PRETRIAL JUSTICE TASK FORCE REPORT

COVER PAGE

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CREATION OF THE AD HOC PRETRIAL JUSTICE TASK FORCE

Supreme Court Charge

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

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

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

The Court specifically asked the Task Force to:

1. Examine current pretrial detention practices for criminal defendants in the Kansas district courts.

2. Examine methods, other than pretrial detention, currently used in Kansas district courts to ensure public safety and encourage the accused's appearances at court proceedings.

3. Compare effective pretrial detention practices and detention alternatives identified by other courts with those currently used in Kansas and use these comparisons to help develop a best practices model for Kansas district courts.

4. Identify any statutory impediments to implementation of any Task Force recommendation.

5. Identify any issues that may require further research, data compilation, or both, before a recommendation can be made to the Court.

6. Identify and prioritize topics that the Office of Judicial Administration can include in training trial court judges in Kansas on best practices for pretrial detention procedures, policies, and alternatives to pretrial detention.

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

Members

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

Guiding Principles

Because the Task Force believed that it was important to approach its task with an open mind and without preconceived ideas, the Task Force set forth guiding principles to govern its research, deliberations, and recommendations. These guiding principles include:

1. **Balancing the presumption of innocence versus the risk of flight and public safety.** Avoidance of unnecessary pretrial incarceration has to be done in such a way as to maintain the faith of all Kansans in their justice system.

2. **Seek out all sides of an issue, examine the issue, and confront the pros and cons with an open mind.** The varied backgrounds and experiences of Task Force members along with the input of stakeholders throughout the process ensured that all viewpoints were heard and considered by the Task Force.

3. **Encourage input from stakeholders.** This was extremely important to the Task Force because the members recognized that their daily exposure to the Kansas justice system was different from those with other experiences. The faith of *all* Kansans in

their justice system was important to the Task Force as they did their work. To foster an open discussion of the issues facing the group, the Chair reached out personally to various stakeholder groups and asked for their input throughout the process. The Chair also authorized the creation of a webpage located at https://www.kscourts.org/About-the-Courts/Court-Administration/Court-Initiatives/Pretrial-Justice-Task-Force. The webpage has links to presentations made by speakers to the Task Force as well as reports of meetings and other resources reviewed by the Task Force.

4. **Address measurable problems with measurable solutions**. Strong feelings, passions, and personal bias too often lead to well-meaning, but ineffective solutions, at best, and sometimes result in even greater problems. As a result, the Task Force wanted to limit its work to problems that are measurable and to recommend changes whose impact could also be measured in some manner. The scientific approach called "developing evidence-based practices" was considered by the Task Force to create the most reliable recommendations.

5. **Certain topics and approaches were considered taboo.** These topics were deemed as being outside the scope of the charge given the Task Force, or not helpful to the open dialogue the Task Force sought. These included:

    a. The topic of post-trial incarceration.
    b. The topic of reducing jail costs.
    c. Elimination of or the continued viability of the commercial bonding industry.
    d. Blaming groups for the problems found around the country with pretrial incarceration, including judges, prosecutors, defense attorneys, bonding agents or legislators.

Process

The Chair concluded that the first few months of the Task Force's existence would be spent: educating the Task Force members on the history of bail, bond and pretrial detention; the approaches taken by other jurisdictions to the same issues confronting this Task Force; reviewing the lessons learned by actions taken by other jurisdictions; and listening to the perceived problems and concerns of stakeholders.

In addition to the quarterly meetings in Topeka, the Task Force membership was divided into subcommittees to examine certain topics in greater depth and to report back to the Task Force as a whole. As part of the goal to make the Task Force's work "evidence-based," surveys were sent to judges, prosecutors and sheriffs regarding pretrial detention issues and statistical evidence from other jurisdictions was also obtained.

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

Following the first Task Force meeting, the Chair undertook a survey of the Chief Judges in the thirty-one judicial districts in Kansas regarding the use of bond schedules, availability of bond agents, use of pretrial detention, and alternatives to detention that were being used within their districts.

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

The March 8, 2019, Task Force meeting allowed representatives of two groups that have been heavily involved in the pretrial detention reform movement to make their case to the Task Force.[11] The afternoon was spent by the Task Force reviewing the results of the Chief Judges and jail surveys and the subcommittees making reports to the Task Force as a whole.

The June 14, 2019, Task Force meeting followed a similar format. The morning was spent listening to criminal justice reform initiatives proposed by Koch Industries[12] and how other states from around the country have approached reform.[13] Finally, the Task Force was introduced to the federal court approach to pretrial detention and monitoring.[14] The remainder of the day was devoted to reports of the subcommittees to the Task Force as a whole. At the conclusion of the meeting, the focus of the Task Force shifted from education to developing recommendations for this report. As a result, the Chair reorganized the make-up and focus of the various subcommittees for future work on recommendations.[15]

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

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

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

With several recommendations tentatively approved by the Task Force, the Chair made the first two hours of the February 7, 2020, meeting available to stakeholders to air any concerns they may have regarding the direction being taken by the group. While no stakeholders made a formal presentation, a two-hour long informal discussion between Task Force members and stakeholders in the room assisted in clarifying issues and addressing concerns. The remainder of the meeting was spent primarily on a recommendation to change the Kansas Constitution and certain Kansas statutes to allow judges to deny bond in cases not involving capital crimes. A report from this meeting was made available to stakeholders and the Chair again requested feedback on the Task Force's proposals.

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

Due to the COVID-19 pandemic, the April 4, 2020 meeting was cancelled. Realizing that the travel restrictions and social distancing requirements caused by the COVID-19 pandemic hindered the Task Force's ability to compete its report by the original deadline, the Supreme Court granted the Task Force an additional six months to finish its work in Administrative Order 2020-CM-039. The new deadline for the report was set at November 6, 2020.

During the following months, the Task Force continued work on its report and best practices guides by circulating these documents via email for review and comment.

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INTRODUCTION

It is no secret that the United States incarcerates more people per capita than any other country in the world.[17] Yet, few Americans believe that we have the most dangerous and irresponsible people living here. Nationally, almost two-thirds of local jail inmates have not been convicted of a crime.[18] The number of people held pretrial in county jails around the country has far outpaced that of the number being sentenced to prisons, with the pretrial population increasing by over 470% since 1977.[19]

In Kansas, 53% of those detained in our county jails are not serving a post-conviction sentence, nor are they being held to answer to a motion to revoke their probation. These inmates are simply awaiting disposition of a current charge against them.[20] They are commonly referred to as "pretrial detainees." For the majority, the only way they could gain their pretrial release is by posting a cash or surety bond with the court to guarantee their future appearance. In some cases, they may be released to a pretrial supervision program, but this also carries costs. If the cost of the bond or pretrial supervision exceeds the person's means, they remain in pretrial detention.

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

In a survey conducted in November 2018 by the Pew Charitable Trust, most Americans reported that they favor pretrial release, believing strongly in the presumption of innocence. Eighty percent believe that nonviolent or misdemeanor crimes do not warrant pretrial incarceration, and 58% also supported releasing people accused of violent crimes, who do not have serious criminal histories, if the release is accompanied by pretrial supervision. For low-level violent crimes, 85% supported release with an order requiring the defendant to stay away from the victim or with pretrial supervision. Finally, two-thirds of the respondents believed that crimes driven by addiction or mental illness should be met with treatment, not jail.[21]

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

across all partisan, regional, and demographic divides— wanted the criminal justice system to reduce the use of pretrial incarceration, except when it is necessary to protect public safety. Only 10% believed failure to appear for trial should be the deciding factor in whether to incarcerate someone.[22]

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

American opinions seem to be well-grounded in the research associated with pretrial detention. Pretrial incarceration not only undermines the core American principle of the presumption of innocence, but also results in significant negative socio-economic impacts.

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

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

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

> *Numerous research projects conducted over the past half century have shown that defendants who are held in pretrial detention have less favorable outcomes than those who are not detained —regardless of charge or criminal history. In these studies, the less favorable outcomes include a greater tendency to plead guilty to secure release (a significant issue in misdemeanor cases), a*

> *greater likelihood of conviction, a greater likelihood of being sentenced to terms of incarceration, and a greater likelihood of receiving longer prison terms. Data support the commonsense proposition that pretrial detention has a coercive impact on a defendant's amenability to a plea bargain offer and inhibits a defendant's ability to participate in preparation for a defense. In summarizing decades of research, the federal Bureau of Justice Assistance noted that research has demonstrated that detained defendants receive more severe sentences, are offered less attractive plea bargains and are more likely to become reentry clients because of their pretrial detention – regardless of charge or criminal history." (internal citations and quotation marks omitted)*[26]

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

In Kansas, pretrial detainees are held in county jails. Although our state prisons offer healthcare, vocational, therapeutic, and other activities geared at reducing recidivism and increasing potential productivity upon release, our county jails—with a few limited exceptions—do not. Jail population is viewed as "temporary" even though we know that some defendants end up spending their entire sentence or longer in the county jail before their case is resolved. In addition, the loss of a job, interruption in education and other negative consequences of incarceration can occur after as little as three days of incarceration.[28]

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

The Law

Methods of Arrest

There are two ways people are arrested for crimes.

> **With a warrant.** A prosecutor presents information to a judge and asks that a warrant for an individual's arrest be issued. If the judge finds that there is probable cause to believe that a crime has been committed and the person in question is the one who committed it, the judge may issue a warrant for the person to be arrested and held to answer for the charges filed by the prosecutor. The warrant includes a bond amount.

The arrestee is required to post the bond amount listed on the warrant, either by cash or through a commercial surety bond company. The person is taken before a judge, usually within 48 hours, at which time the judge could decide to reduce the bond amount or determine alternative or additional conditions of release.

Without a warrant. Often, people are arrested at or near the scene of an alleged crime. Due to the immediacy of the situation, no warrant is obtained. When a person is arrested, several options are available to law enforcement depending on the alleged crime and the law governing it. But generally, an officer may release the person at the scene by simply giving the person a date to appear in court to answer the charges, if and when they are filed. Or an officer may take the arrestee to the police station, obtain fingerprints, a photograph, and either: release the arrestee and give them a court date to appear; or, require that the defendant post a monetary bond under a fixed bond schedule that is based on the charged crime. The officer is required within 48 hours to have a judge determine whether there is probable cause to believe the person committed the crime and what the conditions of release will be. Those conditions could include a monetary bond, no contact with the victim, pretrial supervision, and a limitless number of other conditions.

Conditions of Release or Bail

The term "bail" refers to the release of the defendant and the term “bond” refers to a monetary condition of release. This report deals with both.[29] How the bail (or release) decision is made is at the heart of any discussion of pretrial release. There are several conditions imposed by judges to increase the chances that a person will return to court when ordered without committing a new offense. If a defendant violates the conditions of release, they are arrested and returned to jail to see the judge about modifying the conditions of release. Following are the most common bail requirements, which may be imposed exclusively or in combination with others.

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

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

A monetary bond. A defendant can be required to post an amount of money with the court to guarantee future appearance. This can be posted by cash or through a commercial surety company. If through a surety or bonding company, the person or their friends or family usually pay 10% of the bond amount to the

bond agent as a fee for the service. The person who pays it never gets their money back. If the defendant fails to appear, the bonding company will pay the full bond amount or surrender the defendant. If the person posts a cash bond, they get the money back at the end of the case if they appear in court as ordered. Money bonds only guarantee against the risk of the defendant failing to appear. Failure to appear is the only reason a bonding company would ever have to pay the full monetary bond amount into the court. Monetary bonds are unrelated to public safety concerns. Reliance on monetary bond has come under scrutiny in recent years as opponents argue that it creates a wealth-based system of justice. On the other hand, proponents argue that monetary conditions increase the likelihood of appearance in court.[30] In addition, they point to the added benefit of fugitive apprehension by bond agents who have an incentive to make sure the defendant makes the court date. This provides savings to law enforcement.

A personal recognizance bond. This is also tied to a monetary sum, but the defendant is allowed to simply sign a piece of paper promising to pay a certain amount if they fail to appear. No money is required up front.

Pretrial Supervision. A court can require the defendant be placed on pretrial supervision. This often involves reporting to a pretrial supervision officer who monitors the defendant's compliance with court orders— like drug and alcohol screening and mental health evaluations and related treatment recommendations. The defendant is also generally required to notify the pretrial supervision officer of their residence, employment, and any changes to either. Pretrial supervision is frequently used if it is believed the defendant is at risk of committing another crime. There are often weekly or monthly fees associated with pretrial supervision. Similar conditions of release can be imposed without pretrial supervision monitoring.

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

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

Drug and/or alcohol testing. If the offense was alcohol or drug related, judges often believe that incentivizing sobriety by drug and alcohol tests will increase the chances that a person will appear in court with no new arrests.[31]

Obtain mental health and/or alcohol or drug evaluations and comply with the recommendations. If it is clear that the offense for which the defendant is charged related to a mental health or substance abuse issue, the court may require, as a condition of release, that the defendant obtain a mental health or a substance abuse evaluation[32] and comply with the recommendations of that evaluation, such as classes or treatment.

There is an endless number of conditions a judge may place on a defendant's release.[33] They often are very similar to conditions of probation. For example, a judge may order a defendant to obtain employment or maintain current employment; refrain from violating the law and report any police contact; and pay any ordered child support, etc. The conditions must be individually tailored to the defendant and the offense.

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

Although the public surveys referenced above have indicated that Americans believe defendants should be released before trial, if a defendant is released and commits a violent crime pending trial, blame is often focused on the judge who allowed the defendant to remain free. The fact remains that most defendants appear in court as ordered[34] with no new offenses. But judges do not possess an Infinity Time Stone.[35] They cannot predict future behavior. So, when faced with 100 defendants, only 20 of whom may *either* fail to appear in court or commit a crime before their trial date, judges have a difficult time identifying which 20 to target for meaningful conditions of release. As a result, judges tend to place conditions, either monetary or nonmonetary on everyone even though there is little or no risk they will fail to appear or commit a new crime. Thus, the use of risk assessment tools—based on criminogenic algorithms—has become a popular method to aid judges in setting conditions of release. These will be discussed in more detail later in this report.

Federal Law

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

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

For context, for the majority of our history, the sole consideration when deciding bail was the risk of failure to appear in court.[36] The United States Supreme Court has consistently held that the purpose of setting conditions of release or bail is to secure the appearance of the person at trial.

> *Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.[37]*

Later Congress adopted the Bail Reform Act of 1984 (Act). The Act required courts to detain defendants charged with certain serious felonies until their trial if the Government was able to establish, by clear and convincing evidence at a hearing, that no conditions of release "will reasonably assure…the safety of any other person and the community."[38] Defendants detained under this provision challenged its constitutionality. *U.S. v. Salerno*[39] became the first case in which the United States Supreme Court examined public safety as a consideration in the bail decision.

Salerno argued that the Eighth Amendment granted him a right to bail based solely on considerations of risk of flight. The *Salerno* court rejected his claim. It found nothing in the Eighth Amendment granted a defendant a right to bail. Rather, the Court found that when bail is granted, the bond shall not be excessive "in light of the perceived evil."[40]

> *[When] the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.[41]*

The Court found that the Act was not a punitive measure, but a regulatory one. It found that preventing danger to the community was a legitimate regulatory goal.[42] As further evidence that the provision was not punitive, the Court noted that the Act requires detainees be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal."[43]

Moreover, the Court noted that the procedure applied only to a select list of extremely serious crimes and that the numerous procedural safeguards in place were the key to the Act's

constitutionality. The procedural safeguards went beyond simply demonstrating that there was probable cause to believe the charged crime was committed by the defendant. The Act required a full adversary hearing. At the hearing, the Government bears the burden of proving by clear and convincing evidence that the defendant presents an identified and articulable threat to an individual or to the community. The defendant has a right to counsel, can testify on their own behalf, and can cross-examine the Government's witnesses. At the conclusion of the hearing, the judge is required to make a written statement of reasons for the decision to detain and the defendant has the right to an immediate appeal of the detention decision.[44]

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

> *In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing.*[45]

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

Since *Salerno*, pretrial release—albeit with strict pretrial supervision—is the norm in the federal criminal justice system. The use of money bond as a condition of pretrial release is rare. It is only allowed to address a risk of nonappearance and "it should not result in the detention of a defendant solely for financial reasons."[46] Federal courts use an instrument called the Pretrial Risk Assessment Tool (PTRA) to evaluate risk. It is described as "an objective, quantifiable instrument that provides a consistent and valid method of predicting risk of failure to appear; new criminal arrest; and technical violations."[47] As with many risk assessment tools, even defendants who score in the highest risk category "have a 65% likelihood of success when released utilizing alternatives to detention."[48] In Kansas, very few defendants on federal pretrial supervision either fail to appear (1.5%) or commit new crimes (1%).[49] Of the 205 defendants released on bond in the District of Kansas in 2019, 97% were released on an unsecured bond. Of the six people released on a secured bond, only two used a commercial surety.[50]

Kansas Law

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

> *All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.*[51]

This language, or something very similar, was common in state constitutions when Kansas joined the union.[52] Yet, there are only a few Kansas Supreme Court cases interpreting it.

As to the first sentence, in *In re Schneck*,[53] the Kansas Supreme Court found that the term "capital offenses" referred to offenses punishable by death. The theory was that if a person faced death, they would be more likely to flee and forfeit bond than if they were merely facing life in prison.[54] This first sentence is also routinely interpreted as establishing a right to bail, or a right to release pending trial.

As to the second sentence, in *State v. Foy*,[55] the Supreme Court opined that:

> *Generally, no hard and fast rule can be laid down for fixing the amount of bail on a criminal charge, and each case must be governed by its own facts and circumstances. The amount of bail rests within the sound discretion of the presiding [judge]. The purpose of the statutes requiring bond from persons accused of crimes is to assure their presence at the time and place of the trial. (internal citations omitted)*[56]

This corresponded with the purpose of bail set out by the United States Supreme Court in *Stack v. Boyle*.[57] It also corresponds with the language of K.S.A. § 22-2802 at the time, which was void of any language indicating that pretrial conditions of release were to be based on victim or public safety concerns. In fact, the statute highlighted that the conditions of release needed to be geared to assuring the defendant's appearance at trial.[58]

Then, eight years after *Foy*, and a year before the U.S. Supreme Court decision in *Salerno*, the Kansas legislature amended K.S.A. § 22-2802 to allow the judge to consider public safety in setting the conditions of release.[59] **The amended statute still does not allow a judge to detain a defendant based on public safety concerns. It simply requires public safety and risk of flight be considered in establishing the *conditions of release*.** It did not set forth a list of criminal offenses in which release could be denied all together, as did the federal statute discussed in *Salerno*. It did not adopt any procedural safeguards for mandatory detention required by the court in *Salerno*. Courts have generally not been supportive of "preventative detention" for "anticipated but as yet uncommitted crimes. "[60] So Kansans still have a right to bail (or release) except in the case of capital offenses—first-degree murder being the only one at this time.

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

> *The purpose of [Article 28-Conditions of Release] is to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges or to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.*[61]

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

- the nature and circumstances of the crime charged and the weight of the evidence against the defendant,
- whether the defendant is lawfully present in the United States,
- the defendant's family ties and length of residence in the community,
- the defendant's employment and financial resources,
- the defendant's character, and mental condition,
- the defendant's record of convictions, record of appearance or failure to appear at court proceedings or of flight to avoid prosecution,
- the likelihood or propensity of the defendant to commit crimes while on release, including whether the defendant will be likely to threaten, harass or cause injury to the victim of the crime or any witness thereto, and
- whether the defendant is on probation or parole from a previous offense at the time of the alleged commission of the subsequent offense. [62]

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

RECOMMENDATIONS

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

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

General

Recommendation #1 – Education.

The Kansas Supreme Court should provide pre-trial release education to all district and municipal courts that emphasizes: 1) liberty is the norm and detention is the exception; 2) judges should first consider non-monetary forms of release; and 3) release should be under the least restrictive conditions to assure a defendant's appearance while protecting the public. It should also encourage providers of continuing legal education to offer educational opportunities to attorneys regarding pretrial release.

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

In the last ten years, research in the area of pretrial release has exploded. Computerized research has allowed data collection in the area of effective practices for minimizing failure to appear and maximizing public safety. Social science researchers have measured things such as societal impacts of incarceration, effectiveness of money bond, risk assessment tools, and racial and socio-economic bias in the system. Long held beliefs about what works and what does not in the criminal justice system have been questioned by this research. At the same time, it is undisputed that the steady increase in pretrial incarceration has resulted in unprecedented growth in our jail populations.[63]

In Kansas, it is estimated that 53% of the detainees in county jails are there solely because they are awaiting trial or sentencing.[64] Nationally the figure is about 66%, although this number includes additional holds on other charges or probation violations.[65] Many remain behind bars because they cannot afford to post a monetary bond[66] and recent federal court cases have raised serious constitutional questions about such a system.

As a result, judges and lawyers need to have access to educational programming that will update them on this new research and the reasons behind the nationwide attention that is being given to pretrial release issues. Legal education programs often simply focus on the substantive law, but the area of pretrial release raises issues of statewide policy as well. Lawyers and judges need to be up to date on these topics, which impact the practice of law, to better advise policymakers on the legal challenges.

A survey of 117 judges conducted by the Task Force indicated that judges were open to improving their pretrial process and felt additional education would be helpful.[67]

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

- "In our society, liberty is the norm and detention prior to trial…is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 754–55 (1987).

- "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U. S. 432, 453 (1895).

- "[T]he presumption of innocence, although not explicitly stated in the United States Constitution, is a basic component of our criminal justice system that is founded on the principle that a criminal accused is entitled to have his or her guilt or innocence determined solely on the basis of trial evidence and not upon "'grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *State v. Miller*, 308 Kan. 1109, 1142, 427 P.3d 907, 929 (2018).

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

Several courts around the country have found it important to remind the trial level courts of these basic principles by stressing the importance of pretrial release and recognizing the strain that monetary conditions place on individuals, particularly those of limited resources, by mandating pretrial release procedures by way of court rule.[68]

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

The Task Force believes educational opportunities would be the best approach in Kansas to remind district court judges, magistrates, prosecutors, and defense attorneys of the core constitutional principles at the heart of our criminal justice system and the allegiance of the Kansas Judicial Branch to those core principles.

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

Although there will be some costs associated with training judges, the Office of Judicial Administration (OJA) already trains judges on a wide variety of topics. Since the appointment of this Task Force, judges have received training on these topics at regional trainings and at the Fall judicial conference in 2019. We do not anticipate any additional funding necessary for

judicial education. As for legal education for attorneys, those programs are usually presented by organizations in a cost neutral manner, in that fees are charged for attorneys to attend which are set at an amount to cover the costs of the program. Accordingly, we view it as cost neutral.[69]

3. IMPLEMENTATION:

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

4. STAKEHOLDER CONCERNS:

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

> *The Kansas Supreme Court should not get into the business of prematurely issuing edicts as to what the law is and how local judges should exercise their discretion, particularly since the Kansas Supreme Court is the court of last resort and will be tasked with deciding the contours of the constitutional right to bail in Kansas if and when it reaches them as a justiciable issue.*[70]

In addition, it noted:

> *We do not disagree in principle with this recommendation. However, we don't see the need for "educational opportunities on legal issues" concerned with "pretrial detention decisions." Such cases are infrequent in Kansas and the law is settled on these issues.*[71]

After reviewing this objection, the Task Force agreed that the issue that currently requires education is that of constitutional and statutory procedure and the legal parameters of conditions of *release* rather than detention. We agree, as stated by the Kansas Bail Agents Association, that detention based on public safety concerns is only allowed in Kansas in the case of the capital offense of murder. Accordingly, the Task Force changed the recommendation to reflect training regarding "release decisions" rather than "detention" decisions.

The ACLU supports this recommendation and believes education should include encouraging judges to create a wide net of people eligible for mandatory release and presumptive pre-booking release with no conditions.[72]

The Pittsburg State University student collective[73] did not object to this recommendation but was concerned that it did not go far enough.

> *There must be a suggestion that endorses the removal of cash bailout for low level, non-violent crimes. Not just as a first consideration as mentioned in Recommendation #1 within the 2020*

Summary for Stakeholders, but outright. This practice is horribly discriminatory to lower class people as seen in obvious cases where the wealthy, who commit the same crime and can quickly pay their way out of jail, are released while the poor person may lose their home, job, and family waiting for trial because they cannot afford bail. On top of this, bail for African-American men on average is 35% higher and often is arbitrarily set. In California, a person can receive a $75 bail to a $10,000 bail for public intoxication.[74]

Recommendation #2 – Public Outreach.

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

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

A recent study by the Pew Charitable Trust found that most Americans favor release from incarceration prior to trial because of the strongly held belief in the presumption of innocence. Although 80% believe that nonviolent or misdemeanor crimes do not warrant pretrial incarceration, 58% of respondents supported releasing people accused of violent crimes who do not have serious criminal histories if the release is accompanied by pretrial supervision. For low-level violent crimes, 85% supported release with an order requiring the defendant to stay away from the victim or with pretrial supervision. Finally, two-thirds of the respondents believed that crimes driven by addiction or mental illness should be met with treatment, not jail. [75]

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

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

But judges, attorneys, and the public are equally concerned about people spending time in jail pretrial. A tragic and well publicized example is that of 17-year-old Kalief Brown who spent three years at Rikers Island Prison in New York City—two of which were in solitary confinement--for allegedly stealing a back pack—a charge that was subsequently dismissed.[76] Programs like

3DaysCount™ –a campaign founded by the Pretrial Justice Institute[77]—stress that even three days in jail is enough for people to lose their housing, lose their job, and strain family connections.[78]

Moreover, even though it seems counter-intuitive, research has shown that, particularly with low and medium risk offenders, longer periods of pretrial detention correlate with an *increased* likelihood of failure to appear for court, and an *increased* likelihood of new criminal activity pending trial *and* post disposition examined at both 12 months and 24 months.[79]

The Task Force believes that providing the public and the media with information about how and why decisions are made regarding pretrial release would instill confidence in the process. Our review of best practices in other states revealed that several states provide websites with information about the pretrial process.[80] We were particularly impressed with Kentucky's virtual tour of pretrial services which contains a section regarding the judicial decision to release with flow charts and interviews with judges.

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

First, Brave New Films has a website called The Bail Trap Game.[81] It allows the player to pick an arrestee and walk through the decisions the arrestee must make to get out of jail. Second, Detain/Release is another simulation tool that puts the reader in the position of the judge making the release decision. [82] The person is provided the results of a risk assessment. Finally, the Movement Alliance Project and MediaJustice have collaborated to launch a website called Mapping Pretrial Injustice, which allows users to try the Public Safety Assessment Simulator based on New Jersey's risk assessment tool. Again, users can experiment with various charges and historical data for a particular offender to map their movement through the pretrial system.[83]

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

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

3. IMPLEMENTATION:

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

4. STAKEHOLDER CONCERNS:

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

> *The general public does not have a good understanding of pretrial release and sentencing. An education platform should be introduced before any changes occur or at the time changes do occur.*[84]

The Kansas Bail Agents Association objected to this recommendation:

> *Kansas does not have a system of 'pretrial detention decisions.' The use of preventative detention is rare; there is no need to incorporate this concept into communications materials of the State Judiciary. When the Court's communication experts need to discuss bail in a capital case, it is an uncomplicated inquiry—point to the constitutional language and whether or not the prosecutor is requesting bail or filing a motion for remand. An area of education relevant to the public could address: 'Excessive bail shall not be required'*[85]

After reviewing this objection, the Task Force agreed that the issue that currently requires public education is the required constitutional and statutory procedure and the legal parameters of conditions of release rather than detention. We agree, as stated by the Kansas Bail Agents Association, that detention based on public safety concerns is only allowed in Kansas in the case of the capital offense of murder. Accordingly, the Task Force changed the recommendation to reflect communication regarding *release* decisions.

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

> *Due to the vagueness of Recommendation #2, it should be explained what the "issues involved in pretrial release decisions" are. If the word 'issues' means the ramifications and negative consequences of pretrial release, this should be explicitly stated in the recommendation for people to see that this is what the task force is suggesting that the OJA should be educating others on.*[86]

Recommendation #3 – Data Collection.

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

OJA should support the design of data collection, collect data, and report the data in a manner fostering an understanding of pretrial release through appropriate staffing within OJA.

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

A common hurdle encountered by most states that have embarked on studying pretrial practices is the lack of data or the inability to access existing data in an efficient manner. [87] Scientific best practices call for the collection of data to determine a baseline and to enable statistical analysis of change over time. Just as we stress the need for evidence-based practices in the area of probation and parole, we must also stress evidence-based practices for any modifications in our pretrial practices in Kansas. Without a baseline of information regarding appearance rates or re-arrest data, it is difficult to determine the effectiveness of text notifications, risk assessment tools, money bond, electronic monitoring, and any other conditions of release. Data can help tell the story of pretrial justice in Kansas and show where change may be needed.

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

> *to using data-driven strategies to divert low-level offenders with mental illness out of the criminal justice system and change approaches to pre-trial incarceration, so that low-risk offenders no longer stay in jail simply because they cannot afford a bond. These innovative strategies, which have measurably reduced jail populations in several communities, help stabilize individuals and families, better serve communities, and often save money in the process.* [88]

Of course, different states have taken different approaches. For example, Connecticut[89] passed a comprehensive data collection statute that requires data collection from several different agencies. The Virginia legislature[90] has considered a similar bill for each of the last two years but, as of this writing, has pushed it over to 2021 primarily due to the lack of resources.[91] A recent amendment has limited the bill to require a pilot program of the required data collection to get a better idea of costs and resources needed for full implementation. Massachusetts also has a data collection statute as part of its justice reinvestment policies.[92]

Some states, like Missouri, have sought the services of data collection companies, an example of which is Measures for Justice.[93] In February 2020, a report was released that looked at incarceration rates for felonies and drug possession in Missouri that revealed "notable differences between how counties across the state handle these cases."[94] Others have developed what they call Data Dashboards, integrating data across numerous criminal justice

decision points and other non-justice systems. This allows real-time data to inform decision making.[95]

We were also impressed with the work of the University of North Carolina School of Government Criminal Justice Innovation Lab and its work related to bail reform.[96] The studies it has done related to usage of a summons instead of a warrant by judges for misdemeanor offenses, incidence per county of issuance of citations in lieu of arrest on nonviolent charges, and a statistical look at the role money plays in the North Carolina criminal justice system. This program can serve as a template, among others, for data collection in Kansas.[97]

Challenges in Kansas include the fact that there are many ways to measure the various factors related to pretrial release and the effect that justice system changes may have on it. Also, data points may need to be revised or added to over time based on statistical needs. The quality of the data will depend on accurate input. Further work may be needed to refine the definition of various data points. For example, is "failure to appear" defined as one missed hearing or after a warrant is issued for a missed hearing? Decisions must also be made regarding what kinds of reports may need to be designed in the future to elicit useful information. The National Institute of Corrections has published a monograph entitled "Measuring What Matters,"[98] that provides excellent guidance on the collection of consistent and meaningful data.

We were able to determine that much of the data we have currently identified as important to measuring appearance rates and conditions of release will be available in Odyssey® and is largely available in FullCourt.™ There is, however, a cost to developing and running reports as well as performing statistical analyses and reporting information. FullCourt™ information, while incomplete, is available now provided that judicial branch staff is available to access it. Odyssey implementation is occurring over an extended period so this data will be collected gradually across the state. Track 1 (6 counties) is currently live. Track 3 (18 counties including Shawnee County) is scheduled to go-live in the second quarter of calendar year 2020, Track 2 (4 counties including Sedgwick County) in the third quarter of 2020, Track 4 (10 counties including Wyandotte County) in the fourth quarter of 2020, Track 5 (34 counties largely in the NW) in the first quarter of 2021, and Track 6 (32 counties largely in the SW) in the third quarter of 2021.[99]

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

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

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

3. IMPLEMENTATION:

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

4. STAKEHOLDER CONCERNS:

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

> *We support this recommendation to OJA and suggest it be broadened to include not only 'pretrial release' but those who are held in jail due to unposted bonds, probation violations, types of holds, or other reasons. The question of what data to collect should be left to OJA upon notice and comment opportunity to stakeholders. It would seem that establishing baseline data would be important to conduct prior to implementing any changes, else how does one measure the effectiveness of any changes?*[100]

The Kansas Bail Agents Association also expressed concern with the focus on pretrial detention. Accordingly, the Task Force changed the recommendation to reflect communication regarding release decisions. Finally, the Kansas Bail Agents Association supported data collection regarding issuing citations in lieu of arrest.[101]

The Kansas NAACP, LULAC and ACLU stakeholders stressed the importance of including data collection related to race to measure any disproportionality that may be present. The Pittsburg State University student collective agreed, suggesting that a racial impact statement be created from this data focusing on how pretrial justice reform affects people of color populations in Kansas. The Task Force agrees that data collected should include the examination of racial differences in charging, release, conviction and sentences.[102]

The ACLU supports this recommendation and believes data should be collected about the use of bond, pretrial supervision and pretrial detention for each judicial district.[103]

We have not identified any other stakeholder concerns with data collection, nor has any stakeholder expressed any concern to us. We have spoken several times with the Sheriffs in Johnson and Sedgwick counties who have a wealth of data already available and accessible regarding their jail populations. They could provide guidance to OJA and to other jails about the accessibility of desired information.

Pre-Charging

Recommendation #4 – Notice to Appear.

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

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

The Vera Institute estimates that only 4.83% of arrests made in the United States are for violent offenses.[104] Many states have increased the use of summons, citations or notices to appear in lieu of arrest for non-violent offenses or are currently considering doing so. By diverting defendants charged with nonviolent crimes from the arrest and jail process, officers and courts can spend more time dealing with the defendants charged with violent offenses.

