

# PRETRIAL JUSTICE TASK FORCE STAKEHOLDER REPORT FEBRUARY 7, 2020

The Pretrial Justice Task Force met from 9:00 a.m. – 3:00 p.m. We had several stakeholders attend our meeting for an informal discussion including Shane Rolf, with the Kansas Bail Agents Association, Jessica Domme, Assistant Attorney General, Cal Williams, attorney, and bail agent, Kirk Redmond, Federal Public Defender, and Kirsten Kuhn, with the Douglas County Libertarians. The discussion helped the Task Force Members to understand the issues around the state and share some of our thoughts with the attendees. The discussion lasted about 2 hours.

Later, we heard from the Statutory and Constitutional Changes Committee and reviewed written comments received from the Kansas Association of Defense Counsel, Tom Bath, Attorney, Chief Judge William Mott, and conversations with Heather Cessna, Executive Director of BIDS. We also discussed drafting a “best practices” model for district court judges to use—regardless of whether the Supreme Court implements any of our recommendations—related to pretrial procedures and setting conditions of bond.

What follows are the preliminary recommendations that the Task Force approved at the February 7 meeting. The Final Report will contain a detailed explanation of each. **Until the Task Force approves a Final Report these preliminary recommendations are subject to modification or removal.** These recommendations are in addition to those already preliminarily approved in September and December. We expect and hope that these recommendations will lead to some feedback from stakeholders. We have struggled with this particular issue from the beginning. **So please take some time to give us your thoughts. These are not in stone, but we think they merit discussion.**

## PRELIMINARY RECOMMENDATIONS APPROVED

### 1. 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.”~~

This would result in our Kansas Constitution mirroring the Eighth Amendment of the U.S. Constitution.

## 2. New statute:

### **KSA 22-2802A. Pretrial Detention.**

**(A) On motion of the prosecutor or on the court’s own motion, the magistrate shall hold a detention hearing. If after such hearing, the magistrate finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of any other person or the community, the person may be detained without bail. At any such hearing, the magistrate shall take into account available information concerning the factors enumerated in K.S.A. 22-2208(8) and amendments thereto.**

**(B) If the magistrate orders pretrial detention of the person, the detention order shall include written findings of fact and a written statement of the reasons for detention.**

**(C) Nothing in this section shall be construed as modifying or limiting the presumption of innocence.**

#### **Discussion:**

These two recommendation--adopted together--have led to more discussion and research than any other single recommendation we have considered. We have often referred to it as “truth in bonding.”

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, sets a bond at an amount that will guarantee continued detention until trial. We believe that §9 of our Constitution does not allow such detention, because it provides a right to bail—either secured or unsecured.

And courts can only use money bail to address the risk of flight. We know this not only because a wealth of caselaw says so, but 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, but 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 means rich dangerous people get out, poor dangerous people stay detained...dangerousness has nothing to do with it.

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. So we have struggled with how to deal with such a situation in Kansas.

Based on the United States Supreme Court decision in *United States v. Salerno*, 481 U.S. 739 (1987) we know that when a 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 net”—in their constitution-- identifying certain crimes that create a *presumption* of detention without bail. We have heard some states find it difficult to change the crimes listed because it requires a constitutional amendment, so their experience suggests a general provision with more detail adopted legislatively.

This recommendation takes the simpler approach-- electing to adopt identical language to the Eighth Amendment as well as an accompanying procedure guaranteeing due process. We also 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.

We also examined the New Mexico constitution which reads the same as ours, but then has two additional paragraphs:

*“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. “ N.M. Const. art. II, § 13*

The statutory language we are suggesting is similar some of New Mexico’s constitutional language but may not be targeted enough under *Salerno*. We will continue to examine it over the remaining months. But we believe it is important to get stakeholder comments on this issue.


The Bail Reform Act at issue in *Salerno* did make it clear that the person had a right to counsel at the hearing. In addition, “[The Act] carefully limits the circumstances under which detention may be sought to the most serious of crimes. ... (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders). *U.S. v. Salerno*, 481 U.S. 739, 747 (1987). Finally, it put in place an expedited right to appeal and requires that the detainees be held in separate facilities or areas from the general prison population. Our statutes currently allow a defendant to ask the judge to review the conditions of release and the judge must do so “without unnecessary delay.” K.S.A. 2019 Supp. 22-2802 (10) But there is no expedited appellate procedure for bond in Kansas.

But even with future modifications to the statutory recommendation, some members of the Task Force were concerned about this approach. Several were concerned that the procedure would become the rule and when tasked with decreasing pretrial detention, we will have caused the opposite effect.

**Please weigh in on this, stakeholders. We want your thoughts. How do you think our system should handle the dangerous offender? Are pretrial release conditions like house arrest, GPS monitoring, or reporting enough? How should dangerousness be determined? Past violent crime? Present offense violent? Something else?**

### **PRELIMINARY RECOMMENDATIONS TABLED**

The Task Force is working on two “Best Practices” guides, one for pretrial procedure and one for conditions of release to help judges navigate the process as it currently exists. We will share these as soon as they are completed, and the Task Force reviews them.



**Our next meeting will be March 6, 2020 from 9:00 a.m. – 4:00 p.m. in the Fitzer Courtroom, 3<sup>rd</sup> Floor, Kansas Judicial Center, 301 SW 10<sup>th</sup> Ave., Topeka, KS. If there is enough interest, we will again have the first 2 hours reserved for stakeholder input. Let me know if you would be interested in informal discussion that morning.**