

**IN THE SUPREME COURT OF  
THE STATE OF KANSAS**

<b>James Hadley, et al.,</b>	)	
<b>Petitioners,</b>	)	
<b>vs.</b>	)	<b>Case No. 122,760</b>
<b>Jeffrey Zmuda, in his official capacity</b>	)	
<b>as the Secretary of Corrections for the</b>	)	
<b>State of Kansas, et al.,</b>	)	
<b>Respondents.</b>	)	
_____	)	

**RESPONDENTS' RESPONSE TO THE COURT'S APRIL 10, 2020 ORDER  
AND MOTION TO DISMISS**

This is an original action under Rule 9.01 and K.S.A. 60-1501 (*habeas corpus*) where Petitioners, inmates at Lansing, Ellsworth, and Topeka Correctional Facilities, seek, among other things, immediate or expedited release from their court-ordered incarceration on behalf of themselves and thousands of other inmates, including convicted serial killers such as Dennis Rader (a.k.a. “the BTK Killer”) and John Robinson, and all future inmates. In essence, Petitioners allege that being in prison during the COVID-19 Pandemic is in and of itself a violation of their rights under the Eighth Amendment and the Kansas Constitution. This is not the law.

Although this is not a fact-finding Court, Petitioners also misstate the facts. The Kansas Department of Corrections (“KDOC”) response to the Pandemic in this challenging time has been aggressive, informed, intelligent, comprehensive, progressive, and generally successful. Details of that response are found at

<https://www.doc.ks.gov/kdoc-coronavirus-updates>, and as outlined in the attached Affidavit of KDOC Deputy Secretary for Facilities Management, Joel Hrabe.

Because Petitioners fail to allege a constitutional violation, the Court should decline to issue the writ under K.S.A. 60-1503 and summarily dismiss the Petition.

## **ARGUMENT AND AUTHORITIES**

Petitioners’ extreme, expansive, and extraordinary requests for relief should be denied, no writ should issue, and the “Class Action Petition for Writ of Habeas Corpus” (Petition) should be dismissed. Habeas corpus is “an extraordinary legal remedy.” *Foster v. Maynard*, 222 Kan. 506, 513, 565 P.2d 285 (1977). Petitioners have not met their considerable burden in seeking such an extraordinary remedy in this original action which they have asked to be expedited, yet another extraordinary proceeding. The Petition should be dismissed for at least the following reasons.

### **I. The Petition Raises Exceptional Separation of Powers’ Concerns as Administration of KDOC and Kansas’ Correctional Facilities Belongs in the Executive Branch of Government**

Running Kansas prisons is a job for the executive branch of government, and courts give great deference to the expertise of prison officials. *Bell v. Wolfish*, 441 U.S. 520, 547-48, 99 S. Ct. 1861, 60 L.Ed.2d 447 (1979).

Frequent news reports show beyond dispute that Wardens Shannon Meyer, Don Langford, and Gloria Geither, as well as Secretary Jeff Zmuda – along with other State of Kansas officials – are working tirelessly at the challenging job of running Kansas prisons in the face of this Pandemic. Respondents are not dismissive of, or deliberately indifferent toward, the health and well-being of Petitioners and all of the

inmates in their custody. Instead, they are working closely with their medical provider and the Kansas Department of Health and Environment (KDHE) to do everything they can to protect inmates in this difficult time.

Nothing raised in the Petition suggests that this Court should depart from the traditional deference given to prison officials – in this case, prison officials working closely with the KDHE – normally afforded by courts. The safety of the inmates, staff, and public are at stake and Respondents submit that competent, professional KDOC and KDHE employees with subject matter expertise are busily at work each day dealing with the Pandemic’s impact on Kansas correctional facilities.

This court has long recognized and often articulated the importance of this rule of law. In *Jamerson v. Heimgartner*, 304 Kan. 678, 681, 372 P.3d 1236 (2016), the Court stated: “Courts give penal authorities great deference in the management and operation of the prison system.” (citing *Meachum v. Fano*, 427 U.S. 215, 224, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *Schuyler v. Roberts*, 285 Kan. 677, 681, 175 P.3d 259 (2008); *Foster v. Maynard*, 222 Kan. 506, 509, 565 P.2d 285 (1977); *Chambers v. Colorado Dept. of Corrs.*, 205 F.3d 1237, 1242 (10th Cir. 2000)). Indeed, “[t]he cases are legion that recognize the deference courts give penal authorities in the management and operation of our prison system.” *Schuyler, supra*. As the Court recalled in *Foster, supra*: “In *Levier v. State*, 209 Kan. 442, 497 P.2d 265, this court recognized that prison officials are vested with wide discretion in the discharge of their duties and that their decisions concerning matters of internal management and operation of a

state penitentiary will not be disturbed unless clearly arbitrary or shocking to the conscience.”

Respondents acknowledge that the Eighth Amendment “imposes duties on [prison] officials, who must provide humane conditions of confinement,” to include medical care. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994). But they submit that they moved aggressively and have taken all reasonable steps to protect inmates in their custody from the Pandemic, and that intervention by this Court is not necessary, particularly under the deferential standards applied by courts to questions of management of prisons.

With this Pandemic, we are in uncharted waters. Kansas correctional administrators and professionals, in conjunction with medical and other related professionals, are giving their all to address these concerns. Petitioners have presented nothing to suggest that Respondents have not taken responsible steps to mitigate the risk, or that Respondents have displayed deliberate indifference to Petitioners’ health and safety. Nor have Petitioners demonstrated that they would be any safer if released, or that the general public would be safer if Petitioners or the thousands of other inmates are hastily released. Indeed, Kentucky’s recent experience where an inmate released due to the Pandemic was re-arrested within days and charged with murder highlights the risk. *See* <https://www.wave3.com/2020/03/30/more-inmates-released-amid-corona-concerns-one-inmate-gets-re-arrested-murder/>. Public safety is not a simple matter.

As a federal district court addressing a similar challenge recently noted in language that applies equally here:

[A]lthough the COVID-19 situation is an extraordinary one for the population at large in this country, including prisoners, and without diminishing in the least the fact that petitioner is part of an especially at-risk COVID-19 population, petitioner has not shown that prison authorities are unable or unwilling to address this serious problem within prisons, or that petitioner is unable to take the general, protective measures applicable to all as of yet unafflicted persons, i.e., wash hands frequently, avoid touching the face and so forth. Moreover, prison authorities may be able to isolate highly at-risk prisoners, such as petitioner, more easily than isolation or “social distancing” is achieved in the general population, e.g., housing in administrative segregation, partial lockdowns or transfers. Prisons are certainly able to order their afflicted employees to stay at home, and can probably, more easily find testing opportunities for their essential employees than is yet possible for the general population. Finally, prison and state officials are more likely to know who may be best subject to compassionate release under state laws than is the undersigned.”

*Peterson v. Diaz*, 2020 WL 1640008 at \*2 (E.D. Cal. April 2, 2020).

Moreover, release of persons who have been in prison is not a simple task. One does not simply open the doors and let them walk out. There are many issues to be faced and resolved as a person is released from custody.

In the pre-Pandemic environment, those coming out of prison faced difficulties of joblessness, unstable housing and access to medical care. Any persons released as this Pandemic unfolds are certain to find that unfortunate reality exacerbated even further with the record high and growing unemployment and an unstable economy. Further, someone released early during this Pandemic will also face the challenge of accessing already scarce substance abuse and mental health treatment options, the availability of which is now further complicated due to social distancing

requirements. In more typical times parole officers and faith-based transition programs play vital roles in helping these individuals reintegrate successfully into society. Given the current health crisis, these services will be stretched – when available at all – to the breaking point. And, of course, the threat of being infected with COVID-19 is just as real outside the prison walls as in. So, it is not fair to assume – as Petitioners urge – that they will be safer and better off with an early release from their sentences.

In sum, Respondents respectfully submit that Petitioners have not met their burden of showing such a risk to their health as to establish an Eighth Amendment violation, a point discussed in greater detail below. There is no reason for this Court to depart from the standard deference it affords prison officials and to involve itself in what is primarily a matter for the Executive Branch given the earnest and reasonable efforts being made by officials of KDOC and the KDHE.

## **II. Available and Mandatory Administrative Processes for Case-by-Case Review Are Sufficient, But Have Not Been Exhausted as Required by Kansas Law**

A fundamental concept in inmate litigation is the inmate’s obligation to exhaust administrative remedies before filing suit. In Kansas, that obligation is included in statutory law. This court succinctly said so in *Sperry v. McKune*, 305 Kan. 469, Syl. 5, 384 P.3d 1003 (2016) as follows: “Before an inmate in the custody of the Kansas Secretary of Corrections files a civil suit against the state, any political subdivision of the state, or any public official, K.S.A. 75-52,138 requires an inmate to (1) exhaust administrative remedies established by rules and regulations

promulgated by the secretary of corrections and (2) file with the inmate's petition proof that the administrative remedies have been exhausted.”

“Courts demand strict compliance with these exhaustion requirements.” *Litzinger v. Bruce*, 41 Kan. App. 2d 9, Syl. 2, 201 P.3d 707 (2008). Yet, the face of the Petition admits these requirements have not been satisfied or even attempted.

The Kansas Legislature made it quite clear that administrative exhaustion applies to actions in *habeas corpus* by including in the statutory language reference to exhaustion of the “inmate’s administrative remedies.” See K.S.A. 60-1501(b). A detailed explanation of the inmate grievance procedure in Kansas – together with supporting footnotes featuring Kansas case law – is found in *Sims v. Kansas Department of Corrections*, 2019 U. S. Dist. LEXIS 158248 (D. Kan. 2019):

"The KDOC makes a four-step grievance procedure available to its inmates, which must begin with an attempt at informal resolution, and thereafter proceed through three 'levels of problem solving.'" This procedure is codified in K.A.R. 44-15-101, *et seq.* and requires the following: (1) an attempt at informal resolution with the unit team member; (2) a formal grievance report submitted to the appropriate unit team member; (3) submission of the grievance to the warden; and (4) submission of the grievance to the Secretary of Corrections. If an inmate does not receive a timely response at any point during the grievance process, the inmate is allowed to move to the next step of the process.

The inmate grievance process is "applicable to a broad range of matters that directly affect the inmate, including . . . [c]omplaints by inmates regarding policies and conditions within the jurisdiction of the facility or the department of corrections . . . and actions by employees and inmates, and incidents occurring within the facility."

Kansas administrative regulations also set forth a procedure for “emergency” grievances. See K.A.R. 44-15-106. If an inmate’s situation qualifies as an

“emergency,” some of the administrative steps can be bypassed and the grievance goes directly to the “level at which corrective action can be taken.”

There is nothing in the Petition suggesting any of the procedures required by statute and regulation were satisfied by each of the Petitioners or even attempted. Were any of the named Petitioners to comply with these administrative requirements, his or her individual situation would be carefully assessed and a determination made, ultimately by the Secretary of Corrections (if need be). By its nature, the types of requests at issue in this action must be assessed on a case-by-case basis, on the ground where the relevant factors are known, by qualified staff. This existing structure allows KDOC personnel to consider the unique circumstances of the offender, including his medical history and current medical status, social history, criminal history, particular offense(s) resulting in current sentence, disciplinary history during incarceration, program participation, nature and extent of re-entry plans, and so on. The benefits of such an approach have been completely bypassed here.

Petitioners attempt to excuse their total failure to pursue administrative relief based on bald allegations that such efforts would be futile and any relief would be untimely. Pet. at 18-19. The Court should not credit these bare statements. While there are admittedly exceptions to the requirement of administrative exhaustion, those are just that – exceptions – and the Petition fails to allege any facts to support their application here.



The failure to exhaust administrative remedies is particularly poignant in this case because without the documentation created by that exhaustion, Respondents have no record upon which to rely and submit to this Court as evidentiary response to the Petition's various claims. As it stands, there is no such evidentiary record from which this Court could order the relief requested as contemplated by Kan. Sup. Ct. R. 9.01(d). And as the Affidavit of Douglas Burris reveals, there in fact is no record of administrative exhaustion by these Petitioners. On this reason alone, the Petition must be dismissed.

### **III. Jurisdiction is Lacking**

#### **A. No Statewide Case or Controversy Exists**

As of this writing, no reported cases of COVID-19 with KDOC inmates have occurred except at Lansing Correctional Facility and, very recently, the Wichita Work Release Facility (the latter of which does not involve any of the named Petitioners). Accordingly, there is no case or controversy as to any of the remaining KDOC correctional facilities. The broad statewide problem Petitioners seek to paint simply does not exist.

It is the duty of the courts to decide actual controversies and not give opinions on moot questions or abstract propositions. Similarly, courts do not issue advisory opinions. Instead, courts decide actual disputes relative to the legal rights of those actually involved in the case. *Shanks v. Nelson*, 258 Kan. 688, Syl. 1, 2, 907 P.2d 882 (1995).

This case is distinguishable from *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993), where the United States Supreme Court ruled that the Eighth Amendment protects against future harm, 590 U.S. at 33-34, because in *Helling*, the petitioner was already and indisputably in a situation where he was exposed to a health danger – secondhand smoke. Although the injury from this exposure was not likely to manifest until sometime in the future, the Supreme Court nonetheless held that he could sustain an Eighth Amendment claim based on his current exposure to the health risk. *Id.* But here, Petitioners cannot establish that they, or members of their proposed class, are currently exposed to COVID-19, with the arguable exception being those housed at the Lansing Correctional Facility, where the issue is being aggressively addressed.

There are other KDOC correctional facilities located throughout Kansas, including Norton, Stockton, Larned, Hutchinson, El Dorado and Winfield. None of the Petitioners are located at any of those facilities. In addition, no COVID-19 cases have been reported with inmates housed at those facilities. Thus, there is no evidence to support the contention that the steps being taken by KDOC in those facilities has not been, and is not continuing to be, effective at mitigating the threat of COVID-19. There simply is no case or controversy to be resolved as to those other facilities, or as to any Petitioners not housed at LCF.

## **B. There is No Basis to Exercise Original Jurisdiction**

The Petition cites Article III, Section 3 of the Kansas Constitution. That constitutional provision grants the Kansas Supreme Court original jurisdiction in proceedings in *habeas corpus*. The Petition also cites Section 9 of the Bill of Rights to the Kansas Constitution. That constitutional provision provides that cruel and unusual punishment shall not be “inflicted.” Generally speaking, rights protected under the Bill of Rights to the Kansas Constitution are judicially enforceable against governmental action that allegedly does not meet constitutional standards. *Hodes and Nauser MDS, P.A. v. Schmidt*, 309 Kan. 610, Syl. 7, 440 P.3d 461 (2019). There is an argument that this Court’s original jurisdiction in habeas corpus at the time the Kansas Constitution was ratified in 1859 was not intended to extend to detentions pursuant to legal process by a court of competent jurisdiction, but rather, the writ was intended to be limited to illegal executive detention and detention by courts that lacked jurisdiction. *See, e.g., Lonchar v. Thomas*, 517 U.S. 314, 322 (1996); *Lindh v. Murphy*, 86 F.3d 856, 867 (7th Cir. 1996), *rev’d on other grounds*, 521 U.S. 320 (1997). None of the Petitioners have challenged the legality of their underlying detentions pursuant to court order. The relief requested in the Petition is also not limited to the relief customarily understood as within the power of habeas relief.

Assuming for the sake of argument that this Court had original jurisdiction, it does not necessarily follow that this court should exercise that jurisdiction. Supreme Court Rule 9.01(b) notes that this Court “ordinarily will not exercise original jurisdiction if adequate relief appears to be available in a district court.” To get

beyond that presumption, Petitioners are obligated to explain in the Petition “why the action is brought in the appellate court instead of in the district court.”

Admittedly, Petitioners do take a run at meeting the obligation imposed by Rule 9.01(b). However, their effort fails as it is cursory and unavailing. Petitioners cite no authority that a district court of competent jurisdiction would not hear a properly filed and supported Petition on an emergency basis as contemplated by this Court’s Administrative Order 2020-PR-032, as the district courts of this state handle emergency matters on a regular basis. Again, this is the type of situation where the individual circumstances of each petitioner’s case requires careful inspection and analysis, and it is only in the court of local jurisdiction – where the petitioner and the relevant facility staff are located – where that determination can most accurately be made, if indeed it is ever determined that judicial intervention is appropriate. Only a district court is equipped to engage in the detailed fact-finding necessary for the type of “class action” determinations the Petitioners are seeking, or relief in habeas.

The language from *Wheeler v State*, 2019 Kan. App. Unpub. LEXIS 655 (2019) [copy attached per Kan. App. Rule 7.04] carries particular persuasive weight in this present circumstance:

These decisions reasoned that (1) K.S.A. 60-1503(a) requires a "judge in the district court" to make the first determination on the merits of a K.S.A. 60-1501 petition and it would be inappropriate for this court to usurp that statutorily designated role; (2) there is a distinction between this court reviewing an argument the district court rejected—which could be brought in an appeal or cross-appeal—and an argument the district court never considered; and (3) the district court is more readily able to hold hearings to clarify issues raised in a K.S.A. 60-1501 petition than an appellate court, rendering it more appropriate to decide the merits of such a petition for the first time.

This Court isn't a fact-finding court. Rule 9.01(b) exists for a reason, and should be complied with here.

### **C. Kayla Nguyen Lacks “Next Friend” Capacity or Authority to Sue**

For reasons that are not adequately explained, Kayla Nguyen seeks to proceed as “next friend” to assert an Eighth Amendment claim on putative Petitioner Sashada Makthepharak’s behalf. A “next friend” is one who pursues an action on behalf of the real party in interest, when that person cannot appear on his own behalf for some legitimately recognized reason “such as inaccessibility, mental incompetence, or other disability.” *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (discussing doctrine in *habeas* context).

The only circumstance Kansas allows for next friend status in a *habeas* proceeding is “for the protection of infants or allegedly incapacitated or incompetent persons.” K.S.A. 60-1501(a). Next friend standing for a mentally competent adult has not been recognized in the *habeas* context in Kansas. Petitioners have pointed to no authority, evidence, or other reason to believe that Sashada Makthepharak lacks the ability to pursue this suit on his own behalf. Instead, Petitioners utterly fail to address the issue. Given the absence of any applicable statutory authorization, next friend standing should be rejected on this ground alone. This is a specific denial of capacity or authority to sue as contemplated by K.S.A. 60-209(a)(2).

### **IV. Petitioners Fail to Demonstrate a Constitutional Violation**

To state a claim under K.S.A. 60-1501, a petition must allege “shocking and intolerable conduct or continuing mistreatment of a constitutional stature.” *Stano v. Pryor*, 52 Kan. App. 2d 679, 681, 372 P.3d 427 (2016). The threshold question for

determining whether conduct is shocking or intolerable is whether the conduct is “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *County of Sacramento v. Lewis*, 523 U. S. 833, 847-48, n.8 (1998), recently cited with approval by the Kansas Court of Appeals in *Bloom v. Miller*, 2017 Kan. App. Unpub. LEXIS 967 (2017) [copy attached per Kan. App. Rule 7.04]. Petitioners fail to meet that very high standard for a constitutional violation required by law.

Petitioners claim that alleged deficiencies in KDOC’s COVID-19 response violate their rights under the Eighth Amendment of the U.S. Constitution and Section 9 of the Kansas Constitution Bill of Rights to be free from cruel and unusual punishment. There’s not a great deal of Kansas law concerning K.S.A. 60-1501, the Eighth Amendment, the Kansas Constitution’s prohibition of cruel or unusual punishment, and the applicable standards in such an action. However, a good overview is found in *McCaine v. Maschner*, 1987 Kan. App. Unpub. LEXIS 1277 (1987) [copy attached per Kan. App. Rule 7.04]:

The infliction of cruel and unusual punishment is constitutionally prohibited by both the United States and the Kansas Constitutions. U.S. Const. amend. VIII; Kan. Const. Bill of Rights, § 9 *Levier v. State*, 209 Kan. 442, 497 P.2d 265 (1972). Kansas courts have defined cruel and unusual punishment as involving a deprivation which is inhumane, barbarous, or shocking to the conscience. *State v. Rouse*, 229 Kan. 600, 605, 629 P.2d 167 (1981); *Turner v. Maschner*, 11 Kan. App. 2d 134, 715 P.2d 425. *rev. denied* 239 Kan. 695 (1986). Although convicted and incarcerated for the commission of crimes, inmates retain the right to protection against physical or psychological abuse of unnecessary indignity. *Levier*, 209 Kan. at 448.

The Kansas prohibition on cruel or unusual punishment “has been construed in the same manner as the Eighth Amendment.” *McComb v. State*, 32 Kan. App. 2d

1037, 1048, 94 P.3d 715 (2004) (citing *State v. Scott*, 265 Kan. 1, 5, 961 P.2d 667 (1998); *Murphy v. Nelson*, 260 Kan. 589, 597, 921 P.2d 1225 (1996)). To prevail on an Eighth Amendment “conditions of confinement” claim, Petitioners must show that prison officials (1) deprived them of the minimal measure of life’s necessities, such as inmate health or safety (the objective prong), and (2) did so with “deliberate indifference” (the subjective prong). *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Petitioners can show neither.

#### **A. Petitioners are Not Subject to an Unreasonable Risk of Harm**

The “objective prong” of the Eighth Amendment requires a showing that an inmate has been deprived “of the minimal civilized measure of life’s necessities.” *Farmer*, 511 U.S. at 834. When this deprivation involves a risk of harm, this prong requires the inmate to show that “society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today’s society chooses to tolerate.” *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

Petitioners cannot show that KDOC is depriving them of the “minimal civilized measure of life’s necessities” or “violating contemporary standards of decency” in addressing the risk of harm to inmates that COVID-19 presents. “A prison official’s duty under the Eighth Amendment is to ensure *reasonable safety*.” *Farmer*, 511 U.S. at 844 (emphasis added). The current state of the COVID-19 Pandemic exposes everyone—prisoner and non-prisoner alike—to the risk of falling ill.

KDOC's response is aligned with official guidance from leading federal and local health authorities for mitigating the risks associated with the Pandemic in a correctional facility setting. See CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>. In fact, KDOC has implemented many of the same risk-reduction practices among the inmates and staff that are recommended for the community at-large: physical distancing, limited movement, screening mechanisms, providing soap for hand washing, frequently disinfecting common, high-touch areas, quarantining or isolating individuals as appropriate, and implementing the use of cloth masks. (Attached Affidavit of Joel Hrabe, KDOC Deputy Secretary for Facilities management) These practices are the same measures that society deems capable of reducing the risk of COVID-19 transmission, and thus reflect the manner in which "today's society chooses to tolerate" that risk. *Helling*, 509 U.S. at 36.

