Pretrial Justice Task Force

Executive Summary

Report to the Kansas Supreme Court

November 6, 2020

Nationally, almost two-thirds of local jail inmates have not been convicted of a crime. Kansas is slightly lower at 53%. These are predominantly people awaiting trial who cannot post a monetary bond.

Concerns about ever-growing jail populations, several high-profile incidents in the news, and the perception that many pretrial practices discriminate against the poor have brought the issue of pretrial release to the forefront of national attention.

With the belief that no person should be deprived of liberty unnecessarily or unconstitutionally, the Kansas Supreme Court, in November 2018, created the Ad Hoc Pretrial Justice Task Force ("Task Force").

The Task Force was charged to review current pretrial detention practices in Kansas and elsewhere; review alternatives to detention; and determine what lessons can be learned from other jurisdictions that have already tackled these issues.

The members of the Task Force were selected based upon their varied positions within the Kansas judicial system and include judges, criminal defense attorneys, prosecutors, and members of the court administration system. Geographic diversity across the state of Kansas was also a factor in selecting Task Force members.

To aid in its work, the Task Force created guiding principles that included:

1. balancing the defendant's liberty interests and the presumption of innocence with the risk of flight and public safety;

2. seeking out all sides of an issue;

3. encouraging input from stakeholders;

4. addressing measurable problems with measurable solutions; and

5. staying away from certain topics and approaches that were considered taboo, such as laying blame on any group.

The first few months of the Task Force's existence was spent educating the Task Force members on the history of bail and pretrial detention, and reviewing the approaches taken by other jurisdictions concerning pretrial release. Members also listened to the perceived problems and concerns of stakeholders. The Task Force surveyed judges, prosecutors and sheriffs in Kansas regarding pretrial release issues and reviewed statistical evidence from other jurisdictions.

After approximately six months of educating themselves on the topics, the Task Force members began formulating recommendations to present to the Kansas Supreme Court and creating "best practices" guides for use by judges. Throughout the process, stakeholders were kept advised on the workings of the Task Force and encouraged to provide feedback. Many chose to do so, and their input was invaluable to the process.

Task Force recommendations

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

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

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 principles.

2. PUBLIC OUTREACH

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

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.

3. DATA COLLECTION

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

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

Pretrial decision points

Law enforcement can:

- take no action
- take no action, but send reports to prosecutor for consideration of charges;
- issue a citation; or
- arrest and take into custody for hearing before judge.

The prosecutor can:

- charge the person or decline prosecution;
- offer a diversion from prosecution;
- accept a plea bargain;
- take the case to trial; or
- dismiss the charge.

The judge can:

- determine if there was probable cause to arrest;
- set bail (conditions of release) which can range from no conditions to numerous conditions;
- order the person detained without bail (capital murder only in limited circumstances); and
- review conditions of release upon request.

SOURCE: Kansas statutes

Release or detain?

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

SOURCE: Kansas statutes

Scientific best practices call for the collection of data to determine a baseline and to enable statistical analysis of change over time. The Task Force believes that data can help tell the story of pretrial justice in Kansas and show where change may be needed.

4. NOTICE TO APPEAR

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

It is estimated that less than 5% of arrests made in the United States are for violent offenses. The Task Force believes that by diverting defendants charged with nonviolent crimes from the arrest and jail process, law enforcement and courts can spend more time dealing with the defendants charged with violent offenses. For example, 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 other nonperson misdemeanor offenses are a few that the Task Force believes account for significant numbers of unnecessary incarceration and inefficient use of limited resources.

The Task Force ultimately concluded that it was not the proper role of this group to make specific recommendations as to which crimes should be considered for cite and release, but it does believe that the issue needs to be examined by the legislative and executive branches of government with input from stakeholders. Amending statutes as noted in this recommendation would facilitate the discretionary use of notices to appear in situations in which they are not currently allowed.

5. MENTAL HEALTH IDENTIFICATION

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

Many sheriffs indicate that jails have become mental health institutions. To determine whether calls for service are truly 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. The Task Force believes that these programs should be made available statewide to divert those with mental illness from detention to treatment.

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.

In July 2017, the Kansas Legislature adopted the Crisis Intervention Act to allow law enforcement officers to take persons with mental illness or a substance abuse problem to a crisis intervention center instead of jail. But to date, the KDADS has not adopted draft regulations and accordingly has not licensed any crisis intervention centers. The Task Force believes that these centers could assist in diverting those with mental illness or substance abuse issues from detention to treatment.

