KANSAS SUPREME COURT AD HOC PRETRIAL JUSTICE TASK FORCE

This submission is a combination of what I have learned, and in an overly broad sense my thoughts dealing with Pretrial Justice that may or may not be workable or popular with this Task Force. I looked at the parties, the statutes and common practices that create or increase pretrial detention. There is one issue that I address that may be overlooked, the long term pretrial detention of the person who cannot bond or be released on any other basis. That is one of the reasons for concentration on the time factor, the nine months or more it can take to get a case to trial. From my research I have found boasts, claims and statistics bantered about from the opposing sides that deserve further scrutiny. Some are addressed here and some will be addressed in Part Two which I will submit after a conference I am attending next week.

I admit that many of the possible solutions I discuss in Part One are so far-fetched as to be laughable, but it was my intent to leave no stone unturned in examining both the causes and possible, even if improbable, in-house solutions to the problem. I have made an effort not to let any personal bias shade my writing and if any is apparent, I apologize.

SUBMITTED BY,

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PART ONE:

The Pretrial Reform Movement has its strength in statistics alleging that current pretrial practices promote racial and economic bias; problems compounded and exacerbated by lengthy delays in pretrial procedures.

This raises the question can the framework that we have in place be changed sufficiently to correct delays and bias? More simply put, **can the pretrial structure as it exists in Kansas today be fixed from within?**

PART TWO:

The Pretrial Reform Movement is a nationwide effort sponsored by well-established legal activist organizations such as the ACLU and the Southern Poverty Law Center. These parties are working with social reform movements and foundations such as the Pretrial Justice Institute and the Laura and John Arnold Foundation, the developer and owner of the most widely-used pretrial risk assessment tool.

The goal is to submit all detainees to a pretrial risk assessment within hours of arrest; if the assessment score recommends it, release the accused without the necessity of monetary or secured bail. Utilizing this tool the intent is to eliminate economic bias against the "poor", racial disparity and delay when considering pretrial release.

A worthy goal, but implementation of such a program would mean the establishment and maintenance of a state-wide Pretrial Services Program. This would require the hiring and training of staff, office space, equipment and the other needs of a newly created department within the Criminal Justice System in our Kansas District Courts.

KANSAS SUPREME COURT AD HOC PRETRIAL JUSTICE TASK FORCE

PART ONE

I. ADDRESSING PRETRIAL JUSTICE

A. The Charge to the Task Force:

"The task force is charged with examining current pretrial detention practices for criminal defendants in Kansas district courts, as well as alternatives to pretrial detention used to ensure public safety and encourage an accused to appear for court proceedings."

KANSAS COURTS NEWS RELEASE, NOVEMBER 6, 2018

B. Identify the Goal:

The Task Force title is interesting in that it is the Pretrial Justice Task Force not the Pretrial Detention Task Force. The Charge to the task force states the examination should address three areas of concern to pretrial justice, detention practices, public safety, and the defendant's appearance in court. The word release, although not used in the charge, seems to draw all the public attention in this discussion. The Task Force Title and Charge indicate the expectation is more than just activism focusing on *release*. Effective solutions must be broader than a one-size-fits-all answer that fails to address the full scope of pretrial justice. A valid approach must examine pretrial detention for abusive practices and find options that ensure:

a. a fair pretrial detention policy,

b. public safety, and

c. a credible expectation defendant will appear for court.

C. Identifying the Parties

The obvious parties to any corrective measures are the District Courts which include District Court Judges, District Court Magistrates, Court Services Officers and Clerks of the District Court; other court parties are Prosecuting Attorneys' offices and the Criminal Defense Bar both private and public. Others directly affected by the task force's assignment include: 105 County Sheriffs, their jails, all other law enforcement functions including laboratories, the Legislature, and the Kansas Bail Bond Industry. Not all of these parties are represented in the makeup of the task force, but all have been recognized as stakeholders and their input invited.