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

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

> *Many believe that as a practical solution to some of these issues, the use of citation in lieu of full custody arrest, particularly for non-violent misdemeanors, can improve criminal justice efficiency, cutting costs and leaving officers with more time for more pressing duties. Potential reduction in jail population also serves as incentive for use of citation. Additionally, in this time of increased community scrutiny of law enforcement practices, use of citation can show law enforcement's commitment to preservation of individual rights, and interest in the well-being of the community. [105]*

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

> *Citations divert lower risk people from detention, reserving limited space and resources for more dangerous people. By providing an alternative to pretrial detention and release processes for certain defendants, citation in lieu of arrest can be considered a component of state pretrial policies.[106]*

Other groups recommending this approach include the Presidential Task Force on 21st Century Policing, who described citations as a "least harm" resolution that promotes effective crime reduction while building trust in the community,[107] and the American Bar Association in its publication "Standards for Criminal Justice-Pretrial Release." [108]

The Criminal Justice Innovation Lab at the University of North Carolina School of Government has studied the use of citations in lieu of arrest through pilot programs across North Carolina. As part of the study, a Cite or Arrest Pocket Card was created to encourage use of citations.[109] The project was funded by the Charles Koch Foundation.[110] Citation in lieu of arrest programs have been supported by both Americans for Prosperity[111] and the ACLU.[112] On a related topic, the American Bar Association Standards for Criminal Justice also encourages judges to fully utilize the authority to issue a summons in lieu of an arrest warrant. [113] Kansas judges currently have such authority for misdemeanor crimes or for any crime upon the request of the prosecuting attorney.[114]

In addition, the Task Force reached out to local stakeholders and considered current practices in Kansas across a variety of demographics. We asked both state and municipal law enforcement agencies to respond to a survey sent out by the Sheriffs' Association--at the request of the Task Force--inquiring about the frequency of use of citation in lieu of arrest for certain charges. The results led us to the conclusion that officers are using their discretion to arrest or issue a citation. The most frequent reasons noted for arrest rather than citation were repeat offenders, prior failures to appear, or lack of identification. The Task Force believes that charges such as driving on a suspended license, driving without a license, minor in possession of alcohol, possession of marijuana, possession of drug paraphernalia, theft, and all other nonperson misdemeanor offenses should be considered for citations in lieu of arrest, unless specifically excluded by statute.[115]

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

a. Amend K.S.A. § 22-2202(h):

(h) "Complaint" means a written statement under oath of the essential facts constituting a crime. ~~, except that a~~ A citation or notice to appear issued by a law enforcement officer pursuant to and in compliance with K.S.A. 8-2106, and amendments thereto, or a citation or notice to appear issued pursuant to and in compliance with K.S.A. 32-1049, and amendments thereto, or a notice to appear issued pursuant to and in compliance with K.S.A. 22-2408, and amendments thereto, or a citation issued by an agent of the division of alcoholic beverage control under the authority of K.S.A. Chapter 41, are also considered to be complaints for purposes of initiating prosecution. A complaint shall be deemed a valid complaint if it is signed by a law enforcement officer for any offense for which a citation or notice to appear may be written or by an agent of

the division of alcoholic beverage control for violations of misdemeanor offenses in K.S.A. Chapter 41.

b. Amend K.S.A. § 22-2408 (5):

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

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

The study conducted by the International Association of Chiefs of Police found that citations result in a time savings to law enforcement.[116] Accordingly, it appears this would be a cost reduction strategy.

3. IMPLEMENTATION:

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

4. STAKEHOLDER CONCERNS:

The Kansas Bail Agents Association expressed its support of this recommendation.[117]

The Kansas Association of Defense Counsel also supports this recommendation.

> *KACDL supports a statutory amendment to favor citations in lieu of arrest. However, as the majority of misdemeanors resolve through probation, KACDL believes that all misdemeanor offenses should be eligible for citation in excess of the list currently proposed. For example, misdemeanor marijuana possession in on the list, but misdemeanor paraphernalia is not. Similarly, prostitution or lewd behavior is also a misdemeanor offense that typically results in probation and does not warrant detention. Prostitution in particular would benefit from a citation-based policy to build a relationship with law enforcement that could assist in reaching human trafficking victims.*
>
> *In order to favor a citation-based policy, discretionary arrest should require a specific documented reason for detention that mirrors those factors considered by the Court in assessing detention such as flight or risk to the community. In regard to other issues such as identification, fingerprints, and DNA concerns identified by law enforcement, many municipal courts operate under citation-based systems and fingerprints, etc. are collected at the time of sentencing.*

Similarly, at the time of citation technology would enable a picture, a body cam video or car video to assist in identification matters.

The Kansas Sheriff's Association did not comment on this program but stated generally:

Bonding is a necessary tool to ensure compliance with pretrial stipulations. The suspect/family understand they could lose money or belongings if the suspect violates the bond or does not attend a court date which increases compliance. Too many NON-VIOLENT OFFENDERS are released from jail immediately after the offense has occurred and re-offend while waiting on the disposition of the first case. These same offenders are often on pre-trial release monitoring or have conditions placed on them that are disregarded.[118]

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

KSA understands the reasoning behind this proposal. Example: first time offender for simple possession of marijuana. We would like to point out that we would like the language to stay as written, (encourage and facilitate.) We do not support a mandated (shall) on this recommendation. We believe there are too many times we have a need to remove the offender from the environment they are in when we encounter them such as trespassing. We also believe this should only apply to [nonperson] misdemeanor crimes and not to person misdemeanor crimes. An example would be window peeping.[119]

Stakeholders representing minority communities, particularly LULAC, the Urban League, and NAACP, have indicated support for the increased use of citations and notices to appear. But they expressed concern that the decision to arrest or cite can result in discrimination, either based on explicit or implicit bias. They would prefer to see a mandatory citation program for nonviolent misdemeanor offenses.[120]

The ACLU supports this recommendation but believes there should be situations that mandate law enforcement release with a citation or notice to appear in lieu of arrest.[121]

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

Public safety concerns must remain the number one consideration. Persons whose identity are in question should be held until the identity is confirmed. Persons who have provided false identity or attempted to flee or resist arrest should not be eligible for an OR bond, based on a demonstration of a flight risk. Certain cases should be exempt from immediate bonding, especially an OR bond. For example, persons who are intoxicated (drugs or alcohol); persons who are making threats to victims, witnesses, or public safety; persons already on bond for similar offenses or the same victim; and domestic violence cases.[122]

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

1. Judges and law enforcement groups may be concerned that this will result in an increase in failure to appear rates.[123] But the Task Force believes that with proper implementation, these concerns could be overcome. These could be remedied with additional information gathering, such as, cell numbers and contact information at the time of arrest. They also could be alleviated in conjunction with electronic notification procedures outlined in Recommendation # 14. But the Task Force agrees that appearance rates should be monitored in conjunction with any concerted effort to increase the use of citations and notices to appear.

2. Victims have reportedly been frustrated with law enforcement when an offender is simply cited and released. The victim perceives a failure to arrest and jail as a lack of support. But even under this recommendation, the officer would still have discretion to arrest, particularly in any case involving violence or threats.

3. Law enforcement officers may feel frustrated if an offender is cited or booked and released and the offender is back out on the street before the officer is done generating a report. Officers often speak negatively of "catch and release" procedures, and this could be classified as such. This can be addressed through education. The research is clear that the longer a person remains in jail pretrial, the more likely they are to reoffend in the future. With low level offenders, arresting everyone results in increasing crime instead of reducing it. The arrest and then failure to be able to post bond results in loss of job, loss of benefits, and the many other collateral consequences already addressed in this report.

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

Recommendation #5 – Mental Health Identification.

Law enforcement agencies are encouraged to work with community mental health organizations, either live or virtually, for quick identification and referral of offenders with mental health and substance abuse issues to appropriate resources.

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

Many sheriffs around the state and country indicate that jails have become the new community mental health institutions. [124]

In recognition of the importance of determining whether calls for service are criminal behavior or simply manifestation of mental illness, many local law enforcement agencies around the state are now conducting initial screenings of those with whom they come into contact. In Kansas, Crisis Intervention Teams have been established in Johnson, Leavenworth, Douglas, Reno, Lyon, Shawnee, Ellis, and Sedgwick counties.[125] These teams of law enforcement officers are specially trained to interact with persons that exhibit mental illness. At least 13 of the cities in Johnson County have partnered with Johnson County Mental Health Center and created a mental health co-responder program. Overland Park reported that in 2013, the year following the institution of the program, mental health-related calls for service were 15 to 16 times less likely to result in an emergency room referral and four to five times less likely to result in an arrest when compared to data from the year prior to the program.[126]

The Topeka Police Department has a Behavioral Health Unit which partners with Valeo Behavioral Health Care. TPD states the unit "[r]educes recidivism and arrests by diverting individuals with a mental illness to appropriate community mental health providers."[127]

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

> *Mental health and the methamphetamine problem here [are] driving over 70% of our calls. The response to the mental health calls involves a law enforcement officer being dispatched to make sure that it's a safety issue, fire department, EMS being dispatched, and then it involves law enforcement if we have to take custody of that individual because they're a threat to themselves or others. Then we have to involve Comcare and we have to involve Via Christi. By placing a qualified EMT, law enforcement officer and a social worker from Comcare we have it all there at the same time.*[128]

In 2017, Douglas County established the Douglas County Behavioral Health Court. Its mission "is to connect defendants with community support services and reduce criminal involvement of defendants who suffer from serious mental illness and co-occurring disorders thereby enhancing public health and safety."[129]

Barton County has also been bringing community members together to discuss such a program in Barton and surrounding counties.[130] And Ellis County has established a Critical Incident Team, and all law enforcement officers in the county participated in Mental Health First-Aid training.[131]

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

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

> *[A]bout 85 percent of the people who had been incarcerated were diagnosed with mental illness and/or drug and alcohol addiction. And the problem was exacerbated by the fact that the jail was at capacity, without room for more inmates. We know that people are better off getting treatment to help them stay out of trouble than they are going into the criminal justice system. Diverting these non-violent or persistent offenders from jail and emergency rooms became our two primary goals.*[132]

First, Chief Williams made sure his officers received Crisis Intervention Training (CIT) so they can better respond to calls involving a person with mental illness. Recognizing that they did not have the resources to have mental health professionals respond on-site, he launched a small pilot program in 2012 that equipped 16 officers with tablets they could take on patrol. The tablets had Skype installed on them, and on the other end of the Skype connection was round-the-clock access to a mental health clinician employed by Burrell. By Skype, these clinicians could help de-escalate situations involving a mentally ill person in crisis.

> *At first, we didn't know how folks experiencing a mental health episode would react to being handed a tablet. Would they want to talk to the clinician on the other end, or would they throw it across the room? I'm pleased to report that the tablets were a big success. Not only did individuals want to talk to the clinicians, the clinicians were able to help us de-escalate the situation and identify whether this was a person who truly needed immediate care, whether they could be connected to outpatient treatment the next day, or whether they were not experiencing a mental health issue and could be treated like any other offender.*
>
> *All of this resulted in fewer folks being taken to the emergency room or the jail. In a study we conducted in 2017, of the people who received access to the tablets, 87 percent were diverted from inpatient psychiatric hospitalization, only 16 percent were referred to an emergency department, and none were incarcerated. That is a massive improvement over the status quo, when the default outcome was taking them to jail or the hospital.* [133]

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

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

Programs like those in Springfield began with grant funding. But as the need outstripped the grant funds available, the local behavioral health center became a Certified Community Behavioral Health Clinic (CCBHC). CCBHCs were established under the federal Excellence in Mental Health Act and "are designed to provide a comprehensive range of mental health and substance use disorder services to vulnerable individuals. In return, CCBHCs receive an enhanced Medicaid reimbursement rate based on their anticipated costs of expanding services to meet the needs of these complex populations."[134] One of the keys of certification is the availability of services 24/7. Only a limited number of states are part of the CCBHC program right now, and Kansas is not one of them.[135]

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

> *The program is expected to cost $94,664 a year, not including overtime, with each city's share based on population. Prairie Village, with roughly 23 percent of population, would pay $22,055. Leawood, with 36 percent, would pay the most at $34,452 while Westwood Hills, with less than 1 percent of total population would pay $370.*[136]

3. IMPLEMENTATION:

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

4. STAKEHOLDER CONCERNS:

We cannot identify any stakeholders in opposition to this recommendation. Funding sources, not only for partnership programs, but for the availability of treatment resources in the community is the only identifiable issue facing law enforcement and mental health stakeholders. In fact, even the American Bail Coalition (ABC) recognizes that the drug addicted and mentally ill are not bondable. Jeff Clayton, executive director of ABC agrees that diverting some detainees to drug and mental health treatment is the way to go. "People with mental health and drug issues and all these problems, nobody's going to post bond for them," says Clayton. "Does it mean that we need to keep all these people in jail? No." [137]

The Pittsburg State University student collective would like to see referrals to homeless services and homeless organizations included in this recommendation. The Task Force believed that these resources are included in referrals to "appropriate resources" already noted in the recommendation.[138] Although the Task Force was also cognizant of the fact that some communities in Kansas have been unable to fund homeless services.

Recommendation #6 – Crisis Intervention Centers.

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

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

In July 2017, the Kansas Legislature adopted the Crisis Intervention Act. The Act defined a crisis intervention center as any entity licensed by the KDADS that is open 24 hours a day, 365 days a year, equipped to serve all individuals in crisis due to mental illness, substance abuse, or a co-occurring condition, and that uses certified peer specialists.[139]

> *Any law enforcement officer who takes a person into custody pursuant to K.S.A. § 59-2953 [harm to self or others involuntary mental commitment] or 59-29b53 [involuntary commitment for substance abuse], and amendments thereto, may transport such person to a crisis intervention center if the officer is in a crisis intervention center service area. The crisis intervention center shall not refuse to accept any person for evaluation if such person is brought to the crisis intervention center by a law enforcement officer and such officer's jurisdiction is in the crisis intervention center's service area.*[140]

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

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

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

According to a 2019 Mental Health Task Force Report to the Kansas Legislature, KDADS can develop regulations within existing resources. It estimated additional licensure FTEs at $60,000 to $80,000/FTE.[141]

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

> *saved about $4 million in state hospital costs, $2 million in emergency room visits, and $75,000 in jail costs. In Sedgwick County, COMCARE anticipated saving $4 million after it opened its crisis center. However, a recent report indicates a savings of $8.1 million.*[142]

3. IMPLEMENTATION:

Kansas Department of Aging and Disability is the implementing agency.

Both the 2018 and 2019 Mental Health Task Force Reports to the Kansas Legislature recommended the adoption of regulations and licensing procedures. [143] As of the date of this report, no regulations have been adopted.

4. STAKEHOLDER CONCERNS:

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

> *There are already laws governing the involuntary housing of persons. We would question the need for 'new regulations' but for the extension of time to 72 hours to 'immediately connect,' would mean deliver the defendant to a Crisis Intervention Center without his consent.*[144]

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

> *While the goal of diverting individuals from the criminal justice system to the care and treatment system is shared by [this] organization, the funding for such services remains an ongoing issue for both crisis and pretrial related concerns for our clients. Frequently mental health facilities are understaffed such that there is a substantial wait for bed space or an appointment, even for those who truly need the care. As such the funding for such services should be considered a priority.*[145]

The Kansas Sheriff's Association supports this recommendation.[146]

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

> *We have no objection to licensing regulations, but we do have an objection to regulations that specify law enforcement actions or policy. Our objection is not so much to the concept but to the potential for abuse with a 'regulation' rather than a statute. Even the statute, in light of recent events, is troubling. For example, K.S.A. § 59-29c03 states, '(a) The fact that a person has been detained for emergency observation and treatment under this act shall not be construed to mean that such person shall have lost any civil right such person would otherwise have as a resident or citizen, any property right or legal capacity,* ***except*** *as may be specified within any court order or as otherwise limited by the provisions of this* ***act or the reasonable policies which***

the head of a crisis intervention center may, for good cause shown, find necessary to make for the orderly operations of that facility.' *There have clearly been overreaches by public health officials during the current stay-at-home orders, which one could reasonable argue do not meet the definition of powers of a public health official as described in K.S.A. § 65-129b. Our concern is there may be overreaches that result in the violation of civil rights by health officials in these facilities.*

As to actions for law enforcement our position is that K.S.A. § 59-29c05 and K.S.A. § 59-29c06 already describes procedures for law enforcement. We follow those procedures as outlined in statute.[147]

Recommendation #7 – Larned State Hospital.

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

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

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

Any time after a defendant is charged with a crime, either the defendant, defense counsel, or the prosecutor can request a determination of the defendant's competency to stand trial. An initial competency determination is made locally and usually done quickly.[148] If, based on the initial determination, the judge has reason to believe the defendant is incompetent to stand trial, the case is stayed or suspended until competency can be determined. The court then orders the defendant to the state hospital at Larned for an evaluation of competency.[149] The defendant cannot be committed for more than 90 days, but the 90 days does not start to run until the defendant is accepted at Larned.[150] Until a decision is made regarding the defendant's competency, no plea can be entered. The problem is the very long wait time to be accepted at Larned under normal circumstances. This problem has been further compounded by Larned's inability or refusal to accept new court referrals during the COVID-19 pandemic. It is reported as not unusual (during normal times) for a person to spend more time waiting to go to Larned than the entire sentence the defendant would have been given if the defendant had pled guilty, which is something they are not permitted to do until the competency evaluation is completed at Larned.

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

Defendant was arrested on August 19, 2019 and charged with aggravated assault on a law enforcement officer (felony), fleeing and eluding (felony) and DUI (misdemeanor). He only had one prior arrest, so his criminal history score was at the lowest level. At the time of his Preliminary Hearing on October 3rd, defense counsel requested a competency hearing. The local mental health center was ordered to do the evaluation. The local center completed the evaluation and forwarded its report to the court on November 4th. The court conducted a formal hearing on November 22nd, at the end of which the court declared the defendant incompetent.

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

On March 5th, almost four months later, the defendant had progressed to #63 in line to get into Larned under K.S.A. § 22-3303 for the competency restoration and treatment program. Given that timeline it is anticipated the defendant will not be accepted until September 2020[151] having been confined in the county jail, which has no resources to provide mental health treatment, over ten months since being found to be incompetent. Once accepted, Larned has 90 days to conduct the evaluation. If he is convicted of the charge, and if receives the maximum sentences, run consecutively, and receives his 20% good time credit, he will have served all of his time on October 14, 2020, at which time he will probably be in Larned having his competency evaluated. Of course, his attorney cannot plead him guilty until he has been determined competent to stand trial. The failure of the state to adequately fund Larned has resulted in the local county jail housing a defendant for over a year and potentially several months longer than he would have had to stay in jail but for the wait for the competency restoration and treatment.

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

The issue of the competency statutes was recently part of a year-long study by the Kansas Judicial Council. In December 2019, the Judicial Council Advisory Task Force on Commitment of Incompetent Defendants Under K.S.A. § 22-3303 submitted a report to the Kansas Legislature along with some recommended statutory changes.[152] Changes were meant to address the situation where a defendant is incompetent solely because of conditions that cannot be improved through psychiatric treatment in the mental health system, such as organic brain injury. A bill was introduced, SB 333, but it died on Senate General Orders. It does not appear that this report addresses the problem of wait times for evaluations at LSH.

Task Force members met by Zoom with personnel at LSH to discuss this issue. On the call were Task Force Members: Judge Jared Johnson, Tom Drees, Chief Judge Karen Arnold-Burger, and for LSH: Lesia Dipman, LSH Superintendent, Scott Brunner, Deputy Secretary of Hospitals and Facilities, Sherry Diel, Chief Legal Counsel KDADS, Chianna Hemken, SSP Administration Program Director and David Barnum, SSP Clinical Program Director. They advised us regarding their efforts to perform initial competency evaluations on-site in the local jails. They are also evaluating ways to do restoration evaluations in cases where it is appropriate on-site as well. They have contracted with Clinical Associates, P.A. to provide these services.

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

The Task Force is not aware of the cost, although it assumes it to be substantial.

3. IMPLEMENTATION:

The Kansas Legislature would need to implement this by statute.

4. STAKEHOLDER CONCERNS:

This recommendation has not been shared with stakeholders yet except Sheriffs and KDADS. We will record any concerns stated as soon as the draft report is released, and comments submitted.

Recommendation #8 – Pre-Conviction Treatment.

State funds earmarked for drug treatment and evaluation should be available for use by persons in diversion programs for drug-related offenses.[153]

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

Several professionals we spoke with indicated that as many as 80% of the defendants in the criminal justice system in Kansas are there because: 1) their crime is related to the consumption, possession or distribution of illegal drugs; 2) they were under the influence of alcohol or drugs at the time they committed their crime; or 3) they committed their crime to get money to support their addiction to alcohol or drugs. Many who are addicted to alcohol or drugs are using substance abuse to self-medicate underlying and/or undiagnosed mental illness.[154]

Kansas law allows for state-funded treatment, as an alternative to incarceration, for some individuals who are convicted of drug crimes. This is commonly referred to as SB 123 treatment, named after the senate bill creating it in 2003.[155] Codified at K.S.A. § 21-6824, the legislature created an alternative sentencing policy for first-time, non-violent drug offenders. The Kansas Supreme Court explained the goal of SB 123:

> *[T]he Kansas Sentencing Commission identified the goal of the alternative drug policy (S.B. 123) as: 'to provide community punishment and the opportunity for treatment to nonviolent offenders with drug abuse problems in order to more effectively address the revolving door of drug addicts through the state prisons, which should be reserved for serious, violent offenders.'*[156]

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

In the 2020 legislative session, HB 2708 was introduced. It would allow prosecutors' offices "to enter into agreements for supervision of people on diversion and allow[] people on diversion to participate in the certified drug treatment program."[157] We find Sedgwick County District Attorney Marc Bennett's testimony on an identical bill, HB 2292 introduced in the 2019 Session, compelling:

> *According to the Kansas Department of Corrections, in 2018, 39% of KDOC adult inmates had a serious mental illness. If even a small portion of those folks committed diversion-eligible crimes, then by expanding access to supervision of diversion, we create an opportunity at least to offer assistance without a felony conviction that has not previously existed.*
>
> *Further, according to the Kansas Department of Corrections FY 2018-2019 KDOC Budget (page 15), 21% of inmates in KDOC prisons as of July of 2018 had a term of confinement of 6 months or less. The term for 12% of inmates was 12 months or less and the term of confinement for 15.5% of inmates was less than 2 years. Meaning, 48.5 % of inmates were serving terms of confinement of less than 2 years. Add up all those serving less than 5 years and the percentage leapt to 69.8%. Those receiving terms of confinement of over 5 years made up just 29.7%.*
>
> *If we really want to stop the revolving door at Kansas prisons we need more access to community-based drug and mental health treatment programs to afford more opportunities for folks committing low level crimes to be successful probationers and parolees. These stats, coupled with the well documented issues of overcrowding and understaffing currently afflicting the prison system in Kansas, strongly suggest that it's time for a full assessment of our approach*

to criminal justice in Kansas and the manner in which we allocate resources for the same. HB 2292 can be a small, first step in this process.[158]

The Kansas Association of County and District Attorneys (one of our stakeholder groups) filed testimony in support of District Attorney Bennett's comments, praising his tireless work on HB 2292 and his "commitment to the protection of Kanas citizens and ensuring a fair and just criminal justice system in our state."[159]

While the Task Force agrees with the use of SB 123 funds to cover treatment related to diversion, we share some of the concerns expressed to the legislature from the Kansas District Judges Association, the Kansas Community Corrections Association (KCCA) and the Office of Judicial Administration regarding some of the specifics HB 2292.

First, although court services officers and community corrections officers provide similar services for those convicted of a crime, diversion programs are entirely prosecutor-approved and supervised. As such, court services officers, who are employed by the judicial branch, should not be the supervising entity. The only role the court has and should have in a prosecutor/offender diversion contract is continuing the case upon joint request to allow for compliance with the terms. These programs should be supervised through local county and district attorneys' offices or community corrections—which is another executive branch agency—and not by the court.

Second, we agree that appropriate funding is critical to supervise those offenders placed on diversion as well as assuring adequate funds for treatment and evaluation are available. In the testimony presented to the House Judiciary Task Force on HB 2292, a common theme expressed was the need for adequate funding. As Stuart Little with the KCCA (one of our stakeholder groups) warned:

Regarding the SB 123 treatment program, there are no margins or savings to cover adding more participants. Overall funding has declined from over $8.0 million to close to $6.0 million while demand and costs increase. HB 2292 is symbolic of the great success of the Senate Bill 123 treatment instead of incarceration policy set 20 years ago. The program works by treating offenders and diverting them from prison. However, that success drives the interest in expanding the program. Expansion in the number of offenders in the program only works well when it is accompanied by [expanded] funding to treat offenders and supervise them or we eventually put the program at risk. The only result is swift and expensive increases in incarceration costs.[160]

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

From Fiscal Note for HB 2292 by House Task Force on Judiciary:

The Kansas Sentencing Commission estimates enactment of HB 2292 could result in additional prison admissions and beds; however, the Commission cannot estimate an effect. Further, the Commission estimates enactment of the bill could increase the number of SB 123 drug treatment

offenders by either 25, 50, or 75 in FY 2020. The Commission's estimates are based on three different scenarios. Because of the potential increase of SB 123 drug treatment offenders, the Commission estimates additional State General Fund expenditures of either $92,840, $185,681, or $275,520 in FY 2020, depending on which scenario plays out.[161]

3. IMPLEMENTATION:

This recommendation would require legislative change; the Kansas Legislature would be responsible for implementation.

4. STAKEHOLDER CONCERNS:

The Kansas Sheriff's Association supports this recommendation.[162]

The Judicial Branch, through its testimony before the legislature, has concerns about the role of the court services officer as it relates to diversion and about funding, generally.[163]

The ACLU supports the liberal use of diversion and encourages alternatives to pretrial detention.[164]

The Release Decision

Recommendation #9 – Pretrial Release Decision Procedures.

The Supreme Court should require each judicial district to adopt pretrial procedures that provide for: (a) a timely judicial determination of probable cause and conditions of release upon warrantless arrest; (b) the opportunity for timely judicial hearing for review of conditions of release; and (c) the release of arrestees when a complaint is not "filed forthwith."

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

The Task Force has developed and recommended a set of procedures that are attached to this report as Appendix A. The research associated with each recommended practice is noted in the annotations of the appendix.

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

The Task Force has been advised, anecdotally, that persons in some Kansas judicial districts are kept in jail pending the filing of charges for longer than necessary or constitutionally allowed due to the lack of adequate staff in local prosecutor offices. Moreover, public defenders, who are already carrying what are sometimes unmanageable caseloads, cannot be available for bond review hearings when they are already trying to cover a multi-county district. There is

simply insufficient capacity. Likewise, overburdened courts may have a difficult time scheduling frequent bond review hearings due to inadequate staffing. Accordingly, we anticipate that compliance with constitutionally and statutorily mandated procedures will result in costs related to additional staffing of prosecutors, public defenders and court personnel.

3. IMPLEMENTATION:

Either the Kansas Supreme Court by adoption of a Court Order establishing the process for all judicial districts, or each judicial district by local Administrative Order based on district circumstances.

4. STAKEHOLDER CONCERNS:

Koch Industries indicated that:

> *[W]henever possible, we favor a strong presumption of pre-trial release, strict timeliness and procedural protections, and the least restrictive and onerous conditions of pretrial release. It is going to be up to states to decide whether and what role money bail plays; for now our position is that judges should be empowered to make the best decisions possible based on a number of factors such as the findings of a risk assessment, and there may be a role for money bail in that consideration. We do firmly believe that access to cash, or lack thereof, should not be the only factor in determining pre-trial release decisions.*[165]

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

> *Cost is a big concern for counties as jails drive a large portion of the budget. Breaking it down further, there are two separate issues with pre-trial holds.*
>
> 1. *Cost of jail space. Holding individuals pre-trial takes away from jail space used to hold individuals post-conviction, requiring some counties to send prisoners to other counties due to overcrowding.*
> 2. *Medical Care. Local government is responsible for the medical care of individuals that are being held. This is potentially a large expense."*[166]

The ACLU is in favor of pretrial release.

> *Cash bail is over-relied upon in the system and punishes individuals for being poor. For-profit bail, or commercial sureties can exacerbate that issue with pretrial profiteering that places low-income people and their families in untenable positions. We urge the Task Force to consider this issue in deliberations [related to all the recommendations].*[167]

Select prosecutors around the State have expressed concern about their ability to get charges on file within 72 hours of arrest. For minimally staffed offices, prosecutors are frequently in court and finding time for staff to review charges for filing sometimes takes several weeks. They would be more comfortable with a requirement that charges be filed within 72 hours of the probable cause hearing rather than within 72 hours of arrest. The

Task Force discussed the practical problems associated in those counties, but the Task Force was guided by the statutory language of K.S.A. § 22-2901. If the arrest has been made on probable cause without a warrant, the defendant must be taken without unnecessary delay before the nearest available judge and "a complaint shall be filed forthwith."[168]

Recommendation #10 – Defense Counsel

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

A. Counsel should be appointed to qualifying defendants at first appearance.

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

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

The U.S. Supreme Court's Sixth Amendment jurisprudence is clear. "A criminal defendant who is entitled to counsel but goes unrepresented at a critical stage of prosecution suffers an actual denial of counsel and is entitled to a presumption of prejudice."[169] With this standard firmly in mind, the Task Force reviewed scholarly articles, caselaw, and practices in other states to inform its recommendations regarding appointment of counsel. It found the following sources particularly compelling.

a. A blog post entitled "Guaranteeing Representation at First Court Appearances May be Better for Defendants and Cheaper for Local Governments,"[170] which was based on a scholarly article entitled "What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small-Town Courts."[171] The authors examined whether defendants who are represented by counsel at first appearance (CAFA), are more likely to be released on recognizance, are less likely to have a high bond set, and are consequently less likely to be jailed pending disposition. They concluded that they were.

> *Our results suggest two things. First, having counsel present at first appearances can change the pattern of decisions judges make. Judges may release more people with fewer conditions and impose fewer financial barriers upon those from whom they demand bail, with the cumulative result that fewer people will be detained pretrial. Second, having counsel present may ultimately save incarceration costs - often rated at*

over a hundred dollars per inmate per day - which could save counties and other local governments money.

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

> *[N]onviolent criminal suspects [the only group studied] who were provided lawyers at their bail review hearings fared substantially better than those without lawyers. Although comparable before the bail review hearing, suspects who were represented by [an attorney]:*
>
> - *were substantially more likely to be released on their own recognizance;*
> - *were more likely to have their initially set bail reduced at the hearing;*
> - *had their bails reduced by a greater amount;*
> - *were more likely to have affordable bails ($500 or under) set;*
> - *served less time in jail; and*
> - *had longer bail review hearings.*[172]

b. The Task Force also found *Rothgery v. Gillespie Cty*[173] instructive and controlling. In *Rothgery,* the United States Supreme Court recognizes a right to counsel at the initial bail hearing.

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

> *[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.*

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

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

The majority noted that "[w]e are advised without contradiction that not only the Federal Government, including the District of Columbia, but 43 States take the first step

toward appointing counsel before, at, or just after initial appearance… And even in the remaining seven States (Alabama, Colorado, Kansas, Oklahoma, South Carolina, Texas, and Virginia) the practice is not free of ambiguity."[174]

The Supreme Court refers to the Kansas law on this topic as “unclear.” The Court refers the reader to the following statement in an amicus brief filed by the National Association of Criminal Defense Lawyers.[175]

> *Kan. Stat. § 22-4503 states that once a defendant is charged with a complaint by the State, he is entitled to appointed counsel. Kan. Stat. § 22-2901 suggests that a complaint must be filed at approximately the same time as an initial appearance before a magistrate following a warrantless arrest. Combined, these statutes suggest that Kansas provides counsel to indigent defendants upon initial appearance. However,* State v. Waugh *[238 Kan. 537, 545-46 (1986)], suggests that in some instances, a defendant will appear before a magistrate for initial appearance before a complaint is filed. Erring on the side of caution, we have deemed Kansas’s law unclear.[176]*

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

> *Indigent defendants in Alabama, Kansas, Maryland, Michigan, Mississippi, New Hampshire, Oklahoma, South Carolina, Tennessee, and Texas appear alone and represent themselves at the initial bail hearing before a judicial officer. Within these ten 'No, We Don't' [provide a lawyer] states, many defendants unable to afford bail remain in jail for prolonged periods, often many weeks beyond the forty-eight-hour initial appearance, until their next court date when they finally receive in-court representation.[177]*

The Task Force shares the concerns noted by the author.

> *Simply stated, a municipality that ignores the Rothgery Court's concerns, risks liability and economic peril. Failing to provide counsel at an accused's first appearance before a judicial officer may expose a municipality to costly compensation where a defendant can establish that the delay 'cause[d him or her] to be subjected' to injury, including loss of liberty. A court's granting of declaratory or injunctive relief would increase a municipality's vulnerability against similar claims. Municipalities could gamble that the Supreme Court ultimately will rule that a 'reasonable' delay justifies appointing counsel sometime after a bail proceeding for a detained or released defendant. But the longer the municipality delays appointing counsel, particularly for an incarcerated defendant, the more financial risk the municipality will face. Additionally, a municipality invites further exposure when it appears 'indifferent' toward monitoring the timing of counsel's actual appearance.[178]*

c. Federal Public Defenders appear with the defendant at his or her first appearance. Because charges are filed by indictment, there is no requirement for a 48-hour probable cause hearing. Investigators assist in gathering necessary information for a bail review hearing that is set within three days.[179]

d. The Task Force conducted a survey of judges and magistrates in the State that hear first appearances and criminal cases. One hundred seventeen judges responded. Almost two-thirds (64%) indicated that they conduct first appearance hearings every day court is in session. Fifty-five percent of reporting judges indicated that it was their practice to discuss appointment of counsel at the initial hearing. However, 68% of the Kansas judges surveyed indicated there was no attorney present at the first appearance.[180] Requiring submission of the court-appointed attorney affidavit at the first appearance would encourage judges to appoint counsel at the earliest stage possible. Moreover, the same information could be examined when considering whether a money bond is necessary to guarantee appearance and in what amount, considering the defendant's financial situation as required by statute.[181] The Task Force would like to see some changes made to the Financial Affidavit to make it more user friendly and have it collect additional information, still related to appointment of counsel, which will further assist in an indigency determination for both counsel and bond.

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

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

   With the help of Heather Cessna, Executive Director of the Kansas State Board of Indigents' Defense Services,[182] we located one such program in Idaho. Idaho currently uses a video system to connect the defendant, public defender, court, and prosecutor. Their legal standard requires counsel **at** the first appearance. Lifesize[183] video communication software, is being used by 43 counties connecting the courtroom, public defender, and the jails. All may be connecting virtually in from various locations. This software is also designed to allow secure conversations between the defendant and his or her attorney. Documents are exchanged via scanning and distribution through email or text. This program complies with government security protocols and appearance can be accomplished through a smart phone, tablet, or computer.

Although costs vary based on each county's needs, a camera--which includes a microphone and television—was roughly $3,000. Yearly maintenance and technology support add about $650, not including the cost of a cloud subscription and then additional costs for multiple locations (beyond the basic 3). One small county was paying about $750 per hosting location. There is unlimited use between the courtroom and the jail and it can be installed with web conferencing capabilities. Because some counties are extremely rural and have no technology support, the indigent defense services agency pays to get the video technology up and working. It has been highly praised by those who use it. Anecdotally there is a belief that it has resulted in lower bonds—getting back to family and jobs—while still addressing public safety.