7. LARNED STATE HOSPITAL

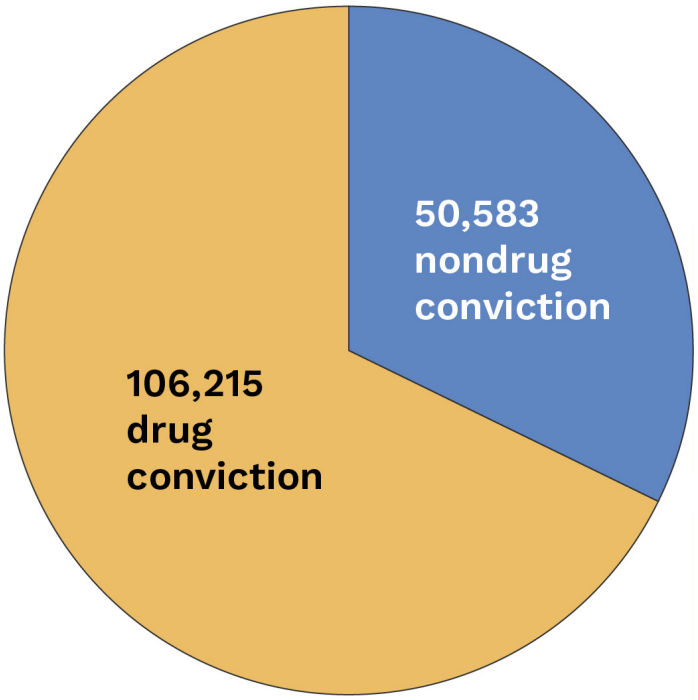
The Kansas Legislature should provide adequate funding to the Larned State Hospital (LSH) to allow timely admission of defendants for competency evaluation, restoration, and treatment pursuant to K.S.A. § 22-3303.

Any time after a defendant is charged with a crime, a request for a competency determination can be made. If the judge has reason to believe the defendant is incompetent to stand trial, the case is suspended until competency can be determined at the Larned State Hospital. The problem is the very long wait time to be accepted at LSH. The Task Force believes the long wait times result in unnecessary detention of defendants who require mental health treatment.

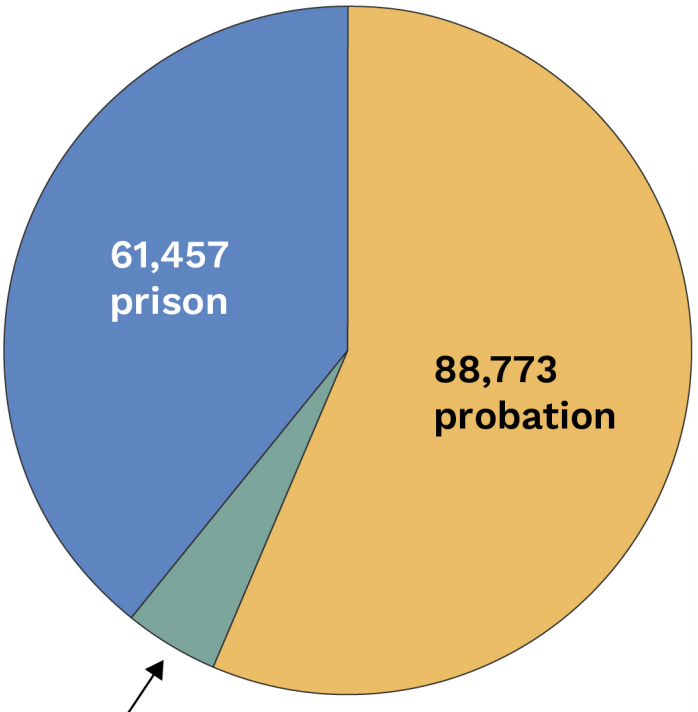
8. PRE-CONVICTION TREATMENT

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

Kansas felons, 2009-2019



Type of felony sentences in Kansas, 2009-2019



6,568
driving under the influence
post-imprisonment supervision

SOURCE: Kansas Sentencing Commission

The path from arrest to pretrial detention

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

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

As many as 80% of the defendants in the criminal justice system in Kansas are there because their crime was directly or indirectly related to illegal drugs. Existing Kansas law allows for state-funded treatment, as an alternative to incarceration, for some individuals who are convicted of drug crimes. The Task Force believes that diverting or deflecting defendants prior to conviction into the treatment they need may prevent future recidivism in the same way that SB 123 assists those convicted of the same crimes.

9. PRETRIAL RELEASE DECISION PROCEDURES

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

1. **a timely judicial determination of probable cause and conditions of release upon warrantless arrest;**

2. **the opportunity for timely judicial hearing for review of conditions of release; and**

3. **the release of arrestees when a complaint is not "filed forthwith."**

The Task Force has been advised, anecdotally, that persons in some Kansas judicial districts are kept in jail pending the filing of charges longer than necessary or constitutionally allowed due to the lack of adequate staff in local prosecutor offices. In addition, public defenders are not available for bond review hearings in many courts. The Task Force believes that resources need to be made available and certain judicial processes need to change to eliminate the delay that results in unnecessary detention.

10. DEFENSE COUNSEL

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

1. **Counsel should be appointed to qualifying defendants at first appearance.**

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

The U.S. Supreme Court's Sixth Amendment jurisprudence is clear that the right to counsel attaches when an individual under arrest makes an initial appearance before a magistrate for a probable-cause determination and the setting of bail.

A 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. Although the costs may be great, the Task Force believes that early appointment of counsel can reduce pretrial incarceration and assure an individual's constitutional rights are honored.

