"BAIL AGENTS ASSURE JUSTICE"

Kansas Bail Agents Association

2947 N. Athenian Ave., Wichita, Kansas 67204

February 22, 2021

Mr. Chairman and Members of the Committee,

My name is Shane Rolf. I am the Executive Vice President of the Kansas Bail Agents Association. I am providing this testimony on behalf of the KBAA in Opposition to House Bill 2346 in its current format.

There are three main issues in this bill, one of which could impact the bail bond industry and while the other two do not necessarily impact us directly, as regular observers and participants in the pretrial process, we do have concerns about the potential impact.

1. It allows "Bond Supervision" (both under 22-2802 and 22-2814, which are two different types of pretrial supervision) to be conducted by Court Services Officers or "a pretrial supervision entity or program." This is an expansion of pretrial services to "entities" outside the Judicial Branch.

2. It directs (at the discretion of the chief judge) the distribution of any monies generated from bond supervision to be paid directly to the State and allocated to the Judicial Branch "non-judicial salary adjustment fund."

3. Allows the defendant to petition for a waiver of any pretrial supervision costs.

Issue One – Expansion to "Entities"

KBAA is opposed to expanding pretrial supervision to others beyond Court Services Officers.

This recommendation comes directly from the Pretrial Justice Task Force (PTJTF) report, which states – at page 62 – that the "sole purpose of this recommendation is to recognize current practices in some districts." So, basically, there are certain pretrial supervision programs currently operating in violation of the statute, and rather than halt those programs, they would like the Legislature to modify the statute to legalize their activities.

Concerns about the idea of ratifying illegitimate behavior aside, there are other reasons that this proposed expansion is a poor idea.

"Pretrial Supervision Entity or program" is so vague a term as to be meaningless.

This could mean virtually anything. As stated in the PTJTF report at page 59 "Most {districts} use court services to monitor compliance, but some use commercial house arrest program staff, the sheriff's department, or community corrections staff." Is the local Sheriff a "Pretrial Supervision Entity" rather than custodial officer? Can private probation companies compete for these contracts? Could the spouse or child of the local county commissioner start up "ACME Pretrial Services" and go into the Supervision business? Would they be considered "Pretrial Supervision Entities?" What authority do these "entities" actually have? Just a few years ago one of these programs operating outside the statutory pale approached the Legislature requesting arrest authority, despite the fact that they lacked statutory authority to even engage in the supervision. What protections are in place for the defendants against potential abuses of pretrial service "*entities*?"

Without question, there were reasons the Legislature limited pretrial supervision to be done by Court Services Officers when this section of the statue was originally enacted, most specifically:

Defendants awaiting trial should not be subject to "supervision" by the same branch of government that is attempting to convict them.

Supervision by Executive Branch personnel creates an inherent conflict of interest. Court Services Officers are a better choice for this role in that a CSO is a judicial branch employee, who is accountable to the Judge, rather than the local Sheriff or prosecutor. A CSO is a statutorily defined position. From a criminal defense standpoint, it is likely a conflict, and perhaps an ethical conflict, to have Executive Branch personnel (the same branch that is prosecuting the defendant) being involved with the defendant on a pretrial basis. Particularly if the supervision involves exploring aspects of the defendant's personal life like medical, psychiatric and substance abuse issues and other factors that could impact his legal defense to the charges against him. The first piece of advice any criminal defense attorney gives to a client is "stop talking." How is that advice going to be implemented when a Pretrial supervision entity can demand the defendant talk under threat of incarceration? If the program is being operated by law enforcement, it is easy to imagine a situation wherein that authority could be abused to question the defendant or find out private details about the defendant that could negatively impact the outcome of his criminal case. CSO's on the other hand, are criminally and ethically forbidden from taking advantage of the defendant, legally, financially or sexually. Those same protections are not necessarily present with a vaguely defined "pretrial supervision entity or program."

The unstated goal of eliminating professional bail bondsmen.

"Pretrial Supervision" has almost always been promoted as a replacement for traditional surety bail. All of the organizations who support these types of programs actively advocate for the destruction of private sector bail. The oldest of these groups, the Pretrial Justice Institute actually calls for the elimination of commercial bail in its mission statement. These are the groups who then sit down and establish "Best Practices" for how pretrial supervision should work. And, unsurprisingly, these guidelines do NOT advocate for the use of commercial bail, despite the fact that it is the most successful method of ensuring appearance. Expanding beyond court services officers will allow these activist groups even more influence to attack our industry.

Excessive pretrial supervision increases failures to appear.

The PTJTF report points this out at page 58 and makes the argument that pretrial supervision is best when not overly invasive. Yet, the report follows up that concern with a recommendation to expand pretrial supervision. Expansion to providers other than CSO's is likely to lead to "over-supervision" and increased failures to appear, particularly as these program often engage in "pretrial probation" rather than simply monitor the conditions of bond. Pretrial supervision programs across the state have non-compliance rate in excess of 30%. Non compliance typically results in a warrant being issued. Defendants with active warrants for non-compliance, knowing they will be placed into custody if they appear as ordered, fail to appear at a much higher rate. This means that at least a third of the defendants on supervision have an increased incentive to abscond. Signature bonds already have a failure to appear rate of almost twice that of surety bonds, even though those bonds are typically used on the "least risky" defendants.

Pretrial Supervision & House Arrest are only statutorily permissible for risky defendants.

