

KMJA ANNUAL CONFERENCE
April 24th and 25th, 2017

Indigence issues in Municipal Court, from A-Z

Bonds-Past, Present and do they have a Future

Maurice J. Ryan-Municipal Court Judge- Kansas City, Kansas

Bonds-

- a) History of bonds
 - a. American understanding of bail is derived from 1,000-year-old English roots ¹
 - b. The Anglo-Saxon legal process was created to provide an alternative to blood feuds to avenge wrongs
 - i. As Anglo-Saxon law developed, wrongs once settled by feuds (or by outlawry or “hue and cry”, both processes allowing the public to hunt down and deliver summary justice to offenders) were settled through a system of “bots” or payments designed to compensate grievances
 - ii. Crimes were private affairs (unlike our current system of prosecuting in the name of the state)
 - 1. Suits sought remuneration as the criminal penalty
 - 2. Small # of cases, persons who were considered to be a danger to society along with persons caught in the act of a crime were either mutilated or summarily executed
 - iii. Anglo-Saxons were concerned that the accused might flee to avoid paying the bot, or penalty, to the injured (as well as a “wite,” or payment to the king)
 - 1. Prisons were costly and troublesome so an arrestee was usually “replevied”, that is he was set free so soon as some sureties undertook or became bound for his appearance in court
 - c. A system was created in which the defendant was required to find a surety who provide a pledge to guarantee both the appearance of the accused in court and the payment of the bot upon conviction.
 - i. Under the Anglo Saxon system of pretrial release, the sheriffs relied on a surety, or some third party custodian who was usually a friend,

¹ A substantial portion under Heading II is taken directly from *The History of Bail and Pretrial Release*, Jones, Brooker and Schnacke (2010) www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf and accompanying footnotes

- neighbor, or family member, to agree to stand in for the accused if he absconded.
- ii. As the bot system evolved, with penalties for most crimes payable by fine, sureties were allowed to pledge personal or real property in the event the accused failed to appear.
- iii. Before the Norman invasion, the pledge matched the potential monetary penalty perfectly.
- d. After the Norman Conquest in 1066 until 1700 things became more complex
 - i. Criminal justice became an affair of the state.
 - ii. Capital and other forms of corporal punishment replaced money fines for all but the least serious offenses
 - iii. Delays between accusation and trial lengthened.
 - iv. With increased use of corporal punishment it became more difficult to assign a monetary amount that ought to be pledged and sureties were less likely to stand in the shoes of the accused.
 - v. Accused more likely to flee because of corporal punishment
- e. At the time of American independence English jurisprudence contained 3 principles
 - i. Defendant had a right to bail (except in capital cases)
 - ii. Right to Habeas Corpus
 - iii. Protection against the judicial abuse by the excessive bail clause of the Bill of Rights of 1689²
- f. However, because of complications, the colonies had to improvise
 - i. The absence of close friends and neighbors in frontier America made it difficult to find an acceptable personal custodian for many defendants
 - ii. The vast unsettled American frontier provided a ready sanctuary for any defendant wanting to flee.
 - iii. Thus commercial bonds were a useful device in America.³
- g. The Rise of Commercial Money Bail Bondsmen
 - i. Some debate when it started
 - 1. *Taylor v. Taintor*, 83 U.S. 366 (1872)-case commonly cited as authority for bail bondsmen to act as bounty hunters
 - 2. However, the first true commercial bondsmen were Peter and Thomas McDonough in San Francisco They were considered underworld bosses, who were active in gambling and prostitution rings in turn of the century San Francisco.

² Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 *University of Pa. L. Rev.* 959, 967 (1965)

³ Wayne H. Thomas Jr. *Bail Reform in America* (Univ. of California Press) 1976 Note 1

