: Science Provides Guidance on Assessing Defendants*, Pretrial Justice Institute, May 2015 (Issue Brief), https://www.bja.gov/Publications/PJI_PretrialRiskAssessment101.pdf.

253 Emails dated Mar. 1, 2019 and Mar. 7, 2019 from Silas Horst, Koch Industries. In addition, Mr. Horst recommended a publication that he found compelling: Marc Levin & Michael Haugin, *Open Roads and Overflowing Jails: Addressing High Rates of Pretrial Incarceration*, Texas Public Policy Foundation-Right on Crime, May 2018, <http://rightoncrime.com/2018/05/open-roads-and-overflowing-jails-addressing-high-rates-of-rural-pretrial-incarceration/>.

254 Email dated Feb. 22, 2019 from Jay Hall, Legislative Policy Director and General Counsel, Kansas Association of Counties.

255 Written testimony of Austin Spiller before Task Force on Mar. 6, 2020.

256 ACLU, Feedback on Draft Pretrial Task Force Report, Sep. 18, 2020.

- “Best practices” should not be defined as or limited to the bare minimum afforded under the U.S. Constitution, but rather evaluated under and expanded to incorporate state constitutional protections.
- Any secured or unsecured bail amount set must be for an amount that the person is able to afford based on their affidavit and/or testimony, subject to any rebuttal evidence the government may have, at the release hearing. Rebuttal evidence regarding ability to pay should be limited to substantiated income or inflows of cash or liquid assets from other sources. The government must be able to establish that this income or other money is not allocated to household necessities, considering an individual’s circumstances.
- Fixed crime-based bond schedules should not be used. They pose challenges to the Equal Protection Clause, and they exacerbate wealth-based and racial inequalities in the criminal legal system.

In response to the ACLU concern regarding what constitutes “affordable” the Task Force referred to some additional courtroom practices concerning evidence required related to a defendant’s financial circumstances in Appendix B, I(e).

We do have several concerns about the language and perhaps general tenor of Appendix B, which is styled as a “Best Practices” guide for setting conditions of release.

We have previously expressed our concerns with both numbers #2 and #3 of the overarching principles and we do appreciate the Task Force including our concerns about these in the various footnotes of the draft report. To briefly restate, we feel that Principle #2 conflates bail and preventative detention. While we agree that “detention” should be the exception – and as detention *without bail* is only allowed in capital cases, it very much is the exception. However, the case precedents from which this language is originally drawn squarely placed bail on the “liberty” side of this equation, not on the “detention” side. “Detention” as referenced in *Salerno* (from which this quote originates) was referring to detention without any bail option. It was not intended to reference being held in lieu of nonexcessive bail. We are concerned that this distinction is not made clear in either the draft report or the Best Practices.

Principle #3, as we noted in our initial response this principle reverses the statutory order of operations in setting bond. The default bond under the statute is a surety bond, which may be modified by an act of judicial discretion – when the court makes an individualized determination – to a personal recognizance bond. This Principle #3 seems to say that a judge must consider a personal recognizance bond first which may then be modified to a surety bond after judicial discretion is exercised. This is the reverse of what the statute indicates. While we realize that Judges tend to look at bond setting more holistically than a rote order of operations equation, we do feel that it is important to stress that the statutory default is a surety bond, not a personal recognizance bond.

We also pointed out that so called “nonmonetary” conditions are often more expensive and more onerous than the cost of a surety bond (or no cost at all if the full bond is posted in cash and returned at the conclusion of the case). In short, so called “nonmonetary conditions” are not nonmonetary at all and can be quite invasive and as such may not be the “least restrictive, least onerous” form of release.

In the body of the introduction of Appendix B, we are very much concerned about the evident instruction that Judges should ignore the plain language of K.S.A. 22-2802, which states: “(1) Any person charged with a crime shall, at the person’s first appearance before a magistrate, be ordered released pending preliminary examination or trial upon the execution of an appearance bond in an amount specified by the magistrate and sufficient to assure the appearance of such person before the magistrate when ordered and to assure the public safety.” [Emphasis added] This is quite clear that both appearance and public safety are to be considered when setting bond amounts. However, the Appendix argues that “Money bond relates solely to risk of flight.” We do not agree with this contention.

To support this argument that the plain language of statute should be disregarded, the report cites case precedents that were decided prior to the addition of the “public safety” language to the statute. (Specifically, *Foy*, which the Appendix does grudgingly acknowledge, albeit in the footnotes, is no longer on point, in that it predates the addition of public safety language to the statute.) There are no case citations included that indicate that when a bond setting statute requires consideration of public safety in setting the amount of bond, that judges are free to disregard that directive (or in this case instructed as “best practices” to disregard the plain language of the statute altogether). There are, in fact, recent cases from other states that indicate that the bond amount can very much be tied to public safety risk and that consideration for public safety is indeed a valid government interest in establishing bond amounts. See *Valdez-Jimenez V Eighth Judicial District*, 460 P.3d 976 (2020) (Nevada) “bail must relate to one of these two purposes — to ensure the appearance of the accused ... or to protect the safety of the victim and the community”; *Torgerson V. State*, 444 P.3d 235 (2019) (Alaska) “a judge may not set bail in an amount that goes beyond that which is reasonably necessary to fulfill the purposes of bail — i.e., to reasonably assure the defendant’s appearance and the safety or the alleged victim, other persons, and the community”; Conversely, in *Brangan v Commonwealth*, 477 Mass. 691 (2017), the Court held that “a judge may not consider a defendant’s alleged dangerousness in setting the amount of bail, although a defendant’s dangerousness may be considered as a factor in setting other conditions of release.” However, this was more of a statutory analysis rather than a constitutional one and Massachusetts has a different statutory scheme. *Brangan* is in fact the only case that we have located that makes this claim. Essentially then, this is an outlier opinion on whether or not public safety can be considered in establishing the amount of bail and is based solely on their statutory scheme.

The other factor the report attempts to use to justify this argument is the language in K.S.A. 22-2807(2) which states “An appearance bond may only be *forfeited* by the court upon a failure to appear. If a defendant violates any other condition of bond, the bond may be *revoked* and the defendant remanded to custody.” Using this to justify the claim that money bond only relates to appearance, seems to be a very small needle to try to drive this camel through, as it ignores the nature

of a recognizance bond and seeks to treat it as a simple performance bond. Rather than the bond being forfeited with no recourse for violation of conditions, in the manner of a life insurance policy upon death, the surety on the bond has the statutory ability to cure the forfeiture with a timely surrender of the defendant or a demonstration that production is impossible. As such, a declared forfeiture can be rectified by returning the defendant to custody in a timely fashion.

When a defendant fails to appear, the violation is obvious and immediately made a part of the court record by the judge. That is, a judicial determination of violation is already made. Violations of conditions other than failure to appear can often be less obvious and require additional evidence, such as actual testimony and a judicial decision to determine whether or not a violation has even occurred. Said determination would tend to require the defendant to be present to have the opportunity to challenge these claims of violation. This can be problematic when the violation is not appearance based. When a person is arrested for a new crime, is the probable cause statement enough to justify a declaration of forfeiture (doubtful)? Does a forfeiture only get declared upon a conviction of the new charge, perhaps months later and perhaps after the original case has been already resolved? Victim claims of harassment, while important to prevent, are notoriously unreliable and can be driven by spite. Even something as simple as positive drug screen is subject to the vagaries of false positives. Generally, the surety on a bond has the ability to absolve itself of liability for a declared forfeiture with a timely surrender of the bond (*State v. Midland*, *State v. Buckle*). How should that work with nonappearance related conditional violations? Should the surety be judge, jury and executioner of alleged nonappearance related conditional violations prior to a judicial determination of violation? If, conversely, the defendant is present and the court revokes the bond after a showing of violation, then that is functionally the same result as a bond surrender. The defendant has been returned to custody. Should a declaration of forfeiture be used for no other reason than to force a ministerial action of a formalized bond surrender by a surety?

The Legislature determined that the best solution was to use revocation by the Court to address nonappearance related violations while still maintaining the liability of the surety (or the bond) to ensure that the defendant appeared as ordered to address claims of other violations. This was one of the reasons that language added stating that the appearance “bond is revoked by the execution of a warrant for a defendant’s arrest for a violation of a bond condition.” That is, to ensure that the surety was still responsible for the defendant’s appearance until he either appeared in Court or was arrested. In this manner, the bond still ensures compliance with nonappearance related conditions without trampling the due process rights of the defendant, by forcing a defendant to be present so that the court can determine whether a violation has even occurred. Without the defendant appearing to submit to the judgment of the court, any other conditions are functionally meaningless.

Conversely, even if the claim that money bail only relates to flight risk is accurate – which we dispute – then public safety is still one of the factors that must be considered in assessing flight risk, as a public safety violation would predictably lead to a revocation of the bail and a return to custody, thus providing additional incentive to fail to appear. Said another way, any defendant who is viewed as a public safety risk is, or should be, also viewed as a flight risk.

Although we disagree with the argument the report is making, we do understand the argument. However, it is simply that: an argument advocating for a position. We do not feel that a “Best Practices” guide is the proper place for attempting to invalidate statutory language. If the Task Force feels that there is a conflict in the statutory language it would be better to recommend modifying the statute(s) in the draft report to correct this perceived shortcoming than to recommend that Judges simply disregard the plain language of the statutes as “Best Practices.”

Section I – Determining Monetary Conditions of Release

- a. *Judges should gather as much information as possible in order to make an individualized determination as to the amount of bond or other conditions of release.*

We agree with this. Informed decisions are typically better. However, the bond is often initially set with limited information available and we feel that judges should err on the side of caution – in terms of appearance risk and public safety concerns – when there is a dearth of information. We note that the draft report recommends getting defense counsel involved as soon as possible and we agree that having an advocate for the defendant involved earlier can help the court flesh out limited information.

- b. *The bond amount cannot be excessive.*

This is the constitutional standard. The real question is “what is excessive?” The primary concern we have with this section is the use of case references that precede the inclusion of “public safety” as a bond consideration in K.S.A. 22-2802. Obviously, *Foy* was on point when it was written, excessive bail was any bail amount that was higher than needed

to assure appearance. However, the controlling statute was modified subsequent to *Foy* to include additional the additional consideration of public safety. We addressed this earlier herein, but our position is that the amount of bail can and should be reflective of public safety concerns as well as flight risk.

We would also point out that, while the report seems overly concerned about financial bail, applying nonmonetary conditions that are not reasonably intended to address flight risk or public safety concerns would also *constitute excessive bail*. “Excessive” is not simply a monetary measurement.

c. Setting a bond in an amount that results in preventative detention is prohibited.

We disagree that this is an accurate statement of the relevant law. Excessive bail is prohibited. There is a wealth of case law that indicates that the mere fact that bail may be set beyond a defendant’s means does not make it excessive. As the body of the paragraph explains, setting bond in an amount that is *intended* to result in detention and is set independent of flight risk or public safety concerns, is definitionally excessive and is prohibited. The intent of the court is the relevant issue here, not the result. The mere fact, obviously in hindsight, that someone was unable or unwilling to post bond (or more accurately, unable to convince friends or family to come to his aid – usually for good reason in our experience) does not mean the bond is or was excessive or in fact constituted *intentional* preventative detention. The definition of preventative detention in the paragraph also seems slightly inaccurate. Preventative detention is the denial of bail altogether based upon concerns of future misconduct. High bond is not a denial of bail – hence not preventative detention – and there are a multitude of procedural safeguards in place both in statute and in practice to guard against excessive bail. These include the statutory right to have bail reviewed at any time as well as the ability to take an expedited interlocutory appeal from the denial of such a motion to reduce bail. We realize the “rose by any other name” argument, but many factors that seem facially similar are treated differently in law based upon intent.

Additionally, one of the problems with this argument is that it can be equally applied to any difficult to meet bond condition, not simply the bond amount. For instance, requiring a homeless person to go on house arrest as a condition of bond is a functionally impossible condition to meet. Similarly, a requirement that a defendant wear a GPS monitor, but the defendant already owes the monitoring company for old balances for previous monitoring and won’t accept the defendant would be “prohibited” since he cannot meet that condition. By this logic, any difficult to meet condition whose result is a failure to post bail would be considered preventative detention and be prohibited and that is simply not accurate.

d. Judges must be cognizant of the affordability of the bond to the defendant and set at the minimum amount necessary to achieve the goal of appearance in court.

We are not opposed to the notion that Courts should make an individualized determination about each defendant as to bond amount and conditions and that that determination should include an evaluation of the defendant’s financial condition as one of the factors to consider. This consideration is one of the factors listed in K.S.A. 22-2802. However, it is not the *sole* factor listed in the statute (there are at least 12 other factors the court is supposed to consider listed in K.S.A. 22-2802(8)).

This recommendation – that “the safe approach ... is to assume that the defendant has a right to “affordable bail” - reduces the determination of bail amounts to a single issue, the defendant’s financial condition. Further, there is no case law that would support such an assumption. In fact, the most recent court to rule on this issue, the United States Fifth Circuit, in *O’Donnell*, held exactly the opposite, that there was no “right” to affordable bail. The Fifth Circuit stated:

That is not what the preliminary injunction does, however. Rather it amounts to the outright elimination of secured bail for indigent misdemeanor arrestees. That remedy makes sense if one assumes a fundamental substantive due process right to be free from any form of wealth based detention. But, as the foregoing analysis establishes, no such right is in view.

Clearly, the task force is aware of this ruling – it has been cited elsewhere in the report, and the ACLU amicus brief in the *O’Donnell* case was referenced in the footnote of this very topic, yet the actual ruling that found there was no right to “affordable bail” was left out of this section.

Even *Brangan*, likely the most progressive case on the topic of public safety and bail does not support the notion that there is a right to affordable bail, at 700, it states:

Whether bail must be affordable. The arguments that Brangan and the amicus present also raise the question whether unaffordable bail is unconstitutional per se. We conclude that it is not, but in doing so, we recognize that

the imposition of unaffordable bail is subject to certain due process requirements. We previously have stated that an “amount of bail [is] not excessive merely because [a defendant] could not post it.” *Leo v. Commonwealth*, 442 Mass. at 1026. Other courts have similarly concluded that a defendant is not constitutionally entitled to a bail that is affordable. See, e.g., *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988) (“a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement”); *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968) (“The mere fact that petitioner may not have been able to pay the bail does not make it excessive.”); *Hodgdon v. United States*, 365 F.2d 679, 687 (8th Cir. 1966), cert. denied, 385 U.S. 1029 (1967) (same); *State v. Pratt*, 2017 VT 9, ¶ 15 (“the Constitution does not require that a defendant have the ability to pay the required bail if it is otherwise reasonable”). Even Justice Jackson, in arguing for the importance of an individualized bail determination in *Stack*, qualified his point by noting that “[t]his is not to say that every defendant is entitled to such bail as he can provide.” *Stack*, 342 U.S. at 10 (Jackson, J., concurring). Although the judge must take a defendant’s financial resources into account in setting bail, that is only one of the factors to be considered, and it should not override all the others. Bail that is beyond a defendant’s reach is not prohibited. [Emphasis added]

As noted in the recommendation, K.S.A 22-2802 indicates that the court should take into consideration the defendant’s “financial condition” when setting bond. And the recommendation argues that this is supportive of the call for the assumption of a right to affordable bail. However, this makes far more sense when evaluated in the context of using bail to incentivize behavior and the requirement to make individual determinations of bail amounts and conditions. The level of incentive that any particular bond amount can provide is inexorably tied to the individual and the Court should be cognizant of that when setting bond. This does not mean that the defendant must be able to pay a bond with the loose change in his pocket at the time of arrest in order for the bail amount to be considered nonexcessive.

The recommendation also includes – verbatim – an ACLU circular logic claim that Judges can never prove a negative, that is: was the amount of an unposted bail appropriate or could it have been just as effective if it was lower, so judges have no expertise to evaluate the effectiveness of “unaffordable bail” in compelling compliance, since the defendant was never released. This was included in the amicus brief in the O’Donnell case and the Fifth Circuit did not adopt this “need to prove the unknowable argument” in any fashion. It should not be included here. It is actually a better argument against preventative detention than an argument against secured bond. At least with secured bond the defendant has the opportunity to secure his release. When a defendant is ordered held without bond, even that possibility is unavailable.

This recommendation is also problematic in that while it calls for judges to assume a right that doesn’t exist, i.e. “affordable bail,” it then makes no attempt to define the term “affordable bail.” “Affordable” is an amorphous term that has no legal meaning, at least one case has tried to redefine “Affordable bail” to mean “nonexcessive bail,” but as borne out by the case law cited above, that is inaccurate. It is exceedingly difficult to see how a “right” exists to anything “affordable,” much less bail, which already has its own constitutional standard.

The recommendation does suggest using an online LFO (fines/fees/etc) calculator in the footnotes as an example of how “affordability” could be determined. However, that calculator advocates for zero fines/fees for indigent persons (which basically renders any sort of negative reinforcement to counter criminal behavior essentially meaningless.) Presumably, then the recommendation is implying that a person who is indigent cannot be held on any sort of financial bond, regardless of charge, community ties, mental condition or any of the other statutorily mandated risk factors to be considered. Obviously, we are opposed to that implication. Such a recommendation is not supported by either the law or by sound public policy considerations.

e. Judges should exercise caution in relying on fixed, crime based bond schedules.

We agree that the Courts should not rely on fixed, crime based bonds schedules – *after 48 hours*. As the recommendation notes, albeit not until the third page, the *Walker* case determined that the use of bonds schedules was permissible, so long as there was an individualized determination by a judge within 48 hours, and presumably that this determination was not simply a rubber stamp of the bond schedule but was an actual exercise of judicial discretion.

It is our feeling that bond schedules should err on the side of caution in establishing crime based bond amounts, for those jurisdictions that use them. That is, set a meaningful bond until such time as judicial review can be had, or within 48 hours, whichever comes first. To that end, we do not support or agree with the idea that a bond schedule using only unsecured bonds is a reasonable solution. First, we believe that it runs counter to statutory bond setting procedures. K.S.A. 22-2802 (4) states that “The appearance bond shall be executed with sufficient solvent sureties who are residents of the state of Kansas, unless the magistrate determines, in the exercise of such magistrate’s discretion, that requiring sureties is not necessary to

assure the appearance of the person at the time ordered.” This means that the setting an unsecured bond requires an act of individual judicial discretion, taking into consideration the various risk factors set out in the statute. We do not believe that a blanket, charged based, Own Recognizance policy constitutes an act of individual discretion as required by the statute.

Secondly, it is – by definition – a less secured method of release, allowing those who are flight risks to slip away again, often pejoratively referred to as “catch and release”. Since, as the recommendation acknowledges, there is no constitutional concern about the initial use of secured bail, there is no legal reason to mandate such a release scheme.

Finally, we are unsure of where the authority to set up a bond schedule, pre-charge, even comes from, particularly in felony cases. Certainly, in most misdemeanor cases, a short form complaint (i.e. a ticket) has been issued and constitutes a charging document. However, we are unaware of a similar method for felony cases. It may be worth exploring the establishment of a statutory regimen for such authority that could also address the public policy considerations around the use of various bond types.

f. Judges should be cautious in mandating the method of posting a monetary bond.

We believe that paragraph two should largely be removed from this best practice recommendation. As paragraph 3 correctly, if underwhelmingly, acknowledges, “cash only” bonds are not permissible under K.S.A. 22-2802 (4). A defendant cannot be denied the option to post a surety bond and “surety” is a statutorily defined term in Kansas so there is no need to attempt to engage in the legal gymnastics to redefine “sufficient surety” to mean “cash only” that some courts elsewhere have done. Nor is there any reason to encourage judges to engage in attempts to circumvent the plain language of the statute.

258 The listed concerns were those noted by the KBAA for which the Task Force elected not to make any changes to the report. The following KBAA recommendations were made on Sep 24, 2020 and changes consistent with the KBAA recommendations were made to the report before publication. A summary of those follows:

1. *The KBAA agrees bail should not be excessive in in light of the risk of flight and the risk to public safety, but nonmonetary conditions should also not be excessive. Accordingly, it points out that nonmonetary conditions must also be related to flight risk and public safety.*

[This criticism recognizes that the term bail as used in the Kansas Constitution does not mean solely monetary bond. The Task Force agrees and has now noted this concern in Section II, Appendix B].

2. *The KBAA agrees bail should not be excessive in in light of the risk of flight and the risk to public safety, but nonmonetary conditions should also not be excessive. This position necessarily asserts that the term bail as used in the Kansas Constitution does not mean solely monetary bond. Accordingly, it points out that nonmonetary conditions must also be related to flight risk and public safety.*

[First, the Task Force agrees that the term *bail* in the Kansas Constitution refers to both monetary and nonmonetary conditions of release. The Task Force agrees with this recommendation and has now noted this concern in Section II, Appendix B].

3. *The KBAA disagrees that a bond that is set in an amount that results in preventive detention is prohibited. It agrees that setting a bond in an amount that is **intended** to result in detention and is set independent of flight risk or public safety concerns is excessive and prohibited. But simply because a monetary bond is beyond a person’s means is not prohibited. In addition, to be consistent, this same logic should be applied to nonmonetary conditions of release. If a condition of release is that a defendant wear a GPS monitor but either cannot afford it or cannot be placed on a monitor due to prior amounts owing for monitoring, this would be setting conditions that results in preventive detention.*

[The Task Force agrees that nonmonetary conditions of release are part of the definition of bail in the Kansas Constitution and that they are held to the same standards as monetary conditions. Amendments were made to Section II, of Appendix B in response to the KBAA’S concerns.]

4. *The KBAA asserts that although financial condition is one factor to consider in setting bail, by assuming that a monetary bond be affordable, the Task Force is reducing the determination of bail to a single issue, financial condition. It is one factor to consider, not the sole factor. The KBAA contends there is no caselaw to support the Task Force position. It accuses the Task Force of purposefully avoiding the language used by the Fifth Circuit in ODonnell v. Harris County and surreptitiously leaving out pertinent provisions when we did cite it.*

The KBAA then returns to the Brangan case, discussed in #3 above, and emphasizes that Brangan, a decision it describes as an outlier in a different part of its comments, held that unaffordable bail is not unconstitutional per se.

Finally, the KBAA points out that the Task Force has not included any definition of “affordable.”

[In response to these concerns, the Task Force has included a discussion of *ODonnell* in Appendix B, fn. 31 in conjunction with its discussion of whether bonds must be affordable and citing the provision the KBAA would like to be noted. We are uncertain what would lead the KBAA to believe the Task Force was purposefully avoiding this discussion, because a full discussion of *ODonnell* supports the Task Force’s position. In addition, the Task Force notes that it did cite *Brangan* and the cases listed therein in its list of cases that reject the notion of a constitutional right to an affordable bond—fn. 29 of Appendix B. And finally, based on a recent case out of North Carolina, the Task Force has now noted what at least one court has been *ordered* to consider in determining the affordability of bond. A similar request was made by stakeholder, the ACLU. The Task Force believes that the factors to consider in the affordability equation could be adopted by statewide or local court rule or statute.

5. *The KBAA asserts that it is not clear whether there is even statutory authority for setting a bond schedule at all.*

[We believe the KBAA raises a valid concern that should be examined and would be an additional reason for courts not to use such schedules at all. Because if there is no authority for a judge to adopt a bond schedule, all arrestees who are not released on a summons or notice to appear would have to be released outright or held without bond until they see a judge for a first appearance, when an individualized bail decision could be made. We are not able to find any explicit statutory authority for the adoption of a bond schedule for release prior to the first appearance and the KBAA does not suggest any. Nor are we able to find any statutory provision that would prevent judges from adopting bond schedules. The Task Force has discussed this issue in Appendix B, I(e).]

6. The KBAA believes that section I(f) regarding the method required to post bond is unnecessary. Cash only bonds are not permissible, and it is improper to encourage judges to circumvent the plain language of the statute.

[After considering the KBAA concern, the Task Force agrees and has modified the section as requested.]

259 See p. 22, *supra*.

260 The Task Force notes that the Nevada Supreme Court referenced NV CONST. Art. 1, §8A(1)(c) to support its finding that that purpose of bail in Nevada included a community safety component because the Nevada constitution requires consideration of the safety of the victim and the victim’s family in setting bail. 460 P.3d at 984. Although Kansas has a provision in its constitution related to Victims’ Rights, it does not contain any requirements related to the setting of bail.

261 Relying on AK ST § 12.30.011, which is similar to K.S.A. § 22-2802(8).

262 477 Mass 691 (2017).

263 *Brangan* was cited by the Task Force in Appendix B, I(b) and (d) for its discussion of determining whether a bond is excessive and affordable.

264 “What the evidence *does* reflect is that most defendants who are released from custody pending trial will appear for their court dates without any financial incentive, and that many of those who miss a court appearance do so for mundane reasons such as lack of reliable transportation, illness, or inability to leave work or find childcare, rather than out of a desire to escape justice.” Cty. of Santa Clara Bail & Release Work Grp., Final Consensus Report on Optimal Pretrial Justice, at 2 (2016), <https://www.sccgov.org/sites/ceo/Documents/final-consensus-report-on-optimal-pretrial-justice.pdf>.

265 Rachel A. Harmon, *Why Arrest?*, 115 Mich. L. Rev. 307, 338 (2016) (“In one study, over half of the failures to appear were solved by continuing the case for a week and informing the suspect of the new day, with no additional penalty for the initial failure to appear.”) citing Mark Berger, *Police Field Citations in New Haven*, 1972 Wis. L. Rev. 382, 407-408.

266 Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

267 Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

The ACLU went on to cite from its March 2019 report, *A New Vision for Pretrial Justice in the United States*, a report that focuses on programs that reduce the harm associated with the pretrial process. In addition, the ACLU recommends:

- Create a system that allows people to call or go online to reschedule their court dates. Pretrial systems should allow for as much flexibility in rescheduling without burdensome procedures as possible. This system, as with all elements of the process, should be accessible to people with disabilities and people who speak languages other than English.
- Reduce required court dates for people who have been arrested; allow people to use their court summons as a free pass on public transportation on court dates; allow people to waive in-person appearances through counsel for certain pretrial hearings; enable people who have been arrested to appear via phone or video for post-release court dates, particularly process-related hearings in which the person may not be expected to speak and during which key elements of their case are not being adjudicated (for example, scheduling conferences).
- Eliminate employment discrimination against individuals who must miss work due to required court dates.
- Provide compensation for individuals detained whose cases are later dismissed or end in acquittal.
- Provide onsite, nonmandatory childcare for people who need to attend court dates. Courts should relax any policies that disallow children, or people other than the person arrested, in courthouses and courtrooms.

The Task Force appreciates the above recommendations, although most are beyond the scope of this report. We encourage courts and the Kansas Legislature to explore innovative practices to reduce failures to appear altogether.

269 *Large-Scale No-Show Patterns and Distributions for Clinic Operational Research*, Healthcare 2016, at 4, Feb. 16, 2016, <https://pdfs.semanticscholar.org/57df/3eb2595a353b9a750076f1773c87d471f9cc.pdf>.

270 *Court Appearance Notification System Process and Outcome Evaluation*, Multnomah County Budget Office Evaluation, Mar. 2006, <https://multco.us/file/26884/download>; See also, Brian H. Bornstein, Alan J. Tomkins, & Elizabeth M. Neeley, *Reducing Courts' Failure to Appear Rate: A Procedural Justice Approach*, U.S. Department of Justice, May 2011, <https://www.ncjrs.gov/pdffiles1/nij/grants/234370.pdf>.

271 Email dated Mar. 5, 2019 of list of concerns provided by Kansas Bail Agents Association.

272 For example, B & K Bonding out of Salina reported at the Task Force meeting in March 2019 that it uses Captira Bail Management Software to track clients, <https://www.captira.com/pages/bail-software>; and Owens Bonding out of Hutchinson uses Expertbailvision, <http://www.bailvisionpro.com/>.

273 *Failure to Appear is the Top Charge for People Booked into Jail in 2017*, chart provided by District Attorney Charles Branson.

274 Jennifer Elek, Sara Sapia, & Susan Keilitz, *Use of Court Date Reminder Notices to Improve Court Appearance Rates*, National Center for State Courts' Pretrial Justice Center, Pretrial Justice Brief 10, Sep. 2017, https://www.ncsc.org/_data/assets/pdf_file/0015/1635/pjcc-brief-10-sep-2017-court-date-notification-systems.ashx.pdf.

275 Timothy R. Schnacke, Michael R. Jones, & Dorian M. Wilderman, *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 Court Review 86, 94 (2012), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1396&context=ajacourtreview>:

For many jurisdictions, the singular response to defendants failing to appear for court is to issue warrants, typically with high monetary bonds attached, and then to wait for law enforcement to serve those warrants through arrests. Unfortunately, this way of doing business is costly, and it has resulted in some jurisdictions having court-appearance rates as low as 70%. Innovative ways of dealing with the issue of court appearance rates should be of primary concern to all people in the criminal justice system, including judges. The Jefferson County FTA Pilot Project demonstrated that live telephone callers either reminding defendants to come to court or notifying them of their impending warrant status after they fail to appear for court can have a dramatic effect on appearance rates. The resulting Court Date Notification Program has shown that these results can be improved, and that customer service is significantly enhanced through the use of a live caller intervening in advance of the court event.

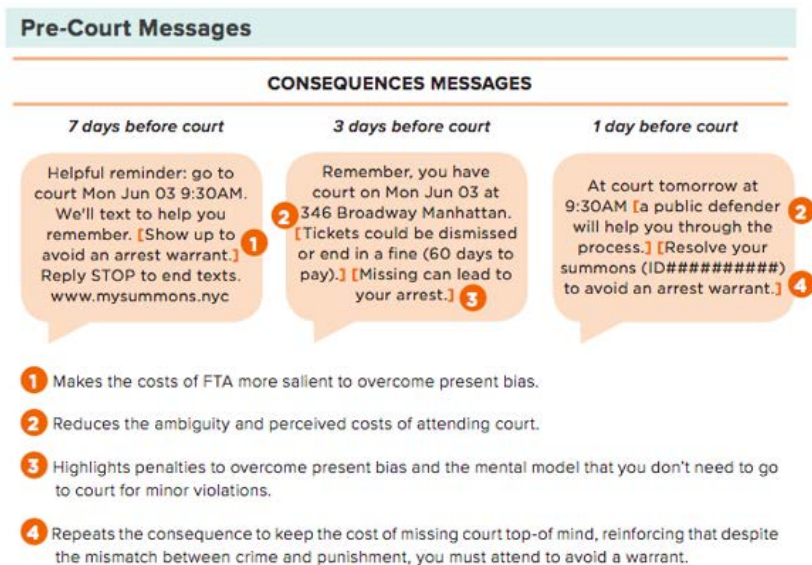
276 Mitchel N. Herian & Brian H. Bornstein, *Reducing Failure to Appear in Nebraska, A Field Study*, The Nebraska Lawyer, Sep. 2010, <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1008&context=publicpolicyfacpub>; See

also, Brian H. Bornstein, Alan J. Tomkins, & Elizabeth M. Neeley, *Reducing Courts' Failure to Appear Rate: A Procedural Justice Approach*, U.S. Department of Justice, May 2011, <https://www.ncjrs.gov/pdffiles1/nij/grants/234370.pdf>.

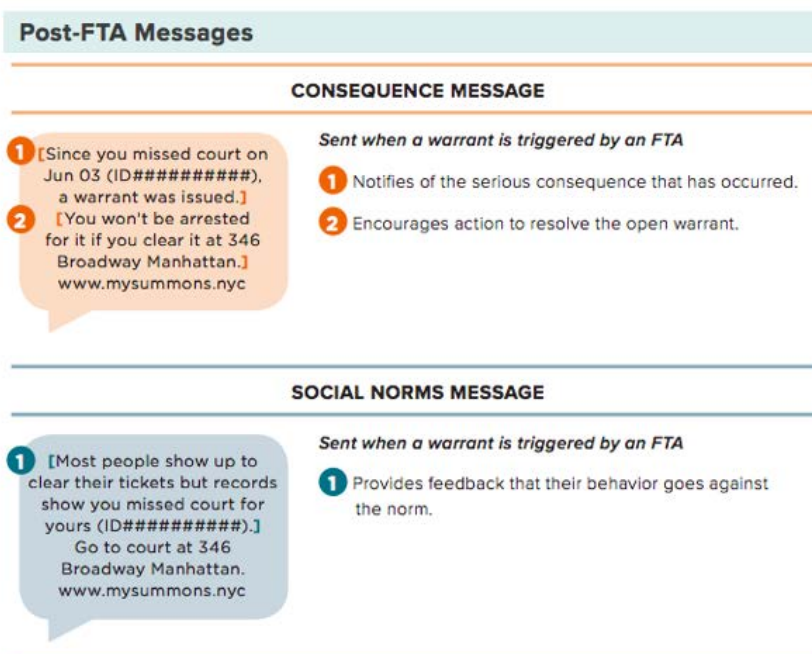
277 Dane County, Wisconsin, <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1008&context=publicpolicyfacpub>; Lafourche Parish, Louisiana <http://www.tlgnewspaper.com/lpso-to-begin-sending-text-message-reminders-for-court-dates>; New York City, New York <https://www.nydailynews.com/new-york/text-message-reminders-curb-number-defendants-skip-court-article-1.3774378> ; Richmond, Virginia <https://www.latimes.com/nation/la-na-court-case-text-reminders-defendants-20190504-story.html>.

278 Denise Lovie, *Text Messages Now Remind Court Defendants to Show Up*, AP Legal Affairs Writer, May 4, 2019, <https://www.9news.com/article/news/text-messages-now-remind-court-defendants-to-show-up/507-eb097f68-e53b-41e3-9e33-9988c84f65a5>.

279



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281 Teresa Mathew, *Hello, Your Court Date is Tomorrow*, Bloomberg CityLab, Jan. 29, 2018, <https://www.bloomberg.com/news/articles/2018-01-29/texting-people-makes-them-more-likely-to-attend-court>.

282 Johnson County Survey results provided to Task Force by member, Robert Sullivan. Survey from Feb. 6, 2019 to Mar. 30, 2020.

Survey Results 2/6/2019 - 3/30/2020						
Reason	TAY	TAY %	NON-TAY	NON-TAY %	Total	Total %
Afraid	22	1.8%	101	2.5%	123	2.3%
Did Not Know About Court Date	249	20.7%	893	21.8%	1142	21.6%
Did Not Want To Appear	45	3.7%	117	2.9%	162	3.1%
Forgot	446	37.1%	1465	35.8%	1911	36.1%
Had Another Court Appearance/Same Time	7	0.6%	26	0.6%	33	0.6%
Hospital	13	1.1%	104	2.5%	117	2.2%
Illness	3	0.2%	27	0.7%	30	0.6%
Incarcerated	69	5.7%	343	8.4%	412	7.8%
Inpatient Treatment	2	0.2%	10	0.2%	12	0.2%
No Childcare	9	0.7%	11	0.3%	20	0.4%
No Money To Pay Fines/Court Costs/Fees	33	2.7%	118	2.9%	151	2.9%
No Transportation	142	11.8%	382	9.3%	524	9.9%
Out Of Town	30	2.5%	94	2.3%	124	2.3%
Other	56	4.7%	191	4.7%	247	4.7%
Roads/Weather	3	0.2%	7	0.2%	10	0.2%
Refused To Answer	2	0.2%	15	0.4%	17	0.3%
Went To Wrong Court	2	0.2%	17	0.4%	19	0.4%
Work	47	3.9%	113	2.8%	160	3.0%
Attorney Issue	7	0.6%	19	0.5%	26	0.5%
Family Issue/Death	15	1.2%	38	0.9%	53	1.0%
Total	1202	100%	4091	100.0%	5293	100%

*Transitional Aged Youth (18-24)(TAY)

283 Paul D. Schultz, *The Future Is Here: Technology in Police Departments*, Police Chief, June 2008, (noting that police can locate a fleeing fugitive or a missing child “in a matter of minutes.”).

284 News release from Chief Justice Marla Luckert, Sep. 22, 2020.

285 Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

286 Email from Pittsburg State University student collective dated July 11, 2020.

287 Timothy R. Schnake, Michael R. Jones, & Dorian M. Wilderman, *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 Court Review: the Journal of the American Judges Association, 86 (2012). <http://digitalcommons.unl.edu/ajacourtreview/393>.

288 Brook Hopkins, Chiraag Bains, and Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 685 (2019).

289 Marie VanNostrand & GenaKeebler, *Pretrial Risk Assessment in Federal Court*, Federal Probation. Vol. 73 No. 2, Sept. 2009, https://www.uscourts.gov/sites/default/files/fed_probation_sept_2009_test_2.pdf.

290 Brook Hopkins, Chiraag Bains, and Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 679-80 (2019). See also Lisa Pilnik, *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency*, National Institute of Corrections, Feb. 2017, <https://nicic.gov/framework-pretrial-justice-essential-elements-effective-pretrial-system-and-agency>.

291 Marc Levin, Right on Crime, Vice President of Criminal Justice Policy at the Texas Public Policy Foundation, *Pretrial Justice in a Pandemic: Panel Discussion at 2020 Smart on Crime Innovations Conference*, July 16, 2020, <https://www.youtube.com/watch?v=wXGakNHI0IM&t=35s>.

One of the most encouraging things is the use of virtual hearings. And so, we actually have some hard data, which is really exciting. So, Michigan, in April [2020] they used virtual check-ins basically and hearings for people that were released prior to trial. And the failure to appear rate was .5% in April of 2020 versus 10.7% in April of 2019. And New Jersey had the same thing. It went down from 20% to .3% when they used these virtual hearings...All the research told us, for many years, that most people who fail to appear, 80 to 90% of them appear for a hearing within a month, for example, of the original hearing. They missed their hearing because they didn't have childcare, they didn't have transportation, they couldn't get off of work. And with these virtual hearings, the data on these, we now see how right that was, the reasons why people weren't showing up to in-person hearings. So, let's not just automatically revert. Let's take some parts of what we put in place during the pandemic and keep those.

292 <https://www.ncsc.org/Microsites/PJCC/Home.aspx>. See also, *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency*, National Association of Corrections, Feb 2017; <https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf>; *Standards on Pretrial Release: Revised 2020*, National Association of Pretrial Services Agencies; https://cdpsdocs.state.co.us/ccjj/committees/PRTF/Handout/2020_NAPSA_StandardsOnPretrialRelease.pdf; The ABA *Standards for Criminal Justice: Pretrial Release*, 3d ed. © 2007; https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf.

293 It should be noted that this position is contrary to the recommendations contained in Third Edition of the National Association of Pretrial Services Agencies (NAPSA) Standards on Pretrial Release, 1.4(g). https://www.oakgov.com/commcorr/Documents/2004_napsa_standards.pdf.

A judicial officer should not direct a pretrial services agency to provide supervision or other services for a defendant released on surety bond. No defendant released under conditions providing for supervision by the pretrial services agency should be required to have bail posted by a compensated surety.

An explanation is provided in the commentary to Standard 1.4(g):

The effect is to make the pretrial services agency a kind of guarantor for the bail bondsman, in effect subsidizing the commercial bail industry by helping to reduce the risk that a defendant released on money bail will not return for scheduled court appearances... It also drains supervisory resources from often understaffed and overworked pretrial services agencies, making it more difficult to supervise the defendants for whom they properly have responsibility.

Washington, D. C. has statutorily banned such a practice. See, D.C. Code Ann. § 23-1303(h)(1)

(h) The agency shall --

- (1) supervise all persons released on nonsurety release, including release on personal recognizance, personal bond, nonfinancial conditions, or cash deposit or percentage deposit with the registry of the court;

See also, Cty. of Santa Clara Bail & Release Work Grp., Final Consensus Report on Optimal Pretrial Justice, at 2 (2016), <https://www.sccgov.org/sites/ceo/Documents/final-consensus-report-on-optimal-pretrial-justice.pdf> (discouraging the practice of ordering or maintaining money bond in addition to pretrial supervision). Finally, whether or not a risk assessment tool is used to determine the amount of bond, jurisdictions must consider whether the amount is individualized, supportable as the least

amount to achieve the goal of appearance in court and takes into account the defendant's financial situation. Otherwise, the risk assessment tool is no different than a fixed bond schedule.

294 Judge Survey conducted at Regional Trainings 2019 by Task Force.

295 Survey conducted for Task Force of county and district attorneys, Mar. 2019.

296 *Justice Reinvestment in Kansas, Update to the Criminal Justice Reform Commission* Sep 14, 2020, at 32 ("It costs \$7.52 per day to supervise in the community compared to \$71.25 per day to incarcerate."); https://csgjusticecenter.org/wp-content/uploads/2020/09/KCJRC-September_9_14_20_FINAL.pdf.

The Task Force made a conscious decision not to base its recommendations on jail savings. It is the Task Force's firm belief that any savings in jail expenses that may be realized, should be reinvested in evidence-based crime prevention programs, i.e. increased access to mental health and substance abuse treatment services.

297 Email dated Mar. 4, 2019 from Silas Horst.

298 Email dated Feb. 27, 2020 from Sarah Mays.

299 Email dated Feb. 27, 2020 from Sarah Mays.

Joshua Ross CSO II and Brad Schuh CSO I:

My thoughts would be that the system should handle the dangerous offender by looking at all possible information that is available. That would include past criminal history, the alleged current offense, and the victim's insight. As we talked about this morning, our district already has this procedure in place via first appearances and bond hearings. And both the DA and defense would have the opportunity to file the appropriate motion to get in front of the court to either detain the defendant or ask for a reduced bond. The judge is presented with information plus the arguments of the lawyers in the case of bond hearings and bases their decision off of that. I'd think at the very least supervision should be imposed with various conditions as the court sees fit. If the situation calls for the defendant to be detained due to the danger they present to the victim/community then I definitely think that should be an option. Again this all would vary depending on each case and the circumstances surrounding it.

I know I can't speak for all the other districts but the way we do things here seems to run smoothly and it gets people in front of the court fairly quickly so a bond/conditions can be set. So I have a hard time seeing why we need to fix something that isn't broken.

David Padilla, CSO II:

Dangerous Offender: it would seem that the most recently based practices in the 3rd Judicial District are a good outline for identifying a dangerous offender. The review of the current available resources in a criminal complaint are best for assessing level of dangerousness; the initial Offense Report, Criminal Complaint/Affidavit, and Criminal History (PSI); the Criminal History identifies prior convictions, episodes of incarceration, episodes of supervision, (successful or unsuccessful) relevant victim(s); in addition, on review of incarceration episodes an offender's disciplinary history can be reviewed, paying attention to disciplinary sanctions for violations of authority(e.g. orders) or behaviors (e.g. fighting, inciting a riot, contraband); additionally, episodes of special housing for psychiatric or mental health services (e.g. suicidal, homicidal, risk to self and/or others), or substance abuse can be of assistance in determining dangerousness due to the influence of each on behavior; the same can be identified when reviewing supervision episodes; these variables are consistent with the Level of Service Inventory-Revised currently being used to determine level of supervision on felony cases.

When assessing dangerousness, the District Court needs to make decisions in the best interest of all parties involved, including the offender, along with victim and community safety; there is no victimless crime and collateral or community damage can be deterred or minimized with just and prudent decisions that are lawful and protective of all parties rights and liberties. Collateral or community damage occurs when an offender gains release from detention in part due to the passage of time, and the modification of a professional surety bond; District Court, Criminal Divisions, often times at the request of the defense with no opposition from the State's attorney, will modify a bond

or grant an O.R. bond at the time of a plea, and impose pretrial supervision conditions; pretrial supervision, even the most **stringent**, do not guarantee victim/community safety or no collateral damage; one of the most recent and prime examples of this was in 2018, offender [L.W who] was granted and O.R. bond with Pretrial Supervision after entering a plea, regretfully while out of custody, the offender committed a new crime [of] **Murder in the 2nd Degree, Intentional**; the offender had a prior convictions, felony and misdemeanor, felony drug convictions, successful and unsuccessful supervision episodes, documented use of illegal drugs, yet no prior violent offense conviction. So, when assessing dangerousness, all variables and factors need to assessed in the best interest of all parties, especially community/citizen safety not just the severity of the current offense, violent or nonviolent.

District Court(s) need to exercise due caution when modifying bonds, especially the practice of O.R. bonds at the time of taking a plea; District Courts could benefit from guidelines of the Supreme Court while pursuing ‘best practices’. Offender(s), violent/nonviolent, presumptive prison or presumptive probation are ‘at risk’ of reoffending when released on Pretrial Supervision, that risk based on review of documentation needs to be considered. The District Court when making decisions, should consider illegal use of drugs, abuse of alcohol, possession of firearm as level of **dangerousness**; dangerous to the offender, Law Enforcement, and citizens of the community; special rules are identified in the KS Sentencing Guidelines with presumptions identified; Offense Reports are written 24-7 that identify law violations in which the offender is influenced by the use of illegal drugs or abuse of alcohol, these variables do not go away with the passage of time, and although an offender may have been incarcerated for a duration, the District Court can make a ruling(presumption) after receiving evidence that the negative variables that have contributed to the criminal behavior have not changed; abstinence due to incarceration does not demonstrate short term or long term behavior change or lessen risk of criminal behavior; offenders, violent or nonviolent, seeking release, know that the environment and influences: access to illegal drugs or alcohol, weapons or firearms in the community remains, offenders when released are at a heightened risk to use, re-offend and abscond from the court due to these factors; thus, causing delay and requiring additional time in District Court in pursuit of successful prosecution. One example, and there are more is the case of [B.B] [Case No. 1] Lvl. 2-D-F, [Case No. 2] Lvl. 5, **Presumption of Prison**, low PS bonds issued multiple times during life of case, bonds posted and on date of sentencing, offender no showed, BFAW’s issued on 08-08-19.

Previously, at this time, and presumably in the future, there is a process in District Court for an offender via the defense attorney to request a Bond Hearing. At that time, a Judge is requested to review and offenders bond status, specifically the monetary value; the State’s attorney, and defense attorney review and discuss relevant information for the court to assess and consider that may influence a Judge’s decision on bond. This process is available to an offender(s) and the defense attorney throughout the lifespan of the case, a Bond Hearing can be scheduled multiple times, and often the only relevant variable that has changed is the passage of time the offender has been incarcerated. The passage of time does not lesson the criminal action that occurred causing the offender’s arrest and subsequent incarceration, the passage of time does not decrease **dangerousness**; the contrary can be argued, as mentioned in [B.B.], the low bonds did not secure the offender’s presence in court, the offender is avoiding prison, thus, making the offender a fugitive from justice, a risk to the safety and security of the community.

The District Court when considering Pretrial Supervision and conditions needs to consider level of supervision. The court if needing to impose stringent conditions (e.g. GPS monitoring, House Arrest, frequent/daily reporting, etc.) is itself acknowledging a level of dangerousness of the offender and the risk potential. The court can ask itself, where is this offender most secure, and what will keep the community or victim(s) safe, where or what will keep the offender from being **dangerous** to self or others.

300 Email dated Mar. 4, 2020 from Gail Antenen, Chief Court Services Officer, 24th Judicial District.

301 The full response from the Kansas Association of Criminal Defense Lawyers:

The Role of Monetary Bond relative to Pretrial Supervision. KACDL supports to use of pretrial supervision to facilitate release of clients. However, given the additional costs involved in supervision, and compliance with requirements such as treatment, UAs, GPS/House arrest fees etc., use of pretrial supervision should be in lieu of monetary bond. Further, if the Court determines that specific conditions and pretrial supervision would assure appearance and community safety, it does not support the additional “skin in the game” thought process traditionally tied to monetary bond. The client would have “skin in the game” by paying for the supervision and the conditions of compliance which in all likelihood will exceed the 10% of the bond amount charged by the bondsman. The Federal System rarely uses monetary bond, instead relying upon pretrial supervision and services to assist the client in meeting their obligations to the case. Kansas would benefit from a similar model.

Recommendation of Minimal Conditions Necessary. KACDL believes that imposing the minimal conditions necessary is in the best interests of the client and will increase the overall likelihood of success on Pretrial supervision. People become overwhelmed with new requirements in addition to their daily lives that were already difficult. The time to complete these tasks is not minimal, and it places employment at risk. Transportation issues double, triple or quadruple the amount of time it takes to complete these tasks. The goal of pretrial supervision is to both ensure community safety and appearance at court; however, the rehabilitative effects of appropriate pretrial services contribute to the overall benefit of the justice system. As such, the Task Force should consider requiring minimal conditions tailored to the offender and the offense in order to promote appropriate use of Pretrial Supervision and increase the likelihood of success during the pretrial stage.

Over or Under Use of Pretrial Supervision. Consistent with the comments above, imposing unnecessary conditions leads to overall failure and distraction from conditions that would affect public safety and appearance. The goal should be to allow people to succeed on pretrial supervision, maintain their support systems and employment, and begin any necessary rehabilitative efforts as soon as possible while the threat of punishment and arrest are relatively recent. A requirement to limit the amount of conditions to the sole considerations of public safety and appearance should be imposed. A requirement for periodic review of pretrial conditions should be included. Monitoring of pretrial related statistics should be required by the Court to determine whether caseloads are appropriate which would indicate appropriate usage. Pretrial should be a temporary tool to monitor or encourage compliance at the start of the case or following a bond violation, not to effectively put people on probation prior to trial. Education should be provided to the Court and Court personnel to support these recommendations.

Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

302 Kansas Sheriffs' Association, Comments on Pretrial Justice Task Force Draft Report, Sep. 15, 2020.

We agree some level of supervision for persons released on bond posing a public safety risk and perhaps even a flight risk is a positive step, especially if we are going to make it easier to be released pretrial. Cost is the concern and a mandate to fund this becomes an unfunded mandate if not paid with state funds. As mentioned in our discussion of Recommendation #5, when this recommendation is considered jointly with Recommendation #18 the looming question of who pays for it becomes more pronounced.

303 Americans for Prosperity Kansas, Pretrial Justice Task Force Report Recommendations, Sep. 18, 2020.

AFP-Kansas welcomes the Task Force's focus on improving pretrial supervision capabilities, which can protect public safety and health while significantly reducing taxpayer burdens. Research indicates that unnecessary pretrial detention, particularly for lower-risk individuals, can promote both pretrial and post-disposition recidivism. This reality makes expanding pretrial supervision for low-risk defendants a public safety priority. Allowing more low-risk individuals to remain in the community before trial rather than in jails is also a public health concern given the challenges of social distancing in the correctional system. Additionally, the Council of State Governments estimates that supervision costs nearly ten times less per individual than incarceration, making the recommended investments in its safe and effective expansion a long-term benefit for the taxpayer.

To realize the benefits of expanded pretrial capacity more quickly, AFP-Kansas believes that recommendation #15 should be strengthened. Instead of encouraging jurisdictions to study pretrial supervision programs, the Task Force should recommend that every jurisdiction establish a program within 5 years. In the intervening timeframe, the Supreme Court can study best practices for meeting the differing pretrial service needs of rural and urban jurisdictions.

AFP Kansas referred the task force to CHRISTOPHER T. LOWENKAMP, ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION, 3-4 (2013). https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf.

304 In fiscal year 2019, Court Services Officers supervised over 7,000 adults in the pretrial stages charged with felonies (71%) or misdemeanors (29%). See Kansas Court Services Fiscal Year 2019 Report.

305 See e.g.,

K.S.A. § 21-6612(c) ("In determining the amount and method of payment of a fine, **the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.**") (emphasis added).

K.S.A. § 21-6604(b)(1) ("In addition to or in lieu of any of the above, the court shall order the defendant to pay restitution,

which shall include, but not be limited to, damage or loss caused by the defendant's crime, **unless the court finds compelling circumstances which would render a plan of restitution unworkable.**") (emphasis added).

K.S.A. § 22-6607(c)(4) ("reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or of any unpaid portion thereof. ***If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment.***") (emphasis added).

306 *Creecy v. Kansas Department of Revenue*, 310 Kan. 454, ¶3 (2019).

307 This suggested change would conform the statute to the current practice in some jurisdictions of having entities other than court services provide pretrial supervision services. The waiver language was suggested in response to *Creecy v. Kansas Department of Revenue*, 310 Kan. 454 (2019), and makes it consistent with other statutes that allow waiver for indigency. See K.S.A. § 21-6612(c); K.S.A. 21-6604(b)(1); and K.S.A. § 22-6607(c)(4).

308 "Administrative fee" is not defined in the Kansas Code of Criminal Procedure. We know that the application fee for a court appointed attorney either for trial and incidents thereto or for a violation of conditions of postrelease supervision is an "administrative fee" based on K.S.A. § 21-6607(b)(13) and K.S.A. § 22-3717(m)(4). But that is the only context in which an "administrative fee" is mentioned in the Code.

309 The full objection continues:

This section also makes clear that those "nonmonetary" alternatives are indeed not nonmonetary. They are paid for directly by defendants, their friends or family, or by the State or a subdivision of the State of Kansas. To call them "nonmonetary" conditions is to misstate what they are and presume they are automatically the least restrictive. They could involve, for example, \$390 in charges at the minimum level of \$15 per week over a six-month case, in addition to up to and including the actual cost of such conditions for which there is no ceiling.*

***Footnote:** K.S.A. 22-2802(1)(e) ... place the person under the supervision of a **court services officer** responsible for monitoring the person's compliance with any conditions of release ordered by the magistrate. The magistrate may order the person to pay for any costs associated with the supervision provided by the court services department in **an amount not to exceed \$15 per week** of such supervision. The magistrate may also order the person to pay for all other costs associated with the supervision and conditions for compliance in addition to the \$15 per week.

In the current climate of increasing use of drug testing and electronic monitoring, those costs often add up to several hundred dollars per month for bond conditions such as house arrest, GPS tracking bracelets and alcohol monitoring devices, which are billed at a per diem rate.*

***Footnote:** House Arrest = \$15.00 per day; Remote Breath Unit = \$11.00 per day; GPS monitoring = \$10.00 per day; Drug Testing = \$20.00 per test.

It is not uncommon for an accused defendant to accrue thousands of dollars in "nonmonetary" costs in a very short period of time. Further, upon sentencing those costs are typically converted into an enforceable judgment and any probation is conditioned upon payment of those costs. [See K.S.A. 22-2802(15)]. In almost every instances of increased supervision, the cost for that supervision vastly exceeds the cost of a surety bail bond.

A defendant must then prove "*manifest hardship*" in order to avoid having to pay these fees. These fees could represent significant bond premiums that would be less restrictive, insofar as quite often bonds are from third parties securing the release of the defendant and financially guaranteeing the appearance of the defendant. In addition, whereas judges set cash bail the very agency that is going to do the supervising is going to recommend the conditions it will impose; and thus, the supervision fees it will collect in addition to any vendors it may employ. This creates what we believe is a conflict of interest or at least the appearance of such. All pretrial fees should be set by statute, and whether defendants should be charged such fees at all and be supervised calls into question the commitment of the task force to the presumption of

innocence. For denying important liberty rights when someone is not behind bars may be more onerous and destructive to that person's rights and outcomes than actually being in jail and lead to the re-incarceration of the defendant.

In addition to the reasoning set out above we cannot support inclusion of the term "or pretrial supervision program" into K.S.A. 22-2802 because "Pretrial Supervision Program" is an exceedingly vague term that has no statutory definition. By comparison Court Services Officer is a statutorily defined position with both legal authority and legal constraints. Given that there is no statutory definition of a freestanding pretrial supervision program and only limited constraints upon what interactions such a program could have with defendants, there exists a potential for abuse. Not just abusive conduct but also in terms of the defendant's legal defenses as well. For instance, can statements made to these agencies be used in the underlying case against the defendant? Statements in interviews are a different question than in proceedings as addressed in K.S.A. 22-2802(12) *Statements or information offered in determining the conditions of release need not conform to the rules of evidence. No statement or admission of the defendant made at such a proceeding shall be received as evidence in any subsequent proceeding against the defendant.*

This is not a problem with Court Services, but these types of programs are not Court Services; particularly when recognized as a different entity when the Task Force requests inclusion of the term "or pretrial supervision program." This wording specifically identifies a "pretrial supervision program" as a new, separate and different entity from Court Services. Further, a "pretrial supervision program" that is not operated by Court Services Officers is not currently allowed under K.S.A. 22-2802 or K.S.A. 22-2814, et seq. K.S.A. 22-2802(1)(e), which this recommendation suggests altering, currently and explicitly limits supervision to Court Services Officers, and although K.S.A. 22-2814 states: "Release on recognizance programs and supervised release programs shall be administered by court services officers and other personnel of the district court." *Other personnel* of the district court cannot be read to statutorily interpret private outside parties (such as personnel of the Executive branch of government) to be personnel of the district court. Further, although not applicable to this recommendation, participation in any sort of program under the auspices of K.S.A. 22-2814 is *voluntary* and cannot be ordered by the Court and nothing in those statutes authorizes any sort of fee to be charged.

Also troubling, what rights of the defendant would be recognized by such a program? Would these types of programs be allowed to speak to a defendant represented by counsel if the defendant or counsel requested that counsel be present? Would it give rise to an ineffective assistance of counsel defense down the road if counsel did not request to be involved or for allowing a client to participate in such a program? Unintended consequences are a serious matter deserving of careful consideration. We have pointed out a few but there will be others not yet recognized.

Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

310 Adopted in 1981 after a false start in 1978, when it was adopted but later declared unconstitutional due to multiple subjects in the same bill. *See State ex rel. Stephan v. Thiessen*, 228 Kan. 136 (1980). The purpose of what eventually became K.S.A. §§ 22-2814 through 22-2817, were described in the Governor's Message to the House of Representatives explaining his decision not to sign the bill—although not due to these sections.

House Bill 3129 grants discretionary authority to the District Courts of this state to establish, operate and coordinate 'release on recognizance programs and supervised release programs' for persons charged or convicted of crimes. To a large extent, these provisions represent a codification and clarification of existing judicial authority, both expressed and implied. This portion of House Bill 3129 gives needed statutory profile to release programs which can be made available by our district courts in the exercise of their sound discretion. Under such circumstances and assuming that the discretion will be exercised with caution and with wisdom, the proposal is deserving of support. 228 Kan. at 141.

311 C.R.S.A. § 16-4-106. <http://leg.colorado.gov/sites/default/files/images/olls/crs2018-title-16.pdf>, pp. 63-65.

312 That said, the Task Force made a deliberate decision not to base its recommendations on jail savings. It is the Task Force's firm belief that any savings in jail expenses that may be realized, should be reinvested in evidence-based crime prevention programs, i.e. increased access to mental health and substance abuse treatment services.

313 "Pretrial Risk Assessment in the Federal Court," Vo. 73, No. 2, Federal Probation, a journal of correctional philosophy and practice, at 19, https://www.uscourts.gov/sites/default/files/73_2_1_0.pdf.

The average cost of detaining a defendant pending trial is \$19,253 while the average cost of releasing a defendant pending trial to the alternatives to detention program (including cost of supervision, the alternatives to detention, and

fugitive recovery) is \$3,860. A simple comparison of the average cost of detention and the average cost of release to the alternatives to detention program reveals the alternatives to detention program is substantially less costly than detention. The average savings per defendant released pending trial to the ATD program in lieu of detention is \$15,393.

314 Letter dated Oct. 31, 2019 from the Kansas Bail Agents.

315 Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

316 ACLU, Feedback on Draft Pretrial Task Force Report, Sep. 18, 2020; Written testimony provided by Austin Spillar, Mar. 6, 2020 Task Force Meeting.

317 Kansas Sheriffs' Association, Comments on Pretrial Justice Task Force Draft Report, Sep. 15, 2020.

We understand the concern about the presumption of innocence during pretrial. We are concerned about shifting these costs to local governments, especially for those charged with state crimes. Unfunded mandates are a deal stopper for our associations. We also do not believe the \$150 per day jail cost is an accurate assumption in most counties. It is unclear in the document who would be responsible for this supervision.

318 *United States v. Salerno*, 481 U.S. 739 (1987), more fully discussed on pages 18-19, *supra*.

319 It appears that this term was first coined by Tim Schnacke in his work on pretrial justice reform. Timothy R. Schnacke, "Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention, *19-20 (Apr. 18, 2017), http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf.

The term (1) suggests a net, from which one can escape if the proper finding is made (such as no proof evident, or, in other states, no clear and convincing evidence of risk), and (2) it tells people that if you are doing on-purpose detention using prediction and without money, you are limited in whom you may even consider for detention. Email from Tim Schnacke, Aug. 12, 2020.

320 The California Supreme Court has been hovering around several issues related to bond as well as detention nets. *See Humphrey (Kenneth) on H.C.*, 417 P.3d 769 (Cal. 2018) and *In re White*, 9 Cal.5th 455, 463 P.3d 802 (2020).

321 *See State v. Wein*, 244 Ariz. 22, 29-30 (2018). In 2002, Arizona passed a constitutional amendment to its bail provision that prohibited bond for certain sex crimes if the proof was evident or presumption great. It also made note in its constitution that the purpose of bond and any conditions of release was to assure the appearance of the accused, protect against intimidation of witnesses and protect the safety of the victim, any person, or the community. When its constitutionality was challenged, the Arizona Supreme Court struck it down in a 4-3 decision and the US Supreme Court denied cert. It found that the measure aimed at certain crimes, as deplorable as those crimes are, was not supported by any evidence that the crimes chosen inherently demonstrate that the accused will pose an unmanageable risk of danger if released pending trial. It also found that alternatives exist that would serve the State's interest equally well at less cost to individual liberty like GPS monitoring.

See also, Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 785 (9th Cir. 2014) (en banc) (holding that Arizona Constitution provision barring bond for felony arrestees, who were unlawfully present in the United States, failed to comport with substantive due process principles. The Ninth Circuit also opined that "[w]hether a categorical denial of bail for noncapital offenses could ever withstand heightened scrutiny is an open question.").

322 Ohio Const. art. I, § 9:

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The general assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the

community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(B) of the Constitution of the state of Ohio.

323 N.M. Const. art. II, § 13.

324 Arizona, California, Colorado, Florida, Illinois, Louisiana, Michigan, Mississippi, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Washington, and Wisconsin.

325 The White Paper and Appendix were authored by Judge Roger K. Warren (Ret.) and Ms. Susan Keilitz, JD, in collaboration with Ms. Jacquelyn Gilbreath and Dr. Pamela Casey as part of the National Center for State Courts' work on the Safety and Justice Challenge. <https://nationalcenterforstatecourts.app.box.com/s/araiqs9wsh3mi5v60yxa5ufmjgnhgt9w>; See also, *Misdemeanor Bail Reform and Litigation: An Overview*, Sep 2017, Georgetown State University, College of Law, Center for Access to Justice (overview of bail reform measures and litigation across the country), <https://law.gsu.edu/files/2019/06/9.13-Final-Bail-Reform-Report-Center-for-A2J.pdf>; and Appendices C and D to this report.

326 Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

327 Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

328 Rep. Owens' full objection:

- First, I do not support Kansas becoming a so-called excessive bail state by allowing for the denial in any or all cases whatsoever. The affirmative right to bail by sufficient sureties has been the law in Kansas since before statehood, and the language in the Kansas constitution is identical to the Northwest Ordinance of 1787 and the Federal Judiciary Act of 1789. These “problems” the task force is finding, ie: that judges are setting bail that defendants cannot meet every time have a very specific remedy if they are unconstitutional—to be challenged in court as excessive bail pursuant to the federal and Kansas State constitutions. That has been the practice on this continent and in England for centuries.
- Second, I don't think a case has been made that moving to a version of the federal system or something similar will deliver better results in Kansas using any measures of success. The federal system, upon which this recommendation is based, has tripled pretrial incarceration since enacted. If I recall correctly, we heard that about 60% of Federal pretrial defendants were detained. Can you imagine if 60% of State defendants were detained? Moreover, there is no indication that the indigent fare better under such a system. Further, racial disparities are not solved under such a system—in New Jersey for example, the racial make-up of the jail population did not change at all as a result of such bail reforms. In addition, there is no indication that a system of preventative detention reduces pretrial crime, or at least no evidence has been presented to me that convinces me of this proposition.
- Three, as I am aware, there have only been two states that have changed their constitution to allow pretrial detention. They are New Mexico and New Jersey, both of which have ended up with a system that has eliminated money bail. While I know that is not the stated intention of this committee (nor do I believe it was the stated intention of New Jersey) we still need to be forthcoming with the legislature and the public regarding what all of this is going cost if it were to lead to a similar or some intended hybrid system. None of these reforms will save money—they will all cost the State and political subdivisions of the State of Kansas significant taxpayer dollars. It's worth noting that New Jersey has spent \$301 million during the first three years of their new system. These costs were driven primarily by the need to conduct the preventative detention hearings, which as you note require a mini-trial to put on clear and convincing evidence days after an arrest. IN addition, the costs of pretrial services were approximately \$1-2 million per county annually. If we were to propose a new system of bail in Kansas, we have to be able to with some certainty explain to taxpayers and policy-makers what they are getting themselves into. We cannot get into a situation like New Mexico where we gave prosecutors the power to detain but then didn't fund the system to handle the detention hearings.
- Which raises an important fourth point: New Jersey supervises at the county level 91% of all defendants who are released. This is critical, because while I would argue that our current system is far better from a benefit-cost perspective, to truly replace the inherent economic incentives of bail agents with arrest powers or third-parties being held to financial account, some state program is necessary to replace it. I worry that under this statute, the end result will not match New Jersey, because I doubt local governments, or the state are going to have the funds to spend the type of money it is going to take to implement such a system. Similarly, in the federal model, the United States Marshall's service picks up the burden that will now fall exclusively on law enforcement.
- Fifth, as I scanned other state constitutional provisions on this matter, I think I must oppose a total general grant of power to the legislature to decide the contours of preventative detention, perhaps even on an annual basis. Of the sufficient sureties states, many have simply added additional categories that authorize instances of preventative

detention, rather than a general grant of all legislative power to the state legislatures, as the task force report notes. In Utah, for example, a felon on bail who is accused of a new crime becomes eligible for detention. The right to bail is a fundamental right, and I do not want to expose it to a continuing stream of “ripped from the headlines” legislative attempts, which would seek to deny bail in more and more cases. I believe there will be the pressure if those committing crimes are in large part getting released on their own recognizance. Those from other states appropriately note that it is difficult to change the categories or presumptions of preventative detention, which I think should continue to be the rule. While I have general disdain for expanding preventative detention, I would be willing to listen to arguments that specific cases may warrant it and should be codified as a constitutional exception.

- Sixth, the proposed statute does not include one costly safeguard that will be necessary to insulate it from legal challenges: speedy trial. As I understand the Salerno ruling, the statute survived challenge in part due to the expedited speedy trial requirement of 90 days at the time (now 70 days) that is absent from the proposed statute. Trying all persons detained by preventative detention will be expensive, and we should try to get a sense of what it would cost in addition to adding it to the proposed statute.
- Seventh, I am concerned that county jails are not going to be able to comply with a requirement noted in the draft report that comes from Salerno, which “requires that the detainees be held in separate facilities or areas from the general prison population.” This will require local jails to basically build a separate or new facility or make changes to existing facilities, and I worry that many jails are not going to be able to comply with the requirement, which will result in significant taxpayer dollars being spent or the entire law being unraveled via lawsuits.
- Eighth, **I do think preventative detention has the potential to be over-used, and the risk is not going to be more defendants being released but instead will mean more defendants detained.** New Jersey is increasing their use of preventative detention, and as mentioned, the federal government detains better than 60% of all defendants. I worry that every time a person is released and commits a crime, we are going to have calls for legislators to start expanding preventative detention. We are going to challenge prosecutors to seek detention in all cases or be labeled soft on crime. I worry that these on-going and endless debates will be fueled by emotion and politics, and not facts and reason.
- Finally, I just don’t think a compelling enough case has been made in Kansas to change the State Constitution and eliminate the right to bail. That judges are allegedly imposing unconstitutional bails is not a reason to make the bails that are unconstitutional today, constitutional tomorrow. Instead, judges simply need to do what judges have done for several hundred years under our state and federal constitutions—follow the law. This system has served Kansas well since pre-statehood, and I simply do not think a good enough case has been made that will convince me and likely many of my legislative colleagues, that something must be done and that the something is to begin tinkering with our State Constitution.

329 Kansas Sheriffs’ Association, Comments on Pretrial Justice Task Force Draft Report, Sep. 15, 2020.

330 K.S.A. § Supp. 75-771(b).

331 K.S.A. § 22-2307.

332 Kansas Supreme Court Rule 109A.

333 Douglas B. Marlowe, Carolyn D. Hardin, & Carson L. Fox, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States*, National Drug Court Institute, at 14, June 2016, <https://www.ndci.org/wp-content/uploads/2016/05/Painting-the-Current-Picture-2016.pdf>.

334 Although the term “recidivism” has varied definitions. Some programs define recidivism as any type of criminal activity; whereas others only count the same type of crime as recidivism. Also, the length of time varies greatly. Some count a period of time after the end of the program and others only count it as recidivism if the person reoffends during the time he or she is in the specialty court program.

335 *See fn. 333*, p. 15, internal citations omitted.

336 *Id.*

337 *Id.*

338 *Id.*, p. 28.

339 *Id.*, p. 29.

340 *Recommendations for Improving the Kansas Judicial System*, Report of the Kansas Supreme Court's Blue Ribbon Commission, Jan. 3, 2012, pp. 136-141.

341 Report of the Kansas Specialty Courts Commission, Dec 2013; Status Summary Kansas Supreme Court Blue Ribbon Commission Recommendations Jan. 2016, pp. 11-12; 2013 SC 14, filed Mar. 14, 2013.

342 Supreme Court Order 2014 SC 60 filed June 26, 2014.

343 Kansas Supreme Court Rules 109A and 109B.

344 Status Summary Kansas Supreme Court Blue Ribbon Commission Recommendations January 2017, p. 7.

345 *See* fn. 282, *supra*.

346 Sainju et al., *Electronic Monitoring for Pretrial Release: Assessing the Impact*, 82 FEDERAL PROBATION 3, Dec. 2018:

There is a lack of sound research about the effectiveness of electronic monitoring in the pretrial context. The research that does exist has not found that electronic monitoring improves pretrial outcomes. One jurisdiction found that defendants released pretrial with electronic monitoring had similar failure to appear and new arrest rates as those released without electronic monitoring, and those on electronic monitoring actually experienced more technical violations than those without electronic monitoring. One problem with the existing research is that there have been no randomized control trials. Moreover, observational research suffers from the problem that individuals who are put on electronic monitoring are usually considered higher risk than those individuals who are released without electronic monitoring. (Citations omitted).

https://www.uscourts.gov/sites/default/files/82_3_1.pdf. *See also*, Hopkins, Bains, & Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 698 (2018), <https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/2/>; Grommon, Rydberg & Carter, *Does GPS supervision of intimate partner violence defendants reduce pretrial misconduct? Evidence from a quasi-experimental study*, J Exp Criminal 13, 483–504 (2017) (concluding that Pretrial GPS supervision was no more or less effective than traditional, nontechnology based pretrial supervision in reducing the risk of failure to appear to court or the risk of re-arrest for those charged with domestic violence offenses. GPS supervision did reduce the risk of failing to appear to meetings with pretrial services staff), <https://doi.org/10.1007/s11292-017-9304-4>.

347 *See United States v. Blaser*, 390 F. Supp. 3d 1306 (D. Kan. 2019). This case did involve the constitutionality of a federal statutory mandate that house arrest be imposed for certain crimes under the Adam Walsh Act amendments of 2006 to the Bail Reform Act, [18 U.S.C.A. § 3142\(c\)\(1\)\(B\)](#). The decisions in Kansas have all been by district magistrate judges. There is also contrary authority, but none from the 10th Circuit. *See* 54 A.L.R. Fed. 2d 195 (originally published in 2011).

348 Lawsuits challenging long established money bond practices, primarily on equal protection and due process grounds, have been sweeping the country in the last 4 years. *See, Allison v. Allen*, Case No 19-cv-1126, M.D. North Carolina, Consent Order for Preliminary Injunction, Doc. 56, May 8, 2020; *Dixon v. City of St. Louis*, No. 4:19-CV-0112-AGF, 2019 WL 2437026, at *2 (E.D. Mo. June 11, 2019); *O'Donnell v. Harris Cty., Texas*, 227 F. Supp. 3d 706 (S.D. Tex. 2016), *aff'd in part, rev'd in part*, 882 F.3d 528 (5th Cir. 2018), *opinion withdrawn and superseded on reh'g sub nom. O'Donnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018), and *aff'd in part, rev'd in part sub nom. O'Donnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018); *Walker v. City of Calhoun, GA*, 901 F.3d 1245 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun, Ga.*, 139 S. Ct. 1446, 203 L. Ed. 2d 681 (2019); *Martinez v. City of Dodge City*, No. 15-CV-9344-DDC-TJJ, 2016 WL 9051913, at *1 (D. Kan. Apr. 26, 2016); *Buffin v. City & Cty. of San Francisco*, No. 15-CV-04959-YGR, 2019 WL 1017537, (N.D. Cal. Mar. 4, 2019); *Thompson v. Moss Point*, No. 1:15CV182LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015); *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015); *Snow v. Lambert*, No. CV 15-567-SDD-RLB, 2015 WL 5071981 (M.D. La. Aug. 27, 2015); *Welchen v. Cty. of Sacramento*, 343 F. Supp. 3d 924 (E.D. Cal. 2018); *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019); *Daves v. Dallas Cty., Texas*, 341 F. Supp. 3d 688, 690 (N.D. Tex. 2018); *Booth v. Galveston Cty.*, No. 3:18-CV-00104, 2019 WL 3714455 (S.D. Tex. Aug. 7, 2019); *Menter v. Mahon*, No. 3:17-CV-1029-J-39JBT, 2018 WL 4335527 (M.D. Fla. Sept. 11, 2018); *Williams v. Cook Cty.*, No. 18 C 1456, 2019 WL 952160 (N.D. Ill. Feb. 27, 2019); *Mock v. Glynn Cty. Georgia*, No. 2:18-CV-25, 2019 WL 2847122 (S.D. Ga. July 2, 2019); *Caliste v. Cantrell*, 329 F. Supp. 3d 296 (E.D. La. 2018), *aff'd*, No. 18-30954, 2019 WL 4072068 (5th Cir. Aug. 29, 2019).

349 *Pierce v. City of Velda City*, No. 4:15-CV-570-HEA, 2015 WL 10013006, at *2 (E.D. Mo. June 3, 2015).

350 *See also*, Timothy R. Schnacke, “Model” Bail Laws: *Re-Drawing the Line Between Pretrial Release and Detention*, 198 (Apr. 18, 2017), http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf.

351 *See* K.S.A. § 22-2802 (3), and (6).

352 Best Practices-Conditions of Release, Appendix B, *supra*, at 5.

353 https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/Pretrial_Justice_Task_Force/CalWilliamsPaper.pdf.

354 *See State v. Steward*, 219 Kan. 256, 262 (1976).

355 The Kansas legislature did weigh a proposal to return to a 90 day statutory speedy trial clock in 2018 (HB 2535). Although there was a hearing, the bill did not make it out of committee. It was opposed by the Attorney General, the Kansas County and District Attorneys Association, and the Kansas District Judges Association. http://www.kslegislature.org/li_2018/b2017_18/measures/HB2535/testimony.

356 It is interesting to note that in the survey done in November 2018 by the Pew Charitable Trust, *see* fn. 21, *supra*, most Americans supported speedy trials...very speedy trials. 86% of respondents believed that if someone accused of a crime is being detained before trial, the trial should take place within 30 days except in special circumstances.

357 K.S.A. § 22-2906(c).

358 *State v. Chamberlain*, 280 Kan. 214, ¶1 (2005).

359 “Each defendant shall be informed in writing of the diversion program and the policies and guidelines adopted by the district attorney.” K.S.A. § 22-2907(3).

360 LEAD National Support Bureau website, <https://www.leadbureau.org/>.

361 LEAD National Support Bureau-Fact Sheet, https://56ec6537-6189-4c37-a275-02c6ee23efe0.filesusr.com/ugd/6f124f_6c348a0648d045508966dceb187e9fb8.pdf?index=true.

362 Email dated Feb. 22, 2019 from Emily Richardson. *See also*, <https://www.colorado.gov/pacific/cdhs/law-enforcement-assisted-diversion-lead-program>.

363 “Parking lot” issues were issues that were raised during discussions of other recommendations. These issues had not been assigned for review and at least some Task Force members believed they should be. We returned to issues in the parking lot at the end of each meetings. Some were referred for further research and discussion and some were not.

364 http://www.kslegislature.org/li_2020s/b2020s/statute/021_000_0000_chapter/021_069_0000_article/021_069_0002_section/021_069_0002_k/.

365 http://www.kslegislature.org/li/b2019_20/measures/hb2708/.

366 Secretary of Defense Donald Rumsfeld at Department of Defense Press Briefing, Feb. 2002.

367 Kristin Bechtel, John Clark, Michael R. Jones & David J. Levin, *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research*, Pretrial Justice Institute, at 14, Nov. 2012.

368 R. Schauffler, R. LaFountain, S. Strickland, K. Holt, & K. Genthon, *Examining the Work of State Courts: An Overview of 2015 State Court Caseloads*, National Center for State Courts (2016), <https://cdm16501.contentdm.oclc.org/digital/collection/ctadmin/id/2177>.

369 For example, in some parts of the state all persons arrested without a warrant are taken before a judge within 48 hours, with no opportunity to be released prior to seeing the judge, in other parts of the state, most misdemeanors are released before

seeing a judge on their own recognizance with only felony charges brought before the judge, some use fixed-bond schedules based, not on the crime, but on the sentencing level of the offense so that any person charged can post the monetary bond before seeing the judge. Those that have fixed-bond schedules have schedules unique to their jurisdictions that are at time inconsistent with bond amounts in neighboring jurisdictions. *See also*, Matt Krupnick, *Bail roulette: How the same minor crime can cost \$250 or \$10,000*, The Guardian, Sept. 20, 2017, <https://www.theguardian.com/us-news/2017/sep/20/bail-disparities-across-the-us-reflect-inequality-it-is-the-poor-people-who-suffer>.

370 Board of Governors of the Federal Reserve System, “Report on the Economic Well-Being of U.S. Households in 2018,” May 2019, Figures 10, 11 (If faced with an unexpected expense of \$400, 40% of Americans either would not be able to pay it or would have to borrow or sell something to do so.) Although the 2018 report shows significant gains over the prior 4 years, it is unknown whether the current economic downturn will cause that percentage to return to its 50% level of 2013. <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm>.

371 Email from Pittsburg State University student collective dated July 11, 2020. Although there is nothing in Kansas that would prevent an otherwise eligible voter who is in jail from voting by an advance voting ballot, it is unknown whether pretrial detainees are made aware of this or if any accommodations are made in Kansas jails to permit voting while incarcerated. <https://sos.ks.gov/elections/voter-information.html>. The Kansas Constitution does allow the legislature to adopt laws that would exclude anyone from voting who is committed to jail or penal institution. K.S.A. Const. Art. 5, § 2. Timely registration to vote while incarcerated may also be difficult.

372 Sedgwick County Sheriff Jeffrey Easter was very helpful in our research. The Task Force is grateful for his willingness to assist us in any way we requested. He agreed to collect and analyze several data points for us in 2018 in Sedgwick County just for a “quick look.”

First, he compared those released on OR bond and those released on surety bond and a re-arrest before their next court date:

Between January 1, 2018 and December 31, 2018, a total of 24,870 inmates were released from custody. 6,398 were released on OR bonds and 1,172 or 18.3% were rebooked into our facility before their next court date. 5,742 were released on surety bonds and 916 or 16% were rebooked into our facility before their next court date.

Emails dated Mar. 21, 2019, Mar. 25, 2019 and Sept. 13, 2019 from Sheriff Jeff Easter. This indicates only a 2% difference between persons released on OR bonds and those released on surety bonds. However, he was not able to determine how many “rebooks” were from bond agent surrenders and how many were new crimes or warrants.

Next, he looked at the number of inmates who had bonds over \$50,000 for the month of April 2018:

April 2018 the Adult Daily Population (ADP) was 1,402

- On average there were 190 inmates in custody solely for charges with bonds over \$50,000.
 - If these inmates paid the bond they would be released because they had no other holds.
- During the month of April 2018 2,020 inmates were released from custody.
- Of the releases only 15 were inmates who paid a surety bond over \$50,000.

Email dated Sept. 19, 2019 from Sheriff Jeffrey Easter.

373 Aurelie Ouss & Megan Stevenson, *Jail, Bail, and Pretrial Misconduct: The Influence of Prosecutors*, Jan. 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138:

In February 2018, Philadelphia’s district attorney announced that his office would no longer request monetary bail for defendants charged with certain eligible offenses. ... We find no evidence that a reduction in the use of monetary bail and supervisory conditions leads to increased failure-to-appear in court or crime. This suggests a discrepancy between pretrial policies that use monetary penalties as a deterrent and the motivation for defendant behaviors; it also suggests that bail practices may have violated constitutional prohibitions against excessive bail.

Kentucky, a state that prohibits commercial bond companies, reports that:

Statistically, about 70% of pretrial defendants are released in Kentucky; 90% of those make all future court appearances and 92% do not get re-arrested while on pretrial release... In CY 2011, 85% of low risk defendants were released, 67% of

moderate risk defendants were released and 51% of high-risk defendants obtained pretrial release. . . . Furthermore, pretrial jail populations have decreased by 279 people, while appearance and public safety rates have remained consistent.

Pretrial Reform in Kentucky, Pretrial Services Administrative Office of the Courts Kentucky Court of Justice, Jan. 2013, at 16.

The federal district court for the Northern District of Missouri opined, in *Dixon v. St. Louis*, 2019 WL 2437026, *15 (E.D. MO, June 11, 2019) vacated grant of preliminary injunction on other grounds, 950 F.3d 1052 (8th Cir. 2020):

Defendants provide no support for the suggestion that arrestees released without bail are more likely to commit crimes or less likely to appear in court than those released upon payment. Further, as other courts have observed, there is no evidence that financial conditions of release are more effective than alternatives for ensuring court appearances and public safety. [*O'Donnell v. Harris County*, 892 F.3d 147, 154] (noting “reams of empirical data” suggesting the opposite); [*McNeil v. Community Probations Services*], 2019 WL 633012 at 14-15 (noting statistics showing a high rate of court appearance for those released and higher rates of recidivism among those detained); [*Schultz v. State*, 330 F. Supp. 3d 1344, 1363 (N.D. Alabama 2018)] (citing New York data that 95% of arrestees whose bail was paid by nonprofit organizations made their court appearances). Here, Plaintiffs offer statistics from The Bail Project of St. Louis reflecting that 94.4% of defendants for whom the organization paid bail made their scheduled court appearances. [citation to trial record omitted]. Defendants’ position is further belied by the fact that, as noted above, at bond reduction hearings, 69% of detainees received a reduction or were released on their own recognizance. Moreover, Plaintiffs do not request wholesale release of all class members but simply a presumption favoring nonmonetary release conditions and a hearing that comports with due process.

