RECOMMENDATIONS FROM THE PRETRIAL JUSTICE TASK FORCE

BEST PRACTICES[1]

SETTING CONDITIONS OF RELEASE

OVERARCHING PRINCIPLES

1. **All defendants are presumed innocent;**
2. **Liberty is the norm and detention should be the exception;**
3. **Judges should first consider whether nonmonetary conditions of release are sufficient before requiring a monetary bond; and**
4. **Conditions of release should be under the least restrictive conditions to assure the defendant's appearance and the protection of the public.**

A judge[2] is required to set the terms and conditions of any appearance bond.[3] The appearance bond[4] 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 safety[12] 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 that says a money bond can only be forfeited 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]

I. 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 it is at this point where the judge first sets the bond. This requires someone to 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 be avoided if the defendant faces presumptive probation or a short sentence. An appropriate monetary bond should be able to address any flight risk. To detain in such a circumstance 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]

Moreover, for a defendant to successfully claim 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.[26]

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 in an amount that results in preventative detention 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 preventative detention. Preventative detention is jailing people based on the fear of future misconduct.[27] It is no different than a determination of no bail, which is currently prohibited under our Kansas constitution unless the charge is capital murder.[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 preventative detention is prohibited by Section 9 of the Kansas Bill of Rights and must be avoided.

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. 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."[31]

Examination of what a defendant can afford is very similar to the decision whether to appoint counsel or to assesses BIDS fees.[32] 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, defenders and prosecutors to primarily calculate fines and fees owed. The Task Force believes such a tool would be useful to judges in calculating an individual's resources and an affordable bond amount.[33]

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.[34] 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.[35]

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.

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.[36] Three primary concerns are voiced in the opinions:

i. lack of evidence to support the amount of the bond on the schedule,[37]
ii. lack of an individualized determination of conditions of release,[38] 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.[39]

But one federal court has found that if the person is not held any longer than 48 hours (including weekends and holidays)[40] before an individualized bond determination is made, detention due to inability to afford the fixed bond is not unconstitutional.[41] 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.[42] This approach seems reasonable, given that warrant arrests may be associated with preset bond amount set by the judge in advance of arrest that can be posted any time before the arrestee sees the judge.

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.*[43]

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. And all the cases around the country commonly cited that have adopted these procedures either are on appeal to a circuit court or have elected to settle the cases rather than face damage claims, except for *Walker*[44] in the 11th Circuit and *Valdez-Jimenez* in the Nevada Supreme Court.[45]

So how to deal with bond schedules is a difficult decision for Kansas judges. If the judge relies on the analysis in *Walker* [46] and *Valdez-Jimenez*,[47] 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 Supreme Court pointed out in *Riverside v. McLaughlin,*[48] 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.[49] 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.[50] 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."[51]

The Ohio Supreme Court[52] is considering an amendment to its court rules to address this situation.[53] It is consistent with the process the Task Force recommends here. Texas[54] 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.[55]

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.[56] 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.[57] And North Carolina's 21st Judicial District has developed a checklist or "structured decision-making tool" to guide judges instead of pretrial risk assessment tools.[58]

The Task Force recommends that if a judge chooses to adopt a fixed 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 taking into account 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. Moreover, judges should closely follow the legal developments in this area.

f. Judges should be cautious in mandating the method of posting a monetary bond.

The Kansas Constitution provides that "[a]ll persons shall be bailable by sufficient sureties."[59] "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."[60] The statutory definition of

surety is similar to the definition provided in an 1891 edition of Black's Law Dictionary. It defined "surety" as "one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or [pledges] property as security therefor."[61] The judge has complete discretion to require a bond be posted or that the person be released without posting a bond.[62]

In some parts of the country, defendants and commercial surety bond companies--when faced with similar constitutional language--have argued that a judge may not mandate a cash bond, but must give the defendant the option of how they want to post the bond.[63] Other states and federal courts have rejected such claims.[64] While the majority of courts find that a judge can set a cash-only bond as long as it is not excessive and is justifiably related to the risk of the defendant to fail to appear, Kansas appellate courts have not ruled on this issue. Accordingly, the Task Force recommends judges read the positions taken by courts around the country and if requiring a cash-only bond that they make sure they place on the record the justification for the bond.

That said, Kansas statutes provide that cash can be posted in lieu of execution of a surety bond in the same amount as the surety bond. Unless the court finds that a surety bond is not necessary, the defendant must be allowed to post bond by surety.[65] 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 appears, 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.[66]

II. 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.[67]

1. 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;

2. A judge may place a person in the custody of a designated person or organization agreeing to supervise the person;

3. A judge may place restrictions on the travel, association, or place of abode of the person during the period of release;

4. 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;

5. A judge may place the person under a house arrest program;

6. 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."