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

In March 2017, Maine's Legislature commissioned a study by the Sixth Amendment Center[184] regarding legal services provided by the Maine Commission on Indigent Legal Services.[185] Among other recommendations, it recommended;

> ***Finding 4****: MCILS' "lawyer of the day" system primarily serves the need to move court dockets, while resulting in a lack of continuous representation to the detriment of defendants. There is often a critical gap in representation while a substantive lawyer is identified and appointed.*[186]

Idaho is currently in the midst of class action litigation initiated on behalf of indigent defendants through the ACLU over whether the defendants are constitutionally entitled to "vertical" representation, meaning the same attorney from first appearance until the end of the defendants' cases. The ACLU alleges that failure to provide "vertical" representation results in the "constructive" denial of counsel. Since the first litigation,[187] Idaho has adopted statutory standards for defense counsel requiring vertical representation whenever "reasonably practicable."[188] But the case has returned to the Idaho Supreme Court and is in the briefing stage as of this writing.[189]

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

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

> *I will frequently have a three-courthouse day. Because of the travel involved, my secretary knows the approximate travel times for each courthouse. Because of this, she will have me scheduled in one location in the morning and a following location in the afternoon. For example, last Monday, I was scheduled to be in Norton (70 miles away) for a morning docket. Upon completing that morning's hearings, I would return to my home base of Colby (where my actual office is located) for 1:30 hearings. Assuming these hearings are short in nature, we will often times have late afternoon hearings in Goodland (where fortunately we have the benefit of being able to litigate for an additional hour due to the time zone change--Sherman and Wallace county are on Mountain time.*
>
> *As far as additional difficulties that are presented, there are jails in Colby, Goodland, Hoxie, Norton, Atwood and Oberlin. Counties without their own jail include Cheyenne, Logan, and Wallace (although Wallace can hold 1-2 inmates for a short time. When those are full, we must sometimes travel over 2.0 hours round trip to visit with a client in Scott City. Frequently, the inmates are shuffled from one county to another, based on capacity. Although I may have a client with a case in my home county (where the jail is across the street from my office) he may be housed 27 miles/36 miles or 60 miles away based on where they may have been farmed out to.*
>
> *The furthest I have traveled in a single day would be a three-hour round trip to Hays or Garden City for a docket, to turn around and once I return home, travel a 2-hour round trip to Cheyenne County for an additional docket. This is not uncommon for most of the attorneys in this area, although I do travel a bit further than most, given that I have narrowed my practice to focus mostly on criminal defense. Many of these attorneys practice in at least 2 districts, although I practice in 4 different districts, based on the judge's need.*
>
> *Although we get paid travel time, it makes scheduling nearly impossible.*
>
> *That includes all combination of clients, retained and court appointed. The court appointment lists are sparse and some counties will only have 1-2 attorneys who agree to accept court appointments. Some counties have none that live/office within that county. For example, just nearby, Cheyenne County, Decatur County, Sheridan County, Wallace County, and Logan County do not have someone within their county to take court appointments. This requires travel from, at a minimum 20-30 miles away for EVERY attorney who practices within that county. If for example, there is a CINC case, requiring 3-4 attorneys, they are traveling 30-90 miles for each hearing.*

Moreover, with the 2020 court closures related to COVID-19, courts and attorneys have become accustomed to using platforms like Zoom, Microsoft Teams, BlueJeans, and other virtual meeting software. These have included meetings between the defendant,

who is in a local jail, and the attorney. Security issues seem to have been resolved by those involved.

Investigators to assist public defenders. Adding paralegals, social workers or investigators to public defender offices has been shown to help with the collection of data from defendants regarding bond status and with connecting defendants to social services that will assist them in making court appearances and complying with pretrial conditions. A good example is the process used by the Bail Project. Although not a legal defense entity, the Bail Project[190] posts cash bonds for indigent defendants that are set at $5,000 or less. Defendants pay nothing, so they have no "skin in the game" as far as financial consequences if they fail to appear. Yet despite that, they report 97% appearance rates. The Brooklyn Community Bail Fund reports similar results.

In a visit to the Bail Project in St. Louis, Judges Karen Arnold-Burger and Wendall Wurst met with the site director, Mike Milton. He explained the process that he credits as the key behind appearance in court of their clients. The Bail Project staff (some paid, some volunteer) ask clients questions about obstacles to court return (*e.g.* transportation, unstable housing, health concerns) and design a support plan to help overcome these barriers through ongoing communication, effective court notifications, and voluntary referrals to social services and community based programs.[191]

Federal public defender offices around the country have investigators or social workers on staff. They are tasked with interviewing and assessing Public Defender clients "in order to develop a re-entry service plan or referrals to substance abuse, mental health, as well as vocational training programs. Social workers play an important role in the defense team, providing attorneys with the means to advocate for alternatives to incarceration and sentence mitigation."[192]

In Kansas, this role is taken on by an "investigator" in the Public Defender's Office. They have six investigators across the district who work for the twelve lawyers who cover district court cases, a 2:1 ratio. The investigators have a great deal of training concerning both mitigation and access points to substance abuse and mental health treatment. They develop release plans that link clients with community resources. The investigators have developed relationships with agencies in the community that can help with residence plans, job training, and treatment. The investigator collects all necessary records and conducts a pretrial interview to target client needs. They use a standardized, PDF fillable intake form that ensures they have asked all questions relevant to the release plan.[193]

This is also consistent with the theory of a holistic defense. Holistic defense is a philosophy that believes that to fully represent and assist the client, the attorney must

address a whole range of needs: drug treatment, access to mental health care, maintaining employment, preserving housing, filing immigration applications, or assisting with other issues that impact the client's life and future actions. The office consists of an interdisciplinary team that may include social workers, immigration lawyers, and housing specialists.

> *Holistic defense, then, may function as a superior information gathering mechanism, helping defense attorneys to identify mitigating features of their cases and then convey these in a convincing manner to prosecutors, judges, and juries.*[194]

Participatory Defense Program: Closely related to having an investigator, social worker, or paralegal on staff to assist public defenders is a program of community involvement— developed by community organizer Raj Jayadev— called Participatory Defense.[195] In these programs "family members and friends of defendants come together to work with public defenders on their cases. They analyze documents and create social biography packets that include photos, character letters, videos, grades, certificates, pay stubs—anything that reveals the defendant's good qualities, the support of loved ones, and ties to the community. The packets enable judges, prosecutors, probation officers, and the public to see a human being rather than merely a case number or a list of charges."[196]The program measures success in term of "time saved" instead of "time served." They keep track of how many years they have been able to get sentences reduced and whether pretrial detention changed to pretrial release.

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

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

But costs associated with this recommendation remain a concern of stakeholders. Heather Cessna, Executive Director of the Kansas State Board of Indigent Defense Services provided a rough estimate of $1 million to hire twelve new public defenders to adequately cover first appearance and bond hearings around the state. Two positions would be at-large for rural

jurisdictions, and ten would be to the various offices around the state. This was expressed clearly as a "ballpark" figure subject to change, probably upward, upon further review.

Not only are there not enough attorneys currently on staff with public defender offices around Kansas, there is concern that there is not an adequate pool of qualified hires in the state.[197] Law schools have reduced enrollment in the last several years, and current public defender wages are not competitive with the private sector. Accordingly, recruitment is difficult.

Moreover, public defender pay is significantly less than prosecutor pay throughout the state even though there are no significant differences in legal responsibilities to support such a pay differential. Overwhelmed public defenders trying to juggle multiple cases and court dates often require continuances to fully prepare, causing a delay in case processing and continued pretrial incarceration. So, although there is a cost associated with hiring enough public defenders to meet the demand, there is a greater cost in failing to have adequate staffing levels in terms of case delays and extended incarceration.[198]

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

3. IMPLEMENTATION:

Statutory change could be sought. Several states require counsel at the first appearance by statutes,[199] others by Court Rule.[200] In addition, we believe the Kansas Judicial Branch should be supportive in requesting adequate funding for public defenders and prosecutors to fulfill their constitutional duties.

4. STAKEHOLDER CONCERNS:

The Kansas Association of Defense Counsel supports this recommendation.

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

Further, early appointed counsel could address additional issues where the bond is subject to conditions, such as on a clean UA, a task which can take 30 days or more in the case of some substances or arranging mental health or substance abuse treatment. This would also facilitate access to evidence and discovery so that preliminary hearings could proceed more quickly and evidence that could be destroyed is able to be preserved by quick assistance of counsel.[201]

Koch Industries supports this recommendation:

Robust and early access to counsel can improve outcomes for defendants, the courts, and the system overall. Ideally defendants would have access to robust counsel throughout their case; but at a minimum, when conditions of pretrial release or detention are being made, when someone's liberty is at stake, we feel strongly they ought not to simply be at the mercy of the court and the prosecutor.[202]

The Kansas Sheriff's Association supports this recommendation.

The KSA agrees with this recommendation. However, in larger jurisdictions, we know there are not enough Public Defenders and they already carry a high case load which might impede this process. Just suggest reaching out to those jurisdictions, if you haven't already, and get their input. [203]

The ACLU supports this recommendation.[204]

Recommendation #11 – Pretrial Risk Assessment

The Supreme Court should initiate a pilot program of a representative cross-section of jurisdictions across the state, with some jurisdictions utilizing a scored and validated pretrial risk assessment tool, and others using a form with the same information but no algorithm-based score. The Task Force believes that the pilot program should include formation of a stakeholder's group, training, and a designated coordinator. It should include a comparison of data from the jurisdictions that use the scored tool to like-sized jurisdictions that do not use a scored pretrial risk assessment tool. At the conclusion of the pilot program, the participants should be required to make recommendations to the Supreme Court regarding state-wide adoption of a uniform, pretrial risk assessment process.

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

A national debate is currently taking place regarding the use of risk assessment tools in assisting a judge in making the release decision. The goal is to help the judge determine which 20 of the 100 defendants brought before the court after arrest are likely to fail to appear in court *or* reoffend before their trial date—thus requiring conditions placed on their release. These tools "are designed to *inform* not *replace* the exercise of judicial decision-making and discretion."[205] They usually include some combination of the following: defendant age, substance use, criminal history, including violence and failure to appear, active community supervision, pending/current charge(s), employment stability, education, housing/residential stability, family/peer relationships, and community ties. The tool assigns points to each factor and based on the final point total, the defendant is assigned to a category of low, medium, or high risk.

> *Risk factors are characteristics of a defendant, their environment, or their circumstances that are associated with increased likelihood of failure to appear and/or rearrest, whereas protective factors are characteristics that are associated with decreased likelihood of failure to appear and/or rearrest. Although protective factors are not included in many pretrial risk assessment tools, there is more and more research showing the value they add to the risk assessment process. In particular, studies show that protective factors are not just the absence of a risk factor, but rather that they reduce the likelihood of recidivism among offenders exposed to risk factors. In this way, consideration of protective factors can increase the accuracy with which we estimate the likelihood of pretrial outcomes.*
>
> *The ultimate description of a defendant's risk as low, moderate, or high in a given jurisdiction is a policy decision, not a scientific one… For instance, a defendant may receive a score that indicates a 20% likelihood of failure to appear. Stakeholders must decide what this 20% likelihood means for pretrial decision-making in that jurisdiction.*[206]

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

As a starting point, the Task Force recommends initiating a pilot program in select urban, suburban and rural jurisdictions across the state, with a focus on piloting the tool in varied locations so data on a representative cross section of the population can be collected. Participation in the pilot would be voluntary. As part of the process, we recommend each participating jurisdiction utilize the same validated tool—that is supported by evidence that the tool is free of racially disproportionate results—and gather the same measures to ensure uniform application. This will foster an evaluation to determine the tool's effectiveness and

whether its application (or impact) is equitable. Additionally, each participating jurisdiction should receive adequate training prior to the implementation of the pilot program.

The goal of the pilot program is to answer two questions: (1) Which pretrial defendants should stay in jail and which should be released to the community; and (2) if the individual is released into the community, what strategies, techniques and conditions should be put in place to mitigate individual risk?

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

1. Practices currently being used in other states, including:

    a) Delaware: requires the use of a risk assessment tool by statute but emphasizes that the risk assessment is non-binding on the court.;[207]

    b) Idaho: requires full transparency in the tool and its outcomes;[208]

    c) West Virginia: requires a risk assessment tool be completed within three days of arrest and mandates that oral and written statements made by the defendant while answering the questions asked by the tool are not admissible in court. [209]

2. The analysis from *Beyond the Algorithm*[210] indicating that disparate pretrial outcomes can be perpetuated by pretrial risk assessment tools if they are not properly validated or designed to consider the issues plaguing the justice system.

3. Dr. Alex Holsinger's recommendation that a pretrial risk assessment tool be mandated statewide. Dr. Holsinger also recommended performing an assessment on the chosen tool across varied jurisdictions in Kansas to verify whether any biases are occurring in implementation.

4. When using a tool developed outside a given jurisdiction, it is important to validate the tool locally—and across jurisdictions with different populations—to ensure it predicts well for the population served in all communities.[211]

5. Pretrial Risk Assessments (PTA) are not new. PTA have been developed and tested in different jurisdictions across the country going back to at least 1961.[212]

6. In November 2018, The Pew Charitable Trusts published results from a national survey that provided information about how the public thinks pretrial justice should work. The survey found substantial support for pretrial release for people whose likelihood of completing the pretrial period without a new arrest is as low as 70%. Risk assessment tools would generally categorize these individuals as being at moderate or high risk for re-arrest before trial.[213]

That said, the Task Force is aware of the objections being expressed by many stakeholder groups around the country about the discriminatory impact of risk assessment algorithms. On the day of our February Task Force meeting, the Pretrial Justice Institute (PJI) reversed its decade-long position in support of these assessments and instead recommended against their use in making *detention* decisions.[214] Since its release, the National Association of Pretrial Services Agencies (NAPSA), the JFA Institute, and the Center for Effective Public Policy's Advancing Pretrial Policy and Research project (funded by Arnold Ventures—which offers a pretrial assessment tool) have released statements reaffirming the use of these tools as one component of pretrial reform. [215] The Conference of State Court Administrators (COCSA) also notified its members about the change in position by PJI and stressed the importance of a large toolbox for judges:

> *COSCA will continue to monitor responses to PJI's changed position. However, at this point, our position continues to recognize that pretrial reform is multifaceted, and no one approach or solution can be expected to provide a singlehanded remedy. All potential solutions should remain on the table, including the use of evidence-based pretrial risk assessment tools, and future decisions about the best ways to achieve reform should be guided by ongoing research and data.*[216]

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

Finally, we have been made aware of a few states that take slightly different approaches that we believe are worth further examination. These states use an unstructured approach to assist a judge in making a professional judgement regarding release. The outcomes of these unstructured approaches must be evaluated not only for their accuracy in predicting appearance in court with no new arrest during the pretrial period, but also for bias.

a) Through the Criminal Justice Innovation Lab at the University of North Carolina, eight North Carolina counties decided against implementing actuarial risk assessment, opting instead for a tool that is a written decision tree for the judge. Generally, the tool creates presumptions of non-financial conditions for certain low-level offenses and requires consideration of specified factors and circumstances for others. Only if the decision maker documents the presence of those circumstances and factors can a secured bond be imposed. In all counties, the generalized bond table was repealed and replaced with a maximum bond table. But again, that table does not apply unless the decision maker goes through the process and documents reasons for imposing a secured bond. Forms

were created for this purpose. The factors specified in the tool are ones that the judge can verify immediately after arrest[217]

b) Tim Schnacke, Executive Director of the Center for Legal and Evidence-Based Practices, advised the Task Force that when trying to make an individualized determination of the release conditions necessary to reduce risk of flight or protect public safety courts are automatically involved in a sort-of risk assessment. The only question is what that assessment resembles. Statutory lists of factors to consider, like set out in K.S.A. § 22-2802(8), are simply a method of gauging the risks of a defendant failing to appear or risk of violating the law before trial on the current charge. He noted that jurisdictions can keep a fixed bond schedule but change all numbers to unsecured numbers. In other words, the bond schedule represents the OR bond that a person would need to sign for release. If the schedule is used to release rather than detain, there are probably no constitutional due process or equal protection concerns. Any charge not listed on the OR bond release schedule would have to see a judge for an individualized determination shortly after arrest.

Finally, we cannot lose sight of the fact that the majority of people involved in the criminal justice system across this country appear in court as ordered and do not commit new offenses.[218] Even at the highest risk levels established by the most frequently used pretrial risk assessments, the majority will not be arrested for any new offense while on pretrial release, let alone a violent crime.[219]

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

There will undoubtedly be some costs associated with implementation, including staff training and resources. But the Task Force recommends using a tool that is available in the public domain such as the PSA.[220] Dr. Holsinger indicated that grants might be available to help defray the costs of implementation and training associated with piloting this program, although no research has occurred regarding funding, to date.

> *"Efforts to adapt and validate a pretrial risk assessment tool for a specific jurisdiction take time and resources. And, validation efforts and ongoing monitoring of pretrial outcomes require jail and court data systems to interface, often necessitating a minimum level of shared technological infrastructure. …[T]he key to ensuring the utility of a given pretrial risk assessment tool in a given jurisdiction is to tailor risk estimates and pretrial decision-making policies to jurisdiction-specific failure rates over relatively recent timeframes."[221]*

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

3. IMPLEMENTATION:

A review of jurisdictions that have implemented pretrial risk assessment tools indicate that, in most cases, the state either amended or added a new statute. In this case, a note added to the bail statute in Kansas may be enough to start a pilot program, like Pennsylvania.[222]Alternatively, each jurisdiction chosen to participate in the pilot program could create a local court rule authorizing and mandating the tool's use.

The steps required for implementation include:

- Soliciting jurisdictions that are willing to participate in a pilot program, including both risk assessment sites and control group sites.

- Formation of a pretrial stakeholder's group to assist in overseeing the creation, implementation and results analysis.

- Choosing the tool to be used and obtaining it. We recommend that stakeholders have input into which tool is used for the pilot program.

- Arranging training for those administering the tool. The Task Force suggests each jurisdiction decide how they will administer the tool locally (*e.g.*, use dedicated court staff or ask jail staff to conduct the assessment at the time of booking). We would also suggest training for judges in use of the tool.

- Selecting a coordinator—or designating a Task Force—to conduct oversight and data collection during the piloting process.

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

4. STAKEHOLDER CONCERNS:

The Kansas Bail Agents Association (KBAA) strongly opposes the use of pretrial risk assessments. It argues that these tools do not achieve their goals and are not transparent. It provided a list of numerous organizations—including many civil rights organizations—that have criticized assessments based on computer algorithms as inherently biased.[223]

The ACLU is opposed to the use of risk assessment tools unless they are used correctly and free of bias-based outcomes.[224] It referred us to several research studies and reports and the Task Force found one, PRETRIAL RISK ASSESSMENT TOOLS: A Primer for Judges, Prosecutors, and Defense Attorneys,[225] to be particularly informative and balanced. It highlights that even a well validated risk assessment tool will not produce accurate estimates of risk for failure to appear and/or re-arrest if it is not used correctly. It also points out the need to have the infrastructure and financial resources to collect the data necessary to locally validate the tool.

One example of a consideration that is scored and strongly weighted against defendants is their prior criminal history. It is hard to dispute the theory that past behavior predicts future behavior. But a concern of many civil rights groups is the fact that in virtually every community in the United States that has compiled the information, people of color are stopped and arrested more frequently and in disproportionate numbers than white people.[226] This is not to say that a person's criminal history should not be considered. However, care must be taken in predicting future behavior on past behavior. Otherwise, the bias becomes even more entrenched in the system.

> *Given the nature of prediction, a racially unequal past will necessarily produce racially unequal outputs. To adapt a computer-science idiom, "bias in, bias out." [the equivalent of 'garbage in, garbage out'] To be more specific, if the thing that we undertake to predict—say arrest—happened more frequently to black people than to white people in the past data, then a predictive analysis will project it to happen more frequently to black people than to white people in the future. The predicted event, called the target variable, is thus the key to racial disparity in prediction.*[227]

The Kansas Coalition Against Sexual and Domestic Violence is supportive of the use of pretrial risk assessment tools in the case of domestic violence and sexual assault. It believes in the importance of an individualized assessment prior to setting the bond amount or conditions. It believes the assessment should be done by a trained court services officer who has access to prior convictions, protection orders (current and past), police reports, and who has a conversation with the victim regarding the context of the violence. Any conditions should include a no contact order for the victim. It believes the defendant should be closely monitored with the ability to take quick action to immediately revoke the conditions of release if they are violated. It supports the process set out in Chapter 7 of the Blueprint for Safety out of Praxis in Minnesota.[228]

The Kansas Sheriff's Association supports this recommendation, "but do not want that burden placed on the Sheriff's Office or jail personnel."[229]

While pretrial risk assessment tools provide an objective, standardized way of assessing the likelihood of pretrial success, they cannot predict a specific individual's future behavior. Even with the aid of a validated risk assessment, there will be low risk defendants who fail during pretrial release and high-risk defendants who succeed.[230]

As already noted, there is skepticism among some stakeholders of pretrial risk assessment tools, and some evidence that they only perpetuate injustices faced by minority groups. The Task Force is cognizant of these concerns. The Task Force believes transparency is the best way to address these and other concerns and suggests we make the tool, along with the input data, accessible to the public. We would recommend the creation of a webpage containing the tool, validation information, and data collected. The tool would be regularly and frequently evaluated for biased outcomes and only if the instrument has been shown to be bias-free and more effective than those procedures used in the control group will its use be endorsed. Another challenge that must be considered is the local legal culture governing how cases are handled in each of the 31 different judicial districts. Some districts have already embraced pretrial risk assessments and incorporated them into their pretrial practices while others have yet to begin the conversation.

Post Charging Procedures

Recommendation #12 – Timely Hearing Procedures.

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

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

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

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

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

3. IMPLEMENTATION:

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

4. STAKEHOLDER CONCERNS:

Koch Industries indicated that:

> *[W]henever possible, we favor a strong presumption of pre-trial release, strict timeliness and procedural protections, and the least restrictive and onerous conditions of pretrial release. It is going to be up to states to decide whether and what role money bail plays; for now our position is that judges should be empowered to make the best decisions possible based on a number of factors such as the findings of a risk assessment, and there may be a role for money bail in that consideration. We do firmly believe that access to cash, or lack thereof, should not be the only factor in determining pre-trial release decisions.*[231]

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

> *Cost is a big concern for counties as jails drive a large portion of the budget. Breaking it down further, there are two separate issues with pre-trial holds.*
>
> 1. *Cost of jail space. Holding individuals pre-trial takes away from jail space used to hold individuals post-conviction, requiring some counties to send prisoners to other counties due to overcrowding.*
> 2. *Medical Care. Local government is responsible for the medical care of individuals that are being held. This is potentially a large expense.*[232]

The ACLU is in favor of pretrial release.

> *Cash bail is over-relied upon in the system and punishes individuals for being poor. For-profit bail, or commercial sureties can exacerbate that issue with pretrial profiteering that places low-income people and their families in untenable positions. We urge the Task Force to consider this issue in deliberations [related to all the recommendations].*[233]

Recommendation #13 – Missed Court Appearances.

Courts are encouraged to provide an opportunity for offenders to voluntarily report after a missed court date, before service of a bench warrant, to avoid unnecessary arrest.

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

The Task Force recognizes that there are some defendants, although we believe it is a small percentage of the total, who intentionally abscond to avoid or delay consequences of criminal activity.[234] We do not know exactly what our appearance rates are in Kansas, so we cannot make reasoned decisions about how to best address them. But it was agreed by the members, at least anecdotally, that after an initial failure to appear, defendants often panic, and the fear of consequences keeps them from reporting again until arrested on a warrant.

In addition, defendants may appear at the first or second court setting but as the case drags on, it becomes more difficult to miss work, get babysitters, obtain transportation, etc. When that happens, providing a defendant an opportunity to appear without fear of re-arrest allows the case to quickly get back on track. It also allows recall of the bench warrant without taxing law enforcement and jail resources which would be involved in arresting the defendant on a non-appearance bench warrant. A block of court time could be provided on a weekly or monthly basis for this second chance docket for people to report who have missed a prior court date with no fear of arrest.

Several other courts around the country have what our Task Force called “oops” court dates. They believe it saves time in the long run. Moreover, it shows the court’s willingness to accommodate some personal problems that arise in the lives of defendants. At least one study supports the reduction in failure to appears using such an approach.[235]

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

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

3. IMPLEMENTATION:

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

4. STAKEHOLDER CONCERNS:

The Kansas Bail Agents Association objects to this recommendation:

> *Encourage the defendant to voluntarily appear-yes, delay and avoid the issuance of a warrant-no. When a person flees justice, there is a crucial time where the failure to issue an arrest warrant may allow that person to slip through the hands of the police or bail recovery agents. To remove the warrant as a necessary tool for the police and the courts and create some other process is inappropriate and allows for an easy escape by defendants who know they can use this "free pass" to get a head start. This also has the practical effect of encouraging failure to appear, particularly at times that would allow the defendant to manipulate the system [for instance when 100+ potential jurors have been called for a trial only to be dismissed upon the defendants failure to appear, then the defendant appears the following day and the trial process has to begin anew, weeks or months later, only to repeat itself ad infinitum, as there is no consequence for this failure to comply].*
>
> *Defendants should absolutely have an opportunity to informally resolve their failures to appear, and most courts are already willing to do so, depending on the situation. However, making a recommendation that the courts should or must recall warrants or render failure to appear inconsequential is an unnecessary infringement on the discretion of the Courts.*[236]

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

> *KACDL highly encourages the task force to adopt this recommendation. This would eliminate violations related to mis-calendaring, transportation issues, or employment/childcare issues which are an unnecessary use of the court's resources and jail space.*[237]

The ACLU is in support of programs that assist defendants in appearing for court. In its March 2019 report, "A New Vision for Pretrial Justice in the United States," it focuses on programs that reduce the harm associated with the pretrial process. In addition, the ACLU recommends:

- *Create a system that allows people to call or go online to reschedule their court dates. Pretrial systems should allow for as much flexibility in rescheduling without burdensome procedures as possible. This system, as with all elements of the process, should be accessible to people with disabilities and people who speak languages other than English.*
- *Reduce required court dates for people who have been arrested; allow people to use their court summons as a free pass on public transportation on court dates; allow people to waive in-person appearances through counsel for certain pretrial hearings; enable people who have been arrested to appear via phone or video for post-release court dates, particularly process related hearings in which the person may not be expected to*

speak and during which key elements of their case are not being adjudicating (for example, scheduling conferences).

- *Eliminate employment discrimination against individuals who must miss work due to required court dates.*
- *Provide compensation for individuals detained whose cases are later dismissed or end in acquittal.*
- *Provide on-site, non-mandatory childcare for people who need to attend court dates. Courts should relax any policies that disallow children, or people other than the person arrested, in courthouses and courtrooms.*[238]

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

Recommendation #14 – Text Message Reminders.

The Supreme Court should implement a text message reminder system.

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

Many state and local courts around the country have turned to court reminders to improve court appearance rates. Currently, text reminder systems are used frequently by doctors' offices, dentists, and other service providers. In medical settings, no-show rates have been reported to range from 15%-30% in general medical clinics, with some primary care offices reporting rates as high as 50%.[239] Missed appointments cause a significant financial burden on health care systems as well as negatively impact patient care.

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

Many have tried to quantify the monetary cost of failure to appear and compare it to the cost of a robust reminder system. In Multnomah County Oregon in 2006, officials noted that in cases with a hearing but no warrant, the cost is $694.94 and in cases where a warrant is issued, apprehension, booking, jail for one day, and a hearing, the cost is $1,319.78. [240] This is consistent with an estimate provided by Kansas Bail Agents Association of $1,500 per occurrence, although we are not aware of the source of the data.[241] Text reminders or robo-calls are commonly used by bonding agents as one tool to insure defendants appear in court and reduce non-appearance.[242] Douglas County reported in 2017 that failure to appear was the top charge for people booked into the county jail.[243]

In an article published by the National Center for State Courts' Pretrial Justice Center for Courts, the authors found that the four most common methods of notification included use of: a mailing, a live phone call, an automated phone call, and/or a text message. [244] The number of notifications and the success at reducing failure to appear rates vary greatly around the country. Some authors have expressed a strong preference for live telephone call reminders.[245] Nebraska conducted a pilot project using postcard reminders.[246] With the advent of text notification systems many courts have instituted such systems.[247] "In Arizona, after court administrators started a pilot program [in 2018] the text reminders for criminal court hearings helped to reduce the number of failure to appear warrants issued in Scottsdale Municipal Court by 51.9% in the first three months."[248] New York City not only redesigned their summons form but crafted a series of text messages and tested their effectiveness before[249] and after[250] the court date. They were able to reduce failure to appear by 36%.[251]

To gather some local information, Task Force member Robert Sullivan agreed to collect self-reported data from defendants arrested on failure to appear warrants in Johnson County. By April 1, 2020, he had collected the information for just over a year. He gathered information from over 5,000 arrestees. The most common reason reported, at 36%, was "forgot." Next, at 22% was "didn't know my court date." Almost 10% indicated they lacked transportation as the reason for non-appearance and 8% were incarcerated somewhere else on their court date. He estimated that almost 59% of failure to appears could have been mitigated by a text reminder.[252]

These results highlight the difference between simple non-appearance and flight risk. The number of defendants who leave their home jurisdiction is relatively small. It takes resources for a person to flee their home and support system, resources that many people do not have. Although their return is more expensive, increased use of technology and police communication make it much easier to apprehend true fugitives.[253] The fact remains that most people who fail to appear are still living locally and failed to appear for reasons other than attempting to abscond.

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

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

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

3. IMPLEMENTATION:

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

4. STAKEHOLDER CONCERNS:

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

> *Concerns regarding text reminders are related to potential communications outside of the presence of an attorney. As such, KACDL would recommend that such communication be one way only or that any responses not be available as evidence or used against the client similar to Juvenile Intake and Assessment Reports. KACDL would also suggest that the notice include an advisement to contact one's attorney with any questions regarding court.*[254]

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

> *[T]he option for calls should be added to the possibly automated text message reminder. Simply calling people to remind them of their court dates in Jefferson County, Colorado increased appearances from 79% to 92% all because the court official or representative made direct contact with the person involved (3). Texting may have the same effect, however, having someone who can reply and answer questions on a call, alternative to simply having an automated text with no ability to reply, will help remind the person that they have an appearance to maintain and allow the person to ask questions before they arrive at their first appearance to be better prepared*.[255]

The Task Force considered live telephone calls and determined that although that may be possible in some smaller judicial districts, most judicial district districts do not have the staffing resources to make live calls.

Recommendation #15 – Pretrial Supervision.

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

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

The use of pretrial supervision programs either in addition to or in lieu of bond have been growing around the country. By setting appropriate conditions of pretrial release, courts can address the risk of flight and the risk to public safety without unnecessarily incarcerating a defendant pretrial. But pretrial supervision is still a restriction of a defendant's liberty. "Pretrial conditions—especially when multiple conditions are imposed—can unnecessarily burden a defendant's ability to work, care for children, and meet financial obligations. Most pretrial interventions restrict a defendant's freedom."[256]

The question at the heart of pretrial supervision is how to determine a "Goldilocks Rule." In other words, how much is too much, not enough, and just right? Just as studies have shown that one can over supervise low risk offenders on probation and make them more likely to reoffend or violate probation, the same holds true for pretrial supervision. An oft-cited study done in 2009 found that "when required of lower-risk defendants, *i.e.*, risk levels 1 and 2, release conditions that included alternatives to detention were more likely to result in pretrial failure. These defendants were, in effect, over-supervised given their risk level."[257]

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

> *Pretrial services agencies should avoid resorting to probationary tactics because they risk setting defendants up for failure. In the probation context, supervision has been shown to increase recidivism among individuals who have an otherwise low risk of reoffending. This is in large part because 'the sheer number of [probation] requirements imposes a nearly impossible burden on many offenders.' A similar consequence can result in the pretrial context. When a defendant violates a condition of release, he or she may be subject to rearrest, detention, and prosecution for contempt of court—even though, in most cases, the conduct would be legal absent the release condition. To avoid triggering these consequences, pretrial services agencies should attempt to handle [technical] violations of conditions of release administratively and invoke revocation proceedings only when the conduct actually interfered with the court's function or presented a risk to public safety.*[258]

Just because the court *can* impose a wide range of pretrial conditions, does not mean it *should* do so. Pretrial supervision should not serve as pretrial probation. The purposes are completely different. Pretrial supervision has only two goals: get the defendant to court and put conditions

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

And some promising news has been reported regarding virtual pretrial reporting. With the increasing reliance on virtual hearings in the face of COVID-19, some jurisdictions around the country have seen significant decreases in failure to appear by using virtual check-ins for defendants on pretrial supervision.[259] Anecdotal reports by Task Force members suggest that similar results have occurred in Kansas, though no data is available at this time.

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

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

There was consensus that conditions of pretrial supervision should be a local decision based on each jurisdiction's resources with broad discretion to determine the supervising agency. However, the Task Force felt strongly that whoever the supervising agency is, it be well-trained to mitigate the risk of over-supervising people. The Task Force also recommends the use of *The Pretrial Justice Planning Guide for Courts*[260] for those courts that adopt a pretrial supervision program. It is designed specifically for judges and court managers interested in improving their jurisdiction's pretrial practices. The worksheets are designed as templates that can be modified to reflect the context in which each jurisdiction's pretrial system functions (*e.g.*, court structure, legal authority, use of money bond, existence of pretrial services). It provides a step by step process that is aimed at a wide range of challenges and stakeholders engaged in reform efforts.

Some judicial districts regularly use commercial bonds in conjunction with pretrial supervision. There is a widely-held belief within those judicial districts, albeit anecdotal, that bonds tend to be lower in judicial districts with pretrial supervision programs. The belief is that both are needed, and that commercial bonds and pretrial supervision cannot be decoupled completely due to the need to monitor the more serious offenses. Money bond addresses the risk of flight, while other conditions address public safety. [261]

Our survey of judges revealed that 67% had some sort of pretrial supervision program with 78% of them using Court Services to supervise defendants pretrial. And 69% believe that lack of access to pretrial services impacts the ability to set appropriate bond conditions.[262] A survey conducted of prosecutors confirmed that most jurisdictions have a pretrial supervision program. Most use court services officers to monitor compliance, but some use commercial house arrest program staff, the sheriff's department, or community corrections staff.[263]

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

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

3. IMPLEMENTATION:

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

4. STAKEHOLDER CONCERNS:

Koch Industries indicated that:

> *Whenever possible, we favor a strong presumption of pretrial release, strict timeliness and procedural protections, and the least restrictive and onerous conditions of pretrial release. In far too many jurisdictions we have seen 'pretrial services' which amount to monitoring and unnecessary supervision, sometimes coupled with fees and check-in requirements. This presents myriad opportunities for innocent people to fail to comply with the terms of their pretrial release, leading to problematic outcomes. Washington D.C. provides a good example of how the balance can be struck, and pretrial services that exist are focused on addressing underlying mental health and addiction issues.*[264]

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

> *The questions and recommendations the Task Force have wrestled with are not foreign to us. We too have questioned and revised how we handle pretrial offenders in particular those deemed dangerous. The people we have on pretrial supervision are not the ones we had 10-15 years ago or even a year ago. Increased drug usage, mental health issues, socio-economic issues and declining resources have changed how we work with pretrial offenders.*[265]

CCSO Mays also relayed some thoughts from her staff when they were asked about this recommendation.[266]

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

> *We do a lot of bond supervisions in the 24th. We supervise murderers, sex offenders, drug offenses, anything the judge wants to put on. If the county attorney feels like there is a safety issue, they report more than once a week or get a gps and I can track them. The only difference in probation is discretion. On probation, I have discretion in meetings, if someone comes up dirty on a drug test I have discretion in what intervention to handle it with. On bonds, we see this as the most vulnerable time for them because of the unknown, so I don't have discretion. If they miss an appointment, it's a violation. If they have a dirty drug test, it's a violation. I have even had judges revoke bond because they moved and the address on the bond order didn't match the address the offender was currently living at. If they need or want to go out of state for any reason, they have to contact their attorney to contact the judge to get an order to be allowed to do that. I can't give them permission. If the defendant wants to vary anything on the bond order from what the judge initially order in court, they will have to have it in writing from the judge before it will happen. Like over the road truck driving, living out of state, being allowed to call in for reporting. It has to be in writing before we will allow it to happen and we don't facilitate those orders, we will tell them to contact their attorney to contact the judge. This works for us.*[267]

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

> *Domestic violence cases present several unique challenges when determining bail/PTR (pre-trial release) for offenders. The first issue comes with the label of the pending charge. Too often, very serious/chronic violence is charged as a misdemeanor level "assault" or the possibility of enhanced charges due to prior convictions was not investigated/known before the bail/PTR hearing. Thus, it is vital that courts obtain full criminal histories of all offenders, but that there is also some mechanism for looking beyond the labels – both the presenting charge and any prior convictions – to get a more accurate picture of the severity/chronicity of an offender's violence, which can then be reflected in safety provisions for the victim.*
>
> *Many jurisdictions have implemented a variety of risk assessment tools to assist courts in their determinations of the danger of re-offending posed by a particular offender. There are, of course, many critiques of these various tools, their supporting algorithms and the information collected to complete them. It is important, however, that should a court choose to use a risk assessment tool in DV cases, it should be one that particularly measures the risk of DV re-offending and not just a general re-offense factor.*
>
> *With the national conversation encouraging jurisdictions to move away from money bail, courts must think creatively and expansively about various conditions that can be imposed on an offender to insure his return to court as well as the safety of the public and victim. Some states do not include the safety factor in their statutory list of what courts can consider at bail/PTR*

hearings – hopefully, Kansas does (I haven't been able to verify yet). The following is a list of the most commonly used conditions (and note, some of these should be ordered as conditions even if an offender is not released/cannot post bail):

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

For conditions that indicate ongoing violence or danger, the court must also have a process for rapid reporting and enforcement of violations of such conditions (as opposed to technical violations, like being late for a check-in). Research shows that it is the swiftness of imposed consequences that has a greater impact on offender behavior, rather than the length of any jail sentence.

