



SUPREME COURT OF KANSAS

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October 6, 2020

Speaker Ron Ryckman
Speaker Pro Tem Blaine Finch
House Majority Leader Dan Hawkins

Thank you for your letter of September 23, 2020, inviting me to provide information about pending criminal cases in the Kansas judicial system.

The September 23 letter noted county and district attorneys had informed the State Finance Council "it would be impossible for all necessary trials to take place within 150 days of the scheduled September 15 expiration" of the then-in-place statewide disaster declaration. Without question, the largest challenge currently facing Kansas courts is timely resolving criminal jury trials. Bringing the large number of people required for a jury trial into our courtrooms requires thoughtful and careful planning and scheduling.

With that in mind, I turn to the three topics you asked me to address. Those are:

1. The volume of pending criminal cases requiring trial settings;
2. Projections about a timeline for resolving those pending cases; and
3. Measures being taken to timely resolve the pending cases.

1. THE VOLUME OF PENDING CRIMINAL JURY TRIALS

Last week, I asked the 31 judicial districts in Kansas—through their Chief Judges and Chief Clerks or Court Administrators—this question:

"If the statewide declaration of disaster emergency is not extended, the order suspending speedy trial requirements will terminate no later than March 14, 2021. House Substitute for S.B. 102 provides that when that order "is terminated, any trial scheduled to occur during the time such order was in effect shall be placed back on the court schedule within 150 days." Will your district be able to manage the criminal jury trial backlog within that time frame? What, if any, difficulties will you face or what adjustments will need to be made?"

The responses varied, with population being the most obvious factor likely leading to the variance. The less populous districts generally felt their pending jury trials could be managed, although a few small population counties reported barriers. Several of the more populous districts indicated they could not. For the rest, success of addressing the pending jury trials is contingent on many factors outside the court's control: virus case numbers, prosecutors' and public or appointed defenders' capacity, unknown juror response rates, and restrictive venue statutes. Here is a sampling of how some of our concerned chief judges responded:

- "Should the declaration of disaster emergency not be extended, it would be disastrous for the 18th." – Chief Judge Jeff Goering, 18th Judicial District (Sedgwick County);
- "No, the judges absolutely will not be able to. Time will be the issue." – Chief Judge Rene Young, 28th Judicial District (Saline and Ottawa Counties);
- "Respectfully, this is a firm no." – Chief Judge James McCabria, 7th Judicial District (Douglas County); and
- "No. There is absolutely no way this court will be able to manage the criminal jury trial backlog within a 150-day timeframe." – Chief Judge Richard Anderson, 3rd Judicial District (Shawnee County).

To provide some data about the situation, on March 18, 2020, when my initial order suspending statutory speedy trial deadlines was issued, there were at least 1,777 criminal cases statewide scheduled for jury trial. While some cases have resolved, the bulk of these have been or will need to be rescheduled. Of course, since then prosecutors have filed, or are waiting to file, many more. We have heard one report that in Sedgwick County there are an estimated 700 criminal cases waiting to be filed. As of October 1, 2020, chief judges statewide report that 505 criminal jury trials are scheduled to occur before the end of the calendar year.

While trials will not occur in all of those cases, having realistic trial settings—that is, a time when all parties know a jury pool, the judge, and witnesses are present and ready for trial—is often the catalyst that leads to a disposition other than trial. The percentage of cases ending in a jury trial varies district to district. So rather than apply statewide averages, I asked the Chief Judges to account for historical rates in their districts. Their reports reflect the results.

2. PROJECTIONS

Many variables dictate the timeline for resolving pending cases. Some background helps explain those variables.

Jury trials briefly prohibited

The health and safety of jurors; witnesses; members of the public; law enforcement officials, including jail officials; court employees; and judicial officers have dictated the flow of criminal and other judicial proceedings.