Notably, Petitioners have not shown that the risk posed by KDOC's practices raise their risk of exposure substantially over the risk experienced by the outside community. See *Hines v. Youssef*, No. 13-cv-00357-AWI-JL, 2015 WL 164215, at \*4 (E.D. Cal. Jan. 13, 2015) ("Unless there is something about a prisoner's conditions of confinement that raises the risk of exposure substantially above the risk experienced by the surrounding communities, it cannot be reasoned that the prisoner is involuntarily exposed to a risk the society would not tolerate."). In fact, there are



currently no instances of staff or inmates being diagnosed with COVID-19 outside of Lansing Correctional Facility and the Wichita Work Release Facility.

Further, six of the eight named Petitioners do not meet the CDC's definition of individuals with a heightened risk of severe illness. See [www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html). Petitioners Burch, Trotter, Orr, Brooks, and Makthepharak do not allege they have a medical condition that places them at a higher risk of severe illness from COVID-19. Monica (Zachary) Burch and David Brooks describe themselves as prediabetic, Burch Affidavit, ¶ 7; Brooks Affidavit, ¶ 6, yet prediabetes has not been recognized by the CDC as a high-risk factor. Tiffany Trotter states she was previously a smoker and takes anti-depressants, Trotter Affidavit, ¶ 5, yet neither a history of smoking nor the use of anti-depressants are recognized as high-risk. Karen Wilson, Abraham Orr, and Sashada Makthepharak allege only generalized anxiety regarding medical care, yet that too is not a high-risk factor for increased illness as defined by the CDC.

Courts in Kansas and across the nation have declined to grant relief to plaintiffs in similar circumstances. See, e.g., *United States v. Duncan*, No. 18-40030-01-HLT, 2020 WL 1700355, at \*8–9 (D. Kan. Apr. 8, 2020) (HIV-positive pretrial detainee, whose disease was under control, denied release as no increased risk for severe illness and release plan increased COVID-19 risk to the public); *United States v. Sanders*, No. 19-20037-01-DDC, 2020 WL 1528621, at \*4 (D. Kan. Mar. 31, 2020) (“general and speculative fears” insufficient to grant release); *United States v. Clark*, No. 19-40068-01-HLT, 2020 WL 1446895, at \*4–6 (D. Kan. Mar. 25, 2020) (release

denied to diabetic inmate because fears that COVID-19 would spread to his facility were speculative); *United States v. Boatwright*, No. 2:19-cr-301, 2020 WL 1639855, at \*7 (D. Nev. Apr. 2, 2020) (rejecting a request to stay with a parent since the detainee “offers nothing more than mere speculation that home detention would be less risky than detention at [the correctional facility], which has screening practices and other reasonable COVID-19 precautions in place”); *United States v. Martin*, No. PWG-19-140-13, 2020 WL 1274857, at \*4 (D. Md. Mar. 17, 2020) (concluding that a medical history of asthma, high blood pressure, and diabetes “alone is insufficient to rebut the proffer by the Government that the correctional and medical staff at [the correctional facility] are implementing precautionary and monitoring practices sufficient to protect detainees from exposure to the COVID-19 virus”).

Because Petitioners cannot show they are subjected to an unreasonable risk of harm, they fail to allege a constitutional violation.

### **B. Petitioners Have Not Shown KDOC is Acting with Deliberate Indifference**

Petitioners have also failed to satisfy the subjective prong of their Eighth Amendment claim, which requires them to show that Respondents Wardens Shannon Meyer, Don Langford, Gloria Geither, or Secretary Zmuda “kn[ew] of and disregard[ed] an excessive risk to inmate health or safety.” *Self v. Crum*, 439 F.3d 1227, 1231 (10th Cir. 2006) (quoting *Farmer*, 511 U.S. at 837). This test is subjective, meaning “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer*, 511 U.S. at 837.

Deliberate indifference “describes a state of mind more blameworthy than negligence.” *Id.* at 835. To establish a constitutional violation, the prisoner must show that the response was so deficient that it constituted criminal recklessness. *Id.* at 839-40; *see also Whitehead v. Marcantel*, 766 F. App'x 691, 698 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 384 (2019) (providing that the “standard is akin to criminal recklessness.”). Given the extensive efforts by Respondents, as well as other prison officials to protect the inmate population from the Pandemic, Petitioners simply cannot meet that burden.

Contrary to Petitioners’ self-serving assertions, KDOC officials have not acted with deliberate indifference to the risk that COVID-19 poses to inmate populations; rather, they have taken aggressive and appropriate measures to abate that risk. (See Attached Affidavit of Joel Hrabe, KDOC Deputy Secretary for Facilities management) The record shows that KDOC responded quickly to the evolving pandemic, designed a series of measures to combat the disease, and continue to closely monitor the spread of the virus in order to adjust to changing circumstances as the situation evolves. This response began long before Petitioners filed suit. In coordinating their response, KDOC officials have relied on guidance provided by leading health authorities regarding sanitation, physical distancing, testing, and other preventative measures, and have taken actions consistent with those guidelines. These steps, in the face of this global pandemic, demonstrate an extremely high degree of care. Petitioners thus cannot show that KDOC officials are acting with deliberate indifference and cannot show an Eighth Amendment violation. *See*

*Farmer*, 511 U.S. at 844-45 (“[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.”).

As illustrated by the attached Affidavit of Joel Hrabe, KDOC Deputy Secretary for Facilities Management, KDOC’s response to the COVID-19 pandemic has been reasonable and in accordance with KDHE recommendations and CDC guidelines for correctional institutions. While Petitioners allege KDOC’s response is insufficient, disagreement on how to navigate the Pandemic falls far short of the Eighth Amendment threshold required of Petitioners. Respondents’ good faith efforts in complying with public health and medical expertise under prison circumstances does not demonstrate “deliberate indifference” to the medical needs of Petitioners, but the opposite: earnest efforts to protect their health.

Given the evolving understanding of the Pandemic and KDOC’s aggressive proactive measures to combat it, incarceration at Kansas state correctional facilities does not, by itself, violate the United States Constitution or Kansas Constitution.

### **C. Petitioners’ Exhibits Are Insufficient**

While this Court isn’t a fact-finder and there is no developed record as per Rule 9.01(d), Respondents object to the various exhibits to the Petition as set forth more specifically here, and submits those exhibits should not be considered “a part of the” Petition “for all purposes” as contemplated by K.S.A. 60-210(c) (presuming the Kansas Code of Civil Procedure applies to original actions under Rule 9.01, a point argued elsewhere).

Exhibit A is objected to as irrelevant to any legitimate issue or material fact. *See* K.S.A. 60-401 (b). That exhibit also constitutes inadmissible hearsay evidence prohibited by K.S.A. 60-459, *et seq.*

Exhibit B is objected to as being irrelevant to any legitimate issue or material fact insofar as that exhibit offers information about facilities other than KDOC facilities and refers to CDC standards inapplicable to KDOC facilities. *See* K.S.A. 60-401(b). Additionally, this exhibit is objected to as constituting an attempt to insert testimony in the form of expert opinion into this proceeding without undergoing the rigors of those procedures set forth in K.S.A. 60-456, *et seq.* The same applies to that exhibit's effort to adopt and incorporate yet another unrelated declaration filed "in a court in Pennsylvania", which additionally qualifies as hearsay evidence prohibited by K.S.A. 60-459, *et seq.*

Exhibit C is objected to as being irrelevant to any legitimate issue or material fact insofar as that exhibit offers information about facilities other than KDOC facilities. *See* K.S.A. 60-401(b). Additionally, this exhibit is objected to as constituting an attempt to insert testimony in the form of expert opinion into this proceeding without undergoing the rigors of those procedures set forth in K.S.A. 60-456, *et seq.* This exhibit is filled with hearsay evidence prohibited by K.S.A. 60-459, *et seq.*

This Petition should be dismissed, and dismissed summarily. However, in any event, Petitioners have failed to provide evidence that would allow this Court to make the kinds of sweeping findings, including findings of a medical and scientific nature,

that Petitioners seek, and Respondents have not been given a reasonable opportunity to conduct discovery as to Petitioners' claims and to present their own evidence.

**V. The Petition Contains Other Deficiencies**

**A. The Petition Fails to Provide Proof of Service on Respondents as Required by Rule 9.01(a)(1)**

Kansas Supreme Court Rule 9.01(a)(1) provides that in an original action filed in the Supreme Court, a petitioner must “file the petition with the clerk of the appellate courts, **with proof of service on all respondents or their counsel of record.**” (emphasis added). The Petition names four respondents: Jeffrey Zmuda, Secretary of Corrections, Shannon Meyer, Warden of Lansing Correctional Facility, Donald Langford, Warden of Ellsworth Correctional Facility, and Gloria Geither, Warden of Topeka Correctional Facility. Pet., at 12-15. Petitioners failed to provide proof of service on any of the four named respondents as required by Rule 9.01(a)(1).<sup>1</sup>

The Petition recites that a copy “was placed with a courier service on April 9, 2020, for delivery to: Jeff Cowger, Chief Legal Counsel, Kansas Department of Corrections, 714 SW Jackson, Suite 200, Topeka, KS 66603.” Pet., at 17. This is insufficient. Rule 9.01(a)(1) refers to “counsel *of record*,” meaning an attorney who has already entered an appearance for a party in a particular case as per Rule 1.09.

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<sup>1</sup> For comparison purposes, in the expedited action of *Kelly v. Legislative Coordinating Council*, No. 122765, which arose on April 8, 2020 and was filed the very next day, Petitioners' counsel served the Petition on all named respondents in three separate ways, serving each respondent at his or her own individual business address, at their individual email, and at their individual residences, with courtesy copies served upon staff. Pet., at 9.

As of April 9, 2020, Mr. Cowger had not entered his appearance as counsel for respondents in this case. Similarly, while Rule 1.11 refers to service being subject to K.S.A. 60-205, that refers to pleadings “**after** the original petition.” K.S.A. 60-205(a)(1)(B) (emphasis added). Nothing in Rule 9.01, 1.11 or K.S.A. 60-205 countenances non-compliance with service, a basic principle to due process and personal jurisdiction. As Justice Stegall recently noted, the duty to comply with the law “doesn’t evaporate in a crisis.” *Kelly v. Legislative Coordinating Council*, No. 122,765, slip op at 22 (Kan. April 11, 2020) (J. Stegall, concurring).

Petitioners’ “proof of service” appended to the Petition is also insufficient. Rule 9.01 uses the term “proof of service,” which presumably means more than a certificate of service. Even then, Petitioners’ attempt at service does not comply with K.S.A. 60-205(b)(2), as “plac[ing]” a document with an unnamed courier service is not one of the means expressly enumerated in K.S.A. 60-205(b)(2).

After the Court pointed out the service issue in its April 10, 2020, Order, it appears Petitioners have belatedly been making efforts to serve the respondent wardens by the attorneys placing a copy in certified mail, citing K.S.A. 60-303(c)(1), apparently recognizing the deficiency of service. As discussed in detail elsewhere in the Respondents’ submissions, neither the Kansas Supreme Court Rules nor the habeas statutes in Article 15 of the Kansas statutes expressly incorporate all of the provisions of Chapter 60. Even if it did, service upon a state official as here, sued in his or her official capacity, is set forth in K.S.A. 60-304(d)(5), which requires service upon the Attorney General or an Assistant Attorney General, neither attempted, nor

accomplished here. *Gulick v. Kansas Dept. of Wildlife & Parks*, No. 108,132, 301 P.3d 790, 2013 Kan. App. Unpub. LEXIS 467 (Kan. App. May 24, 2013) (district court properly dismissed action for failure to serve the state agency by serving the Attorney General or Assistant Attorney General) [copy attached as per Kan. App. Rule 7.04]; see *Bird v. Kansas Dept. of Transp.*, 23 Kan. App. 2d 164, 167, 928 P.2d 915 (1996) (statutory reference to service on governmental bodies included individual state officials, who were to be served by serving the Attorney General). The proof of service remains deficient.

As suggested in the Court's April 10, 2020, Order, Petitioners have failed to meet their duty to present proof of service with the original Petition seeking release of thousands of Kansas inmates into the community on an expedited basis. Something this important should not be litigated as a moving target or without compliance with law.

Respectfully Submitted,

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*Attorneys for Respondents Appearing  
Under Limited Appearance*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of April, 2020, I electronically filed the foregoing with the Clerk of the Appellate Court's electronic filing system which will serve all registered participants and a copy was also served by email, addressed to: Lauren Bonds, Zal K. Shroff, ACLU Foundation of Kansas, 6701 W. 64<sup>th</sup> St., Suite 210, Overland Park, KS 66202, lbonds@aclukansas.org, zshroff@aclukansas.org, Counsel for Petitioners.

/s/Natasha M. Carter  
Natasha M. Carter # 26074  
Assistant Attorney General

**IN THE SUPREME COURT OF  
THE STATE OF KANSAS**

<b>James Hadley, <i>et al.</i>,</b>	)	
<b>Petitioners,</b>	)	
<b>vs.</b>	)	<b>Case No. 122,760</b>
<b>Jeffrey Zmuda, in his official</b>	)	
<b>capacity as the Secretary for</b>	)	
<b>the State of Kansas, <i>et al.</i>,</b>	)	
<b>Respondents.</b>	)	
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**APPENDIX**

Affidavit of Doug Burris .....	2
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<i>Wheeler v State</i> , 2019 Kan. App. Unpub. LEXIS 655 (2019) .....	61
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**AFFIDAVIT OF DOUG BURRIS**

**IN THE SUPREME COURT OF THE STATE OF KANSAS**

JAMES HADLEY, JOHN EDWARD  
TETERS, MONICA BURCH, TIFFANY  
TROTTER, KARENA WILSON,  
ABRAHAM ORR, DAVID BROOKS,  
SASHADA MAKTHEPHARAK through his  
next friend KAYLA NGUYEN; on their own  
and on behalf of a class of similarly situated  
persons;

Petitioners,

v.

Original Action No. 122,760

JEFFREY ZMUDA, in his official capacity as  
the Secretary of Corrections for the State of  
Kansas, SHANNON MEYER, in her official  
capacity as the Warden of Lansing Correctional  
Facility, DONALD LONGFORD, in his official  
capacity as the Warden of Ellsworth Correctional  
Facility, and GLORIA GEITHER, in her official  
capacity as the Warden of Topeka Correctional Facility.

Respondents.

**AFFIDAVIT OF DOUG BURRIS**

STATE OF KANSAS        )  
                                  ) SS:  
COUNTY OF SHAWNEE )

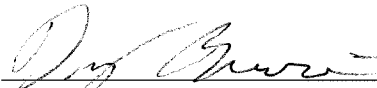
**After being duly sworn, the affiant testifies as follows:**

1. My name is Doug Burris and I am a Corrections Manager II for the Kansas Department of Corrections. In that capacity I am responsible for the administration of the offender grievance process as outlined in K.A.R. 44-15-101, et seq. This would include maintaining all records of inmate grievances.

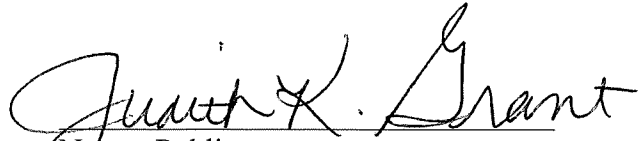
2. All inmates are made aware of the offender grievance procedure and provided orientation on the grievance procedure as well as provided a copy of all regulations on the grievance procedure upon admittance to the Kansas Department of Corrections (KDOC).

3. Upon review of all grievances filed by inmates in the custody of KDOC between December, 2019 and today's date, I did not find any completed grievances by any of the named plaintiffs in this action.

UNDER PENALTY OF PERJURY FURTHER AFFIANT SAITH NOT.

  
\_\_\_\_\_  
Doug Burris

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 13<sup>th</sup> day of  
April, 2021.

  
\_\_\_\_\_  
Notary Public

My Appointment Expires:

1/31/22



**AFFIDAVIT OF JOEL HRABE**

**IN THE SUPREME COURT OF THE STATE OF KANSAS**

JAMES HADLEY, JOHN EDWARD  
TETERS, MONICA BURCH, TIFFANY  
TROTTER, KARENA WILSON,  
ABRAHAM ORR, DAVID BROOKS,  
SASHADA MAKTHEPHARAK through his  
next friend KAYLA NGUYEN; on their own  
and on behalf of a class of similarly situated  
persons;

Petitioners,

v.

Original Action No. 122,760

JEFFREY ZMUDA, in his official capacity as  
the Secretary of Corrections for the State of  
Kansas, SHANNON MEYER, in her official  
capacity as the Warden of Lansing Correctional  
Facility, DONALD LONGFORD, in his official  
capacity as the Warden of Ellsworth Correctional  
Facility, and GLORIA GEITHER, in her official  
capacity as the Warden of Topeka Correctional Facility.

Respondents.

**AFFIDAVIT OF JOEL HRABE**

STATE OF KANSAS        )  
                                  ) SS:  
COUNTY OF SHAWNEE )

**After being duly sworn, the affiant testifies as follows:**

1. My name is Joel Hrabec and I am the Deputy Secretary for Facilities Management

for the Kansas Department of Corrections (KDOC). In that capacity, I am responsible for the administration and oversight of all KDOC facilities. The KDOC has the following facilities: El Dorado Correctional Facility, Norton Correctional Facility, Ellsworth Correctional Facility, Topeka Correctional Facility, Hutchinson Correctional Facility, Winfield Correctional Facility, Lansing Correctional Facility, Larned Correctional Mental Health Facility, Wichita Work Release Facility, Kansas Juvenile Correctional Complex, Larned Juvenile Correctional Facility.

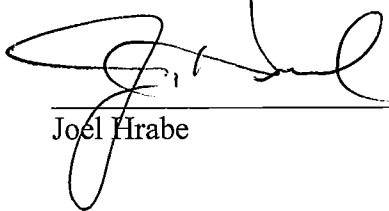
2. In consultation with the Kansas Department of Health and Environment (KDHE), Kansas University Medical Center Compliance staff and use of the Center for Disease Control (CDC) Interim Guidance on Management of Coronavirus Disease (COVID-19) in Correctional and Detention Facilities, the KDOC developed and implemented a COVID-19 Response Plan and Protocol (Attached)

3. The CDC Interim Guidance on Management of Coronavirus Disease (COVID-19) in Correctional and Detention Facilities found here, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf> was instrumental in the formulation of the KDOC COVID-19 Response Plan and Protocol, and as the attached chart of KDOC actions illustrate, the KDOC has cleaved tightly to the CDC guidelines.

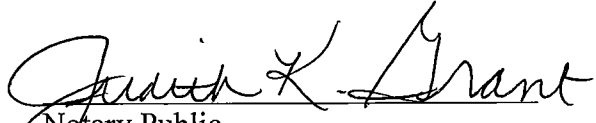
3. As of April 9, 2020, the KDOC had approximately 4068 inmates with a sentence of 18 months or less to serve. As of April 9, 2020, the KDOC had approximately 1233 inmates age 50 and older with sentences of more than 18 months to serve.



**UNDER PENALTY OF PERJURY FURTHER AFFIANT SAITH NOT.**

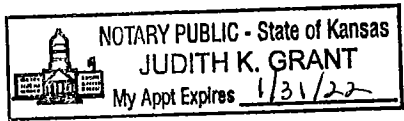
  
\_\_\_\_\_  
Joel Hrabe

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 14<sup>th</sup> day of April, 2021.

  
\_\_\_\_\_  
Notary Public

My Appointment Expires:

1/31/22



# ATTACHMENT

## KDOC Action Chart on Compliance with CDC Interim Guidelines for Correctional Facilities

<b>CDC Guidance for Correctional Facilities</b>	<b>KDHE Guidance</b>	<b>KDOC Action(s)</b>
<p>Develop information-sharing systems with partners. Pg. 5.</p>	<p>Interim guidance from KDHE regarding Prevention and Control of COVID-19 in Correctional and Detention Facilities was issued March 12, 2020. Effective April 3, 2020 Phil Griffin, Deputy Director, Bureau of Disease Control and Prevention at the Kansas Department of Health and Environment serves full time as a liaison for Offenders and staff in our response to COVID-19.</p>	<p>KDOC Covid-19 response planning noted identification and coordination with local county health authorities and was implemented during early stages. Guidance from KDHE regarding Prevention and Control of COVID-19 in Correctional and Detention Facilities was issued March 12, 2020. On April 3 KDOC implemented protocols in reporting suspect offender and staff COVID-19 cases to KDHE liaison Phil Griffin 24 hours/7 days a week. Phil Griffin along with point of contact staff coordinate with local health entities in the timely response.</p> <p>Points of contact from each facility/region have been identified and trained in the timely reporting of unfiltered accurate information.</p> <p>Utilization of essential medical staff and/or security staff from a facility or region with COVID-19 has been outlined for purposes of close contact and required PPE while asymptomatic as well as symptomatic.</p> <p>Correctional leadership is involved in frequent conference calls noting COVID-19 updates statewide and specific to KDOC.</p> <p>Secretary of Corrections Zmuda provides statewide communications with staff on general updates and response to the COVID-19 Pandemic.</p>

<p>Review existing pandemic flu, all-hazards, and disaster plans, and revise for COVID-19. Pg. 6.</p>	<p>Beginning March 2, 2020 Pandemic response plans were reviewed and updated in collaboration with KDHE. Clinical Care Guide planning including the Coronavirus Outbreak Response Checklist, Risk Assessment of Suspected Covid19 Cases in Correctional Facilities (adapted from CDC), KDOC Quarantine Implementation Overview, and Facility Control Measures During an Outbreak for formalized March 9, 2020. In addition, Interim guidance from KDHE regarding Prevention and Control of COVID-19 in Correctional and Detention Facilities was issued March 12, 2020</p>	<p>KDOC reviewed Continuity of Operations (COOP) Plans specific to Pandemic Emergencies, Formalized preparation and planning guidelines, Issued an Instructions Bulletin: How to Respond to Coronavirus Outbreak, and Educational Materials to offenders and Staff. COVID-19. Implementation of the KDOC COVID-19 response plan began March 10, 2020. With formal presentation to the State of Kansas Governor's Office on March 12, 2020. Interim guidance from KDHE regarding Prevention and Control of COVID-19 in Correctional and Detention Facilities was issued March 12, 2020. Daily and weekly briefings at management levels to review and guide implementation of these plans began on March 10, 2020 and continue to date.</p>
<p>Coordinate with local law enforcement and court officials. Pg. 6.</p>	<p>Collaborative efforts between KDHE and KU Medical Compliance oversight staff for the KDOC identified offender screening protocols for any offender and were included as part of the transfer manifest approval process March 26, 2020. Development of intake isolation guidance were completed and</p>	<p>KDOC began coordination with local authorities to review, reduce, and project new admissions, out to court returns, interstate compact cases, and inabstentia cases beginning March 12, 2020. Only necessary offender moves were authorized to include medical appointment oversight and approval by KU Medical Compliance staff. As of April 1, 2020, only confirmed essential offender movement with second level authorization is allowed.</p>

	implemented for units by KU Medical Compliance staff.	On April 3, 2020 an intake isolation unit was activated in a vacant facility to serve as an added precaution for all male offenders entering KDOC.
Post signage throughout the facility communicating symptoms and reporting instructions. Pg. 6.	Collaboration of KU medical Oversight staff and KDHE regarding Prevention and Control of COVID-19 in Correctional and Detention Facilities as published March 12, 2020.	<p>KDHE authored COVID-19, 2019 Novel Coronavirus information was issued in English and Spanish was distributed to all facilities March 10, 2020.</p> <p>Handwashing video tutorial placed on offender media systems.</p> <p>Staff direction to remain responsive to offender health concerns with direct referrals to medical staff issued as part of the response plan.</p> <p>Offender copay (\$2) removed for COVID-19 illness to reduce barrier or delay accessing health care and to encourage offenders to report symptoms.</p> <p>Secretary of Corrections Zmuda communicates with offender population and staff via electronic messaging noting updates and information specific to COVID-19. Summary of correspondence available at:  <a href="https://ekdoc.doc.ks.gov/coronavirus-updates">https://ekdoc.doc.ks.gov/coronavirus-updates</a>.</p> <p>Passive screening signage was placed referencing symptoms or illness that prompt individuals to go home or seek medical oversight and care. Information provided to staff identifying proper quarantine protocols related to the COVID-19 pandemic.</p> <p>Staff assistance available to individuals with disabilities.</p>