In the recent decades the primary parties have identified changes they wanted in order to perform in this adversarial setting. To do so they can sponsor or oppose legislation and court rules' changes to fashion pretrial policy. Changes have evolved that counsel or the courts believed aided them in performing their duties. We have arrived here today by evolution, during a 40-year "Tough on Crime" campaign that may be ending, the pendulum effect. But as the stakeholders lobby and jockey for advantage the problems created for an often overlooked party, the defendant, grow to become the worthy poster child of social activists.

All of the parties must understand that effective solutions will create more work and require changes to what they consider sacrosanct. Speed up calendars and we will hear the complaints of counsel. Require more information quicker, Court Services and Clerks along with counsel may be

adversely impacted. Require the adversaries to exchange information and negotiate more timely and the grumbling will be epic. Radical suggestions to be sure, but such matters should not be beyond the task force's review.

Anticipating a critical response to my last statement, this part of the problem is not a numbers game; yes, there is more crime to deal with today. However, prosecutors' staffs have expanded, the district courts have added divisions, public defenders offices have grown, more private attorneys are doing more court-appointed cases and retained criminal defense. We cannot short circuit due process using caseload as an excuse. They (we) cannot have it both ways.

D. The Analysis

We may be failing to look at the big picture; modification of certain practices and procedures could greatly reduce the impact of pretrial detention. Should the task force consider the causes preceding detention such as why are there an increasing percentage of persons detained versus those booked and released? Should the task force consider suggesting a schedule for judicial reconsideration of bond, for example should a defendant unable to bond within a set period on a nonviolent crime be given a reduced bond, or if that individual also has a no criminal history be considered for unsecured release on a signature bond?

A publicized fact that has brought pretrial detention to the public's attention is that it takes so long for a case to come to trial. We have lost our institutional memory of when the clock on the criminal pretrial system worked. As an example, K.S.A. 22-3402, the statute governing speedy trial was amended in 2014, to resolve an unrelated problem. The amendment almost doubled the speedy pretrial period before trial was required. The

amendment was not fully vetted, and has negatively affected the length of pretrial detention.

This task force should fully analyze all proffered solutions to identify the potential for ricochets creating unintended consequences. The effects of a quick and easy solution in pretrial detention, such as prerelease testing, can end up creating problems like unexpected bias [think S.A.T.-A.C.T.], loss of judicial discretion, creation of a pretrial bureaucracy at tax dollar expense, and decisions made using "proprietary formulas" blocked from discovery.

Before we jettison over 200 years of experience with a system that has a proven record of adapting to change, there are some factors we should consider. Why is there not only a growing number of defendants but also a growing percentage of that number in pretrial detention? What is the cause of the length of pretrial detention? Can we fix these from within the system?

There are those who jump to conclusions saying "too many people cannot afford cash bond so therefore cash bonds are the problem. Taking the simplistic view is a mistake; like the statement that makes all of us trained in the law shudder, "It's easy all you have to do is…"

Blaming the bail bond industry for setting high bonds is like blaming the delivering doctor for the expense of twins or blaming the funeral home for the death rate.

II. LAW ENFORCEMENT DECISIONS

A. Why Arrest?

The court does not track arrest statistics, but in 40 years of dealing with the Criminal Justice System I believe that both a growing number and

a growing percentage of persons arrested are being subjected to warrantless arrests, a decision to arrest made in the moment without a warrant. An arrest on a warrant is decision is made by an attorney-prosecutor after a careful review of the facts and the law. Once jailed on a warrantless arrest, the law enforcement presumptions regarding that individual are skewed toward that of "the prisoner".

B. Why Detain?

In response to the question "why arrest and jail?, an officer once told me it was his job to "cuff'm and stuff'm and let God or a judge sort it out." Not funny and not intended to be an indictment of all officers. However, a training officer of a state law enforcement agency told me that this is not an uncommon attitude among the younger generation of (millennial) officers.

Education of officers to reduce warrantless arrests will also reduce the number of unnecessary detentions.

Once jailed and unable to gain release, an additional issue is the length of detention before trial. In a perfect world where a quick arraignment, preliminary hearing, and no continuances exist there is still six months of pretrial detention before trial must begin. In our not so perfect world the reality can be much longer; this is for persons presumed innocent. Warrantless arrests are at the root of many pretrial justice problems and show this to be a broader subject than just pretrial release.