7. 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.[68]

8. 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.[69]

9. 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."[70]

III. PRETRIAL SUPERVISION

Each judicial district has the discretion to establish, operate and coordinate release on recognizance programs and supervised release programs.[71] Currently the statute requires that these programs be administered by court services officers and other personnel of the district court.[72] Participation by defendants must be voluntary. Programs can be offered to people who are, or will be, charged with crimes.[73]

a. Release on recognizance programs.[74] 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:

1. Information about "certain basic criteria" closely related to the likelihood that the person will appear in court if released;
2. Length of residence in the local community;
3. Nature and extent of local family ties;
4. Time in the local area;
5. Stability of employment;
6. Extent of prior criminal history;
7. An objective analysis of the above information; and
8. 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.[75] These programs apply to those persons denied release on personal recognizance. Again, an interview is required to determine if the person is likely to

1. appear in court if released on some form of supervised release;
2. cooperate and benefit from supervised release; and
3. actively participate in supervised release.

The following people are not eligible for supervised release:

1. non-residents of the state of Kansas
2. persons subject to specific detainer orders of other state or federal law enforcement agencies; or
3. 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:

1. An acknowledgement 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.

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.[76] So just because the court *can* impose a wide range of pretrial conditions, does not mean it *should*.

IV. CONDITIONS OF RELEASE SHOULD BE REVIEWED REGULARLY.

The judge can review and modify the conditions of release, including money bond, at any time.[77] 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."[78] 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.[79] The setting of bond is a release decision. So, if a person is not released as intended, the case should be reviewed.

V. 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.[80] 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.[81] 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.[82] A copy of the complaint must be supplied to the county attorney and the defendant or the defendant's attorney if the defendant requests.[83]

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.[84] The warrant must be signed by the judge, contain the defendant's name or description and the crime charged. The amount[85] of any appearance bond must be stated on the warrant.[86]

A. SUMMONS. In lieu of issuing an arrest warrant, in some circumstances, the judge may issue a summons.[87] 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.[88] The judge may issue a summons:

1. If requested by the prosecuting attorney, in any case; **or**
2. In any misdemeanor.

If the person fails to appear as indicated on the summons, a warrant will issue.[89] 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.[90]

B. 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.[91] 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.[92] 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.[93] Unless the arrestee demands an earlier date, the date for appearance must be at least seven days after the notice to appear is given.[94] In order to be released on a notice to appear, the arrestee must sign it—which constitutes a promise to appear.[95] The officer keeps the original of the notice to appear, gives a copy to the arrestee, and must release the person "forthwith."[96]

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.[97] 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.[98]

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.[99]

C. TRAFFIC CITATION PROCEDURES: VIOLATION OF ANY LAW REGARDING TRAFFIC ON THE HIGHWAYS OF THIS STATE.

1. 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.[100]

2. 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.[101]

3. If the offense is a traffic infraction,[102] the officer *must* simply write a citation and not take the person before a judge.[103] 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.[104] A traffic citation is deemed a lawful complaint for purposes of initiating prosecution.[105]

4. If the person is arrested for any of the charges listed in K.S.A. § 8-2107(d)[106] and the person is not taken before a judge, the following options are available:

   a. The officer *may* simply release the person with a traffic citation.[107]

   b. 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.

   c. 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 amounts for the following charges:

Reckless Driving	*$82*
Driving while suspended, cancelled, or revoked	*82*
Failing to comply with lawful order	*57*
Registered weight violation (reg for less than 12,000)	*52*
Registered weight violation (reg for more than 12,000)	*92*
No DL or violation of restrictions	*52*
Spilling load on road	*52*
Transporting an open container.	*223*

   d. 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.[108]

   e. 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.[109]

VI. 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 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?
- And there are many more.

Although our Final Report recommends statewide data collection; it will be 2021 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.

[1] These recommendations are based solely on the majority opinion of the Pretrial Justice Task Force. We believe that adherence to the recommendations will fulfill all the court's constitutional and statutory duties. Procedures that are less conservative may also be legally supportable, but jurisdictions adopting less conservative approaches are encouraged to fully consider and document the legal justification for their procedures. This procedure applies only to actions in the district 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 Constitution 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] *State v. Ruebke*, 240 Kan. 493, 498 (1987).

[27] 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).

[28] "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.

[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).He 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, 7 L. Ed. 2d 9 (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, 103 S. Ct. 2064, 2070 76 L. Ed. 3d 221 (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] *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.

[32] *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, 545 P.2d 358, 364 (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.")

[33] The LFO (Legal Financial Obligations) Calculator, try it here:
https://finesandfeesjusticecenter.org/articles/washington-lfo-calculator-legal-financial-obligations-fines-fees/

[34] "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).

[35] 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.

[36] "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).

[37] *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.)

[38] *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.