And finally, a growing number of charitable bond funds, like the Bail Project, “which demand no cash from and therefore impose no financial incentive on the bailees—have achieved promising appearance rates with little more than low-cost text message reminders and transportation subsidies. “ Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L. J. FORUM 1098, 1114 (2019).

374 See fn. 72, *supra*.

375 They have seen commercial bonding companies out-lawed in Kentucky (1976) Ky. Rev. Stat. Ann § 431.510, Illinois (1963) 725 Ill. Comp. Stat. Ann.5/110-7, Oregon (1973) Or. Rev. Stat. § 135.255, .260, .265; and Wisconsin (1969) Wis. Stat. § 969.12; National Conference of State Legislatures, *Bail Bond Agent Business Practices* (April 23, 2013): <https://www.ncsl.org/research/civil-and-criminal-justice/bail-bond-agent-business-practices.aspx>. They have been replaced by robust Pretrial Services programs.

Some states allow commercial bonding companies but prohibit money bond from being required by the judge such as New Jersey and California.

The United States and the Philippines are the only nations on earth that have a cash bond system for release that is dominated by commercial bond agents (or the practice of paying a third party to post bond on your behalf). Louise Jacobson, *Are U.S., Philippines the only two countries with money bail?*, PolitiFact, Poynter Institute, Oct. 9, 2018,; <https://www.politifact.com/factchecks/2018/oct/09/gavin-newsom/are-us-philippines-only-two-countries-money-bail/>. Canada, Germany, England, Wales, and Finland to name a few, specifically prohibit commercial money bond. See: *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations*, Justice Policy Institute, Apr. 2011, http://www.justicepolicy.org/uploads/justicepolicy/documents/finding_direction-full_report.pdf. And courts in Australia, India, and South Africa had disciplined lawyers for professional misconduct for setting up commercial bond arrangements. Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, New York Times, Jan. 29, 2008. <https://www.nytimes.com/2008/01/29/us/29bail.html>.

Appendix A

Best Practices¹ Pretrial Procedure

1. WARRANT ARREST

A person arrested on a new charge pursuant to a warrant must be brought before the judge in the county where the crime is alleged to have been committed without unnecessary delay to review the conditions of release.²

2. WARRANTLESS ARREST – PROBABLE CAUSE HEARING³

Within 48 hours of a warrantless felony or misdemeanor arrest if the arrestee is not served with a notice to appear or traffic citation and released, a judge⁴ must review the law enforcement affidavit to determine if there is probable cause⁵ sufficient to continue restricting the person's liberty⁶.

A. No probable cause. If the judge determines no probable cause exists for the person's detention, the judge must issue an order to that effect and the person must be released from custody.

B. Probable cause. If the judge determines probable cause for continued detention exists,⁷ the judge must issue a detention order which includes⁸:

- the name of the arrestee;
- the crime alleged in the affidavit;
- the amount of any appearance bond;
- any conditions of release; and
- an order for the arrestee's appearance before the court (by video or in person) for a first appearance to review the charges,⁹ conditions of pretrial release and the status of legal representation for the arrestee, as follows:
 - i. if not released from custody, on a date no later than 72 hours following the initial arrest absent exigent circumstances; or
 - ii. if released from custody on a date not to exceed 30 days following the initial arrest.

3. FIRST APPEARANCE

A. If held in custody. If the arrestee is held in custody (either on a warrant or a warrantless arrest on new charges), the arrestee must appear before the court (by video or in person) at the first appearance no later than 72 hours after the initial arrest absent exigent circumstances.

- i. **If no charges filed.** If charges have not been filed at the time of the first appearance the judge must order the defendant released with no conditions.¹⁰ Once charges have been filed, the prosecutor is free to seek a summons or a warrant to bring the defendant before the court.
- ii. **If charges are on file.** If charges have been filed¹¹, the court shall conduct a first appearance hearing.¹² At that hearing, the court receives information from the defendant regarding conditions

of release, if any, and must determine if the original conditions of release should be modified. Any bond required must list all conditions of release.¹³

The court also has a duty to inform the defendant of the right to counsel and that counsel will be appointed if the defendant cannot financially employ counsel.¹⁴ If the defendant qualifies, counsel must be appointed.¹⁵

Finally, the judge shall also advise the defendant of their right to have the conditions of their release reviewed by the court upon request and once requested, it must be heard without unnecessary delay.¹⁶

B. If not held in custody. If the arrestee is not held in custody, the arrestee should be seen by a judge within 30 days of initial arrest.¹⁷

- i. If no charges filed.** If charges have not been filed at the time of the first appearance the judge must order the defendant released with no conditions. Once charges have been filed, the prosecutor is free to seek a summons or a warrant to bring the defendant before the court.¹⁸
- ii. If charges are on file.** If charges have been filed, the court shall conduct a first appearance hearing. At that hearing, the court receives information from the defendant regarding conditions of release, if any, and must determine if the original conditions of release should be modified. Any bond required must list all conditions of release.

The court also has a duty to inform the defendant of the right to counsel and that counsel will be appointed if the defendant cannot financially employ counsel.¹⁹ If the defendant qualifies, counsel must be appointed.

4. BOND REVIEW HEARING²⁰

If the defendant remains in custody after the first appearance, they may ask the court to review the conditions of release at any time and the request must be heard without unnecessary delay by the judge who issued the conditions, or if that judge is not available, any other judge in the county.²¹ In addition, a defendant who remains in custody on a magistrate judge's orders can apply to the district judge to get the bond changed. That motion must be determined promptly.²²

5. PRELIMINARY HEARING

In the case of a felony, both the defendant and the State have a right to a preliminary examination.²³ Preliminary hearing shall be held within 14 days of arrest or within 14 days of personal appearance if a summons was issued in lieu of arrest.²⁴ This date may be continued for good cause shown. However, if the defendant is still in custody and either party requests a continuance, the judge should use the opportunity to conduct a bond review hearing along with the motion to continue.²⁵

6. ARRAIGNMENT

A. Felony. If the defendant is bound over after preliminary hearing, the defendant must be arraigned no later than the next required day of court unless a later time is requested or consented to by the defendant and approved by the court or unless continued by the order of the court.²⁶ If the defendant

is not on pretrial release after the preliminary hearing, the judge is encouraged, if possible, to exercise the discretion granted in K.S.A. 22-2902 (7) to conduct arraignment at the conclusion of the preliminary hearing.²⁷

If the preliminary hearing is waived, the arraignment shall be conducted at the time originally scheduled for preliminary hearing if a judge is available.²⁸ Arraignments should be conducted as promptly as possible to avoid prolonged pretrial incarceration.²⁹

- B. Misdemeanor.** While there is no specific time frame listed in the statute, there is no reason to delay a misdemeanor arraignment. The best practice is to hold misdemeanor arraignment at the same time as the first appearance. A defendant does not have to be present for arraignment on a misdemeanor charge if represented by counsel.³⁰ The sooner the arraignment takes place, the sooner the speedy trial clock starts to run, allowing the defendant to receive statutory and constitutional protections against prolonged incarceration.
- C. Waiver.** A defendant may waive arraignment. When a defendant waives arraignment, the statutory speedy-trial clock begins to run upon the waiver of the arraignment.³¹

D. Speedy trial clock.

i. Statutory Clock.³²

Only the State is authorized to bring a criminal prosecution to trial, so it is the State's obligation to ensure that a defendant is provided a speedy trial within the statutory limits.³³ A defendant is not required to take any affirmative action to see that his or her right to a speedy trial is observed.³⁴

If a defendant is in custody solely on the subject charge before the court,³⁵ the defendant must be brought to trial within 150 days after arraignment. If a defendant is out on an appearance bond, the defendant must be brought to trial within 180 days. If the defendant is not brought to trial during these time frames, the charges must be dismissed with prejudice.

If the defendant requests a continuance, the speedy trial clock is extended by a maximum of 90 days from the original trial deadline.³⁶ A continuance hearing is a critical stage of a criminal trial, requiring the defendant's presence.³⁷

If the defendant fails to appear for any setting within the limits of the speedy trial clock and is later arrested on a bench warrant, the State has 90 days from the apprehension or surrender of the defendant on the warrant to get the defendant to trial. If more than 90 days remain on the original speedy trial clock, however, the original timeframe still applies

The statutory speedy trial clock may also be extended if:

- a. the defendant is incompetent to stand trial.** Once competency is restored, the defendant must be tried "as soon as practicable" but in no event more than 90 days from the finding of competency. If, however, the defendant is subject to the 180-day deadline and more than half of that time remains, the original time frame still applies. The time when a decision on competency is pending is never charged against the State.³⁸

b. material evidence that the State has made reasonable efforts to procure is unavailable.

The court can continue the case 90 days past the original deadline provided there are reasonable grounds to believe the evidence can be procured in that time. Only one continuance is allowed on this basis unless the original continuance was for less than 90 days, the trial can be commenced within 120 days of the original date, and the State can show good cause.

c. the court's trial calendar does not allow for a trial setting within the speedy trial guidelines. The case can be continued by the court once for no more than 30 days.

d. the defendant or, in consultation with the defendant, their attorney requests a continuance. The delay is charged to the defendant unless it was due to prosecutorial misconduct. If a delay is initially attributed to the defendant but is subsequently charged to the state for any reason, that delay cannot be used as a basis to dismiss the case or reverse a conviction on speedy trial grounds. The only exception to this rule is when not considering the issue would result in the violation of the constitutional right to speedy trial or there is prosecutorial misconduct related to the delay.

ii. Constitutional Clock. The defendant also has a constitutional right to a speedy trial under the Sixth Amendment to the United States Constitution and Section 10 of the Bill of Rights of the Kansas Constitution.³⁹ This is measured from the date of arrest to the date of trial, regardless of arraignment date. Even if the statutory right to a speedy trial is not violated, the constitutional right may still come into play.⁴⁰

A constitutional claim is based on a balancing test in which the conduct of both the prosecution and the defendant are weighed. Each case is determined on its own merits. The United States Supreme Court has enumerated four factors for the court to examine in determining whether a defendant's constitutional right has been denied:

- a. length of delay,
- b. the reason for the delay,
- c. the defendant's assertion of his or her right, and
- d. prejudice to the defendant.

None of these factors are controlling. They must be considered together with all relevant circumstances.⁴¹ But delays of 14 months between arrest and trial for routine street crimes have been found to be presumptively prejudicial, requiring an analysis of the other three factors.⁴² The United States Supreme Court has observed that unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence.⁴³

iii. Waiver of Speedy Trial. The constitutional and statutory right to a speedy trial is a right personal to the defendant and may be waived.⁴⁴

Like other fundamental rights, a defendant can waive the constitutional right to a speedy trial if the waiver is knowingly, voluntarily, and intelligently made. Courts indulge every reasonable presumption against waiver. Likewise, they do not presume waiver from a silent record.⁴⁵ But if the delay is attributable to the defendant, the court may find waiver.⁴⁶

A defendant may waive the statutory right to speedy trial by requesting or acquiescing in the grant of a continuance or otherwise delaying trial.⁴⁷ In addition, filing a motion that delays the trial beyond the statutory deadline, constitutes a limited waiver. The court and parties are allowed a reasonable period of time to process the defendant's motion and deduct that time from the statutory speedy trial clock.⁴⁸ Defendants who have waived their statutory right to a speedy trial may condition or revoke their waivers and subsequently raise the speedy trial issue if the State is aware of the conditions or the revocation.⁴⁹

Endnotes

1 The Pretrial Justice Task Force recommends that judges follow the procedures outlined below. These procedures meet Kansas statutory requirements as well as both state and federal constitutional requirements. They are designed to recognize our commitment to the presumption of innocence, the right to liberty, and the belief that no person should be deprived of liberty unnecessarily or unconstitutionally. Any extension of the time frames discussed below are up to the local jurisdiction, but we strongly recommend examining the constitutionality of any procedure that varies from these recommendations. These procedures apply only to actions in the district court. And finally, these recommendations are based on the law as it exists on October 1, 2020. It does not incorporate recommendations from the Pretrial Justice Task Force Report to the Supreme Court.

2 K.S.A. § 22-2301.

3 K.S.A. § 22-2401. An officer may make a warrantless arrest in Kansas under the following circumstances:

(c) The officer has **probable cause to believe** that the person is committing or has committed

(1) A felony; or

(2) a misdemeanor, and the law enforcement officer has probable cause to believe that:

- a. The person will not be apprehended, or evidence of the crime will be irretrievably lost unless the person is immediately arrested;
- b. the person may cause injury to self or others or damage to property unless immediately arrested; or
- c. the person has intentionally inflicted bodily harm on another person.

(d) Any crime, except a traffic infraction or a cigarette or tobacco infraction, has been or is being committed by the person in the officer's view.

If an officer arrests a person without a warrant:

1. The officer can release the person without requiring that person to appear before a court when the officer is satisfied that there are no grounds for a criminal complaint. K.S.A. § 22-2406.

2. If the officer believes there are grounds for a criminal complaint, the officer has the following options:

- 1. If it is a misdemeanor except for misdemeanor DUI or fleeing or attempting to elude a law enforcement officer, the officer may release the person upon service of a notice to appear. In the case of misdemeanor traffic offenses, the officer can release the person on a traffic citation. The notice to appear must contain the name and address of the person detained, the crime charged, and the time and place the person is to appear in court in the county in which the crime is alleged to have occurred. The court date must be set at least 7 days from the arrest unless the person detained demands an earlier date. In order to be released, the person detained is required to sign the notice to appear, which constitutes the person's promise to appear in court. The officer keeps the original of the notice to appear and gives a copy to the person detained. The officer is then is required to cause a complaint to be filed in the court without unnecessary delay. If the person fails to appear, the court can issue a warrant for his or her arrest. K.S.A. § 22-2408. If it is a traffic misdemeanor for which the officer can issue a written citation, the citation is deemed a lawful complaint for the purpose of initiating prosecution. K.S.A. § 8-2108.

- 2. If the officer elects against issuing a notice to appear or traffic citation, or if the offense is DUI under K.S.A. §

8-1567, fleeing and eluding under K.S.A. § 8-1568, or any felony (including traffic felonies), the person must be taken “without unnecessary delay” before the nearest available judge, and “a complaint shall be issued forthwith.” See K.S.A. §§ 8-2104, 8-2106, 8-2111; *State v. Fraker*, 242 Kan. 466, 467 (1988) (“DUI is one of those offenses for which the accused must be taken before a judge of the district court without unnecessary delay”).

3. If the offense is a violation of the uniform act regulating traffic, which is defined at K.S.A. § 8-2204 [Chapt. 8, Articles 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 25; 8-1560a through 8-1560d; 8-1,129, 8-1,130a, 8-1428a, 8-1742a, 8-2118, and 8-1599] and is classified as a traffic infraction or for any of the statutes specifically listed in K.S.A. § 8-2106 or K.S.A. § 8-2107, the officer must release the person on a written traffic citation at the scene. See also, K.S.A. § 8-1219, Article III (a) of the Nonresident Violators Compact. The only exceptions are if the person demands to be taken to a judge or if the offense is a DUI under K.S.A. § 8-1567 or for fleeing and eluding under K.S.A. § 8-1568. The citation must have a notice to appear in court on a date not less than 5 days from the date of the violation unless the person requests an earlier date. It must contain the name and address of the person, the type of vehicle, whether there were hazardous materials involved, whether there was an accident, the vehicle’s state registration number, whether it is a commercial vehicle, whether the driver has a commercial driver’s license, the offenses charged, and the signature of the police officer. See K.S.A. § 8-2106.

- a. **In the case of a misdemeanor traffic offense.** If the person signs the citation, the officer is not allowed to physically take the person into custody. It is discretionary with the officer whether to issue a citation on a misdemeanor traffic offense, except for DUI and fleeing and eluding.

K.S.A. § 8-2107 allows an officer to require a bond be posted in lieu of taking the person before a judge for the misdemeanor traffic offenses listed below, but that bond is set by statute.* If the driver is a Kansas resident, there is also a procedure for posting a valid Kansas driver’s license in lieu of bond. Officers may also require drivers from Alaska, California, Montana, Oregon, Wisconsin, and Michigan to post a bond for any traffic offense because those states did not adopt the nonresident violators compact. In those cases, the bond is to be the equivalent of the fine listed in the statutory fine schedule.

Offense	Fine
Reckless Driving	\$82
Driving while suspended, cancelled, or revoked	\$82
Failing to comply with lawful order	\$57
Registered weight violation (registration for less than 12,000 lbs.)	\$52
Registered weight violation (registration for more than 12,000 lbs.)	\$92
No DL or violation of restrictions	\$52
Spilling load on road	\$52
Transporting an open container	\$223

* But see Section I(e) of Appendix B of the Pretrial Task Force Report to the Kansas Supreme Court for discussion of constitutional issues that come into play when mandating compliance with a fixed crime-based bond schedule.

- b. **In the case of a traffic infraction.** The officer is required to write the citation and release the driver. More information is required on the traffic citation than on a typical misdemeanor notice to appear, including the procedure for pleading guilty or no contest and paying the ticket, and the amount of the fine. See K.S.A. § 8-2106.

4 This can be a magistrate, district court, or appellate judge, as the terms are interchangeable for these purposes. See K.S.A. § 22-2202(n).

5 As this process is meant to be a substitute for issuing an arrest warrant, the judge must have probable cause to believe that a crime has been committed and the defendant committed it. K.S.A. § 22-2302(a).

6 Federal caselaw has described “without unnecessary delay” to mean not more than 48 hours after arrest. In *Gerstein v. Pugh*, 420 U.S. 103, 123-35 (1975), the United States Supreme Court determined that the Fourth Amendment requires “a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.”

The court has also defined “prompt” in *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991). There, the court held that a probable cause determination need not be made immediately, but that jurisdictions that have a judicial determination of probable cause

within 48 hours of arrest comport with the promptness requirement. Holidays and weekends are included in the 48 hours calculation.

Also in *McLaughlin*, 500 U.S. at 56-57, the Court noted:

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

The 48-hour timeframe is also consistent with a Fifth Circuit case, *ODonnell v. Harris County*, 892 F.3d 147, 160 (5th Cir. 2018). There, the Fifth Circuit held that the requirement of a probable cause hearing within 24 hours was needlessly restrictive. Likewise, in *Walker v. City of Calhoun*, 901 F.3d 1245, 1266 (11th Cir. 2018), the Eleventh Circuit found that the city “can presumptively hold a person for 48 hours before even establishing probable cause.” In contrast, however, the Kansas Supreme Court in *State v. Cuchy*, 270 Kan. 763, 772 (2001) found that a mandatory 12-hour hold constituted an unreasonable delay and violated the defendant’s right to post bail.

7 The judge must have probable cause to believe that a crime has been committed and the defendant committed it. K.S.A. § 22-2302(a).

8 K.S.A. § 22-2304.

9 Charge is defined as “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(g). A complaint is a written statement under oath of the essential facts constituting a crime, except some complaints are valid without an oath if signed by a law enforcement officer. K.S.A. § 22-2202 (h). An information is defined as a “verified written statement signed by a county attorney or other authorized representative of the state of Kansas presented to a court, which charges the commission of a crime. An information verified upon information and belief by the county attorney or other authorized representative of the state of Kansas shall be sufficient.” K.S.A. § 22-2202(l). Finally, an indictment is a written statement, presented by a grand jury to the court, that charges the commission of a crime. K.S.A. § 22-2202(k).

10 See K.S.A. § 22-2901. If the arrest has been made on probable cause without a warrant, the defendant shall be taken without unnecessary delay before the nearest available judge and “a complaint shall be filed forthwith.” Webster’s dictionary defines “forthwith” as “immediately, without any delay.” This emphasis on immediate action is further supported by K.S.A. § 22-2901(2), which deals with a warrantless arrest made in one county for a crime in another county. If no arrest warrant has been issued by the county where the crime was committed, the judge in the county of arrest has to call the county where the crime was committed, and that county is required to file a complaint, issue an arrest warrant, and send that to the out-of-county judge before the judge can act. Every step has to take place in 48 hours to justify continued detention.

Ideally, the probable cause determination and the first appearance should occur together, within 48 hours of the initial arrest. The statutes are a little confusing. K.S.A. § 22-2901 requires a person arrested based on probable cause (without a warrant) be taken to the judge without necessary delay and a complaint *shall be* filed forthwith. This language seems to imagine the first appearance and the probable cause hearing happening at the same time. On the other hand, it also seems to anticipate a complaint being filed “forthwith”—and not exactly at the same time arrestee is brought before the judge. The *Riverside* Court encouraged combining these steps in the procedure. That said, the Court still cautioned against any delay caused by combining the two:

Under *Gerstein*, jurisdictions may choose to combine probable cause determination with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process—such as bail hearings and arraignments—may be chosen. Even then, every effort must be made to expedite the combined proceedings. *Riverside*, 500 U.S. at 58.

Likewise, our Supreme Court has noted its disapproval of delays between arrest and charging. See *Cooper v. State*, 196 Kan. 421, 423 (1966) (“Needless to say, this court does not approve of unwarranted delay, either in the filing of formal charges against a suspect who is confined in jail, or in taking him before a proper magistrate for examination.”). In *State v. Nading*, 214 Kan. 249, 252 (1974), the Supreme Court noted that “the purpose of K.S.A. § 22-2901 “is to insure that

any person arrested is held on a proper charge and to secure to such person the earliest possible opportunity for bail.” The court continued to stress that the phrase “without unnecessary delay” while intending to provide a measure of flexibility and is dependent upon the circumstances, it still requires “a high degree of promptness.” 214 Kan. at 252. That said, it recognized that this does not require ‘around-the-clock services and availability of a magistrate.’ It is not unnecessary delay to wait until regular business hours to bring the defendant to the magistrate. 214 Kan. at 253.

In *State v. Crouch*, 230 Kan. 783, 784 (1982), the court found that the fact that it took eleven days from arrest to first appearance before the judge did not warrant the extraordinary remedy of dismissal of the charges. In his dissent, Justice Holmes wrote, “[t]he record indicates that the prolonged imprisonment of the defendants without being brought before a magistrate ‘without unnecessary delay’ was not an isolated incident in Geary County. Evidently the practice had prevailed for some time and while the trial judge was understandably reluctant to place specific blame for such delays, he did state for the record: ‘The Court does..find that the fault lies with the situation in which the County Attorney’s Office in this county has to work, which is not the fault of that office.’” 230 Kan. at 789. He then pointed out that the County Attorney offered no explanation or excuse for the delay. “Evidently the action of Judge Christner in this case [dismissing the charges] got someone’s attention.” 230 Kan. at 789.

In sum, although the best practice is to conduct both the appearance before the judge and the charging within 48 hours, a majority of the Task Force believes that a delay of no more than 24 hours after probable cause has been determined to file charges is supported by the U.S. Constitution.

That said, although our recommendation is charging within 72 hours of arrest, we are compelled to note that there is some support for concluding that this definition of *forthwith* is too narrow. Some members of the Task Force believe it is constitutionally supportable to require charges be filed within three business days of the probable cause hearing rather than 72 hours from arrest. They point out that under the Best Practice recommended by the majority if a person is arrested Friday afternoon at 4:00 p.m., and they make an initial bond appearance before the Court Monday morning at 8:30 a.m., the State would have to file charges by 4:00 p.m., some seven and one-half hours following the initial bond hearing. They assert that is an unrealistic amount of time for the prosecutor—particularly in rural Kansas where the prosecutor is only part-time-- to review the 48 Hour Affidavit, determine what charges, if any, to file and prepare and process the charges to the Court. There is some support for their position. Moreover, *forthwith* only requires a reasonable time, and a requirement of three business days after the probable cause hearing is reasonable given the circumstances.

Forthwith in the law has been used to mean promptly, within a reasonable time under the circumstances, with all convenient dispatch. In *Moya v. Garcia*, the Tenth Circuit, pointed to the Black’s Law Dictionary definition of *forthwith* which incorporates a “reasonable time” requirement:

“The bench warrant authorizing plaintiff’s arrest commanded any authorized officer to ‘arrest [plaintiff] and bring him forthwith before this court’; see *Forthwith*, Black’s Law Dictionary (10th Edition 2014) (‘1. Immediately; without delay. 2. Directly; promptly; within a reasonable time under the circumstances; with all convenient dispatch.’)” *Moya v. Garcia*, 895 F.3d 1229, fn. 5 (2018).

And historically, the United States Supreme Court has provided a broader definition. As early as 1896, the U.S. Supreme Court found the word *forthwith* to mean “within a reasonable time”. See *Willard v. Wood*, 164 U.S. 502, 524 (1896) (“Bryan’s obligation to Wood was to pay forthwith, or within a reasonable time.—a distinction of no importance here;”). And in 1900, the U.S. Supreme Court found “*forthwith*” means a different timeframe for different situations.

“In this connection it is claimed that the trust company was premature in declaring the principal and interest of the mortgage to be due, although the mortgage provided that such declaration might be made if the company should not ‘forthwith,’ upon execution being sued out, discharge or pay it. It is insisted that the company was entitled to a reasonable time in analogy to certain cases which hold that in insurance companies the word ‘forthwith’ carries this significance. But ‘forthwith’ is defined by Bouvier as indicating that ‘as soon as by reasonable exertion, confined to the object, it may be accomplished. This is the importance of the term; it varies, of course, with every particular case.’ . . . Anderson (Law Dict.) says of the word that it ‘has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing to be done.’” *Dickerman v. Northern Trust Company*, 176 U.S. 181, 192 (1900).

The Court then found that *forthwith* is a time period that cannot be exactly defined, meaning a longer or shorter period determined by the nature of the thing to be done. *Id.* at 193.

Turning to Kansas case law, in *Matter of Estate of Kern*, the Kansas Supreme Court found that seventy days is “*forthwith*” to file an appeal bond.

“K.S.A. 59-2401(b) does not fix a time within which an appeal bond must be filed. That matter is left to the discretion of the trial court. The order here entered directed that the bond be filed forthwith. It was filed about seventy days later. The matter of reinstatement was discretionary with the Court of Appeals and not jurisdictional. The appeal had not yet been heard on its merits. Under the circumstances, we hold that this court has jurisdiction to hear the appeal.” *Matter of Estate of Kern*, 239 Kan. 8, 19 (1986).

In *Cessna Aircraft v. Hartford*, the Federal District Court for the District of Kansas found that all the notice provisions in insurance contracts calling for immediate, forthwith, promptly or as soon as practical, all require a reasonable amount of time to be given to the person who has the act to perform.

“The notice provisions in the policies at issue obligates Cessna to provide notice to its insurers ‘as soon as practical’ whenever it has information from which it may reasonably conclude that a covered occurrence involves injury or damage which is likely to involve the policies or to ‘immediately advise’ the insurer of an accident or occurrence which appears likely to result in liability under the policy. The CU policy further provides that if a claim is made or suit is brought against Cessna, Cessna shall ‘immediately’ forward every demand, notice, summons or other process received.

The phrase ‘as soon as practical’ has been construed under Kansas law to mean that the insured must notify its insurer within a reasonable period of time in view of all the relevant facts and circumstances of a particular case. *Traveler’s Ins. Co. v. Feld Car & Truck Leasing Corp.*, 517 F.Supp. 1132, 1134 (D.Kan. 1981). Similarly, courts generally construe the term ‘immediately’ in this context to require reasonable notice under the circumstances. See *Compagnie des Bauxites de Guinee v. Insurance Co. of North America*, 724 F.2d 369, 374 (3d Cir. 1983) (insurer must be given notice in a reasonable time under the circumstances regardless of the word ‘immediate’); *Zieba v. Middlesex Mut. Assurance Co.*, 549 F.Supp. 1318, 1320 (D.Conn. 1982) (terms such as ‘immediate’ notice as used in insurance policies are ‘construed to mean and require that reasonable notice be given under the circumstances’); *Gerrard Realty Corp. v. American States Ins. Co.*, 89 Wis.2d 130, 277 N.W.2d 863 (1979) (‘the words immediately, forthwith, promptly, and as soon as practical all require notice in a reasonable time’). As a general rule, the issue of late notice involves a question of fact. *Feld Car and Truck Leasing Corp.*, 517 F.Supp. at 1134 (citing *Goff v. Aetna Life & Casualty Co.*, 1 Kan.App.2d 171, 178, 563 P.2d 1073, 1079 (1977)).” *Cessna Aircraft Co. v. Hartford Acc. & Indem. Co.*, 900 F.Supp. 1489, 1515 (Kan. 1995).

The Kansas Court of Appeals dealt with the definition of *forthwith* in *State v. Garton*, 2 Kan.App.2d 709 (1978). Garton had been declared a habitual violator. The statute required that “upon receiving the abstract, the district or county attorney forthwith shall commence prosecution.” K.S.A. § 8-286. Prosecution had not been commenced for 13 months after receipt of the abstract because Garton was incarcerated. Garton argued that because the State did not comply with the statutory filing requirements, the case should be dismissed. He argued that the term *forthwith* should be synonymous with *immediately*. The district court and the Court of Appeals disagreed. It noted that “our research has failed to disclose any Kansas cases which have construed the term *Forthwith* and none are cited by the parties.” *Garton*, 2 Kan. App. 2d at 710.

“[w]e view the term *Forthwith* as being a directive to the county attorney to carry out his duty to the public by removing habitual violators from public highways at the earliest opportunity. The failure to do so could possibly result in a mandamus or ouster action. We do not view the legislative intent as being a directive to discharge the defendant if the county attorney fails to file the action forthwith. As we view it, the word *forthwith* is directory and not mandatory, for it gives the county attorney directions for the proper, orderly and prompt conduct in carrying out legislative intent and is not followed by words of absolute prohibition. *Wilcox v. Billings*, 200 Kan. 654, 657, 438 P.2d 108 (1968)...

The trial judge correctly determined the county attorney commenced the action forthwith within the meaning of the statute. The term *forthwith* as used in K.S.A. 8-286 does not mean *immediately* and is not susceptible to a fixed time definition; rather, it means without unnecessary delay and requires reasonable exertion and due diligence consistent with all the facts and circumstances of the case in order to carry out the legislative intent of removing habitual violators from the public highways of this state for an extended period of time.” *Id.* at 711. *Internal citations omitted.*

The Kansas Supreme Court followed suit in 2006 in *Foster v KDR*, 281 Kan. 368 (2006). It involved whether a driver’s license suspension hearing had been “forthwith set” as required by K.S.A. § 8-1020(d) (“Upon receipt of a timely request for a hearing, the division shall forthwith set the matter for hearing.”). His hearing was not set until 59 days after his request and was not held until 78 days after his request for a hearing. The trial court struggled with the definition of *forthwith* and cited the Webster’s dictionary definition as well as *Garton* found the delay was too long and dismissed the action. It adopted the *Garton* reasoning.

“In *Garton*, the Court of Appeals defined ‘forthwith’ as used in K.S.A. 8-286 (1982). We now adopt and apply that definition in context of the license suspensions in the present case, and in so doing recognize that what constitutes a ‘forthwith setting’ is a

case by case determination. We view the changes in the statute, taken together, as effecting a balance by easing KDR's burden by allowing more time for setting and holding the hearing, and easing the licensee's burden pending the hearing. It is in the interest of the public for the hearing to be set forthwith, and the changes do not alter the emphasis on protecting the public from dangerous drivers. Thus, the statute should be interpreted from the perspective of protecting the public rather than the licensee. The legislature recognized that in certain circumstances KDR may necessarily need more than thirty days to set the hearing. If the delay in setting the hearing was necessary and did not result from a lack of due diligence or reasonable exertion on its part, then the setting is forthwith and complies with the statute." *Garton* at 377. *Internal citations omitted.*

A reading of these cases could support the view taken by some members of the Task Force that a delay of three business days from the probable cause hearing to charging would not be an unreasonable delay and would easily meet the definition of charging *forthwith*. The majority, however, believes an approach that puts the defendant's liberty above any lack of prosecutorial resources, is the "Best Practice" and avoids a successful constitutional challenge.

11 The statute seems to presume charges have been filed by the time the defendant has his or her first appearance before the judge. K.S.A. § 22-2802. "Any person charged with a crime shall, at the person's first appearance before a [judge], be ordered released pending preliminary examination or trial upon the execution of an appearance bond in an amount specified by the magistrate and sufficient to assure the appearance of such person before the [judge] when ordered and to assure the public safety." An appearance bond is defined as "an agreement with or without security, entered into by a person in custody by which the person is bound to comply with the conditions specified in the agreement." K.S.A. § 22-2202(b).

12 See K.S.A. § 22-2901. Under subsection (3), the judge is required to fix the terms and conditions of the appearance bond upon which the defendant may be released. If it is an out-of-county judge, he or she cannot set it any lower than the amount on the arrest warrant. Upon release, the defendant must appear before the court on a day certain not more than 14 days later.

Under subsection (7), if the person has been arrested on a warrant or without a warrant on probable cause for violation of a restraining order, the person "shall not be allowed to post bond pending such person's first appearance in court provided the first appearance occurs within 48 hours after arrest." The statute provides that this will not constitute unnecessary delay. The judge can require that the person report to a court services officer as a condition of release.

13 K.S.A. 2019 Supp. 22-2802(9).

14 K.S.A. 22-4503(b). "A defendant charged by the state of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceedings against such defendant." The plain language of the statute indicates that a defendant charged with a felony has the right to have counsel be appointed when the defendant appears before any court and at *every* stage of the proceedings against the defendant.

15 K.S.A. § 22-2802(9).

16 See K.S.A. § 22-2802(10).

17 The statute is not clear on how quickly charges should be filed if a person is released before first appearance on bond or pretrial conditions. The Task Force believes it is reasonable to allow up to 30 days when the arrestee is not presently in custody. Certainly, the concern of deprivation of liberty without charges is lessened if the person is not in custody. On the otherhand, the arrestee's liberty is restricted. So judges should encourage prosecutors to get charges on file as soon as possible after arrest, even when the person is released on bond or pretrial conditions.

18 Judges should also be aware the if a person posts a bond to secure their release and charges are not filed and the defendant is released at first appearance, the arrestee will have paid a fee to the bonding agency, only to lose it because no charges are filed. If the prosecutor then files the charges at a later date through an arrest warrant, the arrestee will be faced with paying yet another fee to the bonding agency to secure their release. Some courts in Kansas, in recognition of this fact, have encouraged prosecutors to consider issuing a summons rather than a warrant if charges are subsequently filed. See K.S.A. § 22-2302(a). If the prosecutor elects to pursue an arrest warrant, the judge always has the authority to designate the bond as personal recognizance on the warrant, since the defendant demonstrated a willingness to appear even when no charges were on file.

19 K.S.A. § 22-4503(b). "A defendant charged by the state of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceedings against such defendant." The plain language of the statute indicates that a defendant charged with a felony has the right to have counsel be appointed when the defendant appears before any court and at *every* stage of the proceedings against the defendant.

20 Defendants are not prone to appreciate their ability to request bond review hearings. The presumption of innocence is great and the prejudice due to continued pretrial incarceration is also great. Judges should take the lead in monitoring defendants in custody and making sure they have had an adequate opportunity to challenge the conditions of release.

21 K.S.A. § 22-2802(10).

22 K.S.A. § 22-2803.

23 K.S.A. § 22-2902(1).

24 K.S.A. § 22-2902(2). *But see State v. Rivera*, 277 Kan. 109, 112 (2004), where the court noted that the requirement of K.S.A. § 22-2902 that preliminary hearings “shall be held . . . within 10 days after the arrest or personal appearance of the defendant” was directory, not mandatory. 277 Kan. at 112 (citing *State v. Fink*, 217 Kan. 671, 676 (1975)). There have been anecdotal reports that defense attorneys frequently continue the preliminary hearing in hopes of having a plea agreement by the date of arraignment. Prosecutors often will offer more beneficial plea agreements if they can avoid preliminary hearing.

25 There is no statutory requirement to conduct a bond review as part of the motion for continuance, but the best practice is to be mindful of the defendant’s pretrial incarceration. It serves as a reminder to the court and the parties that the defendant has not yet been convicted of anything but nonetheless sits in jail due to the inability to post bond.

26 K.S.A. § 22-3206.

27 K.S.A. § 22-2902. Although the statute says the district judge “shall have the discretion” to arraign immediately after the preliminary hearing, it is the best practice for arraignment to take place immediately. A timely arraignment helps keep the case moving and starts the speedy trial clock, all of which may result in reduced periods of pretrial incarceration. Since July 2017, Kansas statutes have specifically granted magistrate judges jurisdiction to conduct felony arraignments without any special designation from the district’s chief judge. K.S.A. § 20-302b; *State v. Valladarez*, 288 Kan. 671, Syl. ¶9, (2009).

There may naturally be some scheduling challenges unless the magistrate judge handling arraignment has access to a district judge’s calendar to set the next hearing. That said, those issues can be cooperatively resolved for the greater good of making the system more efficient and reducing pretrial incarceration.

Finally, there have been anecdotal reports that immediate arraignments may burden the courts’ trial dockets with cases that may result in a plea before trial. It appears that some defense attorneys frequently continue the arraignment in hopes of having a plea agreement by the date of arraignment. This strategy is not, however, a valid reason to delay the actual arraignment.

28 K.S.A. § 22-3206(3).

29 There have been anecdotal reports that, in some districts, two or three weeks pass between preliminary hearing and arraignment. Although this delay may be statutorily allowed, it is not the best practice to reduce the period of pretrial incarceration. Instead, arraignment should be immediate to trigger the statutory speedy-trial clock. Magistrate judges available in each courthouse should be able to easily accomplish this in a timely manner.

30 The defendant must personally be present at the arraignment if the defendant is charged with a felony. However, the defendant may appear by two-way video conferencing. K.S.A. § 22-3205(b). If the defendant is charged with a misdemeanor, the defendant may appear by counsel with approval of the court. K.S.A. § 22-3205(a).

31 *State v. Montgomery*, 34 Kan. App. 2d 549, 553-54 (2005).

“The concept of waiver clearly applies to the requirement of an arraignment. It is well-settled law in this state that a defendant who has never been formally arraigned waives the right to an arraignment by going to trial without objection. *See State v. Jakeway*, 221 Kan. 142, Syl. ¶ [1] (1976). Logic compels us to conclude that when a defendant purposefully waives arraignment and the court approves that waiver by accepting the defendant’s not guilty plea and schedules the case for trial, the waiver is an effective substitute for the arraignment and there is no need for further arraignment proceedings to begin the running of the speedy-trial clock.”

32 K.S.A. § 22-3402.

- 33 *State v. Prewett*, 246 Kan. 39, 42 (1990).
- 34 *State v. Williams*, 187 Kan. 629, 635 (1961); *See also State v. Vaughn*, 288 Kan. 140, 144 (2009).
- 35 Statutory right to speedy trial does not apply to defendants who are held in custody for other crimes. *State v. Blaurock*, 41 Kan.App.2d 178, 210 (2009). The statute applies only to “any person charged with a crime and held in jail *solely* by reason thereof.” (Emphasis added.) K.S.A. § 22-3402(a).
- 36 *See State v. Brown*, 283 Kan. 658, 667 (2007):
- “[K.S.A. 2019 Supp. 22-3402(c)] requires that a trial continued at the request of the defendant be rescheduled within 90 days of the original trial deadline . . . [T]his [subsection] requires the trial to be rescheduled within 90 days of the “original trial *deadline*,” not the “original trial *date*,” which is the term used in K.S.A. 2006 Supp. 22-3402(5)(c) (formerly [3][c]), relative to prosecution extensions. *See* L. 2004, ch. 47, sec. 1. This difference is significant and is not inconsistent with the result we reach herein. The 90-day clock continues to run unless there is a delay as a result of the application or fault of the defendant which stops the clock. When delay is caused by the prosecution, the time for trial may be extended if the reason therefor is within one of the statutory grounds therefor. The new subsection is aimed at placing a duty on the court and the State to restart the speedy trial clock which has been stopped by the application or fault of the defendant and to reset the trial date within a specific time period.”
- 37 *State v. Wright*, 305 Kan. 1176 (2017). “Under the plain language of K.S.A. 22–3402, a continuance resulting from a defendant’s request stays the running of the statutory speedy trial period. When the request is made by defense counsel, the request for continuance is attributable to the defendant unless the defendant timely voices an objection. Because a defendant’s disagreement matters in a statutory speedy trial analysis, a defendant must have an opportunity to be present to express that disagreement.” *State v. Dupree*, 304 Kan. 43, Syl. ¶ 2, (2016).
- 38 It makes no difference if the request for a competency hearing is requested by the defendant, or the State or the court. Regardless of the source of the request, the court is statutorily required to order suspension of the criminal proceedings. *State v. Edwards*, 291 Kan. 532, 541 (2010).
- 39 “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial” U.S. Const. amend. VI.
- 40 “Where the statutory right to speedy trial does not apply, an accused is still guaranteed the right to a speedy trial under both the United States and Kansas Constitutions.” *State v. Davis*, 277 Kan. 309, 334 (2004).
- 41 *Barker v. Wingo*, 407 U.S. 514, 530 (1972).
- 42 Our Supreme Court has held that delays of 13 and 23 months in starting trials for murder were not presumptively prejudicial. But the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex charge. For routine street crimes, our Supreme Court has found 14 months to be presumptively prejudicial. *State v. Owens*, 310 Kan. 865, 873 (2019). These cases are highly fact specific.
- 43 *Doggett v. United States*, 505 U.S. 647, 654 (1992).
- 44 *State v. Hess*, 180 Kan. 472, 478 (1956).
- 45 *Barker v. Wingo*, 407 U.S. 514, 525-26 (1972).
- 46 *Id.* at 529.
- 47 *See State v. Brown*, 263 Kan. 658, 665 (2007); *State v. Bloom*, 273 Kan. 291, 310, 44 P.3d 305, 319 (2002)
- 48 *City of Dodge City v. Downing*, 257 Kan. 561, ¶2 (1995).
- 49 *State v. Mitchell*, 285 Kan. 1070 (2008).

Appendix B

Best Practices¹

Setting Conditions of Release

Overarching Principles

All defendants are presumed innocent.

Liberty is the norm and detention should be the exception.

Judges should first consider whether nonmonetary conditions of release are sufficient before requiring a monetary bond.

Conditions of release should be under the least restrictive conditions to assure the defendant's appearance and the protection of the public.

A judge² is required to set the terms and conditions of any appearance bond.³ The appearance bond⁴ must be “sufficient to assure the appearance of such person before the [judge] when ordered and to assure the public safety.”⁵ The appearance bond must set forth all the conditions of release.⁶ The amount of an appearance bond must be based on an individualized determination of the risk of flight of the particular defendant before the court.⁷

The Kansas Legislature has clearly stated its purpose in legislating conditions of release. It is

*to assure that all persons regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges or to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.*⁸

With few exceptions,⁹ the judge has complete discretion to require a bond be posted or that the person be released without posting a bond.¹⁰ The judge can release a person on his or her own recognizance (OR) with the accused guaranteeing to pay the bond amount if he or she fails to appear in court. No cash or surety guarantee will be required on an OR bond.¹¹

“In determining *which conditions of release* will reasonably assure appearance and the public safety¹² the [judge] must, on the basis of available information, take into account

- The nature and circumstances of the crime charged;
- The weight of the evidence against the defendant;
- Whether the defendant is lawfully present in the United States;
- The defendant's family ties, employment, financial resources, character, and mental condition;
- The defendant's length of residence in the community;
- The defendant's record of convictions;
- The defendant's record of appearance or failure to appear at court proceedings or of flight to avoid prosecution;
- The likelihood or propensity of the defendant to commit crimes while on release; including whether

the defendant will be likely to threaten, harass or cause injury to the victim of the crime or any witnesses thereto; and

- Whether the defendant is on probation or parole from a previous offense at the time of the alleged commission of the subsequent offense.”¹³

These are factors to consider in conditions of *release*, not reasons for detention.

*The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.*¹⁴

It is easy to conflate the concepts of risk of flight and public safety. Money bond relates solely to risk of flight. We know this because of a wealth of caselaw and a Kansas statute that makes it clear that money bond can be forfeited only for a failure to appear. If a defendant violates any other condition of release, the bond may be revoked, and the defendant remanded to custody for the court to consider new conditions of release. But no money is forfeited or owed unless the defendant fails to appear for a required court appearance.¹⁵ As U.S. Supreme Court Justice William O. Douglas opined:

*The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court. It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release. (internal citations omitted).*¹⁶

But K.S.A. § 22-2802(8) deals with more than just failure to appear and forfeiture of a money bond. It sets out what a judge must consider in deciding the conditions of *release*.

Conditions of release can have a monetary or a nonmonetary component. For example, if a defendant has ties to the community and may not be at risk to fail to appear but is alleged to have committed a violent offense and has a history of violent behavior toward a particular victim or class of victims, the court would need to consider nonmonetary conditions of release to protect current and future victims. If the person's violent outbursts are often fueled by alcohol or drugs, the court may want to consider frequent drug and alcohol testing as a condition of pretrial release, or GPS monitoring for the protection of the victim. But if failure to appear is not likely, money bond—in *any amount*-- would not be a condition of release individually geared to the risk. The judge may consider the severity of the charges though in evaluating the risk of flight. The more serious the charges, the more likely the defendant may flee.¹⁷

*Generally, no hard and fast rule can be laid down for fixing the amount of bail on a criminal charge, and each case must be governed by its own facts and circumstances. The amount of bail rests within the sound discretion of the presiding [judge]. The purpose of the statutes requiring bond from persons accused of crimes is to assure their presence at the time and place of the trial. (internal citations omitted).*¹⁸

1. Determining monetary conditions of bond

- a. Judges should gather as much information about the defendant as possible in order to make an individualized determination as to the amount of bond or other conditions of release.**

The decision to release a defendant after the defendant posts either a secured (money) or unsecured (OR) bond is a release decision and it is not intended as a means to detain. The amount of an appearance bond must be based on an individualized determination of the risk

of flight of the particular defendant before the Court.¹⁹ Accordingly, the more information the court has before it to make a reasoned decision the better. Some courts in Kansas and around the country use pretrial risk assessments to rank a defendant's individual risk of flight and risk to reoffend. Any risk assessment used that results in numerical risk factor applied to the defendant needs to be validated either locally or nationally. Social science literature is mostly positive in its analysis of these tools, but a growing number of organizations are questioning the tendency of risk assessment tools to reinforce bias in decision making. So if such an assessment is adopted, it must be tested for bias and corrected, if necessary.

There is nothing currently that prevents Kansas judicial districts from adopting a risk assessment tool. In Kansas, Johnson, Douglas, Saline, and Sedgwick counties use pretrial risk assessments. Judges are encouraged to contact those jurisdictions for more information about how effective they believe the tools are. The tools are not intended to be blindly followed and they are not intended to replace the judge's discretion to determine the amount of bond and the conditions of release.

Even if a risk assessment tool is not used, the statute provides guidance on information a judge should consider in setting conditions of bond that are strikingly similar to the questions asked on most risk assessment questionnaires. The judge should have this information at the 48-hour hearing if possible, because that is when the judge first sets bond. Someone must collect this information as part of the pre-hearing process. There is variety in who collects this information. Options include the arresting officer, jailers, or community corrections personnel. Although some have expressed concern that collection of this information may violate a defendant's right to silence, these concerns seem unfounded. Kansas statute provides that "[s]tatements or information offered in determining the conditions of release need not conform to the rules of evidence. No statement or admission of the defendant made at such a proceeding shall be received as evidence in any subsequent proceeding against the defendant."²⁰

Important information that should be obtained includes the defendant's place of residence, employment and length of employment, length of time in the community, financial status, prior warrants for failure to appear, criminal history, whether the current charge is a misdemeanor or felony, the potential jail sentence the defendant would face if convicted, and the nature and extent of local family ties. Having this information allows the court to make an individualized determination concerning conditions of release, including the amount of any money bond.

The judge should also consider the possible sentence the defendant would likely serve if convicted as charged and whether the defendant would fall into a presumptive probation category. Conditions of release that result in pretrial detention should not be used if the defendant faces presumptive probation or a short sentence. To order a condition of release that results in detention increases the likelihood that the defendant will serve more time in jail before conviction—when the presumption of innocence is paramount—than after conviction. There is also concern that the defendant may feel personal pressure to plead guilty simply to be released.

b. The bond amount cannot be excessive.

When setting money bond, both the United States and the Kansas Bill of Rights prohibit the judge from setting a bond that is "excessive."²¹ The United States Supreme Court has said that bail is "excessive" when it is "*set at a figure higher than an amount reasonably calculated to fulfill the purpose of assuring the presence of the accused at future proceedings.*"²² "*What would*

*be a reasonable bail in the case of one defendant may be excessive in the case of another.”*²³

A monetary bond is solely a means to assure appearance in court. A person risks losing the money that was posted if the person fails to appear. Our Kansas Supreme Court reached a similar conclusion in *State v. Foy*, where it noted that “*the purpose of the statutes requiring bond from persons accused of crimes is to assure their presence at the time and place of the trial.*”²⁴

Provided the money bond amount is individually calculated to address the risk of flight, Kansas courts have held it is not excessive.²⁵

Money should not be used as a means to detain. The bond should be set at an amount that will assure the defendant will appear rather than risk losing the money. Or in the alternative, family or friends will make sure the defendant gets to court rather than risk losing the money. It is the Task Force’s position that a money bond set higher than necessary to achieve that goal is excessive.

c. Setting bond for the sole purpose of keeping someone in jail or to punish them is prohibited.

Setting a money bond in an amount that the judge knows and intends to be beyond the reach of the defendant is nothing more than preventive detention. Preventive detention is jailing people based on the fear of future misconduct.²⁶ It is no different than a determination of no bail, which is currently prohibited under our Kansas constitution unless the charge is capital murder.²⁷ Likewise, it may not be used to punish a defendant in advance of conviction or to placate public opinion.²⁸ Bond is a condition of release not a method to detain. The Task Force takes the position that the practice of using monetary bond as a means of intentional detention or as a way to punish defendants before trial is prohibited by the United States Constitution and Section 9 of the Kansas Bill of Rights.

d. Judges must be cognizant of the affordability of the bond to the defendant and set at the minimum amount necessary to achieve the goal of appearance in court.

The Task Force believes that the safe approach to assure the constitutionality of the court’s procedure is to assume that the defendant has a right to an affordable bail. Neither the United States Supreme Court nor the Kansas Supreme Court has directly ruled on this issue. Some federal and state courts have held that “*bail is not excessive under the Eighth Amendment merely because it is unaffordable.*”²⁹

But the issue of the affordability of bond is not whether the bond amount is excessive under the Eighth Amendment, but whether it violates the Due Process and Equal Protections clauses of the Fourteenth Amendment. While there are no United States Supreme Court or Kansas Supreme Court cases that apply the Fourteenth Amendment in the bond context, it has been applied by the U.S. Supreme Court to indigency determinations in several other criminal contexts and by other state and federal courts in the bond context.³⁰ A review of these cases leads us to conclude that until either the Kansas Supreme Court or the United States Supreme Court rules on this issue, the best approach is the conservative one—begin with the assumption that bond must be affordable and when a person is a flight risk set bond at the minimum amount necessary to achieve the goal of appearance in court given all the circumstances.³¹ This position is bolstered by the language of K.S.A. § 22-2802(8) requiring the judge to take into account the defendant’s financial condition in determining conditions of release.

In addition, there is a practical problem with setting an unaffordable bond. “[I]t requires a

court to speculate on the regulatory effect of a particular bond amount *if* the defendant could afford it. Arrestees who cannot afford bond go to jail for the duration of their case; thus, a judge never knows if the arrestee could have been safely released with an affordable bond. Judges consequently cannot develop credible expertise on setting unaffordable bond since it is impossible to ascertain whether unaffordable bail was truly required in any given case.”³²

But how does a judge determine affordability? Examination of what a defendant can afford is very similar to the decision whether to appoint counsel or to assess BIDS fees.³³ Sources of income that rely on state or federal subsidy or assistance payments, certainly point to indigency. The state of Washington with the help of a Microsoft and a Department of Justice grant built a web-based calculator program that enables judges, defendants, public defenders and prosecutors to primarily calculate fines and fees owed. The Task Force believes such a tool may be useful to judges in calculating an individual’s resources and an affordable bond amount.³⁴

The Fifth Circuit Court of Appeals required arrestees in Harris County, Texas (Houston) be given an affidavit to fill out with the following information in an attempt to determine whether the misdemeanor arrestee could afford the prescheduled bond:

1) arrestee and spouse’s income from employment, real property, interest and dividends, gifts, alimony, child support, retirement, disability, unemployment payments, public-assistance, and other sources; 2) arrestee and spouse’s employment history for the prior two years and gross monthly pay; 3) arrestee and spouse’s present cash available and any financial institutions where cash is held; 4) assets owned, e.g., real estate and motor vehicles; 5) money owed to arrestee and spouse; 6) dependents of arrestee and spouse, and their ages; 7) estimation of itemized monthly expenses; 8) taxes and legal costs; 9) expected major changes in income or expenses; 10) additional information the arrestee wishes to provide to help explain the inability to pay. The question is neither the arrestee’s immediate ability to pay with cash on hand, nor what assets the arrestee could eventually produce after a period of pretrial detention. The question is what amount the arrestee could reasonably pay within 24 hours of his or her arrest, from any source, including the contributions of family and friends.”³⁵

Another county court was recently ordered to take a simpler approach. Alamance County, North Carolina was ordered by the federal district court in the Middle District of North Carolina to adhere to a Consent Order for Preliminary Injunction which requires the judge to consider an accused’s ability to post any monetary bond. A rebuttable presumption of an inability to pay the bond is created if the secured bond exceeds 2% of the accused’s monthly income or if the accused is eligible for court appointed counsel, has been homeless within the preceding six months, has income at or below 200% of the federal poverty guidelines, is a full-time student, has been incarcerated within the preceding 6 months, is residing in a mental health or other treatment program, or has resided in such a program in the past 6 months; or is or has dependents who are eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, Social Security Disability Income, public housing, or any other federal or state public assistance.³⁶

e. Judges should use caution in relying on fixed, crime-based bond schedules.

A growing number of federal cases over the last few years have addressed the use of fixed, crime-based bond schedules. These schedules generally link a standard uniform bond amount to the crime charged with higher bonds associated with more serious charges. After arrest, if the

arrestee can post the bond on the schedule, the person is released—with no involvement from a judge. If not able to post the fixed bond, the defendant is detained until an appearance before the judge for an individualized determination of bond.

Neither the United States Supreme Court nor the Kansas Supreme Court has addressed the constitutionality of bond schedules.

In *State v. Cuchy*, the Kansas Supreme Court required that a defendant charged with DUI be allowed to post a fixed monetary bond for release rather than be held as part of a 12-hour mandatory detention policy before seeing a judge.³⁷ The court found that the Kansas Constitution established a right to bail and by mandating detention without bail for 12 hours the county was violating K.S.A. 22-2601(a) by requiring an “unreasonable delay” in seeing the judge.³⁸

A mandatory hold policy is somewhat akin to a fixed bond schedule. *Cuchy* certainly seems to support the idea that defendants should be allowed to post a bond prior to their first appearance. If not, arrestees who could bond out immediately and avoid pretrial incarceration would be required to remain in custody until they see a judge. But alternative and newly minted constitutional theories regarding bond schedules were not raised in *Cuchy*.

In spite of *Cuchy*, some question whether a judge has any authority to adopt a fixed bond schedule that will be used when there has been no individualized determination of risk.³⁹ They assert that there is no explicit statutory authority to do so. But neither is there a statutory prohibition. The Task Force believes the authority comes from a judge’s inherent power exercised as necessary for the administration of justice—as long as the judge’s exercise of this power “does not contravene or are inconsistent with substantive statutory law.”⁴⁰

Some federal courts have addressed constitutional concerns raised by defendants regarding the reliance on fixed, charge-based bond schedules. Instead of simply looking at whether the amount is excessive under the Eighth Amendment to the U.S. Constitution, these defendants have argued successfully that the practice violates the Equal Protection and Due Process clauses of the Fourteenth Amendment.⁴¹ Three primary concerns are voiced in the opinions:

- i. lack of evidence to support the amount of the bond on the schedule,⁴²
- ii. lack of an individualized determination of conditions of release,⁴³ and
- iii. equal protection concerns that persons who are wealthy can post bond, but those who are poor must remain in jail until they see a judge.⁴⁴

But one federal court has found that if the person is not held any longer than 48 hours (*including* weekends and holidays)⁴⁵ before an individualized bond determination is made, detention due to inability to afford the fixed bond is not unconstitutional.⁴⁶ The Nevada Supreme Court has recently followed suit, citing its support for the use of fixed bond schedules as long as the accused is given an opportunity soon after arrest to have an individualized determination made where the person’s financial ability is considered.⁴⁷

The only Kansas case addressing the issue is a federal district court case in front of Judge Daniel Crabtree in the District of Kansas where the court, by agreement of the parties found:

The use of a secured bail as a condition for release of a person in custody after a

*non-warrant arrest for an offense that may be prosecuted by the City of Dodge City implicates the protections of the Equal Protection Clause when such condition is applied to the indigent person. No person, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, may be held in custody after a non-warrant arrest to be prosecuted by the City of Dodge City because the person is too poor to post a monetary bond.*⁴⁸

Dodge City was required to:

1. release all individuals arrested (for non-warrant arrests) in the City for violation of municipal ordinances of the City on OR bonds without further conditions of release as soon as practical after booking;
2. refrain from requiring individuals arrested (for non-warrant arrests) to post any type of monetary bond with the following exceptions:
 - a. individuals who are under the influence of alcohol and/or drugs, with these individuals being held at the Ford County Jail up to a maximum of six (6) hours from the time of the offense in order to allow the person to become sober enough to no longer endanger himself or others and to be able to understand the obligations he or she has to the municipal court upon release on the OR Bond,
 - b. individuals who are charged with a domestic violence crime or any other crime that involves an offense against a person may have a condition of the release on the OR Bond that the individual will have no contact with the alleged victim in the offense, with this condition remaining in effect until termination or until waived or modified by the municipal court judge for the City, and
 - c. individuals arrested for domestic assault, intentional assault or threatening conduct, or assault may be held in the Ford County Jail for up to 48 hours to be brought before the municipal court for the potential imposition of conditions for release other than the posting of a money bond or for a determination that the release must be denied to prevent danger to a victim, the community, or any other person under applicable constitutional standards. If the municipal court does impose conditions of release for these individuals, individuals who violate conditions of release shall be subject to such actions as determined by the municipal court pursuant to applicable law.

There are no cases addressing the application of the equal protection and due process clauses in a bond context in the 10th Circuit, nor in any other federal district court case in Kansas that we can locate as of this writing. And all the commonly cited cases around the country that have mandated these procedures are either on appeal to a circuit court or have elected to settle the cases rather than face additional damage claims, except for *Walker*⁴⁹ in the 11th Circuit and *Valdez-Jimenez* in the Nevada Supreme Court.⁵⁰

So how to deal with bond schedules is a difficult decision for Kansas judges. If the judge relies on the analysis in *Walker*⁵¹ and *Valdez-Jimenez*,⁵² there is no problem with a fixed, crime-based bond schedule if the person is given an opportunity to see the judge for an individualized determination within 48 hours. This is also consistent with the practice in warrant arrests, where a

fixed amount is listed on the warrant and is not subject to change until a hearing before the judge.

However, other cases put indiscriminate reliance on a policy allowing a safe harbor for 48 hours in doubt. As the United States Supreme Court pointed out in *Riverside v. McLaughlin*,⁵³ and our Kansas Supreme Court suggested in *Cuchy*, given the particular circumstances 48 hours may be too long. For example, if arrested on Monday night, and court is in session Tuesday, 48 hours may be too long.

That said, using a fixed bond schedule as a method to release a defendant on an unsecured bond (OR) does not present the same constitutional concerns. Judges may set court policies automatically releasing defendants on OR bonds for certain offenses. If the judge believes that certain offenses (such as nonperson misdemeanors or even low level drug offenses) should always result in release without a secured bond, the district judge, or the Chief Judge in a judicial district on behalf of the district, is free to do that as part of any bond schedule. The bond schedule can indicate that the bond amount is an unsecured (OR) bond only. Some courts around the country have taken this approach.⁵⁴ Some law enforcement agencies in Kansas and elsewhere have determined charges like misdemeanor marijuana possession, driving on a suspended license, and driving without a license as well as other nonperson misdemeanors should result in the issuance of a citation or notice to appear.⁵⁵ Finally, some prosecutor's offices around the country have determined that certain low-level nonperson misdemeanors do not merit detention after arrest and have policies to request release without money bond in those circumstances.”⁵⁶

The Ohio Supreme Court⁵⁷ is considering an amendment to its court rules to address this situation.⁵⁸ It is consistent with the process the Task Force recommends here. Texas⁵⁹ also has changed its procedures on *misdemeanor* arrests as part of the federal Consent Decree in the case of *ODonnell v. Harris Cty.* Harris County adopted a process that, using an offense-based schedule for *misdemeanors*, releases all people on a personal bond with an **unsecured** bond amount of no more than \$100 except for those who fall within a small number of categories who may be detained for up to 48 hours for an individualized hearing—primarily domestic violence, DUI, and terroristic threat.⁶⁰

Washington allows fixed crime-based bail schedules by court rule for lower courts. It allows persons to bail out “administratively” on certain misdemeanor offenses without seeing a judge.⁶¹ But the general process is similar to others: OR bonds for all misdemeanors except a select few and everyone else stays in until the first appearance before the judge, generally in 48 hours or less. Judges must decide bond amount independently from any fixed bond schedule.⁶² And North Carolina's 21st Judicial District has developed a checklist or “structured decision-making tool” to guide judges in making release decisions.⁶³

If a judge chooses to adopt a fixed, secured, crime-based bond schedule for use during the brief amount of time someone is waiting to appear before a judge, it should be established with justifiable reasons determined for each bond amount. Judges should consider the possible penalty, the likelihood of failure to appear given the severity of the charge, financial ability of people in the community, and provisions for release without bond if certain conditions are present. The court should regularly review the bond schedule to make sure that it does not result in unnecessary detention of defendants due to inability to post the secured bond.

One Kansas jurisdiction will begin experimenting soon with a bond schedule that lists nonperson misdemeanors and low level felonies as **unsecured** bond amounts, and person misdemeanors and higher level felonies as “must see a judge.” If the arresting officer believes that there are unique

circumstances related to the arrest for any crime with an unsecured bond, the officer can hold the person for an appearance before the judge but must complete an affidavit stating the reasons for requesting special conditions of release.

Another Kansas jurisdiction has adopted a bond schedule that lists **secured** bond amounts on low level felonies and misdemeanors and a “must see judge” designation on more serious felonies. If the arresting officer believes in good faith that the person presents a danger to self or others, is a flight risk, or has no positive identification, the arresting officer may hold the person over to see the judge without giving the person the opportunity to post the bond under the bond schedule. The bond schedule lists exceptions to the rule and what factors will allow release on an unsecured bond for misdemeanor offenses. The judges believe the bond amounts are appropriately tied to the risk of flight.

In sum, to put the issue in perspective, judges should ask themselves how they would justify a particular secured bond amount on a bond schedule if asked to testify to the same in a federal court.⁶⁴ The future of bail in America is moving toward less reliance on secured monetary bond schedules and these principles are being tested in the courts every day. So, judges should closely follow the legal developments in this area.

f. Mandating a cash-only bond pretrial is prohibited by statute.

While an argument can be made that mandating a cash-only bond is not prohibited by our constitution, it is prohibited pretrial by state statute.⁶⁵

K.S.A. § 22-2802 provides:

(3) The appearance bond shall be executed with sufficient solvent sureties who are residents of the state of Kansas, unless the magistrate determines, in the exercise of such magistrate’s discretion, that requiring sureties is not necessary to assure the appearance of the person at the time ordered.

(4) A deposit of cash in the amount of the bond may be made in lieu of the execution of the bond pursuant to subsection (3). Except as provided in subsection (5), such deposit shall be in the full amount of the bond and in no event shall a deposit of cash in less than the full amount of bond be permitted. Any person charged with a crime who is released on a cash bond shall be entitled to a refund of all moneys paid for the cash bond, after deduction of any outstanding restitution, costs, fines and fees, after the final disposition of the criminal case if the person complies with all requirements to appear in court. The court may not exclude the option of posting bond pursuant to subsection (3).

Cash bond may be posted in lieu of execution of a surety bond in the same amount as the surety bond. Unless the court finds that a bond is not necessary, the defendant must be allowed to post bond by surety.⁶⁶ If the bond is set at \$2,500 or less and the most serious charge is a misdemeanor, a severity level 8, 9, or 10 nonperson felony, a drug severity level 5 felony, or a DUI, the judge can allow the person to be released upon posting 10% of the bond amount in cash to the court. Moreover, this option only applies if the defendant is a Kansas resident, has a criminal history score of G, H, or I, has no prior failure to appear, has no detainers or holds from another jurisdiction, has not been extradited from another state or awaiting extradition to another state, or has not been detained for an alleged probation violation.⁶⁷

2. Determining nonmonetary conditions of release

A judge has discretion to impose a wide variety of conditions of release that do not involve money and that relate to more than just the risk of flight.⁶⁸

- a. If the person is being released on a person felony or a person misdemeanor, the release order must be conditioned on the person being prohibited from having any contact with the alleged victim of such offense for a period of at least 72 hours unless the judge makes a finding otherwise;
- b. A judge may place a person in the custody of a designated person or organization agreeing to supervise the person;
- c. A judge may place restrictions on the travel, association, or place of abode of the person during the period of release;
- d. A judge may impose any other condition deemed reasonably necessary to assure appearance as required, including a condition that the person return to custody during specified hours;
- e. A judge may place the person under a house arrest program;
- f. A judge may place the person under the supervision of a court services officer responsible for monitoring the person's compliance with any conditions of release ordered by the judge. Court Services can charge up to \$15 per week for supervision. The judge may also order the person to pay "for all other costs associated with the supervision and conditions for compliance in addition to the \$15 per week."
- g. Even if not placed under the supervision of Court Services, the court can order the person to pay for the costs associated with the supervision of any of the conditions of release up to \$15 per week and the costs of alcohol and drug treatment and evaluation.⁶⁹
- h. If the person is charged with a felony, the judge can order the person to submit to an alcohol and drug abuse examination and evaluation in a public or private treatment facility or state institution and, if determined by the head of such facility or institution that such person is a drug or alcohol abuser or is incapacitated by drugs or alcohol, to submit to treatment for such drug or alcohol abuse as a condition of release.⁷⁰
- i. If the person has been arrested for violation of a restraining order, the person "shall not be allowed to post bond pending such person's first appearance in court provided that a first appearance occurs within 48 hours after arrest."⁷¹

Be aware that a nonmonetary condition of release could also be declared excessive or unconstitutional if it is not based on an individualized determination and is not directly tied to the risk it purports to address.⁷² A contemporary definition of bail does not mean exclusively monetary bond; nonmonetary conditions of release are also bail.⁷³ So to the extent that a nonmonetary condition of release impacts a defendant's liberty, the Excessive Bail clause of the United States Constitution and the Kansas Bill of Rights, as well as the Equal Protection and Due Process clauses of the United States Constitution, apply.

3. Pretrial supervision

Each judicial district has the discretion to establish, operate and coordinate release on recognizance programs and supervised release programs.⁷⁴ Currently the statute requires that these programs be administered by court services officers and other personnel of the district court.⁷⁵ Participation by defendants must be voluntary. Programs can be offered to people who are, or will be, charged with crimes.⁷⁶

a. Release on recognizance programs.⁷⁷ If a court has an established program for persons released on their own recognizance, the program must include an interview with the detainee to determine:

- Information about “certain basic criteria” closely related to the likelihood that the person will appear in court if released;
- Length of residence in the local community;
- Nature and extent of local family ties;
- Time in the local area;
- Stability of employment;
- Extent of prior criminal history;
- An objective analysis of the above information; and
- Submission of such information and analysis to the court regarding those persons who are recommended to be released on their own recognizance.

b. Supervised release.⁷⁸ These programs apply to those persons denied release on personal recognizance. Again, an interview is required to determine if the person is likely to

- appear in court if released on some form of supervised release;
- cooperate and benefit from supervised release; and
- actively participate in supervised release.

The following people are not eligible for supervised release:

- non-residents of the state of Kansas;
- persons subject to specific detainer orders of other state or federal law enforcement agencies; or
- persons who need physical or mental care or treatment, including care or treatment for any chemical dependence or intoxication.

The court services officer submits recommendations to the court regarding supervised release and appropriate conditions. If the judge approves supervised release, the defendant must sign an agreement prepared by Court Services that contains:

- An acknowledgement of the relationship between the supervised release program and the defendant;
- The details of the conditions of release; and
- A statement of the consequences of any breach of the agreement by the defendant.

The Task Force recommends that any pretrial supervision or recognizance program be tailored to the individual defendant and provide the least restrictions possible to achieve the goal of appearance in court or protection of public safety. Pretrial supervision should not be viewed as

pretrial probation, although many view it as an opportunity for defendants to prove they would do well on probation. The purposes of pretrial supervision and probation are different. The sole purpose of pretrial supervision is to increase the likelihood that the defendant will appear in court with no new arrests. The Task Force was presented with social science studies establishing that over-supervising low risk offenders pre-trial increases the chance that they will re-offend.⁷⁹ So just because the court *can* impose a wide range of pretrial conditions, does not mean it *should*.

4. Conditions of release should be reviewed regularly

The judge can review and modify the conditions of release, including money bond, at any time.⁸⁰ Upon application, a defendant who continues to be detained can ask the court to review the conditions of release and the court is required to consider the request “without unnecessary delay.”⁸¹ Judges should have a process in place that allows routine and timely review of the bond status of those in custody to make sure no one is unnecessarily detained.⁸² The setting of conditions of release is a *release* decision. So, if a person is not released as intended, the case should be reviewed.

There does not appear to be a direct path for a defendant to appeal the conditions of release in Kansas. For a defendant to successfully claim on direct appeal that constitutional rights were violated because of an inability to make bail, it is necessary to allege how the confinement deprived the defendant of a right or hampered the defense.⁸³ A habeas corpus motion under K.S.A. § 60-1507 would not be available because the statute only applies to a prisoner under a sentence.

A writ of mandamus under K.S.A. § 60-801 may be an option for a defendant who is unconstitutionally being denied release, although there were no cases found addressing such a challenge. And federal claims may be available under 28 U.S.C.A. § 2241(c)(3) (habeas corpus) or 42 U.S.C.A. §1983 (deprivation of constitutional rights).⁸⁴

5. Alternatives to pretrial incarceration: the summons, notice to appear or citation option

A criminal action is commenced in district court by the filing of a complaint.⁸⁵ A complaint is a statement under oath of the essential facts constituting a crime. But if it is a traffic citation or a wildlife and parks citation it does not need to be sworn under oath, simply signed by a law enforcement officer.⁸⁶ A charge means a written statement presented in court accusing a person of the commission of a crime and includes either a complaint, information or an indictment.⁸⁷ A copy of the complaint must be supplied to the county attorney and the defendant or the defendant’s attorney if the defendant requests.⁸⁸

If the judge finds that based on the complaint or from any affidavits filed with the complaint or “from other evidence” that there is probable cause to believe both that a crime has been committed and the defendant committed it, the judge can issue an arrest warrant for the defendant.⁸⁹ The warrant must be signed by the judge, contain the defendant’s name or description and the crime charged. The amount of any appearance bond must be stated on the warrant.⁹⁰

Summons. In lieu of issuing an arrest warrant, in some circumstances, the judge may issue a summons.⁹¹ A summons is a written order issued by a judge directing that a person appear before a designated court at a stated time and place and answer to a pending charge.⁹² The judge may issue a summons:

- If requested by the prosecuting attorney, in any case; or
- In any misdemeanor.

If the person fails to appear as indicated on the summons, a warrant will issue.⁹³ A summons must be signed by either a judge or the clerk of the court and must state the defendant's name, the crime charged, and the required date and time to appear.⁹⁴

- a. Notice to appear.** A law enforcement officer can issue a notice to appear in any case involving a misdemeanor warrantless arrest except as set out below.⁹⁵ A notice to appear is a written request issued by a law enforcement officer that a person appear before a designated court—in the county in which the crime is alleged to have been committed—at a stated time and place.⁹⁶ It must contain the name and address of the person detained, the crime charged, and the time and place where the person must appear in court.⁹⁷ Unless the arrestee demands an earlier date, the date for appearance must be at least seven days after the notice to appear is given.⁹⁸ In order to be released on a notice to appear, the arrestee must sign it—which constitutes a promise to appear.⁹⁹ The officer keeps the original of the notice to appear, gives a copy to the arrestee, and must release the person “forthwith.”¹⁰⁰

The law enforcement officer is then required to “cause to be filed” a complaint in the district court “without unnecessary delay” charging the crime stated in the notice.¹⁰¹ If the person fails to appear on the date indicated on the notice to appear, a warrant will be issued for the person's arrest.¹⁰²

exceptions. This procedure does not apply to the detention or arrest of any person for the violation of any law regulating traffic on the highways of this state, the provisions of K.S.A. § 8-2104 through 8-2108 (which is the traffic citation procedure) will govern those cases.¹⁰³

b. Traffic citation procedures: violation of any law regarding traffic on the highways of this state.

- If the case is a felony traffic offense, DUI, fleeing and eluding charge, or if the defendant demands to be taken immediately to a judge, the person must be taken without unnecessary delay before a judge of the district court in the county in which the offense is alleged to have been committed.¹⁰⁴
- If the case is a misdemeanor traffic offense, the officer *may* take the person before a judge without unnecessary delay or *may* simply write a traffic citation.¹⁰⁵
- If the offense is a traffic infraction,¹⁰⁶ the officer *must* simply write a citation and not take the person before a judge.¹⁰⁷ There are other offenses that are not a part of the uniform act regulating traffic on the highway that may also be charged through a traffic citation.¹⁰⁸ A traffic citation is deemed a lawful complaint for purposes of initiating prosecution.¹⁰⁹
- If the person is arrested for any of the charges listed in K.S.A. § 8-2107(d)¹¹⁰ and the person is not taken before a judge, the following options are available:
 - 1) The officer *may* simply release the person with a traffic citation.¹¹¹
 - 2) The officer *may* require the person to post a valid Kansas driver's license. The officer then issues the defendant a temporary driver's license good until the court date.
 - 3) If the person does not have a valid Kansas driver's license or if the person does but elects instead to post a monetary bond, the person *may*—if required by the officer—be released upon posting a bond in the following amounts¹¹² for the following charges:

<i>Reckless Driving</i>	\$82
<i>Driving while suspended, cancelled, or revoked</i>	82

<i>Failing to comply with lawful order</i>	57
<i>Registered weight violation (reg for less than 12,000)</i>	52
<i>Registered weight violation (reg for more than 12,000)</i>	92
<i>No DL or violation of restrictions</i>	52
<i>Spilling load on road</i>	52
<i>Transporting an open container.</i>	223

- Officers *may* also require drivers from Alaska, California, Montana, Oregon, Wisconsin, Michigan and any foreign country to post a bond for any traffic offense because those states or countries did not adopt the nonresident violators compact. In those cases, the bond is to be the equivalent of the fine listed in the statutory fine schedule at K.S.A. § 8-2118 plus \$75.¹¹³
- If the person is from out-of-state or driving on a foreign license and has no insurance, the officer *may* require the person to post a bond of \$150.¹¹⁴

6. Local data collection is encouraged

Data collection is important if we are to strive for an evidence-based pretrial system. Although the Task Force was able to obtain some very limited data about the number of people being held pretrial in our county jails, it became apparent early in the process that data collection in the counties is inconsistent or unavailable. For example, we discovered that, with a few limited exceptions, we do not measure our appearance rates either statewide or by judicial district. If the only two factors to consider in making a release decision are risk of flight and risk to public safety, it would be hard to measure whether any program we adopted was successful if we do not know what our current appearance rate is or what our recidivism rate is while awaiting trial. And, why do people fail to appear? Is a money bond the most effective way to assure their appearance? What percentage violate the law and is it another drug violation for someone addicted to drugs or is it a violent crime? How could we have predicted the new criminal conduct?

Although we know from surveying sheriffs that about 53% of the people in our local jails in Kansas are there pretrial with no other holds, many important questions remain, such as:

- What is the most serious charge?
- How many are from out-of-state?
- What is the race and gender of those we hold pretrial compared to the numbers arrested for similar crimes?
- What is the average amount of time defendants spend incarcerated pretrial?
- Of those released either on a cash or surety bond, at what rate do they fail to appear as opposed to those released on a PR bond?
- Is there any racial disproportionality in the amount of the bonds or the types of conditions of release ordered or in the likelihood of failing to appear or committing new crimes while on release?
- And there are many more.

Although our Final Report recommends statewide data collection; it will be sometime in 2022 before our new statewide case management system is fully operational and longer until a meaningful amount of data can be collected. We also have no guarantees that any of our recommendations will be adopted or funded. In the meantime, local judicial districts are encouraged to find ways to measure and analyze this data locally.

Endnotes

1 These recommendations are based solely on the majority opinion of the Pretrial Justice Task Force. The Pretrial Justice Task Force recommends that judges follow the procedures outlined below. These procedures meet Kansas statutory requirements as well as both state and federal constitutional requirements. They are designed to recognize our commitment to the presumption of innocence, the right to liberty, and the belief that no person should be deprived of liberty unnecessarily or unconstitutionally. Alternative procedures may also be legally supportable, but jurisdictions adopting alternative approaches are encouraged to fully consider and document the legal justification for their actions. This procedure applies only to actions in the district court. And finally, these recommendations are based on the law as it exists on October 1, 2020. It does not incorporate recommendations from the Pretrial Justice Task Force Report to the Supreme Court.

2 The term judge, used throughout this document, includes magistrate judge.

3 K.S.A. § 22-2901(3).

4 “Appearance bond” is defined as “an agreement with or without security, entered into by a person in custody by which the person is bound to comply with the conditions specified in the agreement.” K.S.A. § 22-2202(b).

5 K.S.A. § 22-2802(1).

6 K.S.A. § 22-2802(9).

7 “Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant” *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

8 K.S.A. § 22-2801.

9 See K.S.A. § 21-6316 (requires bail to be set at no less than \$50,000 cash or surety for street gang members and prohibits OR bond unless certain conditions are noted by the judge on the record); K.S.A. § 21-5703(d) (requires bail to be set as no less than \$50,000 cash or surety for persons charged with unlawful manufacturing of a controlled substance and no OR bond allowed unless certain conditions). See also K.S.A. § 8-2107 for required bond for certain traffic offenses.

10 “The appearance bond shall be executed with sufficient solvent sureties who are residents of the state of Kansas, unless the [judge] determines, in the exercise of [his or her] discretion, that requiring sureties is not necessary to assure the appearance of the person at the time ordered.” K.S.A. § 22-2802(3). “Surety” is defined as “a person or commercial surety, other than a defendant in a criminal proceeding, that guarantees the appearance of a defendant in a criminal proceeding, by executing an appearance bond.” K.S.A. § 22-2809a(a)(1).

11 K.S.A. § 22-2802(6).

12 The use of the term “public safety” in the statute, as it relates to an appearance bond, conflates two issues. First, a money bond is given solely to assure appearance of the accused. The best proof of that is that the only reason a money bond can be forfeited is for failure to appear. A surety has no responsibility for the public safety, only to get the accused to court at the appointed time.

Second, one cannot justify a money bond to protect public safety. It simply means that those who are dangerous and have financial means can get out while those who are poor and dangerous cannot. The statutory language related to public safety was placed in the statute after the U.S. Supreme Court decision in *United States v. Salerno*, 481 U.S. 739, 754–55 (1987). That is when many states started adding provisions to include public safety in the detention calculus. But in *Salerno*, interpreting the federal Eighth Amendment—which provides no right to bond—the Supreme Court said Congress could adopt a statute (in this case the Federal Bail Reform Act of 1984) denying bond based on public safety. It did not make release contingent on money, it simply denied release, after a due process hearing, to those who were a danger to the public or an individual. But the Kansas Constitution provides a right to bond except in capital offenses, so nothing, including public safety, can be used as a basis to detain without giving the person an opportunity to post a bond.

To further support this point, although it was decided before *Salerno* and before the change in the statute, in *State v. Foy*, 224 Kan. 558, 562, 582 P.2d 281, 286 (1978), our Supreme Court noted that “the purpose of the statutes requiring bond from persons accused of crimes is to assure their presence at the time and place of the trial.” If someone is a danger to public or individual

safety, bond is ineffectual unless the bond is knowingly set at an amount that will for all practical purposes result in no bond. We discourage such a practice as not supported either under the Kansas Bill of Rights or the United States Constitution.

13 K.S.A. § 22-2802(8).

14 *Stack v. Boyle*, 342 U.S. 1, 7-8 (1951) (Jackson, J., concurring).

15 K.S.A. § 22-2807(2).

16 *Bandy v. United States*, 81 S. Ct. 197, 197 (1960); see also *Stack v. Boyle*, 342 U.S. 1, 4–5 (1951):

[R]elease before trial is conditioned upon the accused’s giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused.” (internal citations omitted).

17 See *State v. Dunnan*, 223 Kan. 428, 430 (1978) (“The bond fixed [\$250,000 for charge of second degree murder] was indeed high, but the offense was most serious. . . . In the case before us we cannot say that the court below abused its discretion at the time bail was fixed.”).

18 *State v. Foy*, 224 Kan. 558, 562 (1978).

19 *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

20 K.S.A. § 22-2802(12).

21 “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

“All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.” Kan. Const. Bill of Rights, § 9.