III. SHOULD THE COURTS BE PROACTIVE?

It is not a new phenomenon for the courts to reign in developments in criminal practices; to stop or reverse the pendulum effect if those practices are seen as exceeding the foundational concepts of criminal law.

A. Court Sets Amount and Conditions of Bond

This requires examination of factors that cause and control pretrial detention.

1. The initial setting of bond is done in two ways: set at the first appearance if a warrantless arrest,

   K.S.A. 22-2802.

   (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 and sufficient to assure the appearance of such person before the magistrate when ordered and to assure the public safety …

2. … or set out in writing on the face of the arrest warrant.

   K.S.A. 22-2304.

   (a) …The amount of the appearance bond to be required shall be stated in the warrant.

B. Bond Reduction and Judicial Inquiry

The often heard statement that "too many poor people can't afford bond" is a problem with an obvious if not immediate solution. Once the public safety question is answered to the court's satisfaction the rest of the consideration is answered by commercial bail; once a bond is written the court has a party with "skin in the game" whose duty it is to find and return the defendant who fails to appear. So long as it is not a high-level felony (such as 1-2-O.G.) or an extensive criminal history (such as A-B) and

the defendant has not exhibited a violent nature (public safety), the judge in a felony case should be trying to set a bond the defendant can make, providing security to the court and release to the defendant.

Should a defendant be unable to make any amount of bond due to poverty, the court has to decide if the person can be released by the court without security so long as public safety is not an issue and the court trusts the promise the defendant will appear. This is the situation that is the real problem; the argument being that the defendant is only charged not convicted. Some would say immediate release should be mandatory; others are against release satisfied that arrest on probable cause should be sufficient to detain. The court is trapped between these factions and may ultimately be required to release those who cannot make bond but it is justifiable that this is assessing the defendant using a questionnaire. The questionnaire is filled out by the defendant with assistance of appointed counsel or a family member.

The bond is preset on an arrest warrant when all the judge knows is the crime severity and the affidavit facts. If the defendant has not posted bond by the first appearance or if a warrantless arrest and the bond needs to be set, the court has an opportunity to utilize judicial inquiry as to the status, stability and resources of the defendant. Should the fact that so many accused cannot afford cash bond be part of a formula that further individualizes judicial inquiry when setting the amount of bond? This process should apply regardless of the type of arrest.

The magistrate now knowing more about the defendant can consider public safety, the likelihood of appearance, and the need for the defendant to maintain a job, to support himself and or a family and to aid in his

defense. If reasonable the magistrate can reduce the amount allowing the defendant to be released bond or leave the bond in place while more information is gathered by the defendant, his counsel or the prosecution in opposition. This or a subsequent review of bond should be a time-scheduled concern for the court and not require a motion. The bond reduction should be to a figure that allows the public a reasonable degree of safety and the defendant an opportunity to maintain a normal and law-abiding life while awaiting the trial that the bond encourages him to attend. The bond review is done in consideration of the fact that the jailed defendant is still innocent until proven guilty. In addition K.S.A. 22-2208(1)(a)-(e)(2)(3) gives the magistrate numerous choices to structure bond conditions if relevant.

C. Recognizance Bond

When on the first or subsequent bond inquiry the court determines and the facts of the allegation support that the defendant deserves the court's trust, the court can order the release of the defendant:

> K.S.A. 22-2208(6)
>
> 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.

A recognizance bond is not usually a first choice but is an option for

the court. The court may find it necessary to use recognizance to release those who cannot make secured bond due to poverty if in its discretion the court feels that the defendant is not a flight risk or a threat to society. It is justifiable that this be after assessing the defendant using a questionnaire adopted by the court to obtain extensive information. This can be filled out by the defendant with assistance of appointed counsel or family if necessary.

D. Conditions, Restrictions, and Supervision

K.S.A. 22-2802 is a long, multi-part statute that sets out numerous conditions that can be set as requirements on a bond, restrictions on the actions of the defendant and provisions for supervision of the defendant; these are varied and valuable tools that provide a way for a magistrate to fashion bonds that fit the individual needs of defendants to accomplish the task of providing for the release of a defendant while providing public safety and incentives to appear in court. Should the judge determine that the defendant is violating the terms, conditions, restrictions or supervision required by the bond, the judge can order the defendant to be returned to court for a hearing and possibly jail.