<p>Offer the seasonal influenza vaccine to all incarcerated/detained persons (existing population and new intakes) and staff throughout the influenza season. Pg. 6.</p>		<p>KDOC offered all offenders Influenza vaccinations.</p>
<p>Ensure that sufficient stocks of hygiene supplies, cleaning supplies, PPE, and medical supplies (consistent with the healthcare capabilities of the facility) are on hand and available, and have a plan in place to restock as needed if COVID-19 transmission occurs within the facility. Pg. 7.</p>		<p>Directives during preparation and planning identified current inventories of PPE as well as cleaning supplies, hygiene, and warehouse inventories.</p> <p>Daily Facility Briefing to monitor and note supply concerns implemented March 16, 2020.</p> <p>Handwashing basins within community restrooms continue to be furnished soap, indigent offender provided supplies, no shortages of commissary products noted.</p> <p>Fiscal/supply and procurement staff provide daily reports of supply issues.</p> <p>Review and redistribution of PPE monitored and adjusted as needed. Acquisition of additional PPE sourced and procured pending arrival.</p> <p>Rumors or complaints of limited hygiene items are investigated and resolved. KDOC has not encountered confirmed lapses or unavailable hygiene items like soap to date. Disinfectants effective against the virus are confirmed for use and are being utilized. Alcohol based sanitizer is in short supply but available. Nonalcohol based sanitizer is being procured and will be available upon delivery.</p>

<p>Make contingency plans for the probable event of PPE shortages during the COVID-19 pandemic, particularly for non-healthcare workers. Pg. 8.</p>		<p>KDOC PPE inventory monitored continuously.</p> <p>PPE guidelines consistent with KDHE/CDC provided to staff for proper use of PPE. Acquisition of additional supplies has been initiated.</p> <p>Kansas Correctional Industries manufacturing nonmedical grade masks and gowns per KDHE and CDC guidelines.</p> <p>Facility stock of hand sanitizer is being utilized, supply and acquisition of additional hand sanitizer/procurement has been approved.</p>
<p>Provide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing. Pg. 8.</p>		<p>Handwashing basins within community restrooms continue to be furnished soap, indigent offenders are provided hygiene supplies including soap, no shortages of commissary products noted.</p>
<p>Ensure that staff and incarcerated/detained persons are trained to correctly don, doff, and dispose of PPE that they will need to use within the scope of their responsibilities. Pg. 8.</p>	<p>KDHE with KU Medical Compliance issued PPE guidelines and instructions. KU Medical Compliance provided fit testing training for deployment in the field.</p>	<p>March 13, 2020 fit testing of KDOC staff initiated for any person engaged in direct contact care of COVID-19 individual.</p> <p>KDOC medical contract staff fit testing initiated.</p> <p>Donning and doffing procedures outlined during previous KDOC training however revisited with onset of COVID-19 response planning.</p> <p>Personnel maintain level of proficiency and monitor appropriate procedures when required to utilize PPE specific to suspect COVID-19 individuals.</p>
<p>Restrict transfers of incarcerated/detained persons to and from other jurisdictions and facilities unless necessary</p>	<p>Collaborative efforts between KDHE and KU Medical Compliance oversight</p>	<p>KDOC began coordination with local authorities to review, reduce, and project new admissions, out to court returns, interstate compact cases, and</p>

<p>for medical evaluation, medical isolation/quarantine/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding. Pg. 9.</p>	<p>staff for the KDOC identified offender screening protocols for any offender and were included as part of the transfer manifest approval process March 26, 2020. Development of intake isolation guidance were completed and implemented for units by KU Medical Compliance staff.</p>	<p>inabstentia cases beginning March 12, 2020.</p> <p>Only necessary offender moves were authorized to include medical appointments with oversight and approval by KU Medical Compliance staff.</p> <p>As of April 1, 2020, only confirmed essential offender movement with second level authorization is allowed.</p> <p>On April 3, 2020 an intake isolation unit was activated in a vacant facility to serve as an added precaution for all male offenders entering KDOC.</p> <p>Transportation guidelines issued for suspect COVID-19 individuals with proper disinfectant protocol for post transport duties.</p>
<p>Implement lawful alternatives to in-person court appearances where permissible. Pg. 9.</p>	<p>KDHE and KU Medical Compliance development of procedures for any offender transfer noted.</p>	<p>On March 13, 2020, KDOC Chief Legal Counsel provided oversight direction regarding legal visitation.</p> <p>Communication with jurisdictions seeking legal procedures encouraged to utilize media format face-to-face alternatives.</p> <p>Protocols for required out-to-court transports aligned with intake isolation upon return of the individual from a county jail.</p>
<p>Where relevant, consider suspending co-pays for incarcerated/detained persons seeking medical evaluation for respiratory symptoms. Pg.9.</p>		<p>Offender copay (\$2) removed for COVID-19 illness to reduce barrier or delay accessing health care and to encourage the reporting of symptoms.</p>
<p>Limit the number of operational entrances and exits to the facility. Pg. 9.</p>	<p>KDHE and KU Medical Compliance oversight of passive then active screening of</p>	<p>KDOC implemented progressive screening protocols aligned with COVID-19 threat. Active screenings are conducted at reduced entry exit points by facilities.</p>



	staff and offender protocols.	
Adhere to CDC recommendations for cleaning and disinfection during the COVID-19 response. Pg. 9.		<p>Cleaning agents effective against the virus that causes COVID-19 were identified and measures for intensified cleaning have been implemented.</p> <p>Kansas Correctional Industries as other supply sources were identified for acquisition of disinfectant supplies.</p> <p>Staff have been issued equipment and cleaning guidelines have been communicated. Appropriate cleaning PPE has been provided.</p>
Increase the number of staff and/or incarcerated/detained persons trained and responsible for cleaning common areas to ensure continual cleaning of these areas throughout the day. Pg. 9.		Increased cleaning schedules defined by housekeeping plans within each correctional facility and unit implemented. Identification of high traffic/frequent areas are included in this plan.
Ensure adequate supplies to support intensified cleaning and disinfection practices and have a plan in place to restock rapidly if needed. Pg. 9.		<p>Facility briefing process targets supply inventories and supply chains noting any concerns.</p> <p>Fiscal/supply staff monitoring supply levels and vendor supplies.</p>
Reinforce healthy hygiene practices, and provide and continually restock hygiene supplies throughout the facility, including in bathrooms, food preparation and dining areas, intake areas, visitor entries and exits, visitation rooms and waiting rooms, common areas, medical, and staff-restricted areas (e.g., break rooms). Pg. 10.		<p>Leadership teams engaged early in the response planning regularly monitoring and checking response to available supplies throughout institutions.</p> <p>Healthy practices as directed by health authorities are encouraged during meetings, offender groups and communications.</p>
Encourage all persons in the facility to take actions to		Informational postings in place.

<p>protect themselves and others from COVID-19. Post signage throughout the facility and communicate this information verbally on a regular basis. Pg. 10.</p>		<p>Communications forwarded to all staff, offenders family/associates of offenders.</p> <p>Resource center links and guidance for staff communicated and encouraged for education and understanding. Resource links provided both internally and externally.</p>
<p>Perform pre-intake screening and temperature checks for all new entrants. Pg. 10.</p>	<p>KDHE and KU Medical Compliance development of intake screenings. Each maintain suspect COVID-19 review and monitoring of placement and testing processes along with KDOC.</p>	<p>KDOC initiated all offender movement active screenings by medical staff including sending and receiving facilities.</p> <p>Verification of screening process confirmed by KU Medical Compliance and approval of offender intake. Manifest procedures include KU Medical Compliance staff review and monitoring.</p> <p>Intake isolation practices implemented.</p> <p>Offenders displaying symptoms are not transferred unless authorized by second level review to include KU Medical Compliance.</p> <p>Suspect COVID-19 individuals are provided a mask and appropriate PPE for transport protocol is used.</p>
<p>Implement social distancing strategies to increase the physical space between incarcerated/detained persons. Pg. 11.</p>		<p>KDOC COVID-19 response plans incorporate level of risk and implementation of modified schedule or movement considering units and social distancing strategies.</p> <p>COVID-19 responses include limited program sizes and group sizes where modified schedules are implemented.</p> <p>Activities or recreation opportunities are identified by unit schedules as implemented at identified facilities.</p>

		<p>Smaller recreation groups are encouraged with ability to spread out and distance themselves.</p> <p>Equipment is disinfected.</p> <p>Units identified for modified schedules are fed in cell if possible.</p> <p>Callout group size limits are imposed to facilitate social distancing.</p>
<p>Consider suspending work release programs and other programs that involve movement of incarcerated/detained individuals in and out of the facility. Pg. 11.</p>		<p>KDOC has engaged work release employers and private industry partners in communication identifying essential services and the KDOC COVID-19 response to limiting exposure through community interactions.</p> <p>Work release at facilities associated with larger groups of individuals have been suspended.</p> <p>Private industry programs assessed for exposure risk have been suspended and those that continue are being monitored accordingly specific to the nature and essential status of their industry.</p> <p>Community service or contract work crews have been suspended statewide.</p> <p>Active screening processes have been implemented monitoring offenders within these groups returning from any type of community assignment.</p>
<p>Remind staff to stay at home if they are sick. Pg. 12.</p>	<p>KDHE COVID-19 activation of reporting of suspect COVID-19 individuals.</p>	<p>Passive and active screening processes are in place at all sites reinforcing stay at home sick protocols and identification of symptoms associated with COVID-19.</p>

		Screening as well as messaging identifying anyone feeling sick with related COVID-19 symptoms would be referred home and appropriate follow up conducted.
Perform verbal screening (for COVID-19 symptoms and close contact with cases) and temperature checks for all staff daily on entry. Pg. 12.	KDHE along with KU Medical Compliance staff monitor current associated symptoms anticipating the COVID-19 virus in regard to active staff screening.	Anyone entering a KDOC correctional facility is actively screened using current criteria as developed by KDHE and KU Medical Compliance staff.  Screenings are done in person using a screening form. A temperature reading is taken using a touchless IR thermometer.
Provide staff with up-to-date information about COVID-19 Pg. 12.		Coronavirus resource information is widely communicated. Daily briefings are held throughout KDOC.  Secretary of Corrections Zmuda communicates with supplemental field leadership and communicates issued frequently to all KDOC employees.  Daily briefing to include conference calls by Facility Management provided as part of COVID-19 updates.
Consider suspending or modifying visitation programs, if legally permissible. For example, provide access to virtual visitation options where available. Pg. 13.		Inmate visitation, volunteer services, and mentor visits have been suspended.  KDOC coordinated additional phone calls and video visitation for eligible offenders for family support and contact. 2 free phone calls and 3 free video visits (eligible offenders) implemented. 3 additional phone calls approved for non-video visit eligible offenders (managed sex offenders). Review of override process for case by case approval of managed Sex Offenders allowing video visits in in process.

<p>Restrict non-essential vendors, volunteers, and tours from entering the facility. Pg. 14.</p>		<p>Volunteers, tours, and non-essential vendors do not have access to KDOC Correctional Facilities.</p> <p>Anyone authorized to enter a facility is subject to active screening processes.</p>
<p>Suspend all transfers of incarcerated/detained persons to and from other jurisdictions and facilities (including work release where relevant), unless necessary for medical evaluation, medical isolation/quarantine, care, extenuating security concerns, or to prevent overcrowding. Pg. 14.</p>		<p>Offender transfers to Work Release have been suspended.</p> <p>Intake isolation processes are in place for any Work Release offender roll outs.</p> <p>Only essential transfers as subject to second level approval due to security issues or medical care are allowed.</p> <p>New admissions are directed to and housed in an intake isolation unit with sending and receiving medical screenings prior to transport and acceptance.</p>
<p>If possible, consider quarantining all new intakes for 14 days before they enter the facility's general population. Pg. 14.</p>		<p>An Intake Isolation Unit has been put into operation at a vacant facility and procedures for its operation have been implemented.</p>
<p>Coordinate with state, local, tribal, and/or territorial health departments. Pg. 15.</p>	<p>KDHE and KU Medical Compliance staff assist with the performance of this coordination.</p>	<p>KDOC coordination of proper notifications and collaboration with local health authorities is assisted by KDHE.</p>
<p>As soon as an individual develops symptoms of COVID-19, they should wear a face mask and should be immediately placed under medical isolation/quarantine in a separate environment from other individuals. Pgs. 15, 20.</p>		<p>Currently outlined in KDOC COVID-19 response plan and protocol. This is referenced in several summaries however specifically identified in the response checklist.</p>
<p>Keep the individual's movement outside the medical isolation/quarantine space to an absolute minimum. Pgs. 15,19.</p>		<p>Currently outlined in KDOC COVID-19 response plan and protocol. This is referenced in several summaries however specifically identified the response checklist.</p>

<p>Ensure that the individual is wearing a face mask at all times when outside of the medical isolation space, and whenever another individual enters. Pg. 15.</p>		<p>Currently outlined in KDOC COVID-19 response plan and protocol. This is referenced in several summaries however specifically identified the response checklist.</p>
<p>Facilities should make every possible effort to place suspected and confirmed COVID-19 cases under medical isolation/quarantine individually. Each isolated individual should be assigned their own housing space and bathroom where possible. Pgs. 15, 19.</p>		<p>Currently outlined in KDOC COVID-19 response plan and protocol. This is referenced in several summaries however specifically identified the response checklist.</p>
<p>Only individuals who are laboratory confirmed COVID-19 cases should be placed under medical isolation/quarantine as a cohort. Do not cohort confirmed cases with suspected cases or case contacts. Pgs. 16, 20.</p>	<p>KDHE and KU Medical Compliance staff.</p>	<p>Currently outlined in KDOC COVID-19 response plan and protocol. Information available in KDOC COVID-19 Overview.</p>
<p>In order of preference, multiple isolated/quarantined individuals should be housed in these types of units. Pgs. 16, 20.</p>	<p>KDHE and KU Medical Compliance staff.</p>	<p>Quarantine preference is well defined but subject to facility design and available bed space. Items of preference are considered in the planning response. Factors limiting best practices are considered in a transfer for care and monitoring.</p>
<p>If the number of confirmed cases exceeds the number of individual medical isolation spaces available in the facility allocate individual space to high risk individuals. Pg. 16.</p>	<p>KDHE and KU Medical Compliance oversight.</p>	<p>COVID-19 response incorporates housing high risk individuals. This is identified through the KDHE activation of suspect COVID-19 cases and subsequent best practice for care. Cases are reviewed and response determined with key medical, KDHE and KU Medical Compliance oversight.</p>
<p>Minimize transfer of COVID-19 cases between spaces within the healthcare unit. Pg. 16.</p>		<p>Currently outlined in KDOC COVID-19 response plan and protocol.</p>
<p>Custody staff should be designated to monitor these</p>		<p>PPE guidelines are determined for contact levels associated with</p>

individuals exclusively where possible. Pg. 16.		custody staff. Exclusive staff is incorporated into the KDOC COVID-19 response planning.
Provide individuals under medical isolation/quarantine with tissues and, if permissible, a lined no-touch trash receptacle Pg. 17.		Currently outlined in KDOC COVID-19 response plan and protocol. This is specifically referenced the response checklist.
Maintain medical isolation/quarantine until all the CDC criteria have been met. Pg. 17.	KDHE and KU Medical Compliance assistance and guidance.	Currently outlined in KDOC COVID-19 response plan and protocol.
Restrict cases from leaving the facility while under medical isolation/quarantine precautions, unless released from custody or if a transfer is necessary for medical care, infection control, lack of medical isolation/quarantine space, or extenuating security concerns. Pg. 17.	KDHE and KU Medical Compliance staff.	Currently outlined in KDOC COVID-19 response plan and protocol.
Thoroughly clean and disinfect all areas where the confirmed or suspected COVID-19 case spent time. Pg. 17.		Currently outlined in KDOC COVID-19 response plan and protocol.
Ensure that staff and incarcerated/detained persons performing cleaning wear recommended PPE. Pg. 17.		Currently outlined in KDOC COVID-19 response plan and protocol.
Proper handling/disposal of food service items for individuals in isolation/quarantine. Pg. 18.		Currently outlined in KDOC COVID-19 response plan and protocol.
Incarcerated/detained persons who are close contacts of a confirmed or suspected COVID-19 case (whether the case is another incarcerated/detained person, staff member, or visitor) should be placed under quarantine for 14 days Pg. 19.	KDHE and KU Medical Compliance staff assist in the back tracing of close contact individuals and overall medical investigation.	Currently outlined in KDOC COVID-19 response plan and protocol.
Staff who have close contact with quarantined individuals should wear recommended		Currently outlined in KDOC COVID-19 response plan and protocol.

PPE if feasible based on local supply, feasibility, and safety within the scope of their duties. Pg. 20.		
Quarantined individuals should be monitored for COVID-19 symptoms twice per day, including temperature checks. Pg. 21.	KU Medical Oversight staff along with KDHE monitoring.	Currently outlined in KDOC COVID-19 response plan and protocol. Medical provider protocols implemented.
Take CDC designated action if an individual who is part of a quarantined cohort becomes symptomatic. Pg. 21.	KDHE and KU Medical Compliance staff.	Currently outlined in KDOC COVID-19 response plan and protocol. This is outlined in the KDOC COVID-19 overview.
Meals should be provided to quarantined individuals in their quarantine spaces. Pg. 21.		Currently outlined in KDOC COVID-19 response plan and protocol.
Designate a room near each housing unit for healthcare staff to evaluate individuals with COVID-19 symptoms, rather than having them walk through the facility to be evaluated in the medical unit. Pg. 21.	KDHE and KU Medical Compliance staff assist in protocol.	A mask is provided to the offender and escorted direct route to medical review with potential negative pressure airflow in suspect COVID-19 cases.  KDOC response has incorporated medical assessment at the site of the offender at the juvenile facilities.
Medical staff should evaluate symptomatic individuals to determine whether COVID-19 testing is indicated. Pg. 22.	KDHE and KU Medical Compliance staff assist in protocol.	Currently outlined in KDOC COVID-19 response plan and protocol. Medical provider protocols implemented.
Implement daily temperature checks in housing units where COVID-19 cases have been identified, especially if there is concern that incarcerated/detained individuals are not notifying staff of symptoms. Pg. 22.		Currently outlined in KDOC COVID-19 response plan and protocol. Medical provider protocols implemented.
Facilities should ensure that incarcerated/detained individuals receive medical evaluation and treatment at the first signs of COVID-19 symptoms. Pg. 23.	KDHE and KU Medical Compliance staff oversight.	Currently outlined in KDOC COVID-19 response plan and protocol. Direct referrals without delay are incorporated into the protocol.



<p>Staff evaluating and providing care for confirmed or suspected COVID-19 cases should follow the CDC Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19) and monitor the guidance website regularly for updates to these recommendations. Pg. 23.</p>	<p>Currently outlined in KDOC COVID-19 response plan and protocol.</p>	<p>Currently outlined in KDOC COVID-19 response plan and protocol.</p>
<p>Staff identified as close contacts of a COVID-19 case should self-quarantine at home for 14 days and may return to work if symptoms do not develop. Pg. 22.</p>	<p>KDHE and KU Medical Compliance staff direction.</p>	<p>Currently outlined in KDOC COVID-19 response plan and protocol.</p>
<p>The facility should have a plan in place to safely transfer persons with severe illness from COVID-19 to a local hospital if they require care beyond what the facility is able to provide. Pg. 23.</p>	<p>KDHE and KU Medical Compliance staff direction.</p>	<p>Currently outlined in KDOC COVID-19 response plan and protocol.</p>
<p>Healthcare staff should evaluate persons with respiratory symptoms or contact with a COVID-19 case in a separate room, with the door closed if possible, while wearing recommended PPE and ensuring that the suspected case is wearing a face mask. Pg. 23.</p>	<p>KDHE and KU Medical Compliance staff direction.</p>	<p>Currently outlined in KDOC COVID-19 medical guidance response plan and protocol.</p>
<p>When evaluating and treating persons with symptoms of COVID-19 who do not speak English, using a language line or provide a trained interpreter when possible. Pg. 23.</p>		<p>KDOC utilizes translation services and is doing so within the KDOC COVID-19 response plan when needed.</p>
<p>Ensure that all staff (healthcare and non-healthcare) and incarcerated/detained persons who will have contact with infectious materials in their work placements have access</p>	<p>KDHE and KU Medical Compliance staff direction.</p>	<p>Currently outlined in KDOC COVID-19 response plan and protocol.</p>

to and been trained to correctly don, doff, and dispose of PPE relevant to the level of contact they will have with confirmed and suspected COVID-19 cases. Pg. 23.		
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ATTACHMENT

KDOC COVID-19  
RESPONSE PLAN  
AND PROTOCOL

# Prevention and Control of COVID-19 in Correctional and Detention Facilities

March 12, 2020

## Introduction

Kansas is responding to an outbreak of respiratory disease caused by a novel (new) coronavirus that was first detected in Wuhan City, Hubei Province, China and which has now been detected in 37 locations internationally, including cases in the United States. The Kansas Department of Health and Environment (KDHE) is leading these state efforts in collaboration with many state, local, and federal partner organizations. The disease that this coronavirus causes has been named "coronavirus disease 2019" (abbreviated "COVID-19").