The Kansas Association of Criminal Defense Lawyers (KACDL) is generally supportive, but with some limitations. It expressed its belief that pretrial supervision should not be used in addition to monetary bond, should not be overly burdensome, and should not be overused. [268]

Recommendation #16 – Expand Pretrial Supervision Providers.

The Kansas Legislature should amend K.S.A. § 22-2802(1)(e) to allow for other entities or programs, as an alternative to Court Services, to supervise defendants pretrial and provide for a waiver of the assessment of the costs of supervision.

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

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

In addition, adding a provision for waiver of the supervision fee brings the statute in line with other statutory provisions. In various provisions and case precedent, the financial obligations of the defendant must be taken into account.[269]

We were also guided by the recent Kansas Supreme Court decision in *Creecy v. Kansas Department of Revenue*.[270] In *Creecy*, K.S.A. § 8-1001(q) was found to be unconstitutional because it required payment of a fee to obtain the procedural due process a driver is entitled to before suspension of driving privileges *and did not* provide for waiver of the fee due to indigency.

A suggested amendment follows:

Amend K.S.A. § 22-2802(1)(e)

> (e) place the person under the supervision of a court services office~~r~~ or a pre-trial supervision program responsible for monitoring the person's compliance with any conditions of release ordered by the magistrate. The magistrate may order the person to pay for any costs associated with the supervision ~~provided by the court services department office~~ in an amount not to exceed $15 per week of such supervision. The magistrate may also order the person to pay for all other costs associated with the supervision and conditions for compliance in addition to the $15 per week. The defendant may petition the court for waiver of the costs of supervision if the payment of costs would result in manifest hardship for the defendant.[271]

Although this is the only amendment necessary for purposes of this recommendation, we would like to draw the legislature's attention to seemingly inconsistent provisions at K.S.A. § 22-2802(7) (prohibiting the imposition of *any administrative fee*)[272] and K.S.A. § 22-2802(15) (allowing magistrate to order the person to pay *any costs* associated with the supervision of conditions of release of the appearance bond not to exceed $15 per week of such supervision.)

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

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

3. IMPLEMENTATION:

This recommendation requires action by the Kansas Legislature.

4. STAKEHOLDER CONCERNS:

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

> *It might appear to some that this recommendation is an attempt to provide 'legal cover' to those pretrial supervision programs which are currently operating beyond the statutory pale. If there are court sanctioned programs operating in Kansas that are not in statutory compliance that information is outside of the ability of Stakeholders to fully investigate but it is well within the purview of the Task Force. The Task Force and all the Stakeholders have a duty to adhere to the current law and if the Task Force and or Stakeholders become aware of practices that violate current state statutes, they would have an ethical responsibility to report them.*[273]

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

> *KACDL supports the language which would allow for limitations to the costs of pretrial supervision. However, as noted above, additional conditions requiring access to services such as substance abuse treatment or mental health treatment will result in significant additional costs to clients. Those who cannot afford care are those most affected by waiting lists for community/grant/sliding scale beds. As such, it would be urged that where additional conditions for treatment are imposed that monetary bond not be required as that would allow additional funds be available for compliance with Court ordered conditions.*
>
> *It is also concerning that the costs for compliance of conditions can be so expensive as to render this cost ceiling meaningless. House Arrest Fees, GPS Fees, UAs fees, RBU or SCRAM fees etc., are all in excess of the $15/week contemplated by statute. For example, House Arrest in Johnson County costs a minimum fee of $140.00 which must be paid prior to starting house arrest for 10 days or less on the program. From there the costs go up to $5/day or $14/day. UAs range from $16 to $25 per sample. The amendment does not indicate that the Court can waive the costs of compliance such as UAs, House Arrest, etc., merely the $15/week.*

Recommendation #17 – Expand Eligibility for Pretrial Supervision.

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

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

In order to protect public safety, as noted in Recommendation #16, courts often turn to some form of pretrial supervision. Under the existing statute in Kansas, K.S.A. § 22-2816, pretrial supervision is not allowed if the defendant is not a resident of Kansas or is a person in need of physical or mental care or treatment, including care or treatment for any chemical dependency or intoxication. The Task Force can see no valid reason for excluding those groups—particularly, persons in need of physical or mental care or substance abuse treatment. The earlier they can be referred to necessary treatment services with compliance monitoring from the court, the better the outcome. Accordingly, we are recommending a change to the statute to eliminate the prohibition. A judge would still have complete discretion whether to release any person on pretrial supervision.

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

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

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

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

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

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

~~(a) Release on recognizance programs shall consist of initial interviews with persons who are being detained and are, or are to be, charged with crimes, to obtain (1) information about certain basic criteria closely related to the likelihood that the persons will appear in court if released, (2) an objective analysis of such information and (3) submission of such information and analysis to the court regarding those persons who are recommended to be released on their personal recognizance under K.S.A. 22-2802.~~
~~(b) Among other criteria, the following basic variables shall be determined for each person interviewed under a release on recognizance program in ascertaining the likelihood that the person will appear in court if released:~~
~~(1) Length of residence in the local community;~~
~~(2) nature and extent of local family ties;~~
~~(3) time in the local area;~~
~~(4) stability of employment; and~~
~~(5) extent of prior criminal history.~~

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

(a) ~~Supervised release programs shall consist of extensive interviews with defendants who have been denied release on personal recognizance to select those defendants who under some form of supervised release are~~ When placing a defendant in a supervised release program, the judge may consider whether the defendant is likely to appear in court when required, is likely to cooperate with and benefit from supervised release and is willing to actively participate therein.

(b) In ascertaining the likelihood that the person will appear in court if released the court should consider:
   (1) length of residence in the local community;
   (2) nature and extent of local family ties;
   (3) time in the local area;
   (4) stability of employment;
   (5) extent of prior criminal history and
   (6) any other relevant information.

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

(d) Upon the basis of ~~interviews and other~~ available information~~,~~ court service office~~r~~s or other pretrial supervision programs designated by the judge shall prepare and submit, in proper cases, recommendations to the court for supervised release of defendants and shall include suggestions for appropriate conditions for the release of the defendants. If the court orders the release of the defendant with the condition of specific participation in the supervised release program, the court services office~~r~~ or other pretrial supervision program designated by the judge shall prepare and the defendant shall sign a written agreement containing

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

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

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

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

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

The amendments noted above are "fixes" to the current statutes that were originally adopted in 1981.[274]

The Task Force would prefer to see a more comprehensive approach to pretrial supervision programs as a condition of release and was particularly impressed with the approach taken by Colorado.[275] Among other requirements, it establishes a community advisory board to be appointed by the chief judge in any judicial district establishing a pretrial services program which includes representatives from local law enforcement, the district attorney's office, the public defender's office, a citizen at large, and—although not required—a member of the bail bond industry who conducts business in that district. The board would formulate a plan, based on certain statutory criteria, to be submitted to the Chief Judge for approval. This would create stakeholder buy-in and support of any program established. It also requires the implementation of an empirically developed pretrial risk assessment tool to assesses pretrial risk. That said, there are several other states which have adopted robust pretrial release programs with varying approaches. Any comprehensive approach would benefit from reviewing alternative approaches.

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

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION

This recommendation does not create any new programs or positions.

3. IMPLEMENTATION

This recommendation requires action by the Kansas Legislature.

4. STAKEHOLDER CONCERNS:

No concerns were expressed or noted concerning this statutory change.

Recommendation #18 – Additional Funding for Pretrial Supervision.

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

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

As more and more jurisdictions around the country are moving away from money bond and toward pretrial supervision, the Task Force believes we have to examine whether we are simply replacing a cash bond system with a fee-based pretrial supervision system. Although supervision programs that include supervision fees, electronic monitoring fees, interlock devices, regular drug and alcohol screens, educational programs and evaluations have been seen as a panacea for saving counties money by releasing people from jail and back to their jobs and community, are we simply requiring pretrial defendants—people who are presumed innocent—to pay for their release in another way? Are we replacing one money-based system with another?

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

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

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

In its presentation to the Task Force, the Federal Public Defender's Office commented that federal pretrial supervision is provided at virtually no cost to the defendant. The costs are born entirely by the government including entry to inpatient and outpatient treatment programs and electronic monitoring. Although a co-pay for treatment and electronic monitoring is requested, it is rarely collected or enforced.

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

The Task Force believes that the cost of pretrial supervision programs would be less than the cost of incarceration.[276] A robust data collection system could test this hypothesis. In the 23rd, 17th and 15th judicial districts, Northwest Kansas Community Corrections (that does pretrial supervision and parole supervision in addition to Kansas Department of Corrections supervision) has been able to fund treatment, house arrest and other services through grant funding, when necessary.

3. IMPLEMENTATION:

This recommendation would be implemented either by statutory change by the Kansas Legislature or by local government units by agreement.

4. STAKEHOLDER CONCERNS:

This recommendation was brought to the Task Force's attention by stakeholders. The Kansas Bail Agents Association properly noted the hypocrisy in requiring judges to consider nonmonetary forms of release while requiring monetary conditions of pretrial supervision.[277] The Kansas Association of Defense Counsel also indicated its concern about the costs clients are expected to pay for pretrial services.[278] The ACLU also stated its objection to fees that can have a disproportionate burden on the poor.[279]

The Task Force is again moved by the cornerstone of our criminal justice system, that all people are presumed innocent until they are found guilty by a judge or jury. Requiring people to pay anything prior to conviction chips that bedrock.

Constitutional Amendment

Recommendation #19 – Explore Amendment to Constitution.

The Kansas Legislature should encourage a discussion among appropriate stakeholders regarding amendment of the Kansas Bill of Rights to allow a judge to preventatively detain a defendant who has been determined—after a full due process hearing—to be a danger to self

or others or presents such a serious risk of flight that no condition of release could adequately address either risk.

1. EXISTING RESEARCH OR BEST PRACTICES THAT SUPPORT THIS RECOMMENDATION:

We have discovered that it is not unusual for a judge (in Kansas or anywhere in the country for that matter), frustrated by the risk to public safety that a defendant may pose, to set a bond at an amount that will guarantee continued detention until trial. We believe that §9 of our Kansas Constitution Bill of Rights does not allow such detention, because it provides a right to bail (release)—either secured or unsecured.

The Kansas Bill of Rights authorizes courts to use money bond to address only the risk of flight. We know this not only because of caselaw, but also because the only time a court can forfeit a money bond is for failure to appear. In all other situations, the court revokes the bond and new conditions are put in place. There is no impact on the money posted. If someone commits a new crime while on bond, there is no impact on the money. In addition, money cannot guarantee public safety, it only allows those with the means to arrange bond to be released, and those who cannot to be detained. Dangerousness has nothing to do with a release decision based on money. In other words, bond does not increase public safety.

But we also realize that some defendants do pose a real danger to either their victim(s) or the community and there may be no condition of release that could adequately address the danger. The Task Force struggled with how to deal with this situation in Kansas.

Based on the United States Supreme Court decision in *United States v. Salerno*[280] we know that when a state constitution does not provide a right to bail and instead has language identical to the Eighth Amendment to the United States constitution, some defendants may be denied bail based on dangerousness. But the courts must vigilantly honor the right to due process. The accused has a right to a hearing where the State must prove a defendant is a danger to others.

Some states have done this by developing a "detention eligibility net"[281] in their constitution identifying certain crimes that create a presumption of detention without bail. But these have historically assumed a further limiting process requiring judges to make some additional finding that would allow detention for those listed crimes—like the United States Supreme Court required in *Salerno*. So, there is no “automatic” detention based on charge.

The Task Force was advised that some states find it difficult to change the crimes listed because it requires a constitutional amendment. As an alternative, some have attempted to avoid this by a general provision in their constitution with more detail adopted legislatively. The Task Force is unaware of any state supreme court that has definitively ruled on this issue yet.[282]There have been some successful legal challenges to crime-based constitutional

provisions particularly when they provide an absolute denial of bail based on the crime charged as opposed to a consideration or rebuttable presumption.[283]

We obtained a lot of valuable input from stakeholders on this topic. It led us to the conclusion that this is an issue that deserves much more in-depth research with varied stakeholders to find the right fit for Kansas. This topic deserves its own task force or a task force appointed by some entity other than the Judicial Branch who may have to rule on the constitutionality of any approach taken. We identify the constitutional issue in this report because the current Kansas constitutional language directs much of our discussion regarding pretrial detention in Kansas.

We share here only some of the approaches we discussed, although we do not make any recommendation. We provide this only to assist any group that examines this issue to see what ground we have plowed--to the limited extent we have plowed any.

a. Our first approach was very simple, adopt identical language to the Eighth Amendment as well as an accompanying statutory procedure guaranteeing due process. We felt that if our constitution were changed to mirror the Eighth Amendment, we would have the benefit of a wealth of case law interpreting the procedures we must follow in bonding.

   Amend Article 9 of the Kansas Bill of Rights as follows:

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

   Although we also discussed a companion statute that would set out the due process required to impose a preventative hold (no bond allowed), we quickly realized that it would need to be closely tied to the federal statute and felt uncomfortable making any specific recommendations about the form of the statute without more input.

b. Our second approach was equally as simple. Although it maintained the existing language regarding a right to bail, it specifically speaks to dangerousness. Again, any amendment would have to be accompanied by statutory provisions guaranteeing due process whenever the State requests preventative detention.

   Amend Article 9 of the Kansas Bill of Rights as follows:

   §9. All persons shall be bailable by sufficient sureties except for capital offenses <u>and for any offense where the person is found to be a danger to self or others and no conditions of release can adequately address the risk</u>, where proof is evident or

the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

c. Our final approach was the result of a review of the Ohio[284] and New Mexico constitutions. The Kansas constitution was based on Ohio's constitution, so it seemed natural to look to Ohio. We also examined the New Mexico constitution which reads the same as ours, but has two additional paragraphs that we found would work well for Kansas:

> *Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.*
>
> *A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.*[285]

The Task Force believes that the scope of this issue and the rapidly developing caselaw requires a much more in depth review with key stakeholders and legislators devoted solely to this issue.

We conclude by noting that this is a common issue being addressed in states all over the country. Since 1979, nineteen states that had constitutional provisions similar to the Kansas Constitution have changed their constitutions to allow more expansive pretrial detention for certain crimes.[286] The National Center for State Courts released a White Paper in February 2020 examining Pretrial Preventative Detention in the District of Columbia, New Jersey, New Mexico, and Arizona. It expressed caution in establishing preventative detention in state constitutions.

> *Experts express the need for caution and careful consideration of the potential consequences of expanding the authority to detain defendants pretrial. Their concerns arise from potential use of overly expansive categories of persons and classes of crimes subject to preventive detention, as well as the potential absence of rigorous due process safeguards. They fear these changes may lead to even greater numbers of people being detained under the guise of pretrial justice reform.* [287]

2. COSTS AND FUNDING ASSOCIATED WITH THIS RECOMMENDATION:

It is anticipated that there would be some costs associated with detention hearings that would be required to hold anyone without a bond for public safety reasons.

3. IMPLEMENTATION:

Kansas Legislature and the Kansas electorate.

4. STAKEHOLDER CONCERNS:

The Kansas Bail Agents Association is opposed to any change in the Kansas Constitution right to bail.

> *[W]e do not think the Kansas Supreme Court or agencies or Task Forces operating at its direction or judges of the Kansas court system should get into the business of calling for changes to the Kansas Constitution. Obviously, given what happened in New Mexico and New Jersey, we would be opposed to any constitutional changes that would infringe upon the right to bail.*[288]

The Kansas Association of Defense Counsel is opposed to this recommendation:

> *KACDL is opposed to changes that would allow the Court to hold an individual without a bond. However, should such change be adopted by the Task Force, an evidentiary hearing where in the burden to demonstrate dangerousness or risk of flight is on the prosecution should be required in order to exercise such an infringement of pretrial liberty.*
>
> *KACDL would support a definition of pretrial detention in order to facilitate consistency throughout the State.*[289]

The owner of Owens Bail Bonding, State Rep. Stephen Owens submitted a nine point objection to adoption of a constitutional amendment, objecting particularly to any recommendation that allows for preventative detention.[290]

APPROACHES CONSIDERED BUT NOT PART OF RECOMMENDATIONS

Rejected Recommendation #1 – Victim Notification

Local detention facilities and law enforcement agencies should implement victim notification systems that notify victims, whose public safety may be at risk, when offenders are released pretrial, either by jail release or release on site by law enforcement. In addition, whatever entity provides pretrial supervision should have a system in place to notify victims of any pretrial behavior that may pose a risk to the safety of the victim.

The two main purposes of pretrial detention are risk of flight and risk to public safety. Regarding public safety, victims' groups expressed their concern that if more people are released pretrial it is essential that victim notification systems are in place to protect them. The Kansas Coalition Against Sexual Assault and Domestic Violence expressed concern that victim safety be the primary consideration when the detention decision is made. Victims need to be notified of release and advised of protective measures they can take. The Attorney General's office expressed concern that if people are placed on pretrial supervision rather than detained, there must be a system in place to notify victims if an offender's behavior while on supervision has the potential to present a risk to the victim. Likewise, the Kansas Peace Officers Association and the Kansas Association of Chiefs of Police both expressed its concern for the safety of victims as it relates to the detention decision. The Kansas Bail Agents Association also expressed a concern for victim safety. It noted that a high failure to appear rate would inconvenience the victim and raise anxiety. Systems with poor accountability tend to re-victimize and increase the possibility of victim intimidation.

A review of current state statutes revealed that several statutory provisions already deal with victim notification in Kansas.

- "Victims of crime, as defined by law, shall be entitled to certain basic rights, including the right to be informed of and to be present at public hearings, as defined by law, of the criminal justice process, and to be heard at sentencing or at any other time deemed appropriate by the court…" Kan. Const. art. XV, § 15

- The Kansas Bill of Rights for Victims of Crime provides that "(7) Measures may be taken when necessary to provide for the safety of victims and their families and to protect them from intimidation and retaliation." K.S.A. § 74-7333.

Offenders in State Prison System or Juvenile System:

- For those offenders in the state prison system, state law requires that except for notifications of releases due to a court order, escape or death, victims must be notified by the secretary of corrections in writing at least 14 days before an inmate is released. K.S.A. § 22-3727.

- The county or district attorney is required under certain circumstances to provide notice to victims of the escape or death of a committed defendant while in the custody of the secretary for aging and disability services. K.S.A. § 22-3727a.

- Prior to the release of a person committed under this sexually violent predator act, the secretary of the department of aging and disability services shall give written notice of such placement or release to any victim of the person's activities or crime who is alive and whose address is known to the secretary. K.S.A. § 59-29a13.

- The county or district attorney shall give written notice to any victim at least seven days prior to the release of a juvenile offender. K.S.A. § 38-2374. *But see* K.S.A. § 38-2379 (alludes to at least 30 days' notice).

Offenders in Local Jails:

The statutory requirements are more limited when it comes to local jails. Jails have a much higher volume of intake and releases and releases occur more randomly. Jail releases happen any time of day, unlike prison releases. It creates a serious administrative challenge for local jails to keep track of the victims, their contact information, and their notification preferences for the high volume of intake and releases.

The Sheriffs Association advised the Task Force that it has been working to develop an automated system for notification of jail releases for approximately five years. It has partnered with the Kansas Department of Labor for a grant to implement such a system. Through a competitive bidding process the Appriss VINE System was selected. VINE (Victim Information and Notification Everyday) is currently in use in 48 states.

With the VINE system, the victims decide if they want notice and, if so, the victims can select multiple methods of receiving the notice (text, e-mail, phone, etc.). The victims can also decide when notices should be received (24/7, only during specific times of day, etc.). Vine also keeps the victims' notification request in the system for up to one year providing notification if the offender re-enters any jail using the VINE system. Notification is generally made within 15 minutes of the intake or release of the offender. VINE also provides assistance to the victims through a 24/7 help line if they have difficulty signing up for notices, do not have access to electronic signup, want to change notification preferences, or have other issues with the system. That support line can also refer the victims to local services as well.

The grant provided funding to place the VINE system in 80 of the 97 county jails in Kansas. (Eight counties do not have a county jail and one county jail is currently not in use. Those counties contract with neighboring counties.) Implementation of the VINE system in those 80 counties was completed at the end of 2018. In 2019 the Sheriff's Association received additional funding to implement VINE in the remaining 17 county jails. By the end of March 2020, 92 of the 97 counties had implemented the VINE system. Four additional counties are actively engaged in VINE implementation and the Stevens County jail is still deciding whether it will implement VINE.

In the VINE system, the victim is responsible for requesting the notification while law enforcement is responsible for providing them with the information on how to request it. The Office of the Attorney General Victim Services Unit is now responsible for the statewide coordination of the VINE system, through the creation of the position of VINE Coordinator

under K.S.A. § 75-711. The VINE Coordinator is required to "work with interested parties, including, but not limited to, the sheriffs throughout the state, to oversee the implementation and operation of the VINE system throughout the state."[291]

The Sheriff's Association provides information to all Kansas law enforcement agencies about providing the proper information to all crime victims for the VINE service.

Notification by Law Enforcement:

As amended in 2019, K.S.A. § 22-2307 contains requirements for law enforcement to have policies that include advising **victims of domestic violence** of how they can be alerted to a person's release from jail. This is not limited to sheriff's deputies but includes all law enforcement agencies.

> "(c) Such written [domestic violence] policies shall provide that when an arrest is made for a domestic violence offense as defined in K.S.A. § 21-5111, and amendments thereto, including an arrest for violation of a protection order as defined in K.S.A. § 21-5924, and amendments thereto**, the officer** shall provide the victim information related to:
> (A) The fact that in some cases the person arrested can be released from custody in a short amount of time;
> (B) the fact that in some cases a bond condition may be imposed on the person arrested that prohibits contact with the victim for 72 hours, and that if the person arrested contacts the victim during that time, the victim should notify law enforcement immediately; and
> (C) any available services within the jurisdiction to monitor custody changes of the person being arrested, including, but not limited to, the Kansas victim information and notification everyday service if available in such jurisdiction.
> (d) All law enforcement agencies shall provide training to law enforcement officers about the policies adopted pursuant to this section."[292]

Notification by Pretrial Supervision Program

There are currently no requirements for pretrial supervision programs to provide any notice to victims whose public safety may be at risk from the offender.

Reason for rejection:

The Task Force believed that there were sufficient notification processes in place. All the entities noted in the recommendation have some form of statutory duty to notify victims now with the exception of pretrial supervision programs. A pretrial supervision officer who believes

a victim may be at risk has the ability to quickly notify the police and allow law enforcement to handle the situation. No stakeholders raised this as a concern, nor were pretrial supervision officers aware anecdotally of any issues related to victim notification.

Rejected Recommendation #2 – Specialty Courts

The establishment of specialty courts should be incentivized by grant funding from the state.

Specialty courts, also known as problem-solving courts or therapeutic courts, can take many forms. The most common specialty courts are drug courts, DUI courts, mental health courts, veterans' courts, and domestic violence courts, although this list is not exclusive. They use "therapeutic or problem-solving procedures to address underlying factors that may be contributing to a party's involvement in the criminal justice system, i.e., mental illness or drug, alcohol, or other addiction. Procedures may include treatment, mandatory periodic testing for a prohibited drug or other substance, community supervision, and appropriate sanctions and incentives."[293] Duration and result, whether it be dismissal of the charges or diminished charges or something else, varies widely.

Specialty courts claim to reduce recidivism and therefore increase public safety. More than 80% of persons charged with a crime in the United States misuse illicit drugs or alcohol, and nearly one-half have a moderate-to-severe substance use disorder.[294] Continued substance use is associated with a two- to four-fold increase in the likelihood of criminal recidivism. Studies show that adult drug courts significantly reduce criminal recidivism[295]—typically measured by re-arrest rates over at least two years—by an average of approximately 8% to 14%.[296] "A national study of 23 adult drug courts—the Multisite Adult Drug Court Evaluation (MADCE)— examined a wide range of outcomes in addition to criminal recidivism. Not only did adult drug courts in the MADCE reduce crime, but they also significantly reduced illicit drug and alcohol use, improved participants' family relationships, reduced family conflicts, and increased participants' access to needed financial and social services."[297] Some studies have found them cost effective, producing an average return on investment of approximately $2 to $4 for every $1 invested— a 200% to 400% return on investment. This translated into net economic savings for local communities of approximately $3,000 to $22,000 per participant.[298] However, the methodology for such assessments varies across the country, with no standard method to analyze the costs.

Mental health courts were created to improve outcomes for justice involved individuals with serious mental health disorders or co-occurring substance use and mental health disorders. "Evidence is convincing that MHCs significantly reduce criminal recidivism compared to probation and other community-based dispositions for offenders with mental health disorders… [but] [c]ost-effectiveness analyses have produced mixed findings."[299] At least one study found that "treatment costs were approximately $4,000 more per

participant per year than probation or adjudication as usual, and the higher treatment costs were not recouped over a six-year follow-up period."[300]

In 2012, the Blue-Ribbon Commission presented its report to the Kansas Supreme Court recommending, among other things, that "[t]he Supreme Court and its Office of Judicial Administration should continue examining the efficacy of specialty courts, including veterans' courts."[301]

One year later, the Supreme Court established the Specialty Courts Commission to study the status of specialty courts in Kansas and to suggest procedures for judicial districts to consider when establishing a specialty court. In its December 2013 report to the court, the Commission recommended, among other things, that mandatory statewide specialty court standards be adopted and that a more broadly representative group prepare the standards. It also recommended that the court require, by rule, that specialty courts be certified periodically by the Office of Judicial Administration, that education about issues addressed by specialty courts be offered, and that judicial districts refer to the National Center for State Courts Problem Solving Justice Toolkit.[302] Finally, the Task Force recommended a statutory change to K.S.A. § 21-6610 to allow a resident defendant convicted of an offense in another Kansas county to participate in the offender's home county drug court. To date, said amendment has not been adopted.

In 2014, the Kansas Supreme Court appointed the Specialty Courts Standards Task Force to recommend mandatory statewide standards for specialty courts, identify the likely costs and benefits of the adoption of said standards, identify how the standards would likely impact the development of specialty courts in urban and rural areas, and make any other recommendations necessary.[303] In 2017, the Kansas Supreme Court adopted one of the rules recommend by the Task Force which set voluntary uniform standards for operation.[304] The new standards include a recommendation that the court establish measurable goals and objectives, use evidence-based practices, and have trained, knowledgeable judges overseeing the specialty court.[305]

That said, specialty courts cannot be sustained without interdisciplinary teams of court employees, judges, prosecutors, social workers, treatment professionals and others. Accordingly, additional resources are needed in terms of staff and the availability of treatment at no cost if necessary. Studies seem to indicate that with most specialty courts there is a consistent return on investment of 100-200% in terms of reduced recidivism and the return of the offender to be a productive member of the community. But without adequate resources the benefits of specialty courts cannot be realized.

Reason for rejection:

Judicial districts have the complete discretion to establish specialty courts in their jurisdictions now. One issue is funding. The Task Force concluded that recommending a grant funding process through the legislature would put another layer of state reporting and accountability on programs that are already accountable to the Supreme Court. Judicial districts are free to seek out grant sources for funding or request funding, if available, from the Judicial Branch or their counties if they can establish the need in their community and the anticipated outcomes.

Rejected Recommendation #3 – Transportation

Develop programs providing transportation assistance to defendants to assist in reducing the incidence of failure to appear.

Task Force members were informed by groups such as The Bail Project in St. Louis that providing public assistance vouchers or Uber rides in metropolitan areas was a substantial benefit in getting city defendants to make court appearances. Task Force members also contacted ministerial alliances in the McPherson and Manhattan areas and found that churches provided some assistance in getting people to court in those communities.

Reason rejected:

Given the limited difficulty in getting to court in most small/rural Kansas communities; given the difficulty in administering an effective ride program provided by churches or charities; and given the difficulty in funding and administering a ride program by a government agency, the Task Force concluded that there was not a demonstrated need for a state-wide transportation assistance program at this time. Some urban jurisdictions do provide limited public transportation voucher assistance, but only for post-conviction probationers or parolees. It has not been extended to pretrial services. The Task Force concluded that more data would need to be gathered regarding the prevalence of transportation being the primary reason for failure to appear before it could justify that funding or resources be provided for such a program.

Rejected Recommendation #4 – Electronic Monitoring

Require all high-risk defendants be placed on electronic monitoring.

Some courts around the country place people at high risk to fail to appear on electronic monitoring so their whereabouts are always known.

Reason rejected:

Because the research the Task Force reviewed[306] indicated use of electronic monitoring had not been shown to improve public safety or court appearance rates, was costly, carried a stigma, and was a heavy restriction on liberty, the Task Force was wary of its widespread use and was not prepared to recommend mandatory placement on house arrest. This is best left to the judge's discretion. Moreover, federal courts in Kansas have found that house arrest is a deprivation of liberty and as such it cannot be imposed as a condition of release without due process of law and a finding that less restrictive alternatives are ineffective.[307]

Rejected Recommendation #5 – Amend K.S.A. § 22-2802(10)

Amend K.S.A. § 22-2802(10) as follows:

> **(10) A person for whom conditions of release are imposed and who continues to be detained as a result of the person's inability to meet the conditions of release shall be entitled, upon application, to have the conditions reviewed without unnecessary delay by the magistrate who imposed them. If the magistrate who imposed conditions of release is not available, any other magistrate in the county may review such conditions. <u>No defendant shall be detained solely because the defendant is unable to meet the financial conditions set by the magistrate for release.</u>**

The Task Force reviewed numerous cases nationwide that have challenged pretrial detention practices under the Equal Protection Clause and the Due Process Clause of the U.S. Constitution.[308] One case typical of the others is *Pierce v. City of Velda City*.[309] It was a declaratory judgment action from the United States District Court, Eastern District of Missouri:

> *The use of a secured bail schedule to set the conditions for release of a person in custody after arrest for an offense that may be prosecuted by Velda City implicates the protections of the Equal Protection Clause when such a schedule is applied to the indigent. No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.*

In addition, the ABA Pretrial Release Standard 10-1.1(e) instructs "The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay."[310] The Federal statute regarding conditions of release contains similar language –"(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C.A. § 3142(c)(2).

The Kansas Bail Agents Association advised the Task Force during its presentation that our jails are not full of people who are only there because they cannot post bond. The Sheriffs we spoke with disputed that claim.

Reason rejected:

The Task Force concluded that a statutory amendment was not necessary for several reasons.

First, the legislative preference for release regardless of financial status is clearly set out in K.S.A. § 22-2801.

> *The purpose of this article is to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges or to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.*

Second, a judge is not required to impose a money bond at all.[311]

Third, K.S.A. § 22-2802(8) already requires a judge to consider the defendant's financial resources when determining the conditions of release.

Finally, financial inability to post bond is addressed in the Best Practices-Conditions of Release:

> *A review of these cases leads us to conclude that until either the Kansas Supreme Court or the United States Supreme Court rules on this issue, the best approach is the conservative one—begin with the assumption that bond must be affordable and when a person is a flight risk set bond at the minimum amount necessary to achieve the goal of appearance in court given all the circumstances. This position is bolstered by the language of K.S.A. § 22-2802(8) requiring the judge to take into account the defendant's financial condition in determining conditions of release*.[312]

It is anticipated that financial inability to post bond will also be a necessary part of any discussion of a constitutional amendment as outlined in Recommendation #19, above.

Rejected Recommendation #6 – Speedy Trial Clock

K.S.A. § 22-3402 should be amended to roll back the changes made in 2014 increasing the speedy trial clock from 90 to 150 days for those in custody.

Stakeholder Cal Williams, retired attorney and bond agent, made a persuasive presentation to the Task Force[313] reminding us that the ultimate responsibility for management of the trial calendar is in the trial court.[314] Accordingly, judges are the gatekeepers who can reduce pretrial detention by strictly monitoring the progression of a case. The Task Force was cognizant of this role in developing Best Practice procedures. We recommended that conditions of bond be

examined for persons being detained pretrial whenever a continuance is requested by either party. Just as judges are anxious that a person released pretrial will reoffend in a serious and violent manner, judges are also concerned that a defendant has languished in jail pretrial with no one monitoring as to the length of or reasons for it.

We believed his suggestion to examine the unintended consequences related to pretrial detention by increasing the speedy trial clock by 60% merited review. Unfortunately, because we do not have a statewide data base to mine for the information, we had no easy way to measure his hypothesis. Besides talking to judges and prosecutors, we looked at time to disposition reports before and after the legislative change and did not notice any appreciable difference. In other words, general case resolution was not taking longer. But that did not answer the question regarding whether defendants were remaining incarcerated longer.

The Task Force believes this question merits further review once we have data collection systems in place to accurately measure the impact of the 2014 legislation. In the meantime, we believe we have focused on the judge's role in moving cases quickly through the system to avoid long periods of pretrial incarceration in our Best Practices recommendations.[315]

APPROACHES CONSIDERED BUT NEVER RESULTED IN A FIRM RECOMMENDATION TO CONSIDER

Diversion or Deflection Programs - Diversion is defined by Kansas statute as "referral of a defendant in a criminal case to a supervised performance program prior to adjudication."[316] This referral occurs post-charging, but pre-adjudication. If the diversion program is successful, the prosecutor generally agrees—by contract-- to dismiss the charges against the defendant with prejudice. It is a means to avoid a judgment of criminal guilt.[317] State statute requires prosecutors to notify defendants of the availability of diversion in writing, along with policies and guidelines for its use.[318]

Deflection programs, on the other hand, reroute individuals with behavioral health needs before arrest or before contact with the criminal justice system. One of the most well-known deflection programs, and the one examined by the Task Force, is called the Law Enforcement Assisted Diversion Program or LEAD. These programs began in 2011 in Seattle, Washington and have since been replicated in several states. In the program, "police officers exercise discretionary authority at point of contact to divert individuals to community-based, harm-reduction intervention for law violations driven by unmet behavioral health needs."[319] In 2015, an evaluation of the Seattle Program found that LEAD participants were 58% less likely to be arrested after enrollment in the program than the control group.[320]

One Task Force member spoke to the Manager, Co-Responder Services at the Colorado Department of Human Services, Emily Richardson about their LEAD program. They have been piloting a program in four sites around the State that has produced promising results.[321]

Although it was raised as a "parking lot"[322] issue, both diversion programs and deflection programs were viewed favorably by the Task Force. But the Task Force decided not to pursue a recommendation regarding diversion or deflection programs. These are prosecution and law enforcement programs and offered solely at their discretion. The lack of resources to pursue both programs was considered a major deterrent in some parts of the State. Some prosecutors have no way to supervise people on diversion, nor are behavioral health units and law enforcement present in adequate numbers in much of the State.