E. Use of Available Guidelines and Schedules

There are tools available to a judge or magistrate that can be of assistance when considering setting bond or a subsequent adjustment of a bond. The felony sentencing guidelines' chart is one such tool; in setting bonds a judge might determine the severity level of the alleged offense and the effect of the criminal history if it can be determined from the file as part of a public safety consideration.

A similar approach could be utilized by considering K.S.A. 21-6611 which addresses fines. The range of maximum felony fines runs from $100,000.00 to $500,000.00, spread across the sentencing guidelines. Looking at the high end of bonds set by the court, a bond set on the highest level felony in the Complaint could be set within a range of up to the maximum fine amount as supported by the facts.

The same scenario works even better when applied to misdemeanors; K.S.A. 21-6611, sets out the maximum fines for A misdemeanors at

$2,500.00, B at $1,000.00, C and unclassified at $500.00. The question being why would any class A misdemeanor have a bond in excess of $2,500.00, and unless the facts are particularly egregious why would this or any bond need to be the maximum. Following statements made later in Section VI, most misdemeanor charges, nonperson, and nonviolent, not statutorily requiring arrest could be handled on notice to appear citations or by summons.

Another useful tool is the poverty affidavit if the accused has applied for court-appointed counsel. Having at least a partial understanding of the applicant's financial status can be useful in the original or in subsequent review and inquiry by the court along with the controlling factors of public safety and appearance. If the file does not contain a poverty affidavit, the court could require such an affidavit when considering bond giving the judge materials with which to question the defendant.

IV. ACTIONS OF COUNSEL

A. The Prosecution

There are prosecutors who believe it is their adversarial duty to oppose any reduction in bond; typically, these are the same prosecutors who request the setting of extremely high bonds at the outset. If the magistrate is inclined to go along, which they often are, the accused is facing an unfair uphill battle that has nothing to do with public safety or appearance. This is a situation that defense counsel must confront and attempt to overcome when his time should be spent preparing to defend the case.

There is also the issue of a prosecutor's opposition to bond reduction based only on the defendant's inability to pay after defendant has shown

there is not a public safety or flight risk issue.

There is also the issue, which the prosecution and the defense know to be true, that a defendant is more likely to “take a deal”, even a bad deal, if kept in jail waiting through the long delay before trial. Defense counsel is ethically required to present the offer to the client, making defense a party to the problem. This is using detention to soften-up the defendant to take a plea or simply punishing the accused before conviction or acquittal.

These are just three examples of the kinds of opposition to bond antics used by those prosecutors who have a “keep them locked up” attitude. These are not all prosecutors most of them see their role as functioning within a hopefully reasonable office policy. That does not change the fact; however, that preventing release is seen as an advantage to the State. This is supported by the fact that even though the State has responsibilities; has anyone ever seen the State after obtaining information on the defendant and the alleged crime, move the court to reduce bond or release a defendant from pretrial detention.

For most prosecutors this is not an impossible change; they simply need to be made aware that these practices are having an adverse effect on the Criminal Justice System and thereby the prosecutorial function.

B. Defense Counsel

The actions of the defense counsel do not escape critique. Much of the discussion has been about the time it takes to get to trial; much of it caused by continuances. Early on in a case, both sides may be asking for continuances as they attempt to work with their witnesses and gather evidence. As a case moves through the system; however, it seems that the requests for continuance by the defense far outnumber those coming from

the State. The reasons are many but the attitude could almost be called cavalier as the parties all know they are looking at a 150-day arraignment deadline. The speedy trial deadline then followed by a possible waiver of speedy trial. This fails, however, to take into account the time it took from arrest to arraignment which could be done in less than a month but is known on average to take far longer. Generally all of these delays are chalked up to continuances and requests for settings that are farther out on the calendar than needed.