- a. The McDonough's bailed out people in these illicit industries so they could return to work as soon as possible.⁴
 - b. When their father died they tore out the bar and became the firm of McDonough Brothers in 1898.
 - h. Little happened in the history of bail and pretrial process between 1927 and 1951, the year the US Supreme court decided *Stack v. Boyle* 342 U.S. 1 (1951)
 - i. The 4 Defendants moved the trial court to reduce their bond based upon the Eighth Amendment
 - 1. Supreme Court stated "the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of the accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment."
 - 2. The Court also wrote, "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon the standards relevant to the purpose of assuring the presence of that defendant." [Emphasis added]
 - i. In the 1960's bail reform movement gained momentum with a series of studies.
 - i. Most notable was conducted by the Vera Foundation and the New York University School of Law. It became known as the Manhattan Bail Project. It was designed to "provide information to the court about a defendant's ties to the community and thereby hope that the court would release the defendant on their own recognizance
 - 1. In the first months the Project recommended only 27% of their interviews for release. After 3 years they recommended 65% for pretrial release with less than 1% failing to appear for trial.
 - a. First stab at "risk assessment"
 - ii. In 1966 Congress passed the Federal Bail Reform Act
 - 1. Presumption in favor of OR bonds on non-capital cases
 - 2. Conditional pre-trial release with conditions imposed to reduce risk of FTA
 - 3. Restrictions of money bonds to be imposed only if non-financial release options were not enough to assure a defendant's appearance

⁴ FOR BETTER OR FOR PROFIT: How the Bail Bond Industry Stands in the Way of Fair and Effective Pretrial Justice, Justice Policy Institute (2012) p.5 (Internal citations omitted)

4. Allowed a 10% cash deposit to the court in lieu of full surety bond
 5. Review of bail bonds for defendant's detained for 24 hours or more
- iii. Subsequently, Congress passed the Comprehensive Crime Control Act of 1984, to allow courts to consider a defendant's dangerousness to the community in making bond determination⁵
- b) Current bond practices **Remember, there are only 3 considerations when setting bond;**
- a. **1) Likelihood of return to court,**
 - b. **2) Likelihood of new crimes,**
 - c. **3) Cannot be excessive**
 - i) Bond schedules for warrantless arrest
 - ii) Bond schedules for FTA
 - iii) Recognizance bonds (OR)
 1. **Q & A –who has a bond schedule for warrantless arrests? Failure to Appear? Do you allow people to post less than full bond to set aside warrant?**
 2. Reasons for bond schedule
 - a. That is the way it has always been done
 - b. Pressure from City Council
 - c. Potential source of fine money
 - d. Transient population of offenders
 - e. Infrequent dockets, etc.
 3. Are the reasons cited above justification for continuing the practice?
 - a. Lawsuits- Equal Justice Under the Law lawsuits⁶
 - b. Jail costs- how much does your city pay to house prisoners per year? –Do you know?
 - c. Revenue received vs. jail costs
 - d. Respect for the law
 - e. Eighth Amendment (US Constitution) Ninth Amendment (Kansas Constitution)- **The use of a preset bond schedule may violate the Eighth Amendment⁷**

⁵ The CCCA of 1984 contained in Chapter 1 the Bail Reform Act of 1984 codified 18 U.S.C. Sections 3141-3156. This was upheld in *United States v. Salerno*, 481 U.S. 739, 752 (1987)

⁶ See <http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/>

⁷ See *Stack v. Boyle*

4. How soon do you see arrestees after warrantless arrest? FTA?
 - a. Technology available for video arraignments- Google Hangouts; Adobe Connect; Skype; Cisco WebEx; Fuze
 - b. Contracts with cities call for an extra payment for seeing prisoners on an expedited basis

5. Commercial Sureties –
 - a. Current
 - i. At least 32 surety companies underwrite bail
 - ii. In 2012 these companies underwrote \$13.5 billion worth of bail bonds⁸
 - iii. In 1992, a group of executives banded together believing that there was a “jihad against commercial bail” and that “pretrial service agencies had made deep inroads into the corporate surety market.”
 1. They formed what would become the American Bail Coalition (ABC)
 2. In 1994 ABC joined forces with the American Legislative Exchange Coalition (ALEC)⁹
 - iv. They undertook a letter writing campaign to sheriffs, courts, judges, chambers of commerce critical of pretrial services
 - v. It was a successful effort
 1. In 1990 commercial bail accounted for 23% of pretrial releases, while OR bonds accounted for 40%
 2. Today, 23% are OR bonds and 49% must purchase commercial bail
 - vi. Bail is unique in the insurance business in that it has virtually no losses
 1. Property and auto companies typically pay out 40-60% of their revenue from losses.