The Task Force supports any program that defers or deflects an offender from pretrial arrest or detention as quickly as possible. But it was also informed that the Criminal Justice Reform Commission[323] is currently considering diversion programs as part of its recommendation. The Commission was also examining mental health issues statewide. Moreover, in the 2020 legislative session, HB 2708 was introduced that would "[a]llow prosecutor's office to enter into agreements for supervision of people on diversion and allowing people on diversion to participate in the certified drug treatment program."[324] The Task Force has already included support for this legislation in a prior recommendation.

Mandatory jail data collection and prosecutor data collection - A recommendation was not made in this area, but it was raised as a "parking lot" issue. The majority of the task force believed this would be a significant hardship for some jails in the state as well as prosecutors' offices. Although it was recognized that many evidenced-based practice studies will require information from these groups, it is best to try voluntary methods of collection rather than statutory mandates. Evidenced-based practices that keep people out of jail while maintaining the integrity of the court system and public safety should be supported by both these groups, so collecting needed data should be a cooperative endeavor.

Expanding court hours - A recommendation was not made in this area, but it was raised as a "parking lot" issue. The suggestion was that courts be encouraged to provide some court times after normal business hours to accommodate the working community and decrease failures to appear. The majority of the Task Force felt that this was not possible given current resources and staff shortages. Some counties have only one or two clerks and struggle to keep up during normal business hours. One judge reported anecdotally that his jurisdiction had tried this and did not get enough people to take advantage of it to make it worthwhile. One Task Force member mentioned that even municipal courts that have offered amnesty days do not get much business after normal work hours even though they operate under extended hours for such programs. It was agreed that this option should be a part of overall training on pretrial justice for judges to consider whether this option would be possible in their districts, decrease failure to appears, and be a benefit to court users. In some jurisdictions this will be impossible due to staffing resources. In others it may work well. The Task Force believed it was best to educate judges on this option but not make it a separate recommendation.

CONCLUSION

> *[A]s we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones*[325]

We started our first meeting of this two-year journey with several guiding principles that we believe we have been true to throughout the process.

- ✓ **Balancing the presumption of innocence versus the risk of flight and public safety.**
- ✓ **Seek out all sides of an issue, examine the issue, and confront the pros and cons with an open mind.**
- ✓ **Encourage input from stakeholders.**
- ✓ **Address measurable problems with measurable solutions**.
- ✓ **Avoid focus on topics and approaches the Task Force considered taboo.**

The members of the Task Force came to work with an in-depth knowledge of the workings of the criminal justice system in Kansas. There was not much its members did not know. But we found ourselves reviewing what seemed like millions of pages of literature, research and case law. We met with stakeholders all over the state to learn what was happening from their point of view. We reached out to groups that we knew had varied perspectives. We welcomed experts from outside of Kansas to help educate us on the issues. We traveled to different states to see programs in action and meet with groups of experts. We were sponges. And the more we thought we knew, the more we discovered. New studies and position papers were coming out every week. New lawsuits were being filed all over the country. We were quickly approaching the danger zone described by Secretary Rumsfeld as the unknown unknowns.

Many times, during our discussions, members would "throw the flag"—and yes we did use actual flags—and point out that the arrestee and the defendants we were talking about were entitled to a presumption of innocence and release, not a presumption of guilt and preventative detention. There was not a meeting in which this was not stressed. But we also weighed this against risk of flight and public safety, which require different approaches. Many government officials argue that a defendant's appearance in court is important, but that it pales in comparison to the public's safety.[326] We were frustrated by an inability to detain the dangerous offender without bond. But our Kansas constitution clearly does not allow it.

We encouraged input from stakeholders, those listed in the Supreme Court Order and many others. Members made presentations to Kansas judges at regional trainings seeking their input. We attended annual meetings of the Kansas Chapters of the League of United Latin American Citizens (LULAC) and the National Association for the Advancement of Colored People (NAACP). We attended a meeting in Topeka in advance of Mother's Day of the group Free Black Mamas. We met individually with several judges, district attorneys, and sheriffs around the state. We spoke to pretrial inmates at the Sedgwick County Jail. We spoke at Continuing Legal Education programs for the Kansas County and District Attorneys Association (KCDAA), the Federal Public Defenders Conference, and Kansas Association of Criminal Defense Lawyers. We spoke to the Johnson County Chiefs of Police, the Young Women's Christian Association (YWCA), and visited the Bail Project in St. Louis. We conducted two surveys through the Kansas Sheriff's Association; two surveys of judges in Kansas; and one survey of the KCDAA. We met with the facilitator of the Kansas Criminal Justice Reform Commission before their first meeting. We met with members of Americans for Prosperity and the Kansas Chamber of Commerce. We exchanged information with Heather Cessna, Executive Director of the Kansas Board of Indigent Defense Services (BIDS) and we spoke with individual public defenders around the state. And we presented at a meeting of the African American Affairs Commission in July 2020.

We confronted stakeholder fears head-on. An expressed concern at the beginning of this process from law enforcement groups was that we would pursue a "catch and release" program for most crimes, which would adversely affect the public safety of Kansans. We have recommended increased use of citations and notices to appear for misdemeanor offenses—which could be classified as "catch and release" programs, but we were impressed with research done by national law enforcement groups that these programs do not result in less safe communities, but promote good relationships with the community. When residents are not arrested and taken to jail, it is a law enforcement time saver. Overburdened police departments can focus resources where they are most needed to protect the community. It also assures there will be space in our jails for the serious offenders serving their sentences.

We also recognized that law enforcement personnel were the appropriate experts to evaluate how to exercise their discretion. But based on our discussions with minority groups around the state, we hope their voices will be heard. Many described devastating impacts on their families and communities of the failure to exercise discretion when an "arrest all" policy is followed, no matter how minor the offense.

We learned that three out of four criminal cases in state trial courts are for misdemeanors that, if proved, would result in fines and/or less than a year in jail.[327] We learned that bond amounts and release practices vary greatly between judicial districts in Kansas.[328] We learned that once arrested, four out of ten Americans do not have as much as $400 in ready cash to post a surety bond.[329] We learned that as few as two days of "no-call, no-show" often causes job loss. We

learned that once in jail, childcare, child custody, elder care, employment, government benefits, and even pet care can suffer. One stakeholder noted that pretrial detainees should not be effectively denied the right to vote due to their incarceration.[330] Stakeholders impressed upon us that for people living in poverty or on the edge of poverty, the decision to arrest on a nonperson misdemeanor can cause the defendant's support system to collapse. **We have not suggested that officers have any less discretion than they do now, but that it would be beneficial for prosecutors, defense counsel, community groups, and law enforcement entities around the state to establish uniform standards so that a person will not be treated differently based on which part of the state they get stopped in or the color of their skin. If those cannot be established, we would recommend statutes that mandate the use of citations only for select crimes.**

We have noted that person misdemeanors such as domestic battery or assault, violation of a protective order, or other person crimes would not be appropriate for anything other than arrest and hold until a judge can decide the appropriate conditions of release. This determination must be made within 48 hours or less. And unless requested by the prosecutors, we have not recommended any felony offenses in the citation/notice to appear calculus. From what we have learned of the experience in other states, we anticipate some prosecutors and law enforcement may want to expand the program to low level nonperson felonies in the future, but that will be a decision made between members of those groups, with input from the community.

Commercial bond agents were concerned that we would recommend abandoning commercial surety bond by following the lead of several other states without fully considering documented failures of such an approach. We hope we have alleviated those concerns with this report. We certainly examined the approaches of other states but found we simply did not have enough data to recommend the elimination of money bond from a judge's toolbox at this time. But we do believe data should be collected to determine if money bond results in increased appearance rates.

For example, at the March 2019 Task Force Meeting the Kansas Bonding Agents Association asserted that "[n]o other form of pretrial release guarantees appearance better than surety bail." We do not know if this is true in Kansas or not.[331] We know that some studies in other parts of the country have concluded otherwise.[332] But until we can collect the data to support the most effective and constitutional pretrial practices in Kansas, we cannot confirm or deny such statements, nor remove that tool from the judge's toolbox. We were also advised that "Kansas jails are *not* full of people who are being held 'solely because they cannot buy their freedom.'"[333] But anecdotally, many Sheriffs we have spoken with have disputed that claim. We

have also spoken to inmates who dispute that claim. But again, until we can collect the data to identify the people we have in our local jails, their reason for being there, and reasons they have not been released, we cannot confirm or deny such statements. But we do trust that armed with enough information, our judges, prosecutors, defense counsel, and community activists will do all they can to make sure no one is kept in jail in Kansas for the sole reason they cannot post bond.

Currently, the commercial surety business is a legal and viable business in Kansas and our focus was not on ways to abolish commercial surety in Kansas. Nor, did we focus on finding ways to guarantee its future existence. We understand the overwhelming fear that bond agents have for the continued viability of their industry and their personal livelihood.[334] But our goal was always to focus on evidence-based methods that will increase the likelihood that a defendant will appear in court, without a new arrest, while protecting the defendant's constitutional rights to liberty and counsel.

Our charge from the Supreme Court also asked us to suggest a Best Practices approach that is true to Kansas statutes and evolving caselaw. We did so, by drafting detailed, annotated procedures that we believe are constitutionally and statutorily supportable. We highlighted concerns from prosecutors, defense attorneys, and judges about their implementation.

We have emphasized the need for measurement or data collection before changes are implemented. The only procedural change that we were willing to recommend without supporting Kansas data was instituting a text reminder system. We believe the data across the country universally points to this as increasing court appearance rates. We believe we should move toward that goal with the Odyssey case management system even without state-specific data at this time. We do hope to be able to collect that data in the future.

We have avoided placing blame on any person or entity. Fair and just treatment in our criminal justice system is a goal common to all Kansans. Just as no one wants to see someone released from jail only to commit another crime, we also do not want to see people unjustly jailed pending their trial when their guilt or innocence has yet to be determined. We found complete and even enthusiastic cooperation in seeking ways to achieve this goal from all groups. Even when we disagreed, we discussed the issues in a civil manner. There were no hidden agendas. We have made sure in the format of this report that conflicting viewpoints are stated.

The Task Force believes that while the protection of public safety is paramount, the integrity of our pretrial justice system demands that people are not unnecessarily detained pretrial in Kansas jails. Despite all our work, there is still much we do not know and will not know until we have resources in place for meaningful data collection. Although the issue had not been widely

discussed in Kansas before the Task Force was appointed in November 2018, we believe through discussions and presentations, we have brought necessary stakeholders to the table to continue to discuss these issues in the coming months and years. We hope this Report will serve as a resource for those discussions, and for positive change.

Accordingly, it is with great pride that we submit this report to the Kansas Supreme Court. Dated this ___ day of ___, 2020.

_____

Chief Judge, Karen Arnold-Burger
Chair, Ad Hoc Pretrial Justice Task Force

ENDNOTES

[1] Judge Stoss also served as Chair of Ad Hoc Task Force on Bonding Practices, Fines, and Fees in Municipal Courts which produced the following report: https://www.kscourts.org/About-the-Courts/Court-Administration/Court-Initiatives/Ad-Hoc-Task Force-on-Bonding-Practices .

[2] Conference of Chief Justices, Resolution 3, Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release, adopted as proposed by the CCJ/ COSCA Criminal Justice Task Force at the Conference of Chief Justices 2013 Midyear Meeting on January 30, 2013.

[3] 2018 SC 90; https://www.kscourts.org/Rules-Orders/Orders/SC-Orders/2018-SC-90 .

[4] The stakeholders identified in the Order include: the Kansas Peace Officers Association, Kansas Sheriffs' Association, Kansas Association of Counties, Kansas County and District Attorneys Association, Kansas Association of Criminal Defense Lawyers, Kansas Association of Court Services Officers, Kansas Community Corrections Association, Kansas Correctional Association, and Kansas Bail Agents Association.

Other stakeholders that either requested the opportunity to provide input or were encouraged by the Chair to provide input to the Task Force include: NAACP, Kansas Urban League, LULAC, KCSDV, and Wyandotte County District Attorney, Kansas Libertarian Party-Douglas County, Johnson County District Attorney, Sedgwick County District Attorney, Kansas Chamber of Commerce, Americans for Prosperity, Koch Industries, Kansas Appleseed, Kansas Attorney General, ACLU, Kansas Peace Officers Association, Kansas Association of Chiefs of Police, Johnson County Chiefs of Police, Miami County District Attorney, YWCA-NE Kansas, Kansas League of Municipalities, Bert Nash Community Health Center, US Immigration and Customs Enforcement, Governor Kelly's Office, Johnson County Criminal Justice Coordinator, Pittsburg State University student collective, several legislators, judges, public defenders, and interested citizens on an individual basis.

[5] Dr. Edward Latessa, University of Cincinnati, https://cech.uc.edu/about/centers/ucci/contact/faculty/ed-latessa.html .

[6] Amber Widgery, National Conference of State Legislators, https://cech.uc.edu/about/centers/ucci/contact/faculty/ed-latessa.html .

[7] Professor Jeffrey Jackson, Washburn University School of Law, http://washburnlaw.edu/profiles/jackson-jeffrey.html .

[8] Speakers included: Hon. Brenda Stoss, Municipal Court Judge from Salina and Chair of the Ad Hoc Task Force on Bonding Practices, Fines, and Fees in Municipal Courts; Tom Struble, Sedgwick County Criminal Justice Alternatives Administrator; Robert Sullivan, Director of Johnson County Department of Corrections; and, Ellen Mitchell, Saline County Attorney.

[9] Appearance, Public Safety, and Alternatives subTask Forces.

[10] Legislative Liaison for the Kansas Sheriff's Association, https://www.kansassheriffs.org/ .

[11] Austin Spillar, Policy Associate, and Zal Shroff, Staff Attorney, for the ACLU of Kansas, https://www.aclukansas.org/ , appeared along with Jeffrey Clayton, Executive Director/Policy Director of the American Bail Coalition, http://www.americanbailcoalition.org/team/ , and Representative Stephen Owens, Kansas 74th District and owner of Owens Bonding, Inc., https://www.owensbonding.com/ .

[12] Kurt Level, Deputy General Counsel, and Monica Roth, Public Policy Specialist, of Koch Industries.
[13] Presentation by Timothy R. Schnacke, Executive Director, Center for Legal and Evidence-Based Practices. http://clebp.org/aboutus.html .

[14]Trey Burton, Chief U.S. Probation Officer, and Sara Veldez Hoffer, Senior U.S. Probation Officer. http://ksp.uscourts.gov/ .

[15] Pretrial delays and appointment of counsel, Data collection, Pretrial risk assessments, Statutory changes, and Arrest/Citation subcommittees.

[16] Sedgwick County Sheriff Jeff Easter for the Kansas Sheriff's Association, https://www.kansassheriffs.org/ , Johnson County Special Deputy Greg Smith, Representative Stephen Owens, and Cal Williams, bail agent for Cal-Kan Bail Bonds https://bailbonds.com/sherman-county-kansas/ .

[17] Roy Walmsley, World Prison Population List (Twelfth Edition), World Prison Brief, Institute for Crime & Justice Policy Research, at 2, https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf (data current to end of September 2018).

[18] Jacob Kang-Brown & Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America*, Vera Institute of Justice, June 9, 2017, https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf (Published through a Safety + Challenge Grant from the John D. And Catherine T. MacArthur Foundation); Leon Digard & Elizabeth Swalola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice, Apr. 2019, http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf , *citing* Zhen Zeng, *Jail Inmates in 2016* (Washington, DC: Bureau of Justice Statistics, 2018), at 1 & 9, https://perma.cc/5A4W-XCS5 . Zeng estimates the total local jail population for June 30, 2016, as 740,700.

[19] *Id.*

[20] Kansas Local Jail Survey, questions propounded by the Task Force in partnership with the Kansas Sheriff's Association, Dec. 20, 2018. Sixty-three of the 97 jails in Kansas responded.

[21] *Americans Favor Expanded Pretrial Release, Limited Use of Jail: National poll finds strong support for alternatives to detention*, Pew Charitable Trust, Nov. 21, 2018 (Issue Brief): https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/11/americans-favor-expanded-pretrial-release-limited-use-of-jail.

[22] *New Survey: With Increased Understanding of Current Practices, Americans Support Reforms to Pretrial and Money Bail Systems* Charles Koch Institute, July 12, 2018, https://www.charleskochinstitute.org/news/new-survey-americans-support-reforms-pretrial-money-bail-systems/ ; *Support Grows for Pretrial Justice Reform "National Poll Shows Voters Want Safety, Limited Use of Detention, and Assistance to Ensure Court Appearance*, Pretrial Justice Institute Website: https://higherlogicdownload.s3-external-1.amazonaws.com/PRETRIAL/Support%20Grows%20For%20Pretrial%20Justice%20Reform%20-%20PJI%202018.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1587693883&Signature=PZ3drQcDIqYGH%2BgYM3XiiTaanDk%3D.

[23] *Public Opinion Poll Findings on Jails and Local Justice Systems,* Zogby Analytics, Feb. 13, 2018, http://www.safetyandjusticechallenge.org/wp-content/uploads/2018/02/RTI_MacArthur_Local_Criminal_Justice_Memo-2018.pdf.

[24] *The Socioeconomic Impact of Pretrial Detention,* Open Society Foundation, Aug. 2011, at 12.

[25] Joshua Page, Victoria Piehowski, & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*,, 2019 Russell Sage Foundation, RSF: The Russell Sage Foundation Journal of the Social Sciences Feb. 2019, 5 (1) 150-172; DOI: https://doi.org/10.7758/RSF.2019.5.1.07 https://www.rsfjournal.org/content/5/1/150.

[26] 2012 Policy Paper: Evidence-Based Pretrial Release, 5, Conference of State Court Administrators, https://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx.

[27] Paul Heaton *et al.*, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 717–18 (2017):

> These results raise important constitutional questions and suggest that with modest changes to misdemeanor pretrial policy, Harris County could save millions of dollars per year, increase public safety, and reduce wrongful convictions.

See also, Christopher T. Lowenkamp, et al., *Investigating the Impact of PretriaL Detention on Sentencing Outcomes,* Arnold Foundation, at 4 (2013) (finding that, "[l]ow-risk defendants who are detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to low-risk defendants who are released at some point before trial or case disposition. Moderate and high-risk defendants who are detained for the entire pretrial period are approximately 3 times more likely to be incarcerated than similar defendants who are released at some point."); Gerald R. Wheeler & Gerald Fry, *Evaluation of Effects of Pretrial Status on Case Disposition of Harris County Felony & Misdemeanor A/B Defendants Project Orange Jumpsuit*, at 4 (2013) (finding that in Harris County, Texas "[s]tatistically identical defendants who make bond experience: 86% fewer pretrial jail days; 33% better chance of getting deferred adjudication; 30% better chance of having all charges dismissed; 24% less chance of being found guilty; and 54% fewer jail days sentenced.")

[28] 3DaysCounty™ program founded by the Pretrial Justice Institute. https://www.pretrial.org/what-we-do/plan-and-implement/3dayscount-for-state-level-change/.

[29] Over the years, the terms bond and bail have been used interchangeably by many commentators and studies, but we have tried to remain true to this distinction throughout this report.

[30] In fact, the seriousness of the alleged offense is often the sole factor that determines money bond on pre-fixed bond schedules. The theory underlying this practice is that the more serious the potential penalties the more incentive a person has to flee the jurisdiction to avoid prosecution.

[31] Brook Hopkins, Chiraag Bains, and Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 698 (2019).

> Pretrial drug testing has not been shown to increase appearance rates or decrease pretrial arrest. Randomized control trials have shown that pretrial drug testing made no difference in either metric. Indeed, one study actually found that for high risk defendants, drug testing made no difference in pretrial success rates, but for lower risk defendants, pretrial drug testing actually lowered pretrial success. Another study found drug testing to be effective in reducing reincarceration of people on probation, but subsequent studies have not been able to replicate those findings.

[32] *See* K.S.A. § 22-2802(2).

[33] *See* K.S.A. § 22-2802.

[34] *Defining Flight Risk*, Lauryn P. Gouldin, 85 U. CHI. L. REV. 677, 689 (2018).

> [D]ata from 2009 indicate that the vast majority (83 percent) of felony defendants who are released before trial appear for all scheduled court appearances. The remaining 17 percent missed at least one

scheduled court appearance, with 13 percent (of the total number) returning to court within one year. Only 3 percent of all released felony defendants remained a "fugitive" after a year…Nonappearance rates for those charged with lower-level felonies and misdemeanors are typically higher than for defendants charged with higher-level felonies. In 2009, for example "failure-to-appear rates were lowest for murder (5%) and rape (7%) defendants, and highest for those released after being charged with motor vehicle theft (28%).

[35] The Infinity Stones are six gems appearing in Marvel Comics that are the cosmic source of power in the universe. The Time Stone (green) allows its holder to manipulate time and thus predict the future.

[36] Marie VanNostrand, Gena Keebler, & Luminosity, Inc., *Pretrial Risk Assessment in the Federal Court*, Vol. 73 Federal Probation Number 2, at 3, https://www.uscourts.gov/sites/default/files/73_2_1_0.pdf .

[37] *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

[38] 18 U.S.C. § 3142(e).

[39] *United States v. Salerno*, 481 U.S. 739 (1987).

[40] 481 U.S. at 754.

[41] 481 U.S. at 754-55.

[42] 481 U.S. at 747.

[43] 481 U.S. at 748.

[44] 481 U.S. at 751-52.

[45] 481 U.S. at 755.

[46] Slide Show presented to Task Force on June 14, 2019 by Trey Burton and Sara Veldez Hoffer from the U.S. Probation Office. https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/Pretrial_Justice_Task_Force/Federal_Pretrial_Task_Force_Presentation_6-14-19.pdf.

[47] *Id.*

[48] *Id. See also,* Public Safety Assessment (PSA), Arnold Foundation, PSA Fact Sheet, May 10, 2019 https://www-cdn.law.stanford.edu/wp-content/uploads/2019/05/PSA-Sheet-CC-Final-5.10-CC-Upload.pdf (highest risk category, 60% appear as ordered, and 45% have no new criminal activity) ; Colorado Pretrial Risk Assessment Tool (CPAT); CPAT Fact Sheet, May 6,2019, https://www-cdn.law.stanford.edu/wp-content/uploads/2019/05/Colorado-CPAT-CC-Final-5.10-CC-3.pdf (highest risk category, 51% appear as ordered and 58% have no new criminal activity) ; Ohio Risk Assessment System-Pretrial Assessment Tool (ORAS-PAT). https://www-cdn.law.stanford.edu/wp-content/uploads/2019/05/ORAS-Sheet-Final-5.10-CC-Upload.pdf (highest risk category, 85% appear as ordered, and 83% have no new criminal activity). All Fact Sheets compiled by the Stanford Pretrial Risk Assessment Project.

[49] http://jnet.ao.dcn/court-services/probation-pretrial-services/caseload-tables/pretrial-services-h-tables-march-2019/pretrial-services-violations-summary-report.

Table H-15.
U.S. District Courts ---- Pretrial Services Violations Summary Report
For the 12-Month Period Ending March 31, 2019

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
10TH	12,069	2,924	24.2	404	13.8	12	6	1	49	374	534
CO	1,253	410	32.7	36	8.8	0	0	0	15	36	42
KS	1,199	410	34.2	89	21.7	5	3	0	6	80	137
NM	6,173	895	14.5	109	12.2	0	0	0	20	105	121
OK,N	480	191	39.8	38	19.9	0	0	0	2	31	54
OK,E	246	50	20.3	4	8.0	0	0	0	1	3	4
OK,W	1,149	485	42.2	67	13.8	4	1	1	2	63	96
UT	1,204	378	31.4	54	14.3	3	2	0	2	49	72
WY	365	105	28.8	7	6.7	0	0	0	1	7	8

[50] Email from Trey Burton, Chief U.S. Probation Officer April 30, 2020.

[51] Kan. Const. Bill of Rights §9.

[52] *Ex parte Ball*, 106 Kan. 536, 537 (1920). *See also*, Matthew Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 934-39 (2013) for a lengthy discussion of the development of what he calls "consensus right to bail" provisions like the one in Kansas.

[53] *In re Schneck*, 78 Kan. 207 (1908). *See also*, *State v. Christensen*, 165 Kan. 585, 593 (1948) ("A capital offense is one for which the penalty of death may be inflicted.").

[54] *Commonwealth v. Truesdale*, 449 Pa. 325, 336-37 (1972).

[55] *State v. Foy*, 224 Kan. 558, 562 (1978). *See also*, *State v. Burgess*, 205 Kan. 224, 226. (1970) ("As we understand the purpose of our statutes requiring bond from persons accused of crime, it is to assure their presence at the time and place of trial."); *Craig v. State*, 198 Kan. 39, 41. (1967) ("The purpose of bail is to insure the presence of the prisoner at a future hearing."); *State v. Dunnan*, 223 Kan. 428, 430 (1978) ("The bond fixed [$250,000 for charge of 2nd degree murder] was indeed high, but the offense was most serious…In the case before us we cannot say that the court below abused its discretion at the time bail was fixed.").

[56] *See also*, *State v. Ruebke*, 240 Kan. 493, 498 (1987) ("Bail is excessive when it is set at an amount higher than necessary to insure appearance of the accused at trial.").

[57] *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

[58] K.S.A. § 22-2802 as it existed until 1986:

> In determining which conditions of release will reasonable assure appearance the magistrate shall, on the basis of available information, take into account the nature and circumstances of the crime charged, the weight of the evidence against the defendant, the defendant's family ties, employment, financial resources, character and mental condition, the length of said defendant's residence in the community, said defendant's record of convictions, and said defendant's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

It was only after conviction *that* conditions of release could be based on whether the defendant posed a danger to another person or to the community. K.S.A. § 22-2804:

> A person who has been convicted of a crime and is either awaiting sentence or has filed a notice of appeal may be released by the district court under the conditions provided in K.S.A. § 22-2802, and amendments thereto, if the court or judge finds that the conditions of release will reasonably *assure that the person will not flee or pose a danger to any other person or to the community.* (Emphasis added).

[59] 1986 Session Laws, Ch. 230, Section 1, K.S.A. § 22-2802(4):

> In determining which conditions of release will reasonable assure appearance *and the public safety,* the magistrate shall, on the basis of available information, take into account the nature and circumstances of the crime charged, the weight of the evidence against the defendant, the defendant's family ties, employment, financial resources, character and ~~mental condition, the length of said defendant's residence in the community, said defendant's record of convictions, and said defendant's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings~~ *mental condition, length of residence in the community, records of convictions, records of appearance or failure to appear at court proceedings or of flight to avoid prosecution; the likelihood or propensity of the defendant to commit crimes while on release, including whether the defendant will be likely to threaten, harass or cause injury to the victim of the crime or any witnesses thereto; and whether the defendant is on probation or parole from a previous offense at the time of the alleged commission of the subsequent offense*.

[60]*Williamson v. United States*, 184 F.2d 280, 282 (2nd Cir. 1950). Mr. Justice Jackson, of the United States Supreme Court, sitting as a circuit justice, pointed out the danger of such an approach:

> [I]t is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it. . . .

[61] K.S.A. § 22-2801.

[62] K.S.A. § 22-2802 (8).

[63] Peter Wagner & Wendy Sawyer, Mass *Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE, (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html (citing statistics compiled by the Bureau of Justice Statistics, Prison and Jail Inmates Midyear, Correctional Populations in the United States and Jail Inmates).

[64] Survey conducted by Kansas Sheriff's Association at the request of the Task Force in the Fall of 2018 asking the number of people in their jails with no other holds.

[65] Zhen Zeng, *Jail Inmates in 2018*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, March 2020 at 6. https://www.bjs.gov/content/pub/pdf/ji18.pdf.

[66] A variation on this statement: "Poor people are languishing in jail for the sole reason that they cannot afford a bail bond" is highly contested by the American Bail Coalition:

> This single phrase has become the mantra of the Bail Reform movement relying on empathy for the defendant as punctuation to further the cause to end the judicial discretion of using financial conditions as a form of pretrial release.

First, not a single person is sitting in jail because of the size of their wallet. The reason why any person is in jail is because they were accused of a crime based on probable cause determined by a law enforcement officer.

Second, there are a number of reasons that a person might be in jail who has no yet been convicted of a crime. This may include:

- Probation hold – bail set, but not bailable
- Immigration hold – bail set, but not bailable
- Awaiting transfer to another jail – bail set, but not bailable
- Already convicted with a secondary open charge – bail set, but not bailable
- Awaiting hearing on new charges

For example, in the 2013 JFA Institute study looking on the Los Angeles County Jail population, it was determined while 70% of the defendants were in pretrial status, only 12% were actually bailable. That is a far cry from the claims being made by bail reform proponents that 70% of people sitting in jail are there because they can't afford a bail bond.

Lastly, and perhaps most important, the defendant has family and friends unwilling to post his/her bond for a variety of reasons – none of which have to do with the size of their wallet. They may include:

●Defendant has already been released and failed to appear with a bondsman. In this case, the Indemnitor may be unwilling to post another bond out of fear that the defendant may again fail to appear.
●Defendant may have a substance abuse problem that the Indemnitor fears, if released, would cause harm to the defendant or another person.
● "Tough Love" – the family and friends of a defendant know them best…not the court system. In many cases, the decision to keep someone in jail due to issues spiraling out of control for the defendant is a reality. These decisions often coincide with having the time to arrange for the necessary help a defendant really needs – such as enrolling in a drug treatment facility.

[67] Survey of Judges, Regional Training, April 2019.

[68] *See*, e.g.,

Maryland: Md. Rule 4-216.1 Pretrial Release: Standards Governing; *See also*, Brian Saccenti, Pretrial Release & Detention in Maryland After the 2017 Amendments to the Pretrial Release Rules, 17 U. MD. L.J. RACE RELIG. GENDER & CLASS 307 (2017). Available at: http://digitalcommons.law.umaryland.edu/rrgc/vol17/iss2/5.

Minnesota: Minn. R. Crim. P. 6.02 (a person must be released on personal recognizance or an unsecured appearance bond unless a court determines that release will endanger the public safety or will not reasonably assure the defendant's appearance.)

Washington: Washington Supreme Court Rule 3.2 Release of the Accused: http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&ruleid=supCrR3.2.

Missouri: Missouri Supreme Court Rule, 33.01. Misdemeanors or Felonies - Right to Release – Conditions: https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/3746fcd8eae678fe86256ca600521224?OpenDocument.

Louisiana: Order from federal district court in eastern district of Louisiana in *Caliste v. Cantrell*, 329 F. Supp. 3d 296 (E.D. La. 2018), *aff'd,* No. 18-30954, 2019 WL 4072068 (5th Cir. Aug. 29, 2019). https://www.macarthurjustice.org/wp-content/uploads/2018/08/Caliste-v-Cantrell_Decision.pdf.

Broward County, Florida Administrative Order No. 2019-57-Crim ("for those persons who do not pose a threat to public safety, all judges shall first consider non-monetary release conditions") http://www.17th.flcourts.org/wp-content/uploads/2019/08/2019-57-Crim.pdf.

[69] The Office of Judicial Administration also provides training to municipal court judges and has incorporated training regarding similar issues at these events recently.

[70] The full objection continues:

> In particular the Kansas Supreme Court should not take a premature position that is counter to the *Kansas Bill of Rights § 9. Bail; fines; cruel and unusual punishment. All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 48.*
>
> *1) emphasizes that liberty is the norm and detention is the exception;*
>
> To emphasize that liberty is the norm and detention the exception is to inappropriately lift a line from *Salerno* and apply it to what is already settled constitutional law in Kansas. Also, if *Salerno* is to be quoted, it should be quoted correctly "*In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.*" The line from *Salerno* is the majority's comment on the fact that **preventative detention** is the regulatory exception to bail, which the majority called a regulatory exception to the 8th Amendment right to bail and was to be rarely used. In short, *Salerno* was contrasting bail and preventative detention, not conflating the two, as appears to be the case in this recommendation.
>
> In Kansas, "*preventative detention*" is already more strictly limited than the Bail Reform Act of 1984, and thus to issue an edict that "*liberty is the norm*" is to issue an edict that not only proved false in the federal system over time (pretrial detention of 72% of all defendants) it suggests to judges that there is somehow a more expansive grant of the power to preventative detention than we already understand to be extremely circumspect pursuant to the Kansas Constitution; that preventative detention is only allowable in "*capital offenses, where proof is evident or the presumption great.*" Thus, by default, liberty is more than a mere "norm" in Kansas. All non-capital cases are bailable by sufficient sureties. Nothing else needs to be said.
>
> *2) Judges should first consider non-monetary forms of release;*
>
> To create presumptions in favor of one type of bail or condition of release over another is also inappropriate since each case turns on its own facts and any combination of bail or other conditions may in fact be the appropriate bail and least restrictive form of release under the statutory and constitutional considerations. This recommendation incorrectly assumes that all supervision by pretrial agencies will be less restrictive and less financially onerous than posting a secured bond, an assumption not backed up

with fact or history. Again this frustrates the constitutional provision that all non-capital cases are bailable by sufficient sureties.

Quite frankly, this recommendation is nonsensical. **Every bond** has a financial condition. K.S.A 22-2802 states: "(1) Any person charged with a crime shall, at the person's first appearance before a magistrate, be ordered released pending preliminary examination or trial upon the execution of an appearance bond ***in an amount*** specified by the magistrate…" In other words, the very first action the magistrate is supposed to take under statute is to determine the monetary amount of bail that is to be required. And there is currently a preference in statute for surety bail. If, however, upon consideration, the magistrate determines in the exercising of his individual discretion, that requiring sureties is not necessary, then the statute indicates in subsection (6) that: "In the discretion of the court, a person charged with a crime may be released upon the person's own recognizance by ***guaranteeing payment of the amount of the bond*** for the person's failure to comply with all requirements to appear in court. The release of a person charged with a crime upon the person's own recognizance shall not require the deposit of any cash by the person." So, even a personal recognizance bond has a monetary condition to the bond. In short, there is no such thing as a bond with non-monetary conditions, only that there are bonds with meaningless, uncollectable monetary conditions.

Therefore, in truth, this provision is really just a way to state that the judges should consider personal recognizance bonds before considering cash or surety bonds, despite the fact that this is the exact opposite of the language of the statute [K.S.A. 22-2802 at Subsection (3) "The appearance bond shall be executed with sufficient solvent sureties who are residents of the state of Kansas, ***unless the magistrate determines***, in the exercise of such magistrate's discretion, that requiring sureties is not necessary to assure the appearance of the person at the time ordered"]. This recommendation then suggests that the Supreme Court should order every lower court judge in the state to do the exact opposite, to functionally grant every defendant a personal recognizance bond unless the magistrate determines that requiring sureties is necessary.