As a tactic delay may under the right facts be acceptable, but it easily becomes a habit of convenience without an articulable advantage to either side. This is why education of the prosecutor, defense counsel, and court is so important. Unnecessary delay may become a "conduct of counsel" question in the court's mind when there are opportunities to advance or even expedite the case.

I must admit that during my last ten years of practice I was one of the worst offenders I know of when it came to delaying trial and going so far as to waive speedy trial. If the client was on bond it was not a real problem, but often as not I was court appointed on a level 1 or off grid crime and I felt the farther we could push the trial down the road the better our chances or delay for some other equally unjustifiably weak reasoning.

V. CRIMINAL PROCEDURE STATUTES

A. THE RELEVANCE OF CRIMINAL PROCEDURE STATUTES TO THE PRETRIAL JUSTICE QUESTION

The pretrial detention period of any criminal defendant detained in a

county jail is subject to delays that need not occur.

a. Preliminary Hearing

> 22-2902(2) The preliminary examination **shall be held** before a magistrate of a county in which venue for the prosecution lies **within 14 days after the arrest or personal appearance** of the defendant. **Continuances** may be granted **only for good cause shown**. (emphasis supplied)

Probable cause is a necessary element in any warrantless arrest affidavit or in a warrant for arrest. Having established that probable cause and given that limited hearsay is allowed, there is very little justification for the State to be granted a continuance of a preliminary hearing.

What follows are a few examples of how preliminary hearings do end up being continued: the State is not required to provide full discovery prior to preliminary hearing; many prosecutors have a policy that there will be no plea negotiations if the defense insists on having a preliminary hearing. These are the types of tactics that result in defense counsel requesting a continuance or ultimately waving preliminary hearing in order to obtain discovery and an opportunity to explore plea negotiations. These are tactical decisions and are not a detention problem if the defendant is not in jail. If the defendant is detained, the long slow movement to preliminary hearing begins.

Any continuance, however, postpones the preliminary hearing which delays arraignment. In the example, it was in hope of obtaining full discovery and reaching a plea agreement. Most courts are hesitant to interfere in the efforts of counsel to reach an agreement.

Do what appear to be harmless practices frustrate the intent of the statute? The answer would be that it depends; the primary factor being is defendant still in

jail. Also what is the tactical advantage to arraignment and starting the speedy trial clock weighed against the opportunity for full discovery and the possibility of settlement or other tactical benefits? This is an often overlooked defense decision that counsel cannot ethically make without the input of a fully informed client. It is up to the court to ensure that pretrial requirements are followed; the court must be aware of the custodial status of the defendant. If in custody, the court should satisfy the record that the defendant has been fully informed of the consequences of a continuance. This should include questioning by the court to insure the defendant is aware that the speedy trial countdown starts at the arraignment.

It would be a revealing statistic to know what percentage of the preliminary hearings held in Kansas when the defendant is in pretrial detention are heard within 14 days of the arrest or personal appearance of defendant. It is not unusual for a cycle of pre-preliminary hearing continuances to consume 60 to 90 days or more. Both the detained defendant and the system pay a steep price for (unnecessary) days spent in jail.

B. Arraignment

1. K.S.A. 22-3206. Time of arraignment

(1) A defendant charged with a felony in an information shall appear for arraignment upon such information **in the district court not later than the next required day of court** after the order of the magistrate binding over the defendant for trial, unless a later time is requested or consented to by the defendant and approved by the court or unless continued by order of the court.

(4) The district judges in every judicial district shall **provide by order for one or more required days of**

> **court each month in each county of the district,** at which time a district judge will be personally present at the courthouse for the purpose of conducting arraignments. (emphasis supplied)

The statute suggests 2 alternative approaches, first the language repeated in (1), (2) and (3) "not later than the next required day of court" and then in (4) "one or more required days of court each month in each county of the district".

The reason for the two approaches which are very different in the timing of an arraignment is strictly geographic. It is almost impossible on one day's notice for there to be an arraignment by a district court judge the next working day. In many western and other rural districts, it is 75 miles or more each way from the judge's home court to other county courthouses in the district. To expect that a district judge with one day's notice can always be available points to one of the real problems in our rural state. The Blue Ribbon Commission addressed this issue in its report:

--The Supreme Court should review and seek to modify the case types entitled to priority in the district court and the time standards for expedited disposition of such cases. (BRC Report, 126.);

> --The Supreme Court should implement uniformity in court processes and procedures in all judicial districts. (BRC Report, 134.)
>
> --The Supreme Court should recommend legislation to end the one-resident-judge-per-county restriction on the placement of judges. (BRC Report, 31.)