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak a "public health emergency of international concern" (PHEIC). On January 31, 2020, Health and Human Services Secretary Alex M. Azar II declared a public health emergency (PHE) for the United States to aid the nation's healthcare community in responding to COVID-19.

The following information is intended to help your jail or correctional facility prepare for and respond to the possibility of COVID-19 in your community. As with many situations, information related to the disease and appropriate measures may change and organizations are recommended to check the KDHE COVID-19 webpage for additional or updated information. In developing these plans be in communications with your county public health department including possible trigger points of when to implement these processes (e.g., community spread discussions, release planning, school closures).

## Initial Screening of Inmates

During the planning period, jails and correctional facilities should consider how to implement the following recommendations within their facility and community should person-to-person transmission occur within Kansas. Facilities should also take stock and inventory of the availability of supplies, resources, and spaces that may likely be needed to implement these recommendations.

Early identification and treatment of persons suspected or confirmed with COVID-19 is an important and effective means of preventing disease transmission. When active person-to-person transmission is occurring in Kansas, newly arrived arrestees and inmates should not be housed with other inmates until they have been appropriately screened for COVID-19. Screening within the correctional setting can help identify additional suspect COVID-19 patients while helping to promote staff health when dealing with populations.

The following evaluation should take place upon arrestee booking or initial inmate processing to the facility:

- Does the individual have a fever (subjective or confirmed)? (i.e., disposable thermometers for temperature monitoring, consider this even prior to placing in holding cells for booking)
- Does the individual have signs or symptoms of lower respiratory illness (e.g., cough or shortness of breath)?
- Has the person had close contact with a confirmed COVID-19 patient within 14 days of symptom onset?

- Has the person had travel to a country with known COVID-19 person-to-person transmission within 14 days of symptom onset?
- Has the person had any travel outside the country in the last 30 days?

Any individual reporting or with suggestive clinical features and exposure risks should be evaluated in collaboration with KDHE Infectious Disease Epidemiology staff at 877-427-7317 immediately.

## **Periodic Screening of Inmates**

Long-term inmates or detainees should be re-evaluated during medical rounds for clinical features and symptoms. Officers and staff should be trained and educated in evaluating for symptoms and promptly notifying medical staff or supervisors of the inmate for further medical evaluation.

## **Staff Screening**

This could be the facility's greatest risk for introduction of infection as they are the most in and out of the facility. Staff members may be exposed to individuals with suspected COVID-19 at the facility or while off-duty in the community. If exposed, considerations should be made to policy development to self-quarantine during infectious disease outbreaks. Maintaining a healthy workforce improves the work environment of the facility and reduces the opportunity for disease exposures to other staff and visitors.

When there is person-to-person transmission of disease within the community, the following evaluation should take place of staff:

- Does the individual have a fever (subjective or confirmed)?
- Does the individual have signs or symptoms of lower respiratory illness (e.g., cough or shortness of breath)?
- Has the person had close contact with a confirmed COVID-19 patient within 14 days of symptom onset?
- Has the person had travel to a country with known COVID-19 person-to-person transmission within 14 days of symptom onset?
- Has the person had any travel outside the country in the last 30 days?

Any individual reporting or with suggestive clinical features and exposure risks should be evaluated in collaboration with KDHE Infectious Disease Epidemiology staff at 877-427-7317 immediately.

## **Visitor Screening**

Visitors (including attorneys, family, friends, clergy etc.) could be a high risk for introduction of infection. Visitors may be exposed to individuals with suspected COVID-19 at the facility or while off-duty in the community.

When there is person-to-person transmission of disease within the community, the following evaluation should take place of visitors:

- Does the individual have a fever (subjective or confirmed)?
- Does the individual have signs or symptoms of lower respiratory illness (e.g., cough or shortness of breath)?
- Has the person had close contact with a confirmed COVID-19 patient within 14 days of symptom onset?
- Has the person had travel to a country with known COVID-19 person-to-person transmission within 14 days of symptom onset?

- Has the person had any travel outside the country in the last 30 days?

Any individual reporting or with suggestive clinical features and exposure risks should be evaluated in collaboration with KDHE Infectious Disease Epidemiology staff at 877-427-7317 immediately.

## **Case Reporting**

All cases of novel infectious diseases, including COVID-19, are IMMEDIATELY reportable to the KDHE Epidemiology Hotline at 877-427-7317. This line is monitored 24/7. Law enforcement, corrections, and health staff may press Option 5 to report suspect COVID-19 persons for further evaluation.

## **Respiratory Isolation**

Airborne precautions are currently recommended for any person who has influenza-like illness and screening criteria that would suggest possible exposure to COVID-19.

## **Transfer to Medical Facility**

If airborne isolation is not available in the facility, any detainee who has symptoms suggestive of COVID-19 should be immediately isolated and transferred to a facility (consider identifying other jails or correctional facilities which may have airborne isolation capabilities in advance of need) or hospital in which the detainee can be placed in an All room and evaluated promptly for COVID-19.

## **Transfer Out of Facility for Non-Medical Reasons**

Any inmate who is isolation or quarantine should not be transferred to another facility, court or work assignment. Only medically necessary transfers should be initiated with these inmates and under the guidance provided above for transfer to medical facility. Ensure with your local county health department that there is a standing order of isolation and quarantine of an individual with suspected or confirmed COVID-19 prior to any release from the facility. If an inmate is bonded out or released due to sentence completion while under isolation or quarantine orders, the local health department must be notified immediately (prior to release if at all possible) for appropriate community continuation of isolation or quarantine.

## **Environmental Controls and Personal Protective Equipment**

Primary environmental controls consist of controlling the source of infection by using local exhaust ventilation (e.g., hoods, tents, or booths) and diluting and removing contaminated air by using general ventilation. These controls help prevent the spread and reduce the concentration of airborne infectious droplets. Environmental controls work in conjunction with administrative controls such as isolation of inmates with suspected COVID-19 detected through screening. Secondary environmental controls consist of controlling the airflow to prevent contamination of air in areas adjacent to the source (All rooms) and cleaning the air (using a HEPA filter or ultraviolet germicidal irradiation [UVGI]) to increase the number of equivalent ACH. To be effective, secondary environmental controls should be used and maintained properly, and their strengths and limitations should be recognized. The engineering design and operational efficacy parameters for UVGI as a secondary control measure (i.e., portable UVGI units, upper-room air UVGI, and in-duct UVGI) continue to evolve and require special attention in their design, selection, and maintenance.

Exposure to COVID-19 within correctional facilities can be reduced through the effective use of environmental controls at the source of exposure (e.g., an infectious inmate) or in general areas.

Source-control techniques can prevent or reduce the spread of infectious droplets into the air in situations in which the source has been identified and the generation of the contaminant is localized by collecting infectious particles as they are released. Use of these techniques is particularly prudent during procedures that are likely to generate infectious aerosols (e.g., bronchoscopy and sputum induction) and when inmates with COVID-19 are coughing or sneezing.

Unsuspected and undiagnosed cases of COVID-19 contribute substantially to disease transmission within correctional facilities. When attempting to control this type of transmission, source control is not a feasible option. Instead, general ventilation and air cleaning should be relied on for environmental control. General ventilation can be used to dilute the air and remove air contaminants and to control airflow patterns in All rooms or other correctional facility settings. Air-cleaning technologies include mechanical air filtration to reduce the concentration of COVID-19 droplets and UVGI to kill or inactivate microorganisms, so they no longer pose a risk for infection.

Ventilation systems for correctional facility settings should be designed, and modified when necessary, by ventilation engineers in collaboration with infection-control practitioners and occupational health staff. Recommendations for designing and operating ventilation systems in correctional facilities have been published. The multiple types of and conditions for use of ventilation systems in correctional-facility settings and the individual needs of these settings preclude provision of extensive guidance in this document. *Prevention and Control of Tuberculosis in Correctional and Detention Facilities: Recommendations from CDC (Morbidity and Mortality Weekly Report July 7, 2006/Vol. 55/ No. RR-9* pages 11 – 14 may be a useful guide for consideration of ventilation settings and environmental controls in general.

Incremental improvements in environmental controls (e.g., increasing the removal efficiency of an existing filtration system in any area) are likely to lessen the potential for COVID-19 transmission from persons with unsuspected or undiagnosed COVID-19. This information should not be used in place of consultation with experts who can advise on ventilation system and air handling design, selection, installation, and maintenance. Because environmental controls will fail if they are not properly operated and maintained, routine training and education of infection-control and maintenance staff are key components to a successful COVID-19 infection-control program.

### **Airborne Infection Isolation Rooms**

Inmates known or suspected of having COVID-19 should be placed in an All room or All cell that meets the design and operational criteria for airborne infection isolation described previously. Inmates deemed infectious should remain in isolation until transfer to a medical facility or discharge. Facilities without an on-site All room should have a written plan for referring patients with suspected or confirmed COVID-19 to a facility that is equipped to isolate COVID-19 patients.

New or renovated facilities should ensure that a sufficient number of All rooms are available consistent with the facility risk assessment. Under rare circumstances, if an All room is not available and the immediate transfer of the inmate with suspected COVID-19 is not possible, the inmate should be housed temporarily in a room that has been modified to prevent the escape of infectious aerosols outside the COVID-19 holding area. The heating, ventilating, and air-conditioning (HVAC) system in this temporary COVID-19 holding area might have to be manipulated or augmented with auxiliary exhaust fans to create an inward flow of air that reduces the potential escape of infectious aerosols. If possible, air from these areas should be exhausted directly to the outdoors. If this is not feasible, the highest filtration efficiency compatible with the installed HVAC system should be used. Filter selection based on the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standard 52.2 Minimum Efficiency Reporting Value (MERV)--rating efficiency tables can help in this evaluation.

Secondary air cleaning techniques (portable air cleaners and UVGI) also can be used in these areas to increase effective air cleaning. As with any decision within a secured facility, a safety risk assessment should be considered when placing temporary portable equipment in an area which inmates have access to.

**Local Exhaust Ventilation**

Aerosol-producing procedures (e.g. cough producing) should be performed in an area with a type of local exhaust ventilation that captures and removes airborne contaminants at or near their source without exposing persons in the area to COVID-19. Local exhaust devices typically use hoods. Two types of hoods are used: enclosing devices, in which the hood either partially or fully encloses the infectious source, and exterior devices, in which the infectious source is near but outside the hood. Fully enclosed hoods, booths, or tents are always preferable to exterior devices because of their superior ability to prevent contaminants from escaping. When recommended exhaust ventilation hoods are not available, strong consideration should be given to moving the inmate to a secured area outside with open air, away from windows and doors to conduct aerosol-producing procedures.

Enclosing devices should have sufficient airflow to remove >99% of airborne particles during the interval between the departure of one patient and the arrival of the next. The time required to remove a given percentage of airborne particles from an enclosed space depends on 1) the ACH number, 2) the location of the ventilation inlet and outlet, and 3) the physical configuration of the room or booth. The time interval required to ensure the proper level of airborne contaminant removal from enclosing devices varies according to ACH. For example, if an enclosing device operates at six ACH, and the air inlet and exhaust locations allow for good air mixing, approximately 46 minutes would be required to remove 99% of the contaminated air after the aerosol-producing procedure has ended. Similarly, an additional 23 minutes (total time: 69 minutes) would be required to increase the removal efficiency to 99.9%. Doubling the ventilation rate decreases the waiting time by half.

Air changes per hour (ACH) and time required for removal of airborne contaminants, by efficiency percentage		
ACH	Minutes required for removal of airborne contaminants after infectious person has exited location	
	99.0% efficiency	99.9% efficiency
2	138	207
4	69	104
6	46	69
12	23	35
15	18	28
20	7	14
50	3	6

SOURCE: Modified from the formula for the rate of purging airborne contaminants (Mutchler JE. Principles of ventilation: the industrial environment—its evaluation and control. Washington, DC: US Department of Health and Human Services, Public Health Service, CDC, NIOSH; 1973:573–82).

**General Ventilation**

General ventilation is used to 1) dilute and remove contaminated air, 2) control the direction of airflow in a correctional facility setting, and 3) control airflow patterns in rooms. Recommended ventilation rates for correctional facility settings are typically expressed in ACH. Ventilation recommendations for



selected areas in new or renovated correctional facility settings should be followed. The feasibility of achieving a specific ventilation rate depends on the construction and operational requirements of the ventilation system and might differ for retrofitted and newly constructed facilities. The expense and effort of achieving a high ventilation rate might be reasonable for new construction but not be as feasible when retrofitting an existing setting.

Ventilation design guidance for correctional facilities and related areas has been published. This design guidance includes specific ventilation recommendations regarding total ventilation, filtration efficiency, and environmental design parameters. For minimum outdoor air supply recommendations, the guidance refers to ASHRAE Standard 62, Ventilation for Acceptable Indoor Air Quality. In 2004, ASHRAE revised and renumbered this standard to ANSI/ASHRAE Standard 62.1. For areas within correctional facilities that are not intended to contain persons with COVID-19, the recommended minimum outdoor air supply rates should meet or exceed those recommended in ANSI/ASHRAE Standard 62.1-2004. When risk analysis reveals an enhanced potential for undiagnosed cases of COVID-19, facility designers and owners may consider using higher supply rates of outdoor air (e.g., those recommended for areas within health-care facilities anticipated to contain infectious patients). Minimum outdoor air supply recommendations for health-care facilities have been published. Because correctional areas frequently will not have an exact equivalent area within the health-care environment, the designer or owner should identify an analogous health-care area from which to choose the outdoor air supply recommendation. This selection should be made based on occupant risk factors for COVID-19, occupant activities, and occupant density within the area. For example, the intake, holding, and processing area of a higher risk correctional facility might be considered analogous to the emergency waiting room area in a health-care facility. In that case, the recommended outdoor air supply would be at least two ACH.

The direction of air movement relative to adjacent areas is necessary for the containment of contaminated air. Air within a correctional facility should flow to minimize exposure of others within the building. For example, air inside an All room or cell should flow from the corridor and air-supply grille across the worker, then across that patient, and finally out of the room. To ensure that air is flowing from the corridor into an All room or cell, smoke testing should be performed daily, even if the All room or cell is equipped with a pressure-sensing device. Air flow (supply air and exhaust air) should be measured at least annually and compared with the designed air flow rates to ensure that optimal directional air flow and air exchange rates are being maintained.

## **Air Cleaning Methods**

Detailed information has been published regarding the selection, design, maintenance, and safety considerations associated with air cleaning methods (i.e., filtration and UVGI). Designers and end users should consult this information. Air removed from areas likely to contain infectious aerosols (e.g., All cells, sputum collection and other procedure rooms, and intake areas) should be exhausted directly to the outdoors to ensure that it cannot immediately reenter the building or pose a hazard to persons outside, in accordance with applicable federal, state, and local regulations. If discharging air to the outside is not feasible, HEPA filters should be used to clean the air before returning to the general ventilation system. Such recirculation is acceptable only if the air is recirculated back into the same general area from which it originated.

For general population areas in which infectious aerosols are not anticipated but might be present (from persons with undiagnosed COVID-19), total exhaust ventilation should be considered where and when the outdoor environmental conditions (temperature and humidity) are compatible with a single-pass system without undue energy or equipment costs. When recirculating air from these areas, the minimum ASHRAE-recommended level of filtration is a MERV-8 filter. However, CDC encourages

selection and use of filters with higher MERV ratings to provide an incremental improvement in the protection afforded by this mechanism. The filtration system should be designed to prevent filter bypass and to allow filter leakage testing and safe filter changes. A combination of air cleaning methods (e.g., MERV-rated filters and supplemental UVGI) may be used to increase effective air cleaning.

When used, UVGI should be applied in-duct (i.e., inside the ductwork of existing HVAC systems) or in the upper room of the area to be treated to ensure that organisms are inactivated. Upper-air systems should be designed, installed, and monitored to ensure both sufficient irradiation in the upper room to inactivate COVID-19 virus and safe levels of UVGI in the occupied space.

## **Environmental Control Maintenance**

To be most effective, environmental controls should be installed, operated, and maintained correctly. Ongoing maintenance should be part of any written infection-control plan. The plan should outline the responsibility and authority for maintenance and address staff training needs.

Failure to maintain environmental control systems properly can adversely impact control and prevention efforts at facilities in Kansas. In three multihospital studies evaluating the performance of All rooms, failure to routinely monitor air-pressure differentials (whether manually or through use of continuous monitoring devices) resulted in a substantial percentage of the rooms being under positive pressure. Correctional facilities should schedule routine preventive maintenance that covers all components of the ventilation systems (e.g., fans, filters, ducts, supply diffusers, and exhaust grilles) and any air-cleaning devices in use. A specific consideration for correctional facilities is the concern of inmates manipulating the system by blocking air supplies and ducts because often these systems may create cooler environments than are desired by the inmate. Shift to shift inspection of the air supply ducts into the cells may be necessary in some situations. Performance monitoring should be conducted to verify that environmental controls are operating as designed. Performance monitoring should include 1) directional airflow assessments using smoke tubes and use of pressure monitoring devices sensitive to pressures at 0.001 inch of water gauge (note that in the absence of proper smoke testing equipment, a tissue may be placed at the entry door to observe it being pulled strongly into the All. If the tissue is not pulled into the room or if it is blown away from the room toward the outside of the All, negative airflow is not occurring) and 2) measurement of supply and exhaust airflows to compare with recommended air change rates for the respective areas of the facility. Records should be kept documenting all preventive maintenance and repairs.

Standard procedures should be established to ensure that 1) maintenance staff notify infection-control personnel before performing maintenance on ventilation systems servicing inmate-care areas and 2) infection-control staff request assistance from maintenance personnel in checking the operational status of All cells and local exhaust devices (e.g., booths, hoods, and tents) before use. A protocol that is well written and followed will help to prevent unnecessary exposures of correctional facility staff and inmates to infectious aerosols. Proper labeling of ventilation system components (e.g., ducts, fans, and filters) will help identify air-flow paths. Clearly labeling which fan services a given area will help prevent accidental shutdowns. In addition, provisions should be made for emergency power to avoid interruptions in the performance of essential environmental controls during a power failure.

## **Respiratory Protection**

### **Considerations for Selection of Respirators**

Respiratory protection is used when administrative (i.e., identification and isolation of COVID-19 patients) and environmental controls alone have not reduced the risk for infection with COVID-19 to an acceptable level. The use of respiratory protection is most appropriate in specific settings and situations

within correctional facilities. For example, protection is warranted for inmates and facility staff when they enter All rooms, transport confirmed COVID-19 patients, and participate in cough-inducing procedures.

Respirators should be selected from those approved by CDC/National Institute for Occupational Safety and Health (NIOSH) under the provisions of Title 42, Part 84 of the Code of Federal Regulations. Decisions regarding which respirator is appropriate for a particular situation and setting should be made on the basis of a risk assessment of the likelihood for COVID-19 transmission. For correctional facilities, a CDC/NIOSH-approved N95 air-purifying respirator will provide adequate respiratory protection in the majority of situations that require the use of respirators. If a higher level of respiratory protection is warranted, additional information on other classes of air-purifying respirators and powered air-purifying respirators (PAPRs) is available. The overall effectiveness of respiratory protection is affected by 1) the level of respiratory protection selected (i.e., the assigned protection factor), 2) the fitting characteristics of the respirator model, 3) the care taken in donning the respirator, and 4) the effectiveness of the respiratory protection program, including fit testing and worker training.

### **Implementing a Respiratory Protection Program**

All facilities should develop, implement, and maintain a respiratory-protection program for health-care workers or other staff who use respiratory protection. Respiratory-protection programs are required for facilities covered by the U.S. Occupational Safety and Health Administration (OSHA). The key elements of a respiratory protection program include 1) assignment of responsibility, 2) training, and 3) fit testing. All correctional facility staff who use respirators for protection against COVID-19 must participate in the facility's respiratory protection program (e.g., understand their responsibilities, receive training, receive medical clearance, and engage in fit testing). In addition to staff members, visitors to inmates with COVID-19 should be offered respirators to wear while in All rooms and instructed on proper use. Certain regular visitors (e.g., law enforcement officials, social workers, ministers and other religious representatives, and attorneys and other legal staff) might be there in an occupational capacity. Each facility should develop a policy on the use of respirators by visitors of patients.

### **Precautions for Transporting Patients Between Correctional or Detention Facilities**

Patients with suspected or confirmed COVID-19 can be transported in a van or other automobile. The ventilation system for the vehicle should bring in as much outdoor air as possible, and the system should be set to nonrecirculating. If possible, the cab should be physically isolated from the rest of the vehicle, and the patient should be placed in the rear seat. Drivers or other persons who are transporting patients with suspected or confirmed COVID-19 in an enclosed vehicle should wear at least an N95 disposable respirator. Consideration might be given to having the patient wear a surgical or procedure mask, if possible, during transport, in waiting areas, or when others are present.

### **Cleaning and Disinfection**

Routine frequent cleaning of rooms, furniture, and utensils, and clothing used by infected individuals. Clothing/linens shall be exchanged at least twice weekly; more frequently if soiled. PPE shall be used by staff/workers handling soiled linens/laundry. Soiled linens/laundry should be placed in dissolvable bag. Cleaning of clothing/linens shall be laundered separate from general population items. Conduct frequent environmental cleaning of "high touch" surfaces such as handles, knobs, chairs, tables, etc. using EPA-registered detergent.

## **Attachments**

The policies developed by the Kansas Department of Corrections have been made available for consideration of others in development of individual correctional facility policies and plans.





# Infectious Disease Outbreak

## Clinical Care Guide

March 9, 2020

For security and medical staff

### Instruction Bulletin: How to Respond to a Coronavirus Outbreak

#### ABOUT THE 2019-NOVEL CORONAVIRUS (COVID-19)

The Kansas Department of Corrections (KDOC) is closely monitoring the outbreak of the 2019-novel coronavirus (COVID-19).

Coronavirus is a contagious virus that spreads on droplets when an infected person coughs or sneezes. In some cases, it may be spread in the stool.

Symptoms of coronavirus (Covid-19) often begin with a fever and a cough, followed by muscle aches and headache. The respiratory symptoms can abruptly worsen causing bronchitis, pneumonia, or acute respiratory distress.

A person is contagious from the onset of symptoms. Without precautions, a contagious person will pass the infection to two or three others.

On average, it takes from two days up to two weeks from an exposure for a person to develop symptoms of an infection.

There is no vaccine against the coronavirus. The best prevention is handwashing and avoidance of close contact with infected individuals.

#### HOW TO ADDRESS A CORONAVIRUS OUTBREAK IN DOC

Your job during an outbreak is to help identify cases, treat or provide security for infected individuals, and prevent the spread of virus within DOC facilities. Here are the steps involved in a response:

1. **IDENTIFY CASES:** Staff shall look for individuals who meet both of the following criteria:
  - **Clinical criteria:** fever or symptoms of lower respiratory tract infection (i.e. cough, difficulty breathing), **AND**
  - **Epidemiologic criteria:** contact with an individual who is infected with or suspected to be infected with the coronavirus.