⁸ *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, Mother Jones (6-30-14) Shane Bauer
www.motherjones.com/print/248186 (Bauer)

⁹ *For Better Or For Profit: How The Bail Bonding Industry Stands In the Way Of Fair and Effective Pretrial Justice*, Justice Policy Institute, September 2012 p.8

- 2. In 2012 these 32 companies paid out less than 1%¹⁰
- vii. Since then ABC has written at least 11 ALEC "model bills" regarding bail
 - 1. We're only municipal judges, what does this have to do with us?
 - 2. HB 2138 and SB 141¹¹
- viii. Currently at least four states outlaw the use of commercial surety bondsmen. Illinois, Kentucky, Oregon and Wisconsin
- ix. Commercial sureties do not care about anything except their own money-they do not care about public safety

6. Cash bonds

- a. Q & A –Do you set cash bonds as a percent of surety?
 - i. If so, 10% or some other figure
- b. Do you set cash bond at an amount other than a % of surety?
- c. Do you allow a bond at lesser amount?

7. Forfeitures

- a. Due process- Anyone who posts a bond is entitled to a due process hearing to determine if it is to be forfeited¹²
- b. Due process may be waived. Although Courts indulge every presumption against a waiver of fundamental constitutional rights¹³
- c. Waiver depends upon facts of a particular case and is good only if it is done in an informed manner.¹⁴
 - i. If there is a commercial surety, under Kansas law
 - 1. Set Bond Forfeiture for hearing
 - a. Notify surety and defendant
 - b. Have a hearing

¹⁰ Bauer p 11

¹¹ http://www.kslegislature.org/li/b2017_18/measures/documents/sb141_00_0000.pdf

¹² *Fuentes v. Shevin*, 407 U.S. 67 (1972)

¹³ *United States v Williamson* 806 F2d 216, 219 (10th Cir. 1986)

¹⁴ *Johnson v United States Dep't of Agriculture*, 734 F2d 774, 784 (11th Cir. 1984)

- c. If BF, give surety time to produce? Staggered payments?
 - d. One good thing about proposed bill SB141 and HB 2138 would streamline forfeiture proceeding if surety does not voluntarily pay.¹⁵
 - d. How many surety bonds did you forfeit in the last year
 - i. How much is still owed on that amount?
 - e. How much did you forfeit in cash bonds last year?
 - i. Did you have a due process hearing or did you have a knowing waiver?
 - ii. Do you have a written policy on how that money is applied?
- d. Experiences of our court
 - i. Necessity is the mother of invention
 - 1. Due to furloughs and budget cuts we were forced to answer many of the questions I've asked of you today
 - 2. Jail population committee formed with Sheriff, DA, Administrative Judge of District Court, Police Chief, Pretrial Services, Municipal Court
 - ii. Jail Statistics

1. 2009- average p/day	2016
2. Total Inmates = 529	375
3. 61 City/Municipal Charges	21
4. Average Length 2.1 days	1.7 days
5. County farm out= \$4 million p/year	\$1.5 million \$0 now
6. City payment to jail= \$2 million p/year	\$766,092 p/year
 - iii. What happened?
 - 1. Decrease in felony filings¹⁶
 - 2. Decrease in City charges
 - 3. Coordination to release those with mental illness but who had local support
 - 4. Increased use of OR
 - iv. Bonds- We use cash only bonds
 - 1. Bonds are initially set at amount of fines + court costs.
 - 2. However, we have an informal bench warrant set aside policy

¹⁵ These bills would make the procedure for forfeiture that same as District Court under K.S.A. 22-2807

¹⁶ <http://web.kscourts.org/stats/16/10year/2016%20District%2029.pdf>

- a. Start @ \$100 and increase in \$50 increments for previous bond forfeitures- Bond companies have said they are not interested in bonds of \$100 or less
- 3. Stopped using sureties in 2009-
 - a. Saved 20 hours per month in staff time coordinating bond forfeiture docket
 - b. Saved 2-3 hours p/month in court time
 - c. Increased income-**note, the purpose of court is not revenue generation, but compliance with law**
 - d. Increased payments to restitution victims
 - e. Helped pay off old fines.
- c) Pretrial Services
 - a. Studies have shown that by asking a few questions you can determine who is likely to come to court.¹⁷ These questions can be asked by you, or if cooperative, the jail.