The recommendation by the Blue Ribbon Commission to revise the

one-county, one-judge rule ran into heavy opposition from rural legislators and counties fearing the loss of their local magistrate and the only judicial official regularly present. Given the resistance to changing the rule, there remains at least one Judge or Magistrate Judge in every county courthouse in Kansas.

Additional statutory history, Blue Ribbon Commission Report:

> --District **magistrate judges** have commented that they are both willing and able to take on additional types of cases and motions. The willingness and ability of district magistrate judges to meet the challenge of expanded subject matter jurisdiction was demonstrated in 1999 when they **were successful in expanding their jurisdiction to include felony arraignments subject to assignment by their chief judge. See 1999 Session Laws of 62 Kansas, Ch. 159, Sec. 1.** The Kansas District Magistrate Judges Association sought the 1999 amendment and lobbied for its passage. The rationale for the amendment was to make district magistrate judges more responsive to the needs of their judicial districts.
> (BRC Report, 60-61.) (emphasis supplied)

By using this amendment, arraignment in all Kansas felonies could be held immediately by the sitting preliminary hearing magistrate or district judge. Make the 1999 amendment a court rule rather than an option left to the discretion of the chief district judge. This might require some additional training for magistrates to satisfy the Chief Judges but the positive effect on timing is clear. Changing this amendment to a rule provides that defendants in the 16 of 31 judicial districts with 3 to 7 counties would no longer be subject to arraignment delayed up to 30 days due to geography.

Implementing the amendment as a rule would also fulfill a BRC goal of uniformity across the state in court processes and procedures.

> The Supreme Court should implement uniformity in court processes and procedures in all judicial districts. (BRC Report, 134.)

2. K.S.A. 22-3205. Arraignment.

> **(b) Arraignment may be conducted by two-way electronic audio-video communication** between the defendant and the judge in lieu of personal presence of the defendant or the defendant's counsel in the courtroom in the discretion of the court. The defendant may be accompanied by the defendant's counsel during such arraignment. **The defendant shall be informed of the defendant's right to be personally present in the courtroom during arraignment.** Exercising the right to be present shall in no way prejudice the defendant.

If defendant wishes to be arraigned by the district court judge that can be accomplished, not later than the next required day of court by videoconferencing. Should the defendant wish to wait for the district judge to physically hold court in that county, the matter should be discussed on the record in the magistrate court. The record should contain an examination wherein defendant states his or her understanding of the impact on the speedy trial calendar and a waiver of any subsequent objection to the requested delay in arraignment. The parties would still appear before the District Court Judge to set the trial calendar at the next

required day of court set in that county.

C. Speedy Trial, K.S.A. 22-3402

> **22-3402.** (a) If any **person charged with a crime and held in jail** solely by reason thereof shall not be **brought to trial within 150 days after such person's arraignment** on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant or a continuance shall be ordered by the court under subsection (e). (emphasis supplied)

In 2014 the statutory speedy trial period for those in pretrial detention was extended to 150 days after lobbying by the Kansas County and District Attorneys Association due to the backlog in the receipt of laboratory results in serious felony cases.

This was a problem for the prosecution facing dismissal of cases after the continuances that the statute allowed had been exhausted. This was happening in sex crimes in particular rape kits, and in serious drug cases.

Typical of the Legislature's solution, adding time to the speedy trial statute was quick, cheap and easy, creating a new set of problems for other parties without actually solving the original one. The 2014 amendment to K.S.A. 22-3402 adds significant time to pretrial detention. In addition the

expense of extended detention is borne by the counties not the state, allowing the state to take the position it had solved a problem and saved money by not expanding funding to the labs, when all it did was "kick the can down the road".

