



"BAIL AGENTS ASSURE JUSTICE"

Kansas Bail Agents Association

2947 N. Athenian Ave., Wichita, Kansas 67204

October 31, 2019

Honorable Karen Arnold-Burger
Chair, Pretrial Justice Task Force
301 SW 10th Ave, Room 325
Topeka, KS 66612-1507

RE: Preliminary Recommendations

Dear Judge Arnold-Burger,

I am writing on behalf of the Kansas Bail Agents Association in response to the Task Force's preliminary recommendations. Hopefully, you will incorporate our concerns into the Task Force's body of work.

The KBAA is an identified stakeholder in the conversation regarding pretrial release. The KBAA represents and provides continuing education to hundreds of professional surety agents across the State of Kansas. These individuals represent small businesses in every corner of the state engaged daily in making sure defendants appear in court as directed. Every independent, peer reviewed study – that is, studies not conducted by parties with vested interests in the outcome – has shown that using surety bail is the most effective method of pretrial release in assuring appearance in court. This holds true despite the fact that in many jurisdictions surety bail is required only of the riskiest defendants.

Bearing this fact in mind, we are disappointed that the Task Force appears to have adopted much of the anti-bail propaganda of groups such as the Pre-Trial Justice Institute, an organization that calls for the elimination of commercial bail in its mission statement and actually puts out press releases claiming that failure to appear rates are unimportant.

Needless to say we are opposed to a number of the preliminary recommendations of the Task Force. Most specifically, recommendations #5 and #9 as well as the overarching statement that "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." While anti-bail groups would dearly love to get this sort of a ruling, no such ruling has survived appellate review.

Rick Morey
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Wichita, Kansas

Shane Rolf
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Dennis Berndt
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To further refine and clarify our concerns, we reached out to Jeffrey Clayton, the Executive Director of the American Bail Coalition and a recognized expert in bail and bail law. The Task Force will recall that Mr. Clayton gave his presentation to the Task Force earlier this year on “The 4th Generation of Bail Reform.”

Mr. Clayton has reviewed the Task Force’s preliminary recommendations and help draft our response. We have attempted to supplement this to address specific Kansas issues where they arise. We hope that the Task Force will give these concerns legitimate consideration. So long as appropriate due process is provided during the bond setting procedures, there is no need to destroy a system of pretrial release that has worked effectively for, quite literally, hundreds of years. We do not feel that the State is at any risk of being sued by anti-bail crusaders – despite the implied threats of such from organizations such as the Pretrial Justice Institute and Civil Rights Corp – nor should the State succumb to such insinuations.

As you indicated in your report, the Task Force’s Preliminary Recommendations are just that – preliminary. If you would like us to further supplement our concerns to give the Task Force a more balanced view than can be obtained by attending a PJI convention, we would be happy to do so. Either way, it is our hope that the Task Force will reconsider the most egregious of these recommendations as they are truly not supported by law or fact (despite the assurances of the anti-bail crusaders).

Thank you for your time and consideration in these matter and we invite you to review the attached response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Shane L. Rolf', with a long horizontal flourish extending to the right.

Shane L. Rolf
Executive Vice-President
Kansas Bail Agents Association

cc: Rick Morey, President, KBAA
Jeffrey Clayton, Executive Director, American Bail Coalition

**Response of Stakeholder,
Kansas Bail Agents Association
to
Preliminary Recommendations Approved
By Pretrial Justice Task Force**

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

We agree this is a good idea assuming it is within the province of a judicial branch committee to recommend resources to outside agencies such as law enforcement.

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.

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.

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 beailable 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 "*ailable*" by sufficient sureties. Legal education opportunities may exist regarding setting bail that is not "*excessive*"; which obviates any need for training on preventative detention.

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.

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.

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, *Care 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 be to protect the rights of defendants facing 72 hours?

If this is to be used as a *de facto* 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.

4. State funds earmarked for drug treatment and evaluation should be available for use by persons in diversion programs for drug-related offenses.¹

This is a state legislative matter when the recommendation starts with the wording “state funds.” Attempting to regulate or direct monies designated by the legislature for the broader subject of drug treatment and evaluation may not find legislative support. To “ earmark” funds is a vague term indicating a broad matter when this is in reality a narrow subject. If the monies needed for dealing with drug diversions and drug related offenses as a judicial concern were to become part of the state court budget it respects the purse strings function of the legislature while allowing the judiciary to apply allocated (not earmarked) funds when and where needed within a judicial department function.