**Note: all new remands should be asked about recent travel from out of the state.**
2. **ISOLATE SUSPECTED CASES**
  - Anyone with symptoms of coronavirus must be placed in an isolation cell (negative pressure cell only if available).
  - Standard/Contact/Airborne precautions with directions shall be posted for anyone entering the inmate's cell.

Standard/Contact/Airborne precautions shall be used by all staff when entering the patient's cell, caring for the patient, or when transferring the patient.

- Wear appropriate PPE, including respiratory protection, when entering patient's cell.
  - The patient must wear a surgical mask when moving within or outside the facility.
  - Alert the medical provider to a suspected case of coronavirus. The medical staff is responsible for reporting a case that meets criteria for coronavirus to the Section of Epidemiology 1-877-427-7317.
  - Contact KDHE for lab testing options at 1-877-427-7317.
  - Pregnant inmates, pregnant medical staff, or pregnant security staff should not be assigned to a module or work in an area where an infected patient is housed.
  - **An inmate with confirmed coronavirus should remain in isolation until cleared by a medical practitioner.**
3. **EDUCATE STAFF AND INMATES**
    - Place educational flyers throughout the facility alerting inmates and staff to report any coronavirus symptoms.
    - Distribute education on the signs and symptoms of coronavirus to medical and security staff.
    - Instruct medical and security staff on isolation procedures for the facility and the posting of modified droplet precautions.
  4. **STOP TRANSMISSION OF VIRUS**
    - Movement of inmates to and from a facility with a confirmed case coronavirus should be minimized.
    - Movement in and out of a module which housed an infected inmate should be minimized.
    - Any room occupied by an infected individual should be thoroughly cleaned. This includes cleaning and disinfection of all surfaces.
    - **Wash hands with soap and water after providing patient care, making inmate contact, or handling items used by an infected person.**
  5. **SURVEILLANCE FOR NEW CASES**
    - It takes fourteen days after a case of coronavirus has been confirmed to determine whether the infection has spread to others.
    - Inmates and staff working should immediately report suspicion of new coronavirus cases to the medical staff.

### Coronavirus Outbreak Response Checklist

#### Screening for Patients Under Investigation (PUI) for Coronavirus Disease 2019 (COVID-19)

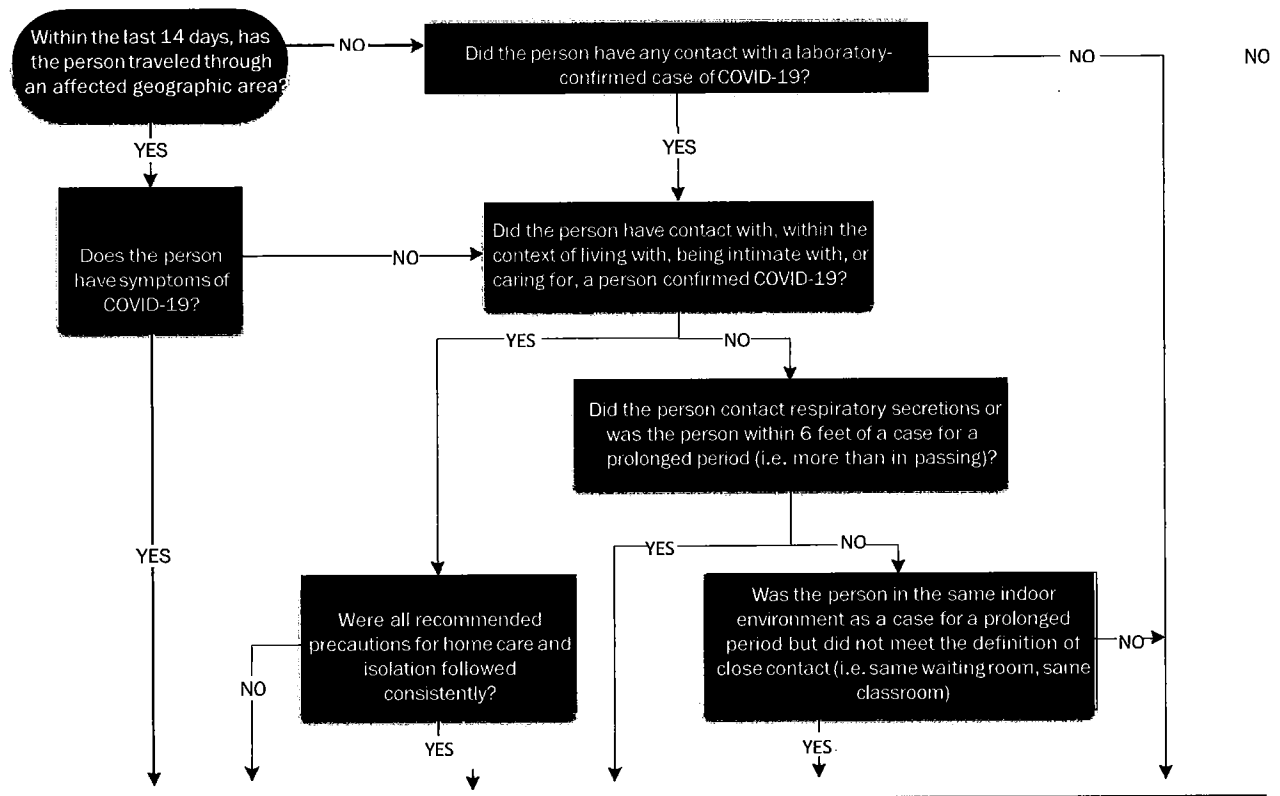
- Screen all new remands or transfers for symptoms or risk of COVID-19
  - **Clinical criteria:** fever and/or symptoms of lower respiratory illness (i.e. cough, difficulty breathing) [AND]
  - **Epidemiologic risk:** within the last 14 days the patient has had a history of:
    - 1) Close contact with a lab-confirmed COVID-19 patient [OR]
    - 2) History of travel from affected geographic areas (including areas in the lower 48 states) [OR]
    - 3) Unexplained febrile illness with severe lower respiratory symptoms (hospitalization for pneumonia, ARDS)
- If *epidemiologic risk only* (no symptoms), place inmate in single cell with BID monitoring for symptoms x 14 days (see quarantine information on pages 2-4) and schedule for medical provider review.
- If *both clinical and epidemiologic risk* (with symptoms), transfer inmate to single cell and alert medical provider immediately (see page 2 and continue with following checklist).

#### Isolation and Treatment of suspected case(s) of COVID-19 (PUI)

- Maintain modified droplet precautions
  - ▶ **Source control:** place a mask on the patient while in waiting area or during movement through facility.
  - ▶ **Ensure appropriate patient placement** in a single room if possible. Instruct patients to follow respiratory hygiene/cough etiquette recommendations.
  - ▶ **Use personal protective equipment (PPE).** Upon entry into patient space (< 6 feet) or exam room, staff should put on impermeable gown and gloves, a N95 mask or Powered Air Purifying Respirator (PAPR), and eye protection. Always wash hands before and after touching the patient.
  - ▶ **Limit transport and movement of PUI patients** to medically necessary purposes. If transport or movement outside of the room is necessary, instruct patient to wear a mask and follow respiratory hygiene/cough etiquette.
- Diagnosis:
  - ▶ Symptoms: Fever > 101F (83%); cough (82% patients); shortness of breath (31% patients); muscle pain (11% patients)
  - ▶ Lab: Collect three specimen types: see [CDC interim guidelines for specimen collection](#)
    - ⇒ **Upper respiratory**– collect 1 nasopharyngeal and 1 oropharyngeal swab (use separate viral transport media tubes)
    - ⇒ **Lower respiratory**– collect 2-3 mL sputum in sterile, leak-proof container with screw cap
  - ▶ Refrigerate specimen at 35°-46° F (2°-8°C) and ship overnight on ice pack to either the Kansas State Virology Lab or Kansas State Public Health Lab.
- Isolation:
  - ▶ House the patient in an individual cell if possible (negative pressure if available).
  - ▶ Movement outside the isolation cell should be avoided unless being transferred to the hospital. Patient should wear a face mask (surgical mask) during movements outside the isolation cell.
  - ▶ Use masks, gowns, gloves, and eye protection when entering cell or handling uncleaned articles moved from the cell (food trays, clothing, medical equipment, etc.) until disinfection occurs.
  - ▶ Isolation should be maintained for 21 days after onset of symptoms unless otherwise approved by the CMO or designee.
- Treatment:
  - ▶ All patients should receive supportive care with oral hydration and analgesic/antipyretic agents.
  - ▶ Initiate antibiotics for any secondary bacterial infections such as pneumonia.
  - ▶ Patients with acutely worsening symptoms or respiratory distress should be transferred to the hospital via EMS. Alert EMS staff and the receiving ER that the patient has suspected coronavirus.
- Report suspected cases:
  - ▶ **Report all suspected cases to the on-call physician.**
  - ▶ Alert the section of Epidemiology 1-877-427-7317

<h2>Coronavirus Overview</h2>	<p><b>Cause:</b> Coronavirus (COVID-19)</p> <p><b>Symptoms:</b> fever &gt; 101F, cough, malaise, and fatigue; sudden worsening of pneumonia or acute respiratory distress syndrome (ARDS) around day 7-10.</p> <p><b>Incubation:</b> range 2-14 days (average 5 days)</p> <p><b>Contagious:</b> from symptom onset up to 21 days</p> <p><b>Prevention:</b> handwashing, isolation of suspected cases, and universal precautions</p> <p><b>Precautions:</b> universal, contact, droplet, and respiratory precautions</p> <p><b>Treatment:</b> symptomatic treatment; antivirals in select cases</p>
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### Coronavirus Disease 2019 (COVID-19) Risk Assessment and Management of Suspected Cases in a Correctional Facility (adapted from CDC)



	HIGH RISK	MEDIUM RISK	LOW RISK	NO IDENTIFIED RISK
Actions for people without COVID-19 symptoms	Place in quarantine. Remain under quarantine authority. No activities in public settings.	House in single cell. Monitoring to include vital signs with temperature twice daily (~ every 12 hours). No congregate activities. Mask for transport movement outside of cell.	House in single cell. Monitoring to include vital signs with temperature twice daily (~ every 12 hours). Wear mask in congregate settings or when moving within the facility.	None
Actions for people with COVID-19 symptoms	Immediate isolation; medical evaluation according to PUI instructions. Pre-notify hospital/ER of any transfers. Mask for all movement outside isolation cell.	Immediate isolation; medical evaluation according to PUI guidelines. Mask for all movement outside cell.	House in single cell. Avoid congregate activities. Wear mask for any movement outside cell.	Routine medical care

**Notes:**

- (1) Report all suspected cases of COVID-19 to the on-call physician.
- (2) Examples may not cover all potential exposures to COVID-19. This algorithm should not replace clinical judgement when determining the course of action for a given case.
- (3) Unless otherwise specified, isolation or quarantine should be maintained for the duration of the incubation period (14 days).



### Kansas DOC Quarantine Implementation Overview

**Purpose:** In the event of an outbreak of a serious communicable disease, the Kansas Dept. of Corrections shall institute quarantine procedures in coordination with state and federal health officials, with the purpose of preventing the spread of disease.

**Definitions:**

Quarantine refers to the procedure of separating and restricting the movement of persons who are *not sick*, yet who were *exposed* to a contagious disease in order to quickly identify those who will become sick. The term *quarantine* is distinct from the term *isolation*.

Isolation refers to the procedure of separating a person who is already sick from others who are not ill in order to prevent the spread of disease.

Incubation period of the Coronavirus is 14 days (length of time between an exposure to an ill person and the development of symptoms in another person).

**Procedure:**

- I. The Kansas Department of Corrections is prepared to implement four levels of quarantine: 1) Individual; 2) Module; 3) Facility; or 4) Inter-Facility.
- II. The level of quarantine shall be determined by the Contracted Regional Medical Director or designee in coordination with the Secretary of Corrections or designee and the Secretary of the Department of Health and Environment.
- III. Isolation and quarantine shall be by the least restrictive means necessary to prevent the spread of a contagious or possibly contagious disease that poses a significant risk to public health.

#### LEVELS OF QUARANTINE

Level	Description	Scenario	Details
I	Individual level	Exposed individual is received into a DOC facility	Quarantine of an exposed individual to include single cell housing, in-cell meals, restriction of movement, and separation from congregate activities for duration of incubation period.
II	Module level	An ill individual is identified in a single module	Quarantine of all inmates in a module with restriction of movement to within the module, in-module meals, separation from congregate activities outside the module for the duration of the incubation period.
III	Facility level	Multiple ill individuals are identified in separate modules or areas	Quarantine of all inmates in an exposed facility to include restriction of movement to and from the facility for the duration of the incubation period.
IV	Inter-facility level	An ill individual is identified after movement between facilities during the infectious period	Quarantine of exposed inmates in multiple modules with-in multiple facilities with restriction of movement to and from the facilities/modules, and separation of exposed inmates from congregate activities.

Table: Kansas DOC levels of quarantine



Facility Control Measures During an Outbreak			
Control Measure	Outbreak Scenario		
	Individuals	Well Person(s) Suspected (e.g. Staff/PUI)	Quarantined
Containment Goal	Prevent spread within institution.	Prevent spread to other institutions or the public	Rapid identification and isolation of new cases
Isolation	Place the patient in an individual cell (negative pressure if available).	Place patients in individual cells if possible (negative pressure if available). Cohort confirmed cases only if necessary.	N/A
General Hygiene	Regular hand hygiene. Wash with soap and water x 20 seconds or use alcohol-based hand gel. Make soap dispensers and alcohol-based hand gel dispensers available to staff. Ensure soap available to inmates. All staff and inmates shall be instructed to avoid touching eyes, nose, or mouth.		
Personal Protective Equipment (PPE)	Provide PPE (gloves, mask, eye protection, and impermeable gown) for use by staff who are in contact with infected individuals or staff who are cleaning rooms or items used by an infected individual or PUI. Properly dispose of used PPE in biohazard waste.		
Environmental Cleaning	Routine frequent cleaning of rooms, furniture, and utensils, and clothing used by infected individuals. Clothing/linens shall be exchanged at least twice weekly; more frequently if soiled. PPE shall be used by staff/workers handling soiled linens/laundry. Soiled linens/laundry should be placed in dissolvable bag. Cleaning of clothing/linens shall be laundered separate from general population items. Conduct frequent environmental cleaning of "high touch" surfaces such as handles, knobs, chairs, tables, etc. using EPA-registered detergent.		
Screening	Screen all inmates at intake.	Screen all inmates at intake. Screen all inmates before transfer. Staff shall report suspected cases to medical.	Screen quarantined individual(s) with temperature twice daily. Screen quarantined individuals before and after all required outside contacts.
Visitors	No unnecessary contact visitors for quarantined individual(s). All used mobile phones should be covered in plastic.		
Treatment	<ul style="list-style-type: none"> <li>▶ All patients with suspected or confirmed coronavirus should receive supportive care with oral hydration and analgesic/antipyretic agents.</li> <li>▶ Initiate antibiotics for any secondary bacterial infections such as pneumonia</li> <li>▶ Patients with acutely worsening symptoms or respiratory distress should be transferred to the hospital via EMS. Alert EMS staff and the receiving ER that the patient has suspected coronavirus.</li> </ul>		N/A
Restricted Movement	No movement of suspected or confirmed cases to include court moves. Notify Classification at Central Office: Michelle Sullivan and Melissa Waldock for coordination. Inmates scheduled for release from a facility that are isolated or quarantined, will require notification to Section of Epidemiology (public health) 1-877-427-7317. Medical staff will need to facilitate this notification and education to inmate.		
Meals	Meals provided in room with disposable utensils/plates/etc.		

Table: Facility Infection Control Measures During an Outbreak

**Kansas Department of Corrections  
Covid19 response overview**

The purpose of this document is to provide an overview of the Kansas Department of Corrections (KDOC) response to the Coronavirus Disease 2019 (COVID-19) Pandemic.

This document will outline procedures for appropriate screening, assessment testing and infection control of offenders in the custody of the Kansas Department of Corrections.

**INTAKE AND SCREENING OF NEW ADMISSIONS AND CONDITION/PAROLE VIOLATORS**

Upon arrival to a Reception and Diagnostic Unit or Correctional Facility all intakes must undergo screening and evaluation. All new intakes from Non-KDOC facilities must have their temperature taken and asked the following screening questions:

- Today or in the past 24 hours, have you had any of the following symptoms?
  - Fever, felt feverish, or had chills?
  - Cough or Difficulty breathing?
- In the past 14 days, have you had contact with a person known to be infected with the novel coronavirus (COVID-19)?

If the patient answers yes to these questions and has a temperature of greater than or equal to 100.0 or shows any signs of respiratory illness such as cough or difficulty breathing, they will immediately be provided a surgical mask and placed in isolation to undergo a medical assessment and further testing as directed below. **See Figure below.**

If the individual has a negative screen, they will undergo a medical assessment in the usual manner per administrative directive. All new admissions from non-KDOC facilities will be placed on a 14-Day quarantine in designated areas. Offenders housed in either quarantine or isolation will have their service needs triaged and a determination for what services need to be delivered emergently, urgently, or routinely will be made. Service delivery in isolation or quarantine will be provided following the safety and security protocols established by the facility.

- Temperatures will be taken twice each day.

If an individual who is part of a quarantined cohort (group of same individuals) becomes symptomatic, they must be placed in isolation for further evaluation and testing of influenza and COVID-19.

**With respect to COVID-19:**

- **If the individual is tested for COVID-19 and tests positive:** the 14-day quarantine clock for the remainder of the cohort (group) must be reset to 0. Refer to attached Personal Protective Equipment guidelines.
- **If the individual is tested for COVID-19 and tests negative:** the 14-day quarantine clock for this individual and the remainder of the cohort does not need to be reset. This individual can return from medical isolation to the quarantined cohort for the remainder of the quarantine period.

**Kansas Department of Corrections**  
**Covid19 response overview**

- **If the individual is not tested for COVID-19:** the 14-day quarantine clock for the remainder of the cohort must be reset to 0.

If offenders must be moved from the quarantine area for medical emergencies or disciplinary reasons they shall be masked with surgical masks during transport to their designated area.

If necessary due to space limitations, offenders may be quarantined as a cohort (group) by date of entry to the facility. If an individual in a cohort develops symptoms, they shall be isolated from the cohort and proceed to be evaluated by a medical provider. The day count for the quarantine is reset to 0.

**During the quarantine:**

At the end of 14-day quarantine period offenders who remained asymptomatic may be moved to general population cells and wings to complete their RDU process.

**TESTING SYMPTOMATIC NEW ADMISSIONS AND OFFENDERS**

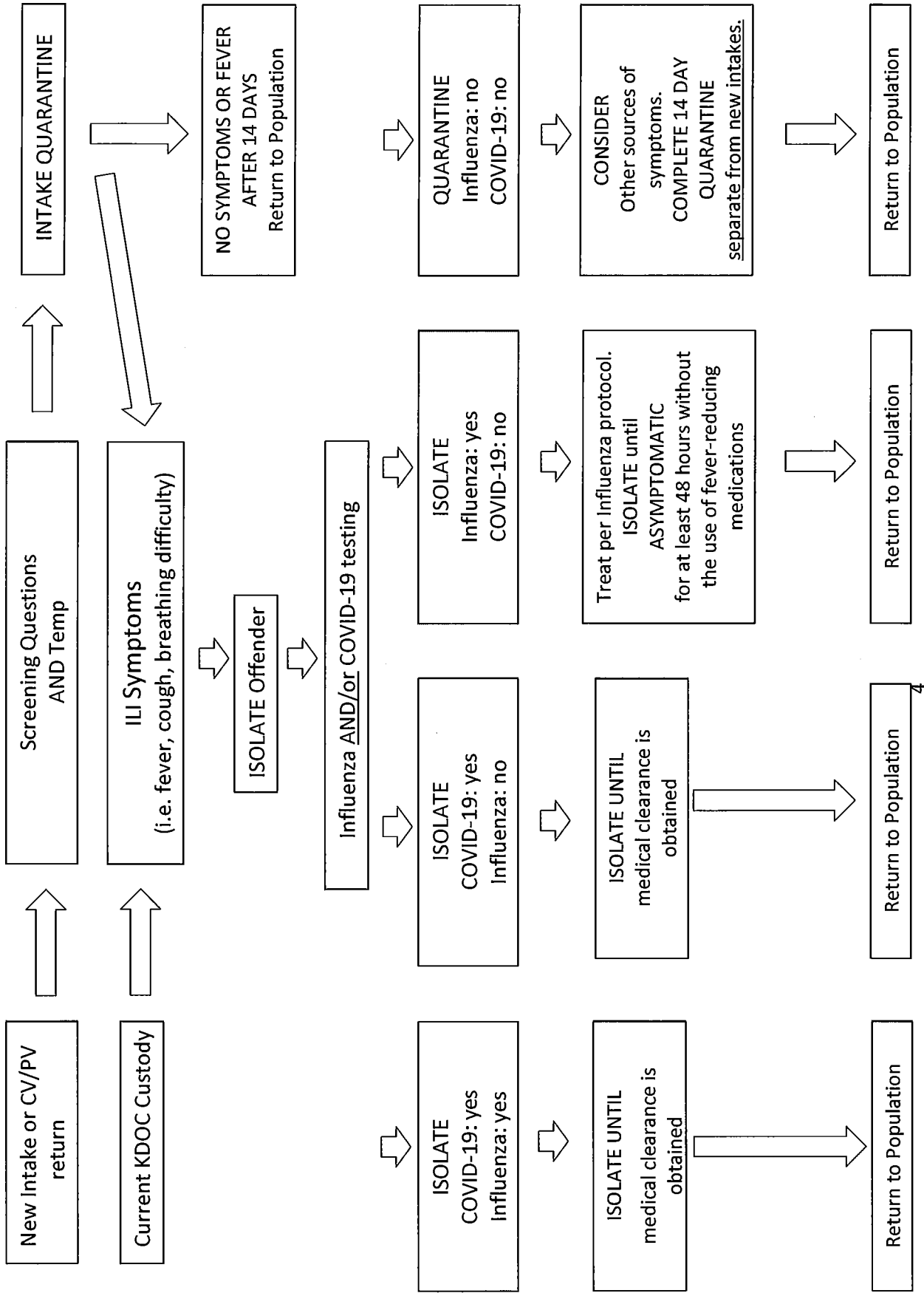
Individuals identified during intake screening or those in KDOC custody who develop symptoms of influenza like illness (ILI) may undergo testing for influenza and coronavirus COVID-19. Individuals with symptoms suggestive of influenza like illness will be identified as such and must be isolated under existing KDOC ILI protocol.