This has cost Kansas citizens increased county property taxes, clogs up the court system and most importantly denies timely justice to the public and the accused. Thus, proving the truth of William Gladstone's quote "justice delayed is justice denied".

Much like an unfunded mandate, the statutory revision causes overcrowding in county jails and exhausts Sheriffs' jail budgets. Numerous Kansas counties have been forced to consider jail expansion which raises county bonded indebtedness and taxes. The solution is the legislature must fix the laboratory funding problem. The recent opening of the new K.B.I. Laboratory on the Washburn University Campus should address some of the problems but more state funding may still be needed to bring the KBI Laboratory in line with the needs and demands of modern forensic science.

D. Using Criminal Procedure Statutes to Reduce Pretrial Detention

a. Preliminary Hearing;

When the issue of defendant's detention is a

concern the Preliminary Hearing can be held within 14 days of

arrest or appearance.

b. Arraignment;

The bound-over defendant can be arraigned immediately by the magistrate handling the preliminary.

c. Speedy Trial;

Under the current statute, the outside limit is 150 Days. Correct the problem that caused the amendment and return it to 90 days.

d. Not easy but worthwhile

If the three statutes discussed can modified and enforced to discourage the habit of unnecessary continuances of convenience it is possible that a felony can be tried in 105-120 days. This sounds good but the execution of the statutory steps is controlled by the prosecutor, defense counsel, and courts not by the desires of a defendant who can't make bond or otherwise qualify for release. Without education of these parties regarding the importance of shorter detention little will change.

VI. MISDEMEANOR PRETRIAL DETENTION

A. Why Misdemeanor Consideration?

1. Analysis shows that misdemeanor pretrial detention is a much different situation than felony pretrial detention.

2. The classification of the misdemeanor crime charged should

control the decision to arrest and detain.

3. Questions that come to mind:

   A. Are too many citizens detained in misdemeanor cases?

   B. Why is the detention before trial so long?

   C. What solutions exist regarding the length of detention?

   D. What avenues are available for pretrial release?

B. The Arrest Decision, A Historical View:

The number of misdemeanor arrests resulting in pretrial detention has grown excessively in the last 40 years. Much of this growth is a result of societal changes in attitude. Examples of those changes from the early 1980's are: Ronald Reagan's Tough on Crime campaign and the public outcry over DUI coming from MADD, SADD and others. Add the growth in availability of personal-use street drugs and the changing attitude of officers on the street discussed in Sec. II. A. and B. and we see major changes in the misdemeanor landscape. Of these examples of arrest, some are justified arrests some are not, it is those that are not necessary that add to the growth in misdemeanor arrests and resulting pretrial detention. The increase in misdemeanor pretrial detention doesn't stop with what should be limited to serious misdemeanors and becomes standard procedure in too many cases in too many jurisdictions.

Misdemeanors as petty crimes rank between infractions and felonies, but in recent years a law-enforcement misperception is that as crimes the preferred result is arrest and jail. There is a whole generation of law enforcement officers on the street today who haven't known any other way to handle misdemeanor crimes and traffic misdemeanors. If the accused defendants cannot make bond or otherwise qualify for some type of release, they sit prior to any finding of guilt or innocence on these minor crimes.

The officer has two decisions to make: whether to cite and whether that citation becomes an arrest which places the individual in jail. These decisions should be made only after considering the relevant misdemeanor classification: A, B, C, or Unclassified, person or nonperson status, and if a violent act was involved. If such considerations were used in the officer's decision making process there would be fewer cases of officer-instigated detention. The goal in most misdemeanor cases should be a return to the practice of filing reports with a prosecuting attorney who determines if probable cause exists, prepares a complaint, and determines if the facts support a warrant or a summons.

C. The Slow Crawl to Trial:

Once arrested the length of misdemeanor detention is aggravated by the fact that there is not a separate misdemeanor speedy trial statute or

bifurcated treatment of misdemeanors under the existing statute. This results in misdemeanors and felonies having the same time requirements to be brought to trial pursuant to K.S.A. 22-3402.

What is the best approach to correct the speedy trial extension of misdemeanor pretrial detention? Would the difference between felonies and misdemeanors justify a separate misdemeanor speedy trial timeframe bifurcating K.S.A. 22-3402? Could this create constitutional concerns or other unintended consequences? Is it a better solution to return to the pre-2014 statutory timeframes?