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

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.

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. 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.

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.

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?

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.

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.

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

We agree.

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.

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 ceiling². 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.³ 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 costs⁴. 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 vendors 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 exceedingly 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

² 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.

³ 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

⁴ K.S.A. 22-2802(15)

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.

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.

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.

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.⁵ The same researchers then sent letters to three jurisdictions demanding that they cease using the tools.⁶

⁵<https://ambailcoalition.org/download/24/risk-assessments/4956/technical-flaws-of-pretrial-risk-assessments.pdf>

⁶ <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.⁷
- 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.⁸
- Over 100 civil rights groups in New York State opposed the expansion or use of pretrial risk assessment tools.⁹
- The ACLU of Kansas issued a powerful rebuke of risk assessment tools to a judiciary led task force looking at bail reform.¹⁰
- 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.¹¹
- 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.¹²
- 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 bail.¹³
- The Idaho Legislature passed legislation, Idaho House Bill 118,¹⁴ 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

³<https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/863/110-civil-rights-groups-pretrial-risk-assessment-full.pdf>

⁸<https://www.stanfordlawreview.org/print/article/life-liberty-and-trade-secrets/>

⁹<https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/864/new-york-100-community-leaders-bail-reform-letter.pdf>

¹⁰https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/4646/aclu_presentation-kansas.pdf

¹¹<https://ambailcoalition.org/download/24/risk-assessments/4766/report-on-algorithmic-risk-assessment-tools.pdf>

¹²<https://ambailcoalition.org/download/24/risk-assessments/835/performance-effects-risk-tech-robert-werth-rice-university.pdf>

¹³<https://ambailcoalition.org/download/24/risk-assessments/828/assessing-risk-assessment-in-action.pdf>

¹⁴<https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/legislation/H0118.pdf>

¹²<https://www.wired.com/story/algorithms-shouldve-made-courts-more-fair-what-went-wrong/>

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.¹⁵
- The ACLU of Colorado at a recent legislative hearing in the House Judiciary Committee 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 committee would have done just that.

11. The OJA should incorporate educational materials detailing the issues involved in pretrial detention decisions in its public communications.

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”*

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.

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 be 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 you, 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.

Comment on Other Matters:

“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.”

We believe this Task Force’s statement is legally erroneous. We respectfully request legal citation to this, and even to the extent there is some right in view it derives more from circumstances that implicate the Due Process Clause. We believe that such statement of a right to an affordable bail, i.e., that no one is detained solely due to inability to post bond (which means if they had the money they would post it, so therefore all unposted bonds are the sole

reason a person is in jail), is not an equal protection right nor is it a right under the Due Process Clause either.

Instead, we believe that the US Court of Appeals for the Fifth Circuit recognized in the *O'Donnell I* case that the Due Process Clause was implicated when there was no meaningful opportunity to argue a bail set by a bail schedule (or the court) within any reasonable period of time. The remedy was better due process, e.g., a hearing, and the panel of the Fifth Circuit actually drafted an appropriate injunction order which this Committee should carefully consider as the appropriate remedy, not the need to embark on some ill-advised mission to change the Kansas Constitution or argue that it is unconstitutional to score a win for the Equal Justice Under Law Foundation that they did not achieve in the *O'Donnell I* case. Of the right referred to, that “no defendant should be detained solely due to inability to meet financial conditions” was a right that the Fifth Circuit held was not in view. In holding the injunction imposed by the District Court overbroad, the Court held as follows:

That is not what the preliminary injunction does, however. Rather, it amounts to the outright elimination of secured bail for indigent misdemeanor arrestees. ***That remedy makes some sense if one assumes a fundamental substantive due process right to be free from any form of wealth-based detention. But, as the foregoing analysis establishes, no such right is in view.***

Thus, the premise upon which the recommendation to consider a system of risk-based preventative detention is faulty. There is no “disconnect” between the Kansas Constitution’s provision on bail and the Federal Constitution. The language that appears in the Kansas Constitution in fact pre-dates the federal constitution as that language appeared in various state constitutional provisions and the Northwest Ordinance of 1787.

The Task Force should instead look at the specific injunction suggested by the Fifth Circuit, look to any appropriate judicial rule changes that may be made to improve and square Kansas’s procedures with the constitutional requirements, (such as excessive bond) and then to note any statutory issues or practice issues that either the legislature or the executive branch agencies should take up.

Finally, we do not think the Kansas Supreme Court or agencies or committees 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.