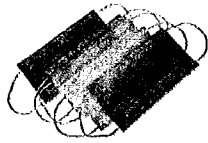
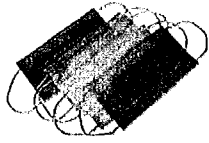
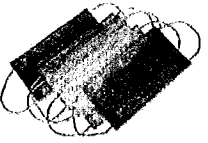
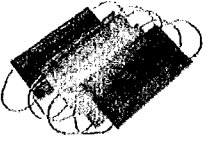



**POSITIVE TEST FOR COVID 19:**

In accordance with the Center for Disease Control (CDC) and the Kansas Department of Health and Environment (KDHE) offenders who have tested positive consider the following recommendations.

- If the number of confirmed cases exceeds the number of individual medical isolation space available in the facility be mindful of areas where individuals are at higher risk of severe illness from Covid19
- Custody staff should be designated to monitor these individuals exclusively where possible
- Minimize transfer/movement of Covid19 cases between areas
- Provide individuals under medical isolation with tissue and, if permissible, a lined no-touch trash receptacle
- Maintain medial isolation until all the following criteria have been met (subject to medical authority)
  - The individual has been free from fever for at least 72 hours without use of fever-reducing medications and
  - The individual's other symptoms have improved (e.g., cough, shortness of breath) and
  - At least seven (7) days have passed since the first symptoms appeared
- Thoroughly clean and disinfect all areas where confirmed or suspected Covid19 individuals spent time
  - Individuals cleaning are to use personal protective equipment
  - Food service items that are disposable need thrown away using PPE
  - Food service items not disposable handled with PPE and sanitized in hot water/dish machine cycle
  - Laundry procedures followed using PPE and designated bins disinfected regularly

# KDOC Covid19 Overview




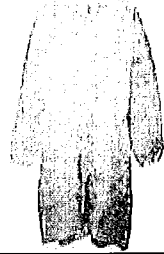
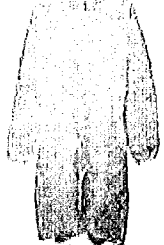
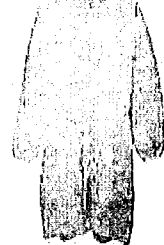
Corrections Officers proximity to the case patient during encounter	Surgical mask or respirator determination	
	Symptomatic patient masked for entire encounter (i.e., with source control)	Unmasked patient or mask needs to be removed for any period of time during the patient encounter
Corrections Officers will remain greater than 6 feet from symptomatic patient or making rounds on unit	No Surgical mask or respirator	No Surgical mask or respirator
Corrections Officers will be within 3 to 6 feet of symptomatic patient	Surgical mask 	Surgical mask 
Corrections Officers will be within 3 feet of symptomatic patient	Surgical mask 	Surgical mask 
Corrections Officers will be present in the room during aerosol generating procedures performed on symptomatic persons	N95 	N95 
Corrections Officers during a pat down or full frisk, ensure patient is facing away from officer.	No Surgical mask or respirator	No Surgical mask or respirator
Corrections Officers during transport of patient, if possible, roll down rear windows approximately 3-4 inches to provide ventilation.	N95 	Patient should wear mask during entire transport.

\*N95 mask are not required for duties associated with routine unit assignment. Remember to practice social distancing. Mask that are used in isolation is **not** to be worn outside of the room around your neck. N95 mask may be re-used up to one shift. You must store the mask appropriately as directed by your site as to not contaminate outside of the isolation area.

FIT Testing is required only if wearing the N95 mask. Recommend pre FIT-testing a set team of officers who will be the only staff that will need to be in the situations that will require a N95 mask.

## References

1. Dato, VM, Hostler, D, and Hahn, ME. Simple Respiratory Maskexternal icon, *Emerg Infect Dis.* 2006;12(6):1033–1034.
2. Rengasamy S, Eimer B, and Shaffer R. Simple respiratory protection-evaluation of the filtration performance of cloth masks and common fabric materials against 20-1000 nm size particleexternal icon, *Ann Occup Hyg.* 2010;54(7):789-98.
3. CDC

<b>Corrections Officers proximity to the case patient during encounter</b>	<b>Disposable Isolation Gown Determination</b>	
	<b>Symptomatic patient masked for entire encounter (i.e., with source control)</b>	<b>Unmasked patient or mask needs to be removed for any period during the patient encounter</b>
Corrections Officers will remain greater than 6 feet from symptomatic patient or making rounds on unit	No Isolation Gown	No Isolation Gown
Corrections Officers will be within 3 to 6 feet of symptomatic patient	No Isolation Gown	No Isolation Gown
Corrections Officers will be within 3 feet of symptomatic patient	No Isolation Gown, long sleeve shirts are recommended	No Isolation Gown, long sleeve shirts are recommended
Corrections Officers will be present in the room during aerosol generating procedures performed on symptomatic persons	Isolation Gown 	Isolation Gown 
Corrections Officers during a pat down or full frisk, ensure patient is facing away from officer.	No Isolation Gown, long sleeve shirts are recommended	No Isolation Gown, long sleeve shirts are recommended
Corrections Officers during transport of patient, if possible, roll down rear windows approximately 3-4 inches to provide ventilation.	Isolation Gown 	Isolation Gown 

Isolation Gowns – may be used in the care of multiple patients that are cohorted and non-visibly soiled. If it becomes soiled, it must be discarded. Disposable gowns may not be reused due to fasteners typically break during doffing.

## References

1. CDC

**Kansas Department of Corrections  
Coronavirus Supplemental Screening for Work Release Inmates**

**Practice distancing from others 6 feet when possible**

**>If NO to all questions: Completion of the form is not required, the individual is clear for purpose of this screening.**

**>Any individual response as yes – this form shall be completed.**

Inmate Name:		Inmate Number:	
Unit/Room:		Date/Time:	
1.	Today, does the offender have a fever $\geq 100.0^{\circ}$ Fahrenheit ( $37.7^{\circ}$ C)? Temperature must be taken.	Yes	No
2.	Today, does the offender have any chills?	Yes	No
3.	Today, does the offender have any shivering?	Yes	No
4.	Today, does the offender have a cough?	Yes	No
5.	Today, does the offender have shortness of breath?	Yes	No
6.	Today, does the offender have body aches?	Yes	No
7.	Today, does the offender have weakness?	Yes	No
8.	Today, does the offender have a headache?	Yes	No
9.	Today, does the offender have loss of taste or loss of smell?	Yes	No
10.	Today, does the offender have a sore throat?	Yes	No

***For an individual when # 1 is yes (Temperature is  $\geq 100.0^{\circ}$  Fahrenheit) and answering "Yes" to questions # 2, 3, 4, 5, 6, 7, 8, or 9 immediately provide the inmate with a mask and direct them to medical immediately for further evaluation. Medical must clear the inmate to return to work.***

***Staff completing/assisting with screen shall immediately notify Shift Commander when directing an individual to medical.***

**Completed by:**

**Printed Name:** \_\_\_\_\_ **Date/Time:** \_\_\_\_\_

**Shift Commander Name:** \_\_\_\_\_ **Date/Time:** \_\_\_\_\_

**Note:** Runny nose, sneezing, and sore throat are likely signs of a cold. Rarely, in only 5% of cases, are these symptoms associated with COVID-19

Version: 4/13/20

**Kansas Department of Corrections  
Coronavirus Supplemental Screening for Employees**

>If NO to all questions: Completion of the form is not required, the individual is clear for purpose of this screening.

>Any individual response as yes – this form shall be completed.

Employee Name:		Employee Number:	
Classification/Job Title:		Date/Time:	
1.	Does the employee have a fever $\geq 100.0^{\circ}$ Fahrenheit (37.7°C)? Temperature must be taken: _____	Yes	No
2.	Does the employee have symptoms of lower respiratory illness (e.g. cough, shortness of breath)	Yes	No
3.	Has the employee had <b>close contact</b> with a confirmed COVID-19 patient within 14 days of symptom onset and is currently exhibiting symptoms. If "Yes", when _____ who _____ <b>Close contact is defined as:</b> a. Being within approximately 6 feet (2 meters) or within the room or care area for a prolonged period (e.g. healthcare personnel, household members) <b>while not wearing recommended personal protective equipment</b> (i.e. gowns, gloves, respirator, eye protection). b. Having direct contact with infectious secretions (e.g. sneezed or coughed on) while not wearing recommended personal protective equipment.	Yes	No
4.	Has the employee traveled outside of Kansas, other than their place of residence, within 14 days? Where: _____	Yes	No

**>For an individual answering "Yes" to questions #1, immediately provide the staff member with a mask and instructions that they must stay on leave until 72 hours after fever is gone without the use of fever reducing medication and there has been a significant improvement in symptoms. Staff completing/assisting with screen shall immediately notify Warden's office, Shift Commander, and Infection Control Nurse.**

**>For an individual answering "Yes" to questions #1 and 2, immediately provide the staff member with a mask and refer them to their medical provider with instructions that they must stay on leave until 72 hours after fever is gone without the use of fever reducing medication and there has been a significant improvement in symptoms. Staff completing/assisting with screen shall immediately notify Warden's office, Shift Commander, and Infection Control Nurse.**

**>For an individual answering "Yes" to question #3 that is asymptomatic, may return to work with a face mask at all times during their shift during the 14 days after exposure. If during the 14 days after exposure the employee develops any symptoms during shift, they will be sent home. The employee must stay on leave until 7 days from the onset of symptoms or 72 hours after fever is gone without the use of fever reducing medication and there has been a significant improvement in symptoms.**

**> For an individual answering yes to question #4 and yes to question #1 immediately provide the staff member with a mask and refer them to their medical provider with instructions that they must stay on leave until medically cleared to work by a licensed clinician and return to work with a note.**

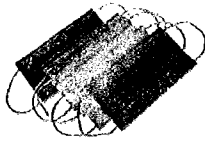
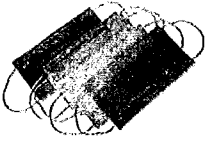



Completed by:

Printed Name: \_\_\_\_\_ Date/Time: \_\_\_\_\_

Shift Commander Name: \_\_\_\_\_ Date/Time: \_\_\_\_\_



## Surgical Mask or Respirator Determination

Corrections Officers proximity to the case offender during encounter	Surgical mask or respirator determination	
	Symptomatic Offender masked for entire encounter (i.e., with source control)	Identified symptomatic Offender who is unmasked or mask needs to be removed for any period of time during the offender encounter
Corrections Officers will remain greater than 6 feet from symptomatic offender or making rounds on unit	No Surgical mask or respirator	No Surgical mask or respirator
Corrections Officers will be within 3 to 6 feet of symptomatic offender	Surgical mask 	Surgical mask 
Corrections Officers will be present in the room during aerosol generating procedures performed on symptomatic persons	N95 	N95 
Corrections Officers during transport of offender if possible, roll down rear windows approximately 3-4 inches to provide ventilation. 	N95 Corrections Officer to wear N95 during entire transport, Gown, and Gloves	Offender should wear Surgical mask during entire transport.  Corrections Officer to wear N95 during entire transport, Gown, and Gloves





\*N95 mask are not required for duties associated with routine unit assignment. Remember to practice social distancing. Mask that are used in isolation is **not** to be worn outside of the room around your neck. N95 mask may be re-used up to one shift. You must store the mask appropriately as directed by your site as to not contaminate outside of the isolation area.


FIT Testing is required only if wearing the N95 mask. Recommend pre FIT-testing a set team of officers who will be the only staff that will need to be in the situations that will require a N95 mask.

### References

1. Dato, VM, Hostler, D, and Hahn, ME. [Simple Respiratory Mask](#)external icon, *Emerg Infect Dis.* 2006;12(6):1033–1034.
2. Rengasamy S, Eimer B, and Shaffer R. [Simple respiratory protection-evaluation of the filtration performance of cloth masks and common fabric materials against 20-1000 nm size particles](#)external icon, *Ann Occup Hyg.* 2010;54(7):789-98.
3. CDC 2020 Coronavirus

## Correction Officers Pat Down or Full Frisk, Property Pack Out PPE Determination

Corrections Officers proximity to the case patient during encounter	Disposable Isolation Gown and Mask Determination	
	Asymptomatic or Symptomatic patient with or without mask for entire encounter (i.e., with source control)	Identified symptomatic patient who is unmasked patient or mask needs to be removed for any period of time during the patient encounter
<b>Offenders in General Population</b>		
Corrections Officers during a pat down or full frisk, ensure patient is facing away from officer. This also include full strip search(Potential exposure to a source patient is a few seconds during pat down)	No Gown or mask is needed  Gloves only 	No Gown or mask is needed  Gloves only 
<b>RETURN FROM OUTSIDE OF FACILITY ONLY: (Contact with community)</b>		
Corrections Officers during a pat down or full frisk, ensure patient is facing away from officer. This also includes full strip search. (Potential exposure to a source patient is a few seconds during pat down)	Surgical mask      Gloves  No Gown needed	Surgical mask      Gloves  No Gown needed

Corrections Officers Packing out symptomatic Offenders	
Corrections Officers packing out items/belongings from a symptomatic offender	Corrections Officer to wear N95, Gown, and Gloves  







**\*Symptomatic patient is exhibiting symptoms or we are awaiting test results or test results are positive for COVID-19.**

**Wash your hands after removing gloves with soap and water for at least 20 seconds.**

### References

1. CDC 2020 Coronavirus

## Disposable Isolation Gown Determination

Corrections Officers proximity to the case patient during encounter	Disposable Isolation Gown Determination	
	Symptomatic patient masked for entire encounter (i.e., with source control)	Identified symptomatic patient who is unmasked patient or mask needs to be removed for any period of time during the patient encounter
Corrections Officers will remain greater than 6 feet from symptomatic patient or making rounds on unit	No Isolation Gown	No Isolation Gown
Corrections Officers will be within 3 to 6 feet of symptomatic patient	No Isolation Gown	No Isolation Gown
Corrections Officers will be within 3 to 6 feet of symptomatic patient	No Isolation Gown	Isolation Gown  <b><u>10 minutes or greater with source patient without mask wear a Gown</u></b>
Corrections Officers will be within 3 to 6 feet of symptomatic offender	No Isolation Gown	<b><u>If less than 10 minutes with source patient without mask,</u></b>  <b><u>NO Gown required</u></b>
Corrections Officers will be present in the room during aerosol generating procedures performed on symptomatic persons	Isolation Gown 	Isolation Gown 
Corrections Officers during transport of offender, if possible, roll down rear windows approximately 3-4 inches to provide ventilation. 	Isolation Gown  Corrections Officer to wear N95 during entire transport, Gown, and Gloves	Isolation Gown  Corrections Officer to wear N95 during entire transport, Gown, and Gloves

Isolation Gowns – may be used in the care of multiple patients that are cohorted and non-visibly soiled. If it becomes soiled, it must be discarded. Disposable gowns may not be reused due to fasteners typically break during doffing.

### References

CDC 2020 Coronavirus

Replaces any version prior to this date.

Revision Date: 4/2/2020

## MEMORANDUM

**TO:** Capitol Complex Tenant Agencies OFPM-20-102  
**FROM:** Frank Burnam, Director of Facilities and Property Management  
**DATE:** March 12, 2020  
**SUBJECT:** Cleaning & Disinfecting Response to Novel Coronavirus - Statehouse & Capitol Complex

---

### Cleaning & Disinfecting Response to Novel Coronavirus

#### Statehouse & Capitol Complex

The Office of Facilities & Property Management (OFPM), as the responsible party for cleaning and maintaining the facilities within the Capitol Complex, is taking the following steps to combat the spread of the 2019 Novel Coronavirus (COVID-19).

OFPM currently uses the following antimicrobial products approved by the EPA for use against COVID-19:

Virex II (EPA no. 70627-24) Diversy, Inc.

- Dilutable concentrate mixed by machine and used by OFPM custodial staff on all solid surfaces. Mixed material is transferred to plastic spray bottles which are labeled as such. Product is applied and then allowed the required 10 minutes on surface to disinfect, then wiped with cloth and allowed to air dry. Employees are required to use gloves when applying product.

Clorox Disinfecting Wipes (EPA no. 5813-79) The Clorox Company

- Wipes used by OFPM custodial staff to wipe all surfaces. Non-bleach formula allows product to be used on metal surfaces (door handles, elevator buttons, handrails) without damaging finish. Gloves are not required, and wipes are disposable.

GOJO – Pomeberry Foam Handwash (68% alcohol) – USDA Certified Biobased Product

- Standard liquid soap supplied in all campus restroom and breakroom dispensers. Alcohol content of product has been identified as effective in combating viruses with proper handwashing practices.

OFPM has identified the Statehouse as a high-traffic area of focus for additional cleaning and will take the following actions to increase daily custodial responsibilities:

- OFPM has placed orders for standalone PURELL sanitizing stations that would be located at the visitor center vestibule before visitors enter security. Stations will also be placed in the Statehouse garage elevator lobbies. (Please note, as of now, these units are in short supply or on back order. OFPM has placed an order for 20 units and will continue to look at alternatives in the short term.)
- OFPM will provide both Capitol Police (screening station) and Historical Society (visitor information desk) with Clorox Wipes so they can self-clean surfaces in between scheduled use of Virex II product by OFPM.
- Custodial staff have been directed to increase frequency of cleaning with Clorox Wipes for the following:
  - door handles, exit devices, brass stair handrails, elevator cab controls/call station
  - folding tables (before and after scheduled event setup)
  - committee room podiums – public & legislative microphones
- As required for large gatherings or as needed, OFPM will re-assign staff from other buildings to support the statehouse.

Within the Capitol Complex buildings, OFPM has identified public spaces as areas of focus for additional cleaning and will take the following actions to increase daily custodial responsibilities:

- Deploy standalone PURELL sanitizing stations at the main entrances – upon availability.
- Provide Capitol Area Guard (security & information station) with Clorox Wipes so they can self-clean surfaces in between scheduled use of Virex II product by OFPM.
- Custodial staff have been directed to increase frequency of cleaning with Clorox Wipes for the following:
  - door handles, exit devices, stair handrails, elevator cab controls/call station
  - break room and vending area surfaces
  - public conference room tables and equipment
- Continue to wipe down individual tenant offices with Virex II once a day as part of standard cleaning. Tenants are asked by OFPM custodial staff if they want their worksurface, keyboard and phone done as well.

At this time, due to short supply of hand sanitizer and wipes, OFPM cannot supply individual tenant agencies with product. Virex II, for example, is an industrial cleaner that would require gloves and proper training to be safe and effective.

We would encourage tenant agencies to provide their own additional products like sanitizer for staff and visitors. OFPM is available to provide a list of [EPA approved products specific to COVID-19](#) upon request.

Please feel free to contact the OFPM customer service center at 785-296-3144 if you have any additional questions.

Frank Burnam, R.A.  
Director of Facilities and Property Management / OFPM  
Kansas Department of Administration

## Lease Property/Public Facing State Offices Email

### Cleaning & Disinfecting Response to Novel Coronavirus

The Office of Facilities & Property Management (OFPM) is providing this guidance document in response to combat the spread of the novel coronavirus (COVID-19).

We understand that each of your situations maybe different in how your custodial services are structured in your lease or in some cases self-performed. We would encourage you to contact your landlord or custodial service provider to inquire about products and practices they are employing and how that complies with current CDC recommendations. Suggested topics of conversations you may wish to have:

1. What specific disinfectants and products are being used and are they approved by the EPA for combating COVID-19? (Please refer to attached list of products)
2. How often do they wipe down heavily used surfaces including – door handles, handrails, elevator buttons, exit devices, counters, vending and conference rooms?
3. Do they wipe down personal office workstation surfaces, keyboards and phones or will they upon request?
4. Can vendor supply additional product for your staff to use in between scheduled daily cleanings and are these products safe for employee use or do they require gloves or special protection?
5. In shared facilities how is your building owner/services cleaning shared common area spaces?
6. Have an understanding of what is standard service and what could be considered additional services so that you are aware of any cost increase up front.
7. Please note that standard products like Clorox wipes are on the approved EPA list as an effective means to self-perform cleaning. Unfortunately these everyday products are in very short supply and state contract vendors are unable to commit to filling orders at this time.

Please visit the following CDC links containing guidance documents and encourage posting and distribution to your staff.

Slides: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/workplace-school-and-home-guidance.pdf>

Guidance on Preparing Workplaces for COVID-19: <https://www.osha.gov/Publications/OSHA3990.pdf>

Posters - <https://www.cdc.gov/coronavirus/2019-ncov/communication/factsheets.html>

OFPM is in communication with Kansas Division of Emergency Management (KDEM) and will continue to seek additional resources. Please feel free to contact OFPM customer service center 296-3144 if you have questions or we can be of assistance in directing you to additional resources and services.

Office of the Secretary  
Curtis State Office Building  
1000 SW Jackson St., Suite 540  
Topeka, KS 66612-1367



Phone: 785-296-0461  
[www.kdhoks.gov](http://www.kdhoks.gov)

Lee A. Norman, M.D., Secretary

Laura Kelly, Governor

### **For Immediate Release**

March 3, 2020

For more information, contact:

Ashley Jones-Wisner

[Ashley.JonesWisner@ks.gov](mailto:Ashley.JonesWisner@ks.gov)

Kristi Zears

[Kristi.Zears@ks.gov](mailto:Kristi.Zears@ks.gov)

## **The Kansas Department of Health and Environment Announces COVID-19 Online Resource Center**

The Kansas Department of Health and Environment (KDHE) today formally announced the launch of the agency's online resource center for Kansans to learn more about COVID-19, the novel coronavirus, get answers to commonly asked questions about the virus and review other helpful information. The site is part of KDHE's ongoing efforts to inform Kansans about the latest COVID-19 news and correct misinformation about the virus.

"The best thing Kansans can do is be informed," Dr. Lee Norman, KDHE Secretary, said. "COVID-19 is a new virus and, as a result, many people have questions about it and how to keep their families safe. The COVID-19 resource center will provide a centralized location for Kansans to go to learn the most up-to-date information."

The public can visit [www.kdheks.gov/coronavirus](http://www.kdheks.gov/coronavirus) to learn more about the virus. The site contains detailed information, answers to frequently asked questions and updated videos from Secretary Norman. Information will also be shared on KDHE's social media channels.

"KDHE is working closely with local and federal authorities to ensure that every effort is made to keep Kansans safe and healthy," Norman said. "In addition to educating yourself about the virus, the public can also take precautions to prevent the spread of it by doing simple things like washing your hands, practicing good hygiene techniques and staying home if you're sick. This is the best defense to COVID-19."

The 2019 novel coronavirus infections were initially diagnosed in Wuhan City, China and have now been reported in 60 locations internationally, including cases in the United States. KDHE, along with its community partners, continue to investigate this illness.