Item	Range
i. Do you own a home or cell phone	0-5 points
ii. Owning or renting one's residence	0-4 points
iii. Contributing to residential payments	0-9 points
iv. Past or current problems with alcohol	0-4 points
v. Past or current mental health treatment	0-15 points
vi. Age of first arrest	0-4 points
vii. Past jail sentence	0-10 points
viii. Past prison sentence	0-5 points
ix. Having active warrants	0-13 points
x. Other pending cases	0-5 points
xi. Currently on supervision	0-5 points
xii. History of revoked bonds	0-4 points

Score each item and you'll get a score ranging from "0" to "82"¹⁸

- b. Up to a score of 37 there is little statistical difference between OR and secured bonds when evaluating the public safety rate and FTA rate¹⁹

¹⁷ *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, Michael Jones (2013) (Jones) <http://www.pretrial.org/download/research/Unsecured%20Bonds,%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf>

¹⁸ *The Colorado Pretrial Assessment Tool (CPAT) 2012* <http://www.pretrial.org/download/risk-assessment/CO%20Pretrial%20Assessment%20Tool%20Report%20Rev%20-%20PJI%202012.pdf> **Scoring included in packet**

¹⁹ Jones p.10

- c. Action- Ask jail to ask these questions and notify you of the scores generated, or establish an administrative order granting O/R bond to those with scores of 37 or less that can be administered by the jail.
- d) If unsure, run a pilot program for 6 months to see what your results are.

Conclusion

All jurisdictions should be able to articulate their guiding principles or philosophies for the administration of bail

All jurisdictions should ensure that their principles comport with Eighth Amendment in making sure bond schedules include individualized considerations

All jurisdictions should know whether their bond procedures and forfeiture procedures comport with due process

Know your finances and talk with your governing bodies and sheriffs to make arrangements to reduce numbers of those incarcerated

IN THE MUNICIPAL COURT OF KANSAS CITY, KANSAS
ADMINISTRATIVE ORDER No. 16-001

RE: Bond Forfeitures

WHEREAS, it is the mission of the Kansas City, Kansas Municipal Court to serve with fairness, honesty, and integrity.

WHEREAS, it is in the goal of the Kansas City, Kansas Municipal Court to be responsive to the citizenry and community we serve.

IT IS HEREBY ORDERED, if an appearance bond is forfeited due to the failure of the defendant to appear in court, the proceeds shall be distributed in the following priority;

- 1) Victim restitution order;
- 2) Payment for any unpaid fine on a previously adjudicated case;