Around March 16, 2020, District Court Chief Judges around the state began canceling jury trials as prospective jurors called expressing fear about reporting for jury service. Around the same time, many County Commissions began closing courthouses or issuing broader stay-at-home orders. To secure the health and safety of court users, staff, and judicial officers, I signed [Administrative Order 2020-PR-016](#) halting jury trials and placing courts on emergency operations to comply with statewide efforts to slow the spread of COVID-19. Trials underway could continue to conclusion, but future jury trials could not be scheduled until my further order.

The order listed emergency operations or essential functions courts would continue to provide. It instructed courts to conduct proceedings by two-way electronic audio-visual communication to the extent feasible.

The order also suspended certain deadlines and time limitations to bring a defendant to trial under K.S.A. 22-3402, effective on the publication of [2020 House Substitute for Senate Bill 102](#), which was published in the March 19, 2020, Kansas Register.

On May 1, with the statewide stay-at-home order set to expire on May 3, I signed [Administrative Order 2020-PR-049](#) and [Administrative Order 2020-PR-048](#) directing judicial districts to develop plans for resuming in-person court proceedings following public health guidelines for COVID-19. These plans required input from the local public health official, considering local conditions and the characteristics of the courthouse facility. From May 1 until today, local courts have worked with local public health officials in implementing safety precautions and determining when to resume in-person hearings and at what volume.

On May 27, I signed [Administrative Order 2020-PR-054](#) to allow courts to convene grand juries and jury trials if necessary to preserve a constitutional speedy trial right. This ended the timeframe where jury trials were not allowed—a period similar to or shorter than jury trial suspensions of many state courts throughout the country.

Current jury trial status

On June 2, I signed [Administrative Order 2020-CM-050](#) creating the [Ad Hoc Jury Task Force](#) composed of judges, court personnel, and several attorneys to analyze issues courts will face as jury operations resume. We have dedicated a page of our website to the Ad Hoc Jury Task Force, which can be located at <https://www.kscourts.org/About-the-Courts/Court-Administration/Court-Initiatives/Ad-Hoc-Jury-Task-Force>.

The task force delivered its report, [Resuming Trials Amid COVID-19](#), to the Supreme Court the last week of July. The report recommended best practices courts will follow to protect the health of jurors and other courtroom participants.

On August 4, in response to the task force's recommendation, I signed [Administrative Order 2020-PR-093](#) to require each judicial district to submit a plan for resuming jury trials to the Office of Judicial Administration, which will review the plans to verify they adhere to [Supreme Court Mandates and Guidance Regarding Resume Jury Proceedings](#) (see [August 4 news release](#)).

Some judicial districts now have approved plans and jury trials have resumed with the volume increasing in the next few weeks in all parts of the State. Courts are increasing the number of prospective jurors being summoned to ensure an adequate juror pool should response rates suffer due to COVID concerns. And courts are sending information with the summons about safety and cleaning protocols the court is taking. Courts are communicating this information through social media and news outlets as well. A short video available for use by all districts can be found at the Ad Hoc Jury Task Force webpage listed above.

But in some areas, jury trials will not resume because the number of COVID cases exceed gating criteria. In Johnson County, for example, plans to resume jury trials in July have been pushed back repeatedly and are now targeted for October 26. Without improvement in COVID case numbers, that date may move again. Other jurisdictions, like Sedgwick and Shawnee counties, have experienced outbreaks in jail that have restricted a detainee's transport to a courthouse.

Going forward, jury trials will look very different from those in early March, and our courtroom capacity has decreased as a result. Jury trial plans include providing appropriate physical distancing, installing barriers or shields between courtroom participants, cleaning and disinfecting public spaces in courtrooms and courthouses, and requiring participants to wear face shields. Some Kansas courtrooms are simply too small or have ventilation systems that raise concerns with local public health officials. Some plan to use alternative venues, such as community centers. But that is not always an option. The recent Coronavirus Relief Fund grant received by the judicial branch permits us to increase capacity, but those changes cannot occur overnight because of supply chain issues for some material, such as plexiglass, necessary to re-engineer courtrooms for safe use.