[39] *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 bases 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://higherlogicdownload.s3-external-1.amazonaws.com/PRETRIAL/Philadelphia_Community_Bail_Fund_v._Bernard.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1582685861&Signature=lGxKCAxJCl1vQGF1rM36W6wDCjM%3D

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); *Allison v. Allen*, No. 1:2019cv01126, M.D. North Carolina, Filed November 12, 2019, https://dockets.justia.com/docket/north-

carolina/ncmdce/1:2019cv01126/84185; *Daves v. Dallas Cty., Texas*, 341 F. Supp. 3d 688 (N.D. Tex. 2018); *Booth v. Galveston Cty.*, No. 3:18-CV-00104, 2019 WL 4305457, at *1 (S.D. Tex. Sept. 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*, S.D. Tex, Filed January 21, 2019 (same issues as *ODonnell v. Harris County* but with *felony* bail practices instead of misdemeanor) https://dockets.justia.com/docket/texas/txsdce/4:2019cv00226/1623889; *Valdez-Jimenez v. Eighth Judicial Dist. Court,* No. 76417 (Supreme Court of Nevada); *In re Humphrey*, 19 Cal. App. 5th 1006, 228 Cal. Rptr. 3d 513 (Ct. App. 2018) (California Supreme Court has accepted the case).

[40] *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.

[41] 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.23d 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.3d at 1266.

[42] *Valdez-Jimenez v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 136 Nev. Adv. Op. 20, 460 P.3d 976, 985 (2020).

[43] *Martinez v. City of Dodge City*, No. 15-CV-9344-DDC-TJJ, 2016 WL 9051913, at *1 (D. Kan. Apr. 26, 2016).

[44] 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.").

[45] Harris County paid over $9 million in 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.

[46] *Walker v. City of Calhoun, GA*, 901 F.3d 1245 (11th Cir. 2018).

[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] *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56–57, 111 S. Ct. 1661, 1670, 114 L. Ed. 2d 49 (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.

[49] 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/news/2020/01/ohio-supreme-court-chief-justice-expects-general-assembly-to-adopt-high-courts-proposed-bail-reforms.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

[50] 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/

[51] 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/ibcFXmvXR1xVO1gWpFdg0M/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.

[52] 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.

[53] 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.[53]
>
> (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.

[54] 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.

[55] 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 hearing69 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.

[56] *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). 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.

[57] Independence from a fixed bond schedule was considered crucial by the Hawaii Supreme Court in *Pelekai 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.

[58] https://cjil.sog.unc.edu/files/2020/01/Project-Report-JD-21.pdf

[59] Kan. Const. Bill of Rights, § 9.

[60] K.S.A. § 22-2809a(a)(1).

[61] Black's Dictionary of Law 1142 (1891); cited in *State v. Barton*, 181 Wash. 2d 148, 155, 331 P.3d 50, 53 (2014).

[62] "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).

[63] *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.").

[64] *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.").

[65] K.S.A. § 22-2802(4), (5).

[66] K.S.A. § 22-2802(5).

[67] K.S.A. § 22-2802(1)(a)-(e).

[68] K.S.A. § 22-2802(15).

[69] K.S.A. § 22-2802(2).

[70] 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.

[71] K.S.A. § 22-2814.

[72] 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.

[73] This seems to recognize some period of detention after arrest and before charges are filed.

[74] K.S.A. § 22-2815.

[75] K.S.A. § 22-2816.

[76] 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

[77] K.S.A. § 22-2802(11).

[78] K.S.A. § 22-2802(10).

[79] 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

[80] K.S.A. § 22-2301.

[81] K.S.A. § 22-2202(h).

[82] K.S.A. § 22-2202(g).

[83] 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.

[84] K.S.A. § 22-2302(a).

[85] This seems to suggest money only.

[86] K.S.A. § 22-2304.

[87] K.S.A. § 22-2302(a).

[88] K.S.A. § 22-2202(s).

[89] K.S.A. § 22-2302(a).

[90] K.S.A. § 22-2304(b).

[91] K.S.A. § 22-2408(1), (3).

[92] K.S.A. § 22-2202(o).

[93] K.S.A. § 22-2408(1).

[94] K.S.A. § 22-2408(2).

[95] K.S.A. § 22-2408(4).

[96] K.S.A. § 22-2408(4).

[97] K.S.A. § 22-2408(5).

[98] K.S.A. § 22-2408(5).

[99] K.S.A. § 22-2408(6).

[100] K.S.A. § 8-2104(a), (d); K.S.A. § 8-2106(d).

[101] K.S.A. § 8-2104(b); K.S.A. § 8-2106 (a)(1); K.S.A. § 8-2106(e).

[102] "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).

[103] K.S.A. § 8-2104(c).

[104] K.S.A. § 8-2106(a)(2)-(8).

[105] K.S.A. § 8-2108.

[106] 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.

[107] K.S.A. § 8-2107 (a): all is discretionary.

[108] K.S.A. § 8-2107(g). See also, K.S.A. § 8-2118c.

[109] K.S.A. § 8-2107(h).