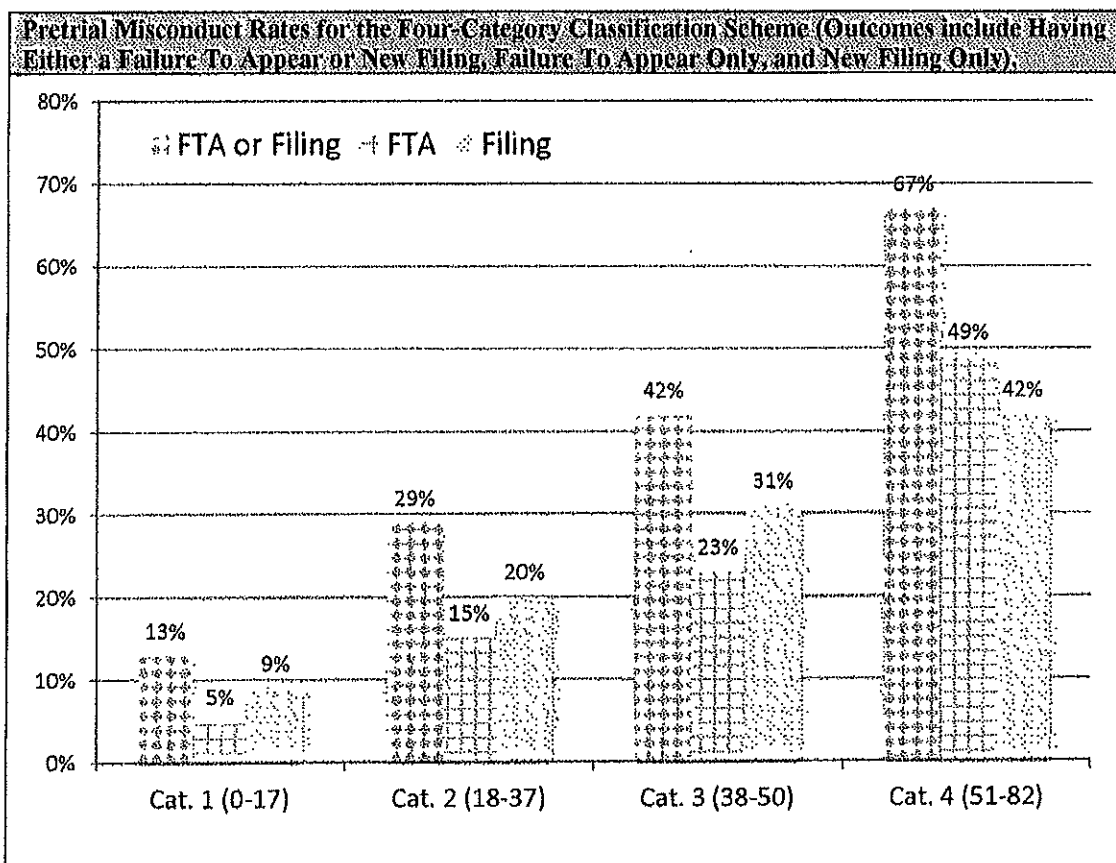
If no prior adjudication,

- 3) General fund of the city.

BY THE ORDER OF COURT on this the _____ day of _____ in 2016.

Judge Maurice Ryan
Administrative Judge
Kansas City, Kansas Municipal Court

Figure 2



The Colorado Pretrial Assessment Tool (CPAT): Items and Scoring²¹

1. Having a Home or Cell Phone

How to score: Ask the defendant, “Do you have a working home phone or cell phone number?”

Choose from among the following two choices:

- Yes [0 points]
- No, or Unknown [5 points]

Source of Information: Face-to-face interview with the defendant

²¹ Items 7 through 12 are scored with a “Yes-No” scheme because the analysis did not show that defendants with multiple instances or events for these six items were more likely to show pretrial misconduct than defendants with only one instance or event.

2. Owning or Renting One's Residence

How to score: Ask the defendant, "For where you were living at the time of your arrest, do you own or rent?"

Choose from among the following two choices:

- Own [0 points]
- Rent, or Unknown [4 points]

Source of Information: Face-to-face interview with the defendant

3. Contributing to Residential Payments

How to score: Ask the defendant, "For where you were living at the time of your arrest, do you financially contribute towards the mortgage or rent?"

Choose from among the following two choices:

- Yes [0 points]
- No, or Unknown [9 points]

Source of Information: Face-to-face interview with the defendant

4. Past or Current Problems with Alcohol

How to score: Ask the defendant, "Do you believe you that you currently have or have ever had a problem with your use of alcohol?"

Choose from among the following two choices:

- No [0 points]
- Yes, or Unknown [4 points]

Source of Information: Face-to-face interview with the defendant

5. Past or Current Mental Health Treatment

How to score: Ask the defendant, "Have you ever been treated for mental health problems?"

Choose from among the following two choices:

- No [0 points]
- Yes, or Unknown [4 points]

Source of Information: Face-to-face interview with the defendant

6. Age at First Arrest

How to score: Ask the defendant, "How old were you the first time you were arrested?"
(Can include when the defendant was first processed at a juvenile facility, taken into custody, or fingerprinted. A first arrest overrides the other categories.)

Choose from among the following five choices:

- This is my first arrest [0 points]
- 35 years or older, or Unknown [0 points]
- 25-34 years [10 points]
- 20-24 years [12 points]
- 19 years or younger [15 points]

Source of Information: Face-to-face interview with the defendant

7. Past Jail Sentence

How to score: Ask the defendant, "Have you ever been sentenced to jail or work release?"

Choose from among the following two choices:

- No, or Unknown [0 points]
- Yes [4 points]

Source of Information: Face-to-face interview with the defendant

8. Past Prison Sentence

How to score: Ask the defendant, "Have you ever been sentenced to prison?"