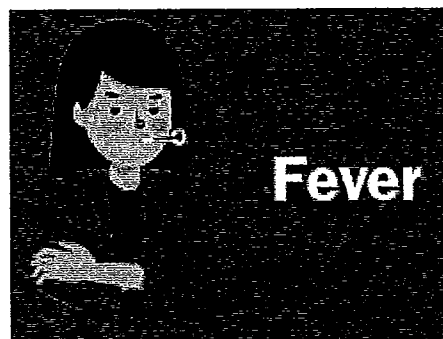
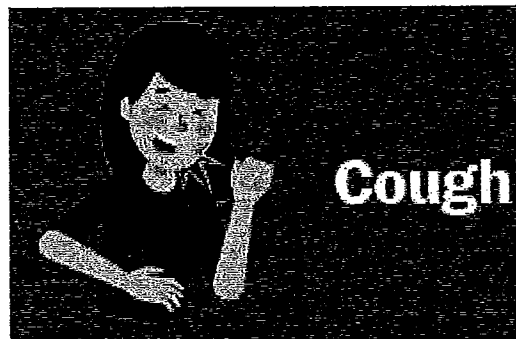
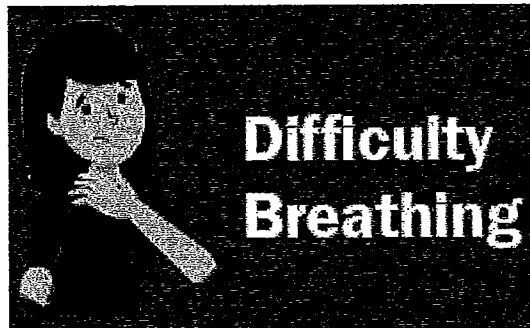
If you have recently traveled to areas including China, Iran, Italy, Japan and South Korea and have developed fever with lower respiratory symptoms including cough and shortness of breath within 14 days of your travel or have had contact with someone with a laboratory-confirmed case of COVID-19, stay home and call your healthcare provider.

For more information about COVID-19, visit KDHE's website and Frequently Asked Questions at [www.kdheks.gov/coronavirus](http://www.kdheks.gov/coronavirus) and [www.cdc.gov/coronavirus](http://www.cdc.gov/coronavirus).

###



Effective Immediately  
If you have any of these  
symptoms:



You may not enter our Facility

DO YOUR PART

# SLOW THE SPREAD OF GERMS



**Cover your coughs  
and sneezes**



**Stay home when  
you're sick**



**Wash your  
hands often**



U.S. Department of  
Health and Human Services  
Centers for Disease  
Control and Prevention

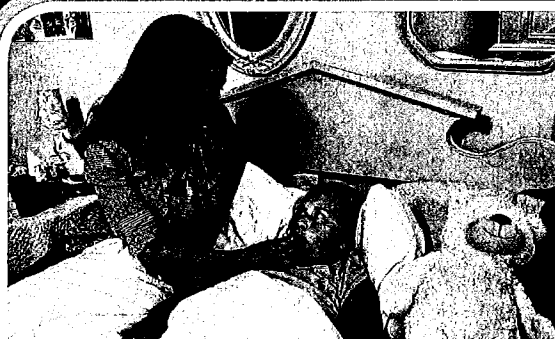
For more information: [www.cdc.gov/np](http://www.cdc.gov/np)  
1 800-CDC-INFO (232-4636) | [www.cdc.gov/info](http://www.cdc.gov/info)

PONGA DE SU PARTE

# FRENE LA PROPAGACIÓN DE LOS MICROBIOS



**Cúbrase la nariz y la boca al toser y estornudar**



**Quédese en casa cuando esté enfermo**



**Lávese las manos con frecuencia**



U.S. Department of  
Health and Human Services  
Centers for Disease  
Control and Prevention

Para más información: [www.cdc.gov/npi](http://www.cdc.gov/npi)  
1-800-CDC-INFO (232-4636) | [www.cdc.gov/info](http://www.cdc.gov/info)

# COVID-19 (2019 Novel Coronavirus)

## What is COVID-19 (2019 Novel Coronavirus)?

The 2019 novel coronavirus, now known as COVID-19, is a virus strain that was newly identified at the end of 2019. Health experts are concerned because little is known about this new virus and it has the potential to cause severe illness and death in some people.

## What are the symptoms?

People who have been diagnosed with COVID-19 have reported symptoms that may appear in as few as 2 days or as long as 14 days after exposure to the virus:



**Difficulty  
Breathing**



**Cough**



**Fever**

## What is the risk to COVID-19?

Currently the risk to the general public is low. At this time, there are a small number of individual cases in the U.S. To minimize the risk of spread, health officials are working with healthcare providers to promptly identify and evaluate any suspected cases. Travelers to and from certain areas of the world may be at increased risk. See [www.cdc.gov/coronavirus](#) for the latest travel guidance from the CDC.

## How can I avoid getting COVID-19?

If you are traveling overseas (to China but also to other places) follow the CDC's guidance: [www.cdc.gov/travel](#). Right now, COVID-19 has not been spreading widely in the United States, so there are no additional precautions recommended for the general public. Steps you can take to prevent spread of flu and the common cold will also help prevent COVID-19:

- 1. **wash** hands often with soap and water. If not available, use hand sanitizer.
- 2. **avoid** touching your eyes, nose, or mouth with unwashed hands
- 3. **avoid** contact with people who are sick
- 4. **stay** home while you are sick and avoid close contact with others
- 5. **cover** your mouth/nose with a tissue or sleeve when coughing or sneezing

Currently, there are no vaccines available to prevent COVID-19 infections.

## How is COVID-19 treated?



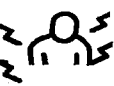









There are no medications specifically approved for COVID-19. Most people with mild COVID-19 illness will recover on their own by drinking plenty of fluids, resting, and taking pain and fever medications. However, some cases develop pneumonia and require medical care or hospitalization.

**For more information, visit [www.cdc.gov/coronavirus](http://www.cdc.gov/coronavirus).**



# COVID-19

## CORONAVIRUS vs. COLD vs. FLU vs. ALLERGIES

SYMPTOMS	COVID-19*	COLD	FLU	ALLERGIES
 <b>Fever</b>	<b>Common</b> (measured at 100 F or higher)	<b>Rare</b>	<b>High (100-102 F), can last 3-4 days</b>	<b>No</b>
 <b>Headache</b>	<b>Sometimes</b>	<b>Rare</b>	<b>Intense</b>	<b>Sometimes</b>
 <b>General aches, pains</b>	<b>Sometimes</b>	<b>Slight</b>	<b>Common, often severe</b>	<b>No</b>
 <b>Fatigue, weakness</b>	<b>Sometimes</b>	<b>Slight</b>	<b>Common, often severe</b>	<b>Sometimes</b>
 <b>Extreme exhaustion</b>	<b>Sometimes</b> (progresses slowly)	<b>Never</b>	<b>Common</b> (starts early)	<b>No</b>
 <b>Stuffy nose</b>	<b>Rare</b>	<b>Common</b>	<b>Sometimes</b>	<b>Common</b>
 <b>Sneezing</b>	<b>Rare</b>	<b>Common</b>	<b>Sometimes</b>	<b>Common</b>
 <b>Sore throat</b>	<b>Rare</b>	<b>Common</b>	<b>Common</b>	<b>No</b>
 <b>Cough</b>	<b>Common</b>	<b>Mild to moderate</b>	<b>Common, can become severe</b>	<b>Sometimes</b>
 <b>Shortness of breath</b>	<b>In more serious infections</b>	<b>Rare</b>	<b>Rare</b>	<b>Common</b>
 <b>Runny nose</b>	<b>Rare</b>	<b>Common</b>	<b>Sometimes</b>	<b>Common</b>
 <b>Diarrhea</b>	<b>Sometimes</b>	<b>No</b>	<b>Sometimes**</b>	<b>No</b>

For more information: [www.kdheks.gov/coronavirus](http://www.kdheks.gov/coronavirus)

\* Information is still evolving.

\*\* Sometimes for children.

***Wheeler v State*, 2019 Kan. App. Unpub. LEXIS 655 (2019)**

# Wheeler v. State

Court of Appeals of Kansas  
October 4, 2019, Opinion Filed  
No. 121,146

## Reporter

2019 Kan. App. Unpub. LEXIS 655 \*; 449 P.3d 780; 2019 WL 4891996

BRETT DAMION WHEELER, Appellant, v.  
STATE OF KANSAS, Appellee.

**Judges:** Before ATCHESON, P.J., MALONE, J.,  
and DANIEL D. CREITZ, District Judge, assigned.

**Notice:** NOT DESIGNATED FOR  
PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR  
CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE  
PACIFIC REPORTER.

**Prior History:** [\*1] Appeal from Leavenworth  
District Court; MICHAEL D. GIBBENS, judge.

State v. Wheeler, 772 P.2d 819, 1989 Kan. LEXIS  
75 (Kan., Apr. 14, 1989)

**Disposition:** Reversed and remanded with  
directions.

**Counsel:** Joseph A. Desch, of Law Office of  
Joseph A. Desch, of Topeka, for appellant.

Sherri Price, special assistant attorney general and  
legal counsel, Lansing Correctional Facility, and  
Derek Schmidt, attorney general, for appellee.

## Opinion

### MEMORANDUM OPINION

PER CURIAM: Inmate Brett Damion Wheeler filed a habeas corpus petition in Leavenworth County District Court. The district court construed the petition as seeking relief under K.S.A. 60-1507 and dismissed it for lack of jurisdiction because Wheeler filed it in the county of his imprisonment, but K.S.A. 60-1507 motions must be filed in the county of the district court that imposed the sentence. Wheeler appeals, arguing that his petition sought relief under K.S.A. 60-1501, so it was properly filed in his county of imprisonment. Wheeler also asks this court to address the merits of his petition and issue a writ of habeas corpus ordering his discharge from further imprisonment or parole. We agree with Wheeler that the district court improperly dismissed his petition for lack of jurisdiction and we reverse and [\*2] remand for further proceedings. We decline to address the merits of Wheeler's petition for the first time on appeal.

### FACTS

In June 1987, a Shawnee County jury convicted Wheeler of two counts of rape and two counts of aggravated sodomy. In July 1987, the Shawnee County District Court sentenced him to concurrent

terms of 10 years to life on each count. Wheeler was first released on parole in February 2000 and was later returned to prison for violating the conditions of his parole. He again was released on parole in April 2002.

In May 2005, Wheeler pled no contest in Wyandotte County to attempted abuse of a child. The district court sentenced Wheeler to 24 months' imprisonment and 12 months' postrelease supervision. The journal entry of judgment ordered the sentence to run "[c]onsecutive to 86CR2627 from Shawnee County; however, it is the court's intention to give the defendant credit for time spent incarcerated from October 11, 2002, to May 2, 2005, as time served on this case."

By August 2005, Wheeler had been paroled again. He absconded in November 2007 and was reincarcerated later that month. Thereafter, Wheeler was paroled at least three times and each time he violated his parole and [\*3] returned to prison. He was paroled again in March 2017 and absconded in February 2018. A Kansas Department of Corrections (KDOC) warrant issued in March 2018, and Wheeler was found to have violated his parole, so he was reincarcerated in April 2018.

On December 13, 2018, Wheeler filed a pro se "Petitioners [*sic*] Habeas Corpus" in Leavenworth County District Court. The petition did not specify whether Wheeler sought relief under K.S.A. 60-1501 or K.S.A. 60-1507, but it asserted that he was being wrongfully imprisoned at Lansing Correctional Facility in Leavenworth County. Wheeler argued that K.S.A. 21-4608(e)(2) mandated that the period of postrelease supervision ordered in the Wyandotte County case controlled, rather than the indeterminate life sentence in the Shawnee County case, because the starting date of his sentence in the Wyandotte County case was before he was paroled in the Shawnee County case. Wheeler also noted that the Wyandotte County sentence was ordered to run consecutive to the Shawnee County sentence. He argued that under *Price v. Simmons*, 31 Kan. App. 2d 631, 632, 71

P.3d 1164 (2002), his indeterminate life sentence imposed in the Shawnee County case necessarily "had to be terminated first before [he] could serve" his sentence for the Wyandotte County case.

The State did not [\*4] respond to Wheeler's petition. On February 25, 2019, the district court issued a form order saying that it had "examined the plaintiff's petition and it plainly appears from the face of the petition and any exhibits attached that the petition should be dismissed." The check-the-box order contained a list of reasons for dismissal, and the district court selected "improper venue, K.S.A. 60-1507(a)" and "Other." Next to "Other," the court wrote: "DISMISSED DUE TO LACK OF JURISDICTION." Wheeler timely appealed and the district court appointed counsel to represent him on appeal.

#### ANALYSIS

In his first issue, Wheeler contends that his petition sought relief under K.S.A. 60-1501, so the district court erred in construing his petition as asserting a claim under K.S.A. 60-1507. The State does not respond to this argument. Instead, the State addresses the merits of Wheeler's claim for release from imprisonment and argues that the district court was right for the wrong reason in dismissing the petition.

Although K.S.A. 60-1501 petitions and K.S.A. 60-1507 motions both start civil habeas corpus proceedings, they serve different purposes. A prisoner seeking to collaterally attack his or her sentence must file a motion under K.S.A. 60-1507, while a K.S.A. 60-1501 petition is for challenging the conditions [\*5] of confinement. *White v. Shipman*, 54 Kan. App. 2d 84, 91, 396 P.3d 1250 (2017). A person must file a K.S.A. 60-1507 motion in the county of the court that sentenced the person, while a person must file a K.S.A. 60-1501 petition in the county in which the person is confined. See K.S.A. 2018 Supp. 60-1501(a); K.S.A. 2018 Supp. 60-1507(a).



When Wheeler filed his habeas corpus petition in Leavenworth County, he was an inmate at Lansing Correctional Facility in Leavenworth County. But the courts that imposed the sentences germane to his current claims were in Shawnee County and Wyandotte County. The district court construed Wheeler's petition as a motion arising under K.S.A. 60-1507 and dismissed it for lack of jurisdiction, finding that Wheeler filed the proceeding in an improper venue.

"Courts are to interpret pro se pleadings based upon their contents and not solely on their title or labels. In construing pro se postconviction motions a court should consider the relief requested, rather than a formulaic adherence to pleading requirements." *State v. Redding*, 310 Kan. 15, 444 P.3d 989, 993 (2019). This court exercises unlimited review over whether a district court properly construed a pro se pleading. 444 P.3d at 993. Likewise, whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *State v. Smith*, 304 Kan. 916, 919, 377 P.3d 414 (2016).

"In a K.S.A. 60-1507 proceeding, an inmate is challenging the criminal proceedings which resulted [\*6] in his or her confinement. . . . In the case of a K.S.A. 60-1501 petition, however, an inmate is challenging the conditions of his or her current confinement." *White*, 54 Kan. App. 2d at 91; see also *Beard v. Maynard*, 223 Kan. 631, 634, 576 P.2d 611 (1978) (holding K.S.A. 60-1507 "has no application" where "the petitioner is not attacking the validity of a sentence").

Wheeler's habeas corpus petition did not allege that the district courts illegally imposed the sentences or that there was some defect in the proceedings that led to the imposition of his sentences. Rather, he claimed that he is being illegally confined despite having completed his sentences of imprisonment. This court has recognized that "[c]hallenges to the mode or condition of confinement, including administrative actions of the correctional institution—like calculating the end date for indeterminate sentences that are aggregated—

should be brought under K.S.A. 60-1501." *Holloway v. State*, 212 P.3d 1039, 2009 Kan. App. Unpub. LEXIS 589, 2009 WL 2436689, at \*2 (Kan. App. 2009) (unpublished opinion). See also *Safarik v. Bruce*, 20 Kan. App. 2d 61, 67, 883 P.2d 1211 (1994) ("[A] 1501 petition is a procedural means through which a prisoner may challenge the mode or conditions of his or her confinement, including administrative actions of the penal institution.").

Wheeler's petition raises an issue properly brought under K.S.A. 60-1501, not K.S.A. 60-1507. See *Davis v. Simmons*, 31 Kan. App. 2d 556, 558-59, 68 P.3d 160 (2003) (addressing merits of K.S.A. 60-1501 petition that argued the KDOC had impermissibly extended [\*7] incarceration); *Muir v. Bruce*, 28 Kan. App. 2d 482, 483-87, 18 P.3d 247 (2001) (same). We find the district court erred as a matter of law by construing Wheeler's petition as seeking relief under K.S.A. 60-1507. Wheeler properly filed his habeas corpus petition in the county of his imprisonment, and the district court erred by dismissing it for lack of jurisdiction.

*Should we address the merits of Wheeler's claim?*

Wheeler next asks this court to resolve the substantive issue he raised in his habeas corpus petition: whether he has completed his sentences and "is entitled to discharge from KDOC custody." He acknowledges that the district court did not reach the merits of his argument, but he asserts that this is a pure question of law based on undisputed material facts, so this court can address the merits for the first time on appeal. Likewise, the State's brief addresses the merits of Wheeler's substantive claim.

At least three panels of this court have declined to address the merits of a K.S.A. 60-1501 petition when the district court erroneously dismissed the petition on procedural grounds. See *Macomber v. Kansas Dept. of Corrections*, 304 P.3d 364, 2013 Kan. App. Unpub. LEXIS 703, 2013 WL 3970209, at \*2-3 (Kan. App. 2013) (unpublished opinion); *Bloom v. Cline*, 288 P.3d 871, 2012 Kan. App.

Unpub. LEXIS 1026, 2012 WL 5974031, at \*2 (Kan. App. 2012) (unpublished opinion); *Markovich v. Green*, 247 P.3d 234, 2011 Kan. App. Unpub. LEXIS 144, 2011 WL 768044, at \*3 (Kan. App. 2011) (unpublished opinion). These decisions reasoned that (1) K.S.A. 60-1503(a) requires a "judge in the district court" to make the first determination [\*8] on the merits of a K.S.A. 60-1501 petition and it would be inappropriate for this court to usurp that statutorily designated role; (2) there is a distinction between this court reviewing an argument the district court rejected—which could be brought in an appeal or cross-appeal—and an argument the district court never considered; and (3) the district court is more readily able to hold hearings to clarify issues raised in a K.S.A. 60-1501 petition than an appellate court, rendering it more appropriate to decide the merits of such a petition for the first time. But see *Yancey v. State*, No. 111,003, 344 P.3d 396, 2015 WL 770204, at \*4 (Kan. App. 2015) (unpublished opinion) (addressing merits of a K.S.A. 60-1501 petition after finding the district court erroneously dismissed for lack of jurisdiction and should have transferred case to proper county).

The rationale discussed in *Macomber*, *Bloom*, and *Markovich* is sound and applies equally to Wheeler's case. In addition, if this court reached the merits of Wheeler's K.S.A. 60-1501 petition, it would first have to determine threshold issues, such as whether Wheeler has proven that he exhausted his administrative remedies as required by K.S.A. 75-52,138. See *Sperry v. McKune*, 305 Kan. 469, 482-83, 384 P.3d 1003 (2016). In his petition, Wheeler tacitly acknowledged that he had not done so, and he asked the district court to apply "a judicially created equitable [\*9] exception to exhaustion" that applies "when the administrative remedies available are inadequate or compliance to [sic] them serves no purpose." The Kansas Supreme Court has recognized such an exception. See *In re Habeas Corpus Application of Pierpoint*, 271 Kan. 620, 622-25, 24 P.3d 128 (2001).

Whether an inmate has exhausted administrative

remedies is a question of law over which an appellate court exercises unlimited review. *Pierpoint*, 271 Kan. at 622-23. But neither Wheeler's brief nor the State's brief adequately address exhaustion of administrative remedies for our court to resolve this issue. Similarly, the district court made no findings on the timeliness of Wheeler's petition, another issue that should be resolved before any resolution of the merits. See K.S.A. 2018 Supp. 60-1501(c).

Here, the district court not only failed to consider the merits of Wheeler's habeas corpus petition, it did not consider other threshold issues such as timeliness and exhaustion of administrative remedies. These issues should be addressed and decided in district court before either party seeks redress on appeal. Thus, we decline the parties' invitation to decide the merits of Wheeler's petition. Instead, we reverse the district court's summary dismissal of Wheeler's petition for lack of jurisdiction and remand for further proceedings.

Reversed [\*10] and remanded with directions.

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*End of Document*

***Bloom v. Miller*, 2017 Kan. App. Unpub. LEXIS 967 (2017)**

**Bloom v. Miller**

Court of Appeals of Kansas

November 17, 2017, Opinion Filed

No. 117,468

**Reporter**

2017 Kan. App. Unpub. LEXIS 967 \*; 405 P.3d 1240; 2017 WL 5507614

STEVEN KENT BLOOM, Appellant, v. KRISTI MILLER, et al., Appellees.

**Judges:** Before BUSER, P.J., BRUNS, J., and STUTZMAN, S.J.

**Notice:** NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

**Subsequent History:** Review denied by Bloom v. Miller, 2018 Kan. LEXIS 324 (Kan., Apr. 26, 2018)

**Prior History:** [\*1] Appeal from Labette District Court; ROBERT J. FLEMING, judge.

**Disposition:** Affirmed.

**Counsel:** Steven Kent Bloom, appellant, Pro se.

Joni Cole, legal counsel, of El Dorado Correctional Facility, for appellees.

**Opinion**

MEMORANDUM OPINION

PER CURIAM: Steven K. Bloom, an inmate at the Oswego Correctional Facility, ordered a book online that was delivered to the prison facility in late August 2016. Upon its delivery, the Kansas Department of Corrections (KDOC) seized the book to evaluate whether its contents posed a safety or security concern. After this review, the KDOC determined that the book's contents violated prison regulations. Bloom exhausted his administrative remedies and then filed a K.S.A. 60-1501 petition in the district court, claiming the seizure of the book violated his constitutional rights. The district court summarily dismissed Bloom's petition. Bloom appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2016, Bloom ordered a book entitled, *Practical Electronics for Inventors*, which was received by the prison facility on August 31, 2016. The KDOC seized the book to allow a mail review officer to evaluate its contents. Upon the review, the officer determined that [\*2] "the content of [the] Book pose[d] a threat to the safety and security of correctional facilities" as prohibited by K.A.R. 44-12-601. The officer wrote that the book contained "[s]tep-by-[s]tep [i]nstructions to build

[c]ircuits/[software] tools." As a result, the KDOC confiscated the book.

Bloom appealed this adverse decision to the Secretary of KDOC. The Secretary affirmed the review officer's decision, stating:

"The response rendered by the mail review officer is appropriate, the evidence presented by the review officer supports the decision to withhold this publication from distribution to inmates housed in the Kansas Department of Corrections Facilities.

"KDOC Information Technology Department states this publication is a risk to perimeter security."