K.S.A. 22-2802 requires that an appearance bond be set "in an amount ... sufficient to assure the appearance of the person ... and to assure the public safety." The statute then states that "The magistrate may impose such of the following additional conditions of release as will reasonably *assure the appearance* of the person for preliminary examination or trial." Both subsection (d) "Release to a house arrest program" and subsection (e) "Supervision by a court services officer" are listed as additional conditions that can be imposed to ensure appearance.

What this means, quite simply, is that by imposing these conditions, the magistrate has already determined that ***these defendants are flight risks***. For that reason:

Defendants risky enough to require pretrial supervision and or house arrest have already been determined to be an increased risk to fail to appear and should not be eligible for personal recognizance bonds.

The Pretrial Justice Task Force report in Appendix B at page 148 states "Money bond relates solely to risk of flight." While the KBAA does not agree that secured bail relates only to flight and does also relate to public safety (that full argument is included in the footnotes of the report), even if one accepts that statement of the report, the conclusion one would have to draw is that financial bail is appropriate (and likely required) when the defendant is a flight risk, and conversely, that a non-financial personal signature bond would be inappropriate for someone who has been determined to be a flight risk. Given that these defendants are already deemed to be flight risks by virtue of the requirement of pretrial supervision or house arrest, any expansion of pretrial services should be accompanied by a restriction on eligibility for personal recognizance bonds for those subject to these conditions. In short, a person who is a flight risk should be required to post a meaningful bail.

A proposed amendment to this bill that would impose those restrictions is attached hereto.

Issue Two – Supervision Proceeds

This could be seen as an attempt to bolster the Judicial Branch budget

We should point out that this aspect of the bill was NOT a recommendation from the PTJTF report and appears to have little purpose other than to funnel funds into the Judicial Branch budget.

It appears that any funds assessed for the cost of bond supervision when collected would be allocated to the Judicial Branch's "non-judicial salary adjustment fund." CSO's are one example of non-judicial employees. So it makes sense that, if CSO's are tasked with pretrial supervision, that the $15 per week fee would be transferred to this fund to offset their salaries, However, it doesn't make a lot of sense to require this money to be paid to the judicial branch if a non-judicial branch "pretrial supervision entity or program" is actually doing the supervising.

Additionally, this could result in the siphoning away of other funds from the counties who are currently providing these services. At page 63, the PTJTF report makes it clear that such "other expenses" (Meaning expenses beyond the $15 per week) include other costs such as "House arrest fees, GPS fees, urinalysis fees, RBU or SCRAM fees for remote alcohol monitoring." These additional funds could run into the millions of dollars statewide. As a crude example, Johnson County spent $2.8 Million on its house arrest program in 2019. It recouped $1.8 Million in fees from defendants, still leaving the program operating at a million dollar deficit. Assuming half of that recovered amount was from pretrial house arrest, this is still $900,000.00 that could just be "reallocated" to the non-judicial salary adjustment fund. This is basically stealing $900,000 from Johnson County and funneling in into the Judicial Branch budget when none of the expense associated with that program is actually borne by the Judicial Branch.

KBAA is concerned that this revenue funneling would make bond supervision a revenue source for the Judicial Branch which then creates a potential conflict in judicial decision making, particularly if an administrative order or some other dictate comes down from the Supreme Court directing its use to be increased in order to increase revenue.

Also, this does seem to be somewhat short sighted if the goal is to expand pretrial supervision. We cannot imagine most local governments would want to pay ALL of the expenses for these programs while any fees recovered where siphoned off to the Judicial Branch. More likely, they would simply decline to provide the option, particularly in smaller districts.

Issue Three - Waiver of pretrial costs

While this does not directly impact KBAA, we think it is important to point out that this waiver could also apply to the more substantial costs associated with house arrest and electronic monitoring and not simply the $15 per week authorized by the statute. What is NOT clear is what happens in instances when those services are provided by outside private entities, particularly as the first part of this bill could potentially authorize private pretrial supervision and the statute already permits private pretrial house arrest. Currently and especially in smaller districts, house arrest services are provided by private house arrest and monitoring companies. Many of those companies have contracts wherein they are paid by the local government; many more however, have contracts that allow them to collect

directly from the defendant as the case progresses. In the latter case, how would such waiver impact the ability of these companies to collect their fees from the defendant? Could they be required to refund fees already paid? Obviously, no private company would be willing to provide House Arrest services if their fees for those services were subject to a waiver. So a blanket waiver could have an impact on the ability of smaller jurisdictions to provide these services.

Conclusion

While we are opposed to the expansion of pretrial supervision beyond the Judicial Branch, we suggest that if such an expansion is contemplated, then it be accompanied by restrictions on personal recognizance bonds for defendants who – by virtue of the supervision requirement – are already deemed to be flight risks. Having a secured bond for these risky defendants will help ensure that they return to court to answer the charges against them. The amendment we have proposed (attached hereto) will help solve this problem.

Shane Rolf
Executive Vice President
Kansas Bail Agents Association

Link to Pretrial Justice Task Force Report: PJTFReporttoKansasSupremeCourt.pdf (kscourts.org)

PROPOSED AMENDMENT TO HB2346

Page three, insert at line 5.

K.S.A. 22-2802

(f) In the discretion of the court, ***if the bond is not conditioned upon subsections (a)(4) or (a)(5),*** 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