

PRETRIAL JUSTICE TASK FORCE
September 12-13, 2019
UPDATE FOR STAKEHOLDERS

The meeting began with an opportunity for stakeholders to informally discuss concerns with the Task Force. The entire morning was devoted to these discussions. Although all were invited, only four stakeholders requested to be part of the discussion, Jeff Easter, Sheriff, Sedgwick County, on behalf of Kansas Sheriff's Association; Greg Smith, Special Deputy, Johnson County Sheriff's Office, Rep. Stephen Owens, Kansas State Representative and Owner of Owens Bonding Co., and Cal Williams, retired attorney, bail agent, Cal-Kan Bail Bonds. Other representatives were present and were allowed to speak as desired, but the four listed were the primary contributors. We asked each to help us understand what "scares them most" about what this Task Force may recommend. We had a very robust discussion.

The discussion around the jails focused on the number of mentally ill and chemically dependent people in our jails. In Wichita, the district attorney's office looks at jail bookings every morning to see who he or she can agree on a signature release or a bond. Some end up being WOP'd (released without prosecution) which means that the prosecutor is not ready to file charges yet, so they are released outright, only to be rearrested 3-6 months later when charges are filed. The current population of the Sedgwick County jail is 1608 inmates and they haven't seen numbers this high since 2009. He indicated that 70% of the jail population there is pretrial felonies. Some low-level offenders cannot post even a low bond. They are working on some very innovative programs regarding crisis intervention teams and special units in the jail for those who are mentally ill. He believed a better use of resources would be to build a mental health detention center with treatment and programs rather than a new state jail.

Special Deputy Smith also presented statistics from the Johnson County jail and shared some of the same concerns of the Sheriff's association. He was able to give the Task Force a good one day snapshot of the jail population in Johnson County. Both expressed their fear that the Task Force would make recommendations that would result in wholesale release and we would just increase the revolving door. They were also both concerned that we will recommend that certain crimes are mandatory automatic citation—no arrest. They felt officers need discretion to treat repeat offenders differently. The officer on the street is best able to make this determination. They have no problem with the statutes being amended to allow state officers to write citations for crimes they currently must arrest on. They would prefer it be a straight discretionary call, but would understand a "default citation" provision that requires justification for arrest—but not their first choice. Special Deputy Smith also raised the issue of identification of the offender, dna swabs and fingerprints if a citation is issued. That would have to be addressed.

Rep. Owens talked about the fugitive recovery benefits of bonding companies. Law enforcement doesn't have to take time and resources to go hunt down people who are on bond

because the bonding company will do it. Sheriff Easter verified that this was helpful. He agreed resources are limited.

Cal Williams talked about the dangers of a risk assessment tool as "one size fits all." He stressed the need to keep cases moving and hold preliminary hearings in 14 days like the statute requires. He says we don't need to spend money on this. He encouraged the Task Force to read what he has submitted already which discusses cheaper alternatives. Both Mr. Williams and Rep. Owens agreed that an attorney should be appointed at that very first appearance. Neither objected to a constitutional amendment that would allow dangerous people to be held without bond. As to risk assessments, both pointed out that even the ACLU has come out against risk assessments because of the biased results. If done, they must be done "right" with proper training and validation.

A representative from LULAC inquired whether the jail statistics could be broken out by race, including Hispanic. It was believed they could be. She wanted to know who determines the race of the offender for reporting purposes. She was advised it was self-reported or what appeared on the person's identification. Another bondsman, Shane Rolf, also appeared and relayed how things used to be done in Newton, Kansas where offenders were released after 24 hours if they had not bonded out. He thought that was a good process. Task Force members questioned why the person should be held at all if he or she would be released without bond after 24 hours. A decision apparently has been made that the person is OK to release.

What follows are the preliminary recommendations that the Task Force approved. A detailed explanation of each will be included in the Final Report. They are in no particular order. And, **until the Task Force approves a Final Report these preliminary recommendations are subject to modification or removal.** Next, we tabled several recommendations for further discussion. We also added one additional topic for discussion in December that we have not addressed yet: pretrial supervision.

PRELIMINARY RECOMMENDATIONS APPROVED

- 1. Law enforcement should be supported and 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.**
- 2. The Office of Judicial Administration should provide judges educational opportunities on legal issues surrounding pretrial detention decisions and providers of continuing legal education should be encouraged to provide similar educational opportunities to attorneys.**
- 3. 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 lawfully house individuals involuntarily for up to 72 hours. This will allow law enforcement the ability**

to immediately connect individuals to effective care, in lieu of incarceration, when appropriate.