22 *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

In *Stack*, the U.S. Supreme Court noted that “traditional right to freedom before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction.” 342 U.S. at 4. The court continued that “[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Id.* The Court criticized the lower court for setting a bail amount without an individualized, evidence-based inquiry into what was necessary to ensure the presence of the defendant at trial. “To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act [that] would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against” 342 U.S. at 6.

23 *Bennett v. United States*, 36 F.2d 475, 477 (5th Cir. 1929); see also *Brangan v. Commonwealth*, 477 Mass. 691, 700, 80 N.E.3d 949, 959 (2017):

A bail that is set without any regard to whether a defendant is a pauper or a plutocrat runs the risk of being excessive and unfair. A \$250 cash bail will have little impact on the well-to-do, for whom it is less than the cost of a night’s stay in a downtown Boston hotel, but it will probably result in detention for a homeless person who’s entire earthly belongings can be carried in a cart.

24 224 Kan. 558, 562 (1978).

25 Cases that have found a bond to be excessive under the Eighth Amendment are sparse. Most view the amount as totally within the discretion of the judge—as long as it is tied to risk of flight.

See *Craig v. State*, 198 Kan. 39, 41 (1967) (increasing bond from \$5,000 to \$50,000 after defendant failed to appear for preliminary hearing and forfeited the \$5,000 bond was not excessive under the circumstances); *State v. Burgess*, 205 Kan. 224,

226 (1970) (\$10,000 bond not excessive for person charged with robbery and larceny who had just briefly touched down in Kansas and just as quickly left after the robbery); *State v. Dunnan*, 223 Kan. 428, 430 (1978) (“The bond fixed [\$250,000 for charge of second degree murder] was indeed high, but the offense was most serious. . . . In the case before us we cannot say that the court below abused its discretion at the time bail was fixed.”); *State v. Foy*, 224 Kan. 558, 562 (1978) (\$250,000 bond not excessive when defendant, charged with murder, admitted to shooting the victim, left the area immediately after the crime, and had few friends and relatives in the town); *State v. Alsup*, 239 Kan. 673, 679 (1986), *overruled on other grounds by State v. McDaniel*, 255 Kan. 756, 877 P.2d 961 (1994) (\$500,000 bond not excessive—defendant charged with aggravated robbery and kidnapping involving violence and also had charge in Oklahoma for shooting with intent to kill); *State v. Ruebke*, 240 Kan. 493, 498 (1987) (\$100,000 bond not excessive when defendant was charged with six class A felonies, unemployed, and on probation for a prior felony conviction).

26 U.S. Supreme Court Justice Robert Jackson opined that it is “difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is . . . unprecedented in this country and . . . fraught with danger of excesses and injustice” *Williamson v. United States*, 184 F.2d 280, 282 (1950).

27 “All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great.” Kan. Const. Bill of Rights, § 9.

28 *Bell v. Wolfish*, 441 U.S. 520, 535 at n. 16 (1979). *See also*, *ABA Standards for Criminal Justice: Pretrial Release*, 3d ed. © 2007; https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf.

Standard 10-5.3(c) Financial conditions should not be set to punish or frighten the defendant or to placate public opinion.

Standard 10-1.8. The judicial officer should not be influenced by publicity surrounding a case or attempt to placate public opinion in making a pretrial release decision.

29 *Walker v. City of Calhoun, GA*, 901 F.3d 1245, 1258 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun, Ga.*, 139 S. Ct. 1446, 203 L. Ed. 2d 681 (2019); *Brangan v. Commonwealth*, 477 Mass. 691, 693–94, 80 N.E.3d 949, 954 (2017); *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968); *Hodgdon v. United States*, 365 F.2d 679, 687 (8th Cir. 1966) (“bail is not excessive merely because the defendant is unable to pay it.”); *Koen v. Long*, 302 F. Supp. 1383, 1391 (E.D. Mo. 1969), *aff’d*, 428 F.2d 876 (8th Cir. 1970) (“It is also clear that bail is not excessive merely because the defendant is unable to pay it or because the cost of obtaining same is high.”); *State v. Pratt*, 204 Vt. 282, 290–91, 166 A.3d 600, 605–06 (2017) (“Although both the U.S. and Vermont Constitutions prohibit excessive bail, neither this Court nor the U.S. Supreme Court has ever held that bail is excessive solely because the defendant cannot raise the necessary funds,”—listing cases from other jurisdictions).

Note: U.S. Attorney for the District of Kansas, Barry Grissom, and Wyandotte County District Attorney, Mark Dupree, joined in an Amicus Brief in *Walker*, along with other U.S. Department of Justice attorneys in support of Walker’s position. They urged the court to find that bond schedules even though facially neutral discriminated based on indigent status. They asked the court to follow the *en banc* opinion in *Pugh v. Rainwater* that “imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.” 572 F.2d 1053, 1056 (5th Cir. 1978). *See* Brief of Current and Former District and State’s Attorneys et al. as Amici Curiae Supporting Plaintiff-Appellee, *Walker v. City of Calhoun, GA*, 901 F.3d 1245 (11th Cir. 2018) (No. 4:15-cv-00170-HLM), 2017 WL 5885782.

30 Even in *Stack v. Boyle*, 342 U.S. 1, 7–8 (1951), Justice Jackson writing separately noted that the purpose of bail is *release*, not detention:

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. . . . Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them.

See also Griffin v. Illinois, 351 U.S. 12, 17–18 (1956). In *Griffin*, Justice Black proclaimed on behalf of the Court that

In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.

Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.

Id. A few years later, in dicta, in a case Justice Douglas was reviewing on a motion to release the defendant, Roger Bandy, from custody pending appeal, Justice Douglas noted that

[The] traditional right to freedom during trial and pending judicial review has to be squared with the possibility that the defendant may flee or hide himself. Bail is the device which we have borrowed to reconcile these conflicting interests. 'The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court.' *Reynolds v. United States*, 80 S.Ct. 30, 32, 4 L.Ed.2d 46. It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release.

But this theory is based on the assumption that a defendant has property. To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. We have held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence. [*Griffin v. Illinois*] Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?

It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. [*Stack v. Boyle*] Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. . . . The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences. In case of reversal, he will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal.

Bandy v. United States, 81 S. Ct. 197, 197–98 (1960). Justice Douglas goes on to note that "there may be other deterrents to jumping bail: long residence in a locality, the ties of friends and family, the efficiency of modern police. All these in a given case may offer a deterrent at least equal to that of the threat of forfeiture." 81 S. Ct. at 198. Due to a procedural issue, however, he did not rule on the motion and returned the case to the circuit court to decide.

When Roger Bandy returned to the Supreme Court, again for review of the same bond, he had been in jail for two years. Justice Douglas was clearly frustrated.

Further reflection has led me to conclude that no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court. Therefore, I reject the Government's argument, in opposition to these applications, that Bandy is a 'poor risk.' That argument was not made when release was sought on a \$5,000 bond. No reason is now put forward which makes it more relevant to release without security than to release on bond. The showing in this respect does not overcome our heavy presumptions favoring freedom.

Bandy v. United States, 82 S. Ct. 11, 13 (1961). The Supreme Court, as a whole, has not had an opportunity to review indigency in the bail context, so we cannot draw any conclusions from Justice Douglas's dicta, but coming closely on the heels of *Stack* and *Griffin*, it does provide some insight into one jurist's thinking.

See also Bearden v. Georgia, 461 U.S. 660, 667-668, (1983) ("[I]f the State determines a fine or restitution to be the appropriate and adequate penalty for a crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.").

31 We note that in *ODonnell v. Harris Cty.*, 892 F.3d 147, 163, (5th Cir. 2018), the Fifth Circuit Court of Appeals stated that one cannot assume that there is a "fundamental substantive due process right to be free from any form of wealth-based detention...no such right is in view" But it did find that indigent defendants in Harris County were denied their liberty interest to be free from incarceration.

[T]his case presents the same basic injustice [as *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973)]: poor arrestees in Harris County are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond. Heightened scrutiny of the County's policy is appropriate.

The Fifth Circuit went on to enjoin Harris County from

imposing prescheduled bail amounts as a condition of release on arrestees who attest that they cannot afford such amounts without providing an adequate process for ensuring that there is individual consideration for each arrestee of whether another amount or condition provides sufficient sureties. 892 F.3d at 164.

Moreover, it required that a pretrial services officer verify the arrestee's ability to pay the prescheduled amount. If the judge declines to lower bail from the prescheduled amount to an amount the arrestee is able to pay, then the judge must provide written factual findings or factual findings on the record explaining the reason for the decision, and the County must provide the arrestee with a formal adversarial bail review hearing before a county judge. 892 F. 3d at 165.

32 See Brief for the American Civil Liberties Union Foundation et al. in Support of Appellees at *23, *ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018) (No. 17-20333), 2017 WL 4876884.

33 See K.S.A. § 22-5504(b) (“[T]he court shall determine whether the defendant is financially unable to employ counsel. In making such determination the court shall consider the defendant’s assets and income; the amount needed for the payment of reasonable and necessary expenses incurred, or which must be incurred to support the defendant and the defendant’s immediate family; the anticipated cost of effective representation by employed counsel; and any property which may have been transferred or conveyed by the defendant to any person without adequate monetary consideration after the commission of the alleged crime. If the defendant’s assets and income are not sufficient to cover the anticipated cost of effective representation by employed counsel when the length and complexity of the anticipated proceedings are taken fully into account, the defendant shall be determined indigent in full or in part and the court shall appoint an attorney.”); *State v. Timmons*, 218 Kan. 741, 748 (1976) (“the ability of a defendant to employ counsel is to be determined in the discretion of the trial court, subject, of course, to review by this court for abuse thereof. In making the determination it is the duty of the trial court to consider the criteria enumerated in the statute and to consider each case in the light of the constitutional mandate of providing a fair trial with effective assistance of counsel.”); *State v. Robinson*, 281 Kan. 538, 546 (2006) (“[T]he sentencing court, at the time of initial assessment, must consider the financial resources of the defendant and the nature of the burden that payment will impose *explicitly*, stating on the record how those factors have been weighed in the court’s decision. Without an adequate record on these points, meaningful appellate review of whether the court abused its discretion in setting the amount and method of payment of the fees would be impossible.”).

34 The LFO (Legal Financial Obligations) Calculator, try it here: <https://finesandfeesjusticecenter.org/articles/washington-lfo-calculator-legal-financial-obligations-fines-fees/>.

35 *ODonnell v. Harris Cty.*, 892 F.3d 147, 164–65 (5th Cir. 2018).

36 *Allison v. Allen*, Case No 19-cv-1126, M.D. North Carolina, Consent Order for Preliminary Injunction, Doc. 56, May 8, 2020; https://www.acluofnorthcarolina.org/sites/default/files/56_order_granting_consent_preliminary_injunction.pdf.

37 “Here the officer made no individualized determination of the intoxication and dangerousness of the defendants. The officer jailed the defendants based solely on the 12-hour detention policy. Thus, the defendants were not taken before a magistrate or judge “without unnecessary delay” and were denied their constitutional right to make bail. Therefore, the detention of the defendants was unlawful.” *State v. Cuchy*, 270 Kan. 763, 772 (2001).

38 The court considered the 48- hour safe harbor in *County of Riverside v. McLaughlin*, 500 U.S. 44, (1991), and noted that the Kansas statute existed before *Riverside*, suggesting that under the Kansas statute something less than 48 hours could constitute unreasonable delay. But the court focused on the difference between a 48-hour probable cause determination and taking the defendant before a magistrate “without unreasonable delay.” K.S.A. § 8-2104 and K.S.A. § 22-2901(1). “[D]etention pending a probable cause determination is a different issue from detention pending appearance before a magistrate for the purpose of obtaining release on bail pending preliminary examination.” *Cuchy*, 270 Kan. at 765. “Due to its intrinsic inflexibility, a policy of automatically detaining probable cause arrestees for a fixed number of hours might be said to violate the without unnecessary delay requirement under the flexible approach used in [*State v. Wakefield*, 267 Kan. 116, 125 (1999)]. The lack of individualized determinations, at the least, creates circumstances in which there would be unnecessary delay for some detainees.” *Cuchy*, 270 Kan. at 767.

In *Cuchy*, the lack of individualized determination was referencing an individualized determination of the level of intoxication of the defendant or whether the defendant could be released to someone sober. But the court rejected *Cuchy*’s claim that his detention violated due process. Relying on its decision in *Wakefield*, 267 Kan. at 125, the court found “[e]ven an unwarranted delay in taking the accused before a magistrate after he or she has been arrested is not in itself a denial of due process unless that delay has in some way prejudiced the right of the accused to a fair trial.” 270 Kan. at 771. In *Wakefield*, which was decided

post-*Riverside*, the Kansas Supreme Court found a delay of slightly more than 48 hours was reasonable. “*Wakefield* teaches that ‘without unnecessary delay’ is a flexible concept dependent upon the circumstances.” *Cuchy*, 270 Kan. at 767.

39 Letter from Kansas Bail Agents Association commenting on draft of this report, Sep. 24, 2020, p. 7.

40 *Wilson v. American Fidelity Ins. Co.*, 339 Kan. 416, 421 (1981).

41 “Claims of unlawful discrimination against the indigent in criminal proceedings have a long pedigree in Fourteenth Amendment case law.” *Walker v. City of Calhoun, GA*, 901 F.3d 1245, 1259 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun, Ga.*, 139 S. Ct. 1446, 203 L. Ed. 2d 681 (2019).

“We generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.” *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).

42 *Buffin v. City & Cty. of San Francisco*, No. 15-CV-04959-YGR, 2019 WL 1017537, at *4-6, 21, 23 (N.D. Cal. Mar. 4, 2019). This is a decision by one federal district court judge. No appellate decision has been filed as of this date.

The record is devoid of any evidence upon which the amounts in the Bail Schedule are determined or justified. For sake of comparison, [the bail agents association] witness testified:

Q: So that’s 20,000 more than driving under the influence, right?

A: Yes.

Q: And 5,000 more than driving under the influence and actually causing injury; is that right?

A: That’s right.

Q: Do you know why receipt of a stolen vehicle has a higher bail than driving under the influence and causing injury?

A: I don’t.

Q: Can you tell me how it protects public safety to have a bail that’s higher for receipt of a stolen vehicle than it is for driving drunk and injuring someone?

A: I can’t—I don’t know what the judges were thinking on this. I don’t know what the date [sic] would show in terms of, you know, are some of these offenses more likely to fail to appear than others? Or are some of them more likely to commit additional crimes, which is a consideration under the constitution and the statutory scheme. But I don’t know why the judges did this schedule the way they did.

. . . No reason or process is provided for the basis upon which the amounts were determined. . . . arrestees who post the full amount of bail listed on the Bail Schedule can secure release more quickly than any other category of arrestees. This is true even when an arrestee who posts the full bail amount has been charged with a more serious offense than the indigent arrestee. By way of example only, the Sheriff released on bail within several hours of arrest a person who had been charged in what appeared to be a serious assault case involving an axe and requiring SWAT team management, while an indigent, disabled individual who was also arrested for assault (her ‘deadly weapon’ was a cane) was held in custody for five days because she could not afford the felony bail. There, the assault charge was ultimately reduced to a misdemeanor, and the individual was released on her own recognizance. Consistent with this example, research indicates that individuals charged with serious or violent offenses who are able to secure release usually do so by posting bail. Moreover, with respect to some offenses, current law elevates bail over OR release. That is, under the law, arrestees for certain offenses are ineligible for OR release before a bail hearing or arraignment *but* bail is nevertheless an option for those very same offenses. This effectively means that a wealthy arrestee who is charged with a violent offense can be released from custody within a matter of hours, while an indigent arrestee can remain incarcerated for as many as five days before seeing a judicial officer or the case is discharged for ‘lack of evidence.’ . . . Finally, the record corroborates plaintiffs’ own experiences while held in pre-arraignment detention. One to five days in jail can take a mental and physical toll on arrestees, impact custody of their children, and, as happened here, lead to loss of employment. . . .

[The bail agents association] witness testified that he do[esn’t] know why the judges did th[e] schedule the way they did[,]” noting that “there’s no requirement for any input, data collection, deviation reports, [or] comparative data ... in putting together the schedule.” Further, [the bail agents association’s] own expert admitted that there are no peer-reviewed

studies that have empirically addressed questions specifically regarding the effectiveness of bail schedules, and that such schedules are simply used for “operational efficiency.”

Absent any evidence justifying the Bail Schedule as a means for accomplishing the government’s compelling interests, the Court finds that “operational efficiency” does not trump a significant deprivation of liberty. Merely assigning a random dollar amount to a Penal Code section does not address an actual person’s ability or willingness to appear in court or the public safety risk that person poses. At most, all that can be discerned is that the amounts are so high as to keep all arrestees detained except for those who can afford to be released. This practice, then, replaces the presumption of innocence with the presumption of detention. Accordingly, the Bail Schedule, which merely associates an amount of money with a specific crime, without any connection to public safety or future court appearance, cannot be deemed *necessary*. . .

The Bail Schedule, by contrast, is arbitrary in that it sets amounts without regard to any objective measurement and thus bears *no* relation to the government’s interests in enhancing public safety and ensuring court appearance. It merely provides a “Get Out of Jail” card for anyone with sufficient means to afford it. In light thereof, [the bail agents association] cannot show that plaintiffs’ proposed alternative *would be less effective at serving the government’s compelling interest or more restrictive and has thus failed to meet its burden under the strict scrutiny standard*. (emphasis added).

At least one bonding company has recently argued that fixed bond schedules are unconstitutional. See *People v. Fin. Cas. & Sur., Inc.*, No. E070480, 2019 WL 3544027, at *2 (Cal. Ct. App. Aug. 5, 2019) (company unsuccessfully argued that it was not required to pay forfeiture because bond scheduled used by jail officials was not based on individualized considerations of the defendant’s ability to pay and the court did not consider less restrictive alternatives in violation of defendant’s constitutional rights. The California appellate court found bonding company could not raise constitutional arguments that were specific to the defendant.).

43 *ODonnell v. Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018):

In sum, the essence of the district court’s equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County’s current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

Note: Kansas, presumably through its Attorney General Derrick Schmidt, joined in an amicus brief on behalf of Harris County, Texas arguing that by making indigent status a determining factor in the bail decision it would invalidate K.S.A. § 22-2802 and K.S.A. § 12-4301. See Brief for the States of Texas, Arizona, Hawai’i, Kansas, Louisiana, and Nebraska as Amici Curiae in Support of Appellants, *ODonnell v. Harris Cty.*, 891 F.3d 147 (5th Cir. 2018) (No. 17-20333), 2017 WL 2861848.

44 *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir.1978) (while the “[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements,” “[t]he incarceration of those who cannot [meet them], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.”).

State v. Blake, 642 So.2d 959, 968 (Ala. 1994) (“Under Alabama law a defendant has an absolute right to bail in all noncapital cases. A system of bail based totally on some form of monetary bail, and not providing for release on a defendant’s own recognizance in appropriate circumstances, would be unconstitutional.”) (internal citations omitted).

Cooper v. City of Dothan, No. 1:15-CV-425-WKW, 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015) (highlighting “long standing case law from the Fifth Circuit Court of Appeals, as well as from the Supreme Court of Alabama, that establishes the unconstitutionality of a pretrial detention scheme whereby indigent detainees are confined for periods of time solely due to their inability to tender monetary amounts in accordance with a master bond schedule, while those able to afford the preset bond may quickly purchase their release.”).

Snow v. Lambert, No. CV 15-567-SDD-RLB, 2015 WL 5071981, at *2 (M.D. La. Aug. 27, 2015) (“Snow [who was indigent] was denied judicial review of her fixed bail [on her misdemeanor charges of theft and trespass]. Additionally, in spite of the five bail options available to arrestees under article 312 of the Louisiana Code of Criminal Procedure, Snow was only afforded two options, either a cash payment of the scheduled bond amount or a secured bond.”).

Jones v. The City of Clanton, No. 2:15cv34-MHT, 2015 WL 5387219, at *1 (M.D. Ala. Sept. 14, 2015) (Plaintiff was jailed because she was too poor to pay a small amount of bail money, which she was required to pay under the terms of defendant City of Clanton's bail schedule. After finding the process unconstitutional, the court noted that bail schemes such as Clanton's:

result in the unnecessary pretrial detention of people whom our system of justice presumes to be innocent. This period of detention has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. It can also impede the preparation of one's defense, [noting that pretrial detention hinders a defendant's ability to gather evidence, contact witnesses, or otherwise prepare his defense]; it can induce even the innocent to plead guilty so that they may secure a quicker release, and it may result in a period of detention that exceeds the expected sentence. Moreover, unnecessary pretrial detention burdens States, localities, and taxpayers, and its use appears widespread: nationwide, about 60 % of jail inmates are pretrial detainees, and the majority of those people are charged with nonviolent offenses.

Id. (internal citations omitted). The City of Clanton subsequently adopted a policy that allowed OR bonds for all misdemeanor offenses unless the person had a prior failure to appear. Those who had failed to appear in the past are required to post the amount on the bond schedule. But if unable to post a bond, they are entitled to a hearing about conditions of release within 48 hours of arrest. The court declared that the new policy passed constitutional muster. The U.S. Department of Justice filed a Statement of Interest in the *Clanton* case, opining:

Fundamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay. Fixed-sum bail schemes do not meet these mandates. By using a predetermined schedule for bail amounts based solely on the charges a defendant faces, these schemes do not properly account for other important factors, such as the defendant's potential dangerousness or risk of flight. The federal government recognized as much when it reformed its bail system over fifty years ago.

Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-00034-MHT-WC (M.D. Ala. Sept. 14, 2015) available at <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=616a52b6-ce51-772b-6d8e-d750f5a93f4e&forceDialog=0>

Thompson v. Moss Point, No. 1:15CV182LG-RHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015) ("The use of a secured bail schedule to set the conditions for release of a person in custody after arrest for an offense that may be prosecuted by the City of Moss Point implicates the protections of the Equal Protection Clause when such a schedule is applied to the indigent. No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.").

Rodriguez v. Providence Cmty. Corr., Inc., 155 F. Supp. 3d 758, 767 (M.D. Tenn. 2015) ("The Court agrees with Plaintiffs that the Fourteenth Amendment requires an inquiry into indigency before probationers are held on secured money bonds and before they can be jailed solely on the basis of nonpayment. . . . The use of secured money bonds has the undeniable effect of imprisoning indigent individuals where those with financial means who have committed the same or worse probation violations can purchase their freedom. This effect stands in flat contradiction to the long-held and much-cherished principle that "[t]here can be no equal justice where the kind of [treatment] a man gets depends upon the amount of money he has.").

Dixon v. City of St. Louis, No. 4:19-CV-0112-AGF, 2019 WL 2437026, at *15 (E.D. Mo. June 11, 2019) (appeal filed):

Further, as other courts have observed, there is no evidence that financial conditions of release are more effective than alternatives for ensuring court appearances and public safety. *ODonnell*, 892 F.3d at 154 (noting "reams of empirical data" suggesting the opposite); *McNeil*, 2019 WL 633012 at 14-15 (noting statistics showing a high rate of court appearance for those released and higher rates of recidivism among those detained); *Schultz*, 330 F. Supp. 3d at 1363 (citing New York data that 95% of arrestees whose bail was paid by non-profit organizations made their court appearances). Here, Plaintiffs offer statistics from The Bail Project of St. Louis reflecting that 94.4% of defendants for whom the organization paid bail made their scheduled court appearances.¹⁸ ECF No. 41, Ex. 29. Defendants' position is further belied by the fact that, as noted above, at bond reduction hearings, 69% of detainees received a reduction or were released on their own recognizance. Moreover, Plaintiffs do not request wholesale release of all class members but simply a presumption favoring non-monetary release conditions and a hearing that comports with due process.

And the following all finding the same: *Menter v. Mahon*, No. 3:17-cv-1029-J-39JBT, 2018 WL 4335527, at *4 (M.D. Fla. Sept. 11, 2018) *e.g.*, *Pierce v. City of Velda City*, No. 4:15-cv-570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015); *McNeil v. Cmty.*

Prob. Services, LLC, No. 1:18-cv-00033, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019); *Schultz v. Alabama*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018); *Edwards v. Cofield*, No. 3:17-CV-321-WKW, 2017 WL 2255775 (M.D. Ala. May 18, 2017). *See also Caliste v. Cantrell*, 329 F. Supp. 3d 296, 312 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019) (“Here, it is clear that Judge Cantrell did not conduct an inquiry into ability to pay or include satisfactory procedural safeguards to that inquiry when setting bail. To satisfy the Due Process principles articulated by Supreme Court precedent, Judge Cantrell must conduct an inquiry into criminal defendants’ ability to pay prior to pretrial detention. ‘This inquiry must involve certain procedural safeguards, especially notice to the individual of the importance of ability to pay and an opportunity to be heard on the issue. If an individual is unable to pay, then [he] must consider alternative measures before imprisoning the individual.’”); *Robinson v. Martin*, Cook County Circuit Court, Illinois, No. 2016-CH-13587 (Cook Cty. Ill. 2016) available at <https://www.macarthurjustice.org/wp-content/uploads/2018/07/Robinson-v.-Martin-Dismissal.pdf> (Dismissed after Illinois passed bail reform legislatively); *State v. Brown*, 338 P.3d 1276 (N.M. 2014).

In March 2019 the ACLU through the Pennsylvania Community Bail Fund and several named defendants filed a class action lawsuit and mandamus in Pennsylvania against six Philadelphia magistrate judges in the Pennsylvania Supreme Court. As a result of the lawsuit, and with the guidance of a special master appointed by the Supreme Court, court leadership elected to change the process and the Pennsylvania Supreme Court is currently in the process of determining if those changes are enough. The changes require the judge to begin with the presumption that the person will be released; the judge must consider the person’s ability to pay before imposing any money bail; requires the defendant have a chance to speak confidentially with a lawyer before the first appearance. Anyone denied bail or unable to post it must be given a review hearing within three days. *Philadelphia Community Bail Fund v. Bernard*, No. 21 EM 2019 (Penn. July 8, 2019) <https://www.inquirer.com/news/aclu-pennsylvania-philadelphia-cash-bail-reform-criminal-justice-20200219.html>; https://www.aclupa.org/sites/default/files/field_documents/special_masters_report_and_filings_forwarded_to_the_court_administrator_-_jurisdiction_relinquished.pdf.

Other cases pending at this writing raising same issues: *Parga v. Bd. of Cty. Commissioners of Cty. of Tulsa*, No. 18-CV-0298-CVE-JFJ, 2019 WL 1231675 (N.D. Okla. Mar. 15, 2019); *Daves v. Dallas Cty., Texas*, 341 F. Supp. 3d 688 (N.D. Tex. 2018), preliminary injunction issued against felony and misdemeanor judges in §1983 action for pretrial detention practices; appeal filed with 5th Circuit, October 23, 2018; *Booth v. Galveston Cty.*, No. 3:18-CV-00104, 2019 WL 4305457, at *1 (S.D. Tex. Sept. 11, 2019) (same) appealed filed with Fifth Circuit Sep 11, 2019; *Ross v. Blount*, No. 2:2019cv11076, E.D. Michigan, Filed April 14, 2019, <https://dockets.justia.com/docket/michigan/miedce/2:2019cv11076/337756> *Little v. Frederick*, No. CV 6:17-0724, 2020 WL 605028 (W.D. La. Feb. 7, 2020); *Russell v. Harris County, Texas*, ___ F.Supp.3d ___, 2020 WL 1866835 (S.D. Tex, 2020) (same issues as *ODonnell v. Harris County* but with *felony* bail practices instead of misdemeanor); *In re Humphrey*, 19 Cal. App. 5th 1006, 228 Cal. Rptr. 3d 513 (Ct. App. 2018) (California Supreme Court has accepted the case).

45 *See County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991):

Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

46 In *Walker*, 901 F.3d 1245, the 5th Circuit found (2-1) that the use of fixed bond schedules that allowed those who could afford it be released by posting the fixed bond, while those who could not post the fixed bond must remain until they were seen by a judge did not violate a defendant’s rights under the Fourteenth Amendment Due Process and Equal Protection clauses. The majority noted that “differential treatment by wealth is impermissible only where it results in a total deprivation of a benefit because of poverty.” 901 F.3d at 1261. The fixed bond schedule was not a total deprivation because “Walker and other indigents suffer no ‘absolute deprivation’ of the benefit they seek, namely pretrial release. Rather, they must merely wait some appropriate amount of time to receive the same benefit as the more affluent. Indeed, after such delay, they arguably receive preferential treatment, in at least one respect, by being released on recognizance without having to provide any security.” 901 F.3d at 1261-62.

The majority reasoned:

Under [*County of Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991)] the City can presumptively hold a person for 48 hours before even establishing probable cause—that is, without even proving that it has evidence that he has committed a crime. It stands to reason that that the City can take the same 48 hours to set bail for somebody held with probable cause. Indeed, *McLaughlin* expressly envisioned that one reason for the 48-hour window is so that probable cause hearings could be combined with bail hearings and arraignments.

Walker, 901 F.2d at 1266. The majority's conclusion was clear: "Indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest." 901 F.2d at 1266.

47 *Valdez-Jimenez v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 136 Nev. Adv. Op. 20, 460 P.3d 976, 985 (2020).

48 *Martinez v. City of Dodge City*, No. 15-CV-9344-DDC-TJJ, 2016 WL 9051913, at *1 (D. Kan. Apr. 26, 2016).

49 The United States Supreme Court denied cert. *See State of Md. v. Baltimore Radio Show*, 338 U.S. 912, 917, 70 S. Ct. 252, 254, 94 L. Ed. 562 (1950) ("The sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of sound judicial discretion.").

50 Harris County paid over \$9 million in its own attorney fees before they settled plus it agreed to pay an additional \$4.7 million in plaintiff's attorney fees as part of the settlement. And the new procedures agreed to in the settlement are estimated to cost about \$97 million. Jolie McCullough, *Harris County agreed to reform bail practices that keep poor people in jail. Will it influence other Texas counties?*, The Texas Tribune, (July 31, 2019), <https://www.texastribune.org/2019/07/31/harris-county-bail-settlement-dallas-texas/>; Gabrielle Banks & Zach Despart, *Harris County reaches landmark settlement over 'unconstitutional' bail system*, Houston Chronicle (July 26, 2019), <https://www.chron.com/news/houston-texas/houston/article/Harris-County-reaches-landmark-settlement-over-14188414.php>.

51 *Walker v. City of Calhoun, GA*, 901 F.3d 1245, 1259 (11th Cir. 2018), cert. denied sub nom. *Walker v. City of Calhoun, Ga.*, 139 S. Ct. 1446, 203 L. Ed. 2d 681 (2019).

52 *Valdez-Jimenez v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 136 Nev. Adv. Op. 20, 460 P.3d 976, 985 (2020).

53 *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56–57, (1991):

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

"Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

54 Examples of court-led reform:

Seward County, Nebraska Judge C. Jo Petersen says "the Fifth Judicial District decided earlier this year to do away with cash bail for nearly all misdemeanor charges. Instead, they get a personal recognizance bond; they sign a waiver promising to appear in court, but they don't have to pay any money." <http://netnebraska.org/article/news/1200170/nebraska-lawmakers-consider-release-programs-debate-over-cash-bail-reform>.

California Chief Justice Tani Cantil-Sakauy led the charge to reform California's pretrial release procedures by appointing a working group of diverse California judges to study complaints that cash bail unfairly penalizes the poor. The working group's report recommended the state establish a new system based on pretrial assessments of a defendant's flight risk and danger to public safety. The current cash bail system "bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias," the report concluded."

District of Columbia Superior Court Judge Truman Morrison where the court releases 90% of the people arrested

with no money bond—just a promise to return to court and comply with pretrial supervision and drug screens—a system it adopted in the 1990’s to mirror the federal system.

We use a risk assessment to try and gauge your likelihood of succeeding, which is whether you’ll come back to court and be law-abiding until your court date. Last year, we released 94 percent of all the people that we arrested without using money. Eighty-eight percent made every single court appearance, and 86 percent were never arrested for any criminal offense of any kind. And of the very small percent of people that were arrested in D.C. that we released, less than 2 percent were rearrested for a crime of violence. <https://www.npr.org/2018/09/02/644085158/what-changed-after-d-c-ended-cash-bail>.

Chief Justice Robert Brutinel, Arizona Supreme Court, has announced his intention to pursue pretrial reforms, including automating data-driven systems to facilitate pretrial release and diverting people with mental health issues away from the justice system. “We want dangerous people to stay in jail, people who are a risk to the public,” said Brutinel in the Arizona Capitol Times. “But we want people who are safe to release to be out working their jobs and being with their families.” <https://azcapitoltimes.com/news/2019/06/23/new-state-chief-justice-to-continue-push-for-bail-reform/>.

Ohio Supreme Court Chief Justice Maureen O’Connor made pretrial justice reform one of the centerpieces of her speech to the Ohio Judicial Council, a meeting of over 500 of the state’s judges. O’Connor said, “Bail is a concept to allow for release from detention while awaiting resolution of your case, it is not a means to keep one in jail. Somehow the concept has gotten backward.” O’Connor encouraged judges to read the recommendations of the task force she convened to “examine Ohio’s bail system under Criminal Rule 46 and make recommendations that will ensure public safety and the accused’s appearance at future court hearings, while protecting the presumption of innocence.” See more at <https://www.cleveland.com/open/2019/09/ohio-chief-justice-maureen-oconnor-touts-work-to-reform-criminal-justice.html>.

Broward County, Florida judges released new court rules in 2019 that state in the case of people charged with misdemeanors, “the presumption shall be in favor of release on non-monetary release conditions, including release on the defendant’s own recognizance.” The new court rules, which are already recognized under state law, received support from the county’s state’s attorney, sheriff, and public defender. <http://www.17th.flcourts.org/wp-content/uploads/2019/08/2019-57-Crim.pdf>; <https://www.miamiherald.com/news/local/crime/article234388292.html>.

Chief Justice Zel Fischer of the Missouri Supreme Court made pretrial reform a focus of his state of the judiciary remarks in 2018. He noted, “Too many who are arrested cannot afford bail even for low-level offenses and remain in jail awaiting a hearing. Though presumed innocent, they lose their jobs, cannot support their families and are more likely to reoffend. We all share a responsibility to protect the public – but we also have a responsibility to ensure those accused of crime are fairly treated according to the law, and not their pocket books.” The Supreme Court also released new court rules that will de-emphasize the role of cash bail. The new rules, which took effect July 1, 2018 state that “[t]he court shall release the defendant on the defendant’s own recognizance” and “the court shall not set or impose any condition or combination of conditions of release greater than necessary to secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses.” <https://www.courts.mo.gov/page.jsp?id=121993>; <https://www.courts.mo.gov/page.jsp?id=802>.

55 Example of law enforcement-led reform. See report of International Association of Chiefs of Police, “Citations in Lieu of Arrest”, <https://www.theiacp.org/projects/citation-in-lieu-of-arrest>.

Two key findings:

- **Citation in Lieu of Arrest Has Been Widely Embraced as a Law Enforcement Tool.** The use of citation in lieu of arrest is a widespread and long-standing tool in American law enforcement, with nearly 87% of agencies engaged in the practice; over 80% of those for ten years or more. Law enforcement agencies are using citation for nearly a third of all incidents, most often for disorderly conduct, theft, trespassing, driving under suspension, and possession of marijuana. Nearly two-thirds of law enforcement officials have a positive view of citation. Very few respondents (fewer than 2%) indicated a negative view of the practice.
- **Citation Offers Potential Time Savings and Increased Law Enforcement Efficiency.** Citations take significantly less time to process than do arrests (85.8 minutes vs. 24.2 minutes), saving just over an hour per incident.

Several cities and counties have started **Law Enforcement Assisted Diversion (LEAD)** community-based, law enforcement diversion programs. “Police officers exercise discretionary authority at point of contact to divert individuals to a community-

based, harm-reduction intervention for law violations driven by unmet behavioral health needs. In lieu of the normal criminal justice system cycle -- booking, detention, prosecution, conviction, incarceration -- individuals are instead referred into a trauma-informed intensive case-management program where the individual receives a wide range of support services, often including transitional and permanent housing and/or drug treatment.” <https://www.leadbureau.org/>.

This is similar to or sometimes the same as police deflection programs. These programs have “rapidly moved onto the policing scene for its promise of (1) reducing crime (a core function of the criminal justice system); (2) reducing drug use (an expected outcome of treatment); (3) ensuring the “correct” movement of individuals either into the criminal justice system or away from it; (4) restoring lives (a core function of the human service system); (5) (re)building community relations (a desire of many community members); and (6) saving money (a concern for both public systems and taxpayers).

Instead of utilizing traditional police interventions (i.e., arrest, booking, and charging), deflection relies on law enforcement to be the referral source to community-based drug treatment and mental health services prior to potential crises. In this way, law enforcement opens up new treatment access points not previously available to those in need. Deflection is distinct from, but complementary with, efforts like crisis intervention teams (CIT), which are focused primarily on officer safety and situation de-escalation (both legitimate goals) at crisis points. The goal of deflection is to refer people to the help they need before such a crisis occurs. This timing is an important distinguishing feature of deflection.” <https://www.policechiefmagazine.org/deflection-a-powerful-crime-fighting-tool-that-improves-community-relations/>.

56 Examples of prosecutor-led reform:

Philadelphia District Attorney Larry Krasner announced a policy in February 2018 that his prosecutors would request release without bond or with OR bonds or pretrial reporting requirements only for 25 listed low-level offenses. A copy of the list of offenses can be found here: <https://www.documentcloud.org/documents/4385289-Cash-Bail-PR-022118-FINAL.html> This creates a presumption of release, but does allow the prosecutor to request bond even for the listed crimes if “justice requires.”

“There is absolutely no reason that a person who is no threat to their neighbors or community should sit in jail for days, or weeks, or months, or years because they can’t post a small amount of bail” said Krasner. <https://phillydeclaration.org/2018/02/22/district-attorney-to-eliminate-cash-bail-for-certain-offenses/>.

A year later Krasner and the Mayor of Philadelphia declared the program a success based on an independent report from Aurelie Ouss, Assistant Professor of Criminology at the University of Pennsylvania and Megan Stevenson, Assistant Professor of Law at George Mason University. They found that the policy did not produce “...detectable evidence that the decreased use of monetary bail, unsecured bond, and release on conditions had adverse effects on appearance rates or recidivism.” The study, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail*, also found:

- Defendants released OR successfully showed up for court in similar amounts as compared to those released during the previous administration;
- Defendants released on OR were not rearrested more often when compared to those released during the previous administration;
- Over the past ten months, about 1,700 fewer defendants were sent to jail before their first hearing;
- There was an immediate 23 percent increase in the number of eligible defendants who were released on OR, without any monetary bail, or with other supervisory conditions;
- A 41 percent decline in bail in amounts of \$5,000 or less; and
- A five percent decline in eligible defendants who spent at least one night in jail.

The authors concluded: *“We find that reducing the use of monetary bail for nonviolent offenders has no detectable effect on pretrial misconduct.”* The full report can be found here: <https://medium.com/philadelphia-justice/prosecutor-led-bail-reform-year-one-transparency-report-76574546049c>.

Middlesex County, Massachusetts District Attorney Marion Ryan adopted a similar policy in January 2018: *“People who might have been kept in jail for days if not weeks because they were unable to post bail in cases like drug possession, shoplifting, or destruction of property will be released...For many people being held for 30 days can have a disproportionate effect on their lives. They lose their jobs, their housing, their kids. I think anyone that is attuned to the discussions around criminal justice reform, around more progressive policing, has been talking about these issues.”*

Suffolk County, Massachusetts (includes Boston) former District Attorney Daniel F. Conley and current District Attorney Rachel Rollins:

“We don’t find a benefit in holding low-level nonviolent offenders behind bars before trial when we don’t intend to seek jail or prison after trial. In most district court cases that is the best outcome for public safety, individuals, and the community, and it has been our practice for years.”

Marc Levin, Vice-President of Right on Crime, a Texas-based conservative public policy institute noted that these policy changes by prosecutors were very important steps:

“I think district attorneys are recognizing their role is more than just getting convictions at any cost...Prosecutors sometimes use bail to ‘effectively administer a punishment before a person has been found guilty. Bail conditions and pretrial conditions are not supposed to be punishment. They are supposed to be used to guarantee the person is going to appear.”

<https://www.bostonglobe.com/metro/2018/01/11/middlesex-prosecutors-told-stop-asking-for-bail-minor-cases/ibcFXmvXR1xVO1gWpFd0M/story.html>.

Douglas County, Kansas District Attorney Charles Branson, no longer charging misdemeanor possession of marijuana through the county considering fact that Lawrence City Council passed ordinance limiting fines to \$1 for first and second convictions. <https://www2.ljworld.com/news/public-safety/2019/oct/17/douglas-county-da-to-stop-prosecuting-simple-marijuana-possession-cases/> In municipal arrests, city officers can simply write a citation, without arrest. See K.S.A. 12-4211. This trend has been followed by prosecutors around the country to lower the penalties and consequences for low level drug possession, particularly marijuana.

San Francisco District Attorney, Chesa Boudin, adopted a new bail policy upon election forbidding prosecutors from requesting money bail under any circumstances. In addition, it allows them to request pretrial jail time only for people who face certain violent charges and who prosecutors believe pose a high risk of violence or flight.

Kathleen Jennings, Attorney General for Delaware, has indicated that she will submit to the judiciary the attorney general’s “strong preferences” that the presumptive request for misdemeanors will be release on own recognizance. Prosecutors will seek reductions of bail for people held solely on misdemeanor offenses whose cases do not resolve during a scheduled calendar.

57 Ohio Const. art. I, § 9:

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The general assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(B) of the Constitution of the state of Ohio.

58 The Ohio Supreme Court has an amended court rule under consideration which appears to be an attempt to deal with these issues. In pertinent part it provides (recommended changes italicized):

(A) Pretrial detention. A defendant may be detained pretrial, pursuant to a motion by the prosecutor or the court’s own motion, in accordance with the standards and procedures set forth in the Revised Code.

(B) Pretrial release. Unless the court orders the defendant detained under division (A) of this rule, the court shall release the defendant on the least restrictive conditions that, in the discretion of the court, will reasonably assure the defendant’s appearance in court, the protection or safety of any person or the community, and that the defendant will not obstruct the

criminal justice process. If the court orders financial conditions of release, those financial conditions shall be related solely to the defendant's risk of non-appearance. Any financial conditions shall be in an amount and type which are least costly to the defendant while also sufficient to reasonably assure the defendant's future appearance in court.

(1) In order to expedite the prompt release of a defendant prior to initial appearance, each court shall establish a bail bond schedule covering all misdemeanors including traffic offenses, either specifically, by type, by potential penalty, or by some other reasonable method of classification. The court also may include requirements for release in consideration of divisions (B) and (C)(5) of this rule. The sole purpose of a bail schedule is to allow for the consideration of release prior to the defendant's initial appearance. . . .

(4) Each court shall review its bail bond schedule bi-annually by January 31 of each even numbered year, to ensure an appropriate bail bond schedule that does not result in the unnecessary detention of defendants due to inability to pay.

(D) Appearance pursuant to summons. When summons has been issued and the defendant has appeared pursuant to the summons, absent good cause, there is a presumption of release on personal recognizance ~~a recognizance bond shall be the preferred type of bail. . . .~~

(H) Review of Release Conditions. A person who has been arrested, either pursuant to a warrant or without a warrant, and who has not been released on bail, shall be brought before a judicial officer for an initial bail hearing no later than the second court day following the arrest. That bail hearing may be combined with the initial appearance provided for in Crim. R. 5(A).

If, at the initial bail hearing before a judicial officer, the defendant was not represented by counsel, and if the defendant has not yet been released on bail, a second bail hearing shall be held on the second court day following the initial bail hearing. An indigent defendant shall be afforded representation by appointed counsel at State's expense at this second bail hearing.

59 Provisions of Texas constitution addressing bail:

Tex. Const. art. I, § 11:

All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law.

Tex. Const. art. I, § 11a:

(a) Any person (1) accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor, (2) accused of a felony less than capital in this State, committed while on bail for a prior felony for which he has been indicted, (3) accused of a felony less than capital in this State involving the use of a deadly weapon after being convicted of a prior felony, or (4) accused of a violent or sexual offense committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony, after a hearing, and upon evidence substantially showing the guilt of the accused of the offense in (1) or (3) above, of the offense committed while on bail in (2) above, or of the offense in (4) above committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony, may be denied bail pending trial, by a district judge in this State, if said order denying bail pending trial is issued within seven calendar days subsequent to the time of incarceration of the accused; provided, however, that if the accused is not accorded a trial upon the accusation under (1) or (3) above, the accusation and indictment used under (2) above, or the accusation or indictment used under (4) above within sixty (60) days from the time of his incarceration upon the accusation, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder, and said appeal shall be given preference by the Court of Criminal Appeals.

(b) In this section:

(1) "Violent offense" means:

- (A) murder;
- (B) aggravated assault, if the accused used or exhibited a deadly weapon during the commission of the assault;
- (C) aggravated kidnapping; or
- (D) aggravated robbery.

(2) “Sexual offense” means:

- (A) aggravated sexual assault;
- (B) sexual assault; or
- (C) indecency with a child.

Tex. Const. art. I, § 11b:

Any person who is accused in this state of a felony or an offense involving family violence, who is released on bail pending trial, and whose bail is subsequently revoked or forfeited for a violation of a condition of release may be denied bail pending trial if a judge or magistrate in this state determines by a preponderance of the evidence at a subsequent hearing that the person violated a condition of release related to the safety of a victim of the alleged offense or to the safety of the community.

60 Reprinted in full, but without footnotes. Annotated version can be found here: [Pages from Doc. 617-1 Consent Decree.pdf](#).

VI. COMPLIANCE WITH CONSTITUTIONAL STANDARDS

30. As of the entry of this Consent Decree, the County, the Sheriff, and the CCCL Judges shall comply with, implement, and enforce the post-arrest procedures set forth in Local Rule 9 and reproduced herein as follows:

RULE 9. BAIL POLICIES

9.1 Pursuant to *ODonnell v. Harris County*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017), and the Fifth Circuit in *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018), the Harris County Criminal Court at Law Judges (“CCCL Judges”) order these policies be applied to all persons arrested for a misdemeanor offense. This rule is designed to vindicate the federal constitutional rights at issue in *ODonnell v. Harris County* arising from the federal Due Process and Equal Protection Clauses. To the extent other provisions of federal or Texas law provide greater protections, nothing in this Rule should be construed to limit those greater protections.

9.2. To the extent Local Rule 9 conflicts with any other local rule, Local Rule 9 controls. Except for situations described in Local Rule 9.4.1–9.4.6, all misdemeanor arrestees will have unsecured bail amounts set initially at no more than \$100 and be promptly released⁶⁸ on a personal bond with or without other non-financial conditions as soon as practicable after arrest. Consistent with Texas law, a judicial officer is not required to sign a personal bond prior to the person’s release.

9.3. Secured money bail must not be required as a condition of pretrial release prior to a bail hearing that meets the requirements of Local Rule 9.12, including an individualized determination of ability to pay and, if the person cannot pay, consideration of alternatives and a finding that detention is necessary to meet a compelling government interest in reasonably assuring public safety or reasonably protecting against flight from prosecution.

9.4. All misdemeanor arrestees must be released on a personal bond or on nonfinancial conditions as soon as practicable after arrest, except those who fall within the following categories, who may be detained for up to 48 hours for an individualized hearing.

9.4.1 Individuals arrested and charged under Penal Code § 25.07 [Violation of Certain Court Orders or Conditions of Bond in a Family Violence, Sexual Assault or Abuse, Indecent Assault, Stalking, or Trafficking Case];

9.4.2 Individuals arrested and charged under Penal Code § 22.01, against a person described in Penal Code § 22.01(b)(2), or individuals arrested and charged under Penal Code § 22.07(c)(1) [Assault against certain people or Terroristic Threat]

9.4.3 Individuals arrested and charged under Penal Code § 49.04 and who the State gives notice may be subject to Penal Code § 49.09(a)[DUI] for a conviction that became final within the past five years;

9.4.4 Individuals arrested and charged with any new offense while on any form of pretrial release;

9.4.5 Individuals arrested on a capias issued after a bond forfeiture or bond revocation; and

9.4.6 Individuals arrested while on any form of community supervision for a Class A or B misdemeanor or a felony offense.

9.5 Any person arrested for the reasons described in Local Rule 9.4.1–9.4.6 may be kept in custody pending an individualized hearing before a judicial officer.⁷² Any judicial officer who makes decisions about conditions of release, including the Harris County Criminal Law Hearing Officers, must have complete discretion to release on a personal bond any misdemeanor arrestee prior to an individualized hearing.

9.6 Secured money bail must not be imposed as a condition of release prior to a bail hearing that meets the requirements of Local Rule 9.12.

9.7 Secured money bail must not be used as a condition of pretrial release at any time in the pretrial period for any misdemeanor arrestee other than those persons arrested for the reasons described in Local Rule 9.4.1–9.4.6.

9.8 Any arrestee who is not promptly released on a personal bond after arrest must receive a bail hearing that meets the requirements of Local Rule 9.12 as soon as practicable but no later than 48 hours after arrest. Nothing in this provision is intended to conflict with any provision of Texas law or local rules.

9.9 If a person falls within a carve-out category set forth in Local Rule 9.4.1– 9.4.6 and cannot be physically brought to an in-person hearing, a bail hearing must be conducted within 48 hours of arrest in absentia, and an in-person bail hearing must be conducted as soon as practicable thereafter. A judicial officer may travel to the physical location of the arrestee to conduct the bail hearing in-person; a bail hearing conducted using audio-visual equipment will satisfy the requirement for an in-person bail hearing.

9.10 At the bail hearing, the judicial officer may consider the full range of available conditions of release, including secured money bail (to the extent consistent with Local Rule 9.7), unsecured money bail, and nonfinancial conditions. Any judicial officer has complete discretion to release any misdemeanor arrestee on a personal bond.

9.11 Arrestees subject to a bail hearing must be represented by the Harris County Public Defender or other court-appointed counsel. Arrestees may retain a private attorney to represent them at the bail hearing.

9.12 Before a judicial officer may require secured money bail as a condition of release at a bail hearing, the following procedures must be provided, and the following findings must be made:

9.12.1 Arrestees must be represented by counsel at bail hearings. Indigent arrestees are entitled to representation by the Public Defender's Office or other court-appointed counsel. At bail hearings under Local Rule 4.2, arrestees must be represented by the Harris County Public Defender as described in Local Rule 4.2.2.2.

9.12.2 In every case, notice must be provided to the arrestee that financial information will be collected through an affidavit, and the County must explain to the arrestee the nature and significance of the financial information to be collected. The language required is as follows:

9.12.3 I am [First Name] from Harris County Pretrial Services. I am here to interview you and report your answers to the Court. What you tell me may be used to make decisions about your release from jail and whether a lawyer will be appointed in your defense. Also, you will need to state the amount of money that you can afford to pay at the time of the hearing that will be held after we talk. This is the amount of money you could pay without suffering any hardship in your ability to meet your basic needs, like food, clothing, shelter, phone, medical care, and transportation for you and any dependents. If you cannot afford to pay any money without hardship, please let me know. I will then also ask you to sign a paper with the financial

information that you provided. Your answers must be truthful under penalty of law. False answers may be used against you. The information will be shared with the Court, the District Attorney, and possibly other agencies. You may refuse to complete the interview, or you may refuse to provide me with the financial information. You will be allowed to talk to an attorney before your bail hearing. You may speak to the attorney before you decide whether to participate in this interview. Do you agree to go forward with the interview and to provide financial information?

9.12.4 The judicial officer must provide adequate notice to every arrestee appearing for a hearing concerning pretrial release and detention of the rights at stake in the hearing and the procedural protections and substantive findings required when determining conditions of pretrial release or detention. The judicial officer may satisfy this requirement by providing a general oral notice to a group of arrested individuals. The judicial officer must provide notice that includes the following in all material respects:

- The purpose of this hearing is to determine the least-restrictive pretrial conditions necessary to serve the government's interest in reasonably assuring public safety and reasonably protecting against flight from prosecution.
- Your federal constitutional rights to pretrial liberty and against wealth-based detention are at issue in this hearing because I will be considering conditions of release and whether pretrial detention is necessary.
- I am required to consider whether alternatives to pretrial detention could serve the government's interests in reasonably assuring public safety and reasonably protecting against flight from prosecution. I cannot order you detained before trial—and I cannot require you to pay an amount of money bail that you cannot afford—if there are any conditions of release that would be adequate to reasonably assure public safety and reasonably protect against flight from prosecution.
- Your lawyer will be able to present or proffer evidence and to argue on your behalf at this hearing about any factors relevant to release, detention, and the availability of alternative conditions.
- Before requiring secured money bail as a condition of release, I will review the financial information that was collected through an affidavit so that I can determine whether you can afford to pay money bail and if so, how much. Before I am permitted to require money bail, I must make a finding on the record as to whether you can afford to pay that amount today.
- You will have an opportunity to challenge the government's arguments and evidence relating to the bail decision. You will also have an opportunity during this hearing to make legal arguments and to present or proffer evidence about any factors relevant to release, detention, and the availability of alternative conditions. This is not an opportunity to try your case—the issue before the court is determining appropriate conditions of pretrial release or whether you must be detained as a last resort pending your trial.
- If I require conditions of release or pretrial detention, I will explain my decision on the record.
- I cannot order that you be detained or require you to pay an unaffordable amount of money bail as a condition of release unless I make a finding by clear and convincing evidence that no other condition or combination of conditions is adequate to reasonably assure public safety or to reasonably protect against flight from prosecution. I must identify and explain the reasons for my decision and the evidence and information I relied on in making that decision on the record, so that you can challenge the decision at a later date. Requiring unaffordable money bail or ordering you detained must be the last resort, and I will order detention after this hearing only if I make a finding that there are no alternatives for reasonably assuring the safety of the community and reasonably protecting against your flight from prosecution.
- After the hearing today, you will have an opportunity to have the bail decision, including any conditions of release, reviewed by another judge within one business day if you remain detained after today's hearing. If you are released, you will also be entitled to a hearing before another judge if you want to challenge conditions of release.

9.12.5 In every case in which a judicial officer is contemplating secured money bail as a condition of release,

the arrestee must be asked, under penalty of perjury, the amount of money she can afford to pay from any lawful source at the time of the hearing.

9.12.6 The arrestee must be given an opportunity to be heard concerning any factors relevant to release, detention, and the availability of alternative conditions. Additionally, the arrestee must have an opportunity at the hearing to present evidence and make argument concerning those issues, and to contest any evidence or argument offered by the government concerning those issues. The arrestee must have access to all of the evidence and information considered at the bail hearing, including any criminal history from the National Crime Information Center (“NCIC”) and Texas Crime Information Center (“TCIC”).

9.12.7 If the judicial officer requires money bail as a condition of release, the money bail order must be accompanied by substantive findings on the record that are reviewable by a higher court. The findings will be deemed “on the record” if they explain the reasons for the decision and the evidence relied on either

- (1) in writing on a form available to the arrestee and her lawyer upon request without a fee, or
- (2) orally and available to the arrestee through transcript or audio recording at no cost to the indigent.

The findings must be that, by clear and convincing evidence:

- (1) the arrestee has the ability at the time of the hearing to pay the amount required, or
- (2) that the arrestee does not have the ability to pay the amount required, but alternative conditions of release were considered, no less-restrictive condition or combination of conditions could reasonably assure the safety of the community or reasonably protect against flight from prosecution, and imposition of unaffordable money bail is necessary to reasonably assure the safety of the community or to reasonably protect against flight from prosecution.

These findings and procedures must be provided if the court imposes an order of pretrial detention, either through an unattainable financial condition or directly through an order of pretrial detention.

9.12.8 An arrestee who is indigent (as defined in Section 17(h)) or who meets any of the following, may not be assessed any fee associated with a personal bond or an unsecured bond, or the cost of a nonfinancial condition of release, including but not limited to, a supervision fee, a fee for electronic monitoring, or the cost of an interlock device:

- Is eligible for appointment of counsel;
- Has been homeless in the past six months;
- Has income at or below 200% of the federal poverty guidelines;
- Is a full-time student;
- Is, or within the past six months has been, homeless;
- Is incarcerated, or residing in a mental health or other treatment program; or
- Is or has dependents who are eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, Social Security Disability Income, public housing, or any other federal or state public assistance program based on financial hardship.

9.12.9 No arrestee may be incarcerated due to inability to pay a fee or cost associated with a condition of release.

9.13 At any bail hearing in the assigned County Criminal Court at Law, the arrestee shall be provided with the same substantive and procedural protections as described in Local Rule 9.12. Specifically, the court is required to afford the arrestee counsel under Local Rule 9.12.1 and to make findings under Local Rule 9.12.7 if the court imposes or continues an order of detention or money bail set at an unaffordable amount. Any arrestee who remains in jail after a Local Rule 4.2 hearing that meets the requirements of Local Rule 9.12 must be provided with a bail hearing the next business day before a CCCL Judge under Local Rule 4.3. The bail hearing before a CCCL Judge must occur before a plea can be accepted by the court. If a person is subject to a hold or has a concurrently pending felony case, the person may waive the bail hearing before a CCCL Judge without being brought into the courtroom. For every other arrestee, waiver of the bail hearing before a CCCL Judge may not be accepted unless the person is present in court,

appears before the CCCL Judge, is informed by the judge of her rights as set forth in Local Rule 9.12.4, and makes a knowing, intelligent, and voluntary waiver of the bail hearing before the CCCL Judge on the record.

9.14 Upon an arrestee's request at any subsequent time prior to trial, the CCCL Judge shall provide a prompt bail hearing on the record to review conditions of bail. Prior to a hearing before a CCCL Judge, if requested by defense counsel, the court must approve and assure timely access to supportive defense services such as investigators, experts, or social workers and to discovery of any information that may be considered by the court at the hearing. If the CCCL Judge imposes or continues conditions of release after the hearing, the CCCL Judge must provide written factual and legal findings that the conditions imposed are the least restrictive necessary to reasonably assure public safety or to reasonably protect against flight from prosecution.

9.15 The Sheriff must not enforce any order requiring secured money bail that was imposed prior to an individualized hearing. All arrestees shall be treated in accordance with Local Rule 9.2 and released on a personal bond, or Local Rule 9.12, and afforded an individualized hearing.

9.16 The Sheriff must not enforce any order requiring secured money bail that is not accompanied by a record showing that the procedures and findings described in Local Rule 9 were provided. By General Order of the CCCL Judges, if an order to pay secured money bail is unaccompanied by the required record, the Sheriff must deliver to the arrestee a General Order Bond ("GOB") issued by one or more of the CCCL Judges and release the arrestee.⁷³

9.17 Any directive or requirement to pay money bail must not be enforced if issued prior to the bail hearing.

9.18 If an arrestee is in the Sheriff's custody 40 hours after arrest and no conditions of release have been determined, the Sheriff must present the arrestee to a judicial officer for a bail hearing. If the person does not appear before a judicial officer within 48 hours of arrest, by general order of the judges, the Sheriff must deliver to the arrestee a "General Order Bond" issued by one or more of the CCCL Judges and release the arrestee.

9.19 The District Clerk's Office will electronically provide to the Sheriff's Office, on an hourly basis, a list of all misdemeanor arrestees who have been in custody 40 hours or more from the recorded arrest date and time, and have not received a bail hearing or a General Order Bond.

61 See Wash. Super. Ct. Crim. R. 3.2, 3.2.1, available at http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=CrR; See also King County rules regarding bail, available at [LCrRLJ 3.2\(o\)](https://kingcounty.gov/courts/district-court/local-rules.aspx). Bail <https://kingcounty.gov/courts/district-court/local-rules.aspx>; Uniform Bail Schedule for lower courts, available at http://www.courts.wa.gov/newsinfo/content/pdf/Bail_Schedule.pdf.

62 Independence from a fixed bond schedule was considered crucial by the Hawaii Supreme Court in *Peleikai v. White*, 75 Haw. 357, 367, 861 P.2d 1205, 1210 (1993) (finding that by rigidly following the Bail Schedule, the trial judge substituted the Bail Schedule for the discretion vested in her by statute and, in doing so, abused her discretion.); See also Lindsey Carlson, *Bail Schedules A Violation of Judicial Discretion?*, CRIM. JUST., Spring 2011, at 12, 16:

And while judges typically bristle at relinquishing their discretion at sentencing, the use of bail schedules represents a willing surrender of such discretion. Again, the presumption of innocence demands a bail hearing with at least the same kind of discretionary deliberation as is exercised at sentencing. And although bail schedules may be informal or only meant to provide presumptive sums, in practice because judges need to move fairly quickly through bail hearings, the amount in the bail schedule typically becomes the automatic sum. For example, in New York city, judges "set bail in amounts that are familiar and entrenched, and not closely tailored to the individual's resources. Bail amounts tend to fall into categories, e.g., \$500, \$1,000, or \$1,500." (Human Rights Watch at 36.) In short, bail schedules do not merely diminish or impede judicial discretion--they most often simply displace it altogether.

63 <https://cjl.sog.unc.edu/files/2020/01/Project-Report-JD-21.pdf>.

64 See fn 43, *supra*.

65 Cases that hold it is constitutional to require a cash-only bond:

See *Trujillo v. State*, 2016 Ark. 49, 8, 483 S.W.3d 801, 806 (2016) ('we hold that the term 'sufficient sureties' refers to a broad

range of methods to accomplish “sufficient sureties,” including cash. Accordingly, our constitution permits cash-only bail...”); *Saunders v. Hornecker*, 2015 WY 34, ¶ 35, 344 P.3d 771, 781 (Wyo. 2015) (“we hold that the term “sufficient sureties” refers to a broad range of methods to accomplish the primary purpose of bail in Wyoming, to secure the appearance of a defendant. Those methods can include cash-only bail, as determined in the discretion of the trial court and subject to the constitutional safeguard that bail not be excessive.”); *State v. Jackson*, 384 S.W.3d 208, 209 (Mo. 2012) (“The constitutional directive that persons be bailable by sufficient sureties does not require that only commercial bondsmen can stand as sureties. Historically, and today, other third parties and a reasonable cash bond required of defendant have been permitted to stand as surety so long as the bail requirement is used to serve the purpose of securing the defendant’s appearance at trial rather than for preventing pretrial release or for other disallowed purposes.”); *State v. Gutierrez*, 140 N.M. 157, 158, 140 P.3d 1106, 1107 (2006) (holding that the cash-only bond imposed by the district court was not unconstitutional.”); *Fullerton v. Cty. Court*, 124 P.3d 866, 870 (Colo. App. 2005) (“Accordingly, we agree with the majority of jurisdictions considering the issue that, in reference to bail, the term “sureties” refers to a broad range of guarantees used for the purpose of securing the appearance of the defendant. Such guarantees include, but are not limited to, bonds secured by cash.”); *Fragoso v. Fell*, 210 Ariz. 427, 434, 111 P.3d 1027, 1034 (Ct. App. 2005) (“According a judicial officer the discretion to impose a cash-only condition of release as one such tool is not only statutorily authorized but also entirely consistent with article II, § 22 of our state constitution.”); *Ex parte Singleton*, 902 So. 2d 132, 134 (Ala. Crim. App. 2004) (“Though we have not specifically addressed the issue presented in this case, we agree with the rationale of the Supreme Court of Iowa when upholding the setting of a cash-only bail against a claim that it violated an identical constitutional provision.”); *State v. Briggs*, 666 N.W.2d 573, 583 (Iowa 2003) (“To conclude the sufficient sureties clause extends an unfettered right to a commercial bail bondsmen contradicts the language of our constitution as well as historical reality.”); *Burton v. Tomlinson*, 19 Or. App. 247, 251–52, 527 P.2d 123, 126 (1974) (“The constitutional provision requires only that ‘[offenses] shall be bailable by sufficient sureties.’ Nowhere does it say that lawful release of a defendant may be accomplished only through the medium of sureties. Were this contention sound, release of a defendant on his own recognizance or by any other means would be constitutionally prohibited—an obvious absurdity.”).

Cases that hold such mandates are not constitutional:

State ex rel. Haynes v. Daugherty, No. M201801394COAR10CV, 2019 WL 4277604, at *14 (Tenn. Ct. App. Sept. 10, 2019), *appeal denied, not for citation* (Feb. 19, 2020) (finding trial court erred in requiring a cash-only appearance bond for past due child support because by doing so it violated Father’s constitutional rights under the Tennessee Constitution and his equal protection and due process rights under the United States Constitution.); *State v. Barton*, 181 Wash. 2d 148, 156, 331 P.3d 50, 53 (2014) (“As a matter of plain language, ‘bailable by sufficient sureties’ means a defendant must have the option to utilize a surety in making bail.”); *State v. Hance*, 2006 VT 97, ¶ 22, 180 Vt. 357, 366, 910 A.2d 874, 882 (2006) (“Our Constitution provides that ‘[a]ll persons shall be bailable by sufficient sureties.’ Vt. Const. ch. II, § 40. To permit imposition of cash-only bail would impermissibly restrict an accused’s ability to negotiate with a surety to avoid pretrial confinement upon a promise of appearance.”); *Smith v. Leis*, 106 Ohio St. 3d 309, 310, 835 N.E.2d 5, 7 (“After due consideration, we hold that cash-only bail is unconstitutional under Section 9, Article I of the Ohio Constitution.”); *State v. Brooks*, 604 N.W.2d 345, 354 (Minn. 2000), *as modified* (Mar. 15, 2000) (finding that the Minnesota Constitution “prohibits a court from setting a monetary bail amount that can be satisfied only by a cash deposit in the full amount of bail set by the court. Therefore, Brooks’ rights under our constitution were violated because his bail order limited him to posting cash bail for the full amount of bail set by the court, thereby restricting his right to post bail by providing alternative forms of sufficient surety.”); *State v. Rodriguez*, 192 Mont. 411, 418–19, 628 P.2d 280, 284 (1981) (setting out in dicta: “A cash bail requirement may also effectively undermine the constitutional guarantee of bail by “sufficient sureties” and the statutory provision of section 46-9-102, MCA, that ‘(a)ll persons shall be bailable before conviction ...’ This may well deprive a person of his liberty before trial and clash with the presumption of innocence, a cornerstone of our judicial system.”); *Lewis Bail Bond Co. v. Gen. Sessions Court of Madison Cty.*, No. C-97-62, 1997 WL 711137, at *5 (Tenn. Ct. App. Nov. 12, 1997) (“we hold that where a judge determines that imposing bail is an appropriate condition of release, the judge’s discretion is limited to setting the amount of the bond in accordance with the factors listed in T.C.A. § 40-11-118. Once the amount of the bond is set, the defendant may exercise his right under the Tennessee Constitution and T.C.A. § 40-11-102 and enlist the services of a professional bail bondsman or other surety to post bail on his behalf.”); *State v. Golden*, 546 So. 2d 501, 503 (La. Ct. App.), *writ denied*, 547 So. 2d 365 (La. 1989) (“We have not found, and the respondent prosecutors have not cited to us, any Louisiana authority indicating that Louisiana state judges and magistrates have the statutory prerogative to limit the security for pre-trial release on bail to a cash deposit.”)—*but see, Ass’n of Louisiana Bail Underwriters v. Johnson*, 615 So. 2d 1345, 1347 (La. Ct. App.), *writ denied*, 617 So. 2d 1184 (La. 1993) (distinguishing *Golden* and holding that “we find no error in the approval by the trial court of a bond/bail schedule and acceptance of a ten per cent cash bond in lieu of surety.”).

66 K.S.A. § 22-2802(4), (5).

67 K.S.A. § 22-2802(5).

68 K.S.A. § 22-2802(1)(a)-(e).

69 K.S.A. § 22-2802(15).

70 K.S.A. § 22-2802(2).

71 K.S.A. § 22-2901(7). This is quoted because it suggests that people charged with all other crimes can post bond prior to that 48-hour first appearance.

72 Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, Aug. 2014, 56. <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf>.

73 *Holland v. Rosen*, 895 F.3d 272, 291 (3d Cir.), *cert. denied*, 139 S. Ct. 440, 202 L. Ed. 2d 319 (2018).

74 K.S.A. § 22-2814.

75 The Task Force has recommended in its Pretrial Justice Report expanding the entities that can provide pretrial services to provide some local options based on local resources.

76 This seems to recognize some period of detention after arrest and before charges are filed.

77 K.S.A. § 22-2815.

78 K.S.A. § 22-2816.

79 VanNostrand & Keebler, *Pretrial Risk Assessment in Federal Court*, Federal Probation. Vol. 72 (2) (2009) https://www.uscourts.gov/sites/default/files/fed_probation_sept_2009_test_2.pdf.

80 K.S.A. § 22-2802(11).

81 K.S.A. § 22-2802(10).

82 A survey done of 117 judges by the Pretrial Justice Task Force revealed that 62% said they had a procedure for reviewing bonds after first appearance if defendant unable to bond out.

83 *State v. Ruebke*, 240 Kan. 493, 498 (1987).

84 We do note that some courts provide a review procedure by court rule, i.e., New Mexico: NM R DIST CT RCRP Rule 5-405, Some do so by statute, i.e., VT ST T. 13 § 7556.

85 K.S.A. § 22-2301.

86 K.S.A. § 22-2202(h).

87 K.S.A. § 22-2202(g).

88 K.S.A. § 22-2301(2). The statute allows, in extreme cases, the judge—when presented with an affidavit regarding the commission of a crime—to order the county attorney to file charges. The judge is then recused from the case going forward and cannot communicate with any judge appointed to hear the case.

89 K.S.A. § 22-2302(a).

90 K.S.A. § 22-2304.

91 K.S.A. § 22-2302(a).

92 K.S.A. § 22-2202(s).

- 93 K.S.A. § 22-2302(a).
- 94 K.S.A. § 22-2304(b).
- 95 K.S.A. § 22-2408(1), (3).
- 96 K.S.A. § 22-2202(o).
- 97 K.S.A. § 22-2408(1).
- 98 K.S.A. § 22-2408(2).
- 99 K.S.A. § 22-2408(4).
- 100 K.S.A. § 22-2408(4).
- 101 K.S.A. § 22-2408(5).
- 102 K.S.A. § 22-2408(5).
- 103 K.S.A. § 22-2408(6).
- 104 K.S.A. § 8-2104(a), (d); K.S.A. § 8-2106(d).
- 105 K.S.A. § 8-2104(b); K.S.A. § 8-2106 (a)(1); K.S.A. § 8-2106(e).
- 106 “A traffic infraction is a violation of any of the statutory provisions listed in subsection (c) of K.S.A. 8-2118” or a seat belt violation. K.S.A. § 21-5102(b); K.S.A. § 8-2116. If a case is not a felony, traffic infraction, or tobacco infraction, it is a misdemeanor. K.S.A. § 21-5102(d); K.S.A. § 22-2116(b).
- 107 K.S.A. § 8-2104(c).
- 108 K.S.A. § 8-2106(a)(2)-(8).
- 109 K.S.A. § 8-2108.
- 110 Reckless driving, driving while suspended, cancelled, or revoked license, failing to comply with lawful order, registered weight violation, no DL or violation of restrictions, spilling load on road, or transporting an open container.
- 111 K.S.A. § 8-2107 (a): all is discretionary.
- 112 But see Section I(e) *supra* for discussion of constitutional issues that come into play when mandating compliance with a fixed crime-based bond schedule.
- 113 K.S.A. § 8-2107(g). See also, K.S.A. § 8-2118c.
- 114 K.S.A. § 8-2107(h).

Appendix C

State Constitutional Provisions

STATE	ORIGINAL BAIL CLAUSE	CURRENT BAIL CLAUSE
KANSAS Kan. Const. Bill of Rights, § 9	“All persons shall be bailable by sufficient sureties, except for capital offenses, where proof is evident or the presumption great....” (1859)	Same
ALABAMA	“All person shall, before conviction, be bailable by sufficient securities, except for capital offenses, when the proof is evident, or the presumption great....” (1819)	“That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great....” (1901)
ALASKA	“In all criminal prosecutions, [t]he accused is entitled ... to be released on bail, except for capital offenses when the proof is evident or the presumption great.” (1959)	Same
ARIZONA	“All persons charged with crime shall be bailable by sufficient sureties except for capital offenses when proof is evident or the presumption great.” (1912)	<p>“A. All persons charged with crime shall be bailable by sufficient sureties, except:</p> <ol style="list-style-type: none"> 1. For capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great. 2. For felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge. 3. For felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge. 4. For serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge. <p>B. The purposes of bail and any conditions of release that are set by a judicial officer include:</p> <ol style="list-style-type: none"> 1. Assuring the appearance of the accused. 2. Protecting against the intimidation of witnesses. 3. Protecting the safety of the victim, any other person or the community.” <p>(2006)</p>

ARKANSAS	<p>“That all prisoners shall be bailable by sufficient sureties, unless in capital offences, where the proof is evident or the presumption great...”</p> <p>(1836)</p>	<p>“All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.”</p> <p>(1874)</p>
CALIFORNIA	<p>“All persons shall be bailable by sufficient sureties: unless for capital offences, when the proof is evident or the presumption great.”</p> <p>(1849)</p>	<p>“Sec. 12. A person shall be released on bail by sufficient sureties, except for:</p> <p>(a) Capital crimes when the facts are evident or the presumption great;</p> <p>(b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person’s release would result in great bodily harm to others; or</p> <p>(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.</p> <p>Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.</p> <p>A person may be released on his or her own recognizance in the court’s discretion.”</p> <p>(1994)</p>

<p>COLORADO</p>	<p>“That all persons shall be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great.”</p> <p>(1876)</p>	<p>“(1) All persons shall be bailable by sufficient sureties pending disposition of charges except:</p> <p>(a) For capital offenses when proof is evident, or presumption is great; or</p> <p>(b) When, after a hearing held within ninety-six hours of arrest and upon reasonable notice, the court finds that proof is evident or presumption is great as to the crime alleged to have been committed and finds that the public would be placed in significant peril if the accused were released on bail and such person is accused in any of the following cases:</p> <p>(I) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on probation or parole resulting from the conviction of a crime of violence;</p> <p>(II) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on bail pending the disposition of a previous crime of violence charge for which probable cause has been found;</p> <p>(III) A crime of violence, as may be defined by the general assembly, alleged to have been committed after two previous felony convictions, or one such previous felony conviction if such conviction was for a crime of violence, upon charges separately brought and tried under the laws of this state or under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States which, if committed in this state, would be a felony; or</p> <p>(c) Deleted by 1994, H.C.R.94-1003, § 1, eff. Jan. 1, 1995.</p> <p>(2) Except in the case of a capital offense, if a person is denied bail under this section, the trial of the person shall be commenced not more than ninety days after the date on which bail is denied. If the trial is not commenced within ninety days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of the bail for the person.</p> <p>(2.5) (a) The court may grant bail after a person is convicted, pending sentencing or appeal, only as provided by statute as enacted by the general assembly; except that no bail is allowed for persons convicted of:</p> <p>(I) Murder;</p> <p>(II) Any felony sexual assault involving the use of a deadly weapon;</p> <p>(III) Any felony sexual assault committed against a child who is under fifteen years of age;</p> <p>(IV) A crime of violence, as defined by statute enacted by the general assembly; or</p> <p>(V) Any felony during the commission of which the person used a firearm.</p> <p>(b) The court shall not set bail that is otherwise allowed pursuant to this subsection (2.5) unless the court finds that:</p> <p>(I) The person is unlikely to flee and does not pose a danger to the safety of any person or the community; and</p> <p>(II) The appeal is not frivolous or is not pursued for the purpose of delay.</p> <p>(3) This section shall take effect January 1, 1995 and shall apply to offenses committed on or after said date.”</p> <p>(1995)</p>
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CONNECTICUT	<p>“All prisoners shall, before conviction, be bailable by sufficient sureties, except for capital offences, where the proof is evident, or the presumption great....”</p> <p>(1818)</p>	<p>“In all criminal prosecutions, the accused shall have a right to ... be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great...”</p> <p>(1996)</p>
DELAWARE	<p>“All prisoners shall be bailable by sufficient sureties, unless for capital offences when the proof is positive, or the presumption great....”</p> <p>(1792)</p>	Same
FLORIDA	<p>“That all persons shall be bailable, by sufficient securities, unless in capital offenses, where the proof is evident or the presumption strong....”</p> <p>(1839)</p>	<p>“Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.”</p> <p>(1982)</p>
GEORGIA	<p>“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison.”</p> <p>(1877)</p>	Same
HAWAII	<p>“Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment.”</p> <p>(1968)</p>	Same
IDAHO	<p>“All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great.”</p> <p>(1890)</p>	Same

ILLINOIS	<p>“That all persons shall be bailable by sufficient sureties, except for capital offences, where the proof is evident or the presumption great....”</p> <p>(1818)</p>	<p>“All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person.”</p> <p>(1986)</p>
INDIANA	<p>“That all persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great....”</p> <p>(1816)</p>	<p>“Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong.”</p> <p>(1851)</p>
IOWA	<p>“All persons shall before conviction, be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great.”</p> <p>(1846)</p>	Same
KENTUCKY	<p>“All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or the presumption great....”</p> <p>(1792)</p>	<p>“All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great.”</p> <p>(1891)</p>
LOUISIANA	<p>“All prisoners shall be bailable by sufficient securities, unless for capital offenses, where the proof is evident or the presumption great....”</p> <p>(1812)</p>	<p>“(A) Excessive bail shall not be required. Before and during a trial, a person shall be bailable by sufficient surety, except when he is charged with a capital offense and the proof is evident and the presumption of guilt is great. After conviction and before sentencing, a person shall be bailable if the maximum sentence which may be imposed is imprisonment for five years or less; and the judge may grant bail if the maximum sentence which may be imposed is imprisonment exceeding five years. After sentencing and until final judgment, a person shall be bailable if the sentence actually imposed is five years or less; and the judge may grant bail if the sentence actually imposed exceeds imprisonment for five years.</p> <p>(B) However, a person charged with a crime of violence as defined by law or with production, manufacture, distribution, or dispensing or possession with intent to produce, manufacture, distribute, or dispense a controlled dangerous substance as defined by the Louisiana Controlled Dangerous Substances Law, and the proof is evident and the presumption of guilt is great, shall not be bailable if, after a contradictory hearing, the judge or magistrate finds by clear and convincing evidence that there is a substantial risk that the person may flee or poses an imminent danger to any other person or the community. «</p> <p>(1998)</p>

MAINE	<p>“All persons, before conviction, shall be bailable except for capital offences, where the proof is evident or the presumption great...”</p> <p>(1819)</p>	<p>“No person before conviction, shall be bailable for any of the crimes which now are or have been denominated capital offenses since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crimes may be.”</p> <p>(1837)</p>
MARYLAND	<p>“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law.”</p> <p>(1867)</p>	<p>Same</p>
MASSACHUSETTS	<p>“No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. “</p> <p>(1780)</p>	<p>“No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.”</p> <p>(1916)</p>

MICHIGAN	<p>“All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great...”</p> <p>(1835)</p>	<p>“All persons shall, before conviction, be bailable by sufficient sureties, except that bail may be denied for the following persons when the proof is evident or the presumption great:</p> <p>(a) A person who, within the 15 years immediately preceding a motion for bail pending the disposition of an indictment for a violent felony or of an arraignment on a warrant charging a violent felony, has been convicted of 2 or more violent felonies under the laws of this state or under substantially similar laws of the United States or another state, or a combination thereof, only if the prior felony convictions arose out of at least 2 separate incidents, events, or transactions.</p> <p>(b) A person who is indicted for, or arraigned on a warrant charging, murder or treason.</p> <p>(c) A person who is indicted for, or arraigned on a warrant charging, criminal sexual conduct in the first degree, armed robbery, or kidnapping with intent to extort money or other valuable thing thereby, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person.</p> <p>(d) A person who is indicted for, or arraigned on a warrant charging, a violent felony which is alleged to have been committed while the person was on bail, pending the disposition of a prior violent felony charge or while the person was on probation or parole as a result of a prior conviction for a violent felony.</p> <p>If a person is denied admission to bail under this section, the trial of the person shall be commenced not more than 90 days after the date on which admission to bail is denied. If the trial is not commenced within 90 days after the date on which admission to bail is denied and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of bail for the person.</p> <p>As used in this section, “violent felony” means a felony, an element of which involves a violent act or threat of a violent act against any other person.”</p> <p>(1979)</p>
MINNESOTA	<p>“All persons before conviction shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.”</p> <p>(1857)</p>	Same

MISSISSIPPI	<p>“That all persons shall, before conviction, be bailable by sufficient securities, except for capital offences, when the proof is evident or presumption great....”</p> <p>(1817)</p>	<p>“(1) Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses (a) when the proof is evident or presumption great; or (b) when the person has previously been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more.</p> <p>(2) If a person charged with committing any offense that is punishable by death, life imprisonment or imprisonment for one (1) year or more in the penitentiary or any other state correctional facility is granted bail and (a) if that person is indicted for a felony committed while on bail; or (b) if the court, upon hearing, finds probable cause that the person has committed a felony while on bail, then the court shall revoke bail and shall order that the person be detained, without further bail, pending trial of the charge for which bail was revoked. For the purposes of this subsection (2) only, the term “felony” means any offense punishable by death, life imprisonment or imprisonment for more than five (5) years under the laws of the jurisdiction in which the crime is committed. In addition, grand larceny shall be considered a felony for the purposes of this subsection.</p> <p>(3) In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a county or circuit court judge may deny bail for such offenses when the proof is evident or the presumption great upon making a determination that the release of the person or persons arrested for such offense would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required.</p> <p>(4) In any case where bail is denied before conviction, the judge shall place in the record his reasons for denying bail. Any person who is charged with an offense punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment and who is denied bail prior to conviction shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court. The provisions of this subsection (4) do not apply to bail revocation orders.”</p> <p>(1995)</p>
MISSOURI	<p>“That all persons shall be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great....”</p> <p>(1820)</p>	<p>“That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.”</p> <p>(1945)</p>
MONTANA	<p>“All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.”</p> <p>(1889)</p>	Same
NEBRASKA	<p>“All persons shall be bailable by sufficient sureties, except for capital offences, where the proof is evident or the presumption great.”</p> <p>(1866)</p>	<p>“All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great.”</p> <p>(1978)</p>

NEVADA	<p>“All persons shall be bailable by sufficient sureties; unless for capital offenses, when the proof is evident, or the presumption great.”</p> <p>(1864)</p>	<p>“All persons shall be bailable by sufficient sureties; unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the presumption great.”</p> <p>(1980)</p>
NEW HAMPSHIRE	<p>“No magistrate, or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”</p> <p>(1792)</p>	Same
NEW JERSEY	<p>“All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or presumption great.”</p> <p>(1844)</p>	<p>“All persons shall, before conviction, be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community or prevent the person from obstructing or attempting to obstruct the criminal justice processes. It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision.”</p> <p>(2017)</p>
NEW MEXICO	<p>“All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.”</p> <p>(1911)</p>	<p>“All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.</p> <p>Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.</p> <p>A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.”</p> <p>(2016)</p>
NEW YORK	<p>“Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.”</p> <p>(1777)</p>	Same

NORTH CAROLINA	<p>“All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great.”</p> <p>(1776)</p>	<p>“Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”</p> <p>(1868)</p>
NORTH DAKOTA	<p>“All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great.”</p> <p>(1889)</p>	Same
OHIO	<p>“That all persons shall be bailable by sufficient sureties, except for capital offences, where the proof is evident or the presumption great....”</p> <p>(1802)</p>	<p>“All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.</p> <p>The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) of the Constitution of the state of Ohio.”</p> <p>(1998)</p>
OKLAHOMA	<p>“All persons shall be bailable by sufficient sureties, except for capital offenses when the proof of guilt is evident, or the presumption thereof is great.”</p> <p>(1907)</p>	<p>“A. All persons shall be bailable by sufficient sureties, except that bail may be denied for:</p> <ol style="list-style-type: none"> 1. capital offenses when the proof of guilt is evident, or the presumption thereof is great; 2. violent offenses; 3. offenses where the maximum sentence may be life imprisonment or life imprisonment without parole; 4. felony offenses where the person charged with the offense has been convicted of two or more felony offenses arising out of different transactions; and 5. controlled dangerous substances offenses where the maximum sentence may be at least ten (10) years imprisonment. <p>On all offenses specified in paragraphs 2 through 5 of this section, the proof of guilt must be evident, or the presumption must be great, and it must be on the grounds that no condition of release would assure the safety of the community or any person.”</p> <p>(1989)</p>

OREGON	<p>“Offences, except murder and treason, shall be bailable by sufficient sureties. Murder or treason, shall not be bailable, when the proof is evident or the presumption strong.”</p> <p>(1857)</p>	Same
PENNSYLVANIA	<p>“All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great.”</p> <p>(1776)</p>	<p>“All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great....”</p> <p>(1998)</p>
RHODE ISLAND	<p>“All persons imprisoned ought to be bailed by sufficient surety, unless for offenses punishable by death or by imprisonment for life, when the proof of guilt is evident or the presumption great.”</p> <p>(1842)</p>	<p>“All persons imprisoned ought to be bailed by sufficient surety, unless for offenses punishable by imprisonment for life, or for offenses involving the use or threat of use of a dangerous weapon by one already convicted of such offense or already convicted of an offense punishable by imprisonment for life, or for offenses involving the unlawful sale, distribution, manufacture, delivery, or possession with intent to manufacture, sell, distribute or deliver any controlled substance or by possession of a controlled substance punishable by imprisonment for ten (10) years or more, when the proof of guilt is evident or the presumption great.”</p> <p>(1988)</p>
SOUTH CAROLINA	<p>“All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great....”</p> <p>(1868)</p>	<p>“All persons shall be, before conviction, bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment, or with violent offenses defined by the General Assembly, giving due weight to the evidence and to the nature and circumstances of the event.”</p> <p>(1998)</p>
SOUTH DAKOTA	<p>“All persons shall be bailable by sufficient sureties, except for capital offenses when proof is evident or presumption great.”</p> <p>(1889)</p>	Same
TENNESSEE	<p>“That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident of the presumption great.”</p> <p>(1796)</p>	<p>“That all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great.”</p> <p>(1870)</p>
TEXAS	<p>“All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great....”</p> <p>(1845)</p>	Same

UTAH	<p>“All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong.”</p> <p>(1895)</p>	<p>“(1) All persons charged with a crime shall be bailable except:</p> <p>(a) persons charged with a capital offense when there is substantial evidence to support the charge; or</p> <p>(b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or</p> <p>(c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.</p> <p>(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law.”</p> <p>(1989)</p>
VERMONT	<p>“All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great.”</p> <p>(1777)</p>	<p>“Excessive bail shall not be exacted for bailable offenses. All persons shall be bailable by sufficient sureties, except as follows:</p> <p>(1) A person accused of an offense punishable by death or life imprisonment may be held without bail when the evidence of guilt is great.</p> <p>(2) A person accused of a felony, an element of which involves an act of violence against another person, may be held without bail when the evidence of guilt is great and the court finds, based upon clear and convincing evidence, that the person’s release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence. A person held without bail prior to trial under this paragraph shall be entitled to review de novo by a single justice of the Supreme Court forthwith.</p> <p>(3) A person awaiting sentence, or sentenced pending appeal, may be held without bail for any offense.</p> <p>A person held without bail prior to trial shall be entitled to review of that determination by a panel of three Supreme Court Justices within seven days after bail is denied.</p> <p>Except in the case of an offense punishable by death or life imprisonment, if a person is held without bail prior to trial, the trial of the person shall be commenced not more than 60 days after bail is denied. If the trial is not commenced within 60 days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set bail for the person.”</p> <p>(1994)</p>
VIRGINIA	<p>“That excessive bill ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;”</p> <p>(1776)</p>	<p>Same</p>

WASHINGTON	<p>“All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great.”</p> <p>(1889)</p>	<p>“All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature.”</p> <p>(2010)</p>
WEST VIRGINIA	<p>“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence. No person shall be transported out of, or forced to leave the state for any offence committed within the same; nor shall any person, in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offence.”</p> <p>(1872)</p>	Same
WISCONSIN	<p>“[A]ll persons shall before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great....”</p> <p>(1848)</p>	<p>“All persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses. Monetary conditions of release may be imposed at or after the initial appearance only upon a finding that there is a reasonable basis to believe that the conditions are necessary to assure appearance in court. The legislature may authorize, by law, courts to revoke a person’s release for a violation of a condition of release.</p> <p>(3) The legislature may by law authorize, but may not require, circuit courts to deny release for a period not to exceed 10 days prior to the hearing required under this subsection to a person who is accused of committing a murder punishable by life imprisonment or a sexual assault punishable by a maximum imprisonment of 20 years, or who is accused of committing or attempting to commit a felony involving serious bodily harm to another or the threat of serious bodily harm to another and who has a previous conviction for committing or attempting to commit a felony involving serious bodily harm to another or the threat of serious bodily harm to another. The legislature may authorize by law, but may not require, circuit courts to continue to deny release to those accused persons for an additional period not to exceed 60 days following the hearing required under this subsection, if there is a requirement that there be a finding by the court based on clear and convincing evidence presented at a hearing that the accused committed the felony and a requirement that there be a finding by the court that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent intimidation of witnesses. Any law enacted under this subsection shall be specific, limited and reasonable. In determining the 10-day and 60-day periods, the court shall omit any period of time found by the court to result from a delay caused by the defendant or a continuance granted which was initiated by the defendant.”</p> <p>(1981)</p>

WYOMING	<p>“All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.”</p> <p>(1889)</p>	Same
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Appendix D

Reference Sheet

for Pretrial Justice Reports¹

State	Recommendations
Alabama ² 2020	Governor Kay Ivey set up a “Study Group on Criminal Justice Policy” in 2019 and the report was released at the end of January 2020. The report had many recommendations, but it does not appear to have any significant reference to pretrial reform. The report did state, “Community corrections programs—the umbrella term for alternative courts {drug courts, veterans courts, etc.} and the pretrial diversion programs administered by district attorneys’ offices and municipal governments—hold enormous potential for the State because they steer low-level offenders into the programs that address underlying factors that contribute to criminal activity—substance abuse, lack of educational attainment, and lack of employment. . . . Our Study Group strongly believes that improvements to these programs are necessary. . . We therefore recommend legislation to require better data collection by government agencies administering these programs.