It has always been our understanding that both local court rules and Supreme Court Administrative Rules – which is what such an order would be – are required to comply with statute. An order of this type, insomuch as it turns the statute completely upside down, as it were, certainly would be extra-statutory.

3) release should be under the least restrictive conditions to assure defendant's appearance and the protection of the public.

Least restrictive or least onerous pretrial release has been the constitutional standard on this continent for hundreds of years. The fact that there are now also other conditions, invented as a result of technological advancements, doesn't change the law. Also, "*non-monetary conditions*" is a false construct since most "*non-monetary*" conditions are paid for by defendants or a non-judicial branch agency. Unless the Court is prepared to order that no "*non-monetary*" conditions of release may cost the defendant money, then issuing such a blanket order risks forcing courts to consider and potentially unconstitutionally impose "*non-monetary*" conditions that might be more onerous, financially costly, and restrictive than a bail would have been. To the absolute contrary, such as when the court specifically allows a flat charge of $15, but then also allows courts to require a defendant to pay "all" costs of pretrial supervision and other so-called "*non-monetary*" conditions. As an example, a condition that we are seeing more often is a requirement that the defendant enter into an in-patient treatment program as a "non-monetary" condition of their bail. However, that treatment is not provided by the State and, depending on the defendant's health insurance, could cost tens of thousands of dollars in out of pocket medical expenses. This is certainly a financially burdensome "non-monetary" condition that many, if not most, defendants would be unable to comply with for purely financial reasons.

> Unfortunately, this recommendation seems to be directed at getting the Supreme Court to pressure local judges to move away from using secured bail. We do not feel that such a wholesale alteration of a millennium of pretrial release practices should be enacted by judicial fiat and is instead the province of the Legislature.

Letter dated Oct. 31, 2019 from the Kansas Bail Agents.

[71] The full objection continues:

> The federal standard in detention decisions is driven by the United States Supreme Court's decision in *U.S. v. Salerno, 481 U.S. 739 (1987).*There, the Court held that if "*the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.*" When addressing such provisions, a federal prosecutor bears the burden of proof by clear and convincing evidence. There is no need for this education, as the provisions found in *Salerno* do not exist under Kansas law and Kansas State Prosecutors and Kansas State Judges lack such authority.
>
> The Kansas Constitution, however, is crystal clear regarding the cases for which preventative detention may be sought: "*All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great.*" To call the setting of reasonable bail in a non-capital offense a "*detention decision*" is to concede on its face all bail that is not posted is per se unconstitutional. Instead, a judge is tasked with setting a bail that is otherwise not "*excessive*" pursuant to the Kansas and Federal constitutions recognizing that all persons shall be "bailable" by sufficient sureties. Legal education opportunities may exist regarding setting bail that is not "*excessive*"; which obviates any need for training on preventative detention.

Letter dated Oct. 31, 2019 from the Kansas Bail Agents.

[72] Written testimony of Austin Spiller before Task Force on Mar. 6, 2020.

[73] This references several groups at Pittsburg State University that collaborated and signed off on a letter of recommendations submitted to the Task Force. The signatories to the document were the Pittsburg State University Campus Democrats, Pittsburg State University Student Government Association President, Pittsburg State University Black Students Association (BSA), Pittsburg State University Hispanics of Today (HOT), Pittsburg State University People for Respect, Integrity and Support Movement (PRISM), and Q Space, Pittsburg, Kansas.

We have noted throughout this report the collective's concerns about several recommendations proposed by the Task Force in an email dated July 11, 2020, but we also want to note a few other suggestions the students made that the Task Force deemed outside the scope of its charge from the Supreme Court but worthy of consideration. The introduction to their suggestions was powerful in itself:

> As Martin Luther King Jr. said, "Our lives begin to end the day we become silent about things that matter." In carrying on the spirit of Dr. King's message, we feel that it is best to tackle racism and unfair policies that directly and disproportionately affect people of color (POC) and those who live in poverty. As of 2017, roughly seven percent of Kansans were African-American, however, the prison population comprised 28 percent African-American people. * https://www.census.gov/quickfacts/KS and https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-kansas.pdf. This overwhelmingly shows that even though African-Americans make up a small percentage of the population, they are imprisoned at ludicrous and insensible rates compared to their fellow Kansans. In fact, African-Americans are 5.6 times more likely than white people to be imprisoned. * https://www.pretrial.org/get-involved/learn-more/how-to-fix-pretrial-justice/. This issue is largely

affected by the policy, procedure, and effects of pretrial detention. Currently, 6 out of every 10 people in jails are awaiting trial, and 95% of all US jail population growth between 2000 and 2014 were people who had not yet been proven guilty. Arnold Ventures estimates that 14 billion dollars are spent housing and caring for people in jail who have not been convicted yet.* https://www.arnoldventures.org/work/pretrial-justice/.

They went on to make the following suggestions for additional recommendations:

- More research should be done as to investing and suggesting that a period be given to detainees during the first few days of pre-trial detention, as well as for non-detained people who are facing more serious crimes to make such decisions in case of detention, which would allow them to handle arrangements for their expenses such as utilities, rent, care of family, and other expenses or matters that, if left unchecked, can cause a person to accrue debilitating debt that prevents their future success upon release and possibly causes them to lose their children and homes.
- Create a system where people can donate clothes through to those detained, jailed, or imprisoned so they have a fighting chance in court to counter the stereotype and effect of wearing jumpsuits and uniforms.
- A new recommendation should be included that offers suggestions which state that judicial districts and law enforcement agencies should create third-party outlets for people being arrested, in custody, or awaiting trial to report or make a complaint if they feel that they are being discriminated against.

[74] Email from Pittsburg State University student collective dated July 11, 2020.

[75] *Americans Favor Expanded Pretrial Release, Limited Use of Jail: National poll finds strong support for alternatives to detention*, Pew Charitable Trust, Nov. 21, 2018 (Issue Brief), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/11/americans-favor-expanded-pretrial-release-limited-use-of-jail.

[76] Michael Schwirtz, Michael Winerip, & Kalief Brower, *Held at Rikers Island for 3 Years without Trial, Commits Suicide* , New York Times, June 8, 2015. https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html.

[77] https://www.pretrial.org/what-we-do/plan-and-implement/3dayscount-for-state-level-change/.

[78] *See Barker v. Wingo*, 407 U.S. 514, 532–533 (1972).

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

[79] CHRISTOPHER T. LOWENKAMP, ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION, 3-4 (2013). https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf.

[80] *See* Kentucky Supreme Court, http://icmelearning.com/ky/pretrial/KY-Pretrial-VirtualTour/; New Jersey Supreme Court, https://njcourts.gov/courts/criminal/reform.html; New Mexico, https://www.nmcourts.gov/pretrial-release-and-detention-reform.aspx. We note the California Supreme Court for its extensive use of video to increase the transparency of the court operations and process, although it does not have anything currently on the site about pretrial detention. https://www.youtube.com/watch?v=ktOsD5c0MCw&list=PLE5350C442AB073B6.

[81] https://www.bravenewfilms.org/bailgame. "We're taking it back to the old school with this 8-bit game! Select a character, get arrested, and see how the consequences of money bail play out! Disclaimer: Mass incarceration is NOT a game. For many, it's life altering affects make access to basic needs a real hurdle."

[82] Keith Porcaro, *Detain/Release: simulating algorithmic risk assessments at pretrial*, Jan. 8, 2019, https://medium.com/berkman-klein-center/detain-release-simulating-algorithmic-risk-assessments-at-pretrial-375270657819. ("The risk assessment provides a low/medium/high likelihood that a defendant will fail to appear, commit a crime, or commit a violent crime. Under the hood, it uses U.S. Census and Bureau of Justice Statistics data to generate defendants and alleged offenses. The simulation can generate millions of unique defendants. We added additional mechanics to make the world of the simulation more complete. Detained defendants are placed in a county jail with limited capacity and stay there for a period of time, depending on their charge. Released defendants may commit a violation or new crime while on release, which appears in the form of a (sometimes histrionic) local newspaper article [headlined: Violent Suspect at Large Thanks to Activist Judge]").

[83] *Public Safety Assessment Simulator*, https://pretrialrisk.com/the-basics/simulator-for-tools/.

[84] Email dated Mar. 7, 2019 from Sheriff Jeffrey Easter, Sedgwick County, stating position of the Kansas Sheriff's Association.

[85] Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

[86] Email from Pittsburg State University student collective dated July 11, 2020.

[87]Recommendations of the Criminal Pretrial Task Force to the Thirtieth Legislature of the State of Hawaii, December 2018, at 7.

> Data regarding pretrial decisions and outcomes is limited. Collecting such data and developing metrics requires deep understanding of the interactions of the various agencies in the system. A Criminal Justice Research Institute should be created under the office of the Chief Justice. The Institute should collect data to monitor the overall functioning of the criminal justice system, monitor evidence-based practices, conduct cost benefit analysis on various areas of operation and monitor national trends in criminal justice. The Institute should further develop outcome measures to determine if various reforms, including those set forth herein, are making positive contributions to the efficiency of the criminal justice system and the safety of the community.
>
> This Task Force recommends that a centralized statewide criminal pretrial justice data reporting and collection system be created. A systematic approach to gathering and analyzing data across every phase of our pretrial system is necessary to assess whether reforms, suggested by this group or others, are effective in improving the quality of pretrial justice in Hawaii.

Ohio Sentencing Commission Ad Hoc Task Force on Bail and Pretrial Services, June 2017, at 26.

> Recent trends in criminal justice reform, including bail and pretrial service reform, call for the use of evidence-based practices. Evidence-based practices and decision making require a strategic and deliberate method of applying empirical knowledge and research-supported principles to justice system decisions.55 In order to adequately determine the current state of pretrial services in Ohio and measure outcomes of any implemented reforms, the General Assembly and the Supreme Court of Ohio must require the collection of robust and useful data.

[88] *Fact Sheet: Launching the Data-Driven Justice Initiative: Disrupting the Cycle of Incarceration*, June 2016, https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-launching-data-driven-justice-initiative-disrupting-cycle. Johnson County, Kansas was one of the participating counties. *See also*: https://www.naco.org/resources/signature-projects/data-driven-justice; Lynn Overmann, Angela LaScala-Gruenewald, & Ashley Winstead, *Modern Justice: Using Data to Reinvent America's Crisis Response Systems*, the Laura and John Arnold Foundation, May 2018, http://craftmediabucket.s3.amazonaws.com/uploads/PDFs/DDJ-MODERN-JUSTICE-Short.pdf.

[89] 2019 Conn. Legis. Serv. P.A. 19-59 (S.B. 880) (Signed into law July 1, 2019) (Titled: AN ACT INCREASING FAIRNESS AND TRANSPARENCY IN THE CRIMINAL JUSTICE SYSTEM; https://www.cga.ct.gov/2019/ACT/pa/pdf/2019PA-00059-R00SB-00880-PA.pdf. The act requires the Division of Criminal Justice, in consultation with the Judicial Branch, the Department of Correction (DOC), and the Criminal Justice Information System Governing Board, to (1) collect disaggregated, case-level data by docket number on defendants who are age 18 or older at the time of committing an alleged offense and (2) starting by February 1, 2021, annually provide the data collected for the previous calendar year to OPM. The data must be collected under the following categories:

1. arrests, including data on citations, summonses, custody arrests, warrants, and on-site arrests;

2. arraignments of individuals in custody;

3. continuances;

4. diversionary programs, including data on (a) program applications, diversions, and participants' successful completions and failures and (b) people in diversion programs on the first of each month;

5. contact between victims and prosecutorial officials, including data on cases involving victims;

6. dispositions, including data on pending cases and cases disposed of;

7. nonjudicial sanctions, including data on (a) sanctions applied, successfully completed, and failed and (b) individuals on nonjudicial sanction status on the first day of each month;

8. plea agreements, including data on the total number of plea agreements, agreements involving probation or prison, other agreements, and prosecutor's last best offer;

9. cases going to trial, including data on cases added per month, pending trial cases, plea offers accepted and rejected by the court per month, disposition by trial, disposition involving probation or prison, and other dispositions;

10. demographic data, including race, sex, ethnicity, and age;

11. court fees or fines, including those imposed by the court at the disposition of the defendant's case and any outstanding balance the defendant may owe;

12. restitution amounts ordered at sentencing, including any amount (a) collected by the court and (b) paid to a victim; and

13. the zip code of the defendant's primary residence.

The act prohibits disclosing any collected information that personally identifies a victim.

The fiscal note for the legislation estimated costs at just over $1 million per year due to additional staff needed to assist in data collection in each of 13 judicial districts. https://www.cga.ct.gov/2019/FN/pdf/2019SB-00880-R000836-FN.pdf. *See also*, Connecticut PA 19-59 Presentation (slide show dated July 14, 2020 analyzing implementation) at https://portal.ct.gov/OPM/CJ-About/CJ-SAC/SAC-Sites/SAC-Homepage.

[90] Virginia, 2020 Legislative Session, SB 723. The legislation requires the Department of Criminal Justice Services (DCJS) to create uniform reporting mechanisms for appropriate criminal justice agencies, in every locality to collect data relating to bail determinations made by judicial officers conducting hearings. The collected data must be disaggregated by locality and by individual. In order to maintain anonymity of the individual, localities must use a unique identifier for each individual. At the minimum, the data collected by DCJS must include the following:

- The hearing date of any hearing conducted and the date any individual is admitted to bail;

- Information about the individual, including the individual's year of birth, race, ethnicity, gender, primary language, and residential zip code;

- The determination of the individual's indigency;

- Information related to the individual's charges, including the number of charges; the most serious offense with which the individual is charged; the code section for such offense; the general description of such offense; whether such offense is a felony, misdemeanor, civil infraction, or other type of offense; and the specific classification of any felony or misdemeanor offense;

- If the individual is admitted to bail, information related to the conditions of bail and the bond, including (i) whether the bond was secured or unsecured; (ii) all monetary amounts set on the bond, including amounts set on both secured and unsecured bonds; (iii) any initial nonmonetary conditions of release imposed; (iv) any subsequent modifications; and (v) whether the individual utilized the services of a bail bondsman;
- If the individual is not admitted to bail, the reason for the denial;

- Any outstanding arrest warrants or other bars to release from any other jurisdiction;

- Any revocation of bail due to a violation of such individual's conditions of release, failure to appear for a court hearing, or the commission of a new offense by such individual;

- The date the individual is sentenced to an active term of incarceration and the date such individual begins serving such active term;

- All dates the individual is released or discharged from custody, including release upon satisfaction of the terms of any recognizance, release upon the disposition of any charges, or release upon completion of any active sentence;

- The reason for any release or discharge from custody, including whether the individual posted a bond, was released on a recognizance, or was released under terms of supervision, or whether there was a disposition of the charges that resulted in release of the individual. If the reason for release is due to a court order or a disposition of the charges resulting in release, the data collected must include the specific reason for release, including the nature of the court order or, if there was a conviction, the particular sentence imposed. The data must also include a list of definitions of any terms used by the locality to indicate reasons for release or discharge; and

- The average cost for housing the individual in the local correctional facility, for one night.

http://lis.virginia.gov/cgi-bin/legp604.exe?201+oth+SB723FES1122+PDF.

[91] http://lis.virginia.gov/cgi-bin/legp604.exe?201+oth+SB723FES1122+PDF.

[92] Mass. Gen. Laws Ann. ch. 6A, § 18 3/4 and Mass. Gen. Laws Ann. ch. 7D, § 11. *See also,* Florida Statute § 900.05- Criminal Justice Data Collection https://casetext.com/statute/florida-statutes/title-xlvii-criminal-procedure-and-corrections/chapter-900-general-provisions/section-90005-criminal-justice-data-collection

[93] https://measuresforjustice.org/about/overview#what-we-do.

[94] https://measuresforjustice.org/news/2020-02-11-1.html.

[95] Megan Russo, Jesse Jannetta, & Marina Duane, *Developing Data Dashboards to Drive Criminal Justice Decisions: An Innovation Fund Case Study from Allegheny County*, *Pennsylvania, and San Francisco, California*, Urban Institute, Oct. 2018, http://www.safetyandjusticechallenge.org/wp-content/uploads/2018/10/2018.10.11_Developing-Data-Dashboards-to-Drive-Criminal-Justice-Decision....pdf (published with funding by the John D. and Catherine T. MacArthur Foundation under the Safety and Justice Challenge Network).

[96] https://cjil.sog.unc.edu/areas-of-work/bail-reform-2-0/.

[97] *See*, Jessica Smith & Ross Hatton, *Use of Summons v. Arrest in North Carolina Misdemeanor Cases: A County-Level Analysis*, Sept. 2019, https://cjil.sog.unc.edu/files/2019/09/Summons-v.-Arrest-for-North-Carolina-Misd.-Cases-9.13.2019.pdf ; Jessica Smith & Ross Hatton*, Citation Versus Arrest by North Carolina Law Enforcement Officers: A County-Level Analysis*, https://cjil.sog.unc.edu/files/2019/09/Prevalence-of-Citation-Use-in-North-Carolina-2.pdf ; Jessica Smith, *How Big a Role Does Money Play in North Carolina's Bail System?*, UNC School of Government, July 2019, https://cjil.sog.unc.edu/files/2019/07/How-Big-a-Role-Does-Money-Play-in-North-Carolina.pdf . The Task Force was also impressed with the comprehensive data collection related to the role race plays at every stage of the criminal justice system found in a report issued in November 2019 by the W. Haywood Burns Institute for Justice Fairness and Equality, *Racial and Ethnic Disparities in Multnomah County*, https://multco.us/file/84525/download. This too should be a template for multijurisdictional and multiagency reports in Kansas.

[98] National Institute of Corrections, *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field*, August 2011, https://s3.amazonaws.com/static.nicic.gov/Library/025172.pdf.

[99] The go-live dates may be impacted the COVID-19 pandemic and may be adjusted. Additionally, it was recently announced that Johnson County will transition from their unique case management system to Odyssey. The timeline for that transition is unknown at present.

[100] The full objection continues:

> Data collection should not be for the purposes of "*fostering an understanding of pretrial release and detention*" since Kansas does not have a system of "*pretrial release and detention*." Kansas has a system of bail and excessive bail. Preventative detention is narrowly limited, "*All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great,*" and otherwise all persons shall be bailable by and a non-excessive setting of bail and sufficient sureties. "*Excessive bail shall not be required.*" To design the data collection system to inform a change in practices or procedures that would warrant a constitutional change (New Jersey, New Mexico, etc.) is inappropriate since it presumes that the legislature and the voters would approve such a change when one is not before them.

[101] Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

[102] Email from Pittsburg State University student collective dated July 11, 2020.

[103] Written testimony of Austin Spiller before Task Force on Mar. 6, 2020.

[104] Vera Institute website, Arrest Trends, https://arresttrends.vera.org/arrests.

[105]https://www.theiacp.org/sites/default/files/all/c/Citation%20in%20Lieu%20of%20Arrest%20Literature%20Review.pdf.

[106] *Use of Summonses and Custodial Arrests for Municipal Offenses,* Criminal Justice Leadership Alliance, Apr. 7, 2010, http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx. See also, National Conference of State Legislatures website on pretrial release: http://www.ncsl.org/research/civil-and-criminal-justice/pretrialrelease.aspx; *See also*, DUE SOUTH: *New Orleans, Louisiana: Reforming Arrest and Pretrial Practices*, Justice Policy Institute, May 2011, http://www.justicepolicy.org/uploads/justicepolicy/documents/due_south_-_new_orleans.pdf.

[107] *Final Report of the President's Task Force on 21st Century Policing,* President's Task Force on 21st Century Policing, Office of Community Oriented Policing Services, (2015) https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

[108] ABA Standards for Criminal Justice: Pretrial Release, Standard 10-1.3, https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf (3d ed. 2007).

[109] https://nccriminallaw.sog.unc.edu/10723-2/.

Cite or Arrest?

Best practices call for "least harm" resolutions, including using citations instead of arrests, when appropriate. ***Whether to cite or arrest is always in your discretion***. However, you are encouraged to issue citations for misdemeanors unless one of the following circumstances exists:

- ☐ Defendant poses a danger of continuing criminal activity if not arrested
- ☐ Defendant poses an immediate danger to himself and assistance without arrest is not an option
- ☐ Defendant poses a danger to others
- ☐ Pretrial restrictions are required (e.g., stay away from victim)
- ☐ Offense involved physical harm to a person (as opposed to property)
- ☐ Offense involved deadly weapon
- ☐ Domestic dispute
- ☐ Defendant has more than 2 prior FTAs within the past 2 years
- ☐ Defendant has prior violent crime convictions
- ☐ Defendant committed offense while on probation/pretrial release
- ☐ Cannot confirm Defendant's identity or physical address
- ☐ Defendant has no local address or connections and thus is a FTA risk
- ☐ Defendant also arrested for a felony
- ☐ Statute requires arrest

[110] "We are excited to support the Citation Project," said Charles Koch Foundation Executive Director Ryan Stowers. "The Project's research will help law enforcement develop best practices to improve public safety, increase trust between police and communities, and ensure that the criminal justice system offers alternatives to arrest that allow non-violent offenders a second chance." https://www.sog.unc.edu/about/news/cite-or-arrest-school's-new-innovation-lab-will-research-options-1.

[111] https://americansforprosperity.org/afp-tennessee-has-most-productive-session-ever/.

[112] https://www.aclu-tn.org/2019-tga-legislative-review/.

[113] American Bar Association Standards for Criminal Justice, Pretrial Release (3rd ed. 2007), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc/.

[114] K.S.A. § 22-2302.

[115] For example, K.S.A. § 22-2401 allows an officer discretion to make an arrest if there is probable cause to believe the person will not be apprehended, or evidence of the crime will be irretrievably lost unless the person is immediately arrested; or the person may cause injury to self or others or damage to property unless immediately arrested; or the person has intentionally inflicted bodily harm on another person. In these specific situations a notice to appear may not be appropriate. There may be other circumstances, but the Task Force believes that stakeholders are in a better position to determine those exceptions.

[116] https://www.theiacp.org/projects/citation-in-lieu-of-arrest.

[117] Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

[118] Email dated Mar. 7, 2019 from Sedgwick County Sheriff Jeffrey Easter on behalf of the Kansas Sheriff's Association.

[119] Email dated Mar. 4, 2020 from Kansas Sheriff's Association.

[120] Email dated Mar. 5, 2019 from Melody Miller, Kansas Urban League; Anecdotal information provided by members of minority communities expressed a concern that officers often choose to arrest minorities while giving whites a ticket or summons. These concerns were relayed from LULAC and many members of the black community. The ACLU also alerted the Task Force to several studies that would support a concern regarding discriminatory enforcement practices in Kansas. For example, the Manhattan Alliance for Peace and Justice reported that in 2014 black persons in Riley County were 6.8 times more likely than white persons to be arrested for marijuana possession (a nonperson crime): https://mapj.org/2017/02/23/cej-leaflet-on-rcpd-drug-law-enforcement-2010-2014/. *See also*, Kelsey Ryan and Amy Renee Leiker, *Ballot Issue Invites Look at Marijuana Use in Wichita*, The Wichita Eagle, Mar. 28, 2015, https://www.kansas.com/news/politics-government/election/article16705595.html ("Nationally, blacks were 3.7 times more likely than whites to be arrested for marijuana, even though black people and white people use marijuana at roughly the same rates, according to an ACLU analysis of millions of marijuana arrests between 2001 and 2010.").

The Task Force was also impressed with the work done by Professor Michael Birzer, Wichita State University, regarding minority experiences with law enforcement throughout the state and the response from law enforcement to those concerns. *See,* Birzer, Michael*, Racial Profiling: Perspectives of Kansas Law Enforcement,* Kansas Department of Transportation, May 2015*;* Birzer, Michael, *Racial Profiling: They Stopped me Because I'm ----*, CRC Press, 2013; Birzer, Michael, *The Phenomenology of Racial Profiling in Kansas Technical Report*, Kansas Department of Transportation, December 23, 2010.

[121] Written testimony of Austin Spiller before Task Force on Mar. 6, 2020.

[122] Email dated Mar 7, 2019 from Ed Klumpp on behalf of the Kansas Association of Chiefs of Police, with letter attached from President, Chief Mike Keller and email from Chief Stu Hite, Kansas Peace Officers Association dated Mar. 5, 2019.

[123] Email dated Nov. 22, 2019 from Tenth Judicial District Magistrate Judge Daniel Volkins.

> I know there is a push to perhaps issue more citations rather than an arrest. I would be interested to know what the FTA percentage is with citations in City Courts where they are commonly used. I bet the percentage is high. In addition, how do you handle the fingerprint and DNA sample issue. I can guarantee that if I tell the

defendant at first appearances/arraignments to go across the street to the jail to submit the fingerprints/DNA, they will not go. Therefore, something would have to be set up right outside the courtroom and that raises space and manpower resources for the Sheriff.

[124] Matt Ford, *America's Largest Mental Hospital is a Jail*, The Atlantic, June 8, 2015, https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/.

[125] Kansas Law Enforcement, Crisis Intervention Team website, Sept. 6, 2019, http://kansascit.org/about.php.

[126] Ashleigh Fryer, *Eleven Johnson County KS Cities to Partner a Mental Health Co-Responder with Law Enforcement*, Council of State Governments-Justice Center, July 21, 2016, https://csgjusticecenter.org/mental-health/posts/eleven-johnson-county-ks-cities-to-partner-mental-health-co-responder-with-law-enforcement/.

[127] Topeka Police Department Website https://www.topeka.org/tpd/cit/.
[128] Matthew Kelly, *Integrated Care Team Launches with focus on Mental Healthcare*, The Wichita Eagle, Aug. 2, 2019, https://www.kansas.com/news/local/crime/article233183986.html.

[129] Douglas County Kansas website, https://douglascountyks.org/depts/district-attorney/behavioral-health-court-information.

[130] Susan Thacker, *Crisis Team Looks at Jail Overcrowding and Mental Health: Community hopes to form crisis intervention team*, Great Bend Tribune, August 20, 2019, https://www.gbtribune.com/news/local-news/crisis-team-looks-jail-overcrowding-and-mental-health/.

[131] Oral report to Task Force from Ellis County Attorney Thomas Drees.

[132] Paul Williams, *Law Enforcement & Certified Community Behavioral Health Clinics: Increasing Access to Treatment, Decreasing Recidivism*, Dec. 4, 2018, https://www.thenationalcouncil.org/wp-content/uploads/2018/12/Paul-Williams-statement.FINAL-PRINT-VERSION.pdf.

[133] *Id.*

[134] *What is a CCBHC*?, National Counsel of Behavioral Health, https://www.thenationalcouncil.org/wp-content/uploads/2017/11/What-is-a-CCBHC-11.7.17.pdf.

[135] *See* National Council for Behavioral Health Website for information about the CCBHC program, https://www.thenationalcouncil.org/topics/certified-community-behavioral-health-clinics/.

[136] David Twiddy, *Nine Johnson County Cities to Share Costs for Mental Health Professional*, The Kansas City Star, June 7, 2016, https://www.kansascity.com/news/local/community/joco-913/northeast-joco/article82298477.html#storylink=cpy.

[137] Dave Roos *Cash Bail Punishes Poor, But What's the Alternative?*, HowStuffWorks.com, Feb. 14, 2018, https://money.howstuffworks.com/cash-bail-punishes-poor-but-whats-alternative.htm.

[138] Email from Pittsburg State University student collective dated July 11, 2020.

[139] K.S.A. § 59-29c02.

[140] K.S.A. § 59-29c05.

[141] Mental Health Task Force Report to the Kansas Legislature, Recommendation 1.1, Jan. 14, 2019, at 13, http://kslegislature.org/li/b2019_20/Task Forces/ctte_s_phw_1/documents/testimony/20190206_03.pdf.

[142] *Id. at* 14.

[143] *See* http://kslegislature.org/li/b2019_20/Task Forces/ctte_s_phw_1/documents/testimony/20190206_03.pdf , p. 13 and https://www.kdads.ks.gov/docs/default-source/CSP/bhs-documents/governor's-mental-health-task-force/mental-health-task-force-report.pdfm, at 16.

[144] The full objection continues:

> However a review of the definition at K.S.A. 29-59c02(f): ["*Crisis intervention center service area*" *means the counties to which the crisis intervention center has agreed to provide service*], indicates that there are counties, including numerous rural counties, which do not have Crises Intervention Centers available. Such regulations would only serve limited areas of the state. The laws which currently allow for involuntary committal by law enforcement are a convoluted and complicated patchwork procedure. Is this Task Force willing to suggest regulatory revisions of the Crises Intervention Act and the nightmare of statutory revisions of K.S.A. 59-2945, C*are and Treatment, et seq*. The suggestion from the Task Force is a laudable and much needed proposition but it is of limited application. This problem highlights the problems endemic to our rural state with its urban centers. Last but not least expect pushback to regulation changes from mental health, poverty, and civil rights special interests asking what procedural safeguards will there by to protect the rights of defendants facing 72 hours?
>
> If this is to be used as a *defacto* method a preventative detention in criminal cases, we would be opposed as would, we suspect, other civil rights groups more familiar with mental health and committals.

Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

[145] Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense.

[146] Letter dated Mar. 5, 2020 from Kansas Sheriff's Association.

[147] Email dated Apr. 30, 2020 from Special Deputy for Government Affairs, Johnson County Sheriff's Office, Greg Smith.

[148] K.S.A. § 22-3302(3)(A)(b).

[149] K.S.A. § 22-3302.

[150] K.S.A. § 22-3303.

[151] Assumes pre-COVID-19 pandemic shutdown.

[152] https://www.kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2019%20Reports/Report%20on%20Commitment%20of%20Incompetent%20Defendants%20-%20JC%20Approved.pdf.

[153] *See* HB 2292 introduced in the 2019 Kansas Legislative Session.

[154] *See* Ram Subramanian, *et. al*., *Incarceration's Front door: The Misuse of Jails in America, Vera Inst. of Justice*, Feb. 2015 at 12, http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report_02.pdf (reporting that 60% of jail inmates report having had symptoms of a mental health disorder in the prior twelve months and 68% of jail inmates have a diagnosed substance abuse disorder).

[155] 2003 Kan. Sess. Laws Ch. 135 (S.B. 123).

[156] *State v. Preston*, 287 Kan. 181, 185 (2008) (quoting a 2003 memorandum from Kansas Sentencing Commission to the Senate Judiciary Task Force).

[157] http://www.kslegislature.org/li/b2019_20/measures/hb2708/.

[158] http://www.kslegislature.org/li/b2019_20/measures/HB2292/testimony.

[159] http://www.kslegislature.org/li/b2019_20/measures/HB2292/testimony.
[160] http://www.kslegislature.org/li/b2019_20/measures/HB2292/testimony.

[161] http://www.kslegislature.org/li/b2019_20/measures/documents/fisc_note_hb2292_00_0000.pdf.

[162] "The KSA understands that a bill was recommended by the Justice Reform Commission. But it did not pass the House. HB2708 passed the House 125-0. We are in favor of these funds being earmarked for drug treatment and evaluation." Letter sent by email from Kansas Sheriff's Association dated Mar. 4, 2020.

[163] http://www.kslegislature.org/li/b2019_20/Task Forces/ctte_h_jud_1/documents/testimony/20190219_03.pdf.

[164] Written testimony of Austin Spiller before Task Force on Mar. 6, 2020.

[165] Emails from Silas Horst, Koch Industries, dated March 1, 2019 and March 7, 2019. In addition, Mr. Horst recommended two publications that he found compelling: Marc Levin and Michael Haugin, *Open Roads and Overflowing Jails: Addressing High Rates of Pretrial Incarceration*, published by the Texas Public Policy Foundation-Right on Crime, May 2018: http://rightoncrime.com/2018/05/open-roads-and-overflowing-jails-addressing-high-rates-of-rural-pretrial-incarceration/ and Colin Doyle, Chiraag Bains, and Brook Hopkins, *Bail Reform: A Guide for State and Local Policy Makers*, published by Criminal Justice Policy Program at Harvard Law School, February 2019: http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf.

[166] Email dated Feb. 22, 2019 from Jay Hall, Legislative Policy Director and General Counsel, Kansas Association of Counties.

[167] Written testimony of Austin Spiller before Task Force on Mar. 6, 2020.

[168] The issue comes down to what is meant by the term "forthwith." We have outlined the respective positions in fn. 10 of the Best Practices for Pretrial Arrest and Charging, attached hereto as Appendix A.

[169] *See United States v. Cronic*, 466 U.S. 648, 658–60 (1984).

[170] Davies, Shteynberg, Morgan & Wordon, *Guaranteeing Representation at First Court Appearances May be Better for Defendants and Cheaper for Local Governments*," LSE US Centre Daily Blog, https://blogs.lse.ac.uk/usappblog/2018/08/28/guaranteeing-representation-at-first-court-appearances-may-be-better-for-defendants-and-cheaper-for-local-governments/.

[171] Davies, Shteynberg, Morgan & Wordon, *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 CRIMINAL JUSTICE POLICY REVIEW 710 (2018).

[172] Douglas L. Colbert *et. al.*, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1741–42 (2002); *See also*, Gerald R. Wheeler & Gerald Fry, *Project Orange Jumpsuit: Evaluation of Effects of Pretrial Status on Case Disposition of Harris County Felony & Misdemeanor A/B Defendants*, at 4 (2013) (finding that in Harris County, Texas, "[s]tatistically identical defendants who make bond experience:

86% fewer pretrial jail days; 33.3% better chance of getting deferred adjudication; 30% better chance of having all charges dismissed; 24% less chance of being found guilty; and 54% fewer jail days sentenced.").

[173] 554 U.S. 191 (2008). *See also*, Sara Sapia, *Access to Counsel at Pretrial Release Proceedings*, by of the National Center for State Courts' Pretrial Justice Center for Courts (www.ncsc.org/pjcc), Pretrial Justice Brief 7, Nov. 2016, https://www.ncsc.org/~/media/microsites/files/pjcc/pretrial%20counsel%20brief%207.ashx.

[174] 554 U.S. at 203–04.

[175] 554 U.S. at 205.

[176] *But see*, *Roeder v. State*, *unpublished*, 2019 WL 3242198, 444 P.3d 379 (Kan. Ct. App. 2019) (discussing *Rothgery* by way of LaFave's interpretation of it).

> Roeder complains the district court violated his Sixth Amendment right to counsel by failing to provide him an attorney at his first appearance, a hearing at which the court determined Roeder should be held without bond. But the Sixth Amendment right to counsel applies only at "critical stages" of the criminal proceeding, and Roeder's first appearance and initial bail hearing was not a critical stage of his criminal proceeding. See *Craig v. State*, 198 Kan. 39, 41, 422 P.2d 955 (1967) (noting that counsel need not be appointed for initial appearance before judge at which bail is determined); see 3 LaFave, Israel, King, & Kerr, Criminal Procedure § 11.2(b), p. 702 (4th ed. 2015) (noting that while United States Supreme Court left open question of whether first appearance in criminal case is critical stage requiring counsel in *Rothgery v. Gillespie County*, 554 U.S. 191, 128 S. Ct. 2578, 171 L.Ed. 2d 366 [2008], statements in Court's opinion and concurring opinion suggested that the standard first appearance ordinarily would not be a critical stage).