4. State funds earmarked for drug treatment and evaluation should be available for use by persons in diversion programs for drug-related offenses.¹
5. The Kansas Supreme Court should issue an order to all district and municipal courts addressing pretrial detention that: 1) emphasizes that 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 defendant's appearance and the protection of the public.
6. 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. The OJA should design reports containing relevant data to aid in the understanding and communication of current state, future state, and the effect of changes made to the pretrial justice system affecting pretrial release and detention.
7. The OJA should support the design of data collection, actual collection of the data, and reporting the data in a manner fostering an understanding of pretrial release and detention through appropriate staffing within the OJA.
8. Data should be collected from Kansas law enforcement officers regarding the frequency of use of citations in lieu of arrest for the following charges: no driver's license, driving while suspended, misdemeanor theft, criminal trespass, telephone harassment, possession of marijuana, minor in possession, criminal damage to property, and battery (not domestic).

IMPLEMENTED ALREADY: COMMITTEE-LED SURVEY AND RESULTS REVIEWED BY TASK FORCE

9. Amend K.S.A. 22-2802(1)(e) as follows:

. .(e) place the person under the supervision of a court services officer or 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 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.²

10. The Supreme Court should initiate a pilot program of a representative cross-section of jurisdictions across the state utilizing a validated pretrial risk assessment tool. The Task Force strongly believes that the pilot program should include formation of a stakeholders group, training, and a designated coordinator. 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, validated pretrial risk assessment tool.
11. The OJA should incorporate educational materials detailing the issues involved in pretrial detention decisions in its public communications.
12. Courts are encouraged to provide an opportunity for offenders to voluntarily report after a missed court date to avoid the issuance of a warrant or arrest for failure to appear.

AREAS REQUIRING MORE RESEARCH BY COMMITTEE

1. Use of text reminders.

The Task Force is uniformly supportive of a text reminder system. But further research is needed to understand any legal requirements of such systems based on the Telephone Consumer Protection Act (TCPA)³ and whether the new case management system being rolled out across the state has a viable method for such notifications.

New Data Collection Committee: Nancy Dixon, Chair, Judge Karen Arnold-Burger and Judge Keith Collett.

2. Citation instead of arrest for certain non-violent offenses.

Without statutory change, state officers are not allowed to write citations for anything but Chapter 8 and Chapter 32 offenses although city officers have broader authority to write citations. The Task Force believed that statutory amendments should be proposed that would allow state officers the discretion to issue citations for offenses other than those in Chapter 8 and Chapter 32. The specific charges being considered for citation are: no driver's license, driving while suspended, misdemeanor theft, criminal trespass, telephone harassment, possession of marijuana, minor in possession, criminal damage to property, and battery (not domestic). Law enforcement organizations appear to fully support this approach. Most task force members preferred that any statutory change list the default practice as issuance of a citation, with the officer required to document why arrest was necessary. This will hopefully support consistency in practices around the state and allow for data collection regarding the most common reason detention is used instead of citation. The new committee will examine this issue along with several statutes that are related or have overlapping language at the December meeting.

New Statutory and Constitutional Changes Committee: Judge Brenda Stoss, Chair; Tom Drees, Sal Intagliata, Judge Lori Bolton Fleming, David Harger.

3. Constitutional or statutory change related to the ability to hold someone who is dangerous without bond.

The Task Force recognizes the inherent disconnect between our Kansas Constitution and the US Constitution, putting in question the ability to detain solely on the basis of public safety in Kansas.⁴ The Task Force recognizes the US constitutional prohibition under the Equal Protection Clause that no defendant should be detained solely due to the inability to meet financial conditions, but the question is how to accomplish this with a dangerous offender. The general consensus was that **if** we recommend a change to the constitution it should simply mirror the 8th Amendment of the US Constitution and adopt a procedure similar (although not exactly the same) as set out in 18 USC 3142 to have a hearing where the state has to prove a risk to public safety in order to detain somewhat with no bond. These changes would have to go hand-in-hand.

Between now and the next meeting the Committee is to look at states that have constitutions similar to Kansas and how they have resolved the safety issue and whether there has been any case law develop around the issue.⁵ In addition, this new committee will also examine all of K.S.A. 22-2802 to see if any additional changes need to be recommended to be consistent regarding the reality that a variety of pretrial supervision entities are used around the state (court services, community corrections, and private providers) and consider whether a definition of pretrial supervision should be included.⁶

New Statutory and Constitutional Changes Committee: Judge Brenda Stoss, Chair; Tom Drees, Sal Intagliata, Judge Lori Bolton Fleming, David Harger.