<p>Alaska³</p> <p>2015</p>	<ul style="list-style-type: none"> ● Expand the use of citations in place of arrest for lower-level nonviolent offenses. ● Create a presumption of citation for misdemeanors and class C felonies, excluding person offenses, domestic violence offenses, violations of release conditions, or offenses for which a warrant or summons has been ordered. ● Allowing law enforcing officials to overcome the presumption of citation if the officer has reasonable grounds to believe the person presents a significant likelihood of flight, presents a significant danger to the victim or the public, or if the officer is unable to verify the person's identification without making an arrest. ● Utilize risk-based release decision making. ● Create an evidence-based pretrial release decision-making grid that strengthens the presumption of release on personal recognizance or unsecured bond for defendants with less serious charges and lower risk scores. (Grid on p. 16.) ● Mandate the DOC to assess all pretrial defendants for risk using a validated pretrial risk assessment tool and make release recommendation to the court based on the grid prior to the defendant's first appearance. All releases on personal recognizance or unsecured bond would be accompanied by release conditions and, when appropriate, varying levels of pretrial supervision. ● Absent compelling circumstances, all defendants should be seen for their first appearance within 24 hours. If a first appearance happens within 24 hours, DOL is not required to be present. The could should notify DOL if an additional probable cause hearing within 48 hours is required. ● Authorize courts to issue unsecured and partially secured performance bonds. ● Authorizing the DOL collections unit to garnish paychecks and Permanent Fund Dividend checks to collect on forfeited unsecured bonds. ● Direct the ACS to eliminate misdemeanor bail schedules following DOC's implementation of the above evidence-based pretrial practices. Thereafter, any defendant arrested by law enforcement would remain detained until they have received a risk assessment and have made their first appearance before a judicial officer. ● Implement meaningful pretrial supervision. ● Direct DOC to provide varying levels of supervision for moderate- and high-risk defendants who are released pretrial. The DOC would also be responsible for standardizing and recommending the use of pretrial diversion, conducting outreach to community programs and tribal courts to develop and expand diversion options, and providing referral services on a voluntary basis for substance abuse and behavioral health treatment services. ● Direct the ACS to issue court date reminders to carinal defendants for each of their hearings, and to coordinate and share information about hearing dates and times with the DOC. ● Focus supervision resources on high-risk defendants. ● Ensure the DOC recommends evidence-based release conditions for each defendant who they have recommended for pretrial release, with more restrictive conditions reserved for higher-risk defendants. ● Entitle defendants to a subsequent bail hearing in cases where the release conditions prevented the defendant's release. At the bail hearing, the court would either revise the conditions or find on the record that there is clear and convincing evidence that no other release conditions can reasonably assure court appearance and public safety. ● Restrict third-party custodian conditions to only those cases in which pretrial supervision provided by the DOC is not available; when no secured money bond is ordered; and when the court finds on the record that there is clear and convincing evidence that no less restrictive release conditions can reasonably assure court appearance and public safety. ● Revise eligibility requirements for third-party custodians to limit disqualification from serving as a third-party custodian if there is a reasonable possibility that the prosecution will call them as a witness.
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<p>Arizona⁴</p> <p>2016</p>	<ul style="list-style-type: none"> ● Use automated tools to determine a defendant's ability to pay. ● Seek legislation to reclassify certain criminal charges to civil violations for first-time offenses. ● Implement English and Spanish Interactive Voice Response (IVR), email, or a text messaging system to remind defendants of court dates, missed payments, and other actions to reduce failures to appear. ● Modify forms to collect cell phone numbers, secondary phone numbers, and email addresses. ● Train staff to verify and update contact information for defendants at every opportunity. ● Provide information to law enforcement agencies regarding the importance of gathering current contact information on the citation form. ● After a defendant fails to appear, notify the defendant that a warrant will be issued unless the defendant comes to court within five days. ● For courts operating pretrial service programs, allow pretrial services five days to re-engage defendants who have missed scheduled court dates and delay the issuance of a failure to appear warrant for those defendants who appear on the rescheduled dates. ● Authorize the court to quash a warrant for failure to appear and reschedule a new court date for a defendant who voluntarily appears in court after a warrant has been issued. ● Consider increasing access to the court (e.g., offering hours at night, on weekends, or extending regular hours, taking the court to people in remote areas, and allowing remote video and telephonic appearances). ● Develop and pilot a system that communicates in English and Spanish (such as video avatars) to provide explanations of options available to defendants who receive tickets or citations. ● Clarify on court informational websites and bond cards that defendants may come to court before the designated court date to resolve a civil traffic case and explain how to reschedule the hearing for those defendants who cannot appear on the scheduled dates. ● Coordinate where possible with the local regional behavioral health authority to assist the court or pretrial services in identifying defendants who have previously been diagnosed as mentally ill. ● Bring together criminal justice and mental health stakeholders in larger jurisdictions to adopt protocols for addressing people with mental health issues who have been brought to court. ● Consider the use of specialty courts and other available resources to address a defendant's treatment and service needs, as well as risk to the community, when processing cases involving persons with mental health needs or other specialized groups. ● Modify Form 6–Release Order and Form 7–Appearance Bond to simplify language and clarify defendants' rights in an easy-to-understand format. ● Eliminate the use of non-traffic criminal bond schedules. ● Amend Rule 7.4, Rules of Criminal Procedure, to require the appointment of counsel if a person remains in jail after the initial appearance. ● Clarify by rule that small bonds (\$5-100) are not required to ensure that the defendant gets credit for time served when defendant is also being held in another case. ● Authorize the court to temporarily release a “hold” from a limited jurisdiction court and order placement directly into a substance abuse treatment program upon recommendation of the probation department. ● Expedite the bond process to facilitate timely release to treatment programs. ● Request amendment of A.R.S. § 13-3961(D) and (E) (Offenses not bailable; purpose; preconviction; exceptions) to authorize the court, on its own motion, to set a hearing to determine whether a defendant should be held without bail.
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<p>Arizona (continued)</p>	<ul style="list-style-type: none"> ● Request amendment of A.R.S. § 13-3961(D) and (E) (Offenses not bailable; purpose; preconviction; exceptions) to authorize the court, on its own motion, to set a hearing to determine whether a defendant should be held without bail. ● Encourage the presence of court-appointed counsel and prosecutors at initial appearance hearings to assist the court in determining appropriate release conditions and to resolve misdemeanor cases. ● Establish information sharing between a superior court that has conducted a pretrial risk assessment and a limited jurisdiction court when the defendant is arrested for charges in multiple courts and a release decision must be made in multiple jurisdictions. ● Request the Arnold Foundation to conduct research on the impact of immigration status on the likelihood of not returning to court if released to ascertain whether it is good public policy to hold these defendants on cash bond. ● Encourage the Arnold Foundation to conduct periodic reviews to revalidate the Public Safety Assessment [PSA] tool as to its effect on minority populations. ● Provide data to judicial officers to show the effectiveness of the risk assessment tool in actual operation. ● Develop an educational plan and conduct mandatory training for all judicial officers. ● Create multi-layer training (court personnel and judicial staff) to include a practical operational curriculum. ● Develop online training modules for future judicial officers. ● Host a one-day kick-off summit inviting all stakeholders (law enforcement, prosecutors, county attorneys, public defenders, city council and county board members, the League of Towns and Cities, criminal justice commissions, legislature, and presiding judges) to educate and inform about recommendations of the task force and provide direction for leadership to initiate the shift to a risk-based system rather than a cash-based release system. ● Train judicial officers on the risk principle and the methodology behind the risk assessment tool. ● Launch a public education campaign to support the adopted recommendations of the task force. ● Provide a comprehensive and targeted educational program for all stakeholders (funding authorities, legislators, criminal justice agencies, media, and members of the public) that addresses the shift to a risk-based system rather than a cash-based release system. ● Request that the Chief Justice issue an administrative order directing the education of all full- and part-time judicial officers about alternatives to financial release conditions. Training and educational components should: ● Inform judges that cash bonds are not favored. Judges should consider the least onerous terms of release of pretrial detainees that will ensure public safety and the defendant's return to court for hearings. ● Train limited jurisdiction court judges to more aggressively allow payment of fines through community service, as permitted by A.R.S. § 13-810. ● Provide focused judicial education on A.R.S. § 11-584(D) and Arizona Rules of Criminal Procedure 6.7(D) about how to determine the amount and method of payment, specifically taking into account the financial resources and the nature of the burden that the payment will impose on the defendant, and making specific findings on the record about the defendant's ability to pay. ● Update bench books and other judicial aides to be consistent.
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California ⁵	<ul style="list-style-type: none"> ● Implement a robust risk-based pretrial assessment and supervision system to replace the current monetary bail system.
October 2017	<ul style="list-style-type: none"> ● Expand the use of risk-based preventive detention. ● Establish pretrial services in every county. ● Use a validated pretrial risk assessment tool. ● Make early release and detention decisions. ● Integrate victim rights into the system. ● Apply pretrial procedures to violations of community supervision ● Provide adequate funding and resources. ● Deliver consistent and comprehensive education. ● Adopt a new framework of legislation and rules of court to implement these recommendations.

<p>Colorado⁶</p> <p>January 2020</p>	<ul style="list-style-type: none"> ● Require a pretrial risk assessment instrument that will assist the court in release decisions for felony, misdemeanor and traffic level offenses that do not qualify for a mandatory summons. ● Criteria for the use of a pretrial risk instrument and data collection for validation and impact of an instrument. <ul style="list-style-type: none"> ○ By December 2020 the Division of Criminal Justice (DCJ) is to compile an inventory of approved risk assessment instruments—any instrument authorized and approved by DCJ must be empirically developed and validated. ○ By January 2021, any risk assessment approved for use must have been evaluated and validated in Colorado to maximize accuracy and to statistically minimize bias of race, ethnicity and gender. ○ Various evaluations will be conducted after implementation of the recommendation. ○ To evaluate the instrument for bias and proper measurement of risk factors, beginning in January 2021, each jurisdiction shall collect all relevant data as requested by DCJ. ● Expand pretrial services statewide and provide state resources for certain assessment and supervision costs with the priority given to assessment costs. ● Expand the use of summons to include mandatory summons and discretionary summons, each with appropriate public safety overrides. ● Eliminate Section 18-8-212 (Violation of bail bond conditions) and establish the crime of violation of bail bond appearance conditions. Establish a contempt process for violation of nonappearance bail bond conditions. Clarify the crime of protection order violation. ● Clarify conditions of release and limitations on the use of conditions. The current language in the bail statutes requires the court to impose the least restrictive alternatives as conditions of bond. It is necessary to clarify this in order to avoid applying certain conditions, especially in the area of monitored sobriety. ● Establish an expedited pretrial release process. Establish, through a locally-determined research-based administrative order, an expedited screening process for persons arrested for an offense committed in that jurisdiction which shall be conducted as soon as practicable upon, but no later than 24 hours after, arrival of a person at the place of detention, allowing for the immediate release of certain persons. If a person does not meet the criteria for release as determined by administrative order, the person shall be held until the initial court appearance if a monetary condition of bond is not posted. ● Division of Criminal Justice of the Department of Public Safety and duties related to the Pretrial Services Fund, pretrial services standards, pretrial risk assessment, and pretrial technical assistance. <ul style="list-style-type: none"> ○ The Division of Criminal Justice (DCJ) of the Department of Public Safety is authorized to administer pretrial funding from the Pretrial Services Fund . . . ○ DCJ is authorized to establish standards for pretrial service programs operated by units of local government or nongovernmental agencies. Such standards must prescribe minimum levels of services based upon national standards and best practices ○ DCJ shall compile an inventory of approved pretrial risk assessment instruments available and authorized for use in Colorado. Any instrument authorized and approved by DCJ must be empirically developed and validated. Any approved risk assessment instrument must be reevaluated for accuracy and for bias as described above at least once every three years. ● Revise the initial bond hearing process and the considerations of monetary conditions of bond. <ul style="list-style-type: none"> ○ For individuals who do not meet the criteria for expedited pretrial release, revise the statutory elements related to the initial bond hearing process, including the considerations of the conditions of monetary bond: <ul style="list-style-type: none"> ▪ Assess persons before the hearing, require the court to consider financial circumstances of persons when setting bond, and presume release on bond with the least restrictive conditions.
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<p>Colorado (continued)</p>	<ul style="list-style-type: none"> ▪ The court shall further presume the release of the defendant without monetary conditions unless the court finds that one or more of the following exist: <ul style="list-style-type: none"> • No reasonable non-monetary conditions will address public safety and flight risk. • Require the filing of felony charges within three days, excluding Saturdays, Sundays and legal holidays, unless good cause is shown or with agreement of the parties. • Require reconsideration of monetary and/or non-monetary conditions of bond in both felony and misdemeanor cases (a second look) when good cause is shown and expand the definition of bonding commissioner. • Create an expedited docket for cases where the defendant is in custody on a monetary bond that he/she has not posted. • Clarify public defender and district attorney involvement in bail hearings. • Comprehensive training for stakeholders. A new section in statute must be created that requires training on pretrial practices for all relevant stakeholders, which must include judicial officers, district attorneys, public defenders, and alternative defense counsel. • Establish an expedited appeal process and a requirement for the appellate court to address constitutional issues raised in the appeal. The current appeal process is cumbersome and does not provide adequate review of bond decisions by a higher court. Further, the appeals court is not required to legally address the legal issues raised in any bail appeal. • Create a telejustice program fund. It is essential for jurisdictions to use the best technology available to conduct bail hearing timely and efficiently. • Increase the representation of the community on the pretrial community advisory boards.
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Connecticut ⁷	<ul style="list-style-type: none"> • Legislation should be enacted requiring that the court make a finding on the record before imposing secured financial conditions in misdemeanor cases.
February 2017	<ul style="list-style-type: none"> • The bail review period should be shortened and modified for certain individuals who remain detained after the imposition of secured financial conditions. • Legislation should be enacted permitting a defendant to deposit 10% of the bond amount with the court whenever a surety bond of \$10,000 or less is imposed. • Judicial Branch bail staff should have adequate opportunity to review and make release decisions following every warrantless custodial arrest. The Commission recommends that the legislature increase access to bail commissioners during booking to allow for pretrial screening and risk-based release decision making shortly after each warrantless arrest. • The Commission should continue to evaluate the effectiveness and fairness of Connecticut's pretrial justice system. • Lawyers, judges, and other stakeholders should receive regular training on current best practices in the area of pretrial release and detention decision making. • The Division of Criminal Justice should have adequate support and opportunity to establish screening and intake units. The Division of Public Defender Services should have adequate attorney, investigator, and social work staff and resources to investigate defendant's individual circumstances for purposes of making comprehensive bail and diversion arguments at arraignment. In addition, the Judicial Branch should have the personnel and resources to accommodate implementation of this recommendation. • The Commission should continue to investigate the feasibility of a carefully limited preventive detention system. The Commission recommends that it continue to evaluate the feasibility of creating a carefully limited preventive detention model to keep the most dangerous defendants in jail. In order to ensure that the most dangerous defendants stay in jail during their pretrial process, it may eventually require a constitutional amendment to substitute preventive detention for the current practice of imposing high-dollar bonds on defendants.

<p>Georgia⁸</p> <p>February 2018</p>	<ul style="list-style-type: none"> ● Make explicit the requirement to consider the financial circumstances of a defendant in setting bail. ● Provide for an expedited financial ability-to-pay determination for purposes of bail only. ● Increase the use of citations issued by police officers. State, magistrate, probate, and municipal courts should have the same citation authority. ● Create statutory authorization for a single Uniform Misdemeanor Complaint & Summons Form through the Uniform Rule process, with limited conditions to be authorized as conditions of release. ● Explore permitting release on an initial non-monetary bail for individuals whose offenses do not authorize jail time as a sentence. ● Provide local courts with the option to authorize unsecured bonds on bail schedules for other misdemeanors. ● Establish a committee or body to study the use of statutorily authorized alternatives to monetary bond. ● Allow for the setting of bond by any judge of a court of inquiry or sitting thereby by designation. ● Allow for the release of individuals with bail-restricted offenses by any judge of a court of inquiry or sitting thereby by designation. ● Mandate the release on the least restrictive conditions for misdemeanors. ● Eliminate a bail schedule for family violence offenses. ● Develop a statewide judicial inquiry system. ● Establish a uniform definition of “failure to appear” and a specific procedure for notation and correction in criminal histories. ● Promote greater use of court appearance notifications through the use of electronic reminders and plain language notices. ● The Council recommends requesting that court-approved notices for appearances and jury service be exempted from the “opt in” requirement for text messages, like the exemption granted for medical appointments. ● Update Uniform Superior Court Rules on pretrial release to allow for additional options to be utilized at the discretion of local courts. ● Establish a statewide repository of bond schedules. ● Institute a system of data collection and reporting to the Judicial Council of Georgia to determine the effectiveness of pretrial detention practices. ● Develop a bench card for judges that outlines alternatives to monetary bail. ● Encourage the use of best practices for pretrial release. ● Promote judicial education on adopted reforms and national research on pretrial incarceration effects.
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Hawaii ⁹	<ul style="list-style-type: none"> ● Reinforce that law enforcement officers have discretion to issue citations, in lieu of arrest, for low level offenses and broaden discretion to include non-violent Class C felonies.
December 2018	<ul style="list-style-type: none"> ● Expand diversion initiatives to prevent the arrest of low-risk defendants. ● Provide adequate funding, resources and access to the Department of Public Safety, Intake Service Center. ● Expand attorney access to defendants to protect defendant's right to counsel. ● Ensure a meaningful opportunity to address bail at the defendant's initial court appearance. ● Where bail reports are received after the defendant's initial appearance, courts should automatically address pretrial detention or release. ● Establish a court hearing reminder system for all pretrial defendants released from custody. ● Implement and expand alternatives to pretrial detention. ● Regularly review the jail population to identify pretrial defendants who may be appropriate for pretrial release or supervision. ● Conduct risk-assessments and prepare bail reports within two (2) working days of the defendant's admission to a county correctional center. ● Inquire and report on the defendant's financial circumstances. ● Evaluate the defendant's risk of violence. ● Integrate victim rights by considering a victim's concerns when making pretrial release recommendations. ● Include the fully executed pretrial risk assessment as part of the bail report. ● Periodically review and further validate the risk-assessment tool and publicly report any findings. ● Provide consistent and comprehensive judicial education. ● Monetary bail must be set in reasonable amounts, on a case-by-case basis, considering the defendant's financial circumstances. ● Permit monetary bail to be posted with the police or county correctional center at any time. ● Require prompt bail hearings. ● Eliminate the use of money bail for low level, non-violent misdemeanor offenses. ● Create rebuttable presumptions regarding both release and detention. ● Require release under the least restrictive conditions to assure the defendant's appearance and protection of the public. ● Create a permanently funded Criminal Justice Institute, a research institute dedicated to examining all aspects of the criminal justice system. ● A centralized statewide criminal pretrial justice data reporting and collection system should be created.

<p>Indiana¹²</p> <p>December 2019</p>	<ul style="list-style-type: none"> ● To enhance state and local collaboration, the General Assembly should enact a legislative proposal from the Justice Reinvestment Advisory Council, which is supported by the Indiana Evidence Based Decision Making Policy Team, to formally incorporate the Indiana Evidence Based Decision Making Policy Team and its accompanying workgroups into the Justice Reinvestment Advisory Council structure. ● All sheriffs' offices should be required to provide clearly defined, specific, realtime data relevant to the jail population. Real-time jail data should be communicated via interfaces with the Odyssey Court Case Management System, the Indiana Prosecutor Case Management System, the Public Defender Information System, the Supervised Release System used by community supervision agencies, and the Department of Correction. ● The Justice Reinvestment Advisory Council should develop a multi-year strategic plan for evaluating Indiana's pretrial reform efforts and measuring local and statewide pretrial outcomes. ● Provide resources to support county-level assessments of current practices and behavioral health resources at each stage of the pretrial process, including citation and arrest procedures, bail and release decisions, initial hearing procedures, pretrial supervision, responses to pretrial misconduct, data collection and management practices, criminal case processing practices, jail population management practices, and other local policies. ● Provide financial resources to support state and county-level training and technical assistance in the following areas: <ul style="list-style-type: none"> ○ Forming a collaborative policy team ○ Providing training to local criminal justice system on legal and evidence based pretrial practices ○ Conducting a local pretrial system assessment ○ Developing evidence based pretrial policies and procedures ○ Implementing consistent data collection procedures • Conducting on-going review and evaluation of pretrial outcomes ● Provide financial resources to support the Indiana Office of Court Services' Pretrial Services Program certification process. ● Indiana counties should utilize the results of an evidence-based risk assessment, if available, and other relevant information to determine whether an arrestee presents a substantial risk of flight, danger to themselves, or danger to the public. ● The Justice Reinvestment Advisory Council should be directed to study Indiana's legal framework relative to pretrial preventive detention. ● The Indiana General Assembly should amend Ind. Code 35-33-8-3.3 to permit pretrial supervision fees to be used by court operated pretrial service agencies and community corrections agencies, in addition to probation departments. ● Increase financial resources to support local pretrial services. ● Increase financial resources to support defense counsel and deputy prosecutor appearance at initial hearings. ● Increase financial resources to support defense counsel representation for indigent defendants in misdemeanor cases.
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Maine ¹³	<p>[The Task Force delivered its first report to the Maine Legislature in February 2016, but the Task Force was re-established in February 2019 because the pretrial detention rates remained high. The recommendations from the 2016 report are in the appendix of the report cited here.]</p> <ul style="list-style-type: none"> • The State should fully support and fund robust data development and collection, including the release of data to the public, the collection of data related to arrests, bail conditions, bail amounts (if applicable), and violations disaggregated by suspect classification (at least race and gender), jail data, and pretrial length of stay. This program should be established and fully supported (legislatively, funding and staffing). • Maine should encourage the use of summons, instead of arrest, for all class D and E offenses, except for a) crimes that threaten or feature threats or actual physical violence against the person, b) crimes against family or household members, c) sexual assaults, d) sexual exploitation of minors, e) kidnapping and/or criminal restraint, f) OUI, g) PFA/PH violations, h) VCRs on PA/PH violations, or i) other similar crimes that are a threat to public safety. • Maine should fully fund the electronic court notification program, including the hardware, software, and personnel necessary to establish and run the program. The program would provide automated text notification to all defendants for upcoming court dates. • Maine should establish and fully fund “safe place” diversion programs (available for both pre- and post-booking), at free standing locations with evidence-based standards and processes. • Maine should mandate and fund regular racial justice training for law enforcement, bail commissioners, judges, prosecutors, pretrial services, corrections officers, probation officers and defense attorneys. • Maine should require that incarcerated individuals receive their court appointed counsel within 48 hours of first appearance and that defense counsel should receive notification of the appointment within the same time frame. • There should be a statewide expansion of the available of GPS monitoring for medium- and high-risk domestic violence preparators in all counties. Funding for costs for indigent defendants and victims should be covered by the state. • The State of Maine should ensure the availability of standardized, evidence-based, robust pretrial services in all 16 counties in Maine. • The Maine Judicial branch should add a fifth Unified criminal Docket event for review of bail two weeks after initial appearance for those incarcerated individuals not granted personal recognizance or unsecured bail at the first bail hearing. • Maine should adopt a universal screening process so all detainees can be assessed for other criminal justice release plans, or interventions, or alternative opportunities (pretrial, drug court, mental health courts, substance use disorder treatment, domestic violence courts, batterers intervention programs, Restorative Justice programs community services in lieu of fines, etc.). • The State should create and fully fund statewide Criminal Justice Coordinating Council (CJCC) beyond the grant funding application review that is currently being done by the volunteer Justice Assistance Council. The CJCC should include all parties in the criminal justice system and public health cohorts. • Maine should eliminate all \$60 bail commissioner fees on personal recognizance, unsecured or in-custody cash bail bonds, and have the Court complete the bond paperwork for all in-custody arraignments. • Maine should eliminate pre-conviction bail conditions for random search and testing for drugs or alcohol, except for persons enrolled in specialty courts or review dockets and persons on deferred dispositions.
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Maine (continued)	<ul style="list-style-type: none"> ● Maine should reinforce existing legislation that requires counties utilize the 30% Community Corrections Alternatives funding for release, diversion, and community-based corrections only. ● Maine should prohibit judges from subsequently setting cash bail if a person shows up for court after having been summoned to appear. ● Maine should decriminalize low-level driving offenses (Failing to register a car, driving on an out-of-state license after living here for more than 90 days, operating a motor vehicle without proof of insurance, attaching false plates, etc.) and certain Title 12 hunting and fishing crimes. ● Maine should eliminate warrantless arrest for violations of conditions of release with exceptions for certain offenses that involve crimes against a family or household members, sexual assaults or OUI. ● Maine should fully fund regular and active judicial education and training on bail, release and detention decision-making, and the most recent and evidence-based research. The Legislature should ensure appropriate funding for backup judicial coverage so that all active full-time judges may attend. ● Maine should fully fund regular bail commissioner, Justice of the Peace, prosecutor and defense counsel education and training on bail., release and detention decision-making, and the most recent and evidence-based research. The curriculum should be developed by a multi-disciplinary committee that is also racially and ethnically diverse. ● Maine should decriminalize the offense of drinking in public. ● Maine should draft and adopt a statewide standardized intake form for the jails that contains sufficient information for a ail commissioner to make a fully informed bail decision. ● Maine should establish a requirement that court appointed counsel must meet with their clients within seven days of arraignment or first appearance and file a compliance report with the Maine Commission on Indigent Legal Services. ● Maine should require that prosecutors initially screening criminal cases be experienced prosecutors with fully-funded, appropriate, and regular training so that charging, bail requests, and plea offers are appropriate for the circumstances. ● The State should reform the drug laws as they related to drug amounts and personal use. ● Maine should eliminate cash bail for Class D and E crimes with exceptions for crimes against family or household members, sex offenses, violations of Protections from Abuse or Protection from Harassment matters, or VCR charges for domestic violence or sexual assault crimes. This proposal assumes that the person charged would be brought to jail or police station for bail processing. (This recommendation had a tie vote by the full task force.)
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Massachusetts ¹⁴	<ul style="list-style-type: none"> • The Commission does not recommend the use of risk assessment tools at this time.
December 2019	<ul style="list-style-type: none"> • The Commission does not recommend the elimination of cash bail or substantially altering conditions of release at this time. The SJC and the Legislature recently put procedures in place to account for the indigency of the defendant without eliminating cash bail. • The Commission ... strongly recommends the continued tracking of how the demographics of a defendant affect the bail determination. • The Commission also recommends that the court, probation, District Attorneys, and police departments continue to implement anti-racism and implicit bias training. • The Commission recommends that future data collected be further separated by race and ethnicity and that alternative methods be explored to gather data on gender identity and sexual orientation to evaluate disparate impact. • The Commission recommends that the Legislature further study or form a commission to address issues surrounding [Bail Commissioners], with input from the State Bail Administrator, Trial Court clerk magistrates, and individuals impacted by the procedures for posting bail. • Accessible guidelines on the procedures for bail should be available to the public at the courts and criminal justice agencies • Training on [<i>Brangan v. Commonwealth</i>, 477 Mass. 691 (2017)] and the Criminal Justice Reform Act (CJRA) should be continued and expanded to other agencies and entities involved in the bail process. • The practice of setting and processing bail outside of the courtroom requires further study. • The Commission recommends collection of data by more entities and developing more detail into sub-groups for a more accurate assessment of the impact of bail on different communities. • The Commission recommends the use of alternative tools to remind defendants of upcoming court dates. • Improve record-keeping practices and information sharing on defaults. • The policies and procedures of bail in Massachusetts be evaluated further in the future once impact of new legislation is evaluated.

Michigan ¹⁵ January 2020	<ul style="list-style-type: none"> ● Stop suspending and revoking licenses for actions unrelated to safe driving. ● Reclassify most traffic offenses and some other minor misdemeanors as civil rather than criminal infractions. ● Expand officer discretion to use appearance tickets as an alternative to arrest and jail. ● Reduce the use of arrest warrants to enforce court appearance and payments and establish a statewide initiative to resolve new warrants and recall very old ones. ● Provide crisis response training for law enforcement and incentivize programs and partnerships between law enforcement and treatment providers to divert people with behavioral health needs from the justice system pre- and post-arrest. ● Release people jailed on certain charges pre-arraignment and guarantee appearance before a judicial officer within 24-48 hours for anyone still detained. ● Strengthen the presumption of release on personal recognizance and set higher thresholds for imposing non-financial and financial conditions. ● Provide a detention hearing for all defendants still detained 48 hours after arraignment. ● Require defendants to be tried within 18 months of arrest and preserve speedy trial rights unless waived by the defendant. ● Repeal the law authorizing sheriffs to bill people for their own incarceration. ● Invest significant resources in victim services and strengthen protection order practices. ● Standardize criminal justice data collection and reporting across the state.
New Jersey ¹⁶ March 2014	<ul style="list-style-type: none"> ● Enact statutory change from our present “resource-based” [money bail] system. In its place, we recommend a system that employs an objective, “risk-based” method of analysis to assess a defendant’s risk of failure to appear and danger to the community. A risk-based instrument would consider objective factors such as current charge, prior arrests and convictions, history of failure to appear and substance abuse, amount of time at current residence, and employment status. It would aid judges as they craft conditions of release-- like electronic monitoring, house arrest, and reporting -- to address the risk level each defendant presents. ● Establish a system of supervised pretrial release with pretrial services officers who will monitor defendants and track their compliance with nonmonetary conditions of release. The system must include an effective way to enforce penalties for noncompliance with those conditions. ● The legislature provide--through a constitutional amendment--for preventive detention of offenders who cannot safely be released into the community or pose a serious risk of flight. ● The Legislature enact a speedy trial act that sets forth time frames in which defendants must be indicted and brought to trial.

<p>New York¹⁷</p> <p>February 2019</p>	<ul style="list-style-type: none"> ● Rebuttable presumption of release: The Task Force recommends there be a presumption that defendants facing misdemeanor and certain non-violent felonies be released without imposing any bail, either on their own recognizance or with the least restrict non-monetary conditions necessary to ensure their appearance in court. <ul style="list-style-type: none"> ○ Task Force recommends the presumption of release not apply to defendants who face a life sentence of imprisonment or who are charged with a non-violent Class B felony carrying a mandatory state prison term (excluding Class B drug offenses), nor would it apply if the defendant is charged with conspiracy to commit one of these offenses. ○ The presumption may be rebutted if the court, in considering the factors set forth in CPL § 510.30, determines that there is a significant risk the defendant will not return to court. In such a case, the court must use the factors set forth in CPL § 510.30 to set the least restrictive conditions necessary to ensure the defendant’s future attendance in court. In addition, the presumption may be rebutted if the court determines that the defendant currently poses a credible threat to the physical safety of an identifiable person or group of persons (e.g., in domestic violence cases). In any case where the court determines that the presumption has been rebutted, it must explain its rationale on the record. ● Factors to consider in all bail determinations: In making any bail determination, regardless of whether the relevant offense falls within the scope of the presumption outlined above, the Task Force recommends that the court weigh the factors set forth in CPL § 510.30, and examine whether the defendant’s release on recognizance is reasonable. Moreover, even when such release is deemed not reasonable, the court should set the least restrictive conditions necessary to ensure that defendant’s future attendance in court as required. ● Task Force recommends the State improve its review and reconsideration process of any bail set in local criminal courts. ● Task Force recommends the State augment training and education, including for the court. ● Task Force recommends the State expand the use of pretrial services, including for supervised release (and ensure proper State-wide funding for the same). ● Task Force recommends the State expand data collection and reporting (and ensure proper State-wide funding for the same). ● Task Force recommends the State further study the use of risk=assessment tools and use certain best practices if such tools are implemented. ● Task Force recommends the State further study the use of “\$1 bail” and how to mitigate any of its intended harms.
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<p>North Carolina¹⁸</p> <p>NC Summit Bail Reform Proposals March 2019</p>	<ul style="list-style-type: none"> • Adopt a carefully limited constitutional preventative detention procedure for the most dangerous defendants who cannot safely be released pretrial. • Revise local policies to honor the existing statutory preference for nonfinancial conditions of release. • Eliminate wealth-based detentions by requiring ability to pay determinations before imposition of financial conditions. • Reinvest money spent on unnecessary pretrial incarceration in appropriate pretrial supervision and services. • Create model local bail policies. • State funding for pretrial programs statewide, with no fees charged to defendants. • Allow defendants to make a deposit with the court in an amount similar to that currently paid to a commercial bondsman. • Early involvement of counsel in bail proceedings. • Funding for defense investigators prior to the first appearance. • Robust ability to pay determinations. • Allow defense counsel to calendar bond hearings. • Increased mental health and substance use programs. • Eliminate commercial bail bonds and/or financial conditions. • Take more time at the first appearance to determine appropriate conditions. • Require judicial officials to record reasons for imposing secured bonds.
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<p>North Carolina¹⁹</p> <p>March 2017</p>	<ul style="list-style-type: none"> ● Implement recommended case management reforms, including, among other things, adopting or modifying time standards and performance measures, establishing and evaluating pilot projects, and developing case flow management templates. ● Conduct a pilot project to implement and assess more broadly in North Carolina [than just the one county that uses one at the time of the report] an empirically derived pretrial risk assessment tool and develop an evidence-based decision matrix to help judicial officials best match pretrial conditions to empirically assessed pretrial risk. ● The implementation of risk management strategies aimed at matching risk levels with the most appropriate level of support or supervision. Put another way: any conditions set on a defendant's pretrial release should be related to the risk identified for that individual defendant. ● A constitutionally valid preventative detention procedure to ensure that wealthy defendants who present an unacceptable risk cannot secure release simply by paying a money bond. ● Encouraging use of criminal process that does not require arrest for low-risk defendants. ● Early involvement by the prosecutor and defense counsel in the setting of conditions of pretrial release. ● Procedures for timely review, in every case, by a judge of a magistrate's pretrial release determination for in-custody defendants. ● Evaluation of a variety of conditions of pretrial release (including but not limited to: secured bonds, unsecured bonds, pretrial services, electronic monitoring, and court date reminder systems) for defendants based on their assessed risk. ● Training for all Pilot Project participants. ● Robust, uniform empirical evaluation of all components of the Pilot Project that takes into missing???
<p>Ohio²⁰</p> <p>Ohio Supreme Court Task Force</p> <p>July 2019</p>	<ul style="list-style-type: none"> ● Require a validated risk assessment tool be available to the judge in every municipal, county, and common pleas court when setting bond or conditions of bond. ● Ohio's Superintendence Rule 5, Local Rules, should be amended to require counties with more than one municipal or county court to adopt a uniform bond schedule to be used by each court in the county. ● The Task Force recommends the Supreme Court of Ohio adopt the amendments to Crim.R. 46 as proposed by the Commission on the Rules of Practice and Procedure. ● Crim.R. 44 should be amended to require the presence of counsel for the defendant at the initial appearance for any offense carrying the potential penalty of confinement, unless the defendant is being released on an unsecured financial condition or on personal recognizance. The rule shall not impede or delay the judge's ability to release a defendant on his or her own recognizance or an unsecured financial condition. ● Pretrial services in Ohio courts should be tailored to offer appropriate supervision and services that correspond to the level of a defendant's risk/needs. ● Courts should leverage technology solutions, such as text/email reminders and remote video conferencing, to implement low-cost improvements to pretrial services in Ohio courts. ● Education and training should be offered and encouraged for court personnel, including judges, clerks of court, prosecutors, defense counsel, and other stakeholders critical to the pretrial process. ● Implement a statewide, uniform data collection system to ensure a fair, effective, and fiscally efficient pretrial process.

<p>Oklahoma²¹</p> <p>January 2020</p>	<ul style="list-style-type: none"> ● Implement policies and procedures to facilitate the responsible release of accused individuals from jail within 48 hours. ● Alternatives to monetary bail be researched, evaluated and, for those solutions determined to be cost-effective, implemented. ● Real-time tracking technology suitable for this purpose be developed and deployed as an alternative to bail for accused individuals lacking the necessary monetary resources to post bail or bond out of jail.
<p>Texas²²</p> <p>October 2016 (update in 2018, post-<i>Harris County</i> issued the same recommendations)</p>	<ul style="list-style-type: none"> ● The Legislature should require defendants arrested for jailable misdemeanors and felonies to be assessed using a validated pretrial risk assessment prior to appearance before a magistrate under Article 15.17, Code of Criminal Procedure. ● The Legislature should amend the Texas Constitution bail provision and related bail statutes to provide for a presumption of pretrial release through personal bond, leaving discretion with judges to utilize all existing forms of bail. ● The Legislature should amend the Texas Constitution and enact related statutes to provide that defendants posing a high flight risk and/or high risk to community safety may be held in jail without bail pending trial after certain findings are made by a magistrate and a detention hearing is held. ● The Legislature should provide funding to ensure that pretrial supervision is available to defendants released on a pretrial release bond so that those defendants are adequately supervised. ● The Legislature should provide funding to ensure that magistrates making pretrial release decisions are adequately trained on evidence-based pretrial decision-making and appropriate supervision levels. ● The Legislature should ensure that data on pretrial release decisions is collected and maintained for further review. ● The Legislature should expressly authorize the Court of Criminal Appeals to adopt any necessary rules to implement the provisions enacted by the Legislature pursuant to these recommendations. ● The Legislature should provide for a sufficient transition period to implement the provisions of these recommendations.

<p>Utah²³</p> <p>November 2015</p>	<ul style="list-style-type: none"> ● Persons arrested for or charged with crimes are presumed innocent. There should be a presumption in favor of pretrial release, free from financial conditions. ● Individuals arrested for or charged with minor offenses should not be held in custody pending the resolution of their cases. <ul style="list-style-type: none"> ○ For example, class B and C misdemeanors, other than DUI, domestic violence, and offenses involving a continued breach of the peace, should be initiated by issuance of a citation and release on recognizance with reporting instructions. ○ When these types of charges are filed by Information, service should be by summons, rather than a warrant. ● Uniform and consistent practices for making pretrial release and supervision decisions should be promulgated, and judges throughout the state should review those decisions as the case progresses. <ul style="list-style-type: none"> ○ The recommendations of the Board of District Court Judges regarding pretrial release and bail practices should be promptly implemented. ● Each person booked into jail should receive a pretrial risk assessment, using a validated instrument, and current assessment results should be available at each stage where a pretrial release and supervision decision is made. <ul style="list-style-type: none"> ○ Judges should evaluate pretrial release and supervision, taking into account the assessment and all other relevant factors. ○ Individuals who present a low pretrial risk should be released on their own recognizance without any conditions other than appearance in court. ○ Individuals who present a moderate pretrial risk, or for whom conditions to release are necessary, should be released with the least restrictive conditions necessary to meet the pretrial risk presented. ○ For individuals who present a high pretrial risk, the court should determine whether the offender can be held without monetary bail. If so, the court should order no bail and revisit that decision as appropriate. If not, under current law, the court must set monetary bail and should order the least restrictive conditions necessary to meet the pretrial risk presented. ● Pretrial supervision practices and procedures, that are appropriate to the size and needs of the community involved, should be developed and implemented. <ul style="list-style-type: none"> ○ Because release conditions will be imposed, and alternatives to jail detention ordered, a mechanism to monitor and enforce them should be implemented. ○ The court or local governments should consider an automated system that uses phone calls or other technology to remind defendants of upcoming court dates. ● Pretrial release is an individualized decision. Judges should not set monetary bail based solely on the level of offense charged. <ul style="list-style-type: none"> ○ The Uniform Fine and Bail Schedule should not be used to set monetary bail. Rather, the schedule should be used only to determine the amount of fines a defendant should remit to avoid the need for a court appearance in non-mandatory appearance cases, e.g. traffic. ● Prosecutors and defense counsel should provide more and better information at pretrial release or bail hearings to help judges make informed, individualized evaluations of the risk of pretrial release. ● The laws and practices governing monetary bail forfeiture should be improved and updated so that when monetary bail is used, the incentives it is designed to create can be furthered. ● The Council should create a standing committee on Pretrial Release and Supervision Practices that includes representatives of all stakeholders to stay abreast of current practices in this area, to develop policies or recommendations on pretrial release and supervision practices, to assist in training and data collection, and to interface with other stakeholders. ● Uniform, statewide data collection and retention systems should be established, improved, or modified.
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<p>Utah (continued)</p>	<ul style="list-style-type: none"> ○ Accurate risk assessments require correct and easily accessible data. Existing data systems are inadequate. They should be improved to permit these tools to operate effectively. ○ All stakeholders should collect consistent data on pretrial release and supervision to facilitate a regular and objective appraisal of the effectiveness of pretrial release and supervision practices. ○ The committee on pretrial release and supervision practices should help determine what data should be collected, how to collect it, and how best to study the efficacy of release and supervision practices. <ul style="list-style-type: none"> ● Judges, lawyers, and other stakeholders should receive regular training on current best practices in the area of pretrial release and supervision practices. ● The public in general and the media in particular should be educated about pretrial release and supervision practices issues.
<p>Virginia²⁴ 2018</p>	<ul style="list-style-type: none"> ● Amend statutes to create a new charge of contempt of court specifically for failure to appear. ● Request that Crime Commission staff convene stakeholders to develop a plan for statewide data systems integration and case tracking across the criminal justice system and any other related systems. ● Request that the Office of the Executive Secretary of the Supreme Court of Virginia (OES) be included as part of Recommendations 2 in order to determine a method for tracking the number of criminal defendants statewide who are found to be indigent. ● Amend statute to require magistrates to complete the existing <i>Checklist for Bail Determinations</i> and transmit it to the court. ● Amend statute to require the basis of an arrest to be stated by a surety when requesting a <i>capias</i>. ● Amend statute to increase the penalty for carnal knowledge of a defendant by a bail bond company owner or agent from a class 1 misdemeanor to a Class 6 felony. ● Request Crime Commission staff to continue to examine the overall pre-trial process and to convene focus groups to address issues of uniformity within that process, including: first appearances, bond hearings, timely sharing of information, conditions of supervision and fees, and monitoring of pre-trial jail populations.

<p>Washington²⁵</p> <p>December 2010</p>	<ul style="list-style-type: none"> ● Provide the Department of Corrections risk assessment tool to judges statewide during the pretrial process. Require the Washington State Center for Court Research to research, evaluate, and monitor the validity of the tool on an ongoing basis, every two to four years, to track the tool's effectiveness. Allocate \$200,000 in the budget for this requirement. Include a null and void clause. ● Require the Washington State Institute for Public Policy to create a risk assessment tool to assess whether an individual is likely to fail to appear at subsequent court hearings. This assessment will be used in conjunction with the Department of Corrections risk assessment tool already in existence. Allocate \$25,000 in the budget for this requirement. Include a null and void clause. ● Require all law enforcement to use a super form that includes information, to the extent that it is available, regarding domestic violence and mental health. The form should also include information regarding the victim's input or position as to the defendant's release. ● Create an exception to allow courts confidential access to the mental health records of offenders for the purposes of bail and pretrial release. ● There should be a generally recognized definition of what bail means, subject to further discussion. ● The Legislature should not implement a uniform, statewide bail schedule. Bail schedules should be left to the discretion of the court and in the control of local jurisdictions. ● The temporary suspension of the use of felony bail schedules should be allowed to lapse, so that felony bail schedules may once again be used after section 2 of HB 2625 expires on August 1, 2011. ● A statewide justification system, as well as some form of statewide notification, would be beneficial. Under a statewide justification system, permit a bail bond agency to file all the primary paperwork with one regulatory agency without re-filing paperwork in every county. Under a statewide notification system, require that a presiding judge of a court notify the Administrative Office of the Courts when it de-justifies a bail bond agent. Require the Administrative Office of the Courts to notify other counties of the de-justification. ● For commercial property bonds, limit the definition of "collateral" to real property, tangible personal property, or a closed bank account. The definition should exclude savings accounts, for example, which can easily be accessed. ● Require a bail bond agent who issues commercial property bonds to post a \$100,000 surety bond instead of a \$10,000 surety bond with the Department of Licensing, or to deposit that amount in a trust account. ● Require that applicants for a bail bond agent license complete a background check. ● Prohibit a general power of attorney or similar contract between the bail bond agent and the client. (Continue to permit the power of attorney between the bail bond agent and the surety insurance company.) ● Require a bail bond agent who surrenders a client to court to return the premium and recovery fee. Provide exceptions for when good cause exists to surrender the client (e.g., the risk substantially increased as a result of judicial action, the client concealed or misrepresented information, or other reasonable cause). Permit the bail bond agent to recover expenses incurred under these circumstances. ● Permit the Department of Licensing to audit the trust accounts of bail bond agents and agencies (both property bond agents and bail bond agents that represent a surety insurance company) once every two years. Permit a bail bond agency to avoid an audit by submitting a financial report prepared by a certified public accountant on an annual basis. ● Grant the Department of Licensing authority to inspect the books and records of the bail bond agent or agency when there is probable cause to believe the agent or agency has engaged in impropriety. ● Require the court to notify the surety of the defendant's failure to appear within 14 calendar days of the failure to appear, instead of 30 days. Begin the 60-day period during which the surety can avoid execution of the bond on the date of notification.
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<p>Wisconsin²⁶</p> <p>April 2019</p>	<ul style="list-style-type: none"> ● Recommended changes to Wisconsin constitution. ● Recommended legislation that requires a court to review the bail of a defendant within 72 hours of initial appearance if the defendant remains in custody as a result of his or her inability to meet the bail. The court must review the bail every seven days thereafter if the defendant remains in custody. If the court does not adjust the bail and release the defendant, the court must set forth the reasons for the continuation of bail. ● Recommended legislation: <ul style="list-style-type: none"> ○ Expanding the categories of defendants who may be detained under this statute to include a person who is accused of any offense if there is a serious risk that: (1) the person poses a danger of inflicting serious bodily harm on a member of the community; (2) the person will intimidate a witness; or (3) the person will not appear in court as required. ○ Authorizing a court to hold a pretrial detention hearing, upon its own motion, under certain circumstances. ○ Providing that the rules governing the admissibility of evidence that apply in criminal proceedings do not apply in pretrial detention hearings. ○ Modifying the burdens of proof in pretrial detention hearings. ○ Lengthening the period a person may be detained prior to trial and allowing a court to extend this time period if it finds that the ends of justice are best served by extending that period. ● Recommended legislation that modifies the list of factors a court may consider when setting bail or imposing other conditions of release to include the results of a validated pretrial risk assessment.
<p>Global Campaign for Pretrial Justice</p> <p>Open Justice Initiative</p> <p>2011²⁷</p>	<ul style="list-style-type: none"> ● Pretrial detention should be used only when no reasonable alternative can address genuine risks of flight or danger to the community. ● States would better serve their citizens by spending less on locking up people who are presumed innocent and dedicating more resources to social services. ● Particularly in communities where economic privation is widespread, the use of monetary bail should be avoided. Poor people do not have money readily available to deposit with the court. In place of bail, courts should use personal surety (a promise by the defendant to attend court hearings and stand trial) or reporting requirements under which the defendant reports regularly to the local police station as a condition of remaining free pending trial. ● Where monetary bail is used it should be proportionate to an accused person's income and within his means. ● Detained persons should receive basic necessities—nutritious food, clothing, toiletries, and medication—free of charge from the prison authorities. ● Independent monitoring bodies should be supported in regularly monitoring detention centers, including police lock-ups and other places of pretrial detention. ● Governments should regularly publish official statistics on their pretrial detention policies, practices, and population. ● To the extent practicable, pretrial detainees should be able to volunteer (though they should not be coerced) to perform prison-based labor for remuneration and should be eligible for training and education programs. ● Further research should be conducted on the scope of pretrial detention and its impact on development.

Endnotes

- 1 In some cases the state report or summit dealt with more than pretrial justice, but the criminal justice system as a whole. In those cases, only the items related to pretrial justice are noted. In addition, some recommendations dealt with items very specific to that jurisdiction and those have been excluded.
- 2 <https://governor.alabama.gov/assets/2020/01/Study-Group-Report-Letter-from-Justice-Lyons-to-Governor-Ivey.pdf>
- 3 https://smartjusticealaska.com/wp-content/uploads/2017/10/AK_JRI-Report_FINAL_2015-12-15.pdf
- 4 [http://www.azcourts.gov/Portals/74/TFFAIR/Reports/FINAL%20FairJustice%20Aug%2012-final%20formatted%20versionRED%20\(002\).pdf?ver=2016-08-16-090815-647](http://www.azcourts.gov/Portals/74/TFFAIR/Reports/FINAL%20FairJustice%20Aug%2012-final%20formatted%20versionRED%20(002).pdf?ver=2016-08-16-090815-647)
- 5 <http://www.courts.ca.gov/documents/PDRReport-20171023.pdf>
- 6 https://cdpsdocs.state.co.us/ccjj/Meetings/2020/2020-01-10_RecFY20-PR03-b.pdf
- 7 https://www.ct.gov/ctsc/lib/ctsc/Pretrial_Release_and_Detention_in_CT_2.14.2017.pdf
- 8 https://csgjusticecenter.org/wp-content/uploads/2017/02/JR-in-GA_Report-of-the-Council-on-CJ-Reform.pdf
- 9 https://www.courts.state.hi.us/wp-content/uploads/2018/12/POST_12-14-18_HCR134TF_REPORT.pdf
- 10 <https://isc.idaho.gov/legislative/2018%20Pre%20Trial.pdf>
- 11 <https://courts.illinois.gov/Probation/12-18.pdf>; <https://theappeal.org/politicalreport/courts-set-policy-illinois-supreme-court-election/> (article clarifying the report hasn't been released yet.)
- 12 <https://www.in.gov/justice/files/jrac-2019-bail-pretrial-report.pdf>
- 13 https://www.courts.maine.gov/reports_pubs/reports/pdf/report-pretrial-justice-reform-task-force-dec2019.pdf
- 14 https://d279m997dpfwgl.cloudfront.net/wp/2020/01/0102_bail-reform-report.pdf
- 15 <https://courts.michigan.gov/News-Events/Documents/final/Jails%20Task%20Force%20Final%20Report%20and%20Recommendations.pdf>
- 16 https://www.njcourts.gov/pressrel/2014/FinalReport_3_20_2014.pdf
- 17 <http://www.nyjusticetaskforce.com/pdfs/ReportBailReform2019.pdf>
- 18 <https://cjlil.sog.unc.edu/files/2019/04/NC-Summit-Bail-Reform-Proposals.pdf>
- 19 https://www.nccourts.gov/assets/documents/publications/nccalj_criminal_investigation_and_adjudication_committee_report_pretrial_justice.pdf?KdCfv06sGFBmgYgCxmmOZmrVY7o1Wr87
- 20 <http://www.sc.ohio.gov/Publications/bailSys/report.pdf> ; And supplement: <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/commReports/bailPretrialSvcsAdd.pdf>
- 21 <https://www.governor.ok.gov/static-assets/documents/RestoreTaskForceInitialReport.pdf>
- 22 <https://www.txcourts.gov/media/1436204/criminal-justice-committee-pretrial-recommendations-final.pdf>
- 23 <https://www.utcourts.gov/resources/reports/docs/Pretrial%20Release%20and%20Supervision%20Practices%20Final%20Report.pdf>

- 24 <http://vscc.virginia.gov/2019/VSCC%202018%20Annual%20Report%20-%20Pre-trial%20Data%20Project%20and%20Pre-trial%20Process.pdf>
- 25 <http://leg.wa.gov/JointCommittees/Archive/BPWG/Documents/BailPracticesWorkGroupReport.pdf>
- 26 https://docs.legis.wisconsin.gov/misc/lc/study/2018/1783/010_august_16_2018_meeting_10_00_a_m_lc_conference_room/sb_2018_06_bail
- 27 <https://www.justiceinitiative.org/uploads/84baf76d-0764-42db-9ddd-0106dbc5c400/socioeconomic-impact-pretrial-detention-02012011.pdf>

TESTING NOTICES – BLOOD OR URINE

1. If you **refuse** to submit to and complete the test or tests, your driving privileges will be suspended for a period of one year.
 2. If you **fail** a test, your driving privileges will be suspended for a period of either 30 days or one year.
 3. The results of the testing may be used against you at any trial or hearing on a charge arising out of the operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both.
 4. After the completion of the testing, you may request and have the right to consult with an attorney and may secure additional testing.
-

UNDER 21 NOTICES

If the person is **UNDER 21**, read the additional notices below:

1. It is unlawful for any person less than 21 years of age to operate or attempt to operate a vehicle in this state with a breath or blood alcohol content of .02 or greater.
 2. If you are less than 21 years of age at the time of the test request and submit to and complete the test or tests and the test results show an alcohol concentration of .02 or greater, but less than .08, on your first occurrence, your driving privileges will be suspended for 30 days and on your second or subsequent occurrence, your driving privileges shall be suspended for one year.
-

CDL NOTICES

If the person has been driving a **COMMERCIAL MOTOR VEHICLE**, read additional notice below:

1. Whenever a law enforcement officer has reasonable grounds to believe a person has been driving a commercial motor vehicle while having alcohol or other drugs in such person's system and the person refuses to submit to and complete a test or tests requested by a law enforcement officer or submits to and completes a test requested by a law enforcement officer which determines that the person's alcohol concentration is .04 or greater, the person will be disqualified from driving a commercial motor vehicle for at least one year, pursuant to Kansas law.
-

OFFICER INSTRUCTIONS: All tests are to be administered at the direction of a law enforcement officer and the law enforcement officer shall determine which type of test or tests to request. Keep a completed copy of this document for your file.

- **PROVIDE A COPY OF THIS FORM TO THE PERSON.**
- **READ ALL APPLICABLE NOTICES.**
- **REQUEST THAT THE PERSON SUBMIT TO A TEST OR TESTS.**

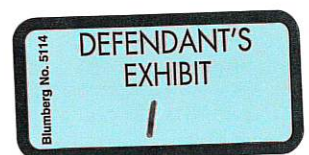
WILL YOU TAKE A: ☐ **BLOOD TEST** ☐ **URINE TEST**

RESPONSE: ☐ **Yes** ☐ **No**

Name of Licensee

Officer Administering Testing

Date



**TESTING NOTICES – BREATH OR OTHER BODILY SUBSTANCE
(NOT BLOOD OR URINE)**

1. You have no right to consult with an attorney regarding whether to submit to testing, but, after the completion of the testing, you may request and have the right to consult with an attorney and may secure additional testing.
 2. If you **refuse** to submit to and complete the test or tests, your driving privileges will be suspended for a period of one year.
 3. If you **fail** a test, your driving privileges will be suspended for a period of either 30 days or one year.
 4. Refusal to submit to testing may be used against you at any trial or hearing on a charge arising out of the operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both.
 5. The results of the testing may be used against you at any trial or hearing on a charge arising out of the operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both.
-

UNDER 21 NOTICES

If the person is **UNDER 21**, read the additional notices below:

1. It is unlawful for any person less than 21 years of age to operate or attempt to operate a vehicle in this state with a breath or blood alcohol content of .02 or greater.
 2. If you are less than 21 years of age at the time of the test request and submit to and complete the test or tests and the test results show an alcohol concentration of .02 or greater, but less than .08, on your first occurrence, your driving privileges will be suspended for 30 days and on your second or subsequent occurrence, your driving privileges shall be suspended for one year.
-

CDL NOTICES

If the person has been driving a **COMMERCIAL MOTOR VEHICLE**, read additional notice below:

1. Whenever a law enforcement officer has reasonable grounds to believe a person has been driving a commercial motor vehicle while having alcohol or other drugs in such person's system and the person refuses to submit to and complete a test or tests requested by a law enforcement officer or submits to and completes a test requested by a law enforcement officer which determines that the person's alcohol concentration is .04 or greater, the person will be disqualified from driving a commercial motor vehicle for at least one year, pursuant to Kansas law.
-

OFFICER INSTRUCTIONS: All tests are to be administered at the direction of a law enforcement officer and the law enforcement officer shall determine which type of test or tests to request. Keep a completed copy of this document for your file.

- **PROVIDE A COPY OF THIS FORM TO THE PERSON.**
- **READ ALL APPLICABLE NOTICES.**
- **REQUEST THAT THE PERSON SUBMIT TO A TEST OR TESTS.**

WILL YOU TAKE A: ☐ **BREATH TEST** ☐ **OTHER BODILY SUBSTANCE TEST (NOT BLOOD OR URINE)**

RESPONSE: ☐ **Yes** ☐ **No**

Name of Licensee

Officer Administering Testing

Date

DC-70 (Rev. 07/19)



OFFICER'S CERTIFICATION AND NOTICE OF SUSPENSION
(SEE REVERSE SIDE FOR HEARING INFORMATION)

INSTRUCTIONS: This form is to be used to certify a test refusal or test failure. A copy of the completed form is required to be served upon the person; a copy is to be forwarded to the Division of Vehicles within seven (7) days after service on the driver; and a copy should be retained by a certifying officer.

DRIVER INFORMATION

Name (Last)	(First)	(M/I)	Date of Birth
Current Address		City	
		State	KS
Driver's License No.	State of Issuance	Zip	
	KS		

CDL YES ☐ NO ☒

CMV YES ☐ NO ☒ (If yes, CDL-5 form required also)

HAZ MAT YES ☐ NO ☒

ADDRESS: The above address will be treated as a change of address if different from that on file with the Division of Vehicles and will be used for all correspondence with the person unless the Division of Vehicles is notified by the person in writing of a different address or a change of address. You can change your address on the Internet, by mail or fax to Central Office Operations, or by going to any Kansas Driver's License Examining Station.

LAW ENFORCEMENT OFFICER'S CERTIFICATION

CERTIFICATION INSTRUCTIONS: To certify a test refusal or test failure, (1) each officer must complete the statement, if necessary, (2) at least one officer must initial on the line to the left of each of the statements intended to be certified and (3) each officer who initials a statement must sign in the space provided below.

- On February 17, 20 24, reasonable grounds/probable cause existed to believe the above-named person, within the State of Kansas, in County, had been ☒ operating a vehicle while under the influence of alcohol and/or drugs in violation of state statute, city ordinance or county resolution, or ☐ attempting to operate a vehicle while under the influence of alcohol and/or drugs in violation of state statute, city ordinance or county resolution; and/or (if certifying a failure of a test, the officer must have reasonable grounds/probable cause to believe the person was operating a vehicle); ☐ driving a commercial vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; and/or ☐ under 21 years of age while having alcohol or other drugs in such person's system.
 - The person had been placed under arrest or otherwise taken into custody or had been involved in a vehicle accident or collision.
 - The person was presented oral and written notice as required by Kansas law.
 - Check one: ☐ The person refused to submit to or complete testing as requested by a law enforcement officer. ☒ The result of the test showed that the person had an alcohol concentration of .08 or greater in such person's blood or breath. NOTE: Please attach a readable copy of the test report.
 - Reason(s) for the initial contact and/or stop: ☒ committed traffic violation(s) (explain below); ☐ officer arrived at scene of accident; ☐ vehicle already stopped; ☐ other (explain)
VEHICLE RIGHT SIDE TIRES DRIFTED OVER FOG LINE
 - Reasonable grounds/probable cause for my belief that the person was operating or attempting to operate a vehicle: ☒ saw person operate; ☐ person identified self as driver; ☐ other (explain)

 - Reasonable grounds/probable cause for my belief that the person was under the influence of alcohol and/or drugs: ☒ odor of alcoholic beverages; ☒ alcoholic beverage containers found in vehicle; ☒ sobriety tests indicated impairment; ☐ refused sobriety tests; ☒ slurred speech; ☒ bloodshot eyes; ☐ difficulty in communicating; ☐ poor balance or coordination; ☐ person stated alcohol/drugs consumed; ☐ failed preliminary breath test; ☐ refused preliminary breath test; ☐ other (explain)
DRIVER HAD TROUBLE BALANCING. HAD TROUBLE TYPING
 - A copy of this document which contains a Notice of Driver's License Suspension is being served on the above-named person on February 18, 20 24, by (check one) ☒ personal service; ☐ mailing by first-class mail to the address shown above. NOTE: Personal service is required if a determination of refusal or failure is made while the person is in custody.
- IF CERTIFYING A FAILURE OF A BREATH TEST, STATEMENTS 9, 10 AND 11 MUST ALSO BE COMPLETED AND CERTIFIED
- The testing equipment used was certified by the Kansas Department of Health and Environment.
 - The testing procedures used were in accordance with the requirements set out by the Kansas Department of Health and Environment.
 - The person who operated the testing equipment was certified by the Kansas Department of Health and Environment to operate such equipment.

I hereby certify to the Division of Vehicles that each of the statements I have initialed above are true and accurate, under penalty of K.S.A. 8-1002(b), and amendments thereto.

Title and name (printed): _____
Agency name: POTTAWATOMIE COUNTY SHERIFF'S DEPARTMENT
Agency address: 108 N. 1ST STREET
City/state/zip: WESTMORELAND KS 66549

Title and name (printed): _____
Agency name: POTTAWATOMIE COUNTY SHERIFF'S DEPARTMENT
Agency address: 108 N. 1ST STREET
City/state/zip: WESTMORELAND KS 66549

Signature of Law Enforcement Officer _____

Signature of Law Enforcement Officer _____

TEMPORARY DRIVER'S LICENSE

THIS NOTICE IS:

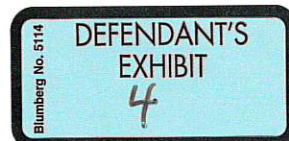
☐ NOT VALID as a temporary license for the reason that your license: ☐ has expired; ☐ has been revoked; ☐ has been suspended; ☐ has been cancelled; or ☐ you have no driver's license.

☒ VALID as a temporary license until the 30th day after the date of service of this document. You must carry this notice with you when driving. This temporary license allows the operation of the same classes of vehicles and is subject to the same restrictions as the driver's license surrendered.

Any temporary driver's license will end and your driving privileges will be suspended on the 30th day after service of this document unless an administrative hearing has been timely requested as set out in the INSTRUCTIONS FOR REQUESTING AN ADMINISTRATIVE HEARING ON THE REVERSE SIDE OF THIS FORM.

Before a test or tests are administered, the officer is required by Kansas law to provide the person oral and written notices. If the person was driving a commercial motor vehicle, as defined by Kansas law, the oral and written notice required by K.S.A. 8-2,145 should also be given. If the person is under the age of 21, the oral and written notice required by K.S.A. 8-1567a should also be given.

Distribution: 1st copy (white) copy to Division of Vehicles 2nd copy (yellow) for your file 3rd copy (pink) to licensee/driver



NOTICE OF DRIVER'S LICENSE SUSPENSION

(Pursuant to K.S.A. 8-1002)

Based upon the certification on the reverse side of this form, your driving privileges are hereby suspended, pursuant to K.S.A. 8-1014, effective the 30th day after the date of service of this notice, unless a timely request for hearing is made. The action taken on your license depends upon whether the officer(s) certified a test refusal or a test failure (a completed test result of .08 or greater) and whether you have any prior "occurrences" on your driving record. "Occurrence" is defined in K.S.A. 8-1013, and amendments thereto, as "a test refusal, test failure or alcohol or drug-related conviction, or any combination thereof arising from one arrest." Entry into a diversion agreement in lieu of prosecution on a prior occasion is treated as a prior "alcohol or drug-related conviction." You may request a copy of your driving record in writing from Driver Solutions Bureau, Division of Vehicles, Kansas Department of Revenue at PO Box 12021, Topeka, Kansas, 66601 or, visit <http://www.ksrevenue.org/recrequest.html> to request a copy of your driving record online.

If paragraph 4 of the certification on the reverse side indicates you refused to submit to or complete a test, the following action will be taken on your driving privileges:

First Occurrence: 1 year suspension & 2 year ignition interlock restriction
Second Occurrence: 1 year suspension & 3 year ignition interlock restriction
Third Occurrence: 1 year suspension & 4 year ignition interlock restriction
Fourth Occurrence: 1 year suspension & 5 year ignition interlock restriction
Fifth or Subsequent Occurrence: 1 year suspension & 10 year ignition interlock restriction

If paragraph 4 of the certification on the reverse side indicates you failed a test and the test result was .08 or above, but less than .15, the following action will be taken on your driving privileges:

First Occurrence: 30 day suspension & 180 days of ignition interlock restriction if you have not previously had your driving privileges revoked, suspended, canceled or withdrawn or been previously convicted of any of the following violations: (1) K.S.A. 8-1599; (2) K.S.A. 41-727; (3) any violations listed in K.S.A. 8-285(a) or (4) been convicted of three or more moving traffic violations committed on separate occasions within a 12-month period. If your driving privileges have previously been revoked, suspended, canceled or withdrawn or your driving record contains convictions as set out above, you will receive a 30 day suspension & 1 year of ignition interlock restriction.
Second Occurrence: 1 year suspension & 1 year ignition interlock restriction
Third Occurrence: 1 year suspension & 2 year ignition interlock restriction
Fourth Occurrence: 1 year suspension & 3 year ignition interlock restriction
Fifth or Subsequent Occurrence: 1 year suspension & 10 year ignition interlock restriction

If paragraph 4 of the certification on the reverse side indicates you failed a test and the test result was .15 or above, the following action will be taken on your driving privileges:

First Occurrence: 1 year suspension & 1 year ignition interlock restriction
Second Occurrence: 1 year suspension & 2 year ignition interlock restriction
Third Occurrence: 1 year suspension & 3 year ignition interlock restriction
Fourth Occurrence: 1 year suspension & 4 year ignition interlock restriction
Fifth or Subsequent Occurrence: 1 year suspension & 10 year ignition interlock restriction

If you possess a commercial driver's license, the following additional action will be taken on your commercial driving privileges as a result of a conviction for violating K.S.A. 8-1567 or K.S.A. 8-1025 or upon a final determination that you have refused or failed a test: First Occurrence - 1 year suspension of commercial driving privileges; Second Occurrence - permanent revocation of commercial driving privileges. For more information, see K.S.A. 8-2, 142, and amendments thereto.

PROCEDURE FOR REQUESTING AN ADMINISTRATIVE HEARING

- A hearing request may be made either by mailing a written request which is postmarked within 14 calendar days after the date of service of this form, or by sending a written request by electronic facsimile (fax) to the Division of Vehicles within 14 calendar days after the date of service of this form. If this form was served on you by mail, you will have an additional 3 days, pursuant to K.S.A. 60-206(d).
- The hearing request must include your full name, driver's license number, birth date and a telephone number at which you or your legal representative can be reached if necessary.
- Constitutional issues cannot be decided at the administrative hearing, but may be preserved and raised in a petition for review of the hearing to a State district court as provided in K.S.A. 8-1020(o) and (p), and amendments thereto.
- The hearing request must include your current address. If the address you provide in your written request for a hearing is different than the address on the reverse side of this form, the address in your hearing request will be treated as a change of address pursuant to K.S.A. 8-248. All correspondence will be sent to the address provided in the hearing request.
- The hearing request must state whether you want to have the certifying officer(s) subpoenaed to the administrative hearing. If you wish to contest the facts contained in the officer's certification at the administrative hearing, you have the burden of disproving those facts, and you may need to compel the appearance of the certifying officer(s) to do so. If you fail to request any officer's attendance at the time you make a hearing request, your right to compel that attendance by subpoena will be deemed waived and the law enforcement officer's certification will be admitted as evidence at the hearing.
- **HEARING LOCATION.** Upon receipt of your timely written hearing request and fee, a hearing will be scheduled by telephone conference call. You may request that the hearing be conducted in person before a representative of the Director of Vehicles. Any request for an in person hearing must be made at the time you request a hearing. A written notice will be mailed to you setting out the time, date and place of the hearing. Any temporary driving privileges granted on the reverse side of this document will be extended until a final determination is made.
- Mail hearing requests to:
DL Administrative Hearing Section
Kansas Department of Revenue
P.O. Box 2744
Topeka, KS 66601-2744
(785) 296-6911
- Send electronic facsimile (fax) requests to: (785) 296-0275

OFFICER'S CERTIFICATION AND NOTICE OF SUSPENSION
(SEE REVERSE SIDE FOR HEARING INFORMATION)

INSTRUCTIONS: This form is to be used to certify a test refusal or test failure. A copy of the completed form is required to be served upon the person; a copy is to be forwarded to the Division of Vehicles within seven (7) days after service on the driver; and a copy should be retained by a certifying officer.

DRIVER INFORMATION			
Name (Last)	(First)	(M/I)	Date of Birth
Current Address		City	State
Driver's License No.		Date of Issuance	Zip

CDL YES ☒ NO ☐ CMV YES ☐ NO ☒ (If yes, CDL-5 form required also) HAZ MAT YES ☐ NO ☒

ADDRESS: The above address will be treated as a change of address if different from that on file with the Division of Vehicles and will be used for all correspondence with the person unless the Division of Vehicles is notified by the person in writing of a different address or a change of address. You can change your address on the Internet, by mail or fax to Central Office Operations, or by going to any Kansas Driver's License Examining Station.

LAW ENFORCEMENT OFFICER'S CERTIFICATION

CERTIFICATION INSTRUCTIONS: To certify a test refusal or test failure, (1) each officer must complete the statement, if necessary, (2) at least one officer must initial on the line to the left of each of the statements intended to be certified and (3) each officer who initials a statement must sign in the space provided below.

- On Jan 8, 2023, reasonable grounds/probable cause existed to believe the above-named person, within the State of Kansas, in _____ County, had been ☒ operating a vehicle while under the influence of alcohol and/or drugs in violation of state statute, city ordinance or county resolution, or ☐ attempting to operate a vehicle while under the influence of alcohol and/or drugs in violation of state statute, city ordinance or county resolution; and/or (if certifying a failure of a test, the officer must have reasonable grounds/probable cause to believe the person was operating a vehicle); ☐ driving a commercial vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; and/or ☐ under 21 years of age while having alcohol or other drugs in such person's system.
- The person had been placed under arrest or otherwise taken into custody or had been involved in a vehicle accident or collision.
- The person was presented oral and written notice as required by Kansas law.
- Check one: ☒ The person refused to submit to or complete testing as requested by a law enforcement officer. ☐ The result of the test showed that the person had an alcohol concentration of .08 or greater in such person's blood or breath. NOTE: Please attach a readable copy of the test report.
- Reason(s) for the initial contact and/or stop: ☒ committed traffic violation(s) (explain below); ☐ Officer arrived at scene of accident; ☐ vehicle already stopped; ☐ other (explain)
Speed
- Reasonable grounds/probable cause for my belief that the person was operating or attempting to operate a vehicle: ☒ saw person operate; ☐ person identified self as driver; ☐ other (explain)
- Reasonable grounds/probable cause for my belief that the person was under the influence of alcohol and/or drugs: ☒ odor of alcoholic beverages; ☐ alcoholic beverage containers found in vehicle; ☐ sobriety tests indicated impairment; ☐ refused sobriety tests; ☐ slurred speech; ☐ bloodshot eyes; ☐ difficulty in communicating; ☐ poor balance or coordination; ☐ person stated alcohol/drugs consumed; ☐ failed preliminary breath test; ☐ refused preliminary breath test; ☐ other (explain)
- A copy of this document which contains a Notice of Driver's License Suspension is being served on the above-named person on Jan 8, 2023 by (check one) ☒ personal service; ☐ mailing by first-class mail to the address shown above. NOTE: Personal service is required if a determination of refusal or failure is made while the person is in custody.

IF CERTIFYING A FAILURE OF A BREATH TEST, STATEMENTS 9, 10 AND 11 MUST ALSO BE COMPLETED AND CERTIFIED

- The testing equipment used was certified by the Kansas Department of Health and Environment.
- The testing procedures used were in accordance with the requirements set out by the Kansas Department of Health and Environment.
- The person who operated the testing equipment was certified by the Kansas Department of Health and Environment to operate such equipment.

I hereby certify to the Division of Vehicles that each of the statements I have initialed above are true and accurate, under penalty of K.S.A. 8-1002(b), and amendments thereto.

Title and name (printed):	_____	Title and name (printed):	_____
Agency name:	_____	Agency name:	_____
Agency address:	_____	Agency address:	_____
City/state/zip:	_____	City/state/zip:	_____
Signature of Law Enforcement Officer	_____	Signature of Law Enforcement Officer	_____

TEMPORARY DRIVER'S LICENSE

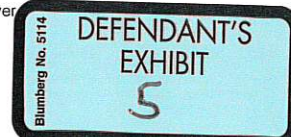
THIS NOTICE IS:

- ☐ NOT VALID as a temporary license for the reason that your license: ☐ has expired; ☐ has been revoked; ☐ has been suspended; ☐ has been cancelled; or ☐ you have no driver's license.
- ☒ VALID as a temporary license until the 30th day after the date of service of this document. You must carry this notice with you when driving. This temporary license allows the operation of the same classes of vehicles and is subject to the same restrictions as the driver's license surrendered.

Any temporary driver's license will end and your driving privileges will be suspended on the 30th day after service of this document unless an administrative hearing has been timely requested as set out in the INSTRUCTIONS FOR REQUESTING AN ADMINISTRATIVE HEARING ON THE REVERSE SIDE OF THIS FORM.

Before a test or tests are administered, the officer is required by Kansas law to provide the person oral and written notices. If the person was driving a commercial motor vehicle, as defined by Kansas law, the oral and written notice required by K.S.A. 8-2,145 should also be given. If the person is under the age of 21, the oral and written notice required by K.S.A. 8-1567a should also be given.

Distribution: 1st copy (white) to Division of Vehicles 2nd copy (yellow) for your file 3rd copy (pink) to licensee/driver



Administrative Hearings Section
109 SW 9th St
PO Box 2744
Topeka KS 66601
Mark A. Burghart, Secretary



Phone: (785) 296-6911
FAX: (785) 296-0275
kdor dcadmin.hearing@ks.gov
Laura Kelly, Governor

January 19, 2023

DOB _____
DL#: _____
CHEMICAL TEST DATE: 1-8-23

Pursuant to K.S.A. 8-1002, the suspension of your driving privileges for either refusing to take a chemical test or failing the test (alcohol content of .08 or greater or .04 or greater if operating a commercial vehicle) on the date shown above has been administratively dismissed for the reason(s) checked below. Since the administrative hearing that you requested is no longer needed, no administrative hearing will be set. This dismissal does not affect any DUI court case that might be in process on this same occurrence.

