BEST PRACTICES[1]

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 HEARING[3]

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 judge[4] must review the law enforcement affidavit to determine if there is probable cause[5] sufficient to continue restricting the person's liberty[6].

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 includes.[8]:

- 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 issue summons or obtain an arrest warrant to bring the defendant before the court.

ii. **If charges are on file.** If charges have been filed[11], 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 issue summons or obtain an arrest 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 HEARING[20]

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]

[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.

[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

    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 72 hours 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.

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*, 17 S.Ct. 176, 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 do hear the appeal." *Matter of Estate of Kern*, 239 Kan. 8, 19 (1986).

In *Cessna Aircraft v. Harford*, 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 caring 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 72 hours from the probable cause hearing to charging would not be an unreasonable delay and would meet the definition of charging *forthwith*. The majority, however, believes that the more conservative approach, the one 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 then 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 (5), if the person arrested cannot provide an appearance bond, or if the crime is not bailable, the judge must commit the person to jail pending further proceedings.

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 aresstee 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 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 as is 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 is for the arraignment 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 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*, ___ Kan. ___, 451 P.3d 467, 473 (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).