11. PRETRIAL RISK ASSESSMENT

The Supreme Court should initiate a pilot program of a representative cross-section of jurisdictions across the state, with some jurisdictions utilizing a scored and validated pretrial risk assessment tool, and others using a form with the same information but no algorithm-based score.

The Task Force believes that the pilot program should include formation of a stakeholder's group, training, and a designated coordinator. It should include a comparison of data from the jurisdictions that use the scored tool to like-sized jurisdictions that do not use a scored pretrial risk assessment tool.

At the conclusion of the pilot program, the participants should be required to make recommendations to the Supreme Court regarding statewide adoption of a uniform, pretrial risk assessment process.

In developing a method to predict risk, 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. 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.

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. The Task Force believes a pretrial risk assessment, used in conjunction with a judge's professional judgement, is one way to accomplish this goal. But it is also aware of valid concerns expressed concerning the possible bias such algorithms bake into the system. As a starting point, the Task Force recommends initiating pilot programs 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. From there, an educated decision came be made as to whether a standard pretrial risk assessment should be adopted statewide.

Risk assessment

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

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

Moreover, 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.

12. TIMELY HEARING PROCEDURES

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

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. The Task Force believes that its recommended set of procedures accomplishes this purpose.

13. MISSED COURT APPEARANCES

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

Most of the time, defendants fail to appear in court due to forgetfulness or an intervening obstacle to them appearing in court. The Task Force believes this recommendation would allow defendants an opportunity to appear, without fear of re-arrest, thus allowing the case to quickly get back on track toward resolution, without taxing law enforcement and jail resources.

14. TEXT MESSAGE REMINDERS

The Supreme Court should implement a text message reminder system.

To combat failures to appear, many state and local courts around the country have turned to court reminders to improve court appearance rates. These are similar to the reminder systems that are now frequently used by doctors' offices.

The Task Force believes the Odyssey Case Manager™ system, currently being implemented in all district courts statewide, has the capability to provide text reminders for minimal additional cost to the state of Kansas and should be utilized to approve court appearance rates.

15. PRETRIAL SUPERVISION

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

By setting appropriate conditions of pretrial release, courts can address the risk of flight and public safety without unnecessarily incarcerating a defendant pretrial. Research has shown, however, that over-supervision of lower-risk defendants can result in negative consequences for both the defendant and society as a whole. Therefore, the Task Force believes that the best practice is not to be overly invasive and to allow flexibility for jurisdictions to adopt pretrial supervision programs that work best based upon their culture and resources.

16. EXPAND PRETRIAL SUPERVISION PROVIDERS

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

Not all judicial districts have court services officers monitoring defendants on pretrial release. Allowing other programs to supervise pretrial defendants brings the statute in line with current practices in some districts. In addition, adding the provision for waiver of the supervision fee brings the statute in line with other statutory provisions requiring the defendant's financial circumstances to be considered. The Task Force believes that utilizing pretrial supervision programs is one of the best methods to prevent pretrial detention.

17. EXPAND ELIGIBILITY FOR PRETRIAL SUPERVISION

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

Under current Kansas statutes, 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 chemical dependency or intoxication. The Task Force believes there is no valid reason for excluding those groups.

Persons in need of physical or mental care or substance abuse treatment can be referred early to necessary treatment services, with compliance monitoring for the court, which should result in better outcomes.

Current statutes require 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. The Task Force believes judges should have the ability to assign or seek resources in their districts as they see fit.

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.

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.

Although supervision programs have been seen as a panacea for saving money by releasing people from jail, charging additional fees simply requires pretrial defendants to bond another way.

The Task Force believes that all people are presumed innocent until they are found guilty by a judge or jury and requiring people to pay prior to conviction chips away at that principle.

19. EXPLORE AMENDMENT TO CONSTITUTION

The Kansas Legislature should consider exploring whether a judge should be allowed to detain persons not accused of capital offenses without bond until trial, by convening appropriate stakeholders to discuss amending the Kansas Bill of Rights. It is the Task Force's position that such an amendment would be necessary to allow a judge to intentionally detain a defendant who has been determined—after a full due process hearing—to be a danger to self or others or presents such a serious risk of flight that no condition of release could adequately address either risk.

Courts can only use money bond to address risk of flight. However, it is not unusual for a judge, 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. The Task Force believes that § 9 of our Kansas Constitution Bill of Rights does not allow such detention. Section 9 provides a right to bail (release), either secured or unsecured, to every defendant unless accused of committing a capital offense. If the Legislature believes that preventative detention for charges other than capital offenses should be allowed in Kansas, a task force to examine amendment to the Kansas Bill of Rights should be appointed.

Read the full report

This is only an executive summary of the report for the Kansas Supreme Court. Detailed discussions of each recommendation, along with extensive citations to the resources used by the Task Force, are contained in the report, which can be found at: www.kscourts.org/About-the-Courts/Court-Administration/Court-Initiatives/Pretrial-Justice-Task-Force.