On the Officer's Certification and Notice of Suspension form (DC-27, DC-28 or CDL-5):

- ☐ The arresting officer failed to indicate on statement #1 (DC-27 or DC-28) that he/she had reasonable grounds to believe that you were operating the vehicle (failure of a test requires operating to be checked).
- ☐ Statement #1 was marked "attempting" and statement #4 was marked "failure" (DC-27).
- ☐ The arresting officer failed to indicate on statement #4 (DC-27 or CDL-5) whether refusal or failure.
- ☐ The arresting officer failed to certify by initialing statements #1, #2, #3, #4 or #5 (DC-28). Note: Failure to initial statements #5 through #8 will not result in dismissal of the DC-27 or CDL-5.
- ☐ Statement #8 (DC-27 or CDL-5) and/or statement #9 (DC-28) lacked proper date of service.
- ☐ The arresting officer failed to certify by initialing statements #9, #10 or #11 (DC-27) or statements #10, #11 or #12 (DC-28) on a breath test.
- ☐ Breath/blood alcohol content was not .08 or above (DC-27) or the test was for drugs and not alcohol.
- ☒ The arresting officer failed to sign the DC-27, DC-28 or CDL-5.
- ☐ Other: _____

Further, the following is an account of your driver license status:

- ☒ Driver's license enclosed
- ☐ Driver's license not received from arresting officer
- ☐ Driver's license was destroyed

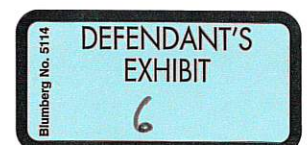
If your driver's license is not enclosed and is not currently suspended, revoked, cancelled, or restricted, you may visit your local Driver's License Exam station or County Treasurer's office to obtain a new license. Please remember to drive safely and responsibly.

Sincerely,

Administrative Hearing Section
Driver License Appeals
Department of Revenue

CO/DC:slm

DC14b



**OFFICER'S CERTIFICATION AND NOTICE OF SUSPENSION
(SEE REVERSE SIDE FOR HEARING INFORMATION)**

INSTRUCTIONS: This form is to be used to certify a test refusal or test failure. A copy of the completed form is required to be served upon the person; a copy is to be forwarded to the Division of Vehicles within seven (7) days after service on the driver; and a copy should be retained by a certifying officer.

DRIVER INFORMATION			
Name (Last)	(First)	(M/I)	Date of Birth
Current Address		City	
		State	KS
Driver's License No.	State of Issuance	Zip	
	KS		

CDL YES ☐ NO ☒

CMV YES ☐ NO ☒ (If yes, CDL-5 form required also)

HAZ MAT YES ☐ NO ☒

ADDRESS: The above address will be treated as a change of address if different from that on file with the Division of Vehicles and will be used for all correspondence with the person unless the Division of Vehicles is notified by the person in writing of a different address or a change of address. You can change your address on the Internet, by mail or fax to Central Office Operations, or by going to any Kansas Driver's License Examining Station.

LAW ENFORCEMENT OFFICER'S CERTIFICATION

CERTIFICATION INSTRUCTIONS: To certify a test refusal or test failure, (1) each officer must complete the statement, if necessary, (2) at least one officer must initial on the line to the left of each of the statements intended to be certified and (3) each officer who initials a statement must sign in the space provided below.

- On June 11, 20 16, reasonable grounds existed to believe that the above-named person, within the State of Kansas in SEDGWICK County, ☒ had been operating a vehicle while under the influence of alcohol and/or drugs in violation of state statute, city ordinance or county resolution, or ☐ had been attempting to operate a vehicle while under the influence of alcohol and/or drugs in violation of state statute, city ordinance or county resolution (If certifying a failure of a test, the officer must certify that reasonable grounds existed to believe the person was operating a vehicle); and/or ☐ had been driving a commercial vehicle, as defined in K.S.A. 8-2-128, and amendments thereto, while having alcohol or other drugs in such person's system; and/or ☐ is under 21 years of age while having alcohol or other drugs in such person's system.
- The person had been placed under arrest or otherwise taken into custody or had been involved in a vehicle accident or collision.
- The person was presented oral and written notice as required by K.S.A. 8-1001(k) and amendments thereto.
- Check one: ☐ The person refused to submit to or complete testing as requested by a law enforcement officer. ☒ The result of the test showed that the person had an alcohol concentration of .08 or greater in such person's blood or breath. NOTE: Please attach a readable copy of the test report.
- Reason(s) for the initial contact and/or stop: ☒ committed traffic violation(s) (explain below); ☐ officer arrived at scene of accident; ☐ vehicle already stopped; ☐ other (explain)
FAIL TO MAINTAIN A SINGLE LANE OF TRAFFIC
- Reasonable grounds for my belief that the person was operating or attempting to operate a vehicle: ☒ saw person operate; ☐ person identified self as driver; ☐ other (explain)
- Reasonable grounds for my belief that the person was under the influence of alcohol and/or drugs: ☒ odor of alcoholic beverages; ☐ alcoholic beverage containers found in vehicle; ☒ failed sobriety tests; ☒ slurred speech; ☒ bloodshot eyes; ☐ difficulty in communicating; ☒ poor balance or coordination; ☒ person stated alcohol/drugs consumed; ☐ failed preliminary breath test; ☐ other (explain)
- A copy of this document which contains a Notice of Driver's License Suspension is being served on the above-named person on June 11, 20 16 by (check one) ☒ personal service; ☐ mailing by first-class mail to the address shown above. NOTE: Personal service is required if a determination of refusal or failure is made while the person is in custody.

IF CERTIFYING A FAILURE OF A BREATH TEST, STATEMENTS 9, 10 AND 11 MUST ALSO BE COMPLETED AND CERTIFIED

- The testing equipment used was certified by the Kansas Department of Health and Environment.
- The testing procedures used were in accordance with the requirements set out by the Kansas Department of Health and Environment.
- The person who operated the testing equipment was certified by the Kansas Department of Health and Environment to operate such equipment.

I hereby certify to the Division of Vehicles that each of the statements I have initialed above are true and accurate, under penalty of K.S.A. 8-1002(b), and amendments thereto.

Title and name (printed): _____
 Agency name: SEDGWICK COUNTY SHERIFF'S DEPARTMENT
 Agency address: 525 N. MAIN STREET
 City/state/zip: WICHITA, KS, 67203

Title and name (printed): _____
 Agency name: SEDGWICK COUNTY SHERIFF'S DEPARTMENT
 Agency address: 525 N. MAIN STREET
 City/state/zip: WICHITA, KS, 67203

Signature of Law Enforcement Officer _____

Signature of Law Enforcement Officer _____

TEMPORARY DRIVER'S LICENSE

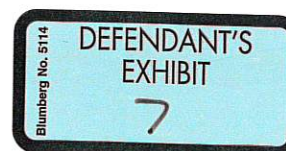
THIS NOTICE IS:

☐ **NOT VALID** as a temporary license for the reason that your license: ☐ has expired; ☐ has been revoked; ☐ has been suspended; ☐ has been cancelled; or ☐ you have no driver's license.

☒ **VALID** as a temporary license until the 30th day after the date of service of this document. You must carry this notice with you when driving. This temporary license allows the operation of the same classes of vehicles and is subject to the same restrictions as the driver's license surrendered.

Any temporary driver's license will end and your driving privileges will be suspended on the 30th day after service of this document unless an administrative hearing has been timely requested and the required \$50 hearing fee paid, as set out in the INSTRUCTIONS FOR REQUESTING AN ADMINISTRATIVE HEARING ON THE REVERSE SIDE OF THIS FORM.

Before a test or tests are administered, the officer is required by K.S.A. 8-1001, and amendments thereto, to provide the person the oral and written notices contained on the implied consent advisory (DC-70). If the person was driving a commercial motor vehicle, as defined by Kansas law, the oral and written notice required by K.S.A. 8-2-145 should also be given. If the person is under the age of 21, the oral and written notice required by K.S.A. 8-1567a should also be given.



NOTICE OF DRIVER'S LICENSE SUSPENSION
(Pursuant to K.S.A. 8-1002)

Based upon the certification on the reverse side of this form, your driving privileges are hereby suspended, pursuant to K.S.A. 8-1014, effective the 30th day after the date of service of this notice, unless a timely request for hearing is made, together with timely payment of the required hearing fee (see below). The action taken on your license depends upon whether the officer(s) certified a test refusal or a test failure (a completed test result of .08 or greater) and whether you have any prior "occurrences" on your driving record. "Occurrence" is defined in K.S.A. 8-1013(e), as amended by the 2013 legislature, as "a test refusal, test failure or alcohol or drug-related conviction, or any combination thereof arising from one arrest." "Alcohol or drug-related conviction" includes violations of K.S.A. 8-1567, 8-2144, 8-1025, and for aggravated battery while committing an act described in K.S.A. 8-1567, as set out in K.S.A. 21-5413(b)(3). Entry into a diversion agreement in lieu of prosecution on a prior occasion is treated as a prior "alcohol or drug-related conviction," pursuant to K.S.A. 8-1013(b)(2). You may request a copy of your driving record in writing from Central Office Operations, Division of Vehicles, Kansas Department of Revenue at PO Box 12021, Topeka, Kansas, 66601 or, visit <http://www.kansas.gov/mvr> to request a copy of your driving record online.

If paragraph 4 of the certification on the reverse side indicates you refused to submit to or complete a test, the following action will be taken on your driving privileges:

First Occurrence: 1 year suspension & 2 year Ignition Interlock restriction
Second Occurrence: 1 year suspension & 3 year Ignition Interlock restriction
Third Occurrence: 1 year suspension & 4 year Ignition Interlock restriction
Fourth Occurrence: 1 year suspension & 5 year Ignition Interlock restriction
Fifth or Subsequent Occurrence: 1 year suspension & 10 year Ignition Interlock restriction

If paragraph 4 of the certification on the reverse side indicates you failed a test and the test result was .08 or above, but less than .15, the following action will be taken on your driving privileges:

First Occurrence: 30 day suspension & 180 days of Ignition Interlock restriction if you have not previously had your driving privileges revoked, suspended, canceled or withdrawn or been previously convicted of any of the following violations: (1) K.S.A. 8-1599; (2) K.S.A. 41-727; (3) any violations listed in K.S.A. 8-285(a) or (4) been convicted of three or more moving traffic violations committed on separate occasions within a 12-month period. If your driving privileges have previously been revoked, suspended, canceled or withdrawn or your driving record contains convictions as set out above, you will receive a 30 day suspension & 1 year of Ignition Interlock restriction.
Second Occurrence: 1 year suspension & 1 year Ignition Interlock restriction
Third Occurrence: 1 year suspension & 2 year Ignition Interlock restriction
Fourth Occurrence: 1 year suspension & 3 year Ignition Interlock restriction
Fifth or Subsequent Occurrence: 1 year suspension & 10 year Ignition Interlock restriction

If paragraph 4 of the certification on the reverse side indicates you failed a test and the test result was .15 or above, the following action will be taken on your driving privileges:

First Occurrence: 1 year suspension & 1 year Ignition Interlock restriction
Second Occurrence: 1 year suspension & 2 year Ignition Interlock restriction
Third Occurrence: 1 year suspension & 3 year Ignition Interlock restriction
Fourth Occurrence: 1 year suspension & 4 year Ignition Interlock restriction
Fifth or Subsequent Occurrence: 1 year suspension & 10 year Ignition Interlock restriction

If you possess a commercial driver's license, the following additional action will be taken on your commercial driving privileges as a result of a conviction for violating K.S.A. 8-1567 or K.S.A. 8-1025 or upon a final determination that you have refused or failed a test, as defined in K.S.A. 8-1013, and amendments thereto.

First Occurrence, as defined by K.S.A. 8-1013(e): 1 year suspension of commercial driving privileges
Second Occurrence, as defined by K.S.A. 8-1013(e): permanent revocation of commercial driving privileges

PROCEDURE FOR REQUESTING AN ADMINISTRATIVE HEARING

• A hearing request may be made either by mailing a written request which is postmarked within 14 calendar days after the date of service of this form, or by sending a written request by electronic facsimile (fax) to the Division of Vehicles within 14 calendar days after the date of service of this form. If this form was served on you by mail, you will have an additional 3 days, pursuant to K.S.A. 60-206(d).

• The hearing request must include your full name, driver's license number, birth date and a telephone number at which you or your legal representative can be reached if necessary.

• The hearing request must include your current address. If the address you provide in your written request for a hearing is different than the address on the reverse side of this form, the address in your hearing request will be treated as a change of address pursuant to K.S.A. 8-248. All correspondence will be sent to the address provided in the hearing request.

• The hearing request must state whether you want to have the certifying officer(s) subpoenaed to the administrative hearing. If you wish to contest the facts contained in the officer's certification at the administrative hearing, you have the burden of disproving those facts, and you may need to compel the appearance of the certifying officer(s) to do so. If you fail to request any officer's attendance at the time you make a hearing request, your right to compel that attendance by subpoena will be deemed waived and the Law Enforcement Officer's Certification will be admitted as evidence at the hearing.

• You must pay a nonrefundable hearing fee of \$50.00 within the time period for making a timely request for a hearing (check or money order preferred). The \$50 hearing fee must be postmarked within the time period for making a timely hearing request or your hearing request will be denied. (A faxed image of cash or of a check or money order will not be accepted.) Checks should be made payable to: Administrative Hearing Section, Kansas Department of Revenue.

• **HEARING LOCATION.** Upon receipt of your timely written hearing request and fee, a hearing will be scheduled by telephone conference call. You may request that the hearing be conducted in person before a representative of the Director of Vehicles. Any request for an in person hearing must be made at the time you request a hearing. A written notice will be mailed to you setting out the time, date and place of the hearing. Any temporary driving privileges granted on the reverse side of this document will be extended until a final determination is made.

• Mail hearing requests to: DL Administrative Hearing Section
Kansas Department of Revenue
P.O. Box 2744
Topeka, KS 66601-2744
(785) 296-6911

• Send electronic facsimile (fax) requests to: (785) 296-0275

DC-27 (Rev. 07/13)

DC-28 Form

CERTIFICATION AND NOTICE OF SUSPENSION OF TEST RESULT OF .02 OR GREATER, BUT LESS THAN .08 FOR PERSONS UNDER 21 YEARS OF AGE (SEE REVERSE SIDE FOR HEARING INFORMATION)

INSTRUCTIONS: This form is to be used to certify a completed test result by a person less than 21 years of age of .02 or greater, but less than .08. A copy of the completed form is required to be served upon the person; a copy is to be forwarded to the Division of Vehicles within seven days after service on the driver; and a copy should be retained by a certifying officer. **IF the person refuses the test or completes a test with a test result of .08 or greater, complete Form DC-27 instead of this form.**

DRIVER INFORMATION		
Name (Last)	(First)	(M/I)
Current Address		City
		State
Driver's License No.	State of Issuance	Zip

ADDRESS: The above address will be treated as a change of address if different from that on file with the Division of Vehicles and will be used for all correspondence with the person unless the Division of Vehicles is notified by the person in writing of a different address or a change of address. You can change your address on the Internet, by mail or fax to Central Office Operations, or by going to any Kansas Driver's License Examining Station.

LAW ENFORCEMENT OFFICER'S CERTIFICATION

CERTIFICATION INSTRUCTIONS: To certify that a person less than 21 years of age has completed a breath or blood alcohol test with a result of .02 or greater, but less than .08, (1) each officer must complete the statement, if necessary, (2) at least one officer must initial on the line to the left of each of the statements intended to be certified and (3) each officer who makes a statement must sign in the space provided below.

- On _____, 20____, reasonable grounds/probable cause existed to believe that the above-named person, within the State of Kansas in _____ County, had been:
 - ☐ operating a vehicle while under the influence of alcohol and/or drugs in violation of state statute, city ordinance or county resolution,
 - ☐ driving a commercial vehicle, as defined in K.S.A. 8-2-120, and amendments thereto, while having alcohol or other drugs in such person's system, or
 - ☐ was under the age of 21 years and had been operating or attempting to operate a vehicle while having alcohol or other drugs in such person's system.
- The person had been placed under arrest, was in custody or had been involved in a vehicle accident or collision.
- The person was presumed oral and written notice as required by Kansas law.
- The person was less than 21 years of age at the time of the test request.
- The result of the test showed that the person had an alcohol concentration of .02 or greater, but less than .08 in such person's blood or breath. **NOTE:** Please attach a readable copy of the test report.
- Reasonable grounds/probable cause for the initial contact and/or stop: ☐ committed traffic violation(s) (explain below); ☐ officer arrived at scene of accident; ☐ vehicle already stopped; ☐ other (explain) _____.
- Reasonable ground/probable cause for my belief that the person was operating or attempting to operate a vehicle: ☐ saw person operate; ☐ person identified self as driver; ☐ other (explain) _____.
- Reasonable grounds/probable cause for my belief that the person was under the influence of alcohol and/or drugs: ☐ odor of alcoholic beverages; ☐ alcoholic beverages found in vehicle; ☐ slurred speech; ☐ bloodshot eyes; ☐ difficulty in communicating; ☐ poor balance or coordination; ☐ person stated that alcohol/drugs consumed; ☐ failed preliminary screening test; ☐ refused preliminary screening test; ☐ other (explain) _____.
- A copy of this document which contains a Notice of Driver's License Suspension was served on the above-named person on _____, 20____, by (check one):
 - ☐ personal service; or
 - ☐ mailing by first-class mail to the address shown above. **NOTE:** Personal service is required for determination of the test result is made while the person is in custody.

IF CERTIFYING A BREATH TEST RESULT, STATEMENTS 10, 11 AND 12 MUST ALSO BE COMPLETED AND CERTIFIED.

- The testing equipment used was certified by the Kansas Department of Health and Environment.
- The testing procedures used were in accordance with the requirements set out by the Kansas Department of Health and Environment.
- The person who operated the testing equipment was certified by the Kansas Department of Health and Environment to operate such equipment.

I hereby certify to the Division of Vehicles that each of the statements I have initialed above are true and accurate, under penalty of K.S.A. 8-1002(b), and amendments thereto.

First and name (printed): _____	First and name (printed): _____
Agency name: _____	Agency name: _____
Agency address: _____	Agency address: _____
City/State/Zip: _____	City/State/Zip: _____
Signature of Law Enforcement Officer _____	Signature of Law Enforcement Officer _____

THIS NOTICE IS:

TEMPORARY DRIVER'S LICENSE

- ☐ **NOT VALID** as a temporary license for the reason that your license: ☐ has expired; ☐ has been revoked; ☐ has been suspended; ☐ has been cancelled; or ☐ you have no driver's license.
- ☐ **VALID** as a temporary license until the 30th day after the date of service of this document. You must carry this notice with you when driving. This temporary license allows the operation of the same classes of vehicles and is subject to the same restrictions as the driver's license surrendered.

Any temporary driver's license will end and your driving privileges will be suspended on the 30th day after service of this document unless an administrative hearing has been timely requested. THE INSTRUCTIONS FOR REQUESTING AN ADMINISTRATIVE HEARING ARE ON THE REVERSE SIDE OF THIS FORM.

Before a test or tests are administered, the officer is required by Kansas law to provide the person the oral and written notices. If the person is under the age of 21, the oral and written notice required by K.S.A. 8-1567a should also be given.

Distribution: 1st copy (white) copy to Division of Vehicles 2nd copy (yellow) for your file 3rd copy (pink) to licensee/driver

DC-28 (Rev. 07/22)

(SEE REVERSE SIDE)

Breath Alcohol



DC-28 Form

NOTICE OF DRIVER'S LICENSE SUSPENSION (Pursuant to K.S.A. 8-1567a)

Based upon the certification on the reverse side of this form, your driving privileges are hereby suspended, pursuant to K.S.A. 8-1567a, effective the 30th day after the date of service of this notice, unless a timely request for hearing is made (see below). The action taken on your license depends upon whether you have had a prior test result of .02 or greater, but less than .08.

If this is the first time you have had a test result of .02 or greater, but less than .08, your driving privileges will be suspended for 30 days and then restricted as provided by K.S.A. 8-1015, and amendments thereto, for an additional 180 days.

If this is the second or subsequent time you have had a test result of .02 or greater, but less than .08, your driving privileges will be suspended for one year.

PROCEDURE FOR REQUESTING AN ADMINISTRATIVE HEARING

* A hearing request may be made either by mailing a written request which is postmarked within 14 calendar days after the date of service of this form, or by sending a written request by electronic facsimile (fax) to the Division of Vehicles within 14 calendar days after the date of service of this form. If this form was served on you by mail, you will have an additional 3 days, pursuant to K.S.A. 60-206(d).

* The hearing request must include your full name, driver's license number, birth date and a telephone number at which you or your legal representative can be reached if necessary.

* The hearing request must include your current address. If the address you provide in your written request for a hearing is different than the address on the reverse side of this form, the address in your hearing request will be treated as a change of address pursuant to K.S.A. 8-248. All correspondence will be sent to the address provided in the hearing request.

* The hearing request must state whether you want to have the certifying officer(s) subpoenaed to the administrative hearing. If you wish to contest the facts contained in the officer's certification at the administrative hearing, you have the burden of disproving those facts, and you may need to compel the appearance of the certifying officer(s) to do so. If you fail to request any officer's attendance at the time you make a hearing request, your right to compel that attendance by subpoena will be deemed waived and the Law Enforcement Officer's Certification will be admitted as evidence at the hearing.

* HEARING LOCATION. Upon receipt of your timely written hearing request, a hearing will be scheduled by telephone conference call. You may request that the hearing be conducted in person before a representative of the Director of Vehicles. Any request for an in person hearing must be made at the time you request a hearing. A written notice will be mailed to you setting out the time, date and place of the hearing. Any temporary driving privileges granted on the reverse side of this document will be extended until a final determination is made.

* Mail hearing requests to:
DL Administrative Hearing Section
Kansas Department of Revenue
P.O. Box 2744
Topeka, KS 66601-2744
(785) 296-6911

* Send electronic facsimile (fax) requests to: (785) 296-0275

West's Kansas Statutes Annotated

Chapter 8. Automobiles and Other Vehicles

Article 15. Uniform Act Regulating Traffic; Rules of the Road

Serious Traffic Offenses

K.S.A. 8-1567

8-1567. Driving under the influence; penalties

Effective: July 1, 2022

Currentness

(a) Driving under the influence is operating or attempting to operate any vehicle within this state while:

(1) The alcohol concentration in the person's blood or breath as shown by any competent evidence, including other competent evidence, as defined in K.S.A. 8-1013(f)(1), and amendments thereto, is 0.08 or more;

(2) the alcohol concentration in the person's blood or breath, as measured within three hours of the time of operating or attempting to operate a vehicle, is 0.08 or more;

(3) under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle;

(4) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle; or

(5) under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely driving a vehicle.

(b)(1) Driving under the influence is:

(A) On a first conviction, a class B, nonperson misdemeanor. The person convicted shall be sentenced to not less than 48 consecutive hours nor more than six months' imprisonment, or in the court's discretion 100 hours of public service, and fined not less than \$750 nor more than \$1,000;

(B) on a second conviction, a class A, nonperson misdemeanor. The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$1,250 nor more than \$1,750. The following conditions shall apply to such sentence:

(i) As a condition of any probation granted under this subsection, the person shall serve at least 120 hours of confinement. The hours of confinement shall include at least 48 hours of imprisonment and otherwise may be served by a combination of: Imprisonment; a work release program, if such work release program

requires such person to return to the confinement at the end of each day in the work release program; or a house arrest program pursuant to K.S.A. 21-6609, and amendments thereto;

(ii)(a) if the person is placed into a work release program or placed under a house arrest program for any portion of the minimum of 120 hours of confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program until the minimum sentence is met. If the person is placed into a work release program or placed under a house arrest program for more than the minimum of 120 hours of confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program until the minimum of 120 hours of confinement is completed, and thereafter, the person shall receive day-for-day credit for time served in such program unless otherwise ordered by the court; and

(b) when in a work release program, the person shall only be given credit for the time served in confinement at the end of and continuing to the beginning of the person's work day. When under a house arrest program, the person shall be monitored by an electronic monitoring device that verifies the person's location and shall only be given credit for the time served within the boundaries of the person's residence;

(C) on a third conviction, a class A, nonperson misdemeanor, except as provided in subsection (b)(1)(D). The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$1,750 nor more than \$2,500. The following conditions shall apply to such sentence:

(i) As a condition of any probation granted under this subsection, the person shall serve at least 30 days of confinement. After at least 48 consecutive hours of imprisonment, the remainder of the period of confinement may be served by a combination of: Imprisonment; a work release program, if such work release program requires such person to return to the confinement at the end of each day in the work release program; or a house arrest program pursuant to K.S.A. 21-6609, and amendments thereto; and

(ii)(a) if the person is placed into a work release program or placed under a house arrest program for any portion of the minimum of 30 days of confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program for the first 240 hours of confinement, and thereafter, the person shall receive day-for-day credit for time served in such program unless otherwise ordered by the court; and

(b) when in a work release program, the person shall only be given credit for the time served in confinement at the end of and continuing to the beginning of the person's work day. When under a house arrest program, the person shall be monitored by an electronic monitoring device that verifies the person's location and shall only be given credit for the time served within the boundaries of the person's residence;

(D) on a third conviction, a severity level 6, nonperson felony if the person has a prior conviction which occurred within the preceding 10 years, not including any period of incarceration. The following conditions shall apply to such sentence:

(i) As a condition of any probation granted under this subsection, the person shall serve at least 30 days of confinement. After at least 48 consecutive hours of imprisonment, the remainder of the period of confinement may be served by a combination of: Imprisonment; a work release program, if such work release program requires such person to return to the confinement at the end of each day in the work release program; or a house arrest program pursuant to K.S.A. 21-6609, and amendments thereto; and

(ii)(a) if the person is placed into a work release program or placed under a house arrest program for any portion of the minimum of 30 days of confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program for the first 240 hours of confinement, and thereafter, the person shall receive day-for-day credit for time served in such program unless otherwise ordered by the court; and

(b) when in a work release program, the person shall only be given credit for the time served in confinement at the end of and continuing to the beginning of the person's work day. When under a house arrest program, the person shall be monitored by an electronic monitoring device that verifies the person's location and shall only be given credit for the time served within the boundaries of the person's residence; and

(E) on a fourth or subsequent conviction, a severity level 6, nonperson felony. The following conditions shall apply to such sentence:

(i) As a condition of any probation granted under this subsection, the person shall serve at least 30 days of confinement. After at least 48 consecutive hours of imprisonment, the remainder of the period of confinement may be served by a combination of: Imprisonment; a work release program, if such work release program requires such person to return to the confinement at the end of each day in the work release program; or a house arrest program pursuant to K.S.A. 21-6609, and amendments thereto; and

(ii)(a) if the person is placed into a work release program or placed under a house arrest program for any portion of the minimum of 30 days of confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program for the first 240 hours of confinement, and thereafter, the person shall receive day-for-day credit for time served in such program unless otherwise ordered by the court; and

(b) when in a work release program, the person shall only be given credit for the time served in confinement at the end of and continuing to the beginning of the person's work day. When under a house arrest program, the person shall be monitored by an electronic monitoring device that verifies the person's location and shall only be given credit for the time served within the boundaries of the person's residence.

(2) The court may order that the term of imprisonment imposed pursuant to subsection (b)(1)(D) or (b)(1)(E) be served in a state facility in the custody of the secretary of corrections in a facility designated by the secretary for the provision of substance abuse treatment pursuant to the provisions of K.S.A. 21-6804, and amendments thereto. The secretary of corrections may refuse to admit the person to the designated facility and place the

person in a different state facility, or admit the person and subsequently transfer the person to a different state facility, if the secretary determines: (A) That substance abuse treatment resources or the capacity of the facility designated by the secretary for the incarceration and treatment of the person is not available; (B) the person has failed to meaningfully participate in the treatment program of the designated facility; (C) the person is disruptive to the security or operation of the designated facility; or (D) the medical or mental health condition of the person renders the person unsuitable for confinement at the designated facility. The determination by the secretary that the person either is not to be admitted into the designated facility or is to be transferred from the designated facility is not subject to review.

(3) In addition, for any conviction pursuant to subsection (b)(1)(C), at the time of the filing of the judgment form or journal entry as required by K.S.A. 22-3426 or K.S.A. 21-6711, and amendments thereto, the court shall cause a certified copy to be sent to the officer having the offender in charge. The court shall determine whether the offender, upon release from imprisonment, shall be supervised by community correctional services or court services based upon the risk and needs of the offender. The risk and needs of the offender shall be determined by use of a risk assessment tool specified by the Kansas sentencing commission. The law enforcement agency maintaining custody and control of a defendant for imprisonment shall cause a certified copy of the judgment form or journal entry to be sent to the supervision office designated by the court and upon expiration of the term of imprisonment shall deliver the defendant to a location designated by the supervision office designated by the court. After the term of imprisonment imposed by the court, the person shall be placed on supervision to community correctional services or court services, as determined by the court, for a mandatory one-year period of supervision, which such period of supervision shall not be reduced. During such supervision, the person shall be required to participate in a multidisciplinary model of services for substance use disorders facilitated by a Kansas department for aging and disability services designated care coordination agency to include assessment and, if appropriate, referral to a community based substance use disorder treatment including recovery management and mental health counseling as needed. The multidisciplinary team shall include the designated care coordination agency, the supervision officer, the Kansas department for aging and disability services designated treatment provider and the offender. An offender for whom a warrant has been issued by the court alleging a violation of this supervision shall be considered a fugitive from justice if it is found that the warrant cannot be served. If it is found the offender has violated the provisions of this supervision, the court shall determine whether the time from the issuing of the warrant to the date of the court's determination of an alleged violation, or any part of it, shall be counted as time served on supervision. Any violation of the conditions of such supervision may subject such person to revocation of supervision and imprisonment in jail for the remainder of the period of imprisonment, the remainder of the supervision period, or any combination or portion thereof. The term of supervision may be extended at the court's discretion beyond one year, and any violation of the conditions of such extended term of supervision may subject such person to the revocation of supervision and imprisonment in jail of up to the remainder of the original sentence, not the term of the extended supervision.

(4) In addition, prior to sentencing for any conviction pursuant to subsection (b)(1)(A) or (b)(1)(B), the court shall order the person to participate in an alcohol and drug evaluation conducted by a provider in accordance with K.S.A. 8-1008, and amendments thereto. The person shall be required to follow any recommendation made by the provider after such evaluation, unless otherwise ordered by the court.

(c) Any person 18 years of age or older convicted of violating this section or an ordinance which prohibits the acts that this section prohibits who had one or more children under the age of 18 years in the vehicle at the time of the offense shall have such person's punishment enhanced by one month of imprisonment. This imprisonment must be served consecutively to any other minimum mandatory penalty imposed for a violation of this section or an

ordinance which prohibits the acts that this section prohibits. Any enhanced penalty imposed shall not exceed the maximum sentence allowable by law. During the service of the enhanced penalty, the judge may order the person on house arrest, work release or other conditional release.

(d) If a person is charged with a violation of subsection (a)(4) or (a)(5), the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(e) The court may establish the terms and time for payment of any fines, fees, assessments and costs imposed pursuant to this section. Any assessment and costs shall be required to be paid not later than 90 days after imposed, and any remainder of the fine shall be paid prior to the final release of the defendant by the court.

(f)(1) In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to \$5 for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed not later than one year after the fine is imposed or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall become due on that date.

(2) The court may, in its discretion, waive any portion of a fine imposed pursuant to this section, except the \$250 required to be remitted to the state treasurer pursuant to subsection (q)(2), upon a showing that the person successfully completed court-ordered education or treatment.

(g) Prior to filing a complaint alleging a violation of this section, a prosecutor shall request and shall receive from the:

(1) Division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state; and

(2) Kansas bureau of investigation central repository all criminal history record information concerning such person.

(h) The court shall electronically report every conviction of a violation of this section and every diversion agreement entered into in lieu of further criminal proceedings on a complaint alleging a violation of this section to the division including any finding regarding the alcohol concentration in the offender's blood or breath. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.

(i) For the purpose of determining whether a conviction is a first, second, third, fourth or subsequent conviction in sentencing under this section:

(1) Convictions for a violation of this section, or a violation of an ordinance of any city or resolution of any county that prohibits the acts that this section prohibits, or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging any such violations, shall be taken into account, but only convictions or diversions occurring on or after July 1, 2001. Nothing in this provision shall be construed as preventing any court from considering any convictions or diversions occurring during the person's lifetime in determining the sentence to be imposed within the limits provided for a first, second, third, fourth or subsequent offense;

(2) any convictions for a violation of the following sections occurring during a person's lifetime shall be taken into account:

(A) Driving a commercial motor vehicle under the influence, K.S.A. 8-2,144, and amendments thereto;

(B) operating a vessel under the influence of alcohol or drugs, K.S.A. 32-1131, and amendments thereto;

(C) involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 21-3442, prior to its repeal, or K.S.A. 21-5405(a)(3) or (a)(5), and amendments thereto;

(D) aggravated battery as described in K.S.A. 21-5413(b)(3) or (b)(4), and amendments thereto; and

(E) aggravated vehicular homicide, K.S.A. 21-3405a, prior to its repeal, or vehicular battery, K.S.A. 21-3405b, prior to its repeal, if the crime was committed while committing a violation of K.S.A. 8-1567, and amendments thereto;

(3) "conviction" includes:

(A) Entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging an offense described in subsection (i)(2); and

(B) conviction of a violation of an ordinance of a city in this state, a resolution of a county in this state or any law of another jurisdiction that would constitute an offense that is comparable to the offense described in subsection (i)(1) or (i)(2);

(4) multiple convictions of any crime described in subsection (i)(1) or (i)(2) arising from the same arrest shall only be counted as one conviction;

(5) it is irrelevant whether an offense occurred before or after conviction for a previous offense; and

(6) a person may enter into a diversion agreement in lieu of further criminal proceedings for a violation of this section, and amendments thereto, or an ordinance which prohibits the acts of this section, and amendments thereto, only once during the person's lifetime.

(j) For the purposes of determining whether an offense is comparable, the following shall be considered:

(1) The name of the out-of-jurisdiction offense;

(2) the elements of the out-of-jurisdiction offense; and

(3) whether the out-of-jurisdiction offense prohibits similar conduct to the conduct prohibited by the closest approximate Kansas offense.

(k) Upon conviction of a person of a violation of this section or a violation of a city ordinance or county resolution prohibiting the acts prohibited by this section, the division, upon receiving a report of conviction, shall suspend, restrict or suspend and restrict the person's driving privileges as provided by K.S.A. 8-1014, and amendments thereto.

(l)(1) Nothing contained in this section shall be construed as preventing any city from enacting ordinances, or any county from adopting resolutions, declaring acts prohibited or made unlawful by this act as unlawful or prohibited in such city or county and prescribing penalties for violation thereof.

(2) The minimum penalty prescribed by any such ordinance or resolution shall not be less than the minimum penalty prescribed by this section for the same violation, and the maximum penalty in any such ordinance or resolution shall not exceed the maximum penalty prescribed for the same violation.

(3) On and after July 1, 2007, and retroactive for ordinance violations committed on or after July 1, 2006, an ordinance may grant to a municipal court jurisdiction over a violation of such ordinance which is concurrent with the jurisdiction of the district court over a violation of this section, notwithstanding that the elements of such ordinance violation are the same as the elements of a violation of this section that would constitute, and be punished as, a felony.

(4) Any such ordinance or resolution shall authorize the court to order that the convicted person pay restitution to any victim who suffered loss due to the violation for which the person was convicted.

(m)(1) Upon the filing of a complaint, citation or notice to appear alleging a person has violated a city ordinance prohibiting the acts prohibited by this section, and prior to conviction thereof, a city attorney shall request and shall receive from the:

(A) Division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state; and

(B) Kansas bureau of investigation central repository all criminal history record information concerning such person.

(2) If the elements of such ordinance violation are the same as the elements of a violation of this section that would constitute, and be punished as, a felony, the city attorney shall refer the violation to the appropriate county or district attorney for prosecution.

(n) No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section, or a violation of any ordinance of a city or resolution of any county in this state which prohibits the acts prohibited by this section, to avoid the mandatory penalties established by this section or by the ordinance. For the purpose of this subsection, entering into a diversion agreement pursuant to K.S.A. 12-4413 et seq. or 22-2906 et seq., and amendments thereto, shall not constitute plea bargaining. This subsection shall not be construed to prohibit an amendment or dismissal of any charge where the admissible evidence is not sufficient to support a conviction beyond a reasonable doubt on such charge.

(o) The alternatives set out in subsection (a) may be pleaded in the alternative, and the state, city or county may, but shall not be required to, elect one or more of such alternatives prior to submission of the case to the fact finder.

(p) As used in this section:

(1) "Alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath;

(2) "imprisonment" includes any restrained environment in which the court and law enforcement agency intend to retain custody and control of a defendant and such environment has been approved by the board of county commissioners or the governing body of a city; and

(3) "drug" includes toxic vapors as such term is defined in K.S.A. 21-5712, and amendments thereto.

(q)(1) The amount of the increase in fines as specified in this section shall be remitted by the clerk of the district court to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of remittance of the increase provided in this act, the state treasurer shall deposit the entire amount in the state treasury and the state treasurer shall credit 50% to the community alcoholism and intoxication programs fund and 50% to the department of corrections alcohol and drug abuse treatment fund, which is hereby created in the state treasury.

(2) On and after July 1, 2011, the amount of \$250 from each fine imposed pursuant to this section shall be remitted by the clerk of the district court to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall credit the

entire amount to the community corrections supervision fund established by K.S.A. 75-52,113, and amendments thereto.

Credits

Laws 1974, ch. 33, § 8-1567; Laws 1976, ch. 50, § 1; Laws 1982, ch. 144, § 5; Laws 1983, ch. 37, § 2; Laws 1984, ch. 37, § 4; Laws 1984, ch. 39, § 9; Laws 1985, ch. 48, § 9; Laws 1985, ch. 50, § 5; Laws 1988, ch. 48, § 6; Laws 1988, ch. 47, § 17; Laws 1989, ch. 92, § 16; Laws 1990, ch. 44, § 6; Laws 1990, ch. 47, § 3; Laws 1991, ch. 36, § 20; Laws 1992, ch. 298, § 1; Laws 1993, ch. 259, § 8; Laws 1993, ch. 291, § 270; Laws 1994, ch. 291, § 2; Laws 2001, ch. 200, § 14; Laws 2002, ch. 50, § 1; Laws 2002, ch. 166, § 2; Laws 2003, ch. 100, § 1; Laws 2007, ch. 181, § 9, eff. July 1, 2007; Laws 2008, ch. 170, § 4, eff. July 1, 2008; Laws 2009, ch. 107, § 5, eff. July 1, 2009; Laws 2009, ch. 143, § 3, eff. July 1, 2009; Laws 2010, ch. 153, § 3, eff. July 1, 2011; Laws 2011, ch. 105, § 19, eff. July 1, 2011; Laws 2012, ch. 172, § 20, eff. July 1, 2012; Laws 2013, ch. 122, § 6, eff. July 1, 2013; Laws 2014, ch. 115, § 3, eff. July 1, 2014; Laws 2018, ch. 7, § 7, eff. July 1, 2018; Laws 2018, ch. 106, § 13, eff. July 1, 2018; Laws 2022, ch. 80, § 14, eff. July 1, 2022.

K. S. A. 8-1567, KS ST 8-1567

Statutes are current through laws enacted during the 2024 Regular Session of the Kansas Legislature effective on April 18, 2024. Some statute sections may be more current, see credits for details.

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West's Kansas Statutes Annotated
Chapter 8. Automobiles and Other Vehicles
Article 15. Uniform Act Regulating Traffic; Rules of the Road
Serious Traffic Offenses

K.S.A. 8-1567a

8-1567a. Driving under the influence by any person less
than 21 years of age; blood alcohol concentration; penalties

Effective: July 1, 2022
Currentness

(a) It shall be unlawful for any person less than 21 years of age to operate or attempt to operate a vehicle in this state with a breath or blood alcohol content of .02 or greater.

(b) Whenever a law enforcement officer determines that a breath or blood alcohol test is to be required of a person less than 21 years of age pursuant to K.S.A. 8-1001 or K.S.A. 8-2,142, and amendments thereto, in addition to any other notices required by law, the law enforcement officer shall provide written and oral notice that:

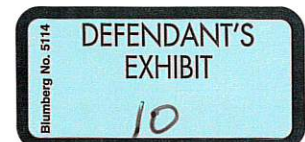
(1) It is unlawful for any person less than 21 years of age to operate or attempt to operate a vehicle in this state with a breath or blood alcohol content of .02 or greater; and

(2) if the person is less than 21 years of age at the time of the test request and submits to and completes the test or tests and the test results show an alcohol concentration of .02 or greater, but less than .08, on the person's first occurrence, the person's driving privileges will be suspended for 30 days and on the person's second or subsequent occurrence, the person's driving privileges shall be suspended for one year.

(c) Any suspension and restriction of driving privileges pursuant to this section shall be in addition to any disqualification from driving a commercial motor vehicle pursuant to K.S.A. 8-2,142, and amendments thereto.

(d) Whenever a breath or blood alcohol test is requested pursuant to K.S.A. 8-1001, and amendments thereto, from a person less than 21 years of age, and results in a test result of .02 or greater, but less than .08, a law enforcement officer's certification under this section shall be prepared. The certification required by this section shall be signed by one or more officers to certify that:

(1)(A) There existed reasonable grounds to believe the person was operating a vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system or was under the age of 21 years and was operating or attempting to operate a vehicle while having alcohol or other drugs in such person's system;



(B) the person had been placed under arrest, was in custody or had been involved in a vehicle accident or collision;

(C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto, and the oral and written notice required by this section;

(D) that the person was less than 21 years of age at the time of the test request; and

(E) the result of the test showed that the person had an alcohol concentration of .02 or greater in such person's blood or breath.

(2) With regard to a breath test, in addition to those matters required to be certified under subsection (d)(1), that:

(A) The testing equipment used was certified by the Kansas department of health and environment;

(B) the testing procedures used were in accordance with the requirements set out by the Kansas department of health and environment; and

(C) the person who operated the testing equipment was certified by the Kansas department of health and environment to operate such equipment.

(e) If a hearing is requested as a result of a law enforcement officer's certification under this section, the scope of the hearing shall be limited to whether:

(1) A law enforcement officer had reasonable grounds to believe the person was operating a vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system or was under the age of 21 years and was operating or attempting to operate a vehicle while having alcohol or other drugs in such person's system;

(2) the person had been placed under arrest, was in custody or was involved in a motor vehicle accident or collision resulting in property damage, personal injury or death;

(3) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto, and the oral and written notice required by this section;

(4) the testing equipment used was reliable;

(5) the person who operated the testing equipment was qualified;

(6) the testing procedures used were reliable;

(7) the test result determined that the person had an alcohol concentration of .02 or greater in such person's blood or breath;

(8) the person was operating a vehicle; and

(9) the person was less than 21 years of age at the time a test was requested.

(f) If a person less than 21 years of age submits to a breath or blood alcohol test requested pursuant to K.S.A. 8-1001 or K.S.A. 8-2,142, and amendments thereto, and produces a test result of .02 or greater, but less than .08, on the person's first occurrence, the person's driving privileges shall be suspended for 30 days and then restricted as provided by K.S.A. 8-1015, and amendments thereto, for an additional 180 days, and on the person's second or subsequent occurrence, the person's driving privileges shall be suspended for one year.

(g) Except where there is a conflict between this section and K.S.A. 8-1001 and 8-1002, and amendments thereto, the provisions of K.S.A. 8-1001 and 8-1002, and amendments thereto, shall be applicable to proceedings under this section.

(h) Any determination under this section that a person less than 21 years of age had a test result of .02 or greater, but less than .08, and any resulting administrative action upon the person's driving privileges, upon the first occurrence of such test result and administrative action, shall not be considered by any insurance company in determining the rate charged for any automobile liability insurance policy or whether to cancel any such policy under the provisions of K.S.A. 40-277(4)(a), and amendments thereto.

Credits

Laws 1996, ch. 216, § 1; Laws 1999, ch. 125, § 19; 1999, ch. 169, § 2; Laws 2001, ch. 200, § 8; Laws 2013, ch. 122, § 7, eff. July 1, 2013; Laws 2022, ch. 80, § 15, eff. July 1, 2022.

K. S. A. 8-1567a, KS ST 8-1567a

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West's Kansas Statutes Annotated

Chapter 8. Automobiles and Other Vehicles

Article 10. Driving Under Influence of Alcohol or Drugs; Related Provisions

K.S.A. 8-1002

8-1002. Test refusal or failure; suspension of license; notice; procedure

Currentness

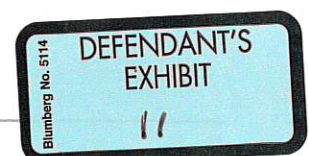
(a) Whenever a test is requested pursuant to this act and results in either a test failure or test refusal, a law enforcement officer's certification shall be prepared. If the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, a separate certification pursuant to K.S.A. 8-2,145, and amendments thereto, shall be prepared in addition to any certification required by this section. The certification required by this section shall be signed by one or more officers to certify:

(1) With regard to a test refusal, that: (A) There existed reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, or is under 21 years of age while having alcohol or other drugs in such person's system; (B) the person had been placed under arrest, was in custody or had been involved in a vehicle accident or collision; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and (D) the person refused to submit to and complete a test as requested by a law enforcement officer.

(2) With regard to a test failure, that: (A) There existed reasonable grounds to believe the person was operating a vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, or is under 21 years of age while having alcohol or other drugs in such person's system; (B) the person had been placed under arrest, was in custody or had been involved in a vehicle accident or collision; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and (D) the result of the test showed that the person had an alcohol concentration of .08 or greater in such person's blood or breath.

(3) With regard to failure of a breath test, in addition to those matters required to be certified under subsection (a)(2), that: (A) The testing equipment used was certified by the Kansas department of health and environment; (B) the testing procedures used were in accordance with the requirements set out by the Kansas department of health and environment; and (C) the person who operated the testing equipment was certified by the Kansas department of health and environment to operate such equipment.

(b) For purposes of this section, certification shall be complete upon signing, and no additional acts of oath, affirmation, acknowledgment or proof of execution shall be required. The signed certification or a copy or photostatic reproduction thereof shall be admissible in evidence in all proceedings brought pursuant to this act, and receipt of any such certification, copy or reproduction shall accord the department authority to proceed as set forth herein. Any person who signs a certification submitted to the division knowing it contains a false statement is guilty of a class B nonperson misdemeanor.



(c) When the officer directing administration of the testing determines that a person has refused a test and the criteria of subsection (a)(1) have been met or determines that a person has failed a test and the criteria of subsection (a)(2) have been met, the officer shall serve upon the person notice of suspension of driving privileges pursuant to K.S.A. 8-1014, and amendments thereto. If the determination is made while the person is still in custody, service shall be made in person by the officer on behalf of the division of vehicles. In cases where a test failure is established by a subsequent analysis of a breath, blood or urine sample, the officer shall serve notice of such suspension in person or by another designated officer or by mailing the notice to the person at the address provided at the time of the test.

(d) In addition to the information required by subsection (a), the law enforcement officer's certification and notice of suspension shall contain the following information: (1) The person's name, driver's license number and current address; (2) the reason and statutory grounds for the suspension; (3) the date notice is being served and a statement that the effective date of the suspension shall be the 30th day after the date of service; (4) the right of the person to request an administrative hearing; and (5) the procedure the person must follow to request an administrative hearing. The law enforcement officer's certification and notice of suspension shall also inform the person that: (1) Constitutional issues cannot be decided at the administrative hearing, but may be preserved and raised in a petition for review of the hearing as provided in K.S.A. 8-1020(o) and (p), and amendments thereto; and (2) all correspondence will be mailed to the person at the address contained in the law enforcement officer's certification and notice of suspension unless the person notifies the division in writing of a different address or change of address. The address provided will be considered a change of address for purposes of K.S.A. 8-248, and amendments thereto, if the address furnished is different from that on file with the division.

(e) If a person refuses a test or if a person is still in custody when it is determined that the person has failed a test, the officer shall take any license in the possession of the person and, if the license is not expired, suspended, revoked or canceled, shall issue a temporary license effective until the 30th day after the date of service set out in the law enforcement officer's certification and notice of suspension. If the test failure is established by a subsequent analysis of a breath or blood sample, the temporary license shall be served together with the copy of the law enforcement officer's certification and notice of suspension. A temporary license issued pursuant to this subsection shall bear the same restrictions and limitations as the license for which it was exchanged. Within seven days after the date of service of a copy of the law enforcement officer's certification and notice of suspension the officer's certification and notice of suspension, along with any licenses taken, shall be forwarded to the division.

(f) Upon receipt of the law enforcement officer's certification, the division shall review the certification to determine that it meets the requirements of subsection (a). Upon so determining, the division shall proceed to suspend the person's driving privileges in accordance with the notice of suspension previously served. If the requirements of subsection (a) are not met, the division shall dismiss the administrative proceeding and return any license surrendered by the person.

(g) The division shall prepare and distribute forms for use by law enforcement officers in giving the notice required by this section.

(h) The provisions of K.S.A. 60-206, and amendments thereto, regarding the computation of time shall be applicable in determining the effective date of suspension set out in subsection (d).

Credits

Laws 1955, ch. 61, § 2; Laws 1985, ch. 48, § 4; Laws 1985, ch. 50, § 2; Laws 1986, ch. 40, § 3; Laws 1988, ch. 47, § 14; Laws 1989, ch. 38, § 35; Laws 1989, ch. 38, § 36; Laws 1990, ch. 44, § 3; Laws 1991, ch. 36, § 19; Laws 1993, ch. 259, § 2; Laws 1993, ch. 275, § 2; Laws 1995, ch. 208, § 2; Laws 2001, ch. 200, § 13; Laws 2007, ch. 181, § 4, eff. July 1, 2007; Laws 2010, ch. 135, § 5, eff. July 1, 2010; Laws 2016, ch. 69, § 1, eff. July 1, 2016.

K. S. A. 8-1002, KS ST 8-1002

Statutes are current through laws enacted during the 2024 Regular Session of the Kansas Legislature effective on April 18, 2024. Some statute sections may be more current, see credits for details.

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West's Kansas Statutes Annotated

Chapter 8. Automobiles and Other Vehicles

Article 10. Driving Under Influence of Alcohol or Drugs; Related Provisions

K.S.A. 8-1013

8-1013. Definitions

Effective: July 1, 2018

Currentness

As used in K.S.A. 8-1001 through 8-1018, and amendments thereto:

(a) "Alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath.

(b)(1) "Alcohol or drug-related conviction" means any of the following: (A) Conviction of vehicular battery or aggravated vehicular homicide, prior to their repeal, if the crime is committed while committing a violation of K.S.A. 8-1567, and amendments thereto, or the ordinance of a city or resolution of a county in this state which prohibits any acts prohibited by that statute, or conviction of a violation of K.S.A. 8-2,144 or 8-1567, and amendments thereto, conviction of a violation of aggravated battery as described in K.S.A. 21-5413(b)(3) or (b)(4), and amendments thereto, or conviction of a violation of involuntary manslaughter as described in K.S.A. 21-5405(a)(3) or (a)(5), and amendments thereto; (B) conviction of a violation of a law of another state which would constitute a crime described in subsection (b)(1)(A) if committed in this state; (C) conviction of a violation of an ordinance of a city in this state or a resolution of a county in this state which would constitute a crime described in subsection (b)(1)(A), whether or not such conviction is in a court of record; or (D) conviction of an act which was committed on a military reservation and which would constitute a violation of K.S.A. 8-2,144 or 8-1567, and amendments thereto, or would constitute a crime described in subsection (b)(1)(A) if committed off a military reservation in this state.

(2) For the purpose of determining whether an occurrence is a first, second or subsequent occurrence: (A) "Alcohol or drug-related conviction" also includes entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging commission of a crime described in subsection (b)(1), including a diversion agreement entered into prior to the effective date of this act; and (B) it is irrelevant whether an offense occurred before or after conviction or diversion for a previous offense.

(c) "Division" means the division of vehicles of the department of revenue.

(d) "Ignition interlock device" means a device which uses a breath analysis mechanism to prevent a person from operating a motor vehicle if such person has consumed an alcoholic beverage.

(e) "Occurrence" means a test refusal, test failure or alcohol or drug-related conviction, or any combination thereof arising from one arrest, including an arrest which occurred prior to the effective date of this act.

(f) "Other competent evidence" includes: (1) Alcohol concentration tests obtained from samples taken three hours or more after the operation or attempted operation of a vehicle; and (2) readings obtained from a partial alcohol concentration test on a breath testing machine.

(g) "Samples" includes breath supplied directly for testing, which breath is not preserved.

(h) "Test failure" or "fails a test" refers to a person's having results of a test administered pursuant to this act, other than a preliminary screening test, which show an alcohol concentration of 0.08 or greater in the person's blood or breath, and includes failure of any such test on a military reservation.

(i) "Test refusal" or "refuses a test" refers to a person's failure to submit to or complete any test of the person's blood, breath, urine or other bodily substance, other than a preliminary screening test, in accordance with this act, and includes refusal of any such test on a military reservation.

(j) "Law enforcement officer" has the meaning provided by K.S.A. 21-5111, and amendments thereto, and includes any person authorized by law to make an arrest on a military reservation for an act which would constitute a violation of K.S.A. 8-1567, and amendments thereto, if committed off a military reservation in this state.

Credits

Laws 1988, ch. 47, § 6; Laws 1993, ch. 259, § 5; Laws 2005, ch. 86, § 1; Laws 2011, ch. 105, § 13, eff. July 1, 2011; Laws 2012, ch. 172, § 15, eff. July 1, 2012; Laws 2013, ch. 122, § 3, eff. July 1, 2013; Laws 2018, ch. 7, § 5, eff. July 1, 2018; Laws 2018, ch. 106, § 9, eff. July 1, 2018.

K. S. A. 8-1013, KS ST 8-1013

Statutes are current through laws enacted during the 2024 Regular Session of the Kansas Legislature effective on April 18, 2024. Some statute sections may be more current, see credits for details.

West's Kansas Statutes Annotated

Chapter 8. Automobiles and Other Vehicles

Article 10. Driving Under Influence of Alcohol or Drugs; Related Provisions

K.S.A. 8-1014

8-1014. Suspension and restriction of driving privileges for test refusal, test failure or alcohol or drug-related conviction; increased penalties for blood or breath alcohol concentration of 0.15 or greater; ignition interlock device

Effective: July 1, 2022

Currentness

(a) Except as provided by subsection (e) and K.S.A. 8-2,142, and amendments thereto, if a person refuses a test, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall:

(1) On the person's first occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for two years to driving only a motor vehicle equipped with an ignition interlock device;

(2) on the person's second occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for three years to driving only a motor vehicle equipped with an ignition interlock device;

(3) on the person's third occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for four years to driving only a motor vehicle equipped with an ignition interlock device;

(4) on the person's fourth occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for five years to driving only a motor vehicle equipped with an ignition interlock device; and

(5) on the person's fifth or subsequent occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for 10 years to driving only a motor vehicle equipped with an ignition interlock device.

(b)(1) Except as provided by subsections (b)(2) and (e) and K.S.A. 8-2,142, and amendments thereto, if a person fails a test or has an alcohol or drug-related conviction in this state, the division shall:

(A) On the person's first occurrence, suspend the person's driving privileges for 30 days and at the end of the suspension, restrict the person's driving privileges as provided by K.S.A. 8-1015(b), and amendments thereto;

(B) on the person's second occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for one year to driving only a motor vehicle equipped with an ignition interlock device;

(C) on the person's third occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for two years to driving only a motor vehicle equipped with an ignition interlock device;

(D) on the person's fourth occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for three years to driving only a motor vehicle equipped with an ignition interlock device; and

(E) on the person's fifth or subsequent occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for 10 years to driving only a motor vehicle equipped with an ignition interlock device.

(2) Except as provided by subsection (e) and K.S.A. 8-2,142, and amendments thereto, if a person fails a test or has an alcohol or drug-related conviction in this state and the person's blood or breath alcohol concentration is 0.15 or greater, the division shall:

(A) On the person's first occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for one year to driving only a motor vehicle equipped with an ignition interlock device;

(B) on the person's second occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for two years to driving only a motor vehicle equipped with an ignition interlock device;

(C) on the person's third occurrence, suspend the person's driving privileges for one year and at the end of the suspension restrict the person's driving privileges for three years to driving only a motor vehicle equipped with an ignition interlock device;

(D) on the person's fourth occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for four years to driving only a motor vehicle equipped with an ignition interlock device; and

(E) on the person's fifth or subsequent occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for 10 years to driving only a motor vehicle equipped with an ignition interlock device.

(3) Whenever a person's driving privileges have been restricted to driving only a motor vehicle equipped with an ignition interlock device for 10 years under this section, such person may petition any district court for relief from such restriction after five years of such restriction have been served. The court shall consider, but not be limited to, whether: (A) Such person's driving privileges have been restricted, suspended, revoked or disqualified pursuant to another action by the division or a court; and (B) such person proves installation, maintenance and use of an ignition interlock device approved by the highway patrol throughout the five-year period. If the court finds that the person's driving privileges should be restored, then the court shall electronically report such order to the division. The division, upon receiving such order, shall restore such person's driving privileges, unless such person's driving privileges have been restricted, suspended, revoked or disqualified pursuant to another action by the division or a court.

(c) Except as provided by subsection (e) and K.S.A. 8-2,142, and amendments thereto, if a person who is less than 21 years of age fails a test or has an alcohol or drug-related conviction in this state, penalties shall be imposed pursuant to subsection (b).

(d) Whenever the division is notified by a provider, as defined in K.S.A. 8-1008, and amendments thereto, or a court that the person has failed to follow any recommendation made by the provider or otherwise ordered by a court for a conviction of a violation of K.S.A. 8-1567, and amendments thereto, the division shall suspend the person's driving privileges until the division receives notice of the person's completion of such recommendation.

(e)(1) Except as provided in K.S.A. 8-2,142, and amendments thereto, if a person's driving privileges are subject to suspension pursuant to this section for a test refusal, test failure or alcohol or drug-related conviction arising from the same arrest, the period of such suspension shall not exceed the longest applicable period authorized by subsection (a) or (b), and such suspension periods shall not be added together or otherwise imposed consecutively. In addition, in determining the period of such suspension as authorized by subsection (a) or (b), such person shall receive credit for any period of time for which such person's driving privileges were suspended while awaiting any hearing or final order authorized by this act¹.

(2) If a person's driving privileges are subject to restriction pursuant to this section for a test failure or alcohol or drug-related conviction arising from the same arrest, the restriction periods shall not be added together or otherwise imposed consecutively. In addition, in determining the period of restriction, the person shall receive credit for any period of suspension imposed for a test refusal arising from the same arrest.

(f) If the division has taken action under subsection (a) for a test refusal or under subsection (b) for a test failure and such action is stayed pursuant to K.S.A. 8-259, and amendments thereto, or if temporary driving privileges are issued pursuant to K.S.A. 8-1020, and amendments thereto, the stay or temporary driving privileges shall not prevent the division from taking the action required by subsection (b) for an alcohol or drug-related conviction.

(g) The provisions of subsections (a), (b) and (c), as amended by this act and section 14 of chapter 105 of the 2011 Session Laws of Kansas, may be applied retroactively only if requested by a person who has had such person's driving privileges suspended or restricted pursuant to subsection (a), (b) or (c) prior to such amendment. Such person may apply to the division to have the penalties applied retroactively, as provided under K.S.A. 8-1015(g), and amendments thereto.

(h) When modifying penalties pursuant to subsection (g), the division shall credit any suspension or revocation time in excess of one year which was imposed and served prior to retroactive application of the provisions of subsections (a), (b) and (c), as amended by this act and section 14 of chapter 105 of the 2011 Session Laws of Kansas, toward the required ignition interlock restriction period imposed pursuant to the retroactive application of such provisions if:

(1) The person's driving record indicates no driving by the person during the applicable suspension or revocation period; and

(2) the person completes a form prescribed by the division indicating that the person did not drive during the applicable suspension or revocation period.

(i) As used in this section, "suspension" includes any period of suspension and any period of restriction as provided in K.S.A. 8-1015(a), and amendments thereto.

Credits

Laws 1988, ch. 47, § 7; Laws 1989, ch. 38, § 37; Laws 1990, ch. 48, § 2; Laws 1990, ch. 47, § 2; Laws 1993, ch. 259, § 6; Laws 1993, ch. 275, § 3; Laws 1994, ch. 353, § 10; Laws 1999, ch. 125, § 18; Laws 2001, ch. 200, § 5; Laws 2006, ch. 173, § 3; Laws 2007, ch. 181, § 5, eff. July 1, 2007; Laws 2010, ch. 153, § 1, eff. June 3, 2010; Laws 2011, ch. 105, § 14, eff. July 1, 2011; Laws 2012, ch. 172, § 16, eff. July 1, 2012; Laws 2018, ch. 106, § 10, eff. July 1, 2018; Laws 2022, ch. 80, § 11, eff. July 1, 2022.

Footnotes

- 1 "This act", referred to in the text, means Laws 2012, ch. 172, classified generally to articles 2, 10 and 15 of chapter 8, articles 41, 44, 45 of chapter 12, and various sections of chapters 21, 22, 60, 74, and 75 of the Kansas Statutes Annotated.

K. S. A. 8-1014, KS ST 8-1014

Statutes are current through laws enacted during the 2024 Regular Session of the Kansas Legislature effective on April 18, 2024. Some statute sections may be more current, see credits for details.

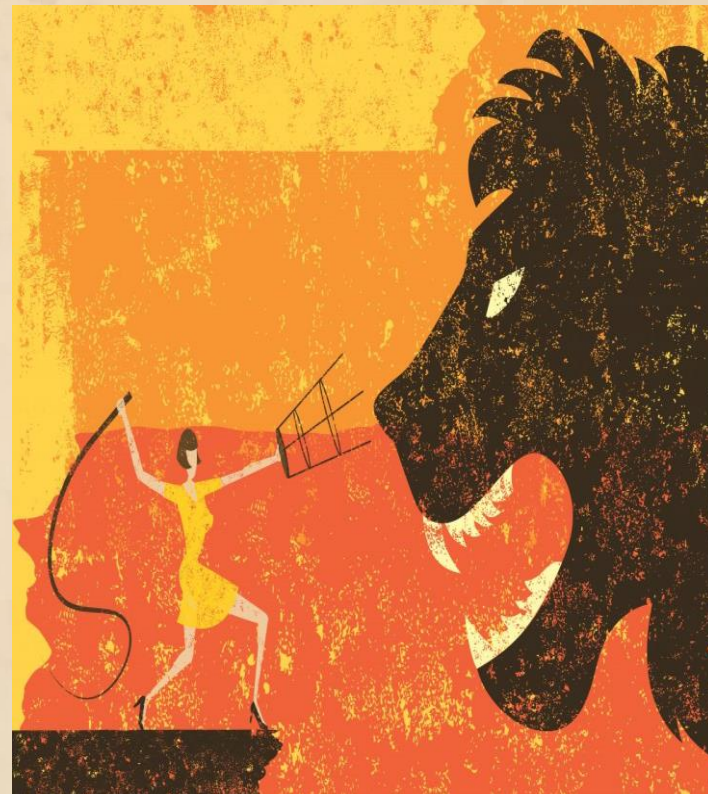
COURAGEOUS KANSAS LAWYERS AND HOW YOU CAN BECOME ONE: USING CIVIC INFLUENCE TO ENSURE EQUAL ACCESS

APPROVED: 2 HOURS JUDICIAL ETHICS CLE

**HON. KAREN ARNOLD-BURGER, CHIEF JUDGE,
KANSAS COURT OF APPEALS**

THURSDAY, MAY 2 • 2024

EDITION Nº 006





Credit Hours. An active attorney must earn a minimum of 12 CLE credit hours at approved programs during each compliance period. Of the 12 hours, at least 2 hours must be in the area of **ethics and professionalism.**

**KANSAS RULES OF PROFESSIONAL CONDUCT
RULE 804 (A)**



“Ethics” means the standards found in the Kansas Rules of Professional Conduct that an attorney must comply with to practice law in Kansas and remain in good standing.

**KANSAS RULES OF PROFESSIONAL CONDUCT
RULE 801 (G)**



“Professionalism” means conduct consistent with the tenets of the legal profession by which an attorney demonstrates civility, honesty, integrity, character, fairness, competence, ethical conduct, public service, and respect for the rules of law, the courts, clients, other attorneys, witnesses, and self-represented and unrepresented persons..”

KANSAS RULES OF PROFESSIONAL CONDUCT
RULE 801 (N)

1

WHAT IS A PROFESSION?

1. **Organization**
2. **Learning**
3. **Spirit of Public Service**



Roscoe Pound, *"What is a Profession? The Rise of the Legal Profession in Antiquity,"*
Notre Dame Lawyer 10 (March 1944): 2003-5



“All lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice.”

KANSAS RULES OF PROFESSIONAL CONDUCT
PREAMBLE: [6]

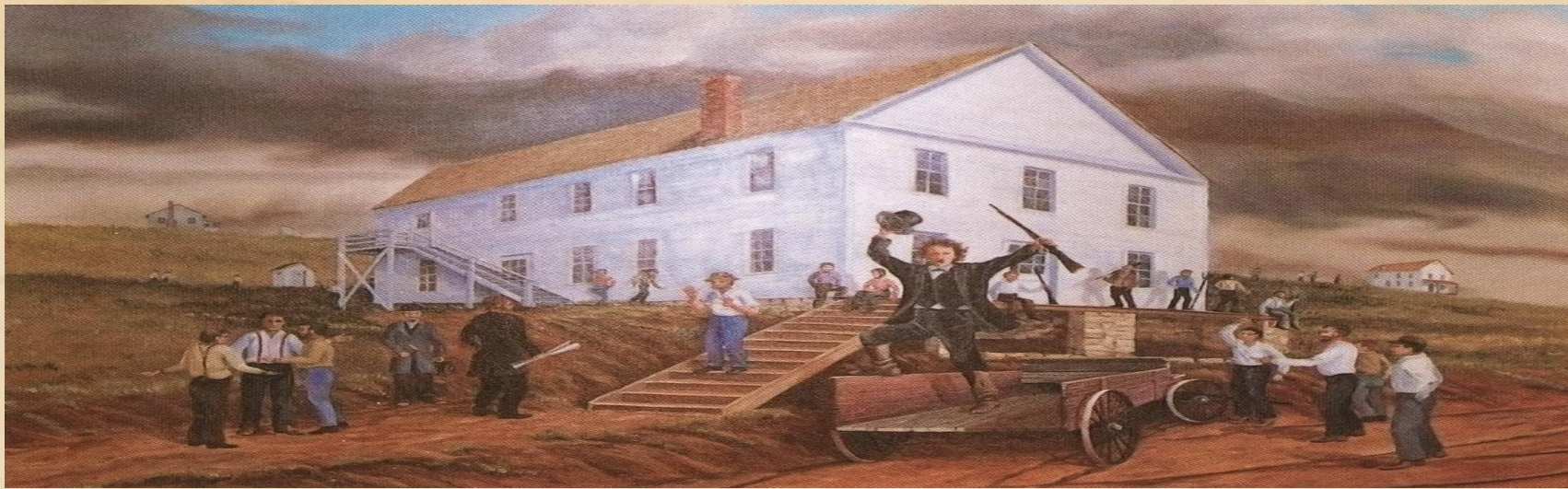


Courage is the most important attribute of a lawyer. It is more important than competence or vision. It can never be an elective in any law school. It can never be de-limited, dated or outworn, and it should pervade the heart, the halls of justice and the chambers of the mind.

— *Robert Kennedy* —

EVERYDAY ACTS OF COURAGE

- **Telling a client or partner what they don't want to hear...like stop tweeting about pending litigation.**
- **Defending positions of your clients that are unpopular.**
- **Taking pro bono cases or causes to help those who cannot afford attorneys.**
- **Asserting claims against hostile tribunals or entities to change the law.**



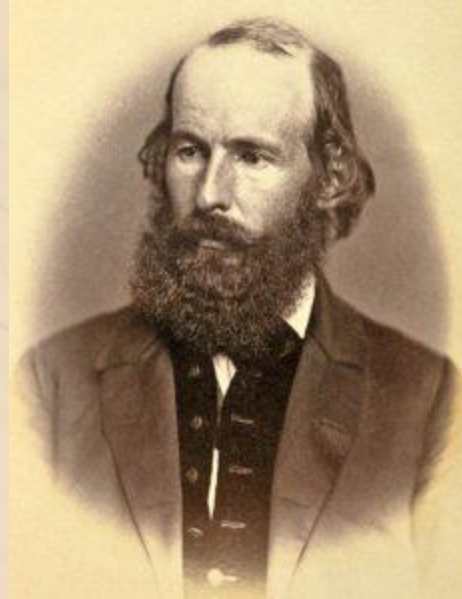
A STEP BACK IN TIME

KANSAS ON THE BRINK OF CIVIL WAR

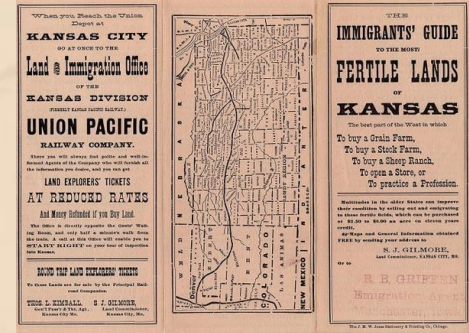
All questions pertaining to slavery in the territories and in the new states to be formed therefore, are to be left to the decision of the people residing therein through their appropriate representatives.

**THE KANSAS-NEBRASKA ACT
MAY 30, 1854**

New England Emigrant Aid Company



ELI THAYER



WHY DID LAWYERS COME?

- . Land acquisition and development**
- . Railroad-Transcontinental**
- . Election Integrity**
- . Position on Slavery**
- . Criminal law**

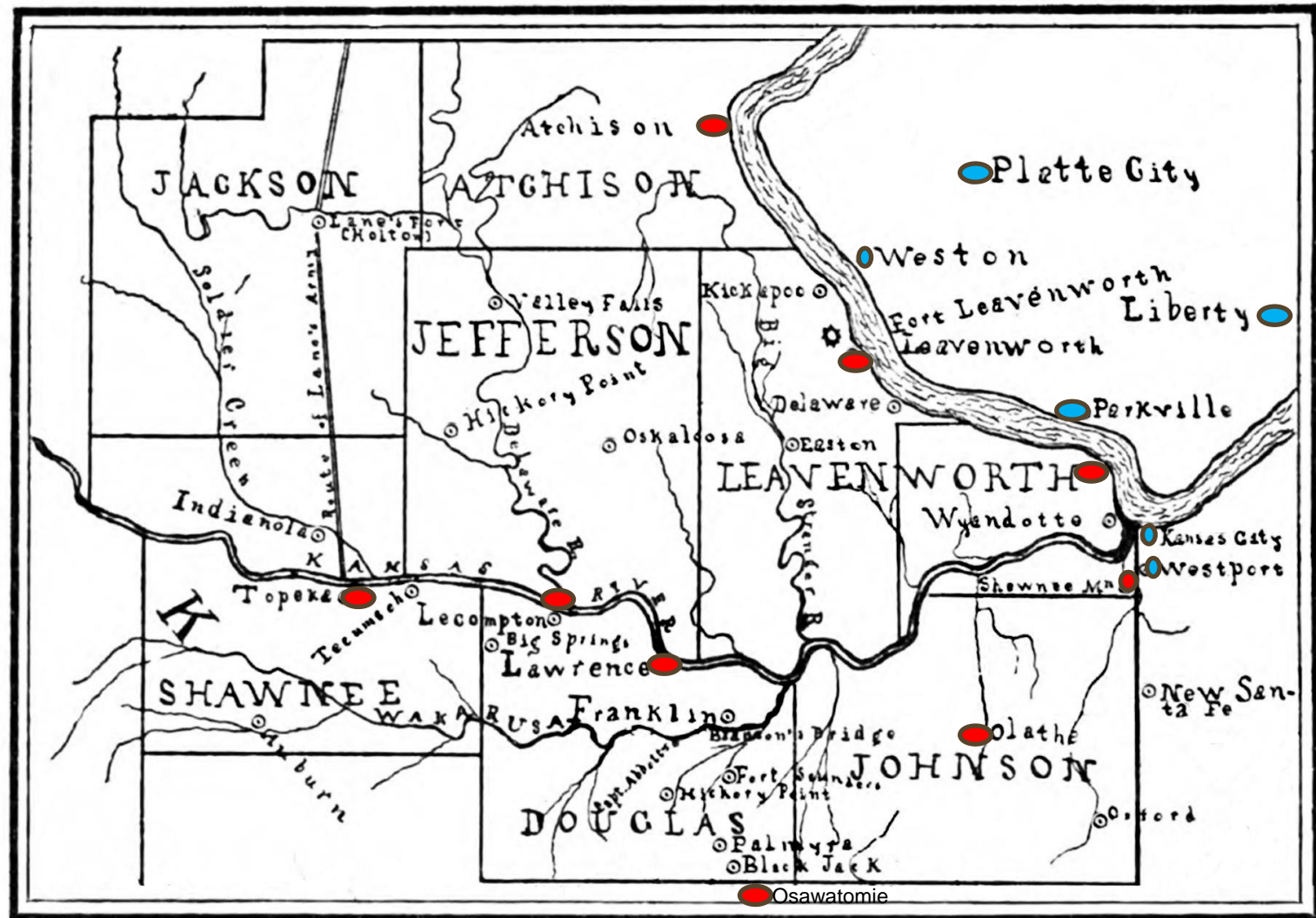
LAWYERS ARRIVE IN KANSAS TERRITORY



THE REQUIREMENTS TO BECOME A LAWYER

- **Be a free white male**
- **Provide testimonials of good moral character**
- **Undergo a strict examination as to his qualifications by one of the judges of the territory**
- **Take an oath to “demean himself in his practice to the best of his knowledge and ability.”**

CHAPTER 11, 1855 STATUTES OF THE KANSAS TERRITORY



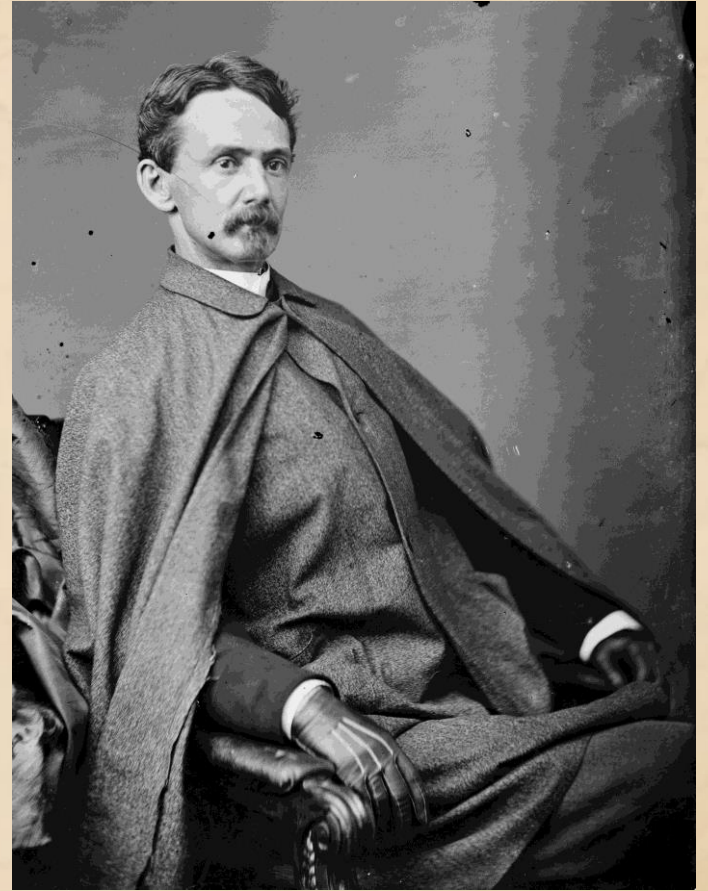
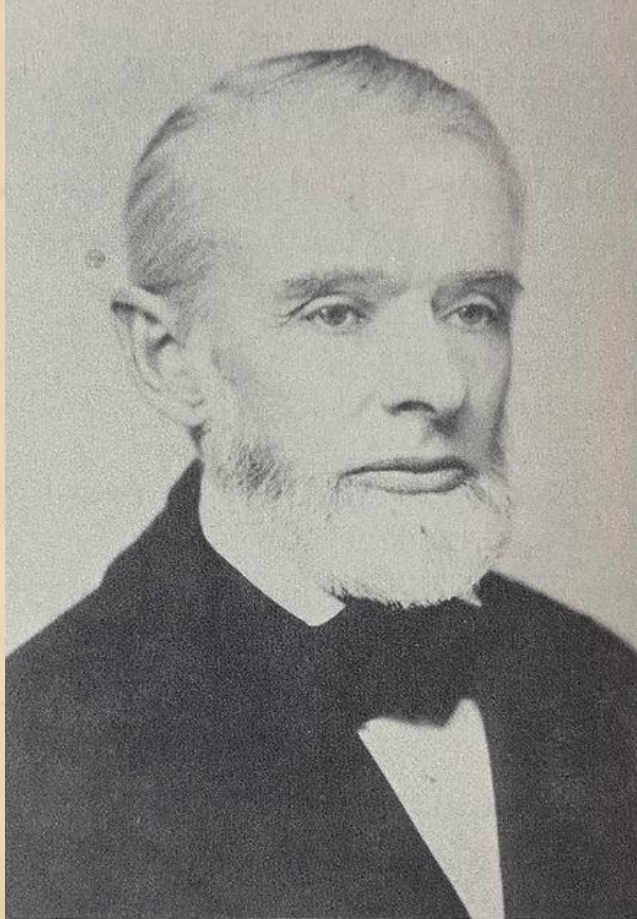
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30

Attorneys Registered to Practice in Atchison, Kansas 1855-1861`



ALFRED GIDEON OTIS 1827-1912



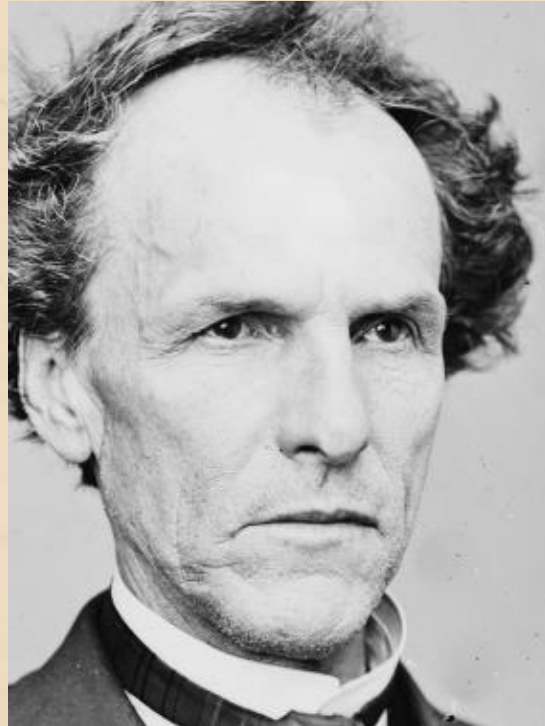
John James Ingalls 1833-1900

205

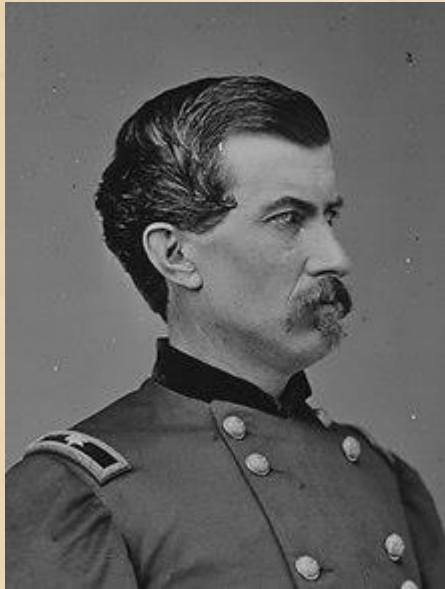
Attorneys Registered to Practice in Leavenworth, Kansas 1855-1861`



JAMES HENRY LANE (1814-1866)



James Monroe Williams (1833-1907)



Courage – a perfect sensibility
of the measure of **danger**,
and a **mental**
willingness to endure it.

– *William Tecumseh Sherman*



WILLIAM PHILLIPS 1827-1856

Jan. 20, 1855.-11.

William Phillips,

Law and Land Agency Office,

South side Delaware street, first door west
from Leavenworth Hotel.