Following the Secretary's decision, Bloom filed a petition for writ of habeas corpus under K.S.A. 60-1501 with the district court. In his petition, Bloom alleged that confiscation of the book violated his rights under the First and Fourteenth Amendments to the United States Constitution and deprived him of the opportunity "to be job ready" as an engineer. Along with his petition, Bloom attached relevant documents which memorialized the KDOC's review of the book, its findings, and the Secretary's decision.

The district court summarily dismissed Bloom's petition and found: [\*3]

"While this Court lacks expertise in the area of electronics, it would certainly appear that a step by step instruction to build circuits/software tools may well pose a definite security threat by a prisoner, especially one with an engineering degree. Furthermore, the prohibition against possession of the book does not apply just to [Bloom] but to all inmates housed in the Department of Corrections Facilities.

"This Court concludes that [Bloom] has failed to allege 'shocking and intolerable conduct or continuing mistreatment of a constitutional stature' and [his] Petition must, therefore . . . be dismissed."

After the summary dismissal, Bloom filed a motion for new trial under K.S.A. 60-259. The district

court denied this motion. Bloom appeals.

#### SUMMARY DISMISSAL OF THE K.S.A. 60-1501 PETITION

On appeal, Bloom submits a pro se brief. In it, he essentially disagrees with the district court's finding that he failed to allege "shocking and intolerable conduct or continuing mistreatment of a constitutional nature." As a result, he contends the district court erred when it summarily dismissed his K.S.A. 60-1501 petition.

At the outset, it is necessary to summarize Kansas law regarding the review and disposition of K.S.A. 60-1501 petitions. To state [\*4] a claim for relief under K.S.A. 60-1501, a petition must allege "shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Johnson v. State*, 289 Kan. 642, 648, 215 P.3d 575 (2009). The threshold question for determining whether conduct is shocking or intolerable is whether the conduct "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847-48, n.8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); *Burch v. Bruffet*, 390 P.3d 123, 2017 WL 754250 (Kan. App. 2017) (unpublished opinion).

When determining whether a K.S.A. 60-1501 petition states a claim for relief, district court's examine the petition and the contents of any attachments to determine if the petition alleges "shocking and intolerable conduct or continuing mistreatment of a constitutional nature." *Schuyler v. Roberts*, 285 Kan. 677, 679, 175 P.3d 259 (2008). In this case, the attachments to Bloom's brief provide important information regarding the contents of the book, the prison mail review process, and the decisions made by prison officials.

"[I]f, on the face of the petition, it can be established that petitioner is not entitled to relief, or if, from undisputed facts, or from uncontrovertible facts, such as those recited in a court record, it appears, as a matter of law, no cause for granting a

writ exists," then summary dismissal is proper. *Johnson*, 289 Kan. at 648-49; see K.S.A. 2016 Supp. 60-1503(a).

With regard to our standard of review on appeal, appellate courts [\*5] exercise unlimited review of a summary dismissal. *Johnson*, 289 Kan. at 649. In our review, we must consider the facts alleged in the petition as true, together with any reasonable inferences that can be drawn from those facts. *Cohen v. Battaglia*, 296 Kan. 542, 546, 293 P.3d 752 (2013).

The facts set forth in the petition and attachments show that KDOC seized Bloom's book in accordance with K.A.R. 44-12-601(d)(1)(A). This prison administrative regulation provides: "Incoming or outgoing mail, other than legal, official, or privileged mail, may be censored only when there is reasonable belief in any of the following . . . [t]here is a threat to institutional safety, order, or security." K.A.R. 44-12-601(d)(1)(A). This regulation applies to all prisoners incarcerated in Kansas, and there are no facts stated to suggest that Bloom is being singled out for enforcement of this regulation.

According to written KDOC documents attached to Bloom's petition, officials confiscated the book after a review of its contents revealed it posed a threat to the safety and security of correctional facilities because it contained "[s]tep-by-[s]tep [i]nstructions to build [c]ircuits/[software] tools." Moreover, this security risk was specifically related to perimeter security as confirmed by the KDOC Information Technology Department. Receipt of books by inmates that threaten the [\*6] safety and security of correctional facilities may be seized as provided by K.A.R. 44-12-601. In Bloom's case, KDOC's determination was made in the ordinary course of enforcing its published administrative regulation. Upon our reading of the petition and the attachments, we concur with the district court's view that Bloom has failed to show the seizure of this particular book constituted "shocking or intolerable" conduct sufficient to withstand

summary dismissal of the petition.

We acknowledge that "[t]he Constitution protects the right to receive information and ideas. Both [a] sender and [an] inmate have fundamental interests in the inmate's access to the information in published material selected for delivery." *Rice v. State*, 278 Kan. 309, Syl. ¶ 2, 95 P.3d 994 (2004). In this regard, we are also mindful of *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), a case in which the United States Supreme Court set forth four factors for evaluating the reasonableness of regulations similar to K.A.R. 44-12-601 to determine if they are "reasonably related to legitimate penological interests." *Pool v. McKune*, 267 Kan. 797, 804, 987 P.2d 1073 (1999) (quoting *Turner*, 482 U.S. at 89). These four factors are:

"(1) [W]hether a valid and rational connection exists between the regulation and a legitimate governmental interest, (2) whether an alternative means of exercising the constitutional right at issue remains available [\*7] to inmates, (3) the impact of accommodation of the asserted right upon guards, other inmates, and the allocation of prison resources, and (4) the absence of ready alternatives to the course of action taken in the regulation. [Citations omitted.]" *Washington v. Werholtz*, 40 Kan. App. 2d 860, 863, 197 P.3d 843 (2008).

Bloom has not challenged the constitutional validity of K.A.R. 44-12-601(d)(1)(A) in his petition or on appeal. As a result, any issue relating to the constitutionality of K.A.R. 44-12-601 has been waived or abandoned. *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011). Nevertheless, we observe in passing that this regulation relates to the very important and legitimate governmental interest in maintaining the security of our state's correctional facilities.

In this case, the considered opinion of prison officials was that the content of the book endangered the facility's security. The application

of K.A.R. 44-12-601(d)(1)(A) by KDOC officials under these circumstances was not "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847-48, n.8. Upon our independent review, we find no error in the district court's summary dismissal.

and did [\*9] not abuse its discretion in either summarily dismissing Bloom's K.S.A. 60-1501 petition or in denying his motion to alter or amend the judgment.

Affirmed.

#### DENIAL OF THE MOTION FOR NEW TRIAL

For his second appellate issue, Bloom claims the district court abused its discretion when it denied his motion for a new trial. It is within the discretion of the [\*8] district court to grant or deny a new trial under K.S.A. 2016 Supp. 60-259(a), and this court will not disturb such a ruling unless the district court abused its discretion. *Miller v. Johnson*, 295 Kan. 636, 684-85, 289 P.3d 1098 (2012). An abuse of discretion occurs if discretion is guided by an erroneous legal conclusion or goes outside the framework of or fails to consider proper statutory limitations or legal standards. *Matson v. Kansas Dept. of Corrections*, 301 Kan. 654, 656, 346 P.3d 327 (2015).

At the outset, the district court summarily dismissed Bloom's K.S.A. 60-1501 petition. As a result, there was no trial. Under these circumstances, Bloom has not informed us how he was entitled to a *new* trial under K.S.A. 2016 Supp. 60-259(a).

Assuming that Bloom meant to cite K.S.A. 2016 Supp. 60-259(f) which relates to a motion to alter or amend a judgment, we have reviewed the district court's order denying the motion. In the order, the district court determined that Bloom's motion failed to set forth sufficient grounds to warrant relief. In particular, the district court found, "[Bloom] simply argues that the Court was incorrect and [cites] a number of cases [not] one of which is on point or supportive of [Bloom's] motion."

We agree. Although in his motion, Bloom references what he considers were erroneous rulings by the district court, upon our review we conclude the district court correctly applied the law

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***McCaine v. Maschner*, 1987 Kan. App. Unpub. LEXIS 1277 (1987)**



# McCaine v. Maschner

Court of Appeals of Kansas

October 22, 1987, Filed

No. 59,774

## Reporter

1987 Kan. App. LEXIS 1277 \*; 763 P.2d 19

Melvin L. McCaine, *Appellant*, v. Herb Maschner,  
*et al.*, *Appellees*

**Notice:** [\*1] NOT DESIGNATED FOR  
PUBLICATION

**Prior History:** Appeal from Leavenworth District  
Court; James W. Lowry, assigned judge. Affirmed.

**Counsel:** *David C. Van Parys*, of Murray &  
Tillotson, Chartered, of Leavenworth, for the  
appellant.

*Charles E. Simmons and Timothy G. Madden*, of  
Department of Corrections, of Topeka, for the  
appellees.

**Judges:** Abbott, C.J., Briscoe, J., and M. Kay  
Royse, District Judge, assigned.

## Opinion

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## MEMORANDUM OPINION

*PER CURIAM:* Petitioner, Melvin L. McCaine, an inmate at Kansas State Penitentiary, appeals from the trial court's denial of two actions filed pursuant to K.S.A. 60-1501. Petitioner contended he was deprived of adequate psychiatric treatment and also protective custody.

Prior to oral argument in this case, a show cause order was issued regarding petitioner's present status as regards both treatment and custody. In response, respondent stated that petitioner received treatment at Larned State Hospital during the following periods: January 15, 1985, to September 4, 1985; November 13, 1985, to January 15, 1986; and January 27, 1987, to August 5, 1987. Petitioner's counsel agreed in his response to the show cause and at oral argument that petitioner received psychiatric treatment during these periods. [\*2] Although less clear in petitioner's response, petitioner's counsel at oral argument agreed that the issue regarding the adequacy of his psychiatric treatment is now moot in that petitioner has received the highest level of treatment available through the Department of Corrections.

The sole issue remaining is whether the lack of protection given petitioner constituted cruel and unusual punishment in violation of both the United States and Kansas Constitutions. Petitioner contends the protection given him from attacks of his fellow inmates was constitutionally inadequate.

The infliction of cruel and unusual punishment is constitutionally prohibited by both the United States and the Kansas Constitutions. U.S. Const.

amend. VIII; Kan. Const. Bill of Rights, § 9 *Levier v. State*, 209 Kan. 442, 497 P.2d 265 (1972). Kansas courts have defined cruel and unusual punishment as involving a deprivation which is inhumane, barbarous, or shocking to the conscience. *State v. Rouse*, 229 Kan. 600, 605, 629 P.2d 167 (1981); *Turner v. Maschner*, 11 Kan. App. 2d 134, 715 P.2d 425. *rev. denied* 239 Kan. 695 (1986). Although convicted and incarcerated for the commission of crimes, inmates [\*3] retain the right to protection against physical or psychological abuse of unnecessary indignity. *Levier*, 209 Kan. at 448.

Here, the trial court found petitioner did not prove that respondent failed to protect his life and physical well-being. Where the trial court has made finding of fact and conclusions of law, the function of this court is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. *Williams v. Maschner*, 10 Kan. App. 2d 79, 81, 691 P.2d 1329 (1984).

In this case, the trial court's findings are supported by substantial competent evidence. At the time of the hearing, petitioner was housed in "A" cellhouse, one the most secure parts of the prison. The record shows that prison officials attempted to accommodate petitioner by moving him. Petitioner was also placed in protective custody status. He did testify that seven assaults had occurred since he was placed in protective custody, although he did not report each one. The only incident documented in the hearing was a May 4 assault. The testimony of the corrections counselor indicates not all reports [\*4] of attacks are documented and investigated and he had not read the report of the May 4 assault until the day of the hearing. However, other prison officials were apparently aware of the incident because petitioner was immediately moved to another cellhouse after the assault.

The single case cited by petitioner to support his

argument, *Little v. Walker*, 552 F. 2d 193 (7th Cir. 1977), is distinguishable from this case. In *Little*, a cellhouse was seized by a group of inmates while gang rapes were inflicted upon its occupants. The court remanded for further evidence the determination that prison officials deliberately deprived the assaulted prison of protection from attack. Here, there is no evidence that prison officials acted with deliberate indifference to petitioner's safety. To the contrary, the record shows an effort by the officials to provide for his security.

A review of federal cases involving the 8th Amendment and the Civil Rights Act shows in most cases something more than mere negligence must be shown to constitute cruel and unusual punishment. Some element of indifference or bad faith is usually necessary. See *Parker v. McKeithen*, 330 F. Supp. 435 (E.D. [\*5] La. 1971); *Wood v. Maryland Casualty Company*, 322 F. Supp. 436 (W.D. La. 1971); Annot., 51 A.L.R.3d 111, 156, § 8. The record in this case does not demonstrate bad faith or indifference regarding petitioner's security.

Given the evidence of efforts by the prison officials to protect petitioner, it cannot be said they acted unlawfully, arbitrarily, or capriciously, *Levier*, 209 Kan. at 450-51. The treatment of petitioner was not so inhumane, barbarous, or shocking to the conscience as to constitute cruel and unusual punishment. *Turner*, 11 Kan. App. 2d 134.

Affirmed.

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***Gulick v. Kansas Dept. of Wildlife & Parks*, 2013 Kan. App. Unpub.  
LEXIS 467 (2013)**

# Gulick v. Kan. Dep't of Wildlife & Parks

Court of Appeals of Kansas  
May 24, 2013, Opinion Filed  
No. 108,132

## Reporter

2013 Kan. App. Unpub. LEXIS 467 \*; 301 P.3d 790; 2013 WL 2395622

**Judges:** Before LEBEN, P.J., BRUNS, J., and  
HEBERT, S.J.

ROGER GULICK, Appellant, v. KANSAS  
DEPARTMENT OF WILDLIFE AND PARKS, Appellee.

## Opinion

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**Notice:** NOT DESIGNATED FOR  
PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR  
CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE  
PACIFIC REPORTER.

**Prior History:** [\*1] Appeal from Greenwood  
District Court; JANETTE L. SATTERFIELD, judge.

**Disposition:** Affirmed.

**Counsel:** Roger Green, of Law Office of Roger  
Green, LLC, of Grand Junction, Colorado, for  
appellant.

James P. Nordstrom and Samuel A. Green, of  
Fisher, Patterson, Saylor & Smith, LLP, of Topeka,  
for appellee.

## MEMORANDUM OPINION

*Per Curiam:* Roger Gulick appeals from the district court's order of dismissal of his lawsuit filed against the Kansas Department of Wildlife and Parks (Department). Specifically, Gulick contends on appeal that the district court erred in dismissing his lawsuit against the Department for failure to properly serve the Department with process. In addition, the Department cross-appeals from the district court's denial of its motion for summary judgment. Because we conclude that Gulick failed to obtain proper service of process on the Department and that the statute of limitations bars his negligence claim, we affirm the dismissal.

## FACTS

On May 14, 2009, Gulick was fishing in the recreational area at the Fall River State Park when a wildlife and parks officer saw him smoking marijuana. The officer arrested Gulick for possession and placed him in handcuffs. [\*2] The officer then placed Gulick into the passenger side of his truck so that he could transport him to the Greenwood County Jail. Unfortunately, as the officer was leaving the area, he backed into a tree. As a result of the accident, Gulick claims to have suffered significant physical injuries.

On May 10, 2011, Gulick filed a petition against the Department alleging negligence. In the petition, Gulick stated that service of process could be obtained on the Department by serving its Chief Legal Counsel, Chris Tymeson. From a review of the record, it appears that a summons and petition was delivered U.S. Mail to Tymeson at his office on 1020 S. Kansas Avenue, Topeka, Kansas 66612.

The Department filed an answer on May 23, 2011. In its answer, the Department denied that service could be obtained on it by serving its Chief Legal Counsel. Moreover, the Department alleged insufficient service of process as an affirmative defense. The Department also alleged that Gulick failed to serve a K.S.A. 12-105b notice of claim before filing the lawsuit.

On October 28, 2011, the Department filed a motion for summary judgment, asserting that it was immune from liability under the recreational use exception [\*3] of the Kansas Tort Claims Act, K.S.A. 75-6103(a). Gulick filed a motion to continue a hearing on the summary judgment motion and to extend all other court dates including discovery cutoff on January 3, 2012.

On March 22, 2012, the district court denied the Department's motion for summary judgment. In doing so, the district court found that although there were no questions of material fact, the recreational use exception did not apply. The district court also found this case to be distinguishable from other cases where the recreational use exception had been applied because Gulick was in the custody of the State at the time of the accident.

A few days later, on March 28, 2012, the Department filed a motion to dismiss, alleging insufficiency of service of process. The Department argued that service on its Chief Legal Counsel was insufficient as a matter of law and that the statute of limitations had expired. The Department noted that Gulick never attempted to cure the insufficiency even though it was alleged as a defense in its answer and that the 90-day relation back period under K.S.A. 60-203(a) had passed.

The district court heard the motion to dismiss on April 17, 2012. The following [\*4] day, a journal entry of dismissal was entered by the district court dismissing the Gulick's lawsuit for failure to properly or timely serve the Department. Because defense counsel failed to comply with Kansas Supreme Court Rule 170 (2012 Kan. Ct. R. Annot. 267) before presenting the proposed journal entry to the district court, Gulick filed a motion to set aside.

The district court held a hearing on May 8, 2012, to consider Gulick's motion to set aside the journal entry. Two days later, the district court filed another journal entry dismissing the case. On May 11, 2012, Gulick filed an amended notice of appeal, and on May 18, 2012, the Department filed a notice of cross-appeal.

#### ANALYSIS

On appeal, Gulick contends the district court erred in granting the Department's motion to dismiss for insufficient service of process. Whether personal jurisdiction exists is a question of law over which our review is unlimited. See *Shipe v. Public Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 165, 210 P.3d 105 (2009). Likewise, to the extent that statutory interpretation may be required, our review is also unlimited. See *Unruh v. Purina Mills*, 289 Kan. 1185, 1193, 221 P.3d 1130 (2009).

A civil action [\*5] is commenced at the time a petition is filed if service of process is obtained within 90 days after the petition is filed. Otherwise, the action is commenced at the time of service of process. K.S.A. 60-203(a). Because Gulick was suing the Department—an agency of state government—K.S.A. 60-304(d)(5) required that he serve the attorney general or an assistant attorney general. Moreover, Gulick admits that he never served the Kansas Attorney General or an assistant attorney general. Thus, Gulick has failed to obtain proper service as required by K.S.A. 60-203(a).

Because this is a negligence action, there is a 2-year

statute of limitations on Gulick's cause of action. K.S.A. 60-513(a). As such, he had until May 14, 2011, to commence his personal injury action against the Department. Although Gulick filed his petition on May 10, 2011, he has yet to obtain proper service. Hence, the statute of limitations has expired and the 90-day relation back provision under K.S.A. 60-203(a) does not help Gulick's cause.

Nevertheless, Gulick argues that the district court erred in considering the Department's motion to dismiss because it was filed after the deadline for dispositive motions set forth in [\*6] the case management order. But Gulick failed to raise this issue before the district court despite having several opportunities to do so. In particular, we note that Gulick failed to argue that the motion to dismiss was untimely in response to the motion to dismiss, at the hearing on the motion to dismiss, in the motion to set aside journal entry, or at the hearing on the motion to set aside journal entry.

If Gulick had raised the issue of timeliness prior to this appeal, the district court could have used its discretion to determine whether to modify the case management order. See K.S.A. 60-216; *Canaday v. Midway Denton U.S.D. No. 433*, 42 Kan. App. 2d 866, 871-72, 218 P.3d 446 (2009). Likewise, we note that the district court considered and granted the motion to dismiss without raising any concerns about its timeliness. Under the circumstances presented, we find that Gulick's failure to raise this issue below precludes this court from considering it on appeal. See *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009). Moreover, even if we were to decide this issue on the merits, the district court did not abuse its discretion by ruling on the Department's motion [\*7] to dismiss.

Gulick also argues that the Department had to file its defense of lack of personal jurisdiction by motion instead of by responsive pleading. But K.S.A. 60-212(b) states that no defense is waived because it is joined with any other defense or

objection in a responsive pleading or motion. Furthermore, a defense of lack of personal jurisdiction is only waived when it is not timely asserted as a defense. See K.S.A. 60-212(h); *Haley v. Hershberger*, 207 Kan. 459, 465, 485 P.2d 1321 (1971), *superseded by statute on other grounds as stated in Myers v. Board of Jackson County Comm'rs*, 280 Kan. 869, 127 P.3d 319 (2006). Here, the Department properly asserted the defense in its responsive pleading.

Gulick next argues that K.S.A. 60-203(b) saves his claim from being time barred because he had 90 days from the time the court found his service to be improper to obtain valid service. K.S.A. 60-203(b) states:

"If service of process or first publication purports to have been made but is later adjudicated to have been invalid due to an irregularity in form or procedure or a defect in making service, the action shall nevertheless be deemed to have been commenced at the applicable time under subsection (a) [\*8] if valid service is obtained or first publication is made within 90 days after that adjudication, except that the court may extend that time an additional 30 days upon a showing of good cause by the plaintiff."

In *Grimmett v. Burke*, 21 Kan. App. 2d 638, 647-48, 906 P.2d 156 (1995), *rev. denied* 259 Kan. 927 (1996), the court determined that the following factors must exist before K.S.A. 60-203(b) can apply:

"(1) The original service must have 'appeared' to be valid and the returns by the sheriff's office or other process servers must indicate that the service was valid. (2) The record should show that the plaintiff believed in good faith that his or her service was valid and relied on that validity to his or her detriment. (3) The plaintiff had no reason to believe the defendant was contesting service until after the statute of limitations had run, but had no opportunity to take steps to correct the defective service."

The *Grimmett* factors were adopted by the Kansas Supreme Court in *Pieren-Abbott v. Kansas Dept. of Revenue*, 279 Kan. 83, 101-02, 106 P.3d 492 (2005). The *Pieren-Abbott* court held that K.S.A. 60-203(b) was inapplicable when a plaintiff was "clearly informed that the [defendant] [\*9] was contesting service and could easily have served the [defendant] with summonses before the 90-day period in K.S.A. 60-203(a) had expired." 279 Kan. at 102. This court is duty bound to follow *Pieren-Abbott*. See *Anderson Office Supply v. Advanced Medical Assocs.*, 47 Kan. App. 2d 140, 161, 273 P.3d 786 (2012) (stating the Kansas Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the court is departing from its previous position).

After the Department raised the defense of insufficient service of process in its answer, Gulick had 77 days to correct the defective service and have the service of process relate back to the date of filing. K.S.A. 60-203. Had Gulick done so, his cause of action would not be barred by the statute of limitations. In addition, even if Gulick was correct and he should have gotten 90 days from the date of the district court's decision finding insufficient service—which would be contrary to Kansas Supreme Court precedent—he has yet to properly serve the Department. Thus, he still would have failed to cure the defect within 90 days of the district court's decision.

Gulick also argues that K.S.A. 60-304(d)(5) is not the [\*10] exclