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300 SW 8th Ave, Suite 303
Topeka, KS 66603
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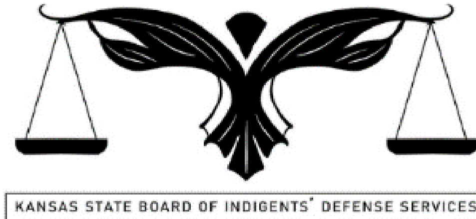

Phone: 785-291-3006
Clayton J. Perkins, Co-Chair
cperkins@sbids.org
Jennifer Roth, Co-Chair
jroth@sbids.org

Senate Committee on Judiciary
January 17, 2024
SB 190

Written Testimony of the
Board of Indigents' Defense Services Legislative Committee
Opponent

Dear Chairwoman Warren and Members of the Committee:

We oppose this bill mandating pretrial release conditioned on one's waiver of extradition because (1) it unconstitutionally mandates that courts impose the condition on presumptively-innocent persons without any individualized findings of necessity, or the ability to impose the pretrial-release condition in the least restrictive manner necessary, (2) we disagree as a matter of policy that it would save resources or create a more expedient avenue surrounding extradition; and (3) it violates principles of federalism.

First, the mandatory nature of this pretrial condition is unconstitutional. Under current State law, a court is mandated to condition a person's pretrial release upon an appearance bond, where necessary, to assure the appearance of that person, and to assure the public's safety.[1] If a person is being bonded out for a person felony or misdemeanor, the court is also required to condition the appearance bond on a no-contact order with any of the alleged victims of the crime for a period of at least 72-hours *unless* the magistrate, in its discretion, makes a specific finding otherwise.[2]

Kansas courts may also impose any other pretrial-release conditions deemed reasonably necessary to assure (1) the individual's appearance, or (2) the public's safety.[3] Critically, however, the Legislature has afforded courts not only the necessary *discretion* to impose any heightened pretrial-release conditions but also mandated that courts consider certain factors relevant to determining *on an individualized basis* whether any additional pretrial-release condition is necessary to assure that person's appearance or the public's safety.[4]

Thus, as currently written, Kansas law affords courts the discretion to impose conditions of pretrial release in a constitutional manner. But, by mandating that courts order pretrial-release

[1] K.S.A. 22-2802(1), (3), (6).

[2] K.S.A. 22-2802(1).

[3] K.S.A. 22-2802(1)(a)-(e).

[4] K.S.A. 22-2802(8).

conditioned upon a presumptively innocent individual's waiver of his or her rights surrounding extradition, SB 190 strips courts of the discretion necessary to comport with federal and state constitutional mandates, as set forth more fully at the conclusion of this testimony.

Take for example the presumptively-innocent single mother living in Kansas. She has neither a criminal history nor record of any failure to appear in court. Nor is there any evidence to support that she is a risk of flight to avoid prosecution. She is prosecuted for charges arising from a domestic incident and released pending trial in Kansas. This mother lawfully crosses the Kansas state border frequently for employment purposes, and one day, while her charges remain pending in Kansas, she is arrested in a neighboring state where her abuser has followed her. Having effected pretrial release in Kansas conditioned upon her signing a waiver of her right to contest extradition or to be released prior to trial in any other state, that single mother has been stripped of her ability—in an effort to expedite her chance of reuniting with and assuring care for her children—to post bond and return to Kansas voluntarily upon proof that she has surrendered to the appropriate custodians.

Under SB 190, a Kansas court would have no discretion whether to impose the waiver-of-extradition condition upon this individual in the first place, nor the discretion to fashion any condition with respect to extradition in the least restrictive manner.

Indeed, mandating the imposition of this pretrial release condition without any discretion afforded to a magistrate to consider a person's individual circumstances defies the very purpose of this Article, as set forth by this Legislature, which declares, "The purpose of this article is to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges or to testify, or pending appeal, *when detention serves neither the ends of justice nor the public interest*."[5]

While proponents of this bill may assert that that a mandatory waiver-of-extradition may save State resources specific to certain cases, such a cost-benefit-analysis argument carries no weight when its implications infringe upon our constitutionally-guaranteed liberty interests, and our rights to the presumption of innocence and against excessive bail. As the United States Supreme Court has repeatedly reminded, "When the American people chose to enshrine [rights] in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed . . . . With humility, we must accept that [these rights] may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics."[6]

Moreover, we disagree with the assertion that a mandatory waiver-of-extradition would necessarily save resources or expedite cases, as proponents argue.