Leavenworth, K. T., }

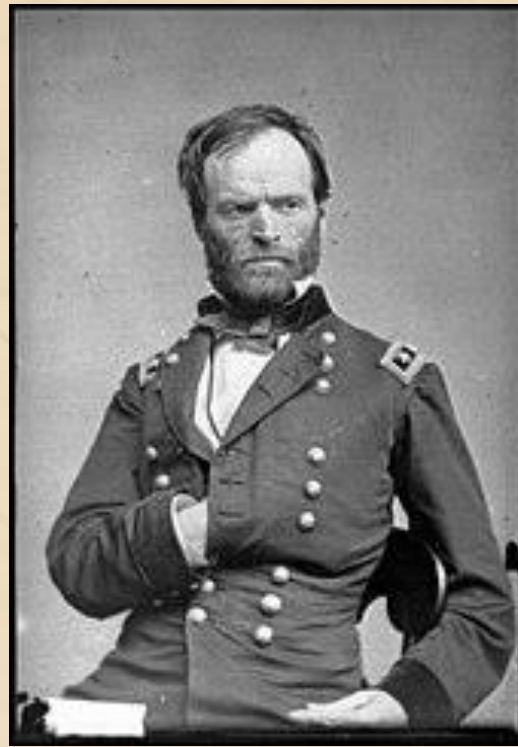
Jan. 19, 1855-1y. }



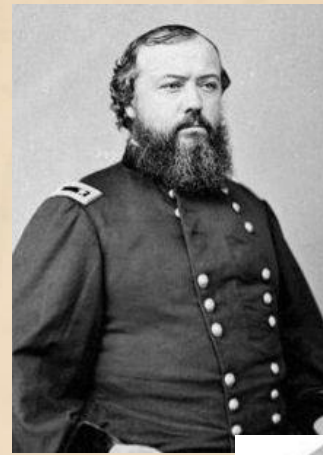
HENRY MILES MOORE 1826-1909



**CHIEF JUSTICE
THOMAS EWING, JR.
1829-1896**



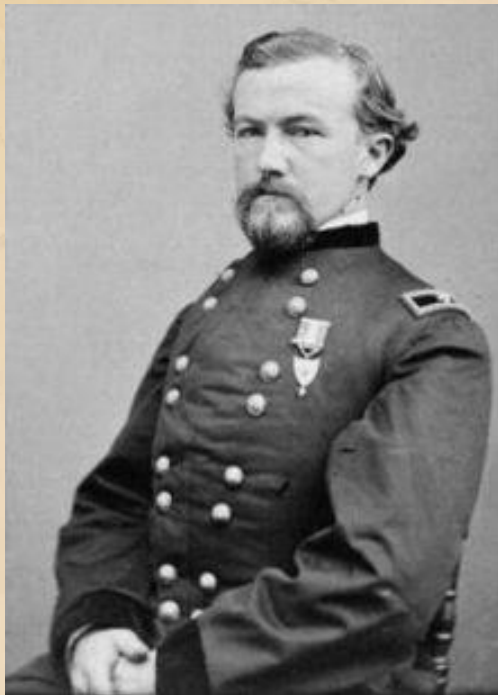
**WILLIAM TECUMSAH
SHERMAN
1820-1891**



**HUGH EWING
1826-1905**



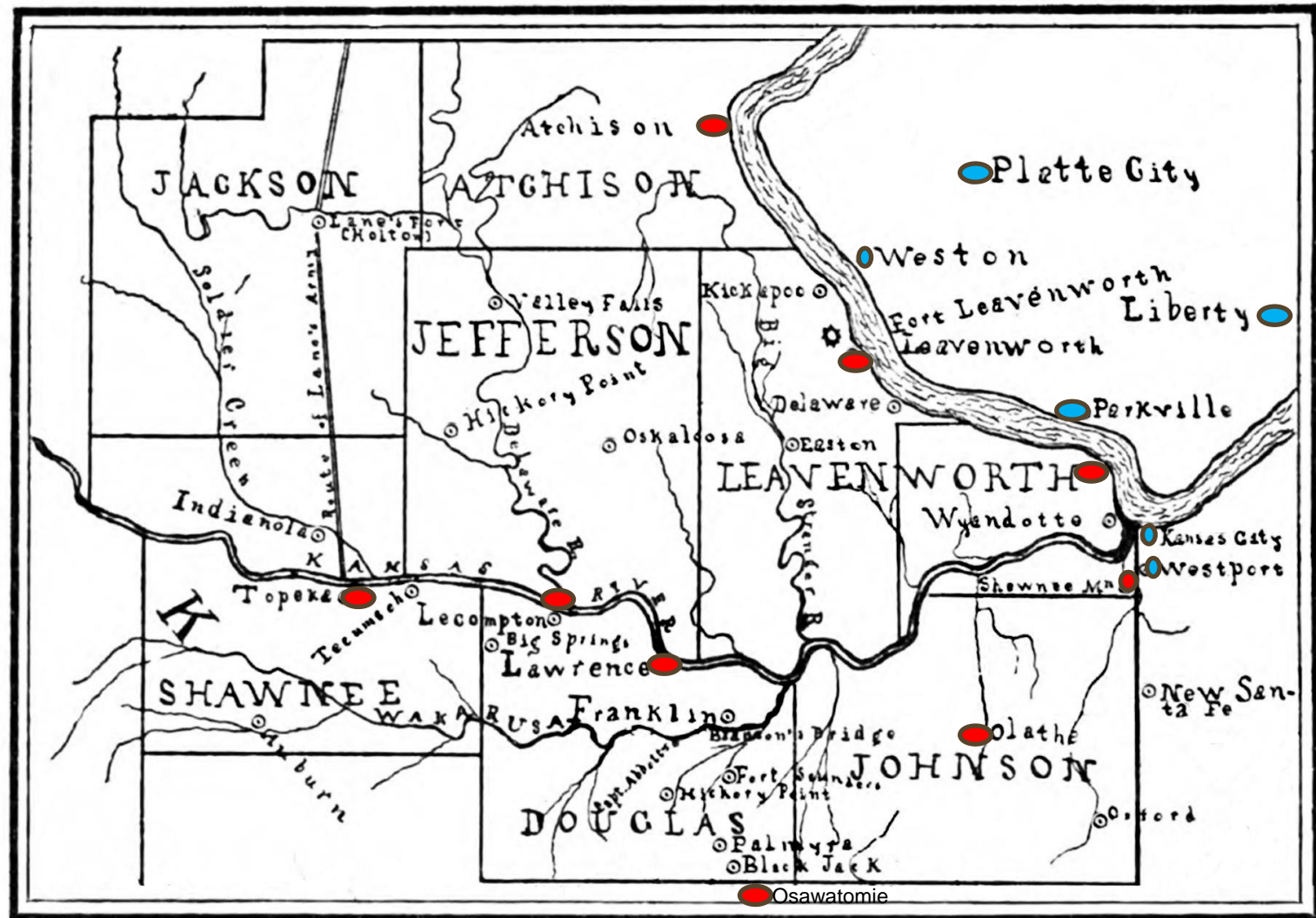
**Daniel McCook, Jr.
1834-1864**



CHARLES EWING
1835-1883



ELEANOR EWING
1824-1888



QUINDARO

Attorneys Registered to Practice in Quindaro, Kansas 1855-1861`





**A judge shall at all times in a manner that
promotes public confidence in the
independence, integrity of the judiciary**

**CANON 1.2
KANSAS CODE OF JUDICIAL CONDUCT**

**An attorney should demonstrate civility,
honesty, integrity, character, fairness,
competence**

**KANSAS RULES OF PROFESSIONAL CONDUCT
RULE 801(N)**

4

JUDGE CHARLES CHADWICK 1820-1900



Know all men by these presents that I, Wiley M. Pope, of Quindaro, Kansas Territory, but late of Choctaw county, in the State of Mississippi, in consideration of the valuable labor and services heretofore done and performed for me by my respective servants

Have given and granted and by these presents do give and grant unto the said Lucy, William Richard, Mary Eleanor, Benjamin Franklin, John Wesley, James Henry, Charles Edmund, Sarah Jane, Abram Henderson, Isaiah, Dora Ann, Madison Monroe, Missouri, and to each of them, her and his full, complete and perfect liberty and freedom, as though each had been born free, and I do hereby the said Lucy, William Richard, Mary Eleanor, Benjamin Franklin, John Wesley, James Henry, Charles Edmund, Sarah Jane, Abram Henderson, Isaiah, Dora Ann, Madison Monroe, Missouri, forever emancipate, liberate and set free.

In testimony whereof I the said Wiley M. Pope have hereunto set my hand and affixed my seal, this 26th day of June, 1860.

WILEY M. POPE. {SEAL}

In presence of
ALFRED ROBINSON,
GAD E. UPSON.

Territory of Kansas, }
Wyandott County. } ss.

Be it remembered that this the 27th day of June, A. D. 1860, before the undersigned, a Justice of the Peace for Quindaro township in the county aforesaid, came the above named Wiley M. Pope, who was personally known to me to be the identical person whose name is affixed to the foregoing deed of emancipation as the party and grantor thereto, and acknowledged the instrument to be his own voluntary act and deed for the purpose therein expressed.

CHAS. CHADWICK,
Justice of the Peace for Quindaro Township.

therein expressed.

CHAS. CHADWICK,
Justice of the Peace for Quindaro Township.



PROCLAMATION BY THE GOVERNOR

TO THE PEOPLE OF KANSAS, GREETINGS:

WHEREAS, Wiley M. Pope and his wife, a former slave, Lucy, along with their children William Richard, Mary Eleanor, Benjamin Franklin, John Wesley, James Henry, Charles Edmund, Sarah Jane, Abram Henderson, Isaiah, Dora Ann, Madison Monroe and Missouri, fled Choctaw County to prevent Pope's family being taken from him as payment for debts; and

WHEREAS, they sought refuge in Quindaro, Kansas to make a new life for themselves, and Wiley M. Pope approached Judge Charles Chadwick who looked into the legalities to save the family and produced the first and only known 'Deed of Emancipation' in Kansas. The writ, signed by both Pope and Chadwick freed Pope's family and set them free on June 6th, 1860; and

WHEREAS, Pope's sons went on to be some of the first black men to fight in the Civil War. The Pope family, since gaining their freedom, went on to do many great things and have become notable in the town of Quindaro; and

WHEREAS, Lisa King, 5th granddaughter of Wiley M. Pope, sought out more information on her grandfather Wiley, and his life that led to the lives of herself and her family, and in doing so partner with Lyndsey Ellis-Holloway, an author in the UK, to bring the Pope family story to life in a novel.

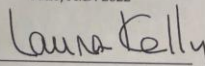
NOW, THEREFORE, I, Laura Kelly, GOVERNOR OF THE STATE OF KANSAS, do hereby proclaim June 6th, 2022 as

Pope Family Emancipation Day

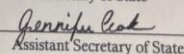
in the state of Kansas and I urge all citizens to join in this observation.

DONE: At the Capitol in Topeka
under the Great Seal of
the State this 6th day of
June, A.D. 2022

BY THE GOVERNOR:



Secretary of State



Assistant Secretary of State



Unified Government of Wyandotte County/Kansas City, Kansas

PROCLAMATION

WHEREAS,

until Kansas residents voted whether or not to allow slavery when Kansas entered the Union as a state, owning slaves was legal in Kansas Territory and was therefore subject to U. S. laws until February 23, 1860, when the Territorial Legislature passed a bill over the governor's veto effectively abolishing slavery in Kansas; and

WHEREAS,

Colonel Wiley M. Pope along with his former slave, now wife of "more than a third of a century" named Lucy, and their twelve children William Richard, Mary Eleanor, Benjamin Franklin, John Wesley, James Henry, Charles Edmund, Sarah Jane, Abram Henderson, Isaiah, Dora Ann, Madison Monroe, fled Choctaw County, Mississippi to prevent their family from becoming indentured as payment for debts; and

WHEREAS,

they sought refuge in the Quindaro of Kansas Territory to make a new life for themselves, and approached attorney Charles Chadwick then Justice of the Peace and local resident for Quindaro Township for assistance. As a result, a writ of emancipation was established, signed by both Pope and Chadwick, securing the Pope families' freedom, and preventing seizure from Federal Marshals, effectively June 6, 1860; and

WHEREAS,

becoming freed approximately three years prior to President Abraham Lincoln's Emancipation Proclamation, Pope's sons went on to become some of the first black men to fight in the American Civil War. The Pope family, after gaining their freedom, went on to do many great things and have become notable in the townsite of Quindaro; and

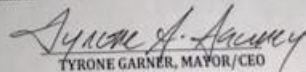
WHEREAS,

Lisa King, 5th granddaughter of Wiley M. Pope, sought out more information on her grandfather gained assistance from the Wyandotte County Museum and later authors and producers, to bring the Pope family story to life

NOW, THEREFORE, I, Tyrone Garner, Mayor/CEO of the Unified Government of Wyandotte County/Kansas City, Kansas, do hereby proclaim June 6, 2022, as:

"Pope Family Emancipation Day"

in Wyandotte County/Kansas City, Kansas and urge all citizens to recognize the importance of Pope Family Emancipation Day. In witness whereof, I have hereunto set my hand and the seal of the Unified Government of Wyandotte County/Kansas City, Kansas.



TYRONE GARNER, MAYOR/CEO





Ho for Kansas!

Brethren, Friends, & Fellow Citizens:

I feel thankful to inform you that the

REAL ESTATE

AND

Homestead Association,

Will Leave Here the

15th of April, 1878,

In pursuit of Homes in the Southwestern
Lands of America, at Transportation
Rates, cheaper than ever
was known before.

For full information inquire of

**Benj. Singleton, better known as old Pap,
No. 5 North Front Street.**

Beware of Speculators and Adventurers, as it is a dangerous thing
to fall in their hands.

Nashville, Tenn., March 18, 1878.

HO FOR KANSAS!

RECONSTRUCTION AND BEYOND

60,000

Blacks Fleeing the South to Kansas Establish
Nicodemus, Baxter Springs, Morton City, Singleton



REFUGEE CRISIS IN KANSAS

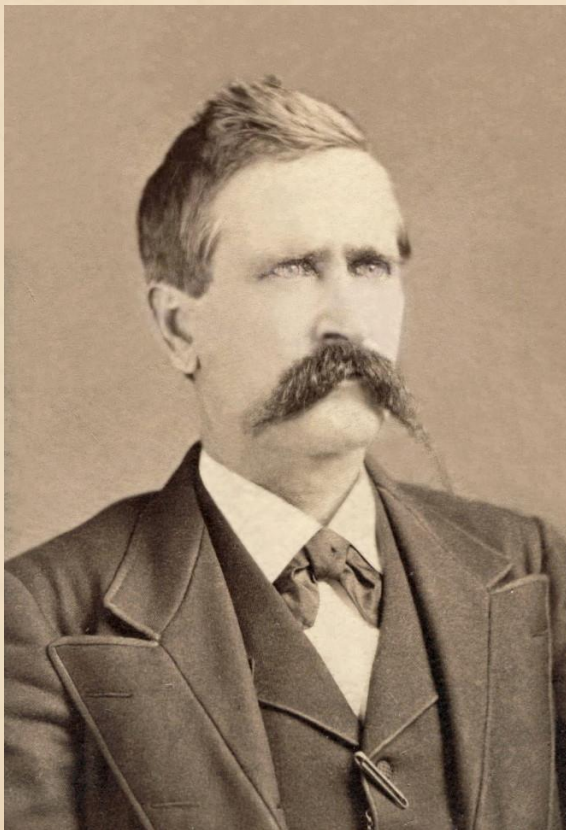
**Kansas attorneys demonstrate
integrity, fairness and public
service.**



5

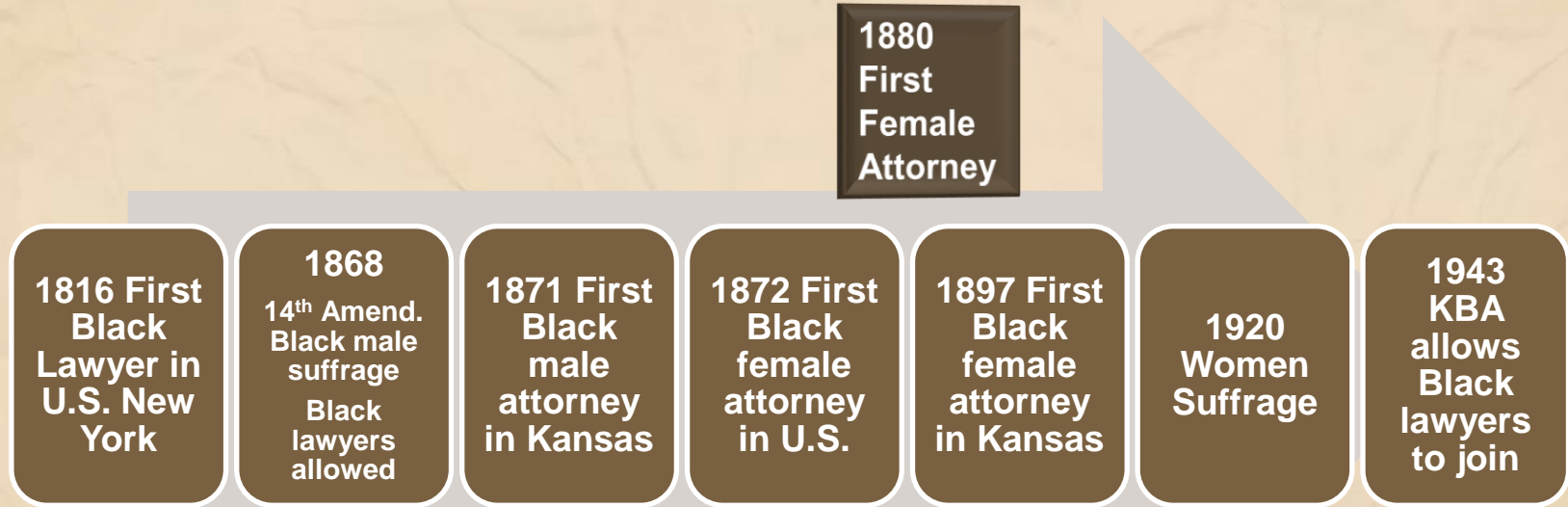
Gov. John St. John

**LIFETIME
1833-1916**



**GOVERNOR
1879-1883**

A TIMELINE FOR MINORITY ATTORNEYS IN KANSAS



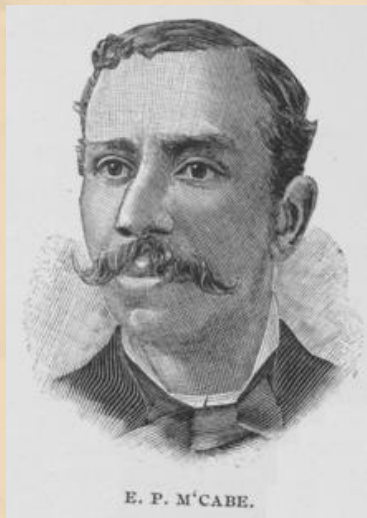


“All lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice.”

KANSAS RULES OF PROFESSIONAL CONDUCT
PREAMBLE: [6]

6

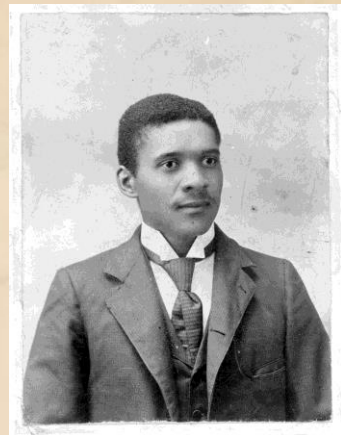
GRAHAM COUNTY



**Edward Preston
McCabe
1850-1920**



**G. W. Jones
1859-1908**



**William Lincoln
Sayers
1872-1956**



**Wendall Sayers
1904-1998**



napkin.
ALEXANDER BURNED AT STAKE
 Taken From County Jail and Cremated
 at Scene of Crime.



During the trip from the court house to Lawrence avenue Alexander acted very cool. He was interrogated all the way by these in the wagon. Such questions as those were asked him.

"Say, did you murder **Pearl Forbes?**"
 "Did you assault Miss Roth?" "Tell us all about it."

"I am innocent. I didn't do any thing. You fellows will find out who the right man is maybe after I'm dead," answered Alexander to all these.

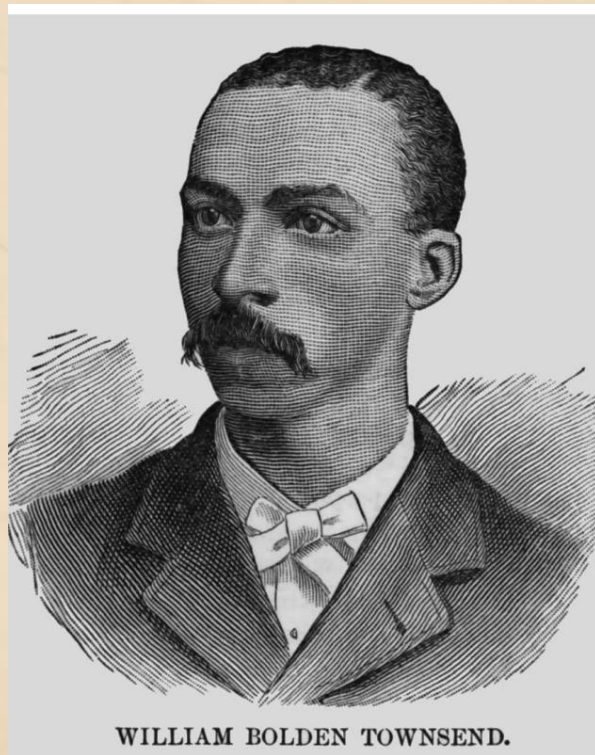
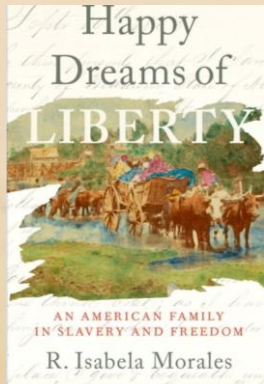
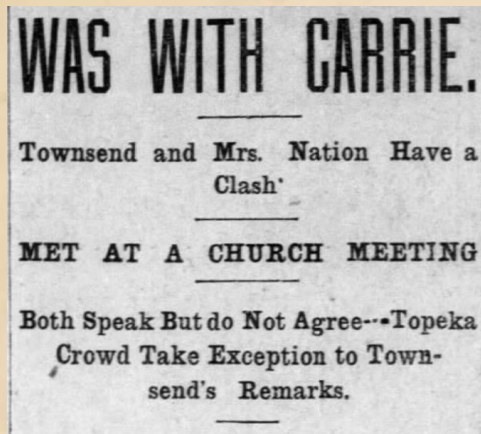
"Well, we are going to burn you when we get you over there!"

"I know you are, but I tell you you've got the wrong man," said Alexander.



7

William Bolden Townsend (1854 – 1917)



8

John Lewis Waller (1850 – 1907)



Turner W. Bell (1857-1948)

SEEK RELEASE OF THOSE IN HOUSTON RIOT

(Special to THE NEW YORK AGE.)

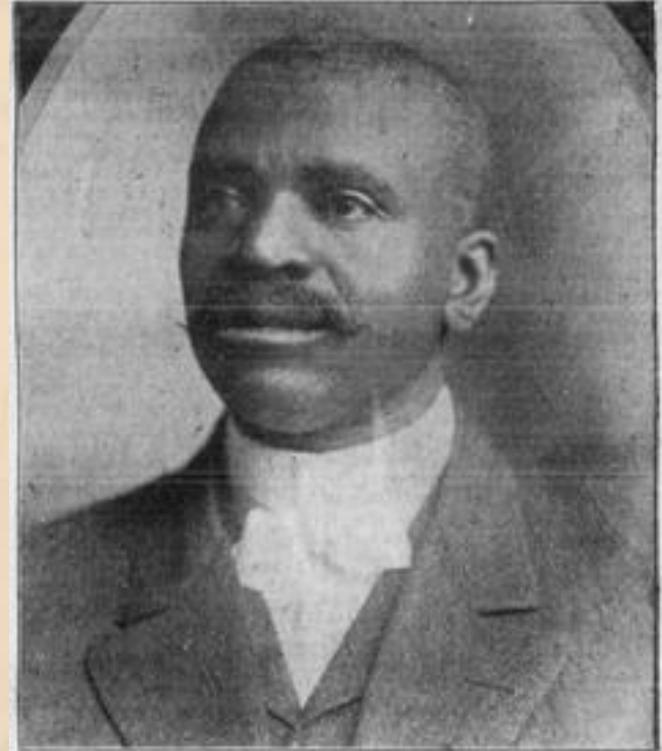
TOPEKA, Kan.—Application for a writ of habeas corpus seeking the release of forty-one Negro soldiers serving sentence in the Federal prison at Fort Leavenworth for participation in the **Houston riot** was filed today in the United States District Court.

PROMINENT ATTORNEY VERY ILL.

Atty. Turner W. Bell of Leavenworth, Neb., the prominent Negro lawyer, is very ill at his home. Atty. Bell is regarded as the greatest "habeas corpus" lawyer in America, having won a score of cases before the U. S. Supreme court, representing many white clients.

ONCE POOR SLAVE
NOW IS SHINING
LEGAL LIGHT

Turner W. Bell, Now Representing Dynamiters, Has Won Many Cases.



HON. TURNER W. BELL.



It is not possible to be in favor of
justice for some people and not be
in favor of justice for all people.

— *Martin Luther King* —

AZ QUOTES

BROWN SYLVESTER SMITH 1861-1932

Att'y. Brown S. Smith will leave Aug. 19th for an eastern trip. He will stop at Chicago, Washington D. C., Baltimore. He will attend the Elk's Grand Lodge in Philadelphia and arrive in New York on August 24 to be the guest of Prof. W. E. B. Dubois and Prof. Joel P. Spingarn.



The Niagra Movement 1905



- 1. The right to vote**
- 2. Condemnation of race discrimination in public places**
- 3. Freedom of social intercourse [Integration of schools, marriage, etc.]**
- 4. Equality in the enforcement of laws—justice even for criminals and outlaws.**

"We demand upright judges in courts, juries selected without discrimination on account of color and the same measure of punishment and the same efforts at reformation for black as for white offenders. We need orphanages and farm schools for dependent children. Juvenile reformatories for delinquents, and the abolition of the dehumanizing convict-lease system."

THE COURTS

ISSAC FRANKLIN BRADLEY, SR. 1861-1938

ISAAC F. BRADLEY.

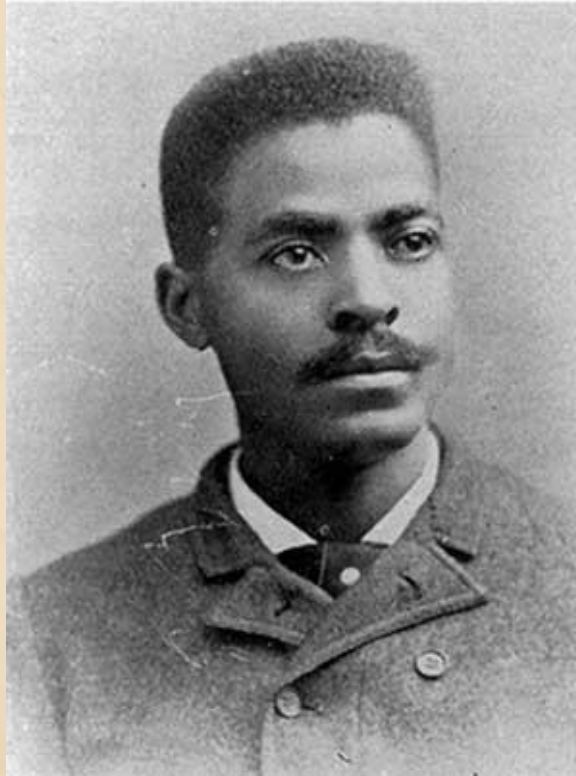
A Brief History of a Young Man Who Is Making His Mark.

Justice of the Peace Isaac F. Bradley is an excellent example of the self-made man. Though quite young, he has acquired a most enviable standing in the

29 YEARS OLD



Frasier Hall 1872-1905



Douglas Hospital

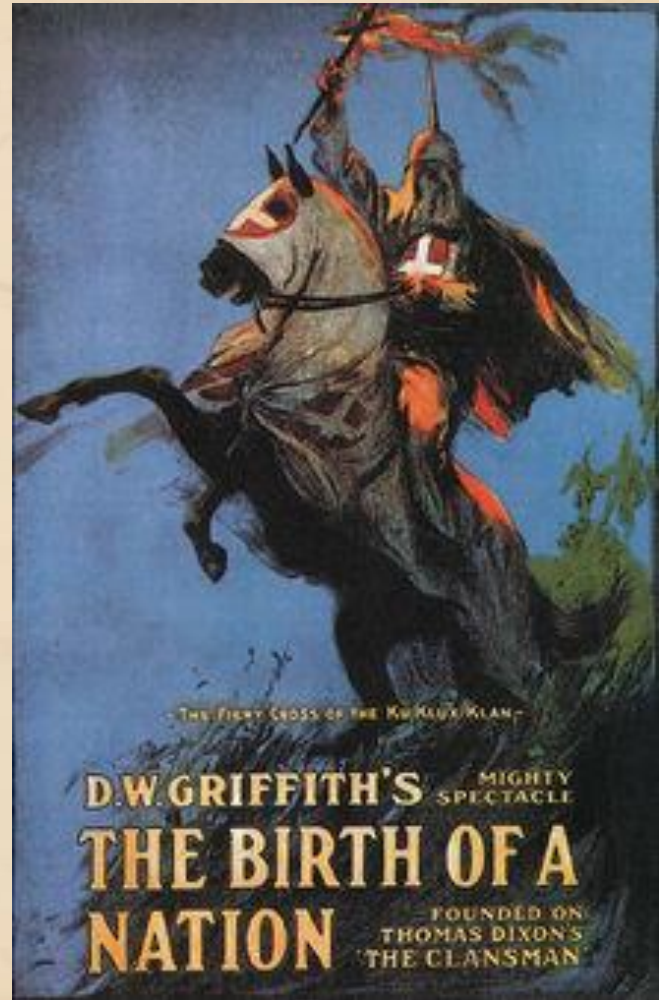
9

Birth of a Nation 1915



Sardius Nathan
Brewster
1870-1936

KANSAS WILL FIGHT
"BIRTH OF A NATION!"
Attorney General Brewster De-
clares Tom Dixon's Photo
Play "Immoral and Not
True to History."



KANSAS DEFENSE SOCIETY 1918

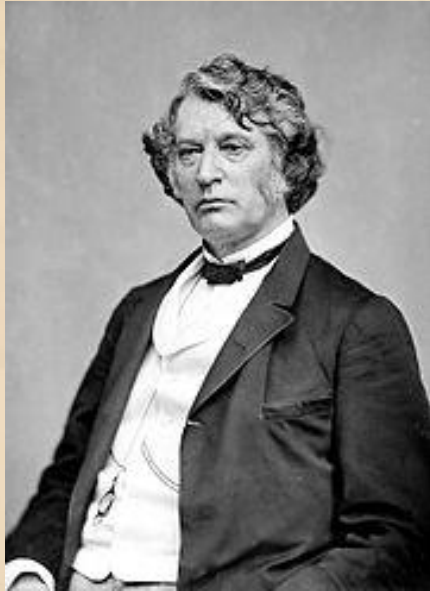


BLACK KANSAS LAWYERS CHANGE THE WORLD

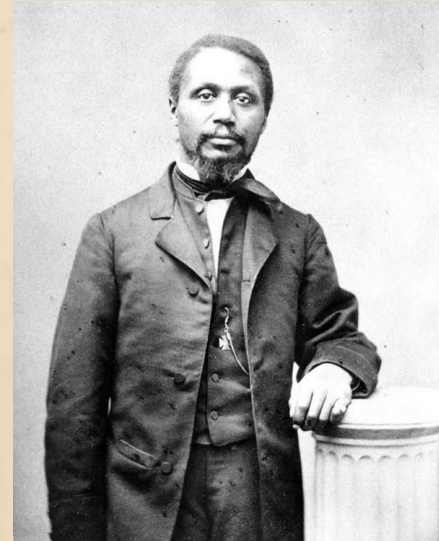


THE ROAD TO DESEGREGATION

- *Roberts v. City of Boston*, 59 Mass. 198 (1849)



Sen. Charles Sumner



Robert Morris
2nd Black Attorney in
US, 1847

Board of Education of Ottawa v. Tinnon

26 Kan. 1 (1881)

- **John W. DeFord**
- **1835-1913**



Knox v. City of Independence
45 Kan. 152 (1891)

- William Abram Price (1847-1893)**



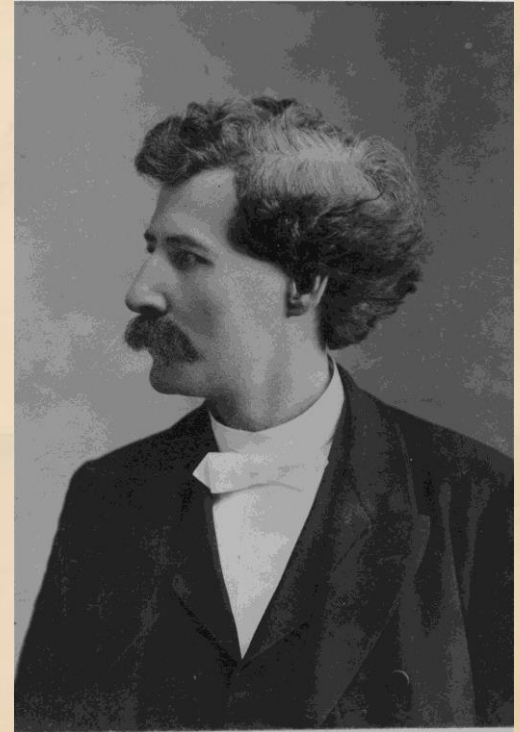
County Court House at Independence, Independence County, State of Kansas,
where Mayo Thomas served as County Attorney, in 1903 and 1904.

Cartwright v. Board of Education Coffeyville,
73 Kan. 32 (1906)

JAMES H. GUY (1862 -1931)



**Gaspar Christopher
Clemens
(1849-1906)**



Woolridge v. The Board of Education of Galena
98 Kan. 397 (1916)



Elisha Scott
1899-1963



Roy M. Van Dyne
1901-1946

Graham v. Board of Education Topeka



**William McKinley
Bradshaw**

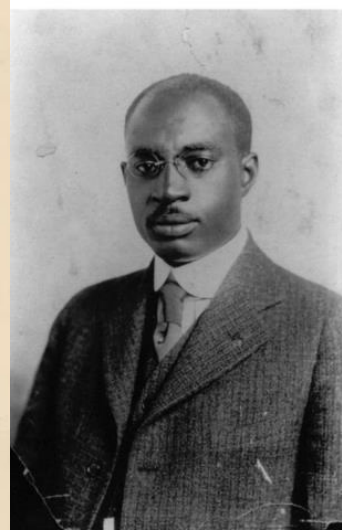


Tinkham Veale

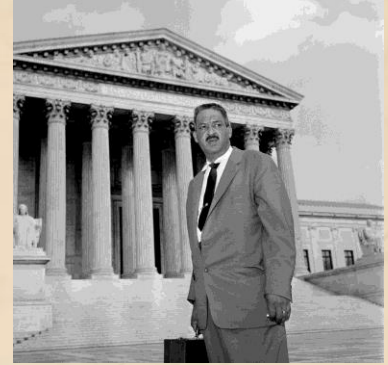
Webb v. School District No 90, 167 Kan. 395 (1940)



Corithian Nutter and her class



**Elisha
Scott
1899-1963**



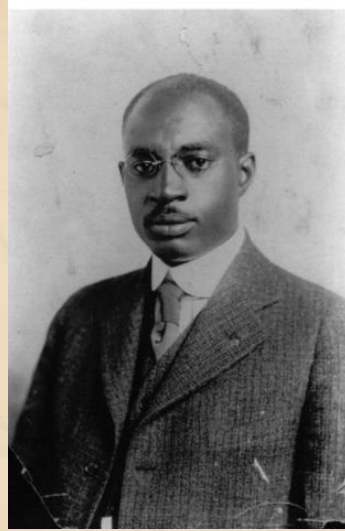
**Thurgood
Marshall**

Brown v. Board

THE TEAM



Charles E.
Bledsoe
1891-1972



Elisha Scott
1899-1963



Charles Scott
1921-1989



John Scott
1919-1984



George Haley
1926-2015

CHAS. E. BLEDSOE
ATTORNEY AT LAW
400 NORTH BOWLING
STREET
TOPEKA, KANSAS

RLC
N. A. A. C. P. LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.

September 7, 1950

1950 SEP 7 1950

The National Association for the Advancement of Colored People
Legal Department
20 West 40th
New York City 18, New York

Gentlemen:

I represent the local branch of N.A.A.C.P., of Topeka, Kansas, and I wish to inform your office of the pending controversy existing in the city of Topeka, and elsewhere in the state of Kansas.

The facts are briefly these: The Board of Education of the aforesaid city is maintaining and has maintained a dual system of education for colored and white grade school children. In doing so, the Board is acting under a permissive statute of the state of Kansas.

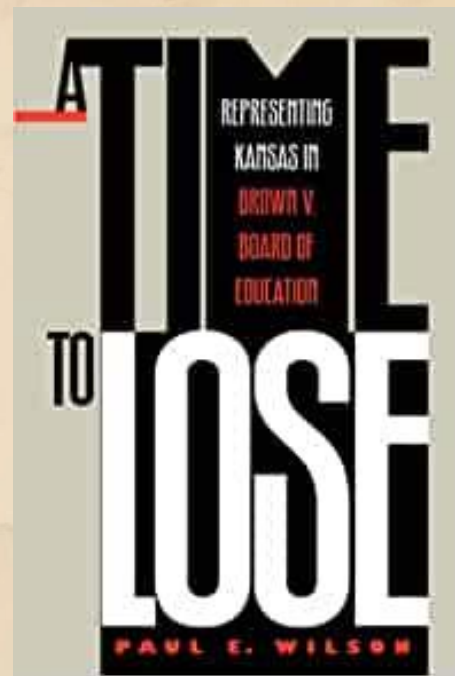
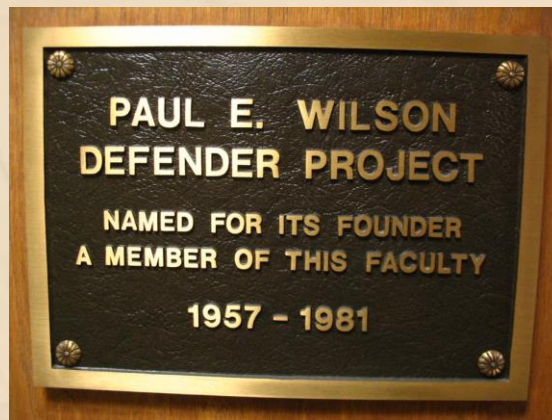
The white children have several districts; in these districts, some colored children live, and their parents own property in these so-called districts. However, said colored children are prohibited from attending the schools in these districts, and are compelled to leave their homes and meet a bus (said bus is provided by the Board of Education) that carries them, often for long distances, to the various Negro schools.

The parents of the said Negro children are taxed for all of the schools, and the whole thing results in a Jim-crow system.

As chairman of the legal redress committee of the N.A.A.C.P., I am asking your office to advise me in this matter. Please send me drafts of pleadings, etc., that will give me a true picture of this case, assuming that this case arises under the constitution—particularly the 14th Amendment thereof. We also assume that our legislature was without authority to enact such a permissive statute in the face of the constitution.

It is our plan to seek redress in the Federal Court, as our State Supreme Court has held that the permissive statute is constitutional and valid; hence, it would be a waste of effort and of

PAUL WILSON, ASSISTANT ATTORNEY GENERAL 1913-2001





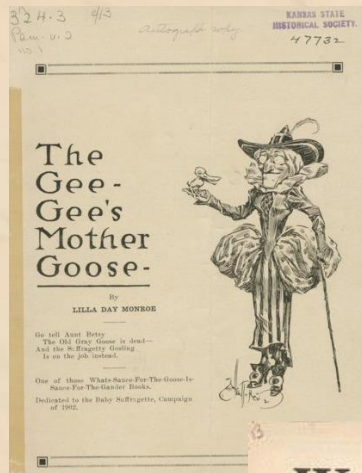
WOMEN LEAD THE WAY

"Lawyers have a professional and moral duty to represent the underrepresented in our society."

Justice Sonia Sotomayor

Health, Welfare and Inheritance Bills Feature.

Mrs. J. Niles Refuses to State Age—Mrs. Lilla Day Monroe Upholds Mrs. McCarter, Says Law Keeps Many Women, Especially Christian Scientists, from Voting—Calls It a "Club Over Women."



Comments That Committee of Women Asked President for Opinion and Ideas, and Got Only Handshake.



Devoted to the Interests of Women, Children and Home of the West
 VOL. 4. TOPEKA, KANSAS, JANUARY, 1926 No. 1
Home-Coming Week in Topeka--Last Week in January
Pioneering in the Indian Country Program Woman's Kansas Day Club Story of a Pioneer Newspaper
 THE STORY OF JENNIE HUBBARD
 By Mabel Gray McVane
 Jennie Hubbard was a young woman of extensive pioneer experience with her parents in Kansas in the 1840's. The story of her life is told in the "Story of a Pioneer" which is the feature of the "Home-Coming Week" in Topeka, commencing on Monday, Jan. 11, and closing on Monday, Jan. 18. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life.
 Meeting at the First Methodist church, 10:30 a. m. on Monday, Jan. 11, to discuss the story of Jennie Hubbard. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life.
 Meeting at the First Methodist church, 10:30 a. m. on Tuesday, Jan. 12, to discuss the story of Jennie Hubbard. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life.
 Meeting at the First Methodist church, 10:30 a. m. on Wednesday, Jan. 13, to discuss the story of Jennie Hubbard. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life.
 Meeting at the First Methodist church, 10:30 a. m. on Thursday, Jan. 14, to discuss the story of Jennie Hubbard. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life.
 Meeting at the First Methodist church, 10:30 a. m. on Friday, Jan. 15, to discuss the story of Jennie Hubbard. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life.
 Meeting at the First Methodist church, 10:30 a. m. on Saturday, Jan. 16, to discuss the story of Jennie Hubbard. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life.
 Meeting at the First Methodist church, 10:30 a. m. on Sunday, Jan. 17, to discuss the story of Jennie Hubbard. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life.
 Meeting at the First Methodist church, 10:30 a. m. on Monday, Jan. 18, to discuss the story of Jennie Hubbard. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life. The story is told in a series of chapters, each of which is a story of a pioneer life.

ELIZA BURTON “LYDA” CONLEY (1869 – 1946)



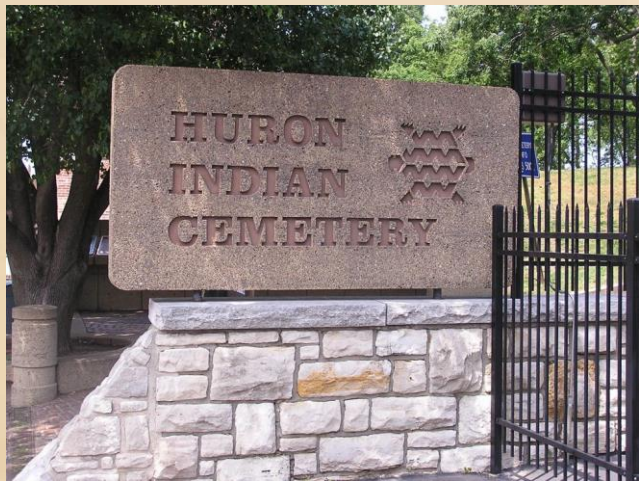
“In this cemetary are buried our ancestors...Why should we not be proud of our ancestors and protect their graves? We shall do it, and who be to that man that first attempts to steal a body”



Helena and Lyda Conley



Fort Conley



Lyda following her arrest for shooting policeman in the cemetery

LUTIE LYTLE 1875-1955



"I conceived the idea of studying law in a printing office where I worked for years as a compositor I read the newspaper exchanges a great deal and became impressed with the knowledge of the fact that my own people especially were the victims of legal ignorance. I resolved to fathom its depths and penetrate its mysteries and intricacies in hopes of being a benefit to my people."

13

Tiera Farrow (1880 – 1971)





“A lawyer should render public interest legal service. A lawyer may discharge his responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.”

KANSAS RULES OF PROFESSIONAL CONDUCT
RULE 6.1

PSYCHOLOGY TODAY

SIX ATTRIBUTES OF COURAGE

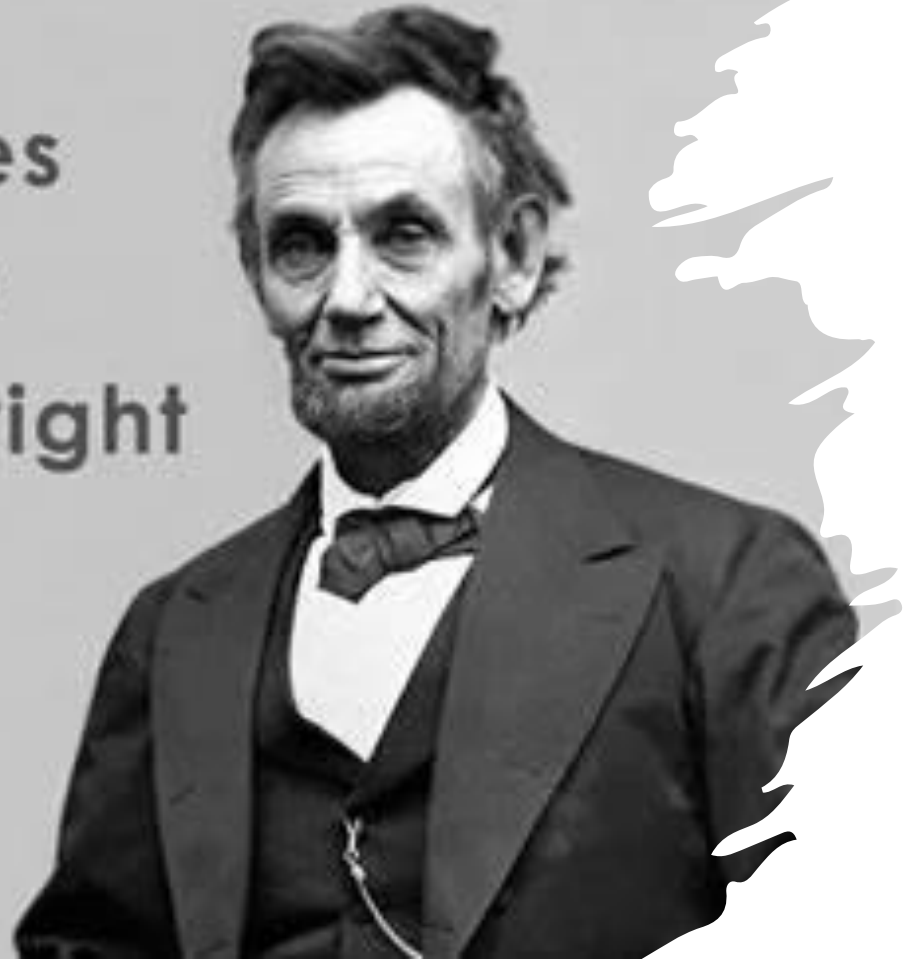
- Feeling fear but choosing to act
- Persevering in the face of adversity
- Following your heart
- Standing up for what is right
- Expanding your horizons--letting go of the familiar
- Facing suffering with dignity or faith

ATTRIBUTES OF A COURAGEOUS ATTORNEY?



It often requires
more courage
to dare to do right
than to fear
to do wrong.

Abraham Lincoln



JOHNSON COUNTY COURAGEOUS ATTORNEYS



Cheryl Pilate

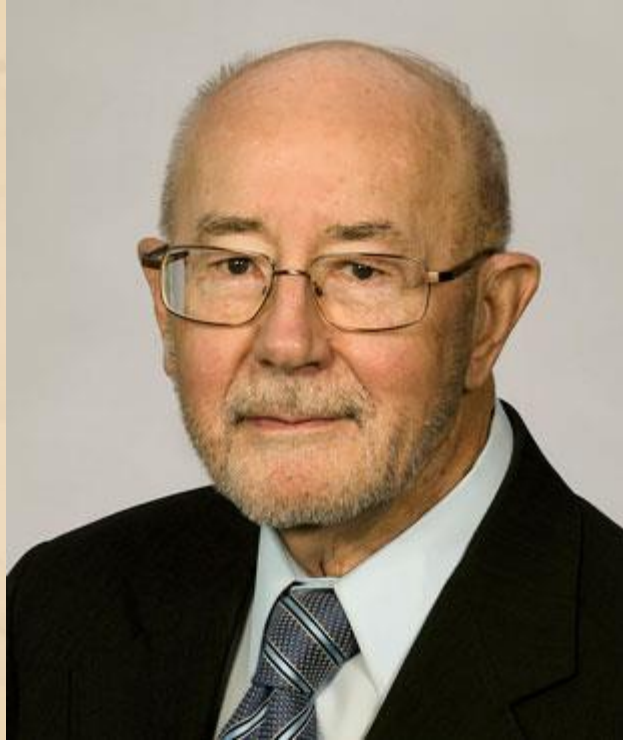
**I DON'T TRUST A
GOVERNMENT THAT
WANTS TO LET US
KNOW WHAT WE CAN
AND CANNOT KNOW.**

Attorney Cheryl Pilate

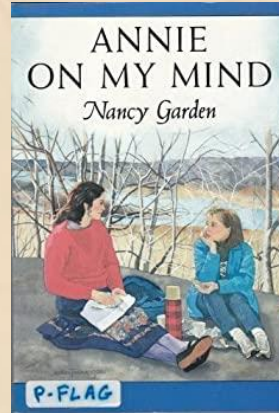
**"There's so many ways for
things to go wrong, and no
one wants to admit that
because we think we have
a great justice system,"**

**State
agrees
to pay
McIntyre
\$1.55M**

JOHNSON COUNTY COURAGEOUS ATTORNEYS



Gene Balloun



David Waxse

JOHNSON COUNTY COURAGEOUS ATTORNEYS

Wyandotte County District Attorney Mark Dupree recently sought funding from the Unified Government Board of County Commissioners to create a Conviction Integrity Unit. Dupree says his office has already identified 19 cases that could be reviewed.

Wyandotte County DA launches law enforcement accountability effort

WYCO DA wants independent unit to investigate complaints against police

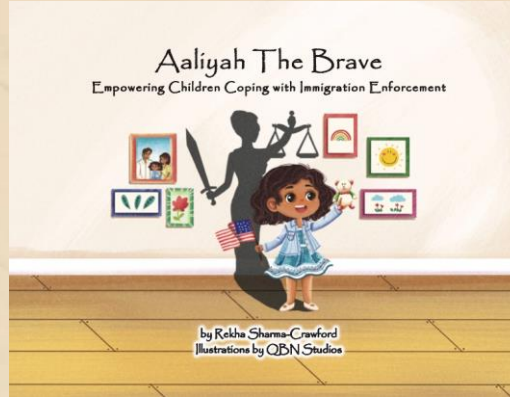


Mark A. Dupree, Sr.

JOHNSON COUNTY COURAGEOUS ATTORNEYS



**Rekha Sharma
Crawford**



**William Michael
Sharma Crawford**

JOHNSON COUNTY COURAGEOUS ATTORNEYS

U.S. Attorney's Office asked to pay more than \$230,000 after call-recording scandal

Judge rebukes prosecutors over prison recordings

Attorneys clash with prison over recordings

By BILL DRAPER
Associated Press

Leavenworth prison. "This has had a chilling effect."

A federal judge said the

extent of the problem, said Barry Pollack, president of the National Association of

The recordings came to light when federal prosecutors tried to force a



Judge Jackie Rokusek

JOHNSON COUNTY COURAGEOUS ATTORNEYS



Kevin Moriarty



1. Roscoe Pound.

“Historically, there are three ideas involved in a profession: organization, learning, and a spirit of public service. These are essential. The remaining idea, that of gaining a livelihood, is incidental...What is most important, however, a profession is practiced in a spirit of public service...The professional man does not measure out his service in proportion to reward, even if, when he can do so, he measures his honorarium by the extent of service rendered. His best service is often rendered for no equivalent, or for a trifling equivalent, and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward.”

2. Sen. Atchison

“If we cannot take Kansas by peaceful means, we must take it at the point of the bayonet.”

2.5 Boston Globe.

“According to these resolutions free-soilers will do well not to stop in Kansas Territory but keep on up the Missouri River to Nebraska Territory where they may peacefully make claims and establish their abolition and free-soil notions; if they do they will be allowed a days grace to take up their bed and baggage and walk. It is estimated the 2,000 claims have already been made within 15 miles of the military reserve, and in another week’s time, double that number will be made.

3. William T. Sherman.

“If that is Kansas justice, I want no more of it. If someone like Burns can win before a wooden headed old justice by simply being gray headed and throwing a library at the old justice, I better quit practicing law in Kansas.”

4. Judge Chadwick.

“Have given and granted and by these presented do give and grant unto the said Lucy, William Richard, Mary, Eleanor, Benjamin Franklin, John Wesley, James Henry, Charles Edmund, Sarah Jane, Abram Henderson, Isaiah, Dora Ann, Madison Monroe, Missouri, and to each of them, her and his full, complete and perfect liberty and freedom, as though each had been born free, and I do hereby the said Lucy, William Richard, Mary, Eleanor, Benjamin Franklin, John Wesley, James Henry, Charles Edmund, Sarah Jane, Abram Henderson, Isaiah, Dora Ann, Madison Monroe, Missouri, forever emancipate, liberate and set free.” June 6, 1860, Quindaro, Kansas

5. Gov. John St. John.

“I am glad to know that the great heart of the loyal North is right upon this question, and I can assure you that Kansas though yet in her infancy, will do her whole duty. We have not forgotten that these same black men fed our boys and piloted them through the swamps and jungles of the South when fleeing from southern prison-pens to a free North; and now that they, after years of oppression and abuse are compelled to flee from the same country and seek shelter in our midst, let us be true to them, as they were faithful and true to our boys in the past.”

6. G.W. Jones

“As an attorney at law, and practicing before Judge Smith in this district ever since he has been on the bench, I have drawn my fees largely from white clients, and I am imbued with the idea that when a man stands before the bar of justice, it makes no difference what may be the color of his skin, whether he be African, Indian, Mongolian or Anglo-Saxon. So self-respecting jury will consider these things in rendering a verdict, and I am persuaded that neither will you gentlemen. ..In the streets of Boston, in the revolutionary war, the first blood shed was that of an African. At Petersburg and Richmond, with Sherman to the sea. With Grant at Appomattox in Indian wars upon the plains and Santiago in Cuba, the black men had fought for this country and she his blood in its defense. He is an American citizen, loyal and patriotic, and asks only fair play and simple justice before the law. . .”

7. W.B. Townsend.

“White people profess to be Christian (Townsend spats) but they get out and burn negroes just the same.”

8. John Waller.

“I think Mr. Kelly should be treated as other nominees on the democratic ticket. This slander and abuse of the race to get at Mr. Kelly is the most inexcusable thing ever resorted to. Today we are “coons,” tomorrow we are “niggers” and then again we are “skunks.” There is entirely too much of this rot found in the republican papers at this time and if they respect our feelings and manhood they will cease to hound and slander us. The colored man is in the politics of the state and nation and is there to stay and demand that papers of both political parties give us a fair deal. If we are citizens, we have a right to go with whatever political party we please and aspire to office, too. No people have suffered so much for opinions sake as the colored people. Though Mr. Kelly is a democrat and has been a consistent one for a number of years, I cannot stand idly by and see him denounced and vilified simply because he is black. Blood is thicker than water, and party relations, for that matter, too. I would not be true to my race and myself if I did not resent such work on the part of these dirty republican papers. Mark you, they had better go slow.”

9. Isaac F. Bradley:

“Is there anything that you can do to prevent a presentation, which can do no good: but which may do a great deal of harm? It is a great pity that men cannot find that which better becomes their time and talent, than this needless appeal to prejudice.”

10. KS Supreme Court in Knox:

- *“If the board has the power, because of race, to establish separate schools for children of African descent, then the board has the power to establish separate schools for persons of Irish descent or German descent; and if it has the power, because of color, to establish separate schools for black children, then it has the power to establish separate schools for red-headed children and blondes. We do not think that the board has any such power.”*

11. Lila Day Monroe:

“The president acted childishly in this matter, in my judgment. He trifled with them; his whole course of action was trivial. His offer to shake hands with these women was absolutely the limit. These women had gone to him, by appointment, on a question of public importance. They were thinking women, interested in national affairs, and whether they agreed with him or not, he owed it to his position to treat their views with consideration. Instead of giving them credit for thinking, for having ideas he offered to shake hands with them. Most of these women had shaken hands with presidents of the United States before. It was not such an exclusive honor after all. His attitude practically was an insult to the intelligence of American Women.”

12. Lyda Conelly.

“History tells us that a superstitious reverence for and burial of the dead has been found a distinguishing trait of Indian character - to some extent we believe this to be true - as graves of the redmen were their only monuments so traditions were their only history. ...Huron Cemetery is known to be the oldest burial ground in the State of Kansas. ...The Wyandots of Wyandot County, Ohio having been promised 148,000 acres of land in Kansas, in lieu of their annuity, which under the treaty of Jan. 29, 1817 was to have been paid annually forever, were persuaded to sell their lands in the states of Michigan and Ohio, and came to what is now known as Wyandotte County Kansas, about the year 1842. . . . My grandfather Isaac Zane, ... was a scout, and also carried mail in the War of 1812. He was among the number of the head men of the tribe and chiefs who came to Kansas in the year 1843 . . .[this promised land] included Huron Cemetery, which under the treaty of Jan. 31, 1855. was not ceded to the United States, being then in use as a public cemetery ... and the Supreme Court of the United States . . held that "whenever a tract of land has been legally severed from the mass of public lands, and no subsequent law, or proclamation, or sale will be construed to embrace it, or to operate upon it, although no reservation of it be made", and have held, also, that "It is well settled in the United States that Cemeteries are among the purposes for which land may be dedicated, and it is held that, upon such dedication, the owner is precluded from exercising his former rights over the land.“... [In closing] when I shall be gathered unto my people, [I] desire that they bury me with my fathers in Huron Cemetery, the most sacred and hallowed spot on earth to me, and I cannot believe that this is superstitious reverence any more than I can believe that the reverence every true American has for the grave of Washington at Mount Vernon is a superstitious reverence.”

13. Tiera Farrow

“Where are the men? Bring the men off the streets.”

COURAGEOUS KANSAS ATTORNEYS AND HOW YOU CAN BECOME ONE

Reading List

CLE RULES

RULE 804 (a) Credit Hours. An active attorney must earn a minimum of 12 CLE credit hours at approved programs during each compliance period. Of the 12 hours, at least 2 hours must be in the area of ethics and professionalism.

RULE 804(g) “Ethics” means the standards found in the Kansas Rules of Professional Conduct that an attorney must comply with to practice law in Kansas and remain in good standing.

RULE 804(n) “Professionalism” means conduct consistent with the tenets of the legal profession by which an attorney demonstrates civility, honesty, integrity, character, fairness, competence, ethical conduct, public service, and respect for the rules of law, the courts, clients, other attorneys, witnesses, and self-represented and unrepresented persons.”

KANSAS RULES OF PROFESSIONAL CONDUCT

THE PREAMBLE

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen **having special responsibility for the quality of justice.**

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. **As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.** As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge

in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. **Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.** A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest. The attributes contained in this paragraph for lawyers' conduct shall be an aspirational goal of all lawyers.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. **A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.**

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

THE RULES

3.1 A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes **a good faith argument for** an extension, modification or **reversal of existing law.** A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to **require that every element of the case be established.**

6.1 **A lawyer should render public interest legal service.** A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or

organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

6.2 A lawyer shall **not seek to avoid appointment** by a tribunal to represent a person except for good cause

6.3 A lawyer may serve as a **director, officer or member of a legal services organization**, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer.

6.4 A lawyer may serve as a **director, officer or member of an organization involved in reform of the law or its administration** notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

BOOKS

1. EARLY HISTORY OF LEAVENWORTH CITY AND COUNTY, by Miles Moore, [Early History of Leavenworth City and County \(forgottenbooks.com\)](http://forgottenbooks.com)
2. IN SEARCH OF CANAAN: BLACK MIGRATION TO KANSAS 1879-1880, by Robert Athearn, Regents Press, Lawrence, 1978.
3. A BLACK ODYSSEY; JOHN LEWIS WALLER AND THE PROMISE OF AMERICAN LIFE, 1878-1900, by Randall Bennett Woods, Regents Press of Kansas, Lawrence, 1981.
4. REASONS TO PERSIST: A BIOGRAPHY OF ISAAC FRANKLIN BRADLEY, by Frances Bradley Robinson, LaunchCrate Publishing, Kansas City, 2018
5. THE REIGN OF REASON: A TREATISE ON POLITICAL ECONOMY, by I. F. Bradley, Library of Congress, 1915.
6. THOMAS EWING JR.: FRONTIER LAWYER AND CIVIL WAR GENERAL, by Ronald D. Smith, University of Missouri Press, 2008.
7. PIONEER WOMEN: VOICES FROM THE KANSAS FRONTIER, by Joanna Stratton, Touchstone, 1982. (writings of Lilla Day Monroe)

8. TO HEAVEN THROUGH HELL, by Cordell Meeks, Sr, Corcell Publishers, Kansas City, Kansas 1986.
9. NEGRO CULTURE IN WEST AFRICA, by George Washington Ellis, The Neale Publishing Co., New York, New York, 1914.
10. LAWYER IN PETTICOATS, by Tiera Farrow, Vantage Press, Inc., New York, 1953

ARTICLES

1. "*W. B. Townsend and the Struggle against Racist Violence in Leavenworth*," by Brent M. S. Campney, *Kansas History: A Journal of the Central Plains* 31 (Winter 2008–2009): 260–273.
2. "*I Shall Talk to My Own People*": *The Intersectional Life and Times of Lutie A. Lytle* by Taja-Nia Y. Henderson, 102 *Iowa L. Rev.* 1983 (2017). ["I Shall Talk to My Own People": The Intersectional Life and Times of Lutie A. Lytle | Iowa Law Review - The University of Iowa \(uiowa.edu\)](https://www.iulawreview.org/article.php?id=102.1)
3. "*Early Civil Rights Activism in Topeka, Kansas, Prior to the 1954 Brown Case*," by Jean Van Delinder, *University of Nebraska-Lincoln, Great Plains Quarterly*, Winter 2001.
4. "*How a Trio of Sisters Occupied—And Saved—A Sacred Native Cemetery in Kansas City, Kansas*," by Celisa Calacal, *KCUR*, February 8, 2020. [How a trio of sisters occupied — and saved — a sacred Native cemetery in Kansas City, Kansas | KCUR - Kansas City news and NPR](https://www.kcur.com/news/kansas-city/how-a-trio-of-sisters-occupied-and-saved-a-sacred-native-cemetery-in-kansas-city-kansas/)
5. "*The Colored People Hold the Key: Abram Thompson Hall, Jr.'s Campaign to Organize Graham County*," by Charlotte Hinger, *Kansas History: A Journal of the Central Plains* 31 (Spring 2008): 32-47.
6. "*The Birth of a Nation and the Kansas Board of Review of Motion Pictures: A Censorship Struggle*," by Gerald R. Butters, Jr., *Kansas History*, Spring 1991. [1991spring_butters.pdf \(kshs.org\)](https://www.kshs.org/files/original/1991spring_butters.pdf)
7. "*Political Institutions in Liberia*," George Washington Ellis, *American Political Science Review*, May 1911, Vol. 5, No. 2, pp. 213-223.
8. "*The Psychology of American Race Prejudice*," George W. Ellis, *The Journal of Race Development*, Vol. 5, No. 3 (Jan. 1915), pp. 297-31

CASES

1. *State ex. rel Watson v. Cobb*, 2 Kan. 32 (1863) (CJ Thomas Ewing resigning before election, but still being elected).
2. *State ex. rel Brewster v. Crawford*, 103 Kan. 76 (1918). (Birth of a Nation Censorship)
3. *Rennolds v. Guthrie*, et al., 103 Kan 829 (1918). (a Tierra Farrow case-first argued before KS SC by woman)
4. *In re Charles*, 115 Kan. 323, 222 P. 606 (1924) (a Turner W. Bell case)
5. *State v. Ryan*, 141 Kan. 549, 42 P.2d 591 (1935) (a Turner W. Bell case)
6. *Stevana Case v. Unified School District 233*, 908 F.Supp. 864 (D. Kansas 1995). (Annie on My Mind)
7. The cases that laid the groundwork for *Brown v. Board* and the black lawyers that argued them. In 1877 the Kansas legislature passed a statute specifically allowing first-class cities (those with populations of 15,000 or more) to run separate elementary schools. This law remained in effect into the 1950s. However, with the exception of Wyandotte, high schools were not segregated in Kansas.
 - 1881 – *The Board of Education of Ottawa v. Elijah Tinnon*, 26 Kan. 1 (1881)
 - Judge Nelson D. Stephens cited the 14th Amendment to the United States Constitution, guaranteeing individual rights of citizenship, among his reasons for deciding in favor of *Tinnon*.
 - Justice Daniel M. Valentine asked in upholding *Tinnon*, “*is it not better for the aggregate of human society as well as for individuals that all children should mingle together and learn to know each other?*”
 - 1891 – *Knox v. The Board of Education of Independence*, 45 Kan. 152 (1891)
 - Attorney: William Abrahm Price, first black lawyer licensed in Texas in 1873, moved to Kansas in 1877 to join the Exodusters.
 - 1903 – *Reynolds v. The Board of Education of Topeka*
 - 1905 – *Richardson v. Board of Education of Kansas City*, 72 Kan. 629 (1906).
 - *Special Legislation for Kansas City, Kansas*
Mamie Richardson brought suit against the Board of Education of Kansas City in 1906 after she was not allowed to attend the Morning High School to which white students had been assigned. This singular case came about after a fatal incident at the integrated high school influenced the Kansas

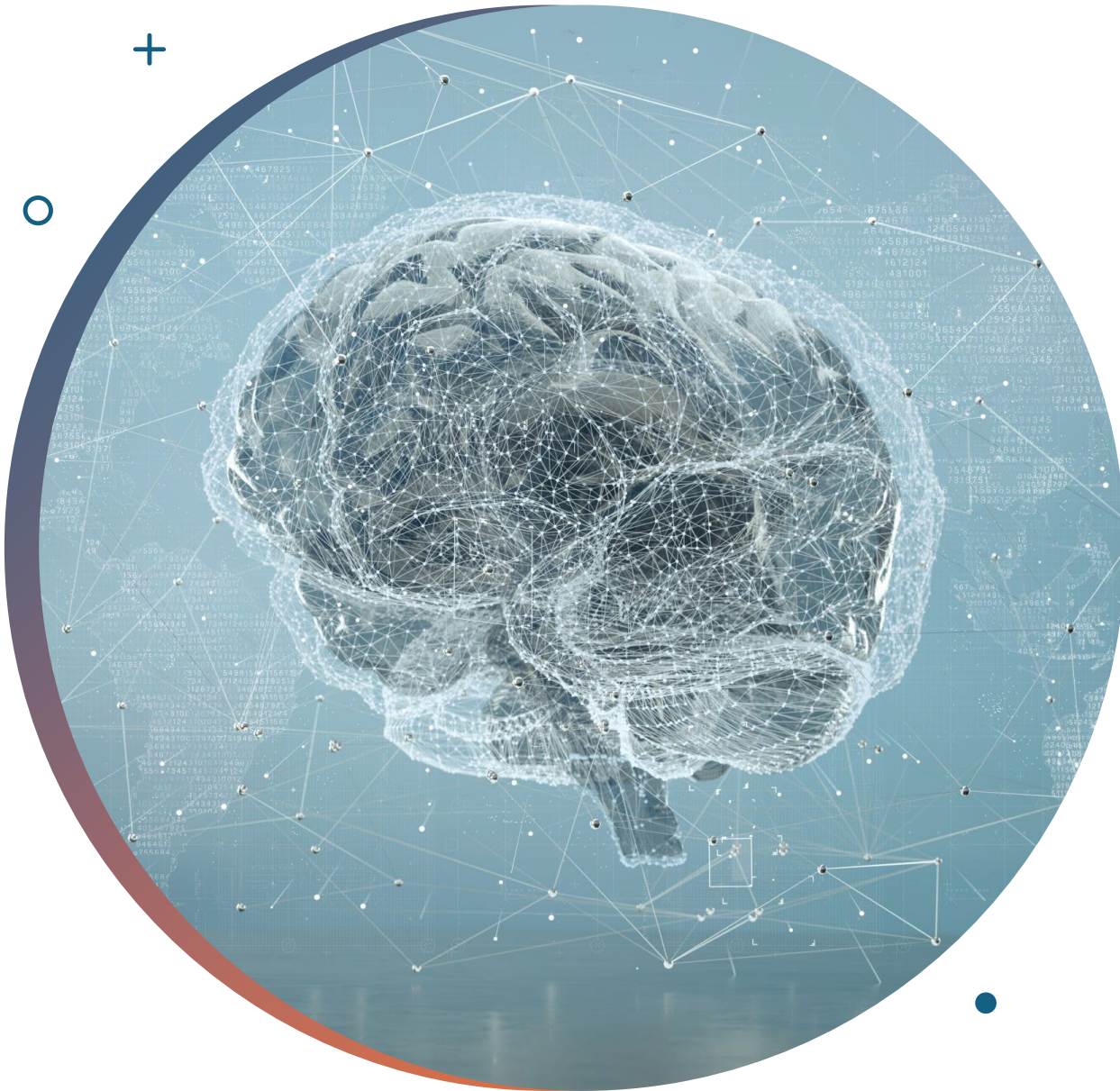
Legislature of 1905 to pass a special act permitting Kansas City to operate separate high schools. The School Board lost no time in instigating separation by dividing each day into two sessions based on race, even as a new building, Wyandotte High School, was under construction. In ruling against Richardson the Kansas Supreme Court also upheld the constitutionality of this special legislation.

- Charles W. Frye attorney
- 1906 – *Cartwright v. The Board of Education of Coffeyville*, 73 Kan. 32 (1906)
 - Attorney: James Guy, first black lawyer admitted in Iowa in 1882, came to Kansas in 1885, practiced in Topeka...His secretary was Langston Hughes' mother.
- 1907 – *Rowles v. The Board of Education of Wichita*
- 1908 – *Williams v. The Board of Education of Parsons*
- 1916 – *Woolridge v. The Board of Education of Galena*, 98 Kan. 397 (1916)
 - Elisha Scott, Washburn Law 1916 and Roy VanDyne (Elisha's brother in law), Topeka
- 1924 – *Thurman-Watts v. The Board of Education of Coffeyville*, 115 Kan. 328 (1924)
 - Elisha Scott, Washburn Law 1916 and Roy VanDyne (Elisha's brother in law), Topeka
 -
- 1929 – *Wright v. The Board of Education of Topeka*
- 1941 – *Graham v. The Board of Education of Topeka*
 - William McKinley Bradshaw
- 1949 – *Webb v. School District No. 90, South Park Johnson County*, 167 Kan. 395 (1949)
 - Elisha Scott (Topeka), Thurgood Marshall (NY), Frank Williams (NY), Carl Johnson (KCMO)
- 1951 – *Oliver L. Brown et. al. v. The Board of Education of Topeka*, 349 U.S. 249 (1955)
 - Elisha Scott, Charles Bledsoe, Charles Scott, John Scott, George Haley

Artificial Intelligence (AI)

- Revolutionize legal research.
- Time consuming.
- Analyze massive amounts of legal data.
- AI algorithms can
 - Identify patterns
 - Extract key insights
 - Predict outcomes based on historical data
- Uncover connections and relationships.
- Identify trends, precedents, and nuanced legal arguments.





Artificial Intelligence (AI)

- AI can continuously learn and improve over time.
- Iterative learning process ensures that legal research remains dynamic and responsive to legal trends and precedents.

Artificial Intelligence (AI)



However, it's essential to recognize that AI is not a panacea for all legal research challenges.



Human expertise remains indispensable for tasks that require

nuanced interpretation,
critical analysis,
and judgment



There are important ethical considerations to bear in mind when using AI in legal research

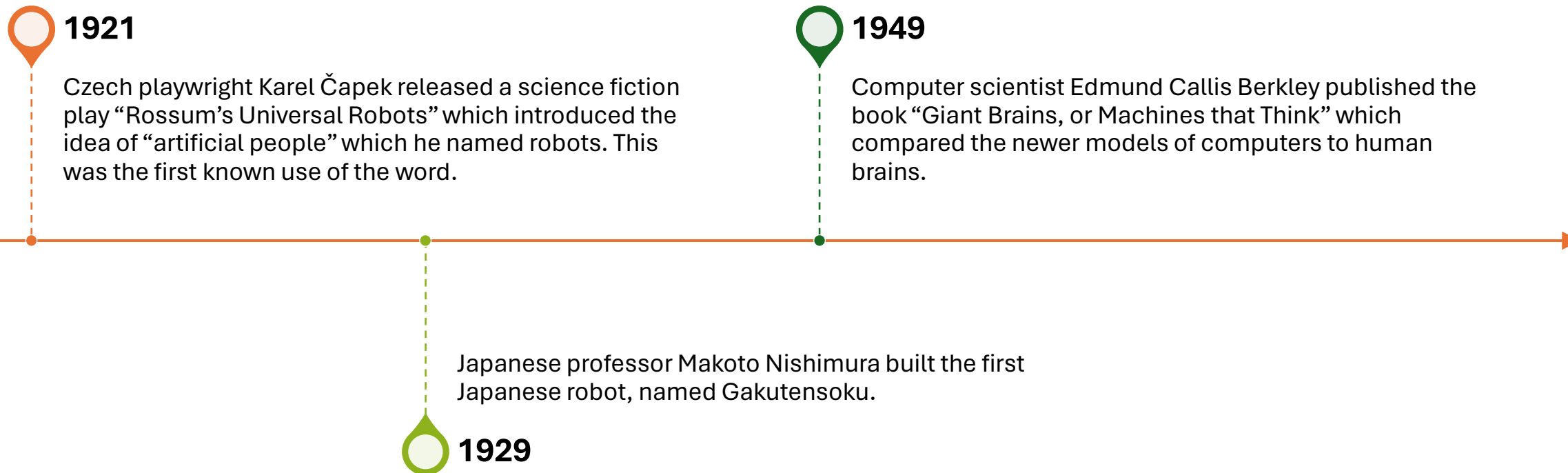
Data privacy
Bias
transparency

The background of the slide is a complex, abstract network diagram. It consists of numerous circular nodes of varying sizes, colored in shades of yellow, grey, and dark blue. These nodes are interconnected by a dense web of thin, dark grey lines, creating a sense of a global or interconnected system. The overall aesthetic is modern and technological.