4. Appointment of counsel at the initial bond hearing.

The Task Force agrees with the literature in the field as well as anecdotally from members that the appointment of counsel at the bond hearing is important and makes a difference in the release determination, as well as the future resolution of the case. All stakeholders that have expressed an opinion regarding this agree early appointment of counsel is essential. But there is not a consistent definition of "first appearance" across judicial districts. The Pretrial Delay and Appointment of Counsel Committee surveyed judges and confirmed the differences in language and procedures. It was also discovered that in many jurisdictions charges may not be filed for week(s) or month(s) after arrest. There is no case on file with the court so even entry of appearance by attorneys is problematic. The Task Force was unclear what to recommend about this "gap" period and it felt more research was necessary. A defendant can be in jail for

weeks before charges are filed, although a bond has been set. It was unclear if and when judicial review was taking place in the absence of a court case.

In addition the Task Force discussed the delay in preliminary hearings, since they rarely take place within 14 days.⁷ Prosecutors ask for continuances due to unavailability of witnesses or evidence testing. Defendants ask for delay until after full discovery. The reasons for continuance requests by defendants was outlined. First, defense counsel feel they need to be thoroughly up on the charges and evidence so they can cross-examine witnesses presented by the state. If the witness is no longer available at the time of trial and the defendant had "a chance" to cross-examine the witness, the witness's testimony can be read into the record at trial. So defense attorneys feel they are not fully representing their clients if they don't wait until all evidence is in and they have had time to view it. In addition, prosecutors generally offer better plea bargains on the condition they don't have to present a preliminary hearing...in other words the deal offers are worse once the preliminary takes place. As a result, defense attorneys feel they need all the information to get the best deals. If defense counsel objects to a prosecution request for continuance, prosecutors will be required to dismiss the charges, but then some prosecutors make it clear that upon refiling there will be more than just the original charge to contend with.

The Task Force members want to review the variations of procedures and what the legally required procedures are under our state and federal constitutions based on detention before and after charges are filed. The Committee assigned this task will present recommendations in December related to this "gap" as well as getting counsel involved as soon as detention is ordered--taking into account variations around the state.

New Pretrial Counsel Committee: Charles Branson, Chair, Judge Wen Wurst, Judge Mary Mattavi, Justin Barrett.

NEW ITEMS FOR DISCUSSION IN DECEMBER:

PRETRIAL SUPERVISION

The Task Force agreed that this area needed further review for a possible recommendation.

The Committee assigned to it should look at things like:

- a. Should defendants have a bond and a pretrial supervision requirement or is pretrial supervision intended to be in lieu of bond?

- b. Should there be a recommendation that pretrial supervision conditions be the minimal conditions necessary to assure appearance and public safety?
- c. How do we make sure we aren't overusing pretrial supervision and over supervising, since studies suggest that this may set people up for failure, remembering the overarching presumption of innocence?

It was agreed that an expert or two on pretrial supervision will speak at our February meeting, since we believe December will be taken up with the hold-overs from the September meeting.

New Pretrial Supervision Committee: Robert Sullivan Chair; Todd Thompson; Judge Jared Johnson; Anita Cash.

Next meeting:

December 13, 2019, 9:00 am – 4:00 pm with working lunch. We will go over everything tabled from September. Each committee should meet at least two times in person or by phone before this meeting.

February 7, 2020, 9:00 am – 4:00 pm with working lunch. Have a speaker on pretrial supervision and devote meeting to that topic and any other tabled items.

¹ See HB 2292 introduced in the 2019 Kansas Legislative Session.

² 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*, __ Kan. ___, 2019 WL 3977508 (August 23, 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).

³ 29.16.Text Messaging and the Requirements of the Telephone Consumer Protection Act (TCPA), 4 E-Commerce and Internet Law 29.16 (2019 update) (copy attached)

⁴ See *U.S. v. Salerno*, 481 U.S. 739 (1987)

⁵ Alabama, Alaska, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Texas, Wyoming.

⁶ See preliminary recommendation #9, p. 3 *supra*.

⁷ See 22-2902: Defendant has right to a preliminary hearing if charged with a felony and it must be held within 14 days after "arrest or personal appearance." Continuances may be granted for good cause shown.