In addition to the constitutional complications noted above (and set forth more fully below), forcing a presumptively-innocent person to relinquish his or her liberty interests surrounding

[5] K.S.A. 22-2801.

[6] *Ramos v. Louisiana*, 140 S.Ct. 1390, 1402 (2020).

extradition in order to gain his freedom through pretrial release is axiomatically coercive. What's more, it potentially creates what the United States Supreme Court has coined a constitutionally "intolerable" choice, in that one is forced to choose between exercising one fundamental right over another. *See Simmons v. United States*, 390 U.S. 377, 393-94 (1968). Whether it is ever constitutional to condition one's presumptive right to pretrial release on waiving liberty interests associated with extradition or release in another state, in addition to the notice and advisement issues surrounding any alleged waiver, are issues that are all but likely to arise through litigation in the courts.

In that vein, when arrested on a charge, an individual in some cases has the opportunity to post a bond before being seen by the magistrate. If the individual were required to execute a waiver signed before a magistrate prior to release, that would similarly overburden the magistrate and the Sheriff's office that would be facilitating this procedure. Please consider this scenario:

John Adam Smith (W/M 01/01/1990) is arrested for felony shoplifting in Topeka, Kansas. He waives his right to extradition as a condition of release. John goes to his home state of Missouri and forgets about his court date. The Court issues a warrant for his arrest. KCMO PD stops a car belonging to a different John Adam Smith born on the same day. This John Smith has never been to Topeka, has never been arrested, and has never been informed of his right to an extradition hearing, nor has he waived that right. Would he be bound by the other John Smith's waiver?

At an extradition hearing, the primary issue is whether the person detained is the person named in the warrant. If by some mistake the wrong person is arrested, that person should be entitled to contest their extradition. In cases where the police are wrong, there must be procedural safeguards in place to prevent errors involving fundamental liberty interests and other rights of such constitutional magnitude.

Further, this bill would violate principles of federalism by legislating in other states. The wording of the mandatory pretrial-release condition, subsection (c)(2), requires that there be an acknowledgment that "such person shall not be released prior to trial in any other state pending extradition to Kansas." This section limits the ability of other states to address their own issues surrounding pretrial detention and bond, and requires the State of Kansas to extradite on all felonies, without discretion or the ability to prioritize.

In sum, Kansas law already authorizes courts broad discretion to impose pretrial release conditions, including restrictions on travel, place of abode, or any other condition deemed reasonably necessary to assure a person's appearance.[7] Individuals may and do choose to execute waivers of extradition by their own free will. A waiver-of-extradition as a mandatory condition of pretrial release would not expedite or save resources but merely transfer burdens to others, including the defense bar and Kansas courts. Because it raises a host of concerns of constitutional magnitude, including those involving fundamental liberty interests, we cannot support this bill.

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[7] K.S.A. 22-2802(1)(c) (a magistrate may "impose any other condition deemed reasonably necessary to assure appearance as required[]").

For further discussion on the federal and state constitutional considerations at play when it comes to the mandatory imposition of pretrial release conditions, please consider the following:

Federal and state constitutional considerations impose a presumption on Kansas courts that every individual facing criminal charges (other than one punishable by death) will be released pending trial conditioned upon the execution of an appearance bond, where necessary, to assure his or her appearance and the public's safety.[8] This presumption of pretrial release, in large part, safeguards our federal and state constitutionally-guaranteed liberty interests, and our rights to the presumption of innocence and against excessive bail.

Guidance from *United States v. Salerno*, in which the United States Supreme Court squarely addressed the constitutionality of a bail system, is important when defining the constitutional contours of a court's authority to impose conditions of pretrial release.[9] Critically, the U.S. Supreme Court held in *Salerno* that a pretrial-detention system comports with due process only where the need to infringe on a presumptively innocent person's liberty interests is demonstrated on an individual basis.[10] And, as demonstrated below, this constitutionally-driven guidance applies not only to an initial detention determination but also to the imposition of pretrial-release conditions that may curtail one's presumption of release pending trial.