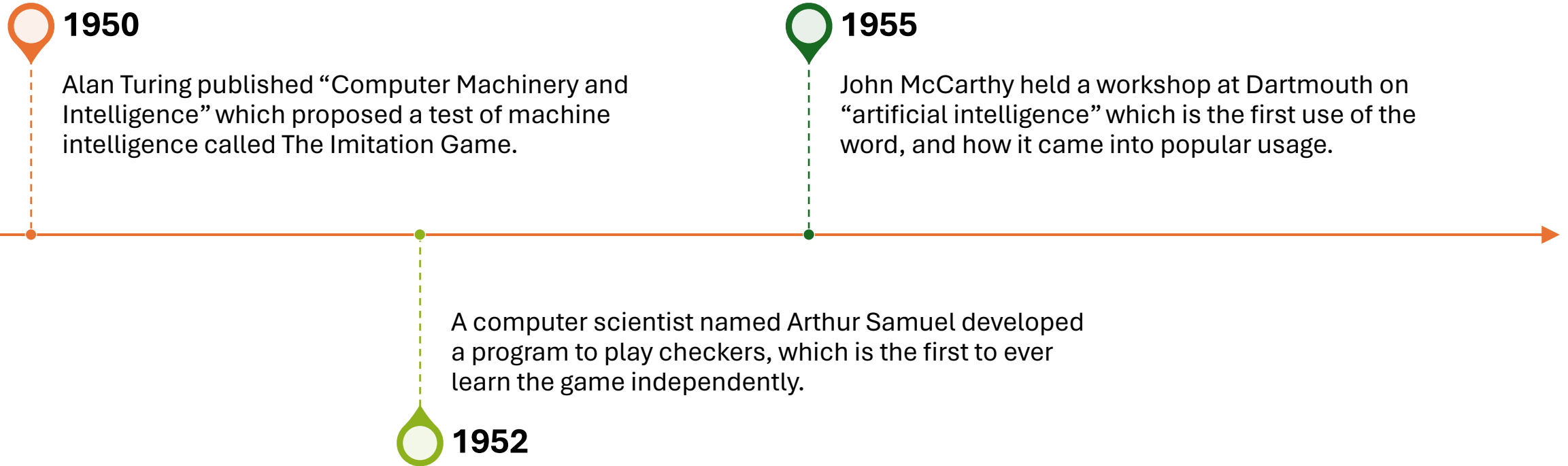
A Brief History

Law and AI

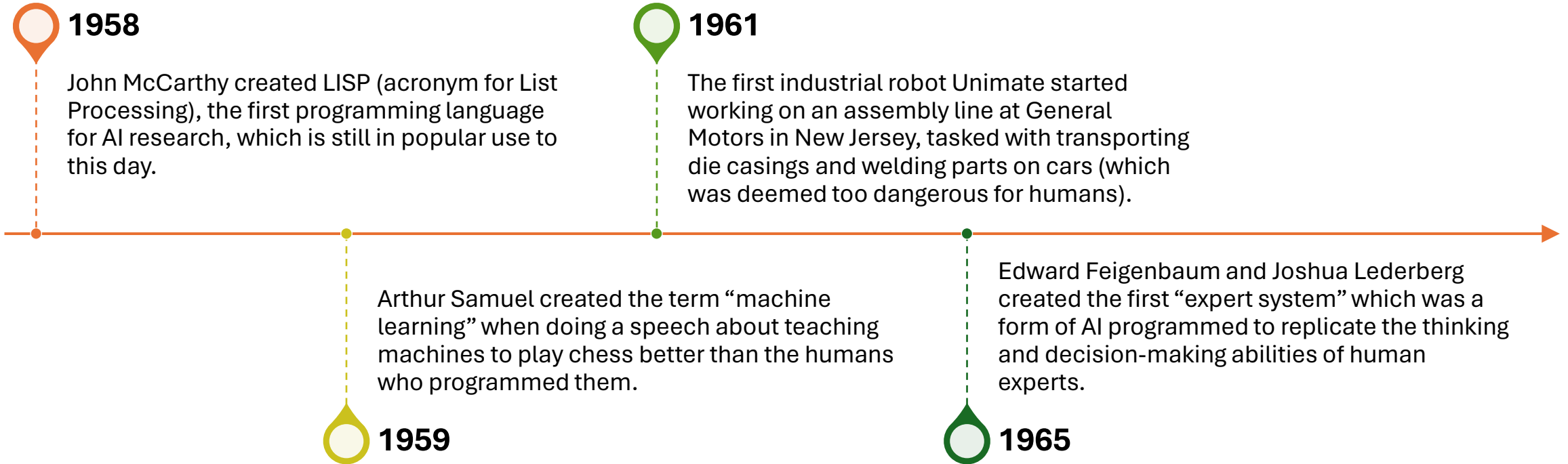
A Brief History of AI



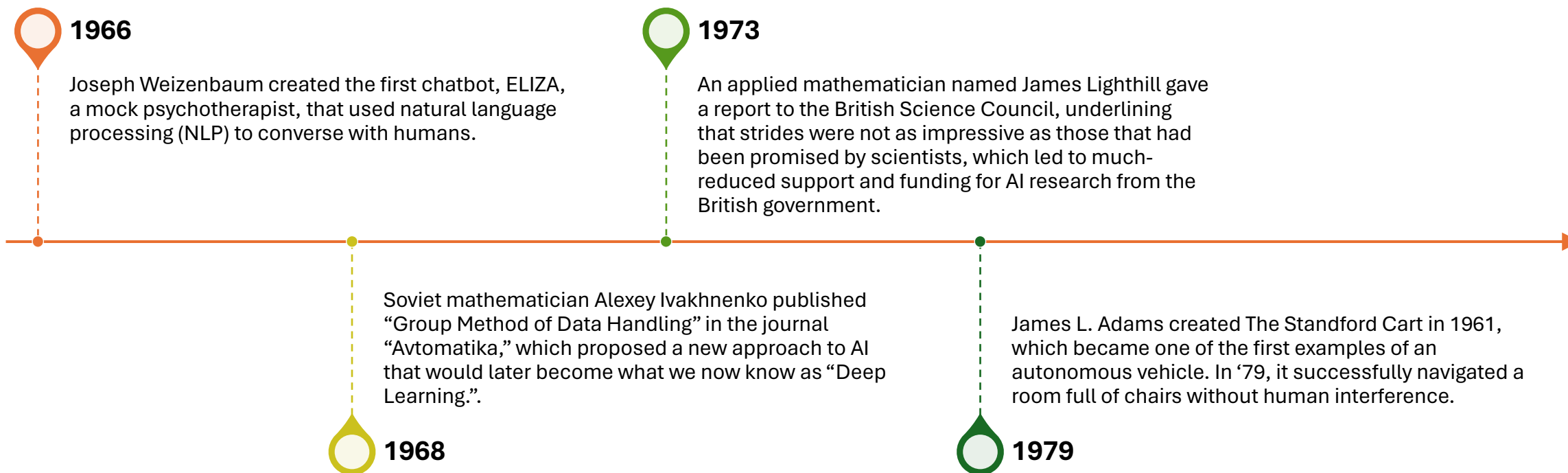
A Brief History



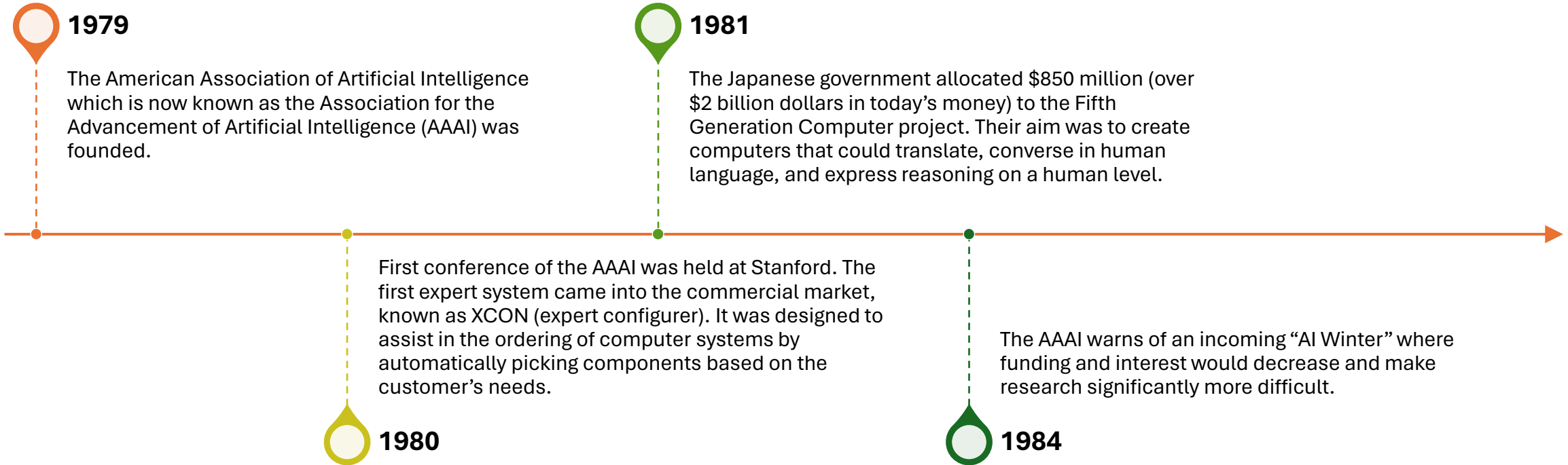
A Brief History



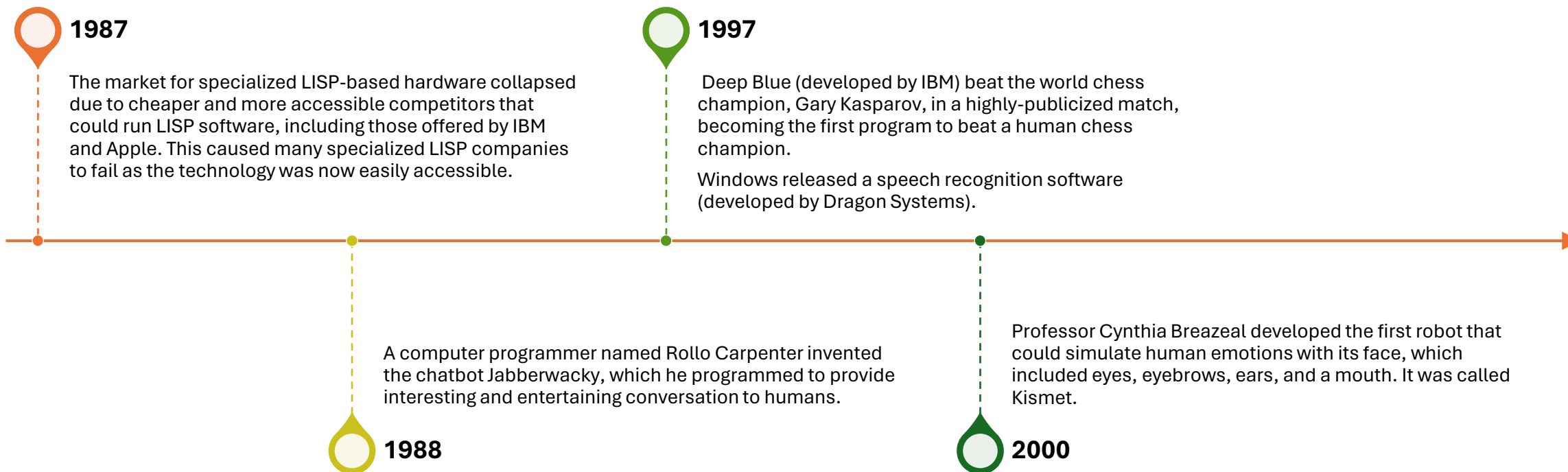
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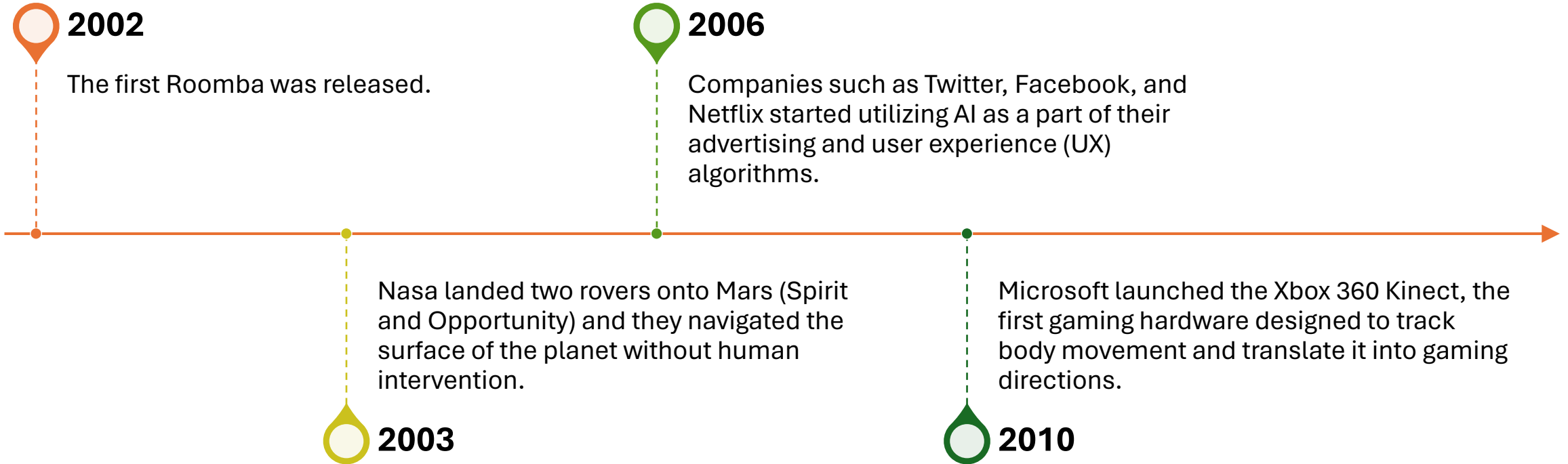
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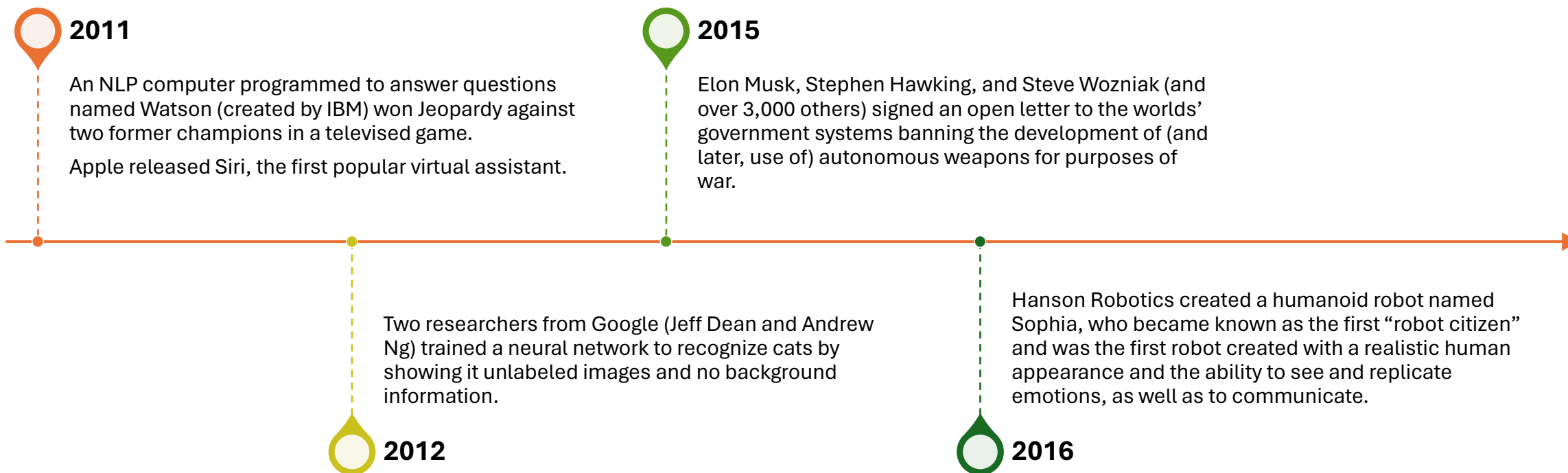
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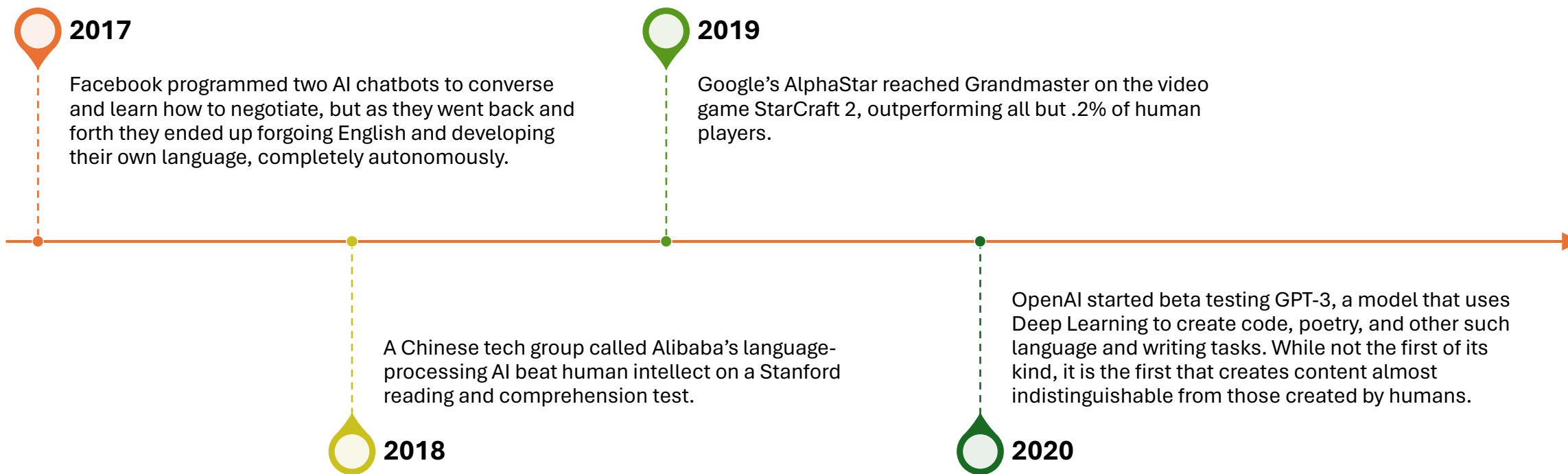
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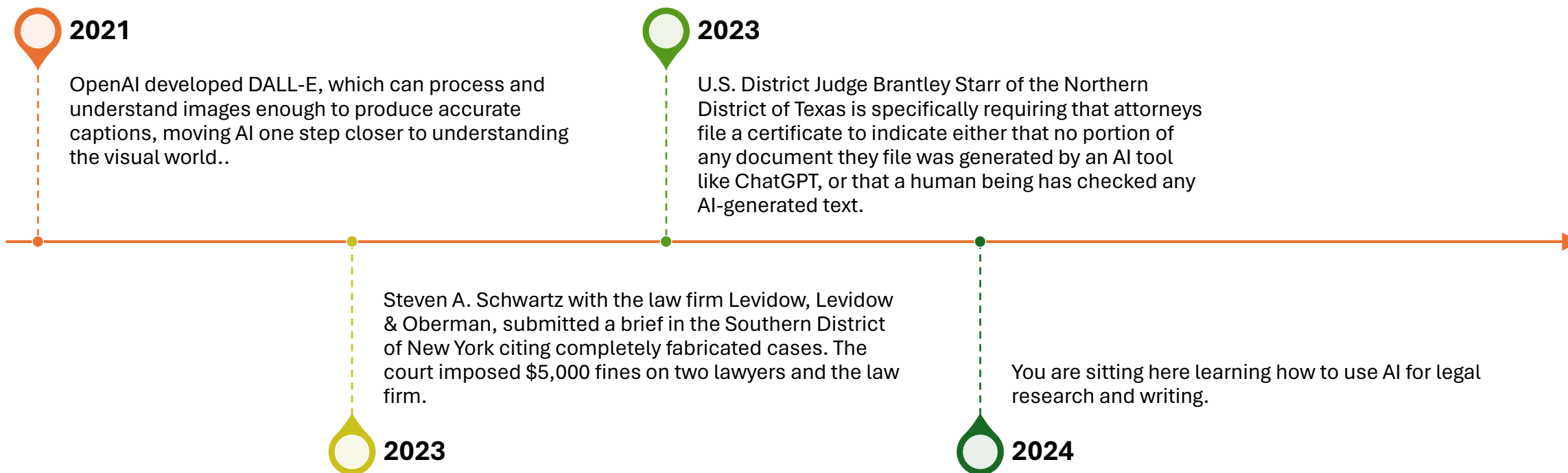
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A Brief History



A Brief History

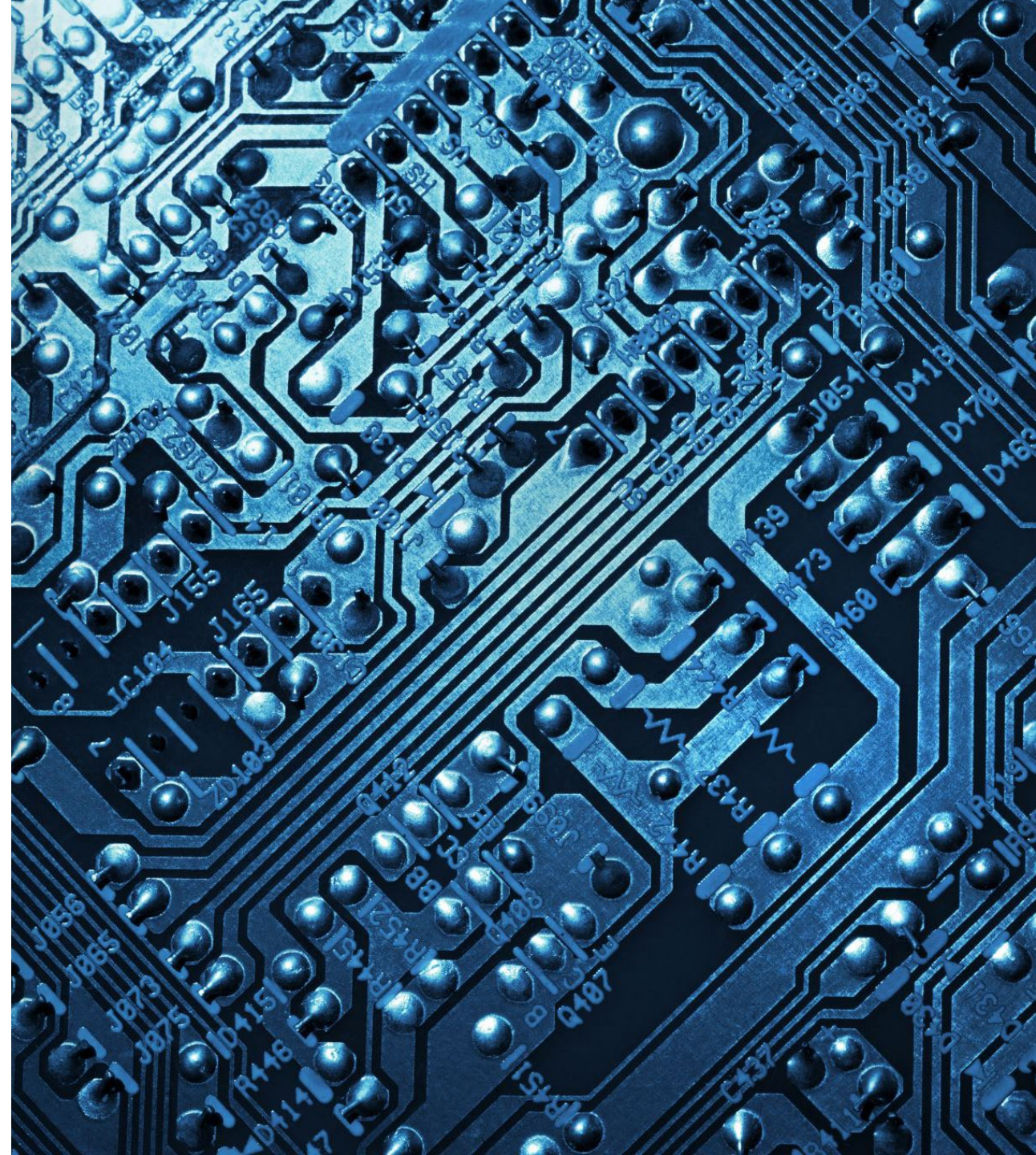


What
exactly IS
AI?



What is AI?

- Artificial intelligence, or AI, is technology that enables computers and machines to simulate human intelligence and problem-solving capabilities.
- The AI used in legal research uses Large Language Models (LLM) .
- LLM is a computational model that can generate language.
- LLMs acquire these abilities by learning statistical relationships from text documents during a training period.
- Generative AI is used for text generation.



AI Risks

The background of the slide is a complex digital graphic. It features a dark blue/black gradient on the left, transitioning into a series of overlapping, semi-transparent geometric shapes in various shades of blue and teal. These shapes create a sense of depth and movement. A prominent feature is a horizontal trail of small, white and light blue squares, resembling a digital signal or a path, that stretches across the middle of the image. The overall aesthetic is high-tech and futuristic.

AI Risks

- AI carries known and unknown risks that need careful navigation
 - error-filled responses,
 - unpredictable and potentially unreliable output,
 - and the friction that accompanies learning to use a new and imperfect tool.



AI Risks



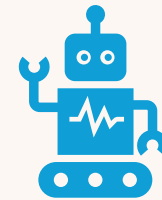
Confabulation:

Large Language Models are prone to producing incorrect, but plausible facts, a phenomenon known as confabulation or hallucination.



Bias:

The way AI is trained may introduce biases in the text, which can range from gender and racial biases to biases against particular viewpoints, approaches, or political affiliations.



Privacy:

Data and information entered into AI can be used for future training of the AI.

Also, there is a question of lawyer/client privilege and whether or not uploading info to a third party breaks it.

AI Risks

- Instructional:
 - AIs can be very convincing, and have strong “viewpoints” about facts and theories that the models “believe” are correct.
- Quality and reliability of data:
 - AI must be trained on legal data by legal professionals.
- Lack of Context:
 - AI typically operates based on patterns learned from data rather than a deep understanding of legal principles.
- Ethical considerations:
 - Unauthorized practice of law?



AI Risks

- Loss of human judgment:
 - Human judgment and legal expertise is needed for critical analysis and decision-making.
- Intellectual property concerns:
 - The use of copyrighted material in training AI models is incredibly complex.
- User understanding and acceptance:
 - Lack of understanding may lead to potential skepticism or mistrust.
 - Might be seen as a threat to the legal profession.





AI Risks

- Cost and access:
 - Considering everything listed above, implementing AI might be out of reach for many attorneys.

Using AI



Using AI

- Understanding the limitations of AI will allow you to create queries that lowers the chances of hallucinations and also prepare you for skepticism.
- AI can be used for research, crafting arguments, and drafting documents including letters, emails, and clauses.
- It is best to treat your interaction with AI much like you are having a conversation with a colleague.



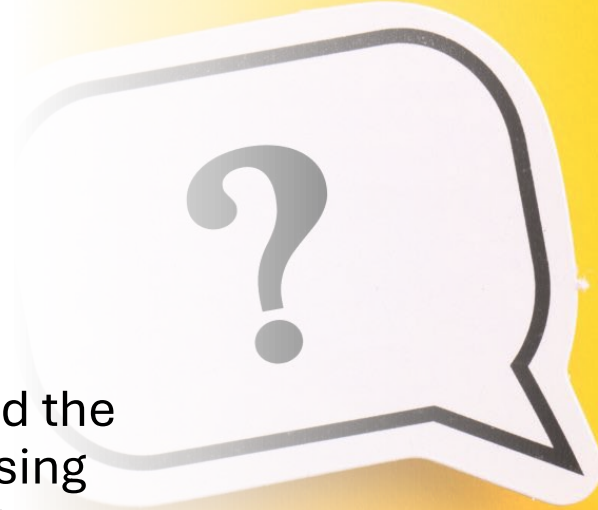
Using AI

- As a matter of fact, you can prompt AI to fulfill a specific role:
 - Mentor
 - Tutor
 - Coach
 - Teammate
 - Student
 - Simulator
 - Tool



Using AI

- Now that you understand the limitations involved in using generative AI, you need to understand how best to create your query, or “prompt.”



AI Prompt

- **Be specific and thorough:**
 - As much information as possible.
 - Jurisdiction
 - Parties
 - Material facts
 - Legal terms and concepts



AI Prompt

- **“You are...”**
 - Ask AI to behave as if it were a certain type of person to generate certain results.
 - Personality
 - Background
 - Tone



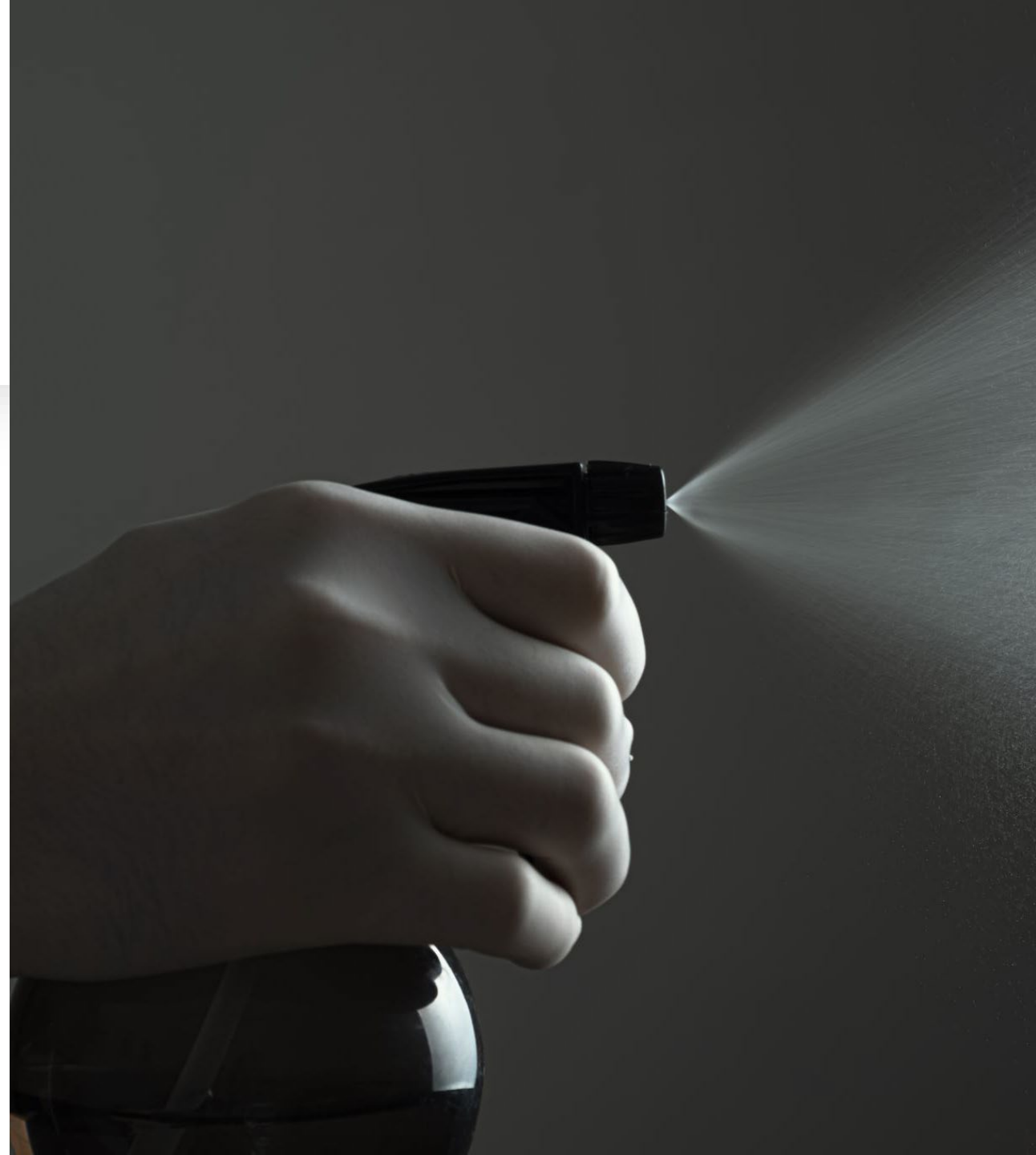
AI Prompt

- **Output**
 - “Present this in the form of a 500-word memo to a senior partner”
 - “Create an email to a junior associate explaining...”



AI Prompt

- **Polish**
 - Feel free to ask AI to clean up and polish.
 - Use examples, avoiding copyright infringement.



AI Prompt

- LEXIS+ uses 5P's:
 - Prime
 - Persona
 - Prompt
 - Product
 - Polish



AI Prompts

- Priming: Provide sufficient context.
 - Jurisdiction
 - Parties
 - Key terms
 - Material facts
 - Legal concepts



AI Prompts

- Persona: Provide who you want AI to be
 - Personality
 - Background
 - Tone



AI Prompts

- Product: The type of output you are looking for.
 - Email
 - Memo
 - Letter
 - Explanation



AI Prompts

- Polishing: Elaborate and refine the exchange through continued conversation.



Basic Prompt Checklist



HAVE YOU GIVEN CLEAR
INSTRUCTIONS?



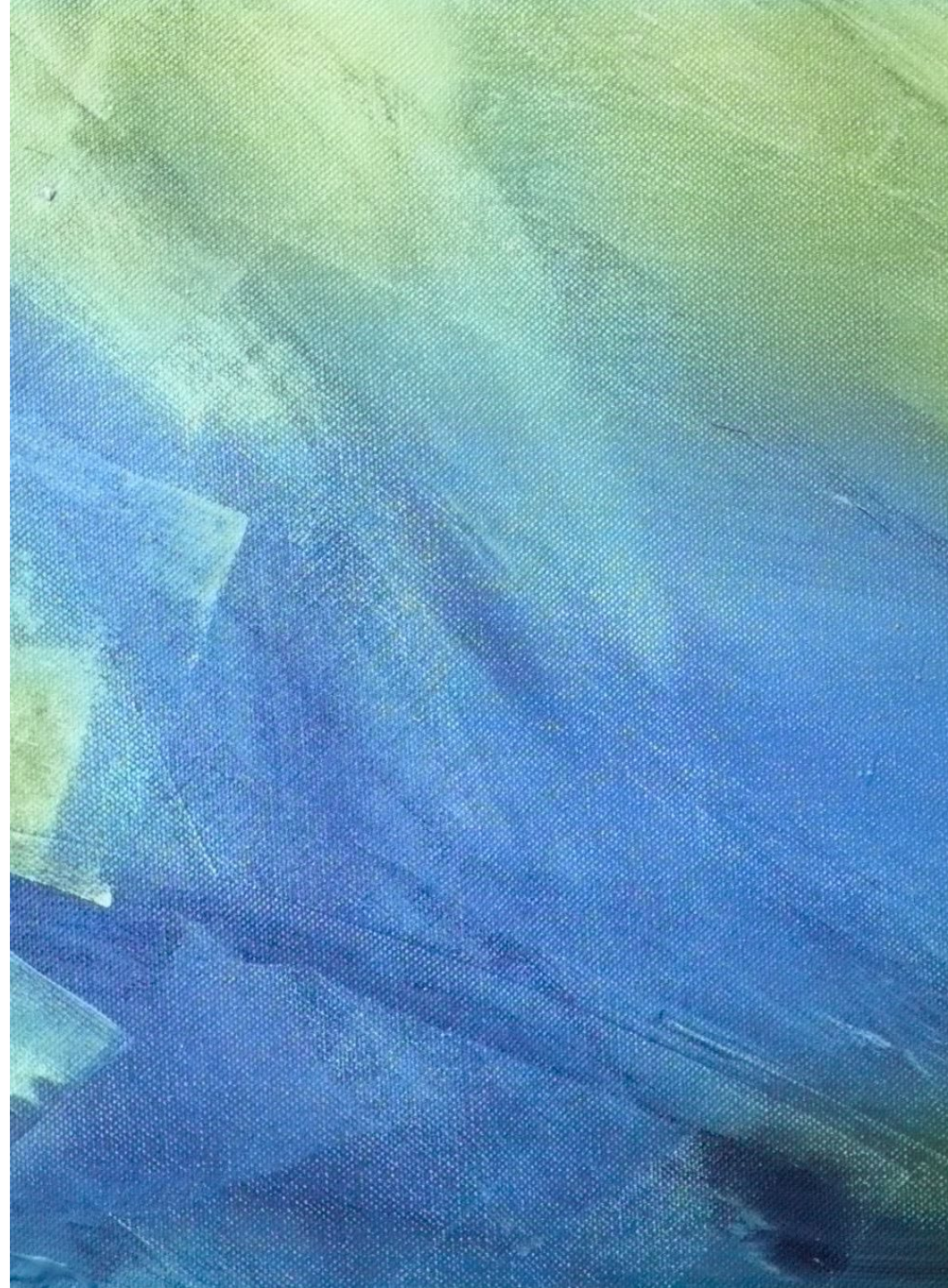
HAVE YOU PROVIDED
SPECIFIC DETAILS?



HAVE YOU PROVIDED
BACKGROUND FOR THE
TASK?



HAVE YOU GIVEN
EXAMPLES AND IDEAS?



Prompt Example

Examine the legal implications and constitutional issues surrounding the use of body cameras by law enforcement officers in the United States. Investigate the relevant federal and state laws governing the use of such technology, including any privacy considerations, Fourth Amendment implications, and policies regarding access to and retention of recorded footage. Additionally, analyze relevant case law, recent legislative developments, and scholarly commentary on the topic.

LEXIS+ AI Examples

What should the ADA interactive process consist of?

LEXIS+ AI Examples

The ADA interactive process should consist of sufficient notice from the employee to the employer that an accommodation is needed, followed by good faith participation by both parties to identify appropriate reasonable accommodations. This requires ongoing communication between the employer and employee to determine the employee's precise limitations and potential accommodations to overcome those limitations. The interactive process is a way to determine reasonable accommodations, not an end. Neither party should obstruct this process, and both sides must participate in good faith. However, the interactive process does not require the employer to make any particular concession, as long as a good faith effort is made to find accommodations. [1][2][3]

- Poole v. Centennial Imps., Inc.
- EEOC v. C.R. Eng., Inc.
- O'Dell v. Dep't of Pub. Welfare

LEXIS+ AI Examples

Does a person have a right of privacy in their fenced in backyard in California?

LEXIS+ AI Examples

Yes, a person generally has a right of privacy in their fenced-in backyard in California. Specifically, courts have found that surrounding a backyard with a fence and limiting entry with a gate, locked or unlocked, demonstrates a reasonable expectation of privacy in that area. This privacy right extends even if there are some gaps or openings in the fence. However, the right of privacy may be diminished if activities in the backyard can be readily observed from outside the fence or by neighbors. Additionally, areas beyond the fenced curtilage of the home are not protected, so unoccupied or undeveloped areas outside a fenced backyard would not be considered private.

- California Criminal Defense Practice
- People v. Winters
- Cal Pen Code § 632

AI Coverage

- What can current AI access?
 - Case Law
 - Statutes
 - Regulations
 - News



AI Coverage

- What can AI NOT access?
 - Copyrighted material
 - Law Reviews
 - Secondary Sources
 - Digest System



ChatGPT Example

Background:

Research generally Educational Savings Accounts (ESA), looking for states that have them, states that don't, states that have pending legislation, and states that have had legislation but rejected.

Specific question request:

Locate news articles for and against ESAs.

ChatGPT Example

Q: Is it possible to summarize the political arguments of ESA programs in the states? What do proponents typically argue? What do opponents argue to defeat proposed ESA legislation?

ChatGPT Example

Proponents' Arguments:

1. **School Choice and Parental Empowerment:** Proponents argue that ESAs provide parents with greater choice and control over their children's education. By allowing parents to use public funds for a variety of educational expenses, including private school tuition, tutoring, and educational materials, ESAs empower families to tailor education to their children's individual needs.
2. **Improved Education Quality:** Proponents contend that increased competition from ESAs encourages schools to improve the quality of education they offer in order to attract students. They argue that this competition leads to innovation and better outcomes for students across both public and private school sectors.
3. **Equity and Access:** Proponents argue that ESAs promote equity by giving low-income families access to educational options that were previously available only to wealthier families. They argue that ESAs level the playing field and provide equal opportunities for all children, regardless of socioeconomic status or ZIP code.
4. **Cost Savings:** Some proponents argue that ESAs can lead to cost savings for taxpayers by reducing the strain on public school budgets. They argue that when students use ESAs to attend private schools or homeschool, it reduces the burden on public schools, potentially saving taxpayer dollars.

ChatGPT Example

Opponents' Arguments:

- 1. Diversion of Public Funds:** Opponents argue that ESAs divert taxpayer dollars away from public schools, which are already underfunded in many areas. They argue that funding private school vouchers or ESAs undermines public education and exacerbates existing inequalities by redirecting resources away from the students who need them most.
- 2. Lack of Accountability and Oversight:** Opponents express concerns about the lack of accountability and oversight in ESA programs. They argue that private schools and homeschooling arrangements funded by ESAs may not adhere to the same standards and regulations as public schools, potentially compromising the quality of education and student safety.
- 3. Segregation and Fragmentation:** Opponents raise concerns about the potential for ESAs to exacerbate segregation and fragmentation within the education system. They argue that ESAs may lead to the creation of parallel education systems, with wealthier families opting for private schools or homeschooling while lower-income families remain in underfunded public schools, further deepening existing divides.
- 4. Erosion of Public Education:** Some opponents argue that ESA programs represent a step towards privatization and the erosion of the public education system. They contend that ESAs prioritize individual choice over the collective good and undermine the principles of universal access and equity that underpin public education.

ChatGPT Example

Follow up question: Please provide a list of news articles and/or scholarly articles that document the political and policy arguments for Educational Savings Accounts covering all 50 states, listing for each article the arguments made for or against ESAs, providing the URLs for each article.

ChatGPT Example

Arizona:

1. "Arizona Supreme Court Upholds Education Savings Account Program" - <https://www.nytimes.com/2021/03/25/us/arizona-education-savings-accounts.html>
2. "Arizona Education Savings Account Program Could Get Major Expansion" - <https://www.azcentral.com/story/news/politics/legislature/2021/02/09/arizona-educationsavings-account-program-could-get-major-expansion/4443073001/>

Florida:

1. "Education Savings Accounts Get a Big Boost from Florida Lawmakers" - <https://www.edweek.org/leadership/education-savings-accounts-get-a-big-boost-fromflorida-lawmakers/2022/01>
2. "Florida Education Savings Account Program Aims to Expand" - <https://www.tampabay.com/news/education/2022/01/11/florida-education-savings-accountprogram-aims-to-expand/>

Nevada:

1. "Nevada Supreme Court Upholds State's Education Savings Account Program" - <https://www.wsj.com/articles/nevada-supreme-court-upholds-states-education-savingsaccount-program-11612847982>
2. "Nevada Supreme Court Ruling Expected Soon on Education Savings Accounts" - <https://www.reviewjournal.com/news/education/nevada-supreme-court-ruling-expectedsoon-on-education-savings-accounts-2331548/>

North Carolina:

1. "North Carolina Supreme Court Upholds Education Savings Account Program" - <https://www.newsobserver.com/news/politics-government/article251012074.html>
2. "North Carolina Lawmakers Consider Expansion of Education Savings Account Program" - <https://www.ednc.org/nc-lawmakers-consider-expansion-of-education-savings-accountprogram/>



Conclusion



Conclusion

- It's important to note that efforts are being made to address all of the challenges facing AI.
- Researchers and practitioners are working on developing more transparent, interpretable, and fair AI systems for legal research.
- Lexis and Westlaw have both introduced their LLM, generative AI systems using their in-house team to keep everything on track.
- Professional organizations such as the ABA have been quick to present CLEs and seminars on AI best practices.

Conclusion



Large Language Models and generative artificial intelligence are transforming legal practice.



Staying on top of the development and honing our skills will turn these into powerful tools that will help us conduct faster and more accurate research inquiries.

NAME OF CLIENT AND MATTER NUMBER:

FINAL WORK PRODUCT:

CONSTRAINTS:

FACTS

Who:

What:

Where:

When:

Why:

GOVERNING LAW

Jurisdiction:

Common law, statutory, both:

LEGAL ISSUES AND KEYWORDS

Initial Statement:

Keywords:

RESEARCH

Secondary Sources:

Statutes:

Cases:

AI:

JOE MOLINA, Director of Legislative Services, KBA
Legislative Update

Summary of Legislation

<https://klrd.org/2024/04/02/2024-preliminary-summary-of-legislation/>

First Supplement

<https://klrd.org/2024/04/11/first-supplement-to-preliminary-summary-of-legislation-2024/>

STATE OF KANSAS
OFFICE OF THE DISCIPLINARY ADMINISTRATOR



GAYLE B. LARKIN
Disciplinary Administrator
MATTHEW J. VOGELSBERG
Chief Deputy Disciplinary Administrator
W. THOMAS STRATTON, JR.
Director of Investigations

DEBORAH L. HUGHES
GARY C. WEST
KATHLEEN J. SELZLER LIPPERT
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Deputy Disciplinary Administrators

BIO:

Kathleen J. Selzler Lippert, JD is a graduate of Drake Law School. She joined the Office of the Disciplinary Administrator (ODA) in December 2019 as a Deputy Disciplinary Administrator. She has practiced law for over two decades in public service. As a prosecutor for over a decade, her work involved general criminal cases, drug task force, and felony domestic violence including homicide cases. She practiced in administrative law and medical license regulation for over a decade by serving in a variety of roles for the Kansas State Board of Healing Arts. She is a wife, mother of three young men – two in college and one in high school – and serves on the local school board.

Presentation Title:

Office of the Disciplinary Administrator: Top 10 Ways to Avoid a Gray Letter

Summary/overview: Drawing from David Letterman's famous style of presenting 'Top 10' lists, this CLE will look at what a gray letter means and how to avoid receiving one. The Office of the Disciplinary Administrator (ODA) is sometimes referred to as the 'gray letter' office. An attorney may be distressed if they receive a 'gray letter' from our office. Kansas attorneys should know what a gray letter from the ODA means and how to avoid distressing gray letters.

Presentation Outline:

Office of the Disciplinary Administrator: Top 10 Ways to Avoid a Gray Letter

1. Not all gray letters from the ODA mean the same thing.
 - a. Review process and procedure of the ODA.
 - b. Understand the types of communication ODA may send to an attorney.
2. Common conduct categories that may lead to a gray letter from the ODA.
 - a. Be fair, respectful, civil, and professional.
 - b. Be prepared and communicate.
 - c. Use your trust account properly.
3. Rules implicated in common conduct categories.
 - a. Know the rules, rule updated in January 2021, and where to find an electronic copy of the rules.
 - b. How the ODA can help you fulfill your professional obligations.

How to Avoid Receiving a Gray Letter: The top ten tips to keep your spotless record spotless.

10. Know the rules.

Re-familiarize yourself with the Kansas Rules of Professional Conduct.

When you receive the Ethics Refresher by email, read it, form your answer, and then scroll down to see if you answered it correctly – AND – read the full explanation of the answer. We have issued more than 160 Ethics Refreshers over the past seven years. They are a great way to remain familiar with the Kansas Rules of Professional Conduct.

Prosecutors: You need to take particular note of KRPC 3.8. Many of the provisions of KRPC 3.8 are generally covered for all attorneys in other rules. But, because of the power a prosecutor possesses, there is a special rule to emphasize and apply these various rules to prosecutors. Under KRPC 3.8, you must:

- refrain from prosecuting a charge that is not supported by probable cause (also a potential violation of KRPC 3.1);
- make reasonable efforts to assure that the defendant has an opportunity to get counsel (also a potential violation of KRPC 8.4(d));
- not seek to obtain from an unrepresented accused a waiver of important rights – and you must not use others to do the same (also potential violations of KRPC 8.4(a), KRPC 8.4(d), and maybe even KRPC 4.3);
- make TIMELY disclosure of all exculpatory evidence and evidence that mitigates sentencing (also potential violations of KRPC 3.2, KRPC 3.4, and KRPC 8.4(d));
- not subpoena an attorney to testify about a client unless certain conditions have been met (also a potential violation of KRPC 3.7); and
- refrain from making extrajudicial comments that heighten the public condemnation of the defendant – and – take steps to prevent others from making extrajudicial comments (also a potential violations of KRPC 3.6, KRPC 5.3, and KRPC 8.4(d)).

It is our position that an open file policy is the best practice for county and district attorney's offices. By allowing the defense attorney to review all evidence in your position, you help to ensure that justice is properly administered.

Finally, we would suggest that prosecutors educate the law enforcement leaders that they work with regarding KRPC 3.6 and KRPC 3.8 and that the prosecutors document the information provided to the law enforcement officers and agencies. By ensuring that the law enforcement officers have a thorough understanding of those two rules, in the unfortunate event that a law enforcement officer makes an extrajudicial comment regarding a criminal case, the prosecutor can establish that the prosecutor took appropriate steps to attempt to prevent that occurrence, under KRPC 3.8(f).

9. Be fair, respectful, civil, and professional.

Do not contact or communicate with a represented party. Having contact with a represented party interferes with the party's relationship with their lawyer. Respect that. KRPC 4.2.

In the heat of the battle, do not lose your cool and mistreat others. This, of course, applies to both in the courtroom and outside the courtroom. KRPC 8.4(g).

KRPC 4.4(a) prohibits lawyers from using means that have no substantial purpose other than to embarrass, delay, or burden a third person. It also prohibits lawyers from using methods of obtaining evidence that violate the legal rights of others.

KRPC 4.4(a) extends beyond the courtroom as well. An attorney must be mindful of how they treat their clients, witnesses, opposing counsel, and judges in written and oral communications.

Timely provide discovery so that the other side has sufficient time to become familiar with the discovery – without the need for a continuance.

If you get fired, you must still be fair.

- You must protect your client's confidences. KRPC 1.6.
- You must take steps to protect their interests. KRPC 1.16.
- In addition, even after you are fired, you still owe your client the duty of loyalty when it comes to conflicts of interest. KRPC 1.9.

Prosecutors: Dumping discovery on the eve of trial, without a reasonable explanation, would appear to be designed to burden and delay in violation of KRPC 4.4(a) and would potentially be a violation of KRPC 3.8(d) as well.

An excellent discussion of civility and limitations of zealous advocacy, see Joseph P. Mastrosimone's article, *Mind Your Manners*, J. Kan. B. Ass'n, October 2014.

On September 28, 2012, the Kansas Supreme Court formally recognized the Pillars of Professionalism that were developed by the Kansas Bar Association's Commission on Professionalism in the Bar. The pillars are recognized as aspirational goals each member of the bar should strive to maintain.

8. Charge reasonable fees.

The reasonableness of a fee turns on the facts involved in the representation. KRPC 1.5. Some of the questions an attorney should ask in calculating an attorney fee include:

- How much time will it take?
- How complex is the case?
- Will accepting this representation preclude the attorney's ability to take on other cases?
- What do other attorneys charge for the same type of work in the same location?
- What is the experience level, the reputation, and the ability of the lawyer performing the service?

While one factor is not necessarily weighted more than the others, the customary fee charged by others in the same geographic and practice areas, would be the easiest factor to prove. So, ask around and see if your fees are similar to other fees charged for doing the same work in the same location.

If you have a new client, you must communicate the basis or rate of the fee to the client, preferably in writing. KRPC 1.5(b). The best practice is to enter into a written fee agreement or send an engagement letter each time new representation is accepted.

A written fee agreement or engagement letter presents you with an excellent opportunity to spell out your file retention policy so later there is no dispute about how long the client expects you to retain their file.

Also, regarding fees, attorneys are required to return unearned fees – failing to return an unearned fee would be per se unreasonable.

Are flat fees unreasonable? No, flat fees are not per se unreasonable. However, absent a fee agreement, a flat fee is not earned until the representation is complete. So, if you want to be able to access portions of the flat fee during the representation, you must enter into a written fee agreement that spells out how and when the fees are earned.

Is a true retainer unreasonable? No, true retainers are not per se unreasonable. It is important to understand what is a true retainer. To understand what a true retainer is let's first talk about what a true retainer is not.

- It is not an advanced fee. An advanced fee is a fee that is paid in advance of the representation and is to be earned by billing against the fee by the hour. Many people call advanced fees retainers. And, while an advanced fee is a fee to retain the attorney, it is not a true retainer.
- A true retainer is also not a flat fee. A flat fee is a set fee charged for certain representation. For example, an attorney may charge \$2,500 to represent a client charged with a DUI in Municipal Court, through trial.

These days, a true retainer is rare. It is a fee paid just to be available. For example, a smaller city might pay a private attorney a true retainer to be available as the city attorney when the city has the need. If the attorney was called upon to represent the city, the attorney would prioritize the city's work and charge the city additional fees for the representation.

The true retainer is all but dead in modern practice. When it was more common, it was typically an annual payment that a client would make to an attorney to prioritize their work, should the need arise.

Except for the rare and unusual exception of true retainers, nonrefundable fees are prohibited in Kansas.

7. Communicate effectively.

All attorneys must properly communicate with their clients.

Communication allows clients to make informed decisions about the representation. So, communication is not JUST returning phone calls.

It is responding to requests for information and providing the necessary information for the client to understand the status of the representation.

Prosecutors: While you do not have clients in the traditional sense, to effectively do your job you must properly communicate with opposing parties and witnesses.

A prosecutor must comply with statutory requirements for communications, i.e. regarding plea offers, etc.

What would be a violation of KRPC 1.4 (communication) to an attorney in private practice, could be seen as a potential KRPC 8.4(d) (professional misconduct) violation by a prosecutor – if the lack of communication rises to the level of interfering with the administration of justice.

6. Meet deadlines.

Of course, an attorney should meet all court-ordered deadlines and comply with all court orders. KRPC 3.4(c). In addition, an attorney should meet all self-imposed deadlines that others are relying on and should keep the promises made to opposing counsel.

Attorney must diligently represent their clients. KRPC 1.3.

For the proper administration of justice, we need to work to move cases through the court systems without unreasonable delay. KRPC 3.2.

Prosecutors: Just like in the KRPC 1.4 (communication) analysis above, you do not have a traditional client. However, your obligation to effectively perform your job duties requires that you engage in the diligent practice of law. A potential violation in this setting for a prosecutor would be if a prosecutor failed to diligently prosecute a case to such a degree as to interfere with the administration of justice. KRPC 8.4(d).

5. Properly prepare your cases.

Competent representation requires exercising the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. KRPC 1.1.

What is necessary will vary from case to case. DISCUSSION QUESTION:
Does competent representation require that you review EVERY PAGE of discovery? What if the discovery includes 5 million pages of documents?

Likewise, does competent representation require that you review EVERY MINUTE of video recordings? What if there are 400 hours of bodycam and dashcam video?

You must exercise reasonable thoroughness to satisfy KRPC 1.1.

It is important to note that KRPC 1.1 also requires attorneys to stay current with technology. See Comment 8 to KRPC 1.1 (To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.”)

This requirement became very obvious during the pandemic with the use of video hearings.

4. Use your trust account properly.

Unearned fees must be deposited into your attorney trust account. You may not transfer fees into your operating account until the fees are earned.

You may not commingle your funds with unearned attorney fees.

Thus, if you have a credit card payment system set up, the attorney fees paid by clients must be deposited directly into an attorney's trust account. If the credit card payment system deposits fees into the attorney's operating account, the attorney is necessarily commingling their funds with unearned attorney fees in violation of KRPC 1.15(a).

The banks that are approved to hold attorney trust accounts are listed on our webpage:

<https://www.kscourts.org/Attorneys/Office-of-Disciplinary-Administration/Banks-Approved-for-Lawyer-s-Trusts>

Unearned fees must be refunded. KRPC 1.15(b) provides that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property."

Also, you are required to keep complete attorney trust account records for five years. KRPC 1.15(a). Complete trust account records would include bank statements and individual client ledgers establishing when attorney fees were earned and when fees were transferred to your operating account.

For more information on this topic, read Money of Others published by the Kansas Bar Foundation, revised in 2017, and is available at:

https://cdn.ymaws.com/www.ksbar.org/resource/resmgr/site/kbf/grants/iolta/moneyofothers_10062020.pdf

3. Cooperate.

If you get a gray letter:

- Open it.
- Read the entire letter.

- Read it again.
- Hire an attorney OR consult with an attorney in preparing your response to the complaint.
- Timely, honestly, and completely respond to each allegation in the complaint.
- If an investigator is appointed and wants to meet with you, schedule a time to meet, keep the appointment, and fully cooperate with the investigator.
- If the investigator wants a copy of your client file or any other document, provide a copy of your client file or other document.

Even if a complaint lacks merit, you are still required to cooperate in the investigation. KRPC 8.1 and Rule 210.

Failing to cooperate in an investigation led to an indefinite suspension – even when the underlying complaint lacked merit. See *In re Cole*, 268 Kan. 828 (2000) (The Supreme Court indefinitely suspended Mr. Cole’s license, even though the underlying complaint lacked merit because the respondent failed to cooperate throughout the investigation, did not appear at the disciplinary hearing, and did not appear before the Supreme Court for oral argument in the disciplinary case.)

2. Verify your facts.

Be sure to do your due diligence before making an allegation. Look for evidence to support your position before filing documents in Court. If you file a document that contains inaccurate information and if you would have discovered that information had you exercised reasonable diligence, you may find yourself charged with a disciplinary complaint alleging dishonesty.

KRPC 3.1 prohibits attorneys from filing frivolous claims – “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”

It is a violation of KRPC 3.3(a)(1) for an attorney to “make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”

It is also a violation of KRPC 3.3 for a lawyer to fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel or offer evidence that the lawyer knows to be false.

KRPC 4.1 prohibits an attorney from knowingly making a false statement of material fact or law to a third person or failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by or made discretionary under KRPC 1.6.

KRPC 8.4(c) prohibits an attorney from engaging “in conduct involving dishonesty, fraud, deceit or misrepresentation.”

It is important to note that the Supreme Court has held that the Kansas Rules of Professional Conduct apply to an attorney’s conduct both while practicing law as well as conduct occurring outside the practice of law. See *In re Busch*, 287 Kan. 80, 194 P.3d 12 (2008) (failing to file income taxes for eight years found to be a violation of KRPC 8.4(d)); *In re Depew*, 290 Kan. 1057, 237 P.3d 24 (2010) (subjecting administrative assistants to sexual harassment, even though criminal charges were not filed, was found to be a violation of KRPC 8.4(d) and (g)); *In re Johnson*, 240 Kan. 334, 337, 729 P.2d 1175 (1986) (an attorney is bound by KRPC, whether or not the attorney is acting as an attorney, even when involved in nonlegal matters including campaigns for nonjudicial public office); *In re Mintz*, 298 Kan. 897, 905, 317 P.3d 756 (2014) (attorney’s dishonesty during a law enforcement interview regarding his girlfriend’s death violated KRPC 8.4(d)); *In re Pyle*, 283 Kan. 897, 156 P.3d 1231 (2007) (attorney’s letter to more than 280 family and friends explaining, minimizing, and calling into question the integrity of the disciplinary process regarding the attorney’s previous disciplinary proceeding and sanction was found to violate of KRPC 8.4(d)).

1. Call our office before you take action.

If you have a question that implicates the rules, call our office at 785-435-8200 or email us at attydisc@kscourts.org with your question.

While we cannot give you legal advice, we can walk you through the applicable rules so you can make an informed decision.

We receive calls and email messages every day from attorneys seeking guidance on how to interpret the rules. If your question is fact intense, we may request that you send us an email message so we have time to review the information and confer about the inquiry before we respond to your request for assistance.

What if you get a gray letter? Tips:

Rule 208

INITIAL COMPLAINT OR REPORT OF MISCONDUCT

(a) **Submission to Disciplinary Administrator.** An initial complaint or a report of attorney misconduct must be submitted to the disciplinary administrator. An initial complaint or a report submitted to the Board, a board member, the clerk of the appellate courts, the Office of Judicial Administration, or a state or local bar association must be delivered immediately to the disciplinary administrator.

(b) **Dismissal.** The disciplinary administrator may decline to investigate and may dismiss an initial complaint or a report received under sub-section (a) under the following circumstances:

- (1) if the allegations in the initial complaint or report do not constitute misconduct;
- (2) if the initial complaint or report is facially frivolous, lacks adequate factual detail, or is duplicative; or
- (3) if the matter is outside the Board's jurisdiction.

(c) **Investigation.** Unless the disciplinary administrator dismisses an initial complaint or a report under subsection (b), the disciplinary administrator must proceed as follows:

- (1) conduct an informal inquiry to determine whether to dismiss the initial complaint or report if it appears to be frivolous or without merit or to docket the initial complaint or report for investigation under Rule 209; or
- (2) promptly docket the initial complaint or report for investigation under Rule 209.

[**History:** New rule adopted effective January 1, 2021; Am. (b) effective November 29, 2021.]

Rule 209

INVESTIGATION OF DOCKETED COMPLAINT

(a) **Assignment.** The disciplinary administrator may assign the investigation of a docketed complaint to the following:

- (1) the disciplinary administrator's office;
- (2) a state or local bar association's ethics and grievance committee; or
- (3) an attorney.

(b) **Investigation.** The investigator assigned to investigate a docketed complaint may proceed as follows:

- (1) interview the complainant, the respondent, and other witnesses;
- (2) gather pertinent documents, including copies of the respondent's file, the respondent's billing records, the respondent's trust account records, court records, and other relevant records;
- (3) seek a subpoena under Rule 217(a); and
- (4) take a sworn statement.

(c) **Investigative Report.** Following the completion of an investigation of a docketed complaint, the investigator must prepare an investigative report that includes factual findings and conclusions regarding the alleged misconduct. The investigator must forward the investigative report to the disciplinary administrator. On request, the disciplinary administrator must provide a copy of the investigative report to the respondent.

(d) **Disciplinary Administrator's Summary and Recommendation.** After receiving a report under subsection (c), the disciplinary administrator must prepare a summary of the

investigation and recommend to the review committee an appropriate disposition under Rule 211(a).

(e) **Dismissal with Permission.** For good cause, the disciplinary administrator may seek permission from the Board chair or the Supreme Court liaison justice to dismiss a docketed complaint any time before docketing a case in the Supreme Court under Rule 228.

[**History:** New rule adopted effective January 1, 2021.]

Rule 210

DUTY TO ASSIST; DUTY TO RESPOND; DUTY TO REPORT

(a) **Duty to Assist.** An attorney must assist the Supreme Court, the Board, and the disciplinary administrator in the investigation and prosecution of an initial complaint or a report, a docketed complaint, and a formal complaint and in other matters relating to the discipline of attorneys.

(b) **Duty to Respond.** An attorney must timely respond to a request from the disciplinary administrator for information during an investigation and prosecution of an initial complaint or a report, a docketed complaint, and a formal complaint.

(c) **Duty to Report.** An attorney who has knowledge of any action or omission that in the attorney's opinion constitutes misconduct must report the action or omission to the disciplinary administrator.

[**History:** New rule adopted effective January 1, 2021.]

Rule 219

CRIMINAL CHARGE; CONVICTION

(a) **Definitions.**

(1) "Conviction" means the following:

(A) a finding based on a plea or trial that a person is guilty of a felony or misdemeanor; or

(B) entry by a person into a diversion agreement or other comparable disposition for a felony or misdemeanor charge.

(2) "Felony crime or a crime mandating registration as an offender" means the following:

(A) a crime classified as a felony;

(B) a crime mandating registration by the defendant as an offender under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq.; or

(C) a comparable offense in any jurisdiction that if committed in Kansas would constitute a felony or mandate registration under KORA.

(3) "Reportable crime" means the following:

(A) a felony crime or a crime mandating registration as an offender; or

(B) a class A or B misdemeanor or an offense of comparable classification.

(b) **Deferral.** If a criminal action is pending based on substantially similar allegations as a disciplinary matter, the following provisions will apply.

(1) The investigation of an initial complaint or a report will not be deferred unless the disciplinary administrator authorizes deferral.

(2) The investigation of a docketed complaint and prosecution of a formal complaint will not be deferred unless the review committee, hearing panel, or Supreme Court authorizes deferral.

(c) **Attorney's Duty When Charged with Reportable Crime.** An attorney who has been charged with a reportable crime must notify the disciplinary administrator in writing of the charge and court of jurisdiction no later than 14 days after the charge is filed.

(d) **Attorney's Duty Upon Conviction.** An attorney who has been convicted of a reportable crime must notify the disciplinary administrator in writing of the conviction and court of jurisdiction no later than 14 days after the conviction. The pendency of sentencing or the filing of a notice of appeal, a motion for new trial, or a motion for other relief does not stay the reporting requirement.

(e) **Duty of Clerk of Court.** The clerk of any Kansas court in which an attorney is convicted of a reportable crime must notify the disciplinary administrator in writing of the conviction no later than 14 days after the conviction.

(f) **Conviction is Conclusive Evidence.** A certified copy of a judgment of conviction of a respondent for a reportable crime is conclusive evidence of the commission of that crime. The respondent may not present evidence that the respondent is not guilty of the crime.

(g) **Automatic Temporary Suspension.**

(1) **Disciplinary Administrator's Duties.** When the disciplinary administrator receives notice that an attorney has been convicted of a felony crime or a crime mandating registration as an offender, the disciplinary administrator must commence a disciplinary board proceeding and file with the Supreme Court an ex parte motion for temporary suspension of the attorney's license to practice law. The disciplinary administrator must attach evidence of the conviction to the motion.

(2) **Supreme Court Order.** After the filing of a motion under sub-section (g)(1), the Supreme Court will issue an order temporarily suspending the respondent from the practice of law until final disposition of the disciplinary board proceeding. The filing of a notice of appeal, a motion for new trial, or a motion for other relief does not stay a temporary order of suspension.

(3) **Notice to Respondent.** The clerk of the appellate courts will provide the respondent with a copy of the Supreme Court's order.

(4) **Respondent's Duties.** After receipt of the order, the respondent must comply with Rule 231.

(h) **Temporary Suspension Following Conviction of Other Crime.** This rule does not preclude the disciplinary administrator from seeking the temporary suspension under Rule 213 of a respondent for the conviction of a reportable crime.

(i) **Motion to Vacate Order of Temporary Suspension.**

(1) A respondent may file with the Supreme Court a motion to vacate an order of temporary suspension for good cause or because a court reversed the conviction that was the basis of the temporary suspension. The respondent must attach a certified copy of the judgment reversing the conviction.

(2) The respondent must serve the disciplinary administrator with a copy of the motion.

(3) A Supreme Court order vacating a temporary order of suspension does not terminate the disciplinary board proceedings.

(j) **Disciplinary Board Proceeding.** A disciplinary board proceeding arising out of a conviction for a crime will proceed the same as any other matter under these rules.

[History: New rule adopted effective January 1, 2021.]

RULE 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6. In addition, a lawyer is not required to disclose information concerning any such violation which is discovered through participation in a Substance Abuse Committee, Service to the Bar Committee or similar committee sponsored by a state or local bar association, or by participation in a self-help organization such as Alcoholics Anonymous, through which aid is rendered to another lawyer who may be impaired in the practice of law.

[**History:** Am. (a) effective March 11, 1999; Am. (b) effective July 1, 2007.]

The Highest Adventure: Being a Kansas Attorney with a Rural Practice

1) Challenges facing rural practitioners in Kansas today

a. Kansas Rural Justice Initiative Committee

- i. Formed by Kansas Supreme Court Administrative Order (issued Dec. 1, 2022), which found:

“[There are] only 1,578 active attorneys to serve 1.255 million Kansans living in the state's other 99 counties. If unaddressed, this issue is likely to worsen as younger attorneys move into Kansas' urban counties and the attorney population in rural Kansas continues to grow older. The Supreme Court recognizes the need to address the unmet legal needs of rural Kansans and seeks to bring together individuals with diverse interests to consider ways to address this need. “

KAN. ADMIN. ORDER, 2022-CM-081 (Dec. 1, 2022)

- ii. The Committee's "charge is to study general population trends, as well as trends related to attorneys and other legal professionals who support court and court-adjacent programs. It will also look for differences in unmet legal needs related to population density."
- iii. There are also supportive initiatives involving Kansas Universities and Organizations. For example, The Rural Legal Practice Initiative:

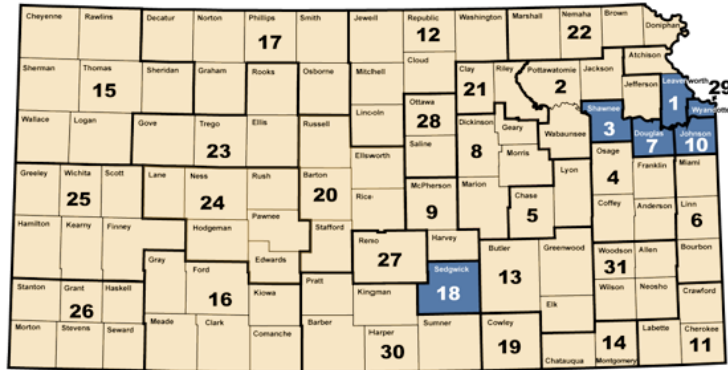
"Nearly one-third of Kansas' 3 million citizens live in rural communities, communities which are too often under-served by legal practices. The Rural Legal Practice Initiative: A Collaboration Between Washburn University School of Law and Kansas State University is for select Kansas State declared pre-law students who are interested in addressing the need for quality legal services in the state's rural communities and in the practice of law. The Kansas Farm Bureau is also collaborator in this initiative to help it reach across Kansas."

<https://www.k-state.edu/academic-success-student-affairs/advising/pre-professional-advising-center/pre-law/initiatives/rural-legal-practice-initiative/>

iv. Initial Data



11-30-22



Darkened counties show where 80% of Kansas attorneys live. The same counties are home to 50% of Kansans. Counties are grouped by judicial district.

7980
active
practicing
attorneys

80%
attorneys
living in
6 counties

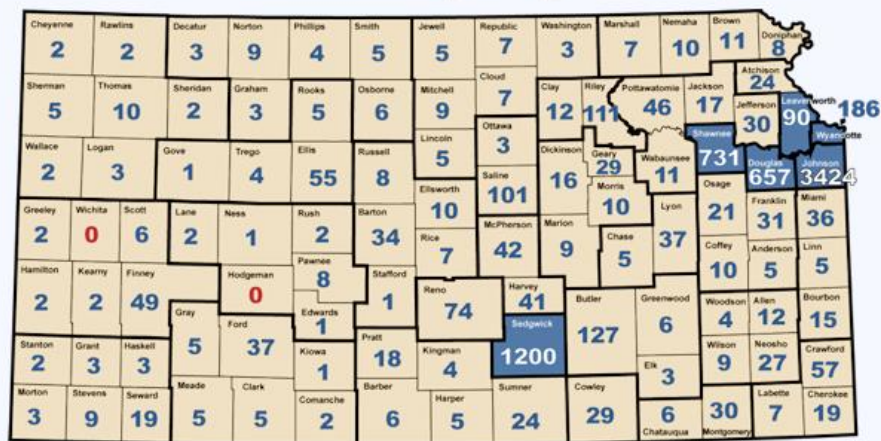
1578
attorneys in
99 counties

2.9
million
Kansans

50%
Kansans
living in
6 counties

1.25
million
Kansans in
99 counties

Active attorneys by county



Counties grouped
by judicial district

Rural counties

Urban counties

October 27, 2022

v. What are other challenges facing Rural Attorneys in Kansas?

1. Technology (Zoom hearings that allow urban lawyers to practice locally)
2. Recruiting new lawyers?
3. Retirement?

2) Community—The Unique and Hidden Strength of Rural Practice

- a. Country Lawyers understand the meaning of “community.” From family to local organizations to longstanding relationships with city and district courts, Rural practice offers human connections that are usually impossible in an urban setting
- b. Let’s talk about community and the special, perhaps sacred, role that it serves.

“Relationships between people within a community are personal. It means they have a moral connotation and that those relationships will profoundly influence, where they do not determine, the moral quality of community life.

...community is by far the oldest political form on record; it is not simply the oldest, it represents a grouping which is a reflection of one of the deepest instinctive forces in the human psyche and is one which has its counterpart in almost every other form of sentient life.

... the community, the natural and organic entity, in the sense that each is a cell in the larger unit, a cell within which each person has a place and a significance, as well as endless possibilities of human fulfilment, a cell where every degree of creativity is possible, which is governed primarily by the moral consensus of its members and where human relationships are the dominant factor determining its general pattern of life[.]”

John Papworth, *SMALL IS POWERFUL: THE FUTURE AS IF PEOPLE REALLY MATTERED*, pp. 56, 65 (1995)

- c. The opposite of effective community strength is the modern trend of impersonal connection.

“...relationships today are for the most part impersonal. A citizen, in dealing with the forces ordaining the main concerns of his life in society today does not, except by a statistical lottery, deal with his neighbours, ...people that is, who have a local reputation to safeguard or local interests to protect. He deals rather with officials who are answerable to him only in some problematically remote electoral proceeding; they, in turn, are generally answerable to some higher form of authority, often beyond the citizen ken and generally not even accessible to him. Instead of direct, face-to-face contact the citizen, all too often, is apt to find the source of his problems ensconced in a remote office safeguarded by lesser luminaries ... people with whom he usually has no other form of relationship beyond this restricted sphere.”

John Papworth, *SMALL IS POWERFUL: THE FUTURE AS IF PEOPLE REALLY MATTERED*, pp. 54-55 (1995)

d. Historical Roots of a Country Lawyer

MY REMEMBRANCE of my father as a country lawyer dates from the time when I first saw him standing in the light of the evening lamp removing the tape by which the pages of a legal paper were bound together. Having removed the tape, he shuffled the pages and went around the dining-room table, distributing them among the members of the family, who sat with pens in their hands and inkwells before them, ready for an evening of copying.

This was back in the eighties before the typewriter had come into general use. It had been patented in the sixties, but the inventors were still busy trying to make it work, and all legal papers had to be written out by hand.

This particular occasion must have been the first evening that I had been allowed to help with the copying. I had been training for the event for some time; one had to be a fast and accurate penman. The thought of copying papers does not seem so attractive to me now, but then it was the most desirable thing in life, for it meant that I could sit up until ten o'clock, when the rest of the family went to bed. We were eight children—and a lawyer's children were expected to help with the copying of legal papers just as a farmer's children were expected to help to get in the crops.

Bellamy Partridge, COUNTRY LAWYER, p. 7 (1939)

e. Relationships and Justice have always been at the center of being a Country Lawyer

"IN COUNTRY practice the young lawyer is likely to take every case that comes along, for he feels that he needs the experience and the publicity, to say nothing of the money. The well-established lawyer, however, is bound by no such necessity and feels free to pick and choose. This he does according to his likes and dislikes, his ethics, his preferences, his abilities, and a dozen other controlling factors. Lawyers who have no taste for criminal practice will avoid all causes involving a crime. Others will eschew matrimonial cases, not because of any disapprobation of divorce but because of the ill repute with which shady divorce lawyers have branded the administration of the domestic relations law.

During his early practice my father took nearly every case that was offered, but as he became better established he began to refuse the types of work that he did not like to handle or the kind of client he did not care to represent. Occasionally a scheming lawyer, in the hope that he may be retained by the rich litigant, will refuse to take the case of his poorer opponent. My father was never thrifty enough for anything of that kind. I do not believe that he was ever swayed by so practical a motive. If he disliked a man or distrusted him, he would not take his business on any terms; and on the other hand, if a litigant happened to be his friend or had ever done him a favor, my father would handle his case for him even if he knew that he would never receive a penny for the most arduous services.

Nothing so enraged my father as seeing the law used as an instrument of injustice, and he would accept the case of the veriest old vagabond against the mightiest if he thought there was any chance to uncover what he called "facial piety" on the part of the higher ups. He took particular delight in unmasking anything that had even a faint aroma of persecution, an attitude which first and last must have cost him no small amount of business."

Bellamy Partridge, COUNTRY LAWYER, pp. 226-27 (1939)

- e. Community strength is the answer to the current situation facing rural lawyers in Kansas

We are looking at a sick society playing its full part in producing a sick citizenry. What is really lacking is the structure and the ethos of vibrant community life in which local people are the masters of their own affairs. Where there are established institutions, traditions and usages which evolve at a pace consistent with human comprehension and adaptability, where community elders – fully empowered in community affairs – provide the necessary role models for youthful aspiration, where there are pulsating and living links with history and with the natural world, where the relationship between the needs of living and the means to meet them are understood and where those means are venerated by common consent rather than degraded by minority greed, and not least where young people have their own ceremonial rites of passage with dignified rituals signifying the importance the community attaches to their emergence onto the adult stage.

This surely is what is lacking in young people's lives today, a sense that they are wanted, are valued and respected; and such qualities can only become manifest in the kind of community relationships which our mass forms of living blindly strangle at birth; the relationships of families, of extended families and the wider small community in which members are identified by the kind of service they give it, so that it is the village doctor, postman, teacher, publican, gardener, weaver and so on who are the established figures in the pattern of local life rather than anonymous functionaries, perhaps of some government department or multinational corporation, ordaining matters a day's journey away in a distant city.

We have to see this and more as the real answer to so many social problems that now beset us, whether delinquency, drugs, marital breakdown the general drift of social moronism which holds us all in thrall. For so often as we hear wails about these matters and recognise that the compound of television, tabloids, advertising, high-level cheating and criminality, coupled with a church abnegation of its role, creates its own seedbed for the callous street culture of the young against which parents, teachers, social workers, police, magistrates and prison governors are helpless to prevail.

John Papworth, SMALL IS POWERFUL: THE FUTURE AS IF PEOPLE REALLY MATTERED, p. 165 (1995)

- f. Many Country Lawyers today have already found success recruiting new lawyers by focusing on the role of community in life and practice

When we do hire attorneys, they are encouraged to live here in the rural communities and become members of the bigger community by joining local service organizations, churches, or sports leagues. Rural clients want to know you are shopping local and living local. It can be a shock for young attorneys to run into their clients in a grocery store or while playing basketball, but it creates a connection deeper than a one-off meeting.

L.R. “Rusty” McGuire, *Why Young Attorneys Fear Working in Rural Areas and Why They Shouldn’t*, NWSidebar (2022), available at <https://nwsidebar.wsba.org/2022/03/22/why-young-attorneys-fear-working-in-rural-areas-and-why-they-shouldnt/amp/>

- g. Community focus provides visible rewards only available to Country Lawyers—whether in Wisconsin or Kansas!

“The collegiality amongst the local bar also makes the local practice enjoyable. We play in a small sandbox when the Ashland-Bayfield County Bar Association is smaller than many Milwaukee and Madison law firms. As we all play in that sand box, we find ways to get along without sacrificing our ethical responsibilities to our clients. One of the attorneys I litigate the most against is on the same trap team with me.

As a small town lawyer, local leaders will look to you for civic engagement and service. You will be asked to serve on boards for various entities. It is rewarding work that often allows you to see immediate impact in the community you leave.”

Tyler Wickman, *The Rewards of Being a Small Town Lawyer*, Marquette University Law School Faculty Blog (May 15, 2019), available at <https://law.marquette.edu/facultyblog/2019/05/the-rewards-of-being-a-small-town-lawyer/comment-page-1/>

3) **THE SOLUTION: Uniting Rural Lawyers in Kansas**

- a. Our strength and survival depend on each other. And coming together returns the power to our Rural practices, communities, and the best adventure for a lawyer in Kansas!
- b. Rural lawyers—both judges and practicing attorneys—have the combined force of being the largest law firm in Kansas
- c. Community offers endless strength, which rural lawyers in Kansas can join together to return the practice of law to what we have always wanted it to be.

Swear never to rest until our local neighbourhood is again empowered to determine its own concerns even as we may recognise the need to co-operate with other neighbourhoods in particular functional matters as common sense may indicate, but recognising that the moment we cease to trust people to be able to run their own local lives we become one of them rather than one of us.

Realise that the future belongs not to the mass and the giant but to the small and the local, if only because no body can be healthier than the cells of which it is comprised and that if those cells lack vitality, lack the power to determine, to refine where necessary

and to create, or if those cells are simply non-existent then what confronts us is terminal forms of leukaemia and the bleak prospects of destruction, disintegration and death.

But of course this need not be. The fundamental thrust of life is towards affirmation, not acquiescence, towards renewal rather than resignation and to strive ever towards new and better forms. Today we have centuries of experience to teach us how localised forms of **community life can provide the basis for adventures of the human spirit** in every sphere its affirmative realm might reach. It will do so again. The nightmare of twentieth century mass living will give way, if we so will it, to those new forms, however much based on ancient insights and wisdom, which can enable humankind to rekindle the blazing fires of its own creativity so that this planet becomes again a playground for its revels and an altar for its aspirations.

John Papworth, SMALL IS POWERFUL: THE FUTURE AS IF PEOPLE REALLY MATTERED, pp. 214-15 (1995) (emphasis added)

d. A unified organisation allows us to address unique ethical issues that only face attorneys and judges in rural areas

i. Nebraska leads the way in dealing with a common concern over conflicts of interest that could arise for rural lawyers who serve as a county attorney and also represent clients charged in criminal matters

ii. Consider the following Advisory Ethics Opinion in Nebraska:

“May a part-time deputy county attorney represent clients in family law cases involving the support of a child?

... Rule 1.7(c) is designed to address the problem faced by county attorneys and lawyers who associate in private practice with county attorneys in rural Nebraska counties. The State has a strong interest in ensuring that attorneys remain willing to serve in the role of county attorney, and Rule 1.7(c) seeks to avoid situations where attorneys avoid serving in such role due to conflicts of interest that would otherwise be imputed to attorneys associated in private practice with the county attorney. This rule provides factors that must be taken into consideration by the attorney associated with the county attorney before undertaking representation of a client with interests adverse to the State, and the Rule provides for safeguards in such situations, including informed consent, screening, and notification to the tribunal. This rule is intended to promote the long-term viability of the practice of law in rural areas of the State, without eviscerating traditional conflict of interest principles expressed elsewhere throughout these Rules.

... In Formal Opinion 08-01, the Committee concluded that a parttime county attorney could not represent clients in family cases that involve the support of a child. The rationale set forth was that a parttime county attorney has access to the CHARTS system, which is a state-run database containing information to assist in nonsupport prosecutions, including (potentially) an individual's current financial information, location, prior employment and past earnings. This information is considered confidential (see 466 NAC 12.002), thus creating a situation where a part-time county attorney, through their public office, has access to confidential

government information that could be used against an adverse client as it pertains to child support. This creates a conflict under Rule 1.11(c)...

Therefore, the conclusion arrived at in Formal Opinion 08-01 remains unchanged by the amendment to Rule 1.7. A part-time county attorney may not represent clients in family law matters that involve support of a minor because, through their public office, they have ready access to the CHARTS system and a wealth of confidential government information that could be used against an adverse party, in violation of Rule 1.11."

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS, NO. 22-01

- iii. Concerns can also arise over probate matters and defending clients accused of violating Kansas law while also serving as a County attorney in Kansas. We can unify and find answers together
- e. What is clear is that a unified organization is essential to protect our way of life and sustain rural practice as the premium choice for lawyers who want a fulfilling life and career

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

NO. 22-01

A DEPUTY COUNTY ATTORNEY OR PART-TIME COUNTY ATTORNEY MAY NOT REPRESENT A DEFENDANT IN A CRIMINAL CASE INVOLVING A VIOLATION OF THE CRIMINAL STATUTES OF THE STATE OF NEBRASKA, HOWEVER, ATTORNEYS WHO ARE ASSOCIATED IN A FIRM WITH A PART-TIME COUNTY ATTORNEY MAY ETHICALLY DO SO IF OTHER CONDITIONS ARE MET

A PART-TIME COUNTY ATTORNEY MAY NOT REPRESENT CLIENTS IN FAMILY LAW MATTERS INVOLVING THE SUPPORT OF A MINOR CHILD

A PART-TIME COUNTY ATTORNEY MAY NOT HANDLE A PRIVATE PROBATE MATTER IN THE COUNTY IN WHICH THE COUNTY ATTORNEY SERVES UNLESS THE COUNTY HAS MADE ARRANGEMENTS FOR ALTERNATE LEGAL REPRESENTATION FOR PURPOSES OF INHERITANCE TAX DETERMINATIONS

QUESTIONS PRESENTED

1. May a deputy county attorney or a part-time county attorney represent a defendant in a criminal case alleging a violation of Nebraska law, in matters pending in other counties?
2. May a part-time deputy county attorney represent clients in family law cases involving the support of a child?

3. May a part-time deputy county attorney represent private clients in probate matters involving inheritance tax determinations within the county they serve?

FACTS

A series of questions have been posed to the Committee, whether the amendments to Nebraska Rules of Professional Conduct (particularly the addition of [§3-501.7\(c\)](#), and corresponding Comment 36, both adopted on January 16th, 2019) should cause the prior Ethics Advisory Opinions [75-8](#) and [08-01](#) to be modified or rescinded as it pertains to the questions presented.

APPLICIBLE RULES OF PROFESSIONAL CONDUCT

[RULE 1.7](#) CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraphs (b) and (c), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(c) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer associated in a firm with another lawyer who is serving as a county attorney in a county where the county attorney is not required to devote his or her full time to the legal work of the county may represent a client with adverse interests to the State of Nebraska in a matter or other proceeding before a tribunal in a separate county if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same matter or other proceeding before a tribunal;

(4) the affected client, or if the affected client is a minor, his or her parent or guardian, gives informed consent, confirmed in writing, subject to the following restrictions:

(i) for appointment of a guardian ad litem pursuant to [Neb. Rev. Stat. § 43-272\(2\)](#), the juvenile court, on behalf of the juvenile, shall provide provisional informed consent upon the guardian ad litem's appointment, and, at the time of the first appearance, the juvenile court shall determine whether the provisional informed consent is appropriate, upon consultation with the parties. For appointment of counsel under [§ 43-272\(1\)\(a\)](#), the parent or guardian of the juvenile shall provide written informed consent; and

(ii) the State of Nebraska shall not be required to provide informed consent; and

(5) the member of the lawyer's firm who serves as county attorney:

(i) is timely screened from any participation in the matter;

(ii) is apportioned no part of the fee therefrom; and

(6) the lawyer representing the affected client provides prompt written notice to the tribunal before which the matter is pending.

Comment 36 to Rule 1.7 provides:

Special Considerations for County Attorneys in Small Counties

[36] [Rule 1.7\(c\)](#) is designed to address the problem faced by county attorneys and lawyers who associate in private practice with county attorneys in rural Nebraska counties. The State has a strong interest in ensuring that attorneys remain willing to serve in the role of county attorney, and Rule 1.7(c) seeks to avoid situations where attorneys avoid serving in such role due to conflicts of interest that would

otherwise be imputed to attorneys associated in private practice with the county attorney. This rule provides factors that must be taken into consideration by the attorney associated with the county attorney before undertaking representation of a client with interests adverse to the State, and the Rule provides for safeguards in such situations, including informed consent, screening, and notification to the tribunal. This rule is intended to promote the long-term viability of the practice of law in rural areas of the State, without eviscerating traditional conflict of interest principles expressed elsewhere throughout these Rules.

RULE 1.9(c) DUTIES TO FORMER CLIENTS

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

RULE 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to [Rule 1.9\(c\)](#); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which

that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules [1.7](#) and [1.9](#); and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by [Rule 1.12\(b\)](#) and subject to the conditions stated in [Rule 1.12\(b\)](#).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

RULE 1.0 TERMINOLOGY

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(k) "Screened" denotes the isolation of a lawyer or support person from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or support person is obligated to protect under these Rules or other law.

DISCUSSION

1. Deputy or Part-Time County Attorney Representing Clients Charged with a Violation of Nebraska Law

The first issue to be addressed is whether a deputy county attorney or part-time county attorney may represent a criminal defendant who is charged with a violation of Nebraska law in a different county, given the amendments to [Rule 1.7](#). (Note that instead of “part-time,” the language employed by Rule 1.7(c) is “[a] lawyer who is serving as a county attorney in a county where the county attorney is not required to devote his or her full time to the

legal work of the county.” “Part-time” will be used as a substitute in this discussion for brevity).

Formal Opinion [78-5](#) concluded that a county attorney or deputy county attorney could not ethically represent a criminal defendant in a case involving a violation of the criminal statutes of the State of Nebraska. The analysis begins with [Neb. Rev. Stat. § 23-1201](#), which sets forth the statutory duties of a county attorney “to prosecute or defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state in which the state or the county is a party or interested.” This led to the conclusion that, “A county attorney, therefore, has three clients; the county, the state, and the public. His [or her] first duty is to them and it takes precedence over all other commitments to which a county attorney may become engaged either at the time or subsequently thereto.”

Formal Opinion 78-5 also found that these same rules must apply to a deputy county attorney, who “having all of the power and authority of the county attorney as far as prosecutions are concerned, should also stand in the shoes of the county attorney where ethical considerations are involved.”

In short, because a county attorney (or deputy) has a statutory duty to act on behalf of the State in criminal or civil matters where the State is an interested party, representation of a criminal defendant charged with violation of Nebraska criminal statutes would constitute a concurrent conflict of interest, in violation of [Rule 1.7\(a\)](#) (the

representation of one client will be directly adverse to another client). Since the county attorney or deputy have a statutory duty to act on behalf of the State of Nebraska, not just the county where they serve, representation of a criminal defendant even outside of the county where the county attorney or deputy serves remains a concurrent conflict of interest and is disallowed.

The inquiries posed to the Advisory Committee have questioned whether the 2019 addition of subsection (c) to [Rule 1.7](#), and the corresponding comment 36, require a renewed analysis of this issue as it pertains to a part-time county attorney or a deputy county attorney. Rule 1.7(c) provides, in part:

“Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), **a lawyer associated in a firm with another lawyer who is serving as a county attorney** in a county where the county attorney is not required to devote his or her full time to the legal work of the county **may represent a client with adverse interests to the State of Nebraska in a matter or other proceeding before a tribunal in a separate county if...**”
(emphasis added)

A close reading of subsection (c) of Rule 1.7 indicates that, if a part-time county attorney is associated with a firm, then a *different* attorney in the firm (a non-county attorney) may represent a criminal defendant in a matter before a tribunal in a separate county, as long as several conditions are met.

Subsection (c), however, does not go as far as to allow a part-time county attorney to represent criminal defendants in other counties. This is evident when considering subsection (c)(5) of Rule 1.7 which requires that “the member of the lawyer’s firm who serves as county attorney: (i) is timely screened from any participation in the matter; [and] (ii) is apportioned no part of the fee therefrom.” By its own terms, the rule requires that the part-time county attorney completely distance themselves from a case where other attorneys in the firm are representing a client who has adverse interests to the State. Therefore, the rule amendment cannot be read to allow a part-time county attorney to represent such clients themselves.