A very real problem with misdemeanor detention is that those defendants who are waiting for trial become discouraged by delay and very often plead out just to get released. There are situations in which the defendant has flattened the sentence for the crime charged while waiting for trial.

D. ARREST [educate officers in misdemeanor arrest/detention]

a. Warrantless Arrest, Classification of Misdemeanors

1. Of the 400+ misdemeanors in the K.S.A.'s only 40%+ are in chapters 21 or 8
2. Identify those misdemeanors classified as appropriate for arrest and detention

i. Class A and B misdemeanors that are

ii. "Person" crimes involving violence

iii. The officer's decision to detain is discretionary not mandatory in all but a few situations

iv. Misdemeanor DUI, release on posted bond or as otherwise eligible for release

3. Identify those misdemeanors appropriate for book and release rather than arrest and detain

i. Inform accused of purpose of book and release

ii. conduct book and release at that time or set a time for person to report to the station

iii Book, fingerprint, interview

iv. If appropriate, release with an NTA and warning that FTA results in a bench warrant

v. If appropriate release with statement that prosecutor will review and make charging determination

vi. Release after processing and at maximum within __X__ hours of detaining

vii. The decision to detain temporarily for book and release is within officer's discretion

viii. Release by officer within _X_ hours is not discretionary in book and release

b. Arrest on warrant

a. Court issues arrest warrant

1. Determination to detain made by court

2. Warrant sets out dollar amount of bail bond

2. Defendant may bond out or may otherwise qualify for release

Why an outline suggesting officer education on how to reduce criminal misdemeanor, traffic misdemeanor, and low level crime detention? Because although a separate problem from felonies, but they can lead to unnecessarily long term local incarceration given that the current statutory scheme fails to differentiate misdemeanors from felony time standards.

During the early discussions held by the Task Force, Judge Stoss the Municipal Judge from Salina explained that in her efforts to reduce the number of arrests leading to detention made by Salina Police, she asked city officers to consider if incarceration was required when dealing with violators and writing tickets/NTA's. Stakeholders were not able to ask questions so Judge Stoss' response was not part of the group discussion, but she told me afterward that her discussion with the police officers had a measurable positive effect on reducing the number of city prisoners in the Saline County jail.

Misdemeanors are a problem separate from felony arrests but reducing the number of persons held in pretrial detention for misdemeanor charges is a positive step that helps the defendant, local entities and the all those affected by unnecessary detention. The misdemeanor segment of pretrial detention deserves study, and possibly education of the parties and

legislative action.

CONCLUSION- PART ONE

The question in Part One was **can the pretrial structure as it exists in Kansas today be fixed from within?** Can we make corrections in house in an effort to not reinvent a historically good wheel in need of a few new spokes. This would seem to be the least expensive and most uncomfortable way to solve the problem. I say uncomfortable because the involved parties will moan and groan if they are asked to take on any changes in their practice from the comfortable status quo. I can say this with some authority because during my almost 40 years I also moaned and groaned whenever an edict or change came; the task force cannot be discouraged by what is nothing more than human nature.

Numerous possibilities are laid out; many would require a change in attitude, education, and some changes in statutes. As I stated at the outset, "many of the possible solutions I discuss in Part One are so far-fetched as to be laughable, but it was my intent to leave no stone unturned in examining both the causes and possible, even if improbable, in-house solutions to the problem."

The dilemma is to decide between:

Option One, an undoubtedly laborious and tedious overhaul of the existing framework to correct identified problems with pretrial detention, while insuring public safety and court appearance by the defendant, or

Option Two the adoption of a new, possibly expensive, system that is receiving mixed reviews using results from those jurisdictions where it has been in use long enough to produce measurable statistics.

PART TWO

Option Two will be addressed in detail after next week; I am registered to attend a 2 day conference of the Pretrial Justice Institute, PJI PI-CON in Denver March 14 and 15 where I hope to learn more about the latest developments and accomplishments by these parties in particular in the use of pretrial risk assessment tools.