These physical limitations are important to keep in mind because of legal venue restrictions imposed on Kansas cases. We can utilize senior judges and judicial officers from various parts of the state to assist where courtroom capacity allows. But we also run into the significant limitations resulting from the capacity of public defenders and County and District Attorney's offices. Scheduling will not be easy in many jurisdictions.

3. STEPS TAKEN

I have already mentioned some steps taken, but many other strategies have and will be used. Throughout the pandemic, Kansas courts have processed cases. We have rapidly adapted processes and practices and learned new technologies in an effort to protect the public and court staff from the risks of disease. Statewide, courts conservatively report more than 110,000 virtual hearings since March 18. Recognizing that no one should lose rights or be forced to appear in court if doing so puts that person's or another's health in jeopardy, we have asked the judges in your communities to work hand-in-hand with local public health officials to tailor our court responses to your communities' needs.

Other steps that have been taken:

1. The Supreme Court established the Ad Hoc Virtual Court Proceedings Committee to study and recommend best practices for use of videoconferencing in Kansas courts. Virtual proceedings are being used pretrial to more efficiently move criminal cases to trial and for any other proceedings as may constitutionally occur remotely.
2. Judges across the state have worked with defense counsel, prosecutors, and law enforcement to set reasonable bonds and manage and reduce pretrial detentions.
3. Many jurisdictions have implemented or increased the use of mediation in criminal cases. We are emphasizing to prosecutors and defense counsel that plea negotiations can and must occur without a trial setting.
4. The judicial branch is preparing for expanded use of senior and retired judges and we have and will continue to cross-assign judges to other parts of the State to handle proceedings.
5. Judges have worked with prosecutors and the defense bar to develop trial schedules that, to the greatest extent possible, avoid scheduling conflicts for law enforcement and other witnesses, court reporters, and all counsel. We hope to keep future continuances to a minimum.
6. Last, but certainly not least, a factor in scheduling is whether a constitutional speedy trial claim is at issue. As I know you are aware, House Sub. for S.B. 102 had no impact on a defendant's right to trial as guaranteed by the Sixth Amendment to the United States Constitution (applied to the States through the Fourteenth Amendment) and Section 10 of the Kansas Constitution's Bill of Rights. Courts weighing whether a delay in court proceedings infringes on a defendant's constitutional trial right generally employ a four-part balancing test established in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2191-92, 33 L. Ed. 2d 101 (1972) (balancing length of delay, reason for the delay, the defendant's assertion of his or her right, and prejudice to the defendant). These factors do not impose presumptive deadlines but do provide protections that remain in place.

In contrast, K.S.A. 22-3402 mandates a trial within 150 days of arraignment if the person is in jail or within 180 days after arraignment if the person is on bond, unless a delay results from the application or fault of the defendant or a continuance is ordered by the court for one of four reasons. Those four reasons do not include public health concerns, inability to convene an adequate jury pool, or the illness of the judge. See *State v. Vaughn*, 288 Kan. 140, 151-52, 200 P.3d 446, 454 (2009) ("A judge's illness . . . cannot alone toll the statutory speedy trial period.").

While Kansas courts will continue to protect constitutional speedy trial rights, we are not currently able to resume jury trials at the frequency and volume they were conducted in early March 2020.

4. CLOSING THOUGHTS

Kansas courts have made tremendous strides in addressing the challenges of conducting jury trials during COVID-19. Chief Judges across the state have given thoughtful consideration of the timelines required to process pending jury trials in their districts. We can provide more detailed calculations if helpful to your discussion. But in short, some chief judges report their district will not be able to manage their pending cases within the timeframe established by House Sub. for S.B. 102 if the statutory speedy trial timeframe is not extended.

Sincerely,

A handwritten signature in blue ink that reads "Marla Luckert". The signature is written in a cursive, flowing style.

Marla Luckert
Chief Justice

ML:sb

cc: Paje Resner