[177] Douglas L. Colbert, *Prosecution Without Representation*, 59 Buff. L. Rev. 333, 396 (2011). He provides the following survey results related to delays in appointment of counsel in Kansas.

Location City (County)	**Represented at Initial Bail Hearing?**	**If No, Days of Delay?**	**Attorney Providing Information**
KANSAS			
Salina (Saline County)	No	2 - 7	Mark J. Dinkel
Wichita (Sedgwick County)	No	2	Steve Osburn
Topeka (Shawnee County)	No	7	Tom Bartee
Liberal (Seward County)	No	14-30	Razmi Tahirkheli

[178] Douglas L. Colbert, *Prosecution Without Representation*, 59 Buff. L. Rev. 333, 413–14 (2011).

[179] 18 U.S.C.A. § 3142(f).

> The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate

Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday).

[180] Judges Pretrial Arrest and Detention Survey, conducted by Task Force.

[181] K.S.A. § 22-2802(8).

[182] Ms. Cessna oversees 16 public defender offices and facilitates the representation of over 400 appointed private counsel in 105 different counties across the state of Kansas on behalf of indigent adult clients charged with felonies.

[183] https://www.lifesize.com/.

[184] https://sixthamendment.org/.

[185] https://www.maine.gov/mcils/document_library/index.html.

[186] https://sixthamendment.org/6AC/6AC_me_report_2019_execsumm.pdf.

[187] *Tucker v. State*, 162 Idaho 11 (2017).

[188] https://legislature.idaho.gov/statutesrules/idstat/Title19/T19CH8/SECT19-850/.

> 6. The defending attorney assigned to a particular case should, to the extent reasonably practicable, continuously oversee the representation of that case and personally appear at every substantive court hearing.

Idaho Code Ann. § 19-850.

[189] Telephone discussion with Kathleen Elliott, Executive Director, Idaho State Public Defense Commission on Feb. 28, 2020. It was also brought to the Task Force's attention that the Deason Center, established in 2017 as part of the Southern Methodist University Dedman School of Law may soon be working on data driven comparisons of vertical v. horizontal representation in indigent defense representation. https://deasoncenter.smu.edu/about/ Conversation with Director, Pamela R. Metzger.

[190] https://bailproject.org/.

[191] https://bailproject.org/after-cash-bail/.

[192] http://sfpublicdefender.org/careers/employment/.

[193] Email conversation with Melody Brannon Federal Public Defender and Kirk Redmond, First Assistant Federal Public Defender, District of Kansas, on Mar. 2, 2020. https://ks.fd.org/.

[194] James Anderson, Mary Buenaventura, & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, https://www.law.upenn.edu/live/files/8282-holisticdefensev201. *See also.* Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 Wash. & Lee L. Rev. 961, 962 (2013).

[195] Ted Talk on Participatory Defense: Raj Jayadev: https://www.ted.com/talks/raj_jayadev_community_powered_criminal_justice_reform#t-211004.

[196] https://www.foolsmission.org/programs/participatory-defense/ ; *See also*, Maura Ewing, *How Prisoner's Family Members Can Assist Overworked Public Defenders*, The Atlantic, July 5, 2017, https://www.theatlantic.com/politics/archive/2017/07/a-replacement-for-overworked-public-defenders/532476/; Thomas Fox Perry, *Ideas We Should Steal: Participatory Defense*, The Philadelphia Citizen, Nov. 29, 2017, https://thephiladelphiacitizen.org/ideas-we-should-steal-participatory-defense/.

[197] Nomin Ujiyediin, *One in Four Public Defenders in Kansas Quit Last Year Leaving Agency in Crisis*, NPR in Kansas City, Apr. 8, 2019, HTTPS://WWW.KCUR.ORG/POST/ONE-FOUR-KANSAS-PUBLIC-DEFENDERS-QUIT-LAST-YEAR-LEAVING-AGENCY-CRISIS#STREAM/0 .

[198] *Id.*

[199] According to a 2008-2009 survey, ten states ensure representation with the 48 hour initial bond hearing; California, Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, North Dakota, Vermont, Wisconsin, and the District of Columbia. *See* Douglas L. Colbert, *Prosecution Without Representation*, 59 Buff. L. Rev. 333, 389 (2011).

[200] Examples: Del. Super. Ct. Crim. R. 44; W. Va. R.Crim.P., Rule 44 ; Fla. R. Crim. P. 3.130 (also allows for limited representation: "If necessary, counsel may be appointed for the limited purpose of representing the defendant only at first appearance or at subsequent proceedings before the judge. ").

[201] Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

[202] Email from Silas Horst, Koch Industries, March 24, 2019. Also referred the Task Force to: Davies, Shteynberg, Morgan & Wordon, *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 CRIMINAL JUSTICE POLICY REVIEW 710 (2018) and Colin Doyle, Chiraag Bains, and Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Criminal Justice Policy Program (CJPP) at Harvard Law School, Feb. 2019, http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf.

[203] Letter sent by email from Kansas Sheriff's Association dated Mar. 4, 2020.

[204] Testimony of Austin Spillar, Policy Associate, ACLU-Kansas, Mar. 6, 2020 Task Force Meeting.

[205] Sarah L. Desmarais and Evan M. Lowder, *PRETRIAL RISK ASSESSMENT TOOLS: A Primer for Judges, Prosecutors, and Defense Attorneys*, Feb. 2019, http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/Pretrial-Risk-Assessment-Primer-February-2019.pdf.

[206] *Id.*

[207] 11 Del.C. § 2104 (e)(1):

> When making a release determination, or imposing conditions set forth in § 2108 of this title, the court shall use an empirically developed risk assessment instrument, if available, designed to improve pretrial release decisions by assessing defendant's likelihood of pretrial success. In circumstances involving suspected domestic or intimate partner violence, the judicial officer shall also consider the results, if available, of an instrument designed to assess the likelihood or predicted severity of future violence against the alleged victim. Any such risk assessment tools are not binding on the court. They are factors to be considered in the totality of the circumstances in determining the conditions of release imposed upon the defendant. The judicial officer may consider any other facts and circumstances regarding a

defendant's likelihood of pretrial success and the protection of the victim, witnesses, and any other person.

(2) The Statistical Analysis Center shall provide the court with a report of rates of re-arrest and failure to appear as required by defendants released by the court.

[208] Idaho Code Ann. § 19-1910:

(1) All pretrial risk assessment tools shall be transparent, and:

(a) All documents, data, records, and information used by the builder to build or validate the pretrial risk assessment tool and ongoing documents, data, records, and written policies outlining the usage and validation of the pretrial risk assessment tool shall be open to public inspection, auditing, and testing;

(b) A party to a criminal case wherein a court has considered, or an expert witness has relied upon, a pretrial risk assessment tool shall be entitled to review all calculations and data used to calculate the defendant's own risk score; and

(c) No builder or user of a pretrial risk assessment tool may assert trade secret or other intellectual property protections in order to quash discovery of the materials described in paragraph (a) of this subsection in a criminal or civil case.

(2) For purposes of this section, "pretrial risk assessment tool" means a pretrial process that creates or scores particular factors in order to estimate a person's level of risk to fail to appear in court, risk to commit a new crime, or risk posed to the community in order to make recommendations as to bail or conditions of release based on such risk, whether made on an individualized basis or based on a grid or schedule.

[209] W. Va. Code Ann. § 15A-5-7:

(a) Within three calendar days of the arrest and placement of any person in a jail, the division shall conduct a pretrial risk assessment using a standardized risk assessment instrument approved and adopted by the Supreme Court of appeals of West Virginia. The results of all standardized risk and needs assessments are confidential and shall only be provided to the court, court personnel, the prosecuting attorney, defense counsel, and the person who is the subject of the pretrial risk assessment. Upon completion of the assessment, the Division of Corrections and Rehabilitation shall provide it to the magistrate and circuit clerks for delivery to the appropriate circuit judge or magistrate.

(b) The pretrial risk assessment and all oral or written statements made by an individual during risk assessment shall be inadmissible evidence at any criminal or civil trial.

[210] Sarah Picard, Matt Watkins, Michael Rempel, & Ashmini Kerodal, *Beyond the Algorithm: Pretrial Reform, Risk Assessment and Racial Fairness*, Center for Court Innovation, 2019. https://www.courtinnovation.org/sites/default/files/media/document/2019/Beyond_The_Algorithm.pdf.

[211] *Pretrial Implementation*, Public Safety Risk Assessment Clearinghouse, https://psrac.bja.ojp.gov/implementation/structured-decision/pretrial.

[212] Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment*, Pretrial Justice Institute, Mar. 2011, https://www.bja.gov/Publications/PJI_PretrialRiskAssessment.pdf.

[213] *Americans Favor Expanded Pretrial Release, Limited Use of Jail*, Pew Charitable Trust, Nov. 2018 (Issue Brief),. https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/11/americans-favor-expanded-pretrial-release-limited-use-of-jail.

[214] https://www.pretrial.org/wp-content/uploads/Risk-Statement-PJI-2020.pdf.

[215] NAPSA: https://napsa.org/eweb/startpage.aspx ; JFA Institute: http://www.jfa-associates.com/publications/NewReleases/TheValueofPretrialRiskAssessmentInstruments.pdf ; CEPP: https://cepp.com/a-statement-from-advancing-pretrial-policy-and-research-appr/.

[216] Email dated Feb. 25, 2020 to members. See also, 2013 position paper supported by the Conference of Chief Justices: https://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx.

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

[218] Brook Hopkins, Chiraag Bains, & Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 683 (2019) ("In jurisdictions that have implemented reforms that result in releasing most people on recognizance, the overwhelming majority of those people have shown up for court dates and have not committed crimes on release.").

[219] Sandra Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 514 (2018). *See also* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, (2012) ("We also show that though defendants with drug felonies are presumed to be dangerous, they are among the least likely to be rearrested for a violent crime. In fact, people charged with drug felonies are about as likely to be rearrested as those brought in on driving-related offenses.")

[220] https://www.psapretrial.org/about.

[221] Sarah L. Desmarais & Evan M. Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys*, Safety and Justice Challenge, Feb. 2019, http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/Pretrial-Risk-Assessment-Primer-February-2019.pdf.

[222]234 Pa. Code Rule 523. https://www.pacode.com/secure/data/234/chapter5/s523.html.

[223] The full response from the Kansas Bail Agents Association:

> The Supreme Court should not get into the business of approving risk tools, piloting risk tools, or doing anything in terms of supervising the use of such tools in the system. In addition, consideration must be given to whether the rules of evidence should be changed regarding the proprietary trade-secret allegation and evidentiary privileges that proprietors of such risk assessments enjoy. To deny defendants and their defense attorneys the information as to how and why a defendant has a high bond or was denied release by application of a supposed "*uniform, validated pretrial risk assessment tool*" is an anathema to the American system of justice. How can a defendant properly represent his own interests if now allowed access to challenge the assertions made against him?
>
> Pretrial risk assessments are sold as an easy way to get everything we want: make the communities safer, reduce jail populations, increase appearance rates, solve racism, and fix many other issues in the system. The problem is that in practice that has simply not occurred. Civil rights groups, academia, legislators, policy-makers and others are now asking not should we simply fix the issues with these pretrial risk assessment tools but should we use them at all?

The following is a list of recent criticisms of such pretrial risk assessment tools:

- In August 2019, twenty-seven prominent academics from prominent universities issued a statement that jurisdictions must stop using pretrial risk assessment tools because they do not accurately predict, they are racially biased, and they cannot be fixed. https://ambailcoalition.org/download/24/risk-assessments/4956/technical-flaws-of-pretrial-risk-assessments.pdf. The same researchers then sent letters to three jurisdictions demanding that they cease using the tools. https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/4976/california-researchers-rat-warning.pdf.

- In 2018, 100 national civil rights groups, including the NAACP and ACLU, issued a statement cautioning jurisdictions to not use the tools due to concerns of racial bias and validity, and then demanding transparency if the tools are to be used. https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/.

- Academic research indicates that proprietors of these tools pursuant the common law are able to shield the underlying mathematics and data of these tools not only from the public but from criminal defendants who seek to expose the ineffectiveness of these tools at the margins when it means jail or freedom. https://www.stanfordlawreview.org/print/article/life-liberty-and-trade-secrets/.

- Over 100 civil rights groups in New York State opposed the expansion or use of pretrial risk assessment tools. https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/864/new-york-100-community-leaders-bail-reform-letter.pdf.

- The ACLU of Kansas issued a powerful rebuke of risk assessment tools to a judiciary led task force looking at bail reform https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/4646/aclu_presentation-kansas.pdf.

- Eighty digital groups, including Google, Facebook, IBM, Samsung, etc. issued a statement saying that they believe the assessments potentially bake-in existing bias into the system and prevent real change. https://ambailcoalition.org/download/24/risk-assessments/4766/report-on-algorithmic-risk-assessment-tools.pdf.

- One scholar's research shows that risk assessment algorithms have contributed to generational mass incarceration, rather than the suggestion that these algorithms actually reduce it. https://ambailcoalition.org/download/24/risk-assessments/835/performance-effects-risk-tech-robert-werth-rice-university.pdf.

- The legislature of the State of Iowa passed legislation that ended a pilot project of the Arnold Foundation PSA in Iowa, which was endorsed by the Governor, due to concerns which we have seen coast-to-coast that the tool is too soft on gun cases, is not transparent and may be potentially biased.

- In a landmark peer-reviewed study, Professor Megan Stevenson of George Mason University School of Law, after reviewing significant data from various jurisdictions, concluded that in

practice the tools had a negligible if any effect on jail populations and increased slightly the risk of failing to appear in court as required and the risk of committing new crimes while on bond. https://ambailcoalition.org/download/24/risk-assessments/828/assessing-risk-assessment-in-action.pdf.

- The Idaho Legislature passed legislation, Idaho House Bill 118, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/legislation/H0118.pdf that Governor Little signed into law, to require the pretrial risk assessments to be fully transparent and to eliminate the ability for the algorithms to be proprietary and enjoy the ability to quash discovery requests in a criminal case. John Arnold, of the Arnold Foundation, in fact supported that legislation, and yet states and jurisdictions like Michigan, New Jersey, Toledo, Ohio, etc. all have contracts that still maintain and allow the proprietary protections. No other legislature in the nation has yet to act on this.

- A recent article on Wired.com noted that the Kentucky experiment with the use of the Arnold Foundation algorithm based on empirical research has failed. https://www.wired.com/story/algorithms-shouldve-made-courts-more-fair-what-went-wrong/.

- The ACLU of Colorado at a recent legislative hearing in the House Judiciary Task Force considering the statewide expansion of risk assessments in H.B. 19-1226, testified that the Colorado CPAT tool violated the Americans With Disabilities Act because it scored those with current or previous mental health or substance abuse disorders as higher risk, increasing the chances they would stay in jail or face greater supervision by county agencies. Many of the existing tools suffer from the same issues.

- 50 Civil Rights groups, including the ACLU and San Francisco public defender, opposed the passage of California's Senate Bill 10, largely on grounds of opposition to the risk assessment and expansion of preventative detention.

- New Jersey claims the success of the Arnold Foundation Public Safety Assessment algorithm, but even if the jail population drop could be attributed to bail reform, there is no indication that the use of the algorithm is the reason versus the forcing of prosecutors to prove that detention is justified has driven more releases.

No one has been able to demonstrate that the investment of government resources into the risk assessment process has resulted in any savings, much less savings significant enough to offset the cost of doing the risk assessment in the first place.

In short, there is no reason at this point to believe that pretrial risk assessments will reduce jail populations, save money, make the system more fair (largely due to inherent bias issues), reduce crimes while on release, or reduce failures to appear in court as required. In practice, the risk assessment era has failed over the last decade to deliver on its promises, and we believe it is time for it to come to an end.

For these reasons, the Supreme Court should allow the other branches of Government to deal with issues related to pretrial risk assessments and should not get into the business of approving tools via court rules. The Supreme Court of Ohio recently, decided not to issue rules that would over-rule the legislature's enactment of ORAS, rules recommended by a judicial Task Force would have done just that.

Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

[224] Presentation to Task Force in Mar. 2019. Written testimony of Austin Spiller before Task Force on Mar. 6, 2020. https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/Pretrial_Justice_Task_Force/ACLU_presentation.pdf.

[225] Sarah L. Desmarais & Evan M. Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys*, Safety and Justice Challenge, Feb. 2019, http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/Pretrial-Risk-Assessment-Primer-February-2019.pdf.

[226] Radley Balko, *There's overwhelming evidence that the criminal justice system is racist. Here's the proof*, THE WASHINGTON POST, June 10, 2020, https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/.

Ruth Marcus, *If you don't believe systemic racism is real, explain these statistics*, THE WASHINGTON POST, June 12, 2020, https://www.washingtonpost.com/opinions/if-you-dont-believe-systemic-racism-is-real-explain-these-statistics/2020/06/12/ce0dff6e-acc7-11ea-94d2-d7bc43b26bf9_story.html?utm_campaign=wp_opinions&utm_medium=email&utm_source=newsletter&wpisrc=nl_opinions .

[227] Sandra G. Mayson, *Bias In, Bias Out*, 128 Yale L.J. 2218, 2224 (2019).

[228] Email from Joyce Grover, Executive Director of the Kansas Coalition Against Sexual and Domestic Violence on Mar. 2, 2020. https://praxisinternational.org/wp-content/uploads/2016/02/BlueprintChapter7.pdf.

[229] Letter emailed on Mar. 4, 2020 from Kansas Sheriff's Association.

[230] *Pretrial Risk Assessment 101: Science Provides Guidance on Assessing Defendants*, Pretrial Justice Institute, May 2015 (Issue Brief), https://www.bja.gov/Publications/PJI_PretrialRiskAssessment101.pdf.

[231] Emails dated Mar. 1, 2019 and Mar. 7, 2019 from Silas Horst, Koch Industries. In addition, Mr. Horst recommended two publications that he found compelling: Marc Levin & Michael Haugin, *Open Roads and Overflowing Jails: Addressing High Rates of Pretrial Incarceration*, Texas Public Policy Foundation-Right on Crime, May 2018, http://rightoncrime.com/2018/05/open-roads-and-overflowing-jails-addressing-high-rates-of-rural-pretrial-incarceration/; Colin Doyle, Chiraag Bains, & Brook Hopkins, *Bail Reform: A Guide for State and Local Policy Makers*, Criminal Justice Policy Program, Feb. 2019, http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf.

[232] Email dated Feb. 22, 2019 from Jay Hall, Legislative Policy Director and General Counsel, Kansas Association of Counties.

[233] Written testimony of Austin Spiller before Task Force on Mar. 6, 2020.

[234] "What the evidence *does* reflect is that most defendants who are released from custody pending trial will appear for their court dates without any financial incentive, and that many of those who miss a court appearance do so for mundane reasons such as lack of reliable transportation, illness, or inability to leave work or find childcare, rather than out of a desire to escape justice." Cty. of Santa Clara Bail & Release Work Grp., Final Consensus Report on Optimal Pretrial Justice, at 2 (2016), https://www.sccgov.org/sites/ceo/Documents/final-consensus-report-on-optimal-pretrial-justice.pdf.

[235] Rachel A. Harmon, *Why Arrest?*, 115 Mich. L. Rev. 307, 338 (2016 ("In one study, over half of the failures to appear were solved by continuing the case for a week and informing the suspect of the new day, with no additional penalty for the initial failure to appear.") citing Mark Berger, *Police Field Citations in New Haven*, 1972 Wis. L. Rev. 382, 407-408.

[236] Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

[237] Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

[238] Andrea Woods & Portia Allen-Kyle, *A New Vision for Pretrial Justice in the United States*, ACLU-Smart Justice, Mar. 2019, https://www.aclu.org/report/new-vision-pretrial-justice-united-states; Written testimony of Austin Spillar at Mar. 6, 2020 Task Force Meeting.

[239] *Large-Scale No-Show Patterns and Distributions for Clinic Operational Research*, Healthcare 2016, at 4, Feb. 16, 2016, https://pdfs.semanticscholar.org/57df/3eb2595a353b9a750076f1773c87d471f9cc.pdf.

[240] *Court Appearance Notification System Process and Outcome Evaluation*, Multnomah County Budget Office Evaluation, Mar. 2006, https://multco.us/file/26884/download ; *See also*, *Reducing Courts' Failure to Appear Rate: A Procedural Justice Approach*, fn. 108, *supra*.

[241] Email dated Mar. 5, 2019 of list of concerns provided by Kansas Bail Agents Association.

[242] For example, B & K Bonding out of Salina reported at the Task Force meeting in March 2019 that it uses Captira Bail Management Software to track clients, https://www.captira.com/pages/bail-software ; and Owens Bonding out of Hutchinson uses Expertbailvision, http://www.bailvisionpro.com/.

[243] *Failure to Appear is the Top Charge for People Booked into Jail in 2017*, chart provided by District Attorney Charles Branson.

[244] Jennifer Elek, Sara Sapia, & Susan Keilitz, *Use of Court Date Reminder Notices to Improve Court Appearance Rates*, National Center for State Courts' Pretrial Justice Center, Pretrial Justice Brief 10, Sep. 2017, https://www.ncsc.org/__data/assets/pdf_file/0015/1635/pjcc-brief-10-sept-2017-court-date-notification-systems.ashx.pdf.

[245] Timothy R. Schnacke, Michael R. Jones, & Dorian M. Wilderman, *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 Court Review 86, 94 (2012), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1396&context=ajacourtreview:

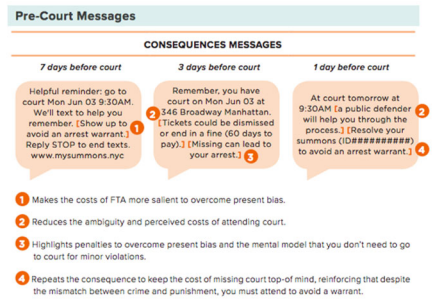
> For many jurisdictions, the singular response to defendants failing to appear for court is to issue warrants, typically with high monetary bonds attached, and then to wait for law enforcement to serve those warrants through arrests. Unfortunately, this way of doing business is costly, and it has resulted in some jurisdictions having court-appearance rates as low as 70%. Innovative ways of dealing with the issue of court appearance rates should be of primary concern to all people in the criminal justice system, including judges. The Jefferson County FTA Pilot Project demonstrated that live telephone callers either reminding defendants to come to court or notifying them of their impending warrant status after they fail to appear for court can have a dramatic effect on appearance rates. The resulting Court Date Notification Program has shown that these results can be improved, and that customer service is significantly enhanced through the use of a live caller intervening in advance of the court event.

[246] Mitchel N. Herian & Brian H. Bornstein, *Reducing Failure to Appear in Nebraska, A Field Study*, The Nebraska Lawyer, Sep. 2010, https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1008&context=publicpolicyfacpub; *See also*, Brian H. Bornstein, Alan J. Tomkins, & Elizabeth M. Neeley, *Reducing Courts' Failure to Appear Rate: A Procedural Justice Approach*, U.S. Department of Justice, May 2011, https://www.ncjrs.gov/pdffiles1/nij/grants/234370.pdf.

[247] Dane County, Wisconsin, https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1008&context=publicpolicyfacpub; Lafourche Parish, Louisiana http://www.tlgnewspaper.com/lpso-to-begin-sending-text-message-reminders-for-court-dates; New York City, New York https://www.nydailynews.com/new-york/text-message-reminders-curb-number-defendants-skip-court-article-1.3774378 ; Richmond, Virginia https://www.latimes.com/nation/la-na-court-case-text-reminders-defendants-20190504-story.html.

[248] Denise Lovie, *Text Messages Now Remind Court Defendants to Show Up*, AP Legal Affairs Writer, May 4, 2019, https://www.9news.com/article/news/text-messages-now-remind-court-defendants-to-show-up/507-eb097f68-e53b-41e3-9e33-9988c84f65a5.

[249]



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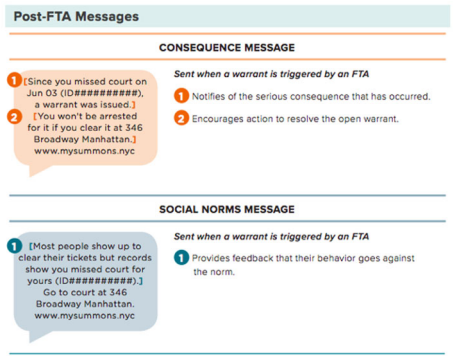

[251] Teresa Mathew, *Hello, Your Court Date is Tomorrow*, *Bloomberg CityLab*, Jan. 29, 2018, https://www.bloomberg.com/news/articles/2018-01-29/texting-people-makes-them-more-likely-to-attend-court.

[252] Johnson County Survey results provided to Task Force by member, Robert Sullivan. Survey ran from Feb. 6, 2019 to Mar. 30, 2020.

Survey Results 2/6/2019 - 3/30/2020						
Reason	**TAY**	**TAY %**	**NON-TAY**	**NON-TAY %**	**Total**	**Total %**
Afraid	22	1.8%	101	2.5%	123	2.3%
Did Not Know About Court Date	249	20.7%	893	21.8%	1142	21.6%
Did Not Want To Appear	45	3.7%	117	2.9%	162	3.1%
Forgot	446	37.1%	1465	35.8%	1911	36.1%

Had Another Court Appearance/Same Time	7	0.6%	26	0.6%	33	0.6%
Hospital	13	1.1%	104	2.5%	117	2.2%
Illness	3	0.2%	27	0.7%	30	0.6%
Incarcerated	69	5.7%	343	8.4%	412	7.8%
Inpatient Treatment	2	0.2%	10	0.2%	12	0.2%
No Childcare	9	0.7%	11	0.3%	20	0.4%
No Money To Pay Fines/Court Costs/Fees	33	2.7%	118	2.9%	151	2.9%
No Transportation	142	11.8%	382	9.3%	524	9.9%
Out Of Town	30	2.5%	94	2.3%	124	2.3%
Other	56	4.7%	191	4.7%	247	4.7%
Roads/Weather	3	0.2%	7	0.2%	10	0.2%
Refused To Answer	2	0.2%	15	0.4%	17	0.3%
Went To Wrong Court	2	0.2%	17	0.4%	19	0.4%
Work	47	3.9%	113	2.8%	160	3.0%
Attorney Issue	7	0.6%	19	0.5%	26	0.5%
Family Issue/Death	15	1.2%	38	0.9%	53	1.0%
Total	1202	100%	4091	100.0%	5293	100%

*Transitional Aged Youth (18-24)(TAY)

[253] Paul D. Schultz, *The Future Is Here: Technology in Police Departments*, Police Chief, June 2008, (noting that police can locate a fleeing fugitive or a missing child "in a matter of minutes.").

[254] Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

[255] Email from Pittsburg State University student collective dated July 11, 2020.

[256] Brook Hopkins, Chiraag Bains, and Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 685 (2019).

[257] Marie VanNostrand & GenaKeebler, *Pretrial Risk Assessment in Federal Court*, Federal Probation. Vol. 73 No. 2, Sept. 2009, https://www.uscourts.gov/sites/default/files/fed_probation_sept_2009_test_2.pdf.

[258] Brook Hopkins, Chiraag Bains, and Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 679-80 (2019). *See also* Lisa Pilnik, *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency*, National Institute of Corrections, Feb. 2017, https://nicic.gov/framework-pretrial-justice-essential-elements-effective-pretrial-system-and-agency.

[259] Marc Levin, Right on Crime, Vice President of Criminal Justice Policy at the Texas Public Policy Foundation, *Pretrial Justice in a Pandemic: Panel Discussion at 2020 Smart on Crime Innovations Conference*, July 16, 2020, https://www.youtube.com/watch?v=wXGakNHl0lM&t=35s.

> One of the most encouraging things is the use of virtual hearings. And so, we actually have some hard data, which is really exciting. So, Michigan, in April [2020] they used virtual check-ins basically and hearings for people that were released prior to trial. And the failure to appear rate was .5% in April of

> 2020 versus 10.7% in April of 2019. And New Jersey had the same thing. It went down from 20% to .3% when they used these virtual hearings…All the research told us, for many years, that most people who fail to appear, 80 to 90% of them appear for a hearing within a month, for example, of the original hearing. They missed their hearing because they didn't have childcare, they didn't have transportation, they couldn't get off of work. And with these virtual hearings, the data on these, we now see how right that was, the reasons why people weren't showing up to in-person hearings. So, let's not just automatically revert. Let's take some parts of what we put in place during the pandemic and keep those.

[260] https://www.ncsc.org/Microsites/PJCC/Home.aspx.

[261] It should be noted that this position is contrary to the recommendations contained in Third Edition of the National Association of Pretrial Services Agencies (NAPSA) Standards on Pretrial Release, 1.4(g). https://www.oakgov.com/commcorr/Documents/2004_napsa_standards.pdf.

> A judicial officer should not direct a pretrial services agency to provide supervision or other services for a defendant released on surety bond. No defendant released under conditions providing for supervision by the pretrial services agency should be required to have bail posted by a compensated surety.

An explanation is provided in the commentary to Standard 1.4(g):

> The effect is to make the pretrial services agency a kind of guarantor for the bail bondsman, in effect subsidizing the commercial bail industry by helping to reduce the risk that a defendant released on money bail will not return for scheduled court appearances… It also drains supervisory resources from often understaffed and overworked pretrial services agencies, making it more difficult to supervise the defendants for whom they properly have responsibility.

Washington, D. C. has statutorily banned such a practice. See, D.C. Code Ann. § 23-1303(h)(1)

> (h) The agency shall --
> (1) supervise all persons released on nonsurety release, including release on personal recognizance, personal bond, nonfinancial conditions, or cash deposit or percentage deposit with the registry of the court;

See also, Cty. of Santa Clara Bail & Release Work Grp., Final Consensus Report on Optimal Pretrial Justice, at 2 (2016), https://www.sccgov.org/sites/ceo/Documents/final-consensus-report-on-optimal-pretrial-justice.pdf (discouraging the practice of ordering or maintaining money bond in addition to pretrial supervision). Finally, whether or not a risk assessment tool is used to determine the amount of bond, jurisdictions must consider whether the amount is individualized, supportable as the least amount to achieve the goal of appearance in court and takes into account the defendant's financial situation. Otherwise, the risk assessment tool is no different than a fixed bond schedule.

[262] Judge Survey conducted at Regional Trainings 2019 by Task Force.

[263] Survey conducted for Task Force of county and district attorneys, Mar. 2019.

[264] Email dated Mar. 4, 2019 from Silas Horst.

[265] Email dated Feb. 27, 2020 from Sarah Mays.

[266] Email dated Feb. 27, 2020 from Sarah Mays .

> Joshua Ross CSO II and Brad Schuh CSO I:

My thoughts would be that the system should handle the dangerous offender by looking at all possible information that is available. That would include past criminal history, the alleged current offense, and the victim's insight. As we talked about this morning, our district already has this procedure in place via first appearances and bond hearings. And both the DA and defense would have the opportunity to file the appropriate motion to get in front of the court to either detain the defendant or ask for a reduced bond. The judge is presented with information plus the arguments of the lawyers in the case of bond hearings and bases their decision off of that. I'd think at the very least supervision should be imposed with various conditions as the court sees fit. If the situation calls for the defendant to be detained due to the danger they present to the victim/community then I definitely think that should be an option. Again this all would vary depending on each case and the circumstances surrounding it.

I know I can't speak for all the other districts but the way we do things here seems to run smoothly and it gets people in front of the court fairly quickly so a bond/conditions can be set. So I have a hard time seeing why we need to fix something that isn't broken.

David Padilla, CSO II:

Dangerous Offender: it would seem that the most recently based practices in the 3rd Judicial District are a good outline for identifying a dangerous offender. The review of the current available resources in a criminal complaint are best for assessing level of dangerousness; the initial Offense Report, Criminal Complaint/Affidavit, and Criminal History (PSI); the Criminal History identifies prior convictions, episodes of incarceration, episodes of supervision, (successful and/or unsuccessful) relevant victim(s); in addition, on review of incarceration episodes an offender's disciplinary history can be reviewed, paying attention to disciplinary sanctions for violations of authority(e.g. orders) and/or behaviors (e.g. fighting, inciting a riot, contraband); additionally, episodes of special housing for psychiatric/mental health services (e.g. suicidal, homicidal, risk to self and/or others), or substance abuse can be of assistance in determining dangerousness due to the influence of each on behavior; the same can be identified when reviewing supervision episodes; these variables are consistent with the Level of Service Inventory-Revised currently being used to determine level of supervision on felony cases.

When assessing dangerousness, the District Court needs to make decisions in the best interest of all parties involved, including the offender, along with victim and community safety; there is no victimless crime and collateral/community damage can be deterred/minimized with just and prudent decisions that are lawful and protective of all parties rights/liberties. Collateral/community damage occurs when an offender gains release from detention in part due to the passage of time, and the modification of a professional surety bond; District Court, Criminal Divisions, often times at the request of the defense with no opposition from the State's attorney, will modify a bond or grant an O.R. bond at the time of a plea, and impose pretrial supervision conditions; pretrial supervision, even the most **stringent**, do not guarantee victim/community safety or no collateral damage; one of the most recent and prime examples of this was in 2018, offender [L.W who] was granted and O.R. bond with Pretrial Supervision after entering a plea, regretfully while out of custody, the offender committed a new crime [of] **Murder in the 2nd Degree, Intentional**; the offender had a prior convictions, felony and misdemeanor, felony drug convictions, successful and unsuccessful supervision episodes, documented use of illegal drugs, yet no prior violent offense conviction. So, when assessing dangerousness, all variables and factors need to assessed in the best interest of all parties, especially community/citizen safety not just the severity of the current offense, violent or non-violent.

District Court(s) need to exercise due caution when modifying bonds, especially the practice of O.R. bonds at the time of taking a plea; District Courts could benefit from guidelines of the Supreme Court while pursuing 'best practices'. Offender(s), violent/non-violent, presumptive prison or presumptive probation are 'at risk' of re-offending when released on Pretrial Supervision, that risk based on review of documentation needs to be considered. The District Court when making decisions, should consider illegal use of drugs, abuse of alcohol, possession of firearm as level of **dangerousness;** dangerous to the offender, Law Enforcement, and citizens of the community; special rules are identified in the KS Sentencing Guidelines with presumptions identified; Offense Reports are written 24/7 that identify law violations in which the offender is influenced by the use of illegal drugs and/or abuse of alcohol, these variables do not go away with the passage of time, and although an offender may have been incarcerated for a duration, the District Court can make a ruling(presumption) after receiving evidence that the negative variables that have contributed to the criminal behavior have not changed; abstinence due to incarceration does not demonstrate short term/long term behavior change or lessen risk of criminal behavior; offenders, violent/non-violent, seeking release, know that the environment and influences: access to illegal drugs/alcohol, weapons/firearms in the community remains, offenders when released are at a heightened risk to use, re-offend and abscond from the court due to these factors; thus, causing delay and requiring additional time in District Court in pursuit of successful prosecution. One example, and there are more is the case of **[B.B] [Case No. 1] Lvl. 2-D-F, [Case No. 2] Lvl. 5, Presumption of Prison,** low PS bonds issued multiple times during life of case, bonds posted and on date of sentencing, offender no showed, BFAW's issued on 08-08-19.