In *Salerno*, the petitioner brought a facial constitutional challenge to the Federal Bail Reform Act ("Act") arguing that the Act violates substantive due process because it authorizes impermissible punishment before trial. The *Salerno* court disagreed, finding that the legitimate regulatory goal of community safety can "in *appropriate circumstances*, outweigh an individual's liberty interest"—but only because the Act "carefully limits the circumstances under which detention may be sought."[11] More specifically, the Court found that the Act institutes procedural safeguards (such as the government's burden to prove dangerousness by clear and convincing evidence, protecting the accused's rights to be heard and to cross examine witnesses, among other due-process protections) to ensure that in the rare circumstance that the accused is detained, the detention-determination is properly made on an individual basis.[12] Thus, underlying *Salerno's* holding is the Due Process Clause's express guarantee that established procedural

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[8] U.S. Const. amends. V, VIII, XIV; Kan. Const. Bill of Rights §§ 1, 2, 9; Kan. Const. Bill of Rights § 9 ("All persons shall be bailable by sufficient sureties except for capital offenses . . . ."); *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm and detention prior to trial or without trial is the carefully limited exception."); *Stack v. Boyle*, 342 U.S. 1, 3 (1951) ("From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, []federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail."); *see also* K.S.A. 22-2801; *cf.* K.S.A. 59-29a20 (an individual facing civil commitment has no right to bail).

[9] *Salerno*, 481 U.S. at 789.

[10] *Salerno*, 481 U.S. at 755.

[11] *Salerno*, 481 U.S. at 747.

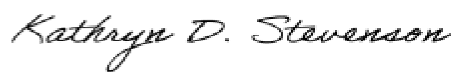
[12] *Salerno*, 481 U.S. at 755 ("The [Bail Reform] Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing.").

safeguards will accompany all deprivations of a person's fundamental liberty interests because due process "requires the government, when it deprives an individual of liberty, to fetter his freedom in the least restrictive manner."[13]

Importantly, *Salerno's* constitutional guidance applies not only to a detention determination but also to the imposition of pretrial-release conditions, as we have seen play out in litigation over the Adam-Walsh-Act-amendments to the Federal Bail Reform Act.[14] The Adam Walsh Amendments imposed a requirement on federal courts to impose heightened pretrial-release conditions upon every person who faces certain charges.[15] Several federal courts have held, however, that provisions of the Adam Walsh Amendments are facially unconstitutional because due process and the prohibition against excessive bail prohibit a court from rubber-stamping the statutorily mandated conditions of pretrial release without first making individualized findings, supported by evidence, that the condition is no greater than necessary to assure a person's appearance or the public's safety, and that when it infringes upon a fundamental liberty interest, the condition is imposed in the least restrictive manner possible under the circumstances.[16]

Here, SB 190 would unconstitutionally strip Kansas courts of the discretion necessary to impose conditions of pretrial release on an individualized basis.

Respectfully submitted,



Kathryn D. Stevenson
kstevenson@sbids.org

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[13] *In re Newchurch*, 807 F.2d 404, 408-09 (5th Cir. 1986) ("Even when a governmental purpose is legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.") (internal quotations and citation omitted); *see also* 18 U.S.C. § 3142(c)(1)(B) (a "judicial officer shall order the pretrial release of the person . . . subject to the *least restrictive* further condition, or combination of conditions . . . .") (emphasis added); *ABA Standards for Criminal Justice: Pretrial Release* 10-5.2 (3d ed. 2007) ("The court should impose the least restrictive of release conditions necessary reasonably to ensure the defendant's appearance in court, protect the safety of the community or any person, and to safeguard the integrity of the judicial process.").

[14] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587; 18 U.S.C. § 3142(c)(1)(B).

[15] 18 U.S.C. § 3142(c)(1)(B).

[16] *See, e.g., United States v. Lee*, 972 F. Supp. 2d 403, 408 (E.D.N.Y 2013); *United States v. Karper*, 847 F. Supp. 2d 350, 362 (N.D.N.Y. 2011); *United States v. Polouizzi*, 697 F. Supp. 2d 381, 390-93 (E.D.N.Y. 2010); *United States v. Smedley*, 611 F. Supp. 2d 971, 977 (E.D. Mo. 2009); *United States v. Torres*, 566 F. Supp. 2d 591, 599, 602 (W.D. Tex. 2008); *United States v. Lillemoe*, No. 3:15CR00025, 2015 WL 9694385 (D. Conn. May 28, 2015) (unpublished); *United States v. Vujnovich*, No. 07-20126-01-CM-DJW, 2008 WL 687203 (D. Kan. March 11, 2008) (unpublished).