Comment 36 to Rule 1.7 also supports this interpretation of subsection (c), stating, “This rule provides factors that must be taken into consideration **by the attorney associated with the county attorney** before undertaking representation of a client with interests adverse to the State.” (Emphasis added). The Comment explains that the rule amendment seeks to avoid situations where an attorney serving as a part-time county attorney automatically imputes a conflict “that would otherwise be imputed to attorneys associated in private practice with the county attorney” when representing clients with adverse interests to the State. However, the rule change cannot be read to waive or remove a part-time county attorney’s ethical conflict in these scenarios by allowing a part-time county attorney to be involved in the representation of a client charged with violating the laws of Nebraska pending in other counties. In actuality, if other attorneys in the firm were handling such a case, the rule requires the part-time county

attorney to be completely distanced from the matter by timely screening from participation and by receiving no fee therefrom.

That being said, the addition of subsection (c) to [Rule 1.7](#) clearly requires an amendment to prior Formal Opinions [75-8](#) and [08-01](#), insofar as those Opinions concluded it would be improper for an attorney associated in a firm with a part-time county attorney to represent a defendant in a criminal case involving the State of Nebraska. The 2019 amendment to [Rule 1.7](#) now allows for an attorney associated with a county attorney to represent clients with adverse interests to the State as long as a number of conditions are met. At the outset, the threshold conditions include: (a) the county attorney with whom the attorney is associated must not be required to devote his or her full time to the legal work of the county which they serve; (b) the matter must be before a tribunal in a separate county than where the part-time county attorney serves; and, (c) there must not be a concurrent conflict of interest set forth in Rule 1.7(a).

If those conditions are met, subsection (c) of Rule 1.7 sets forth several additional requirements to be considered by the attorney who is associated with a part-time county attorney: “(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same matter or other proceeding before a tribunal; (4) the affected client, or if the affected client is a minor, his or her parent or guardian, gives informed consent,

confirmed in writing [subject to additional restrictions in guardian ad litem and juvenile matters]: (5) the member of the lawyer's firm who serves as county attorney: (i) is timely screened from any participation in the matter; [and] (ii) is apportioned no part of the fee therefrom; and (6) the lawyer representing the affected client provides prompt written notice to the tribunal before which the matter is pending."

To the extent that Formal Opinions [78-5](#) and [08-01](#) pertain to attorneys representing clients with adverse interests to the State when the attorney is associated in a firm with a part-time county attorney, including criminal defendants, those opinions are amended accordingly to recognize the changes to [Rule 1.7](#).

2. Part-Time County Attorney Representing Clients in Family Law Matters involving Support of a Minor Child

The next question that has been posed to the Committee is whether a part-time county attorney can ethically represent clients in family law matters where child support is at issue, given the addition of subsection (c) to Rule 1.7.

In Formal Opinion [08-01](#), the Committee concluded that a part-time county attorney could not represent clients in family cases that involve the support of a child. The rationale set forth was that a part-time county attorney has access to the CHARTS system, which is a state-run database containing information to assist in nonsupport prosecutions, including (potentially) an individual's current financial information, location, prior employment and past earnings. This information is considered confidential (see 466 NAC 12.002), thus

creating a situation where a part-time county attorney, through their public office, has access to confidential government information that could be used against an adverse client as it pertains to child support. This creates a conflict under [Rule 1.11\(c\)](#) which sets forth that, “a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.”

As discussed previously, the addition of subsection (c) to [Rule 1.7](#) acts to permit attorneys who are in a firm with a part-time county attorney to represent clients with adverse interests to the State, given that a number of requirements are met. The rule does not operate to allow a part-time county attorney to also represent clients with adverse interests to the State, nor does it otherwise loosen the conflict-of-interest rules that apply to government employees found in [Rule 1.11](#).

Therefore, the conclusion arrived at in Formal Opinion [08-01](#) remains unchanged by the amendment to Rule 1.7. A part-time county attorney may not represent clients in family law matters that involve support of a minor because, through their public office, they have ready access to the CHARTS system and a wealth of confidential government information that could be used against an adverse party, in violation of Rule 1.11.

3. Part-Time County Attorney Representing Clients in Private Probate Matters

The final question before the Committee is whether a part-time county attorney may represent client in private probate matters occurring within the county that they serve. One issue that arises is that [Neb. Rev. Stat. § 77-2018.03](#) creates the statutory duty for the county attorney to represent the county and State of Nebraska in all inheritance tax determinations.

It has been the longstanding opinion of the Committee (see Formal Opinions [72-1](#), [81-6](#), and [08-01](#)) that a county attorney may represent clients in private probate matters (or inheritance tax determinations without probate) as long as the county board has first appointed a separate special county attorney to represent the interests of the county and the State of Nebraska in inheritance tax determinations. In Formal Opinion 72-1, the Committee relied on *State ex rel. Nebraska State Bar Association v. Richards*, 165 Neb. 80 (1957) which found that that it would be improper for the county attorney to act for the private probate client if the county board failed to appoint special counsel, but noted that the county attorney would be relieved of their responsibilities to the county and State once a special county attorney was appointed.

As discussed previously, the addition of subsection (c) to [Rule 1.7](#) does not allow for a part-time county attorney to represent clients with adverse interests to the State; it allows other attorneys in the firm to potentially represent these clients. Therefore, the reasoning behind

prior Formal Opinions on this subject has not changed with the amendment of Rule 1.7. The ethical considerations that apply to a county attorney should also apply to a part-time county attorney in this scenario: A part-time county attorney may ethically represent a client with a probate or inheritance tax determination occurring within the county that they serve, as long as the county board has appointed a special county attorney for the purpose of representing the county and State for the inheritance tax determination.

CONCLUSION

It is the opinion of the Committee that neither a deputy county attorney nor a part-time county attorney may ethically represent a client who is charged with a violation of Nebraska law, even if the matter is pending in a different county. The Committee also holds the opinion that a part-time county attorney may not ethically represent a client in a family law matter that involves support of a minor child, due to the access to confidential government information that the public office provides through the CHARTS system. Finally, much like a county attorney, a part-time county attorney may ethically represent a client in a private probate matter (or inheritance tax determination without probate) occurring in the county which they serve, only if the county board appoints a special county attorney to represent the county and State for the inheritance tax determination.



**STATE BAR OF NEVADA
STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

**Formal Opinion Number 1
April 23, 1986**

QUESTION - May a private attorney who has formed a partnership for the practice of law with a part-time deputy district attorney for a rural Nevada county defend a person charged with a violation of any Nevada ordinance or law in any of the courts of the State of Nevada?

ANSWER - No.

AUTHORITIES RELIED ON

NRS 7.105 (1985)

NRS 252.120 (1985)

Nevada Rules of Professional Conduct

(Supreme Court Rules 157, 160 Op. Nev. Att'y Gen. No. 126 (Apr. 25, 1973))

DISCUSSION

This opinion discusses the ethical issues raised in Nevada when an attorney forms a partnership or association for the private practice of law with another attorney who serves as a part-time deputy district attorney for a rural Nevada county. Specifically, it discusses whether the partner or associate of the deputy district attorney may engage in criminal defense work in any court of the State of Nevada. For the reasons discussed below, it is the opinion of the Committee that the partner or associate may not.

NRS 7.105 states:

No city attorney, state district attorney or attorney general or their deputies and assistants hired or elected to prosecute persons charged with the violation of any ordinance or any law of thisshall, during their terms of office or during the time they are so employed, in any court of this state, accept an appointment to defend, agree to defend or undertake the defense of any person charged with the violation of any ordinance or any law of this state.

(Emphasis added.)

Indisputably, a district attorney or deputy district attorney is disqualified by the terms of NRS 7.105 from defending any person charged with violating the criminal laws of the State of Nevada in any Nevada state court. The precise question presented, however, is whether the disqualification of a deputy district attorney applies to partners or associates of the deputy district attorney.

NRS 252.120 prohibits any partner of a district attorney from appearing in any criminal action, or from aiding, counseling, or assisting in the defense in any criminal action, within the county in which the district attorney serves. The same statute also prohibits the district attorney or his partner from appearing in any civil action begun or prosecuted during the district attorney's term, on behalf of any person suing or sued by the State of Nevada or any county of the State of Nevada. The Attorney General has interpreted NRS 252.120 as prohibiting a district attorney from representing a private client in any state or county civil action where the interests of the private client are adverse to those of the State of Nevada or any county

thereof. Op. Nev. Att'y Gen. No. 126 (Apr. 25, 1973). Logically, then, the statute would also prohibit the district attorney's partner from making any such appearances in civil actions.

By its Order filed January 27, 1986 (effective March 28, 1986), the Nevada Supreme Court adopted, with certain amendments, the Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, as the rules of professional conduct for lawyers who practice in Nevada. These rules may be referred to as the Nevada Rules of Professional Conduct, and are comprised of Supreme Court Rules 150 through 203.5, inclusive.

Supreme Court Rule 157 (1) provides that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless . . . the lawyer reasonably believes the representation will not adversely affect the relationship with the client . . . and each client consents, preferably in writing, after consultation." Supreme Court Rule 160, entitled "Imputed Disqualification," provides in subsection 1 that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [Rule] 157, 158(3), 159 or 168."

A lawyer who represents criminal defendants and whose partner or associate represents the State, though in different cases and in different counties, has divided loyalties. The lawyer may be called upon at time to attack statutes the partner or associate must later defend, or to cross-examine and impeach witnesses on whom the partner or associate must rely tomorrow. The effectiveness of a prosecutor may be diluted if the efforts of the partner or associate on behalf of defendants, even in other cases in other counties, are misconstrued by law enforcement officials.

A law firm is not permitted to represent adverse parties in contested proceedings, whether in the same or a different court; nor may it represent one party in one matter and, at the same time, represent an adverse party in a different matter. The State and those it prosecutes for crimes are adversaries.

The State of Nevada has expressly withheld its consent for a district attorney or a deputy district attorney to represent criminal defendants in any court of this State. NRS 7.105 (1985). Therefore, the partner of a deputy district attorney cannot rely upon the exception in Supreme Court Rule 157(1) (b), which permits the representation of conflicting interests if each party consents to the representation. Since a deputy district attorney is expressly disqualified from being of counsel adversely to the State, no partner or associate of the deputy or of the deputy's firm may accept employment adverse to the State in any case, in any court. To do so is prohibited by Supreme Court Rules 157 and 160 and the statutory sections cited. This appears to be the rule in most jurisdictions. See, e.g., Professional Ethics Comm., State Bar of Texas, Op. 419 (Dec. 1984), digested in ABA/BNA Lawyer's Manual of Professional Conduct 801.8305 (1986); Comm. On Professional Ethics, State Bar of Wisconsin, Mem. Op. 2-69 (Feb. 7, 1969), reprinted in Wis. B. Bull. 84 (Supp. June 1979), digested in O. Maru, 1980 Supplement to the Digest of Bar Association Ethics Opinions 13111, at 602 (1982); State Bar of Michigan, Informal Op. 49, reprinted in 57 Mich. St. B.J. 309 (Feb. 1978), digested in O. Maru, supra, 11496, at 286; Maryland State Bar, Informal Op. 77-57 (April. 28, 1977), digested in O. Maru, supra, 11321, at 246. See also Thompson v. State, 330 S.E.2d 348, 350-52 & 351 n.6 (Ga. 1985), and opinions cited therein. But see id. at 351-52 (because disqualification would limit the ability of criminal courts in rural areas to appoint competent counsel, the court declined to adopt a rule of automatic disqualification, and instead adopted a rule requiring disqualification only when an actual conflict of interest exists).

CONCLUSION

A private attorney who has formed a partnership for the practice of law with a deputy district attorney for a rural Nevada county may not defend any person charged with a violation of any Nevada ordinance or law in any Nevada Court.

This opinion is issued by the standing committee on ethics and professional responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of

Nevada, its board of governors, any person or tribunals charged with regulatory responsibilities, or any member of the state bar.

A Look at the Lives of Five Rural Lawyers in New York

By Joan Fucillo

October 4, 2019

State Bar News recently spoke with five attorneys from rural areas about the journeys that brought them to small-town New York and the challenges their practices face.

Judith Pareira

Judy Pareira had been a pediatric endocrinology nurse in Manhattan for 20 years when she decided to go to law school.

“I went to St. John’s University School of Law in the night program,” she said. “It was just a few blocks from my house.”

The part-time program was ideal as she was pregnant with her son and still working at what is now New York Presbyterian/Weill Cornell Medical Center.

In 1989, when their son turned three, she and her husband moved to Saranac Lake where they had a summer home. With a law license and a master’s degree in nursing, Pareira easily found work with a personal injury firm in Malone, NY. In 2002, she left to open her law office. It is fitting given her background that Pareira’s law office is in one of Saranac Lake’s many tuberculosis ‘cure cottages.’ From the late 1870s through the 1940s, Saranac Lake was a center for TB research and patient care.

A rural law practice

“This is what a rural law practice looks like,” said Pareira, smiling as she gestured to the stacks of files on her conference room table.

She left the law firm, she said, because she wanted to get back to doing what she loved best – advocating for people. She became an attorney for the child, and then began taking assigned counsel cases in Family Court.

“Nursing and the law is a common combination,” she said. “We are advocates for our clients and our patients. The law and nursing fit well together.”

The master’s in nursing program at New York University focused on creativity and learning to think outside the box. This serves her well as a lawyer, as does her pediatric medical experience. She observes the children she sees and will suggest to parents when a child may benefit from medical attention.

While Pareira can assist clients in a number of areas – “No real estate” – her main focus is on the assigned counsel work. Her private clients are mostly divorce cases.

As assigned counsel, she has more work than she can handle. Once, a judge asked her to stay for an arraignment, as the other attorneys in court that day were “conflicted out.” Although she already had a large caseload, that person became a client.

“I could have handed the client back into the system after the arraignment,” she said, noting that the ethical standards for assigned counsel meant that handling the arraignment did not create an attorney-client relationship.

“But I couldn’t,” she said. “For me, that arraignment meant I had started working with that client. And once I do, I believe it is my responsibility to represent that client.”

Pareira is in court almost daily. The county line runs through the heart of Saranac Lake so she has clients in Franklin and Essex counties. The drive to each county seat takes about an hour.

The rules differ from county to county in small but significant ways. It can be hard to keep track.

“I keep reminding myself that it’s the ‘Unified’ Court System, not the ‘Uniform’ Court System,” she said.

Unique client issues and the law of unintended consequences

As more courts require e-filing and encourage videoconferencing for efficiency and cost-savings, steady access to the internet will be an even greater issue for attorneys and their clients. As of now, however, technology doesn’t work that well for Pareira’s clients. For example, cellphones do not always increase access to their attorney.

Before cellphones, Pareira explained, “I could call a client and leave a message on their answering machine.” Now everyone has a cellphone but many clients have not set up voicemail, and they often run out of minutes. With a landline or a monthly plan, if a bill isn’t paid on time there is a grace period. But when a person runs out of minutes, the phone stops.

Meeting with clients can also be difficult. Public transportation is rarely a viable alternative. Often indigent clients cannot make a meeting because they cannot afford a car, can’t afford to fix it, don’t have money for gas, can’t find a ride or don’t have a driver’s license.

There also is the issue of where to meet. Pareira can get a secure meeting space in the courthouse in Elizabethtown, in Essex County, but there is no similar opportunity in Malone, in Franklin County.

Broadband, retirement, attracting new lawyers

Pareira is one of four lawyers in Saranac Lake. Two are looking to retire, but she is not.

“I love what I do,” she said.

But she is fully aware of the issues attracting new lawyers to the area. She believes that the county bar associations could be more proactive about marketing the area to young attorneys – “vacation paradise, nature, recreation” – and look more deeply into the federal loan forgiveness programs and how that can be advantageous to young attorneys who are willing to do the type of work she does.

“There is money to be made up here,” she said, “and there is need. People are not getting represented.”

Broadband and internet access is a big issue for rural lawyers. She has service at her office but when it is spotty, it really slows things down. And if she is at home, “I know where the hot spots are,” said Pareira. “There’s one in my driveway that I can count on.”

One of the Family Court judges requires that attorneys appear via conference call if they cannot appear in court. “I have to tell the judge that if the call is scheduled when I am driving between courts, I can’t count on having continuous cell reception throughout the call” and suggest that the judge reschedule.

Competition for attorneys is a factor, she said. As new court positions open, she sees more clerks being hired. Some attorneys will leave practice or a county job for one with the court system. As an example, Pareira pointed to unfilled attorney positions in Franklin County’s public defender’s office and social services.

She also hopes that, like her, people may consider law as a second career, which she thinks may help alleviate some of the rural justice crisis. She described her experience in night school at St. John’s as fun and stimulating and wondered whether an all-online law school, such as Syracuse University College of Law’s JDinteractive program, lose something in the process.

“You get socialization through interacting with fellow students and in your study groups,” she said. “Teaching the Socratic method might not be as effective through live chat.”

Paul Roalsvig

Paul Roalsvig is a solo practitioner in Long Lake, NY. He moved to the area after 14 years of practicing primarily immigration law in and around New York City. “My wife, having grown up in Long Lake, was always a Long Laker,” he said. And when she was offered a good job in her hometown, the family decided to move.

“I couldn’t have built a new solo practice in this area cold,” he said. “If you want to do something like this, the non-attorney spouse has to be the breadwinner for a time.”

From Immigration Law to a Rural Mix

Roalsvig's immigration practice in New York City covered a range of areas: business and corporate petitions; green cards for family-based immigrants; defending green card holders who had gotten into trouble with the law; and asylum cases from West Africa.

"I had to use my high school French," he noted.

Now the immigration work that comes his way consists of marriage-based green cards, fiancé visas, change of status and extension of status applications and the occasional Violence Against Women Act (VAWA) self-petition cases brought by immigrant spouses of U.S. citizens who have been abused. He noted that VAWA cases are becoming more difficult, as the financial requirements for success are more stringent. Roalsvig also works per diem on green card or citizenship interviews for other law firms.

He sometimes gets calls from the family member of an individual who has been detained at the Clinton County Correctional Facility (CCCF). Bail for such detainees can be set by Customs and Border Patrol and Immigration and Customs Enforcement at incredibly high rates, like \$30,000. The amount is arbitrary, says Roalsvig. If the individual has been only recently detained, he advises the family member to wait a few days. Immigrants detained at CCCF will get transferred to the Buffalo Federal Detention Center in Batavia and will see an immigration judge, who will usually set bail at a fraction of that amount. If need be, Roalsvig will arrange a meeting with the family member in Saranac Lake, halfway between CCCF and Long Lake.

Roalsvig's knowledge and background bring a mix of work. The bulk of his work is as a witness signer and notary for a large lending company. It has become more difficult to get a bank loan for refinancing and businesses like Quicken Loans fill that need.

"I bring the bank documents and I check IDs and explain the nature of the documents if lenders have questions about what they are signing," he said.

Roalsvig does three or four a week, covering an area that extends north of Interstate 90 to the Canadian border. He also handles real estate matters and works per diem in foreclosure cases, participating in mortgage modification conferences.

He is an impartial hearing officer for the state Department of Education, similar to an administrative law judge, for people who have been denied their rights to vocational rehabilitation services and are appealing an adverse decision by that agency. And Roalsvig represents defendants in local criminal court (assigned counsel, tickets, DWIs) as well as other local town courts and county court. Lastly, he represents debtors filing bankruptcy petitions.

"There is always something to do," Roalsvig said. "It's the right amount of work for a one-man operation."

Still, Roalsvig's work is mostly transactional, because in a small town it is easy to run into a conflict of interest, which makes a litigation practice difficult.

“How does the plaintiff find a lawyer in the area who doesn’t have a conflict?” he said. “A plaintiff would have to go to Syracuse or Utica.” It’s a major burden on local plaintiffs because local attorneys can’t represent them.

Roalsvig stopped doing contested divorces because the travel was onerous.

“There is no state Supreme Court seat in Hamilton County,” said Roalsvig. “We have to go to Johnstown in Fulton County, nearly a two-hour drive. No local plaintiff can really afford all that extra time and expense,” he added.

One solution, Roalsvig suggests, might be to “allow county courts to do contested divorces.” He added that he thought it made sense because family court matters can be heard at the county level and parties in northern Hamilton County have easier access to the county seat, which is only an hour away.

Technology

A local cable provider brings internet to his home office, although the rest of his home has the more reliable fiber optic service. Yet, from a business standpoint, Roalsvig believes that changing his email address to reflect the fiber optic service provider would be problematic.

“Everything in our house has battery backup, and of course we have surge protection,” he said, just as the lights flickered and his computer went dead for several seconds. “It’s an issue with the grid.” It was a calm and sunny day, with no wind, and no discernible reason for the interruption.

Recently the area got a new cell carrier, which has been greatly beneficial.

“My old service worked in Long Lake, but not in Elizabethtown, the Essex County seat, or in the larger towns close by like Tupper Lake or Indian Lake or even Newcomb,” Roalsvig said. “Now, I can make cell phone calls in all those towns and get and reply to emails on my phone.”

Equipment breakdowns are more difficult to get resolved in a rural area. When Roalsvig’s office printer/scanner broke down, “It was the worst three weeks of my professional life,” he said.

While he waited for the service call and help from Plattsburgh, he ordered a small emergency backup printer from Staples. The old machine was unsalvageable and now he has a new one. But Roalsvig has kept the backup, just in case.

Home

Roalsvig's office and home are in a pre-Civil War home on the Main Street. The office has stacks of files, boxes of music CDs made with his local band, a wall of vinyl records, awards for best costume and best plunge from the annual Long Lake Polar Bear Plunge and his maternal grandfather's paintings of his home in Stavanger, Norway. The Norway paintings are arranged to give a panoramic view of the land surrounding the cottage.

Roalsvig does not anticipate retiring, as he likes what he does. He admits that there are dead periods – “like mud season – March and April” – but work always picks back up in May. And he likes being able to take a day off from work when he wants to go hiking or cross-country skiing. But he does see the limitations of the area, and outside of its beauty, how do people get by?

In this area, he said, the major employers are hotels, motels and restaurants; the state Department of Transportation (DOT); and Sunmount, New York state's assisted living program that houses the physically disabled people, those adjudicated insane, as well as criminals with mental illness.

Roalsvig served on the local school board, was a substitute teacher and volunteered as a hockey coach. He has observed that the local high school graduates – following in their parents' footsteps — tend to work in restaurants, join the military, or work for DOT or Sunmount.

Very few young people in the area go to college for a full four-year degree, let alone advanced degrees. Roalsvig noted that high school graduation classes at Long Lake can be as small as one or as large as nine, with an average of three to five. He said that Long Lake “is the tiniest school system in the state.”

Music

Roalsvig, a musician with a wide range of musical styles and inspirations, calls himself a “campfire troubadour – I know a lot of songs.” He and his band, “The Dark Marbles,” recently completed a garage-rock CD, a 60s British pop tribute, and are now working on a “more roots-oriented album. Less drum, more of a folk or folk-rock influence with perhaps some mandolin and banjo,” said Roalsvig.

In college and law school, Roalsvig was in two bar bands that were legendary in the Buffalo area during the late 1980s and early 1990s. One – Splatcats – opened for the Ramones when they played at SUNY Fredonia, and another – JackLords – opened for Roy Orbison, at Kleinhans Music Hall in Buffalo.

Roalsvig is a regular in the Long Lake music scene and enjoys the open mic nights. He makes an annual pilgrimage to Buffalo to work with local musicians at a gig that includes a six-song tribute to Lou Reed.

Milo Primeaux: A Virtual Practice

“If five years ago you had bet me a million dollars that I would have a virtual private law practice on a sheep farm in the middle of nowhere, I wouldn’t have taken the bet. And I’d be out a million dollars,” said Milo Primeaux from his home in Livingston County, NY.

Primeaux knew he was taking a risk when he left a steady paycheck to go solo. He loved what he was doing at a nonprofit in Rochester but the hour-long commute was wearing and he felt that “it was time to try this on my own” to focus on LGBTQ+ issues.

Primeaux runs a civil rights practice. He handles a lot of name changes for transgender New Yorkers. “It’s a subset of legal work in the LGBTQ+ community,” he said. He also takes on discrimination cases in health care and employment.

“It’s not lucrative, but it is the reason why I went to law school, the reason why I wanted to be a lawyer,” he said.

Yet, he noted, “My practice has always been in the black. Right now, my caseload is full. I cannot even accept new clients,” adding that he tries to give “advice, counsel and referrals” to anyone who contacts him.

A Practice with a Larger Mission

Even large cities do not have enough resources to serve the LGBTQ+ community but rural communities are vastly under-resourced, said Primeaux.

“Except for New York City and Long Island, my clients come from every county across Upstate New York where folks still cannot locally access the help and resources they need.” He added that it is disappointing but not shocking.

“There are lawyers who just will not take on employment or other discrimination cases for LGBTQ+ people,” he said. Few private attorneys handle name changes for transgender people – a relatively easy process – for less than \$2,000, and “it’s just too much for many of these folks.” And if the clients make more than the 150%-300% of the poverty level, they don’t qualify for free legal services.

To break this unfair logjam, Primeaux decided to charge a sliding scale fee for a name change. He does not ask for documentation.

“I have found that people are quite honest when we discuss what they can afford and are excited to contribute what they can to their own name change process,” he said.

He also takes discrimination cases on a contingency basis.

“This way, we are in it together,” he said. “We do our best. Even if we don’t win, my clients feel empowered by standing up for themselves and having an attorney stand up with them.”

Primeaux's long-term goal is clear: "My goal, and it's a lofty one, is to make myself obsolete. That is, where anyone can at any time call an attorney anywhere and get the access, respect and representation they deserve, regardless of their sexual orientation or gender identity."

Too often, Primeaux said, LGBTQ+ people believe that they are powerless – that discrimination in the workplace, or harassment, name-calling and property damage to their homes is just the price they pay for being who they are.

"No, it's not," he asserted.

Even if Primeaux cannot take a case, he ensures that callers know their rights and know how to exercise them, what they can do pro se and how to file a claim with the state's Division of Human Rights. A successful claimant can win money but also demand mandatory cultural humility training for staff, institute new equitable personnel policies, or even get an apology.

Vandalism and harassment in urban areas might make headlines. But in a small town, if the harassment is from a neighbor, the local police might have the attitude that neighbors should just work it out and turn a blind eye to the injustice.

"We are very fortunate in New York state to have really clear protections in place," Primeaux said, citing the Gender Expression Non-Discrimination Act passed in early 2019, which also adds transgender New Yorkers to those protected by the state's hate crimes law.

But, he admits, "figuring out how to handle these situations is tricky." In extreme cases, "people have been driven out of their homes and communities for lack of resources to address or mediate the issues."

A Virtual Practice in a World Without Broadband

Lacking access to broadband – even basic cable – affects life as a virtual law practitioner. The area is too often overcast, making a satellite dish an unreliable option. Primeaux can't use public wi-fi because of potential for data compromise. He and his partner, who also works from home, buy the maximum amount of data they can from their cell service provider and utilize hotspots on their phones and other devices to get their work done. The upside: "It encourages efficiency. I run a very lean and efficient practice," said Primeaux.

Because Primeaux's clients can be anywhere in the state, he says that e-filing is very helpful. It saves time, travel and when it works, it is quick and easy. But some counties have not yet switched to e-filing and others who use e-filing still want hard copies of all e-filed paper. This places a burden on solo practitioners and rural attorneys working with less resources.

“It’s time to make it universal for all courts,” said Primeaux.

Getting Help When You Need It

Primeaux never thought about opening a law practice, intending to spend his working life at a nonprofit legal services organization. So classes on the business of law didn’t much interest him. Now that he has his own business, he has found his bar membership invaluable in climbing the learning curve. He “leaned into” the Monroe County Bar Association in Rochester, especially its Solo and Small Practice Committee. There he gets help, advice, mentorship and networking opportunities. It also offers conference space for client meetings and quiet places to work. This support, he says, allowed him to take the risk.

Living a Rural Life

As someone with a virtual practice who could be working anywhere –who is in such demand that he is turning away cases, yet is putting up with the lack of services — why Livingston County? Why farming?

“I know. It was a dream. We started with six Icelandic sheep in 2017. Now we have 45. It is so wonderful to birth the lambs and help them grow. We sell breeding stock to other farms, sell their fleece for spinning and fiber, and sell the meat,” said Primeaux.

“It’s unusual in our area, having a queer-owned farm. We are mindful of how different small-town life is. Our home is very well-known because of the Canadian couple who built it from nothing. They added a barn, dug a pond, landscaped the property and planted thousands of bulbs,” he said, adding “it’s a beautiful place to live and work.”

Leonard E. Sienko, Jr.

When Lenny Sienko graduated law school in 1978, he and a few friends had planned on opening a practice in Maine. “They decided to not risk it and to make money instead. I went to the only place that has to take you when there is nowhere else to go – I went home,” said Sienko.

Home was Hancock, NY, a small town on the Delaware River on the Pennsylvania border. That was 41 years ago.

Sienko’s solo career is that of a classic small-town lawyer. He has done personal injury, accidents, wills, real estate, business transactions, matrimonial actions, individuals with disabilities, criminal and all types of litigation.

“But a rural law practice is always a series of things,” he said. “You have your practice, and you cobble together a series of part-time jobs. I was a Delaware County estate tax attorney, a court attorney in the trial part of the county court and an adjunct professor at SUNY Delhi. I’ve been the town attorney for 29 years.”

Being a lawyer in a rural area means being diligent about conflicts.

“It’s easy in small communities to just keep running into each other,” he said. “But it’s not difficult to screen out or disclose.” He doesn’t do legal work for the town planning board, for example, but he does work with the fire department.

The work of a town attorney includes finding outside advice and counsel. When the village closed the volunteer ambulance corps, the town needed to step in and establish a paid ambulance service. Sienko brought in an emergency services attorney to assist the town in providing that service.

Tech Guru

Sienko has a unique place in the firmament of small-town lawyers. He is something of a tech guru – constantly looking for new ideas and new ways to work, testing and reviewing products that make a solo general practitioner’s juggling act easier. He was one of the original tech-evangelists at the New York State Bar Association, recalling that in a meeting in 1993, when he and NYSBA’s then-Law Practice Management Director Steve Gallagher urged the association to develop a web page, they were nearly laughed out of the room. The idea had come from a conference that Gallagher and Sienko had attended at the then-year-old Legal Information Institute (LII), an independently funded project of Cornell Law School.

Sienko’s embrace of technology is at least partly rooted in the serendipity of his law office. About nine years after he moved back home, he bought the Hancock Telephone Co. building, which was for sale because it was erecting a larger office next door. As they expanded their services, the company kept his building up-to-date. This enabled Sienko to be the first lawyer in Delaware County to have email and a website.

The now 100-year-old and still family-owned company received a state grant to bring fiber optic cable service to the town. With some private funding as well, Hancock TelCo completed the project in April 2019, connecting more than 1,600 homes and businesses in this previously underserved area. This is unusual in a rural area, and Sienko knows it.

Sienko presents to groups of lawyers about how they can use tech in their offices. A past chair of NYSBA’s General Practice Law Section (GP), which was cut short due to illness, he is a contributing editor of the section’s weekly wEbrief, an electronic newsletter that aggregates legal stories, tech news and court decisions. He also writes for the Senior Lawyer, the newsletter of NYSBA’s Senior Lawyer Section. Sienko has a full suite of devices – a Mac, an iPad, an Apple Watch and an iPhone with the latest AirPods.

When Paper Ruled

Sienko does not miss the “good old days” of paper. The nearest law library was 40 miles away, so an office library was essential.

“My books cost more than my office mortgage,” he said. “I never got a Pennsylvania law license because I couldn’t afford two sets of law books.” He hasn’t bought a set of law books since he got online in 1993, relying instead on resources such as Google Legal Scholar, which publishes primary source law materials, as well as citation services.

Winding Down a Practice, Crisis in Rural Law

Sienko has cut back on his practice in recent years, dropping the criminal defense, litigation and matrimonial work that can entail an hour-and-a-half commute to Cooperstown, the closest state Supreme Court Chambers handling matrimonials. His focus now is on transactional legal work, such as real estate and wills. Hancock is a bit over two hours from New York City and people began buying second homes in the area after 9/11. The real estate business is still very good.

He also wonders who will take over his practice. There are few lawyers ready to move into a practice like his. Sienko attributes this, at least in part, to the crushing debt many lawyers carry from law school.

That \$200,000-a-year associate fresh out of law school? “That’s the exception, not the rule,” he observed, adding that the median salary for an attorney in the United States is much, much less.

“There has to be some way for lawyers to be able to finance taking over a brick-and-mortar practice but they can’t get loans” because their money is already committed to servicing their debt, Sienko said. And lawyers who want to transition out of their practices “have all their money tied up in their buildings and their homes” and can’t retire unless someone can buy them out.

He notes that when towns lack a local doctor, some have recruited and subsidized a physician, with things like housing, staff and insurance. “Why not do something similar to attract legal talent?” he added.

“When I began practicing in Hancock, there was a calendar call every Monday and all the lawyers would be at the county seat in Delhi. We’d get our schedules and then we’d all go out to lunch,” he said. “It was great for me as a young lawyer and good for the older lawyers too.”

When the individual assignment system replaced the calendar call, attorneys no longer came to court on Monday mornings and no longer had their lunches. While the change may have created greater efficiencies, the regular contact with other attorneys and judges was lost.

NYSBA’s Senior Lawyers Section hosts periodic “gatherings” with the Young Lawyers Section where older and younger lawyers work together to find ways to help each other,

including looking at retirement and succession. Sienko admitted that he would have little contact with young lawyers were it not for the gatherings.

Formalizing what was once an organic process is not easy but Sienko sees hope.

“We need each other, and we have a lot to offer each other,” he said.

Julie Garcia

Julie Garcia believes each twist and turn in her life brought her where she needs to be.

She is a “North Country girl,” one of six children growing up in Witherbee, NY. After high school, she took on a number of jobs in her quest to go to college.

“I worked in the paper mill, I was a secretary, receptionist, worked at a clothing store, took bartending, catering and waitressing jobs to put myself through school,” said Garcia. “It took 14 years.”

Years after attending Hudson Valley Community College, Garcia applied to Siena College, but her application was rejected, and her confidence faltered. She was bolstered by a timely push from a mentor, who informed her that she could appeal Siena’s decision. “She said, ‘You have to learn to advocate for yourself – tell Siena why they should take you,’” Garcia recalled. Garcia begged them to reconsider, and they did, accepting her on a probationary basis.

In 1995 she graduated from Siena College cum laude with a degree in social work and began looking for employment in the field. Though jobs were available, the pay was scant. As a result, Garcia began thinking about getting her master’s degree in social work, but instead, decided on law school.

“I thought I could do as much good as a lawyer as I could as a social worker,” she said.

She graduated from Albany Law School in 1999 and, on the advice of Professor Peter Preiser, looked for a job in a large district attorney’s office. She got an offer from the Suffolk County DA, and she accepted. Long Island was a culture shock.

“As someone from the North Country it was alien to me,” said Garcia.

But she adjusted, and had the opportunity to handle some interesting cases, including one involving Christopher Rocancourt, a con man in the Hamptons who was posing as a Rockefeller.

Going Home

“I saw myself as a career prosecutor in Suffolk,” she said.

But after 18 months on Long Island, tragedy suddenly called Garcia back home. Her mother had died an addiction-related death, and Garcia was deeply concerned for her younger sister, who was also struggling with drug addiction. Garcia's employer, District Attorney James Catterson, aided her relocation by recommending her for a position in the Rensselaer County District Attorney's office. In February 2001, she moved to Troy and helped get her sister into treatment for substance abuse. Only seven months later, Garcia's sister also succumbed to the disease, leaving her three small children behind.

Garcia moved back to the North Country after her sister's death – first to Warren County, then to Essex. Garcia had obtained custody of her sister's two youngest children and wanted to raise the girls near family. She took a risk and opened a solo practice focused on criminal and family law, renting office space from other lawyers.

"I was completely unafraid – I feel I was in survival mode after what had happened to my mother and sister," she said.

Due to the devastation that Garcia and her family experienced, she was driven to tackle the drug problem in Essex County. Believing the problem was not being properly addressed, she discussed her concerns with the Essex County District Attorney. He suggested that if she felt things should be done differently, she should run against him. And so, she did.

"My message was heartfelt and personal; I believe that helped persuade the voters in Essex County to vote for me." She won in 2006, but lost re-election in 2010 by a slim margin.

Drug Problems

The drug problem in Essex County has grown far worse with the influx of opioids.

"There were about 5,000 opioid-related deaths across the country in 2001, now it's more like 60,000," Garcia said.

According to the Centers for Disease Control, 70,237 people died of an overdose in 2017, with opioids being the main cause.

Garcia admits that her approach to drug enforcement has changed, in part due to the realization that sometimes dealing goes hand-in-hand with using.

"Often people who are using are also selling so they can feed their addiction," she noted. Additionally, "treating addiction in rural Essex County is different than in other areas," said Garcia, because "many inpatient treatment facilities are very far from home," which is isolating.

"You leave your family, your support network. People have to take a day off from work to visit," Garcia remarked. "And there are gaps in the availability of services in rural areas."

Also, it is common for clients to need a higher level of care than what might have worked 20 years ago.”

Getting and Giving Representation

Garcia has an office in Warrensburg and a satellite office in Port Henry. For many of her clients, poverty is an issue. People who make just a little too much money to qualify for assigned counsel are still not able to afford an attorney. And laws can affect rural residents differently.

“If you get a DWI in Essex County, you can lose your job and your livelihood,” she said, which can have a huge impact on a family. “We do not have the same access to public transportation as urban areas do. We do not have as many job opportunities as urban areas do.”

Garcia takes assigned counsel cases and her practice uses a sliding scale fee.

“Even when someone has been unable to pay, we find a way to figure it out,” she said.

Garcia is almost constantly working. The last time she planned a vacation, she got a call minutes before she was about to depart and stayed behind to take the case. ”

My practice is built on trust,” she said. “My clients need to trust me.”

She pointed out that Essex County is the second largest rural county in New York State; however, due to the shortage of practicing attorneys in this area, the assigned counsel program must hire attorneys from as far away as Saratoga County to represent indigent clients. Courts are so spread out it can cost the county more to pay for an attorney’s travel time than for legal services.

Washington County, one of the five counties party to the Hurrell-Harring lawsuit over the state’s underfunding of indigent criminal defense, has received increases to its assigned counsel budget, including funds to hire expert investigators. When the terms of the agreement are up in 2021, Garcia is hopeful that these innovations may go statewide.

One question that plagues Garcia is, who will be coming to replace rural lawyers in this area who are close to retirement? Garcia believes that there needs to be incentive programs for lawyers to come and practice in rural areas of New York, similar to those used to attract doctors.

Technology

Lack of cell service, or a client’s phone being turned off because they ran out of minutes, can make contacting clients difficult. When faced with these hurdles, Garcia will try to connect via Facebook messenger.

“It’s free,” she said. “So if they can use a library or if with a friend whose phone is working, they can check Facebook.”

“The first time a law clerk heard that, she seemed shocked,” she added.

Rural attorneys spend a lot of time in their cars.

“My car is a 2012 Honda Accord, and it has 275,000 miles on it.” Garcia noted

Working while driving is necessary, and cell service is an issue. Garcia knows where the hot spots are – and aren’t – and she can warn a caller, “You have one minute before the call gets dropped.”

Garcia sees universal access to broadband as an imperative in rural areas. However, she does not think technology is a good substitute for meeting clients face-to-face. “You learn a lot more seeing and listening to a client in person,” she said.



**The Kansas Tort Claims Act:
Everything You Need to Know for Your First Case**

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ORDER OF PRESENTATION

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INTRODUCTORY REMARKS

The *Kansas Legislator Briefing Book* (2015) provides the following background on the Kansas Tort Claims Act (KTCA):

The enactment of the KTCA in 1979 ended more than a decade of sparring between the judicial and legislative branches of state government over the issue of governmental immunity. The Kansas Supreme Court rendered five decisions between 1969 and 1979 on the issue of governmental immunity, four of which abrogated governmental immunity, either partially or completely. Several of these court opinions were countered or negated by legislative action reestablishing governmental immunity either for the state or for municipalities.

The KTCA incorporates an “open-ended” approach, where liability is the rule and immunity is the exception.

From a plaintiff’s perspective, there are four considerations in the early stages of a case in which one or more claims may fall under the KTCA:

1. Which claims are covered under the KTCA?
2. What coverage is available for those claims?
3. To whom do I send the KTCA Notice of Claim?
4. What defenses are available under the KTCA?

From a defendant’s perspective, the considerations are essentially the same:

1. Is the claim against me covered under the KTCA?
2. What coverage is available to me, and what are my limits of liability?
3. What defenses do I have with respect to the KTCA Notice of Claim?
4. What defenses are available to me under the KTCA?

The information that follows in this presentation will revolve around these basic inquiries from a practical and legal (statutory + case law) perspective.

I. UNDERSTANDING THE PLAYERS: WHO CAN BE SUED UNDER THE KTCA?

Entities Covered: The State and Municipalities

The KTCA lists those government entities it covers, including:

- The **State** (K.S.A. 75-6102(c)), including: (1) the State of Kansas; (2) any department or branch of state government; or (3) any agency, authority, institution, or other instrumentality thereof; **and**
- **Municipalities** (K.S.A. 75-6102(c)), including: (1) Counties; (2) Townships; (3) Cities; (4) School districts; (5) other political or taxing subdivisions of the state; or (6) any agency, authority, institution, or other instrumentality thereof.

As used in the KTCA, the term “governmental entity” is thus defined as a “**state or municipality.**” K.S.A. 75-6102.

Entity Employees

K.S.A. 75-6103(a) provides “subject to the limitations of the act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its **employees** while acting within the scope of their employment **under circumstances where the governmental entity, if a private person, would be liable under the laws of this state.**” (emphasis added)

Under the language of 6103(a), a governmental entity might *not* be liable for the negligence of an employee – even when the employee is within the course and scope of employment – if it would not be liable in an ordinary, non-KTCA scenario (“...under circumstances where the governmental entity, if a private person, would be liable under the laws of this state.”). An example would be a bar on vicarious liability that exists under a different Kansas statute.

Independent contractors are generally excluded from the definition of employee, unless otherwise covered under specific provisions (e.g., K.S.A. 75-6102(d)(1)(B), *infra*).

The KTCA defines “employee” to include the following (K.S.A. 75-6102(d)(1)(A)-(K):

- (A) Any officer, employee, servant, or member of a board, commission, committee, division, department branch, or council of a government entity, including: (1) elected or appointed officials; (2) persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation; and (3) charitable health care providers, as defined under K.S.A. 6102(e);
- (B) Any steward or racing judge appointed pursuant to K.S.A. 74-8818 *** regardless of whether the services of such steward or racing judge are rendered pursuant to a contract as an independent contractor;
- (C) Employees of the United States marshal’s service engaged in the transportation of inmates on behalf of the secretary of corrections;
- (D) A person who is an employee of a nonprofit independent contractor, other than a municipality under contract to provide educational or vocational training to

- inmates in the custody of the secretary of corrections and who is engaged in providing such service in an institution under the control of the secretary of corrections provided that such employee does not otherwise have coverage for such acts and omissions within the scope of their employment through a liability insurance contract of such independent contractor;
- (E) A person who is an employee or volunteer of a nonprofit program, other than a municipality, who has contracted with the commissioner of juvenile justice or with another nonprofit program that has contracted with the secretary of corrections to provide a juvenile justice program for juvenile offenders in a judicial district provided that such employee or volunteer does not otherwise have coverage for such acts and omissions within the scope of their employment or volunteer activities through a liability insurance contract of such nonprofit program;
 - (F) A person who contracts with the Kansas guardianship program to provide services as a court-appointed guardian or conservator;
 - (G) An employee of an indigent healthcare clinic;
 - (H) Former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity;
 - (I) Any member of a regional medical emergency response team, created under the provisions of K.S.A. 48-928 *** in connection with authorized training or upon activation for an emergency response;
 - (J) Any member of a regional search and rescue team or regional hazardous materials response team contracting with the state fire marshal pursuant to K.S.A. 31-133 *** or K.S.A. 75-1518 *** in connection with authorized training or upon activation for an emergency response; and
 - (K) Medical students enrolled at the university of Kansas medical center who are in clinical training, on or after July 1, 2008, at the university of Kansas medical center or at another healthcare institution.

Negligence is the most common theory of liability encompassed under the KTCA, although plaintiffs have also asserted claims for defamation, invasion of privacy, abuse of process, malicious prosecution, trespass and nuisance.

Hospitals & Health Care Providers

Municipal hospitals (and their employees) are generally covered under the KTCA pursuant to K.S.A. 75-6115(a)(2). Other health care providers listed under K.S.A. 75-6115(a) are also covered. Note, however, that the KTCA must be read in conjunction

with other relevant statutes, including K.S.A. 40-3403(h) (addressing the vicarious liability exception for co-Fund-insured health care providers) and K.S.A. 75-6103(a), *supra*.

One good resource to help determine whether a hospital in Kansas is a municipal hospital under the purview of the KTCA is the Kansas Department of Administration's *Municipal Audit* webpage:

<https://admin.ks.gov/offices/chief-financial-officer/municipal-services/municipal-audits>

If you go to this link and click on "Hospitals," you will find a list of all municipal hospitals that were audited in a given fiscal year. This list is valuable in "ruling-in" municipal hospitals covered under the KTCA, although it is possible that a municipal hospital could be missing from the list, which means that this site should not be used to definitively "rule-out" a facility as being a municipal hospital.

Common KTCA Claims

Understanding that the KTCA generally applies to the State, municipalities and their employees, the following is a partial list of common KTCA tort/injury claims that are presented for settlement and/or litigated in the courts:

1. Auto negligence cases against driver-employees of governmental entities;
2. "Police pursuit" cases against local law enforcement agencies;
3. Premises ("slip & fall") cases against cities or counties based upon dangerous sidewalks or roadways;
4. Cases against school districts for injuries which take place on school property;
5. Medical negligence cases against municipal hospitals due to the negligence of employee-nurses or other health care personnel;
6. Cases against public universities for on-campus injuries;
7. Cases against law enforcement or other governmental agencies for negligence in hiring or training personnel

Are They (Am I?) Covered? – Understanding Insurance under the KTCA

The short answer is yes: the claim is probably covered by insurance. And it is probably capped at \$500,000.

Under K.S.A. 75-6105, the liability for claims within the scope of the KTCA shall not exceed \$500,000 for *any number of claims* arising out of a single occurrence or accident, subject to the provisions of K.S.A. 75-6111. Under 75-6111, if the governmental entity is insured (which it probably is) and has purchased coverage in excess of \$500,000 (which does happen every so often), then the limitation on liability shall be fixed at the amount for which insurance coverage has been purchased.

Under K.S.A. 75-6105(c), governmental entities are not liable for punitive or exemplary damages or for interest prior to judgment, and employees are immune from liability as well, absent a finding of actual fraud or actual malice.

Under K.S.A. 75-6109, governmental entities are liable for, and must indemnify their employee against any damages caused by the negligence of the employee while within the course and scope of his or her employment. The governmental entity is not liable for any punitive damages awarded against an employee, however.

If the employee fails to act in good faith in the defense of the claim or action, the governmental entity shall have the right to recover any payments made by it for any judgment, or portion thereof, plus costs and fees. K.S.A. 75-6109.

The bottom line: Whether there are one or ten defendants facing claims covered under the KTCA, the total cap on liability for all KTCA claims is \$500,000, unless more than \$500,000 in insurance coverage has been purchased, in which case the liability limits are equal to the coverage limits. Neither governmental entities nor their employees are liable for punitive damages, with one exception: the employee can be found liable if there is a finding of actual fraud or actual malice, in which case the employee alone will be liable.

The bottom, bottom line: If you are dealing with a tort claim against the state, a municipality or one of their employees and the state or municipality, if a private person, would be liable under the laws of this state, you are likely dealing with a KTCA claim in which the total liability is \$500,000, absent additional insurance coverage in excess of this amount. The governmental entity is likely vicariously liable for the acts or omissions of its employee and must indemnify the employee up to the statutory limit of liability.

II. A SHIELD, NOT A SWORD: UNDERSTANDING THE KTCA NOTICE REQUIREMENTS

First, and most importantly, it is important to understand that the KTCA notice requirements found at K.S.A. 12-105b(d) apply **only to municipalities and not the state**. While the KTCA statutory provisions found at K.S.A. 75-6101 *et seq.* apply to both municipalities and the state, the KTCA notice provisions found at K.S.A. 12-105b(d) apply **only to municipalities**.

Second, it is also important to understand that, aside from the immunities found at K.S.A. 75-6104, the KTCA notice provisions are the most common defenses raised in litigation. In fact, from this practitioner's perspective, a defendant's Answer will almost *always* raise some type of notice defense, no matter what lengths the plaintiff attorney has gone to in order to strictly comply with the statute.

The scary part for a plaintiff is that the KTCA notice requirements are jurisdictional, meaning that failure to substantially comply (addressed *infra*) with the notice requirements deprives the court of subject matter jurisdiction. Any suit filed outside the requirements of the statute is void, and a party who fails to file a proper notice is not

entitled to relief. *See, e.g., Myers v. Board of Jackson County Comm'rs*, 280 Kan. at 876-77 (2006). The defense can “lay low” with its KTCA challenges by raising them in the responsive pleading but not act upon them more aggressively until the statute of limitations has run on the case.

The prudent plaintiff's practitioner must thus protect his client's interests by being aware of the precise notice requirements, complying with the same as outlined in the statute, and immediately acting upon any challenges to the validity of the notice that may be raised in a responsive pleading once suit is filed. Similarly, the prudent defense practitioner must be fully aware of the notice requirements and raise any and all defenses to the same once suit has been commenced.

Before discussing the procedural requirements set forth in the statute, it is helpful to consider the most common KTCA notice-related defenses raised by defendants in litigation, from this practitioner's perspective:

1. The notice was not served on the proper individual(s);
2. The notice does not adequately set forth the claims being presented; and
3. The damages claimed in litigation exceed those presented in the notice

The statutory framework

K.S.A. 12-105b(d) states:

(d) Any person having a claim against a municipality or against an employee of a municipality which could give rise to an action brought under the Kansas tort claims act shall file a written notice as provided in this subsection before commencing such action. The notice shall be filed with the clerk or governing body of the municipality and shall contain the following: (1) The name and address of the claimant and the name and address of the claimant's attorney, if any; (2) a concise statement of the factual basis of the claim, including the date, time, place and circumstances of the act, omission or event complained of; (3) the name and address of any public officer or employee involved, if known; (4) a concise statement of the nature and the extent of the injury claimed to have been suffered; and (5) a statement of the amount of monetary damages that is being requested. In the filing of a notice of claim, substantial compliance with the provisions and requirements of this subsection shall constitute valid filing of a claim. The contents of such notice shall not be admissible in any subsequent action arising out of the claim. Once notice of the claim is filed, no action shall be commenced until after the claimant has received notice from the municipality that it has denied the claim or until after 120 days has passed following the filing of the notice of claim, whichever occurs first. A claim is deemed denied if the municipality fails to approve the claim in its entirety within 120 days unless the interested parties have reached a settlement before the expiration of that period. No person may initiate an action against a municipality or against an employee of a municipality unless the claim has been denied in whole or part. Any action brought pursuant to the Kansas tort claims act shall be commenced within the time period provided for in the code of civil procedure or it shall be forever barred, except that, a

claimant shall have no less than 90 days from the date the claim is denied or deemed denied in which to commence an action.

This one, lengthy statutory subsection provides us with all of the information we need to determine a claimant's rights and responsibilities when presenting a KTCA claim against a municipality:

Do these requirements apply to claims against the state? No. Basis: "Any person having a claim against a municipality or against an employee of a municipality..."

With whom must the notice be filed? "The notice shall be filed with the clerk or governing body of the municipality..."

What must the notice include? Generally, the name and address of the claimant, claimant's attorney and public officer(s)/employee(s) involved and concise statements of the factual basis of the claim, injuries suffered and monetary damages sought. *See* items (1) – (5) contained with the body of the statute.

How strictly must the claimant comply with the requirements? Substantial compliance is the standard. Basis: "In the filing of a notice of claim, substantial compliance with the provisions and requirements of this subsection shall constitute valid filing of a claim."

Is the notice admissible in court? No. Basis: "The contents of such notice shall not be admissible in any subsequent action arising out of the claim."

How long does the municipality have to respond? 120 days. Basis: "Once notice of the claim is filed, no action shall be commenced until after the claimant has received notice from the municipality that it has denied the claim or until after 120 days has passed following the filing of the notice of claim, whichever occurs first. A claim is deemed denied if the municipality fails to approve the claim in its entirety within 120 days unless the interested parties have reached a settlement before the expiration of that period."

Is the notice mandatory? Yes. Basis: "No person may initiate an action against a municipality or against an employee of a municipality unless the claim has been denied in whole or part."

What is the interplay between the notice provisions and the statute of limitations? The ordinary statute of limitations that would otherwise apply is still in effect, but it may be extended in that a claimant has 90 days from the date the claim is denied or deemed denied to file suit. Basis: "Any action brought pursuant to the Kansas tort claims act shall be commenced within the time period provided for in the code of civil procedure or it shall be forever barred, except that, a claimant shall have no less than 90 days from the date the claim is denied or deemed denied in which to commence an action." (*Example:*

Claimant sends KTCA notice out 30 days before the 2-YR SOL runs. Municipality lets 120-day response period lapse without responding. Claimant's SOL is extended to 90 days past the 120-day response period expiration).

Can the notice requirement be waived by the municipality? No. Basis: Use of the words "shall file" and established case law, including *Zeferjohn v. Shawnee County Sheriff's Dept.*, 26 Kan. App. 2d 379, 988 P.2d 263 (1999).

Substantial compliance

Substantial compliance is not defined in the statute, but was discussed for the first time in *Tucking v. Bd. of Comm'rs of Jefferson County*, 14 Kan. App. 2d 442, 448, 796 P.2d 1055 (1990). The appellate court borrowed a definition of substantial compliance used in a zoning case: "[C]ompliance in respect to the essential matters necessary to assure every reasonable objective of the statute." The court found that the objective of the notice provisions are to "give the city an opportunity to ascertain the character and extent of the injury sustained," as well as to inform the municipality of the occurrence and cause of injury.

A Westlaw search calls up 162 "Notes of Decisions" for 12-105b. This is an area of jurisprudence that has been litigated heavily over the years, and not all of the opinions are consistent.

In both the *Myers* and *Zeferjohn* cases, for example, the courts held that service of the notice of claim on the county counselor was not sufficient, as "substantial compliance" does not include creating new methods of service. In the more recent Supreme Court case of *Sleeth v. Sedan City Hospital*, 298 Kan. 853 (2014), however, the Court was forced to reverse a Court of Appeals decision which had gone a different direction, ultimately finding that a letter sent to a hospital administrator by an attorney, threatening suit if settlement could not be reached, did not substantially comply with the notice requirements.

Any challenge to the KTCA notice requirements will be both fact- and case law-intensive, as seemingly minor aspects of the notice process can make a major difference in determining whether there was "substantial compliance."

Another recent Kansas Supreme Court opinion and the legislative events that followed provide an example of the Legislature's continued interest in upholding the strength of the notice provision. In *Whaley v. Sharp*, 301 Kan. 192 (2014), the Supreme Court held, based on the strict language of K.S.A. 12-105b(d), that notice to the municipality was not necessary prior to filing suit against an employee-physician *only*, and not the municipality itself. Interestingly, although the vicarious liability bar found at K.S.A. 40-3403 (*supra*) provided the plaintiff with a compelling argument, the Court decided that it was not necessary to address that specific argument in order to resolve the issue, as strict interpretation of the statutory language alone directed its conclusion that notice was not necessary.

In response to *Whaley*, the Kansas Legislature immediately amended K.S.A. 12-105b(d) to add the “or against an employee of a municipality” language that was not present in the statute at the time *Whaley* was decided. (The statute previously read: “Any person having a claim against a municipality which could give rise...”).

III. A SHIELD AND A SWORD: KTCA IMMUNITIES

There are lots of exceptions for liability being “the rule.”

The KTCA immunities a/k/a exceptions to liability are found within K.S.A. 75-6104 and subsections (a)-(x) – a total of 24 categories of codified immunities.

The four **key** exceptions are:

- (a) **Legislative functions**, including, but not limited to, the adoption or failure to adopt any statute, regulation, ordinance or resolution;
- (b) **Judicial functions**;
- (c) **Enforcement of or failure to enforce a law**, whether valid or invalid, including, but not limited to, any statute, rule and regulation, ordinance or resolution;
- (e) Any claim based upon the exercise or performance or the failure to exercise or perform a **discretionary function** or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved.

The other 20 exceptions are found in subsections (d) and (f)-(x), the more notable of which include: (1) snow or ice conditions or other temporary or natural conditions on any public way (l); (2) the plan or design for the construction of or an improvement to public property (m); (3) failing to provide, or the method of providing, police or fire protection (n); and (4) the “recreational use” immunity for injuries on public property used as a park, playground or open area (o).

As with K.S.A. 12-105b(d) and many statutes within the KTCA, the immunities found within K.S.A. 75-6104 have obviously been litigated heavily over the years. There is a litany of case law available to help analyze almost any immunity defense that may arise. It is useful to read through all 24 subsections within the statute and become familiar with the areas covered, as a practitioner who is familiar with the KTCA immunities will be better able to advise clients – whether plaintiffs or defendants – of the merits of a particular claim or defense in the very earliest stages of a case.

IV. PROCEEDING TO SUIT: PLEADING THE CASE WITH AN EYE ON THE FUTURE

A plaintiff with a tort case against a municipality has submitted her KTCA notice for consideration and feels confident that the notice was fully adequate in all respects. Discouragingly – though perhaps not surprisingly – the claim was denied outright. Now the plaintiff wants to proceed with filing suit. How can the pleading be crafted most effectively to head-off any future KTCA defenses, or, at minimum, ensure that the case survives an initial motion to dismiss?

The following checklist contains important considerations for any petition filed in a KTCA case:

1. Does the petition set forth the specifics of the KTCA notice (when it was served, whom it was served upon, and when the denial was received) and otherwise allege that the plaintiff has fully complied with all conditions precedent to bringing the case under the notice provisions found at K.S.A. 12-105b(d)? It is useful to include this allegation in the suit, so that the defendant will be required to respond and state its position.
2. Do the general factual and legal allegations match what is claimed in the KTCA notice? The key elements of the case should have been encapsulated in the notice, so that there can be no argument that the claims in the suit fall outside the notice.
3. Are the damages claimed consistent with the KTCA notice? Again, while only notice pleading of damages “in excess of \$75,000” is required in a Chapter 60 case, you could run into a snag early on if your KTCA notice only claimed \$50,000 in damages.
4. Have you pled around any immunities to the extent possible? Example: You’re filing a case against a municipality for an injury that took place at a county fair, which was technically located on the grounds of a public park. You note that the “recreational use” immunity found at K.S.A. 75-6104(o) may apply, which provides immunity from damages unless the governmental entity or an employee thereof is guilty of “gross and wanton negligence.” You should be sure to plead gross and wanton negligence in the suit.
5. If you’re going to preserve constitutional challenges to a specific KTCA immunity or other provision – which is a good idea – you should be sure to comply with Sup. Ct. R. 148, which requires that you notify the attorney general’s office of your intended constitutional challenge.

Then, moving forward, you should review the defendant’s answer carefully to look for immunity claims or challenges to the propriety of the KTCA notice. As you move through the case, you should constantly evaluate whether any of your legal claims or claims for damages fall outside the KTCA notice, and if they do at some point, you should be prepared to deal with the situation by filing a new, updated notice or otherwise working the issue out with defense counsel.

V. PLANNING FOR SJ: UNDERTAKING DISCOVERY IN ADVANCE OF MOTION PRACTICE

&

VI. SUMMARY JUDGMENT: PRACTICE TIPS

By the time you begin discovery, you should be aware of every possible immunity defense, have read the key cases addressing the specific immunity claims at issue, and have contemplated what exactly you need out of the discovery process in order to survive summary judgment and ultimately succeed at trial.

The need for experts is also an important consideration which will be addressed in some detail.

APPENDIX: CASES CITED DURING SPEAKER'S PRESENTATION

(Not in sequential order)

1. *Myers v. Board of Jackson County Comm'rs*, 280 Kan. at 876-77 (2006)
2. *Zeferjohn v. Shawnee County Sheriff's Dept.*, 26 Kan. App. 2d 379, 988 P.2d 263 (1999)
3. *Tucking v. Bd. of Comm'rs of Jefferson County*, 14 Kan. App. 2d 442, 448, 796 P.2d 1055 (1990)
4. *Sleeth v. Sedan City Hospital*, 298 Kan. 853 (2014)
5. *Whaley v. Sharp*, 301 Kan. 192 (2014)
6. *Robbins v. City of Wichita*, 285 Kan. 455 (2007)
7. *Jackson v. Kansas City*, 235 Kan. 278 (1984)
8. *Dodge City Implement v. Board of Barber County Comm'rs*, 288 Kan. 619 (2009)
9. *Continental Western v. Shultz*, 297 Kan. 769 (2013)
10. *Adams v. Board of Sedgwick County Comm'rs*, 289 Kan. 577 (2009)
11. *Carpenter v. Johnson*, 231 Kan. 783 (1982)
12. *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 261 P.3d 943 (2011)
13. *Cook v. City of Topeka*, 232 Kan. 334 (1982)
14. *Conrad v. Board of Johnson County Comm'rs*, 237 F.Supp.2d 1204 (2002)
15. *Barrett ex rel. Barrett v. U.S.D.* 259, 272 Kan. 250 (2001)
16. *Wellhausen v. University of Kansas*, 40 Kan. App. 2d 102, 189 P.3d 1181 (2008)
17. *Green v. City of Wichita*, 47 F.Supp.2d 1273 (1999)
18. *Bradley v. Board of Butler County Comm'rs*, 20 Kan. App. 2d 602, 890 P.2d 1228 (1995)
19. *Lopez v. Unified Government of Wyandotte County*, 277 Kan. 682 (2004)
20. *Jackson ex rel. Essien v. U.S.D.* 259, 268 Kan. 319 (2000)
21. *Collins v. Douglas County*, 249 Kan. 712 (1991)
22. *Taylor v. Phelan*, 9 F.3d 882 (1993)
23. *Gragg v. Wichita State University*, 261 Kan. 1037 (1997)
24. *Soto v. City of Bonner Springs*, 291 Kan. 73 (2010)
25. *Jarboe v. Board of Sedgwick County Comm'rs*, 262 Kan. 615 (1997)

ONE MORE THING...RECENT UPDATES IN KTCA CASE LAW

K.S.A. 75-6104

Turner v. City of Topeka, 2024 WL 657219 & *Grey v. City of Topeka*, 2024 WL 657220 are both very recent Kansas Court of Appeals cases which address the city's choice of traffic signage under the discretionary function exception.

Johnson v. City of Wichita, 2024 WL 474591 (D. Kan.) – the U.S. District Court held an officer is not entitled to immunity under KTCA for intentional torts. In this case, the officer was liable for conversion when plaintiff's car was impounded and later sold without giving notice to the plaintiff.

R.P. v. First Student Inc., 62 Kan.App.2d 371 (2022) – The Kansas Court of Appeals held that First Student is a private entity and not an instrumentality, therefore notice requirements do not apply and it is not immune under KTCA.

Osborn v. Kansas Department for Children and Families, 2022 WL 1511255 – In this Kansas Court of Appeals case, the DCF hired KVC as independent contractor to perform the duty of protecting children in custody and therefore shed the protections of the KTCA.

Shreiner v. Hodge, 315 Kan. 25 (Kan. 2022) – The Kansas Supreme Court performed an analysis of the discretionary functions for police officers in investigating a crime.

K.S.A. 12-105b

City of Atchison v. Laurie, 63 Kan.App.2d 310 – the Kansas Court of Appeals held no notice was required under the statute for contract claims against a municipality.

Wickham v. City of Manhattan, 63 Kan.App.2d 294 – the Kansas Court of Appeals analyzed a K.S.A. 60-2006 written demand for settlement vs. a K.S.A. 12-105b notice.

Social Media: Preventing Damage Control From Ruining Your Case

Technology is moving quickly. Are you keeping up...

According to a famous musician, which new technology would “create a marked deterioration in American music”?

- A. Spotify
- B. Itunes
- C. Napster
- D. None of the above

Answer: D

- The musician was John Philip Sousa.
- The technology was the phonograph. In 1906.

Which new technology threatened to “break up home life and the old practice of visiting friends” upon its release?

- A. Facebook
- B. Twitter
- C. The telephone
- D. The television

Answer: C

- Knights of Columbus. In 1926

Last one...

A famous teacher feared that this technological development would “create forgetfulness in the learners’ souls, because they will not use their memories.” What was this person talking about?

- A. Evernote
- B. Google
- C. Copy Machine
- D. None of the above

Answer: D

- The teacher was Plato. The technological innovation was writing. In 375 BC.
- *Source: Jason Feifer, Fast Company, “Fear and Loathing of Silicon Valley,” Nov. 2014*

An idea of how quickly things are changing...

- From the beginning of the world through 2003, humankind created five exabytes of data. By 2010, we were creating five exabytes of data every two days.
- For \$60, you can now buy enough memory to store all the music ever created in the world.
- By 2016, the gigabyte equivalent of all movies ever made was crossing global IP networks every three minutes.

Litigation and Trial Practice in the
Era of Big Data

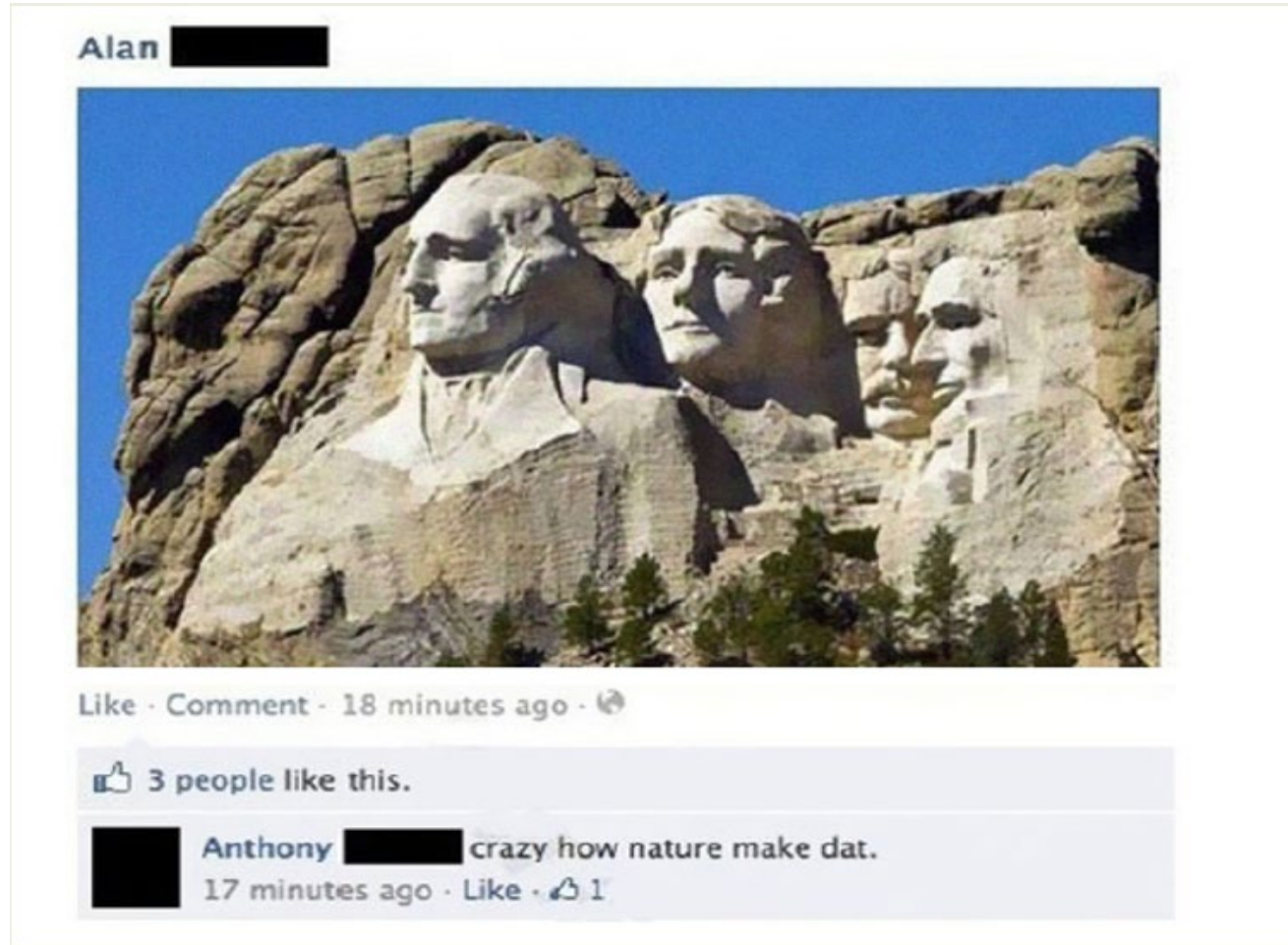
DAVID J. WALTON

The author is a partner at Cozen O'Connor, Philadelphia.

Social media by the numbers:

- Facebook (as of January 2024): 3.049 billion users
 - 2/3 of U.S. adults are users
 - 3/4 of users access the platform every day
- X (F.K.A. Twitter) (as of January 2024): 619 million users
- Snapchat
 - 750 million users
- Instagram (as of January 2024): 2 billion users
 - 95 million posts/day
- YouTube (as of January 2024): 2.491 billion
 - 2,500 videos (500 hours) uploaded every minute

Are these your clients/adversary? Be prepared...





Matthew

My teacher is so dumb. He thought the sun was a star.

Like · Comment · 9 minutes ago near Belmont ·



Allie umm that's because it is...

6 minutes ago · Unlike · 5 people



Matthew no it's not. a sun is a sun, and a star is a star. saying that a sun is a star is the same as saying a tomato is a fruit. thats right, its not true

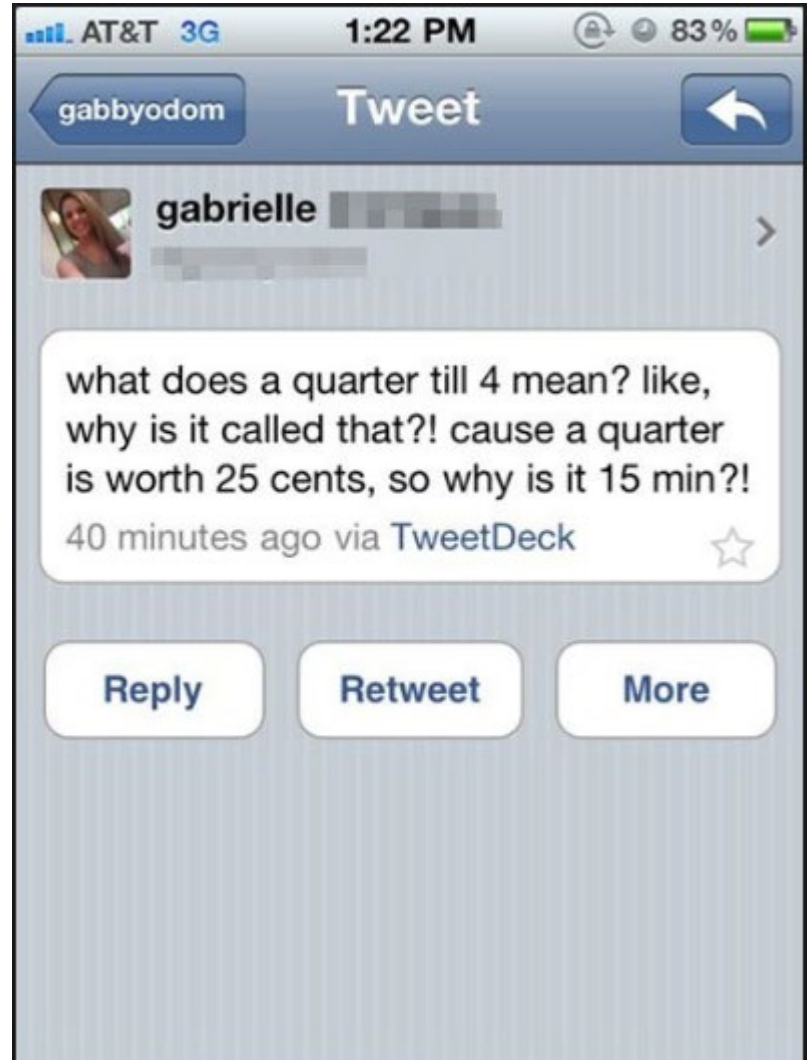
4 minutes ago · Like



Kevin Fabrizio updated his cover photo.

about a minute ago

american flag and weird looking parrot



Driving into the lake juuuuust to see if the ice will hold. Spoiler alert: it didn't.



Like · Comment · Share · 3 hours ago via Instagram · 📷

●●●● AT&T

12:32 PM


12% 🔋

<

Tweet

🔍 ✍️

🔄 speedy bentley retweeted



Kanye

@Chrissy__cindy

+ 👤

Damn...😬 the NFL been around longer than our government. We've had 48 Super Bowls and only 44 presidents. I didn't know that 😬😬

1/19/15, 10:15 AM

3,825 RETWEETS

1,943 FAVORITES

↩️

🔄

★

⋮



Is this ok?



Not Anymore

- Model Rule of Professional Conduct – Rule 1.1
- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- Comment 8 “To maintain the requisite knowledge and skill, **a lawyer should keep abreast** of changes in the law and its practice, including the benefits and risks associated **with relevant technology . . .**”

What is the lawyer's responsibility?

- Rule 226, KRPC 1.3
 - “A lawyer shall act with reasonable diligence and promptness in representing a client.”
 - Comment 1: A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”
- So, how do you treat social media posts?
 - From representation forward → Keep your mouth (and typing hands) shut.
 - Nothing about claim
 - No photos showing damages property or injuries
 - No replying to anyone when asked
 - No reaching out to defendant

What is the lawyer's responsibility?

- Previous posts?
- Discoverable, so there is a duty to preserve.
 - Protocol to do inquiries before representation?
- Make settings private
- Reject any new friend requests, unless the client knows the person well.
- Make sure they know friends and family posts can be just as harmful.
- Do not remove/delete any previous posts.
- Preserve all posts

Duty to preserve

- Social media posts are ESI, which must be preserved and produced.
- FRCP Rule 26(a)(1)(A)(ii)
 - “[ESI]... that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses...”
 - All evidence within a party’s control:
 - Legal authority
 - Practical ability to access it
- When is the duty triggered?
- No bright line, but play it safe:
 - “When a party reasonably foresees that the evidence may be relevant to the issues in the litigation.” *Apple I*, 881 F. Supp. 2d at 1136; *Rimkus Consulting Grp. v. Cammarata*, 688 F. Supp.2d 598, 612 (S.D. Tex. 2010).

‘Mother’ of all spoliation cases:



Ethical Implications

- **3.3 Advocate: Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

- **Comment 3** “There are circumstances where *failure to make a disclosure is the equivalent of an affirmative misrepresentation.*”

- **Comment 5** “Paragraph (a)(3) requires *that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes.* This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. ”

Ethical Implications

- **3.4 Advocate: Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Bottom line...

- It can hurt you at trial...

The Court instructs the jury that the Plaintiff, Isaiah **Lester**, was asked in discovery in this case to provide information from his Facebook account. In violation of the rules of this Court, before responding to the discovery, he intentionally and improperly deleted certain photographs from his Facebook account, at least one of which cannot be recovered. You should presume that the photograph or photographs he deleted from his Facebook account were harmful to his case.

The Court further instructs the jury that the presumption from this inference should not affect any award due to the beneficiaries, Gary Scott and Jeanne Scott.

- It can hurt you in the wallet...

1. The total of fees and expenses found to be payable to Defendants is \$722,000, with the sum of \$625,110 due Patton Boggs LLP and the sum of \$96,890 due Zunka, Milnor & Carter, Ltd.;
2. Of the grand total set forth above, Murray is obligated for, and is hereby ORDERED to remit to Defendants, the sum of \$542,000; and
3. Of the grand total set forth above, Lester is obligated for, and hereby ORDERED to remit to Defendants, the sum of \$180,000; and

Bottom line

- It can end your career:

It is **ORDERED** that:



The Board accepts the Agreed Disposition and the Respondent shall receive a Five-Year Suspension, as set forth in the Agreed Disposition, which is attached to this Memorandum Order.

- So, keep up with changing social media landscape and treat it like e-discovery

This case reflects a trend we see based on anecdotal data points where a minority of legal and eDiscovery practitioners have not quite placed social media evidence on the same par as other electronic evidence. For instance, I believe it is highly unlikely that Murray would have instructed his client to delete all his emails or wipe his hard drive, but for some reason he differentiated social media evidence.

The attorneys we speak with are telling us that social media evidence is relevant to nearly every case they handle and the savvy ones are using social media evidence to win their cases. And as [we recently noted](#), since 2010 social media evidence played a key role in 675 different cases with published decisions reflecting such involvement and in presumably tens of thousands more cases not involving published decisions. Those numbers will only increase as social media networks grow even more popular.

Next Gen eDiscovery Law & Tech Blog

NOVEMBER 15, 2011 - 9:10 PM

Also, we lawyers should be careful on social media too.



3.5 Advocate: Impartiality and Decorum of the Tribunal

A lawyer shall not:

(d) engage in undignified or discourteous conduct degrading to a tribunal.

Relevancy fight:

- Courts are wary about granting discovery of social media content where the requesting party has not identified some specific evidence tending to show that relevant information exists.
- Practically speaking, a requesting party is only able to satisfy this burden if at least some part of producing party's social media content is publicly available.
- Kansas cases:
 - *Kear v. Kohl's Department Stores, Inc.*, (2013 WL 3088922)
 - Constructive discharge – broad scope of discovery = discoverable
 - *Fox v. Pittsburg State University*, (2015 WL 7572301)
 - Harassment, retaliation – broad scope, but not so broad as to capture spouse's social media posts
 - Posts that may indicate instances of... stress, anxiety, depression, etc.
 - *U.S. ex Rel. Feaster v. Dopps Chiropractic Clinic, LLC* (2017 WL 957436)
 - Employment discrimination – request all posts that have been deleted or removed. Can't have unfettered access to rummage through plaintiff's garbage.

Relevancy fight:

- Non-Kansas cases:
 - *Winchell v. Lopiccolo, et al.*, 38 Misc. 3d 458 (N.Y. 2012).
 - “[Mere] hope that they would discover information they sought, and, to extent that plaintiff had provided more reliable indicators of her cognitive abilities, defendants had not made a showing that their request was not cumulative.” Unrestricted access denied.
 - *James v. Edwards*, 85 Va.Cir. 139 (2012).
 - Plaintiff ‘alleged a host of physical and emotional injuries, so information found on her social networking websites ‘may very well undermine or contradict’ those allegations... “[Defendant] has not come forward with any evidence that the content of either of the Plaintiff's public postings in any way undermines their claims in this case.”
 - *Keller v. National Farmers Union Property & Casualty, Company et al*, 2013 WL 27731 (2013).
 - The drinking and partying depicted in Plaintiff's Facebook pictures, for example, may be relevant to the severity of his claimed injuries and would be helpful in evaluating the true extent of his long-term deficiencies. Accordingly, Defendant's discovery requests were reasonably calculated to lead to the discovery of admissible evidence.

Right to privacy?

- “Private” setting does not mean undiscoverable
- “[w]e agree with those cases concluding that, generally, the photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established” and that “[s]uch posted photographs are unlike medical records or communications with one's attorney, where disclosure is confined to narrow, confidential relationships. Facebook itself does not guarantee privacy. *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010).
- By creating a Facebook account, a user acknowledges that her personal information would be shared with others. *Id.* at 657. “Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist.” *Id.*

Collection and production of social media posts:

- Facebook:
 - “Account Settings” under the “Account” tab on your homepage → “learnmore” → “Download your Information”
 - Note, in order to actually delete a facebook account you have to submit an official request. No going back.
- Twitter:
 - “Account settings” → “request your archive”
 - Twitter will send an email to confirm → “Go now” → Unzip the file.
- Instagram
 - Prior to December 2017, all “stories” disappeared after 24 hours. They can now be saved.
 - Now, go to “archived images”

Subpoenaing records:

- If party acquiesces, easy enough.
- If party does not acquiesce, 3rd party will likely object.
 - **Stored Communications Act (SCA)**, codified at 18 U.S.C. Chapter 121 §§ 2701–2712
 - Enacted as Title II of the Electronic Communications Privacy Act of 1986 (ECPA).
 - Enacted because of the advent of the internet.
 - Primarily used to prevent government from compelling information, but it also prevent a third party from using a subpoena in a civil case to get a user's stored communications or data directly from an electronic communication service (ECS) provider or remote computing service (RCS) provider.
- Facebook, in particular, likes the SCA:
 - <https://www.facebook.com/help/473784375984502>

Authentication of social media posts:

- Given the anonymous nature of social networking sites, and the relative ease in which they can be compromised or hijacked, authenticating social networking site evidence is particularly challenging.
- Kansas rules do not specifically mention electronic information, so we have to look to FRCP 901(a):
 - ***In General.*** *To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”*

Authentication of social media posts:

- Two traditional approaches:
 - Texas standard
 - Judicial discretion on authenticity based on circumstantial evidence presented. The judge is the gatekeeper and makes the final decision as to the reliability of that evidence.
 - Maryland standard – three ways to authenticate
 - 1. Deposition testimony
 - 2. Forensic investigation
 - 3. Subpoena third party
- Kansas
 - *State v. Jones*, 318 P.3d 1020 (Kan. Ct. App. 2014).
 - Mirrors the Texas rule: Admissibility of evidence is a matter which rests largely within the discretion of the trial court. Admissibility of evidence is a matter which rests largely within the discretion of the trial court