Previously, at this time, and presumably in the future, there is a process in District Court for an offender via the defense attorney to request a Bond Hearing. At that time, a Judge is requested to review and offenders bond status, specifically the monetary value; the State's attorney, and defense attorney review and discuss relevant information for the court to assess and consider that may influence a Judge's decision on bond. This process is available to an offender(s) and the defense attorney throughout the lifespan of the case, a Bond Hearing can be scheduled multiple times, and often the only relevant variable that has changed is the passage of time the offender has been incarcerated. The passage of time does not lesson the criminal action that occurred causing the offender's arrest and subsequent incarceration, the passage of time does not decrease **dangerousness;** the contrary can be argued, as mentioned in **[B.B.]**, the low bonds did not secure the offender's presence in court, the offender is avoiding prison, thus, making the offender a fugitive from justice, a risk to the safety and security of the community.

The District Court when considering Pretrial Supervision and conditions needs to consider level of supervision. The court if needing to impose stringent conditions (e.g. GPS monitoring, House Arrest, frequent/daily reporting, etc.) is itself acknowledging a level of dangerousness of the offender and the risk potential. The court can ask itself, where is this offender most secure, and what will keep the community/victim(s) safe, where/what will keep the offender from being **dangerous** to self and/or others.

[267] Email dated Mar. 4, 2020 from Gail Antenen, Chief Court Services Officer, 24th Judicial District.

[268] The full response from the Kansas Association of Criminal Defense Lawyers:

> **The Role of Monetary Bond relative to Pretrial Supervision**. KACDL supports to use of pretrial supervision to facilitate release of clients. However, given the additional costs involved in supervision, and compliance with requirements such as treatment, UAs,

GPS/House arrest fees etc., use of pretrial supervision should be in lieu of monetary bond. Further, if the Court determines that specific conditions and pretrial supervision would assure appearance and community safety, it does not support the additional "skin in the game" thought process traditionally tied to monetary bond. The client would have "skin in the game" by paying for the supervision and the conditions of compliance which in all likelihood will exceed the 10% of the bond amount charged by the bondsman. The Federal System rarely uses monetary bond, instead relying upon pretrial supervision and services to assist the client in meeting their obligations to the case. Kansas would benefit from a similar model.

Recommendation of Minimal Conditions Necessary. KACDL believes that imposing the minimal conditions necessary is in the best interests of the client and will increase the overall likelihood of success on Pretrial supervision. People become overwhelmed with new requirements in addition to their daily lives that were already difficult. The time to complete these tasks is not minimal, and it places employment at risk. Transportation issues double, triple or quadruple the amount of time it takes to complete these tasks. The goal of pretrial supervision is to both ensure community safety and appearance at court; however, the rehabilitative effects of appropriate pretrial services contribute to the overall benefit of the justice system. As such, the Task Force should consider requiring minimal conditions tailored to the offender and the offense in order to promote appropriate use of Pretrial Supervision and increase the likelihood of success during the pretrial stage.

Over/Under Use of PreTrial Supervision. Consistent with the comments above, imposing unnecessary conditions leads to overall failure and distraction from conditions that would affect public safety and appearance. The goal should be to allow people to succeed on pretrial supervision, maintain their support systems and employment, and begin any necessary rehabilitative efforts as soon as possible while the threat of punishment and arrest are relatively recent. A requirement to limit the amount of conditions to the sole considerations of public safety and appearance should be imposed. A requirement for periodic review of pretrial conditions should be included. Monitoring of pretrial related statistics should be required by the Court to determine whether caseloads are appropriate which would indicate appropriate usage. Pretrial should be a temporary tool to monitor or encourage compliance at the start of the case or following a bond violation, not to effectively put people on probation prior to trial. Education should be provided to the Court and Court personnel to support these recommendations.

Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

[269] *See e.g.,*

K.S.A. § 21-6612(c) ("In determining the amount and method of payment of a fine, **the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.**") (emphasis added).

K.S.A. § 21-6604(b)(1) ("In addition to or in lieu of any of the above, the court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime, **unless the court finds compelling circumstances which would render a plan of restitution unworkable.**") (emphasis added).

K.S.A. § 22-6607(c)(4) ("reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or of any unpaid portion thereof***. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant***

or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment.") (emphasis added).

[270] *Creecy v. Kansas Department of Revenue,* 310 Kan. 454, ¶3 (2019).

[271] This suggested change would conform the statute to the current practice in some jurisdictions of having entities other than court services provide pretrial supervision services. The waiver language was suggested in response to *Creecy v. Kansas Department of Revenue,* 310 Kan. 454 (2019), and makes it consistent with other statutes that allow waiver for indigency. See K.S.A. § 21-6612(c); K.S.A. 21-6604(b)(1); and K.S.A. § 22-6607(c)(4).

[272] "Administrative fee" is not defined in the Kansas Code of Criminal Procedure. We know that the application fee for a court appointed attorney either for trial and incidents thereto or for a violation of conditions of postrelease supervision is an "administrative fee" based on K.S.A. § 21-6607(b)(13) and K.S.A. § 22-3717(m)(4). But that is the only context in which an "administrative fee" is mentioned in the Code. *See also*, fn. 272, *supra*.

[273] The full objection continues:

> This section also makes clear that those "non-monetary" alternatives are indeed not non-monetary. They are paid for directly by defendants, their friends or family, or by the State or a subdivision of the State of Kansas. To call them "*non-monetary*" conditions is to misstate what they are and presume they are automatically the least restrictive. They could involve, for example, $390 in charges at the minimum level of $15 per week over a six-month case, in addition to up to and including the actual cost of such conditions for which there is no ceiling.*
>
> ***Footnote:** K.S.A. 22-2802(1)(e) … place the person under the supervision of a **court services officer** responsible for monitoring the person's compliance with any conditions of release ordered by the magistrate. The magistrate may order the person to pay for any costs associated with the supervision provided by the court services department in **an amount not to exceed $15 per week** of such supervision. The magistrate may also order the person to pay for all other costs associated with the supervision and conditions for compliance in addition to the $15 per week.
>
> In the current climate of increasing use of drug testing and electronic monitoring, those costs often add up to several hundred dollars per month for bond conditions such as house arrest, GPS tracking bracelets and alcohol monitoring devices, which are billed at a per diem rate. *
> ***Footnote:** House Arrest = $15.00 per day; Remote Breath Unit = $11.00 per day; GPS monitoring = $10.00 per day; Drug Testing = $20.00 per test.
>
> It is not uncommon for an accused defendant to accrue thousands of dollars in "non-monetary" costs in a very short period of time. Further, upon sentencing those costs are typically converted into an enforceable judgment and any probation is conditioned upon payment of those costs. [See K.S.A. 22-2802(15)]. In almost every instances of increased supervision, the cost for that supervision vastly exceeds the cost of a surety bail bond.
>
> A defendant must then prove "*manifest hardship*" in order to avoid having to pay these fees. These fees could represent significant bond premiums that would be less restrictive, insofar as quite often bonds are from third parties securing the release of the defendant and financially guaranteeing the appearance of the defendant. In addition, whereas judges set cash bail the very agency that is going to do the supervising is going to recommend the conditions it will impose; and thus, the supervision fees it will collect in addition to any venders it may employ. This creates what we believe is a conflict of interest or at least the appearance of such. All pretrial fees should be set by statute, and whether defendants should be charged such fees at all and be supervised calls into question the commitment of the task force to the presumption of innocence. For denying important liberty rights when someone is not behind bars may be

more onerous and destructive to that person's rights and outcomes than actually being in jail and lead to the re-incarceration of the defendant.

In addition to the reasoning set out above we cannot support inclusion of the term "or pretrial supervision program" into K.S.A. 22-2802 because "Pretrial Supervision Program" is an exceeding vague term that has no statutory definition. By comparison Court Services Officer is a statutorily defined position with both legal authority and legal constraints. Given that there is no statutory definition of a freestanding pretrial supervision program and only limited constraints upon what interactions such a program could have with defendants, there exists a potential for abuse. Not just abusive conduct but also in terms of the defendant's legal defenses as well. For instance, can statements made to these agencies be used in the underlying case against the defendant? Statements in interviews are a different question than in proceedings as addressed in K.S.A. 22-2802(12) *Statements or information offered in determining the conditions of release need not conform to the rules of evidence.* ***No statement or admission of the defendant made at such a proceeding shall be received as evidence in any subsequent proceeding against the defendant.***

This is not a problem with Court Services, but these types of programs are not Court Services; particularly when recognized as a different entity when the Task Force requests inclusion of the term "**or** pretrial supervision program." This wording specifically identifies a "pretrial supervision program" as a new, separate and different entity from Court Services. Further, a "pretrial supervision program" that is not operated by Court Services Officers is not currently allowed under K.S.A. 22-2802 or K.S.A. 22-2814, et seq. K.S.A. 22-2802(1)(e), which this recommendation suggests altering, currently and explicitly limits supervision to Court Services Officers, and although K.S.A 22-2814 states: "Release on recognizance programs and supervised release programs shall be administered by court services officers and other personnel of the district court." *Other personnel* of the district court cannot be read to statutorily interpret private outside parties (such as personnel of the Executive branch of government) to be personnel of the district court. Further, although not applicable to this recommendation, participation in any sort of program under the auspices of K.S.A. 22-2814 is *voluntary* and cannot be ordered by the Court and nothing in those statutes authorizes any sort of fee to be charged.

Also troubling, what rights of the defendant would be recognized by such a program? Would these types of programs be allowed to speak to a defendant represented by counsel if the defendant or counsel requested that counsel be present? Would it give rise to an ineffective assistance of counsel defense down the road if counsel did not request to be involved or for allowing a client to participate in such a program? Unintended consequences are a serious matter deserving of careful consideration. We have pointed out a few but there will be others not yet recognized.

Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

[274] Adopted in 1981 after a false start in 1978, when it was adopted but later declared unconstitutional due to multiple subjects in the same bill. *See State ex rel. Stephan v. Thiessen*, 228 Kan. 136 (1980). The purpose of what eventually became K.S.A. §§ 22-2814 through 22-2817, were described in the Governor's Message to the House of Representatives explaining his decision not to sign the bill—although not due to these sections.

House Bill 3129 grants discretionary authority to the District Courts of this state to establish, operate and coordinate 'release on recognizance programs and supervised release programs' for persons charged or convicted of crimes. To a large extent, these provisions represent a codification and clarification of existing judicial authority, both expressed and implied. This portion of House Bill 3129 gives needed statutory profile to release programs which can be made available by our district courts in the exercise of

their sound discretion. Under such circumstances and assuming that the discretion will be exercised with caution and with wisdom, the proposal is deserving of support. 228 Kan. at 141.

[275] C.R.S.A. § 16-4-106. http://leg.colorado.gov/sites/default/files/images/olls/crs2018-title-16.pdf, pp. 63-65.

[276] "Pretrial Risk Assessment in the Federal Court," Vo. 73, No. 2, Federal Probation, a journal of correctional philosophy and practice, at 19, https://www.uscourts.gov/sites/default/files/73_2_1_0.pdf.

> The average cost of detaining a defendant pending trial is $19,253 while the average cost of releasing a defendant pending trial to the alternatives to detention program (including cost of supervision, the alternatives to detention, and fugitive recovery) is $3,860. A simple comparison of the average cost of detention and the average cost of release to the alternatives to detention program reveals the alternatives to detention program is substantially less costly than detention. The average savings per defendant released pending trial to the ATD program in lieu of detention is $15,393.

[277] Letter dated Oct. 31, 2019 from the Kansas Bail Agents.

[278] Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

[279] Written testimony provided by Austin Spillar, Mar. 6, 2020 Task Force Meeting.

[280] *United States v. Salerno*, 481 U.S. 739 (1987), more fully discussed on pages 18-19, *supra*.

[281] It appears that this term was first coined by Tim Schnacke in his work on pretrial justice reform. Timothy R. Schnacke, "*Model*" *Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention*, *19-20 (Apr. 18, 2017), http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf.

> The term (1) suggests a net, from which one can escape if the proper finding is made (such as no proof evident, or, in other states, no clear and convincing evidence of risk), and (2) it tells people that if you are doing on-purpose detention using prediction and without money, you are limited in whom you may even consider for detention. Email from Tim Schnacke, Aug. 12, 2020.

[282] The California Supreme Court has been hovering around several issues related to bond as well as detention nets. *See Humphrey (Kenneth) on H.C*, 417 P.3d 769 (Cal. 2018) and *In re White*, 9 Cal.5th 455, 463 P.3d 802 (2020).

[283] *See State v. Wein*, 244 Ariz. 22, 29-30 (2018). In 2002, Arizona passed a constitutional amendment to its bail provision that prohibited bond for certain sex crimes if the proof was evident or presumption great. It also made note in its constitution that the purpose of bond and any conditions of release was to assure the appearance of the accused, protect against intimidation of witnesses and protect the safety of the victim, any person, or the community. When its constitutionality was challenged, the Arizona Supreme Court struck it down in a 4-3 decision and the US Supreme Court denied cert. It found that the measure aimed at certain crimes, as deplorable as those crimes are, was not supported by any evidence that the crimes chosen inherently demonstrate that the accused will pose an unmanageable risk of danger if released pending trial. It also found that alternatives exist that would serve the State's interest equally well at less cost to individual liberty like GPS monitoring.

See also, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 785 (9th Cir. 2014) (en banc) (holding that Arizona Constitution provision barring bond for felony arrestees, who were unlawfully present in the United States, failed to comport with substantive due process principles. The Ninth Circuit also opined that "[w]hether a categorical denial of bail for noncapital offenses could ever withstand heightened scrutiny is an open question.").

[284] 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.

[285] N.M. Const. art. II, § 13.

[286] Arizona, California, Colorado, Florida, Illinois, Louisiana, Michigan, Mississippi, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Washington, and Wisconsin.

[287] The White Paper and Appendix were authored by Judge Roger K. Warren (Ret.) and Ms. Susan Keilitz, JD, in collaboration with Ms. Jacquelyn Gilbreath and Dr. Pamela Casey as part of the National Center for State Courts' work on the Safety and Justice Challenge.
https://nationalcenterforstatecourts.app.box.com/s/araiqs9wsh3mi5v60yxa5ufmjgnhgt9w.

[288] Letter dated Oct. 31, 2019 from the Kansas Bail Agents Association.

[289] Letter dated Jan. 3, 2020 from the Kansas Association of Criminal Defense Lawyers.

[290] Rep. Owens' full objection:

- First, I do not support Kansas becoming a so-called excessive bail state by allowing for the denial in any or all cases whatsoever. The affirmative right to bail by sufficient sureties has been the law in Kansas since before statehood, and the language in the Kansas constitution is identical to the Northwest Ordinance of 1787 and the Federal Judiciary Act of 1789. These "problems" the task force is finding, ie: that judges are setting bail that defendants cannot meet every time have a very specific remedy if they are unconstitutional—to be challenged in court as excessive bail pursuant to the federal and Kansas State constitutions. That has been the practice on this continent and in England for centuries.
- Second, I don't think a case has been made that moving to a version of the federal system or something similar will deliver better results in Kansas using any measures of success. The federal system, upon which this recommendation is based, has tripled pretrial incarceration since enacted. If I recall correctly, we heard that about 60% of Federal pre-trial defendants were detained. Can you imagine if 60% of State defendants were detained? Moreover, there is no indication that the indigent fare better under such a system. Further, racial disparities are not solved under such a system—in New Jersey for example, the racial make-up of the jail population did not change at all as a result of such bail reforms. In addition, there is no indication that a system of preventative detention reduces pretrial crime, or at least no evidence has been presented to me that convinces me of this proposition.
- Three, as I am aware, there have only been two states that have changed their constitution to allow pre-trial detention. They are New Mexico and New Jersey, both of which have ended up with a system that has eliminated money bail. While I know that is not the stated intention of this committee (nor do I believe it was the stated intention of New Jersey) we still need to be forthcoming with the legislature and the public regarding what all of this is going cost if it were to lead to a similar or some intended hybrid system. None of these reforms will save money—they will all cost the State and political subdivisions of

the State of Kansas significant taxpayer dollars. It's worth noting that New Jersey has spent $301 million

during the first three years of their new system. These costs were driven primarily by the need to conduct the preventative detention hearings, which as you note require a mini-trial to put on clear and convincing evidence days after an arrest. IN addition, the costs of pretrial services were approximately $1-2 million per county annually. If we were to propose a new system of bail in Kansas, we have to be able to with some certainty explain to taxpayers and policy-makers what they are getting themselves into. We cannot get into a situation like New Mexico where we gave prosecutors the power to detain but then didn't fund the system to handle the detention hearings.

- Which raises an important fourth point: New Jersey supervises at the county level 91% of all defendants who are released. This is critical, because while I would argue that our current system is far better from a benefit-cost perspective, to truly replace the inherent economic incentives of bail agents with arrest powers or third-parties being held to financial account, some state program is necessary to replace it. I worry that under this statute, the end result will not match New Jersey, because I doubt local governments, or the state are going to have the funds to spend the type of money it is going to take to implement such a system. Similarly, in the federal model, the United States Marshall's service picks up the burden that will now fall exclusively on law enforcement.
- Fifth, as I scanned other state constitutional provisions on this matter, I think I must oppose a total general grant of power to the legislature to decide the contours of preventative detention, perhaps even on an annual basis. Of the sufficient sureties states, many have simply added additional categories that authorize instances of preventative detention, rather than a general grant of all legislative power to the state legislatures, as the task force report notes. In Utah, for example, a felon on bail who is accused of a new crime becomes eligible for detention. The right to bail is a fundamental right, and I do not want to expose it to a continuing stream of "ripped from the headlines" legislative attempts, which would seek to deny bail in more and more cases. I believe there will be the pressure if those committing crimes are in large part getting released on their own recognizance. Those from other states appropriately note that it is difficult to change the categories or presumptions of preventative detention, which I think should continue to be the rule. While I have general disdain for expanding preventative detention, I would be willing to listen to arguments that specific cases may warrant it and should be codified as a constitutional exception.
- Sixth, the proposed statute does not include one costly safeguard that will be necessary to insulate it from legal challenges: speedy trial. As I understand the Salerno ruling, the statute survived challenge in part due to the expedited speedy trial requirement of 90 days at the time (now 70 days) that is absent from the proposed statute. Trying all persons detained by preventative detention will be expensive, and we should try to get a sense of what it would cost in addition to adding it to the proposed statute.
- Seventh, I am concerned that county jails are not going to be able to comply with a requirement noted in the draft report that comes from Salerno, which "requires that the detainees be held in separate facilities or areas from the general prison population." This will require local jails to basically build a separate or new facility or make changes to existing facilities, and I worry that many jails are not going to be able to comply with the requirement, which will result in significant taxpayer dollars being spent or the entire law being unraveled via lawsuits.
- Eighth, **I do think preventative detention has the potential to be over-used, and the risk is not going to be more defendants being released but instead will mean more defendants detained**. New Jersey is increasing their use of preventative detention, and as mentioned, the federal government detains better than 60% of all defendants. I worry that every time a person is released and commits a crime, we are going to have calls for legislators to start expanding preventative detention. We are going to challenge prosecutors to seek detention in all cases or be labeled soft on crime. I worry that these on-going and endless debates will be fueled by emotion and politics, and not facts and reason.
- Finally, I just don't think a compelling enough case has been made in Kansas to change the State Constitution and eliminate the right to bail. That judges are allegedly imposing unconstitutional bails is

> not a reason to make the bails that are unconstitutional today, constitutional tomorrow. Instead, judges simply need to do what judges have done for several hundred years under our state and federal constitutions—follow the law. This system has served Kansas well since pre-statehood, and I simply do not think a good enough case has been made that will convince me and likely many of my legislative colleagues, that something must be done and that the something is to begin tinkering with our State Constitution.

[291] K.S.A. § Supp. 75-771(b).

[292] K.S.A. § 22-2307.

[293] Kansas Supreme Court Rule 109A.

[294] Douglas B. Marlowe, Carolyn D. Hardin, & Carson L. Fox, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States*, National Drug Court Institute, at 14, June 2016, https://www.ndci.org/wp-content/uploads/2016/05/Painting-the-Current-Picture-2016.pdf.

[295] Although the term "recidivism" has varied definitions. Some programs define recidivism as any type of criminal activity; whereas others only count the same type of crime as recidivism. Also, the length of time varies greatly. Some count a period of time after the end of the program and others only count it as recidivism if the person reoffends during the time he or she is in the specialty court program.

[296] *See fn.* 271, p. 15, internal citations omitted.

[297] *Id*.

[298] *Id*.

[299] *Id*., p. 28.

[300] *Id.*, p. 29.

[301] *Recommendations for Improving the Kansas Judicial System*, Report of the Kansas Supreme Court's Blue Ribbon Commission, Jan. 3, 2012, pp. 136-141.

[302] Report of the Kansas Specialty Courts Commission, Dec 2013; Status Summary Kansas Supreme Court Blue Ribbon Commission Recommendations Jan. 2016, pp. 11-12; 2013 SC 14, filed Mar. 14, 2013.

[303] Supreme Court Order 2014 SC 60, filed June 26, 2014.

[304] Kansas Supreme Court Rules 109A and 109B.

[305] Status Summary Kansas Supreme Court Blue Ribbon Commission Recommendations January 2017, p. 7.

[306] Sainju et al., *Electronic Monitoring for Pretrial Release: Assessing the Impact*, 82 FEDERAL PROBATION 3, Dec. 2018:

> There is a lack of sound research about the effectiveness of electronic monitoring in the pretrial context. The research that does exist has not found that electronic monitoring improves pretrial outcomes. One jurisdiction found that defendants released pretrial with electronic monitoring had similar failure to appear and new arrest rates as those released without electronic monitoring, and those on electronic monitoring actually experienced more technical violations than those without electronic monitoring. One

problem with the existing research is that there have been no randomized control trials. Moreover, observational research suffers from the problem that individuals who are put on electronic monitoring are usually considered higher risk than those individuals who are released without electronic monitoring. (Citations omitted).

https://www.uscourts.gov/sites/default/files/82_3_1.pdf. *See also*, Hopkins, Bains, & Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 698 (2018), https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/2; Grommon, Rydberg & Carter, *Does GPS supervision of intimate partner violence defendants reduce pretrial misconduct? Evidence from a quasi-experimental study*, J Exp Criminal 13, 483–504 (2017) (concluding that Pretrial GPS supervision was no more or less effective than traditional, non-technology based pretrial supervision in reducing the risk of failure to appear to court or the risk of re-arrest for those charged with domestic violence offenses. GPS supervision did reduce the risk of failing to appear to meetings with pretrial services staff), https://doi.org/10.1007/s11292-017-9304-4.

[307] *See United States v. Blaser*, 390 F. Supp. 3d 1306 (D. Kan. 2019). This case did involve the constitutionality of a federal statutory mandate that house arrest be imposed for certain crimes under the Adam Walsh Act amendments of 2006 to the Bail Reform Act, 18 U.S.C.A. § 3142(c)(1)(B). The decisions in Kansas have all been by district magistrate judges. There is also contrary authority, but none from the 10th Circuit. *See* 54 A.L.R. Fed. 2d 195 (originally published in 2011).

[308] Lawsuits challenging long established money bond practices, primarily on equal protection and due process grounds, have been sweeping the country in the last 4 years. *See*, *Dixon v. City of St. Louis*, No. 4:19-CV-0112-AGF, 2019 WL 2437026, at *2 (E.D. Mo. June 11, 2019); *Odonnell v. Harris Cty., Texas*, 227 F. Supp. 3d 706 (S.D. Tex. 2016), *aff'd in part, rev'd in part,* 882 F.3d 528 (5th Cir. 2018), *opinion withdrawn and superseded on reh'g sub nom. ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018), and *aff'd in part, rev'd in part sub nom. ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018); *Walker v. City of Calhoun, GA*, 901 F.3d 1245 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun, Ga.*, 139 S. Ct. 1446, 203 L. Ed. 2d 681 (2019); *Martinez v. City of Dodge City*, No. 15-CV-9344-DDC-TJJ, 2016 WL 9051913, at *1 (D. Kan. Apr. 26, 2016); *Buffin v. City & Cty. of San Francisco*, No. 15-CV-04959-YGR, 2019 WL 1017537, (N.D. Cal. Mar. 4, 2019); *Thompson v. Moss Point*, No. 1:15CV182LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015); *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015); *Snow v. Lambert*, No. CV 15-567-SDD-RLB, 2015 WL 5071981 (M.D. La. Aug. 27, 2015); *Welchen v. Cty. of Sacramento*, 343 F. Supp. 3d 924 (E.D. Cal. 2018); *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019); *Daves v. Dallas Cty., Texas*, 341 F. Supp. 3d 688, 690 (N.D. Tex. 2018); *Booth v. Galveston Cty.*, No. 3:18-CV-00104, 2019 WL 3714455 (S.D. Tex. Aug. 7, 2019); *Menter v. Mahon*, No. 3:17-CV-1029-J-39JBT, 2018 WL 4335527 (M.D. Fla. Sept. 11, 2018); *Williams v. Cook Cty.*, No. 18 C 1456, 2019 WL 952160 (N.D. Ill. Feb. 27, 2019); *Mock v. Glynn Cty. Georgia*, No. 2:18-CV-25, 2019 WL 2847122 (S.D. Ga. July 2, 2019); *Caliste v. Cantrell*, 329 F. Supp. 3d 296 (E.D. La. 2018), *aff'd,* No. 18-30954, 2019 WL 4072068 (5th Cir. Aug. 29, 2019).

[309] *Pierce v. City of Velda City*, No. 4:15-CV-570-HEA, 2015 WL 10013006, at *2 (E.D. Mo. June 3, 2015).

[310] *See also*, Timothy R. Schnacke, "*Model*" *Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention*, *198 (Apr. 18, 2017), http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf.

[311] See K.S.A. § 22-2802 (3), and (6).

[312] Best Practices-Conditions of Release, Appendix B, supra, at 5.

[313] https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/Pretrial_Justice_Task_Force/Comments_Presented_by_Cal_Williams_to_the_PTJ_Task_Force_at_its_March_me.pdf.

[314] *See State v. Steward*, 219 Kan. 256, 262 (1976).

[315] It is interesting to note that in the survey done in November 2018 by the Pew Charitable Trust, see fn. 6, *supra*, most Americans supported speedy trials…very speedy trials. 86% of respondents believed that if someone accused of a crime is being detained before trial, the trial should take place within 30 days except in special circumstances.

[316] K.S.A. § 22-2906(c).

[317] *State v. Chamberlain*, 280 Kan. 214, ¶1 (2005).

[318] "Each defendant shall be informed in writing of the diversion program and the policies and guidelines adopted by the district attorney." K.S.A. § 22-2907(3).

[319] LEAD National Support Bureau website, https://www.leadbureau.org/.

[320] LEAD National Support Bureau-Fact Sheet, https://56ec6537-6189-4c37-a275-02c6ee23efe0.filesusr.com/ugd/6f124f_6c348a0648d045508966dceb187e9fb8.pdf?index=true.

[321] Email dated Feb. 22, 2019 from Emily Richardson. *See also*, https://www.colorado.gov/pacific/cdhs/law-enforcement-assisted-diversion-lead-program.

[322] "Parking lot" issues were issues that were raised during discussions of other recommendations. These issues had not been assigned for review and at least some Task Force members believed they should be. We returned to issues in the parking lot at the end of each meetings. Some were referred for further research and discussion and some were not.

[323] http://www.kslegislature.org/li/b2019_20/Task Forces/ctte_ot_criminal_justice_reform_1/.

[324] http://www.kslegislature.org/li/b2019_20/measures/hb2708/.

[325] Secretary of Defense Donald Rumsfeld at Department of Defense Press Briefing, Feb. 2012.

[326] Kristin Bechtel, John Clark, Michael R. Jones & David J. Levin, *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research*, Pretrial Justice Institute, at 14, Nov. 2012.

[327]R. Schauffler, R. LaFountain, S. Strickland, K. Holt, & K. Genthon, *Examining the Work of State Courts: An Overview of 2015 State Court Caseloads*, National Center for State Courts (2016), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/EWSC%202015.ashx.

[328] For example, in some parts of the state all persons arrested without a warrant are taken before a judge within 48 hours, with no opportunity to be released prior to seeing the judge, in other parts of the state, most misdemeanors are released before seeing a judge on their own recognizance with only felony charges brought before the judge, some use fixed-bond schedules based, not on the crime, but on the sentencing level of the offense so that any person charged can post the monetary bond before seeing the judge. Those that have fixed-bond schedules have schedules unique to their jurisdictions that are at time inconsistent with bond amounts in neighboring jurisdictions. *See also*, Matt Krupnick, *Bail roulette: How the same minor crime can cost $250 or $10,000*, The Guardian, Sept. 20, 2017, https://www.theguardian.com/us-news/2017/sep/20/bail-disparities-across-the-us-reflect-inequality-it-is-the-poor-people-who-suffer.

[329] Board of Governors of the Federal Reserve System, "Report on the Economic Well-Being of U.S. Households in 2018," May 2019, Figures 10, 11 (If faced with an unexpected expense of $400, 40% of Americans either would not be able to pay it or would have to borrow or sell something to do so.) Although the 2018 report shows significant gains over the prior 4 years, it is unknown whether the current economic downturn will cause that percentage to return to its 50% level of 2013. https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm .

[330] Email from Pittsburg State University student collective dated July 11, 2020. Although there is nothing in Kansas that would prevent an otherwise eligible voter who is in jail from voting by an advance voting ballot, it is unknown whether pretrial detainees are made aware of this or if any accommodations are made in Kansas jails to permit voting while incarcerated. https://sos.ks.gov/elections/voter-information.html. The Kansas Constitution does allow the legislature to adopt laws that would exclude anyone from voting who is committed to jail or penal institution. K.S.A. Const. Art. 5, § 2. Timely registration to vote while incarcerated may also be difficult.

[331] Sedgwick County Sheriff Jeffrey Easter was very helpful in our research. The Task Force is grateful for his willingness to assist us in any way we requested. He agreed to collect and analyze several data points for us in 2018 in Sedgwick County just for a "quick look."

First, he compared those released on OR bond and those released on surety bond and a re-arrest before their next court date:

> Between January 1, 2018 and December 31, 2018, a total of 24,870 inmates were released from custody. 6,398 were released on OR bonds and 1,172 or 18.3% were rebooked into our facility before their next court date. 5,742 were released on surety bonds and 916 or 16% were rebooked into our facility before their next court date.

Emails dated Mar. 21, 2019, Mar. 25, 2019 and Sept. 13, 2019 from Sheriff Jeff Easter. This indicates only a 2% difference between persons released on OR bonds and those released on surety bonds. However. he was not able to determine how many "rebooks" were from bondsman surrenders and how many were new crimes or warrants.

Next, he looked at the number of inmates who had bonds over $50,000 for the month of April 2018:

> April 2018 the Adult Daily Population (ADP) was 1,402
> - On average there were 190 inmates in custody solely for charges with bonds over $50,000
>   - If these inmates paid the bond they would be released because they had no other holds.
> - During the month of April 2018 2,020 inmates were released from custody.
> - Of the releases only 15 were inmates who paid a surety bond over $50,000.

Email dated Sept. 19, 2019 from Sheriff Jeffrey Easter.

[332] Aurelie Ouss & Megan Stevenson, *Jail, Bail, and Pretrial Misconduct: The Influence of Prosecutors*, Jan. 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138:

> In February 2018, Philadelphia's district attorney announced that his office would no longer request monetary bail for defendants charged with certain eligible offenses. … We find no evidence that a reduction in the use of monetary bail and supervisory conditions leads to increased failure-to-appear in court or crime. This suggests a discrepancy between pretrial policies that use monetary penalties as a deterrent and the motivation for defendant behaviors; it also suggests that bail practices may have violated constitutional prohibitions against excessive bail.

Kentucky, a state that prohibits commercial bond companies, reports that:

> Statistically, about 70% of pretrial defendants are released in Kentucky; 90% of those make all future court appearances and 92% do not get re-arrested while on pretrial release… In CY 2011, 85% of low risk defendants were released, 67% of moderate risk defendants were released and 51% of high-risk defendants obtained pretrial release. . . .Furthermore, pretrial jail populations have decreased by 279 people, while appearance and public safety rates have remained consistent.

Pretrial Reform in Kentucky, Pretrial Services Administrative Office of the Courts Kentucky Court of Justice, Jan. 2013, at 16.

The federal district court for the Northern District of Missouri opined, in *Dixon v. St. Louis*, 2019 WL 2437026, *15 (E.D. MO, June 11, 2019) vacated grant of preliminary injunction on other grounds, 950 F.3d 1052 (8th Cir. 2020):

> Defendants provide no support for the suggestion that arrestees released without bail are more likely to commit crimes or less likely to appear in court than those released upon payment. Further, as other courts have observed, there is no evidence that financial conditions of release are more effective than alternatives for ensuring court appearances and public safety. [*O'Donnell v. Harris County*, 892 F.3d 147, 154] (noting "reams of empirical data" suggesting the opposite); [*McNeil v. Community Probations Services*], 2019 WL 633012 at 14-15 (noting statistics showing a high rate of court appearance for those released and higher rates of recidivism among those detained); [*Schultz v. State*, 330 F. Supp. 3d 1344, 1363 (N.D. Alabama 2018)] (citing New York data that 95% of arrestees whose bail was paid by 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. [citation to trial record omitted]. Defendants' position is further belied by the fact that, as noted above, at bond reduction hearings, 69% of detainees received a reduction or were released on their own recognizance. Moreover, Plaintiffs do not request wholesale release of all class members but simply a presumption favoring non-monetary release conditions and a hearing that comports with due process.

And finally, a growing number of charitable bond funds, like the Bail Project, "which demand no cash from and therefore impose no financial incentive on the bailees—have achieved promising appearance rates with little more than low-cost text message reminders and transportation subsidies. " Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L. J. FORUM 1098, 1114 (2019).

[333] *See* fn. 66, *supra*.

[334] They have seen commercial bonding companies out-lawed in Kentucky (1976) Ky. Rev. Stat. Ann § 431.510, Illinois (1963) 725 Ill. Comp. Stat. Ann.5/110-7, Oregon (1973) Or. Rev. Stat. § 135.255, .260, .265; and Wisconsin (1969) Wis. Stat. § 969.12; National Conference of State Legislatures, Bail Bond Agent Business Practices (April 23, 2013): https://www.ncsl.org/research/civil-and-criminal-justice/bail-bond-agent-business-practices.aspx. They have been replaced by robust Pretrial Services programs.

Some states allow commercial bonding companies but prohibit money bond from being required by the judge such as New Jersey and California.

The United States and the Philippines are the only nations on earth that have a cash bond system for release that is dominated by commercial bondsmen (or the practice of paying a third party to post bond on your behalf). Louise Jacobson, *Are U.S., Philippines the only two countries with money bail?*, PolitiFact, Poynter Institute, Oct. 9, 2018,: https://www.politifact.com/factchecks/2018/oct/09/gavin-newsom/are-us-philippines-only-two-countries-money-bail/. Canada, Germany, England, Wales, and Finland to name a few, specifically prohibit commercial money bond. See: *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations*, Justice Policy Institute, Apr. 2011, http://www.justicepolicy.org/uploads/justicepolicy/documents/finding_direction-full_report.pdf. And

courts in Australia, India, and South Africa had disciplined lawyers for professional misconduct for setting up commercial bond arrangements. Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, New York Times, Jan. 29, 2008. https://www.nytimes.com/2008/01/29/us/29bail.html.