Choose from among the following two choices:

- No, or Unknown [0 points]
- Yes [10 points]

Source of Information: Face-to-face interview with the defendant

9. Having Active Warrants

How to score: Answer the question, "Does the defendant have any active warrants?" (Active Warrants are ones that, at the time of arrest, did not have a court date, and the defendant was not on summons or bond for the charges. Include even if not extraditable. Do not include pending cases or the current charges.)

Choose from among the following two choices:

- No [0 points]
- Yes, or Unknown [5 points]

Source of Information: Online databases²²

10. Having Other Pending Cases

How to score: Answer the question, "Does the defendant have any cases pending against him/her in any criminal or traffic court?"

(Pending Cases require that the defendant was previously arrested or issued a summons for one or more charges and had a future court date pending at the time of arrest. Defendant may be on summons or bond for the charges. Do not include active warrants or the current charges.)

Choose from among the following two choices:

- No [0 points]
- Yes, or Unknown [13 points]

Source of Information: Online databases

²² One or more of three online databases contain the needed information. These databases are: (1) the Colorado State Judicial Branch's statewide court information system, including that of the City/County of Denver; (2) the Federal Bureau of Investigation's National Crime Information Center (NCIC) database; and (3) the Colorado Bureau of Investigation's Colorado Crime Information Center (CCIC) database.

11. Currently on Supervision

How to score: Answer the question, "Is the defendant currently on supervision for another court case not related to the current charges?"

(Includes pretrial supervision, diversion, probation, parole, community corrections, or other form of community-based supervision.)

Choose from among the following two choices:

- No [0 points]
- Yes, or Unknown [5 points]

Source of Information: Online databases

12. History of Revoked Bond or Supervision

How to score: Answer the question, "Has the defendant ever been revoked from any bond or supervision before this arrest?"

(Includes bond, pretrial supervision, diversion, probation, parole, community corrections, or other form of community-based supervision.)

Choose from among the following two choices:

- No [0 points]
- Yes, or Unknown [4 points]

Source of Information: Online databases

Risk Level Designation

As seen in Table 4 below, defendants scored on the CPAT can be placed into one of four risk categories. These categories have different public safety rates, court appearance rates, and combined overall success rates.²³

Table 4

Revised Risk Category	Risk Score	Public Safety Rate	Court Appearance Rate	Overall Combined Success Rate
1	0 to 17	91%	95%	87%
2	18 - 37	80%	85%	71%
3	38 - 50	69%	77%	58%
4	51 - 82	58%	51%	33%
(Average)	30	78%	82%	68%

A defendant's placement into one of these categories can be interpreted as that defendant showing a risk score consistent with defendants whose average public safety rate is ##% and whose average court appearance rate is ##%.²⁴

²³ Consistent with contemporary pretrial performance measurement, the "no new criminal filing rate" (also sometimes known as the "no new arrest rate" in other studies) is expressed here as the public safety rate. The public safety rate for the CPAT study, however, was defined very broadly as a filing for *any* new felony, misdemeanor, traffic, municipal, and petty offense, and was not limited to a more narrowly defined set of crimes that involve a form of physical or emotional harm to one or more victims. For a discussion of this topic, see National Institute of Corrections. (2011). *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field*. Washington, DC: Author.

1 Sec. 2. K.S.A. 12-4303 is hereby amended to read as follows: 12-
2 4303. In the event the accused person fails to appear at the time designated
3 in the appearance bond, or at any subsequent time to which the appearance
4 has been continued, the municipal judge shall declare the bond forfeited,
5 except that, if it appears to the court that justice does not require the
6 enforcement of the forfeiture, the court may set the same aside upon such
7 conditions as the court may impose. Where the forfeiture of a bond has
8 ~~become final~~ *not been set aside*, the court shall direct ~~the application of the~~
9 ~~funds or~~ that suitable action be instituted for the collection from the
10 ~~sureties obligors thereon or from the accused person pursuant to K.S.A.~~
11 ~~22-2807, and amendments thereto.~~

12 Sec. 3. K.S.A. 12-4301 and 12-4303 are hereby repealed.

13 Sec. 4. This act shall take effect and be in force from and after its
14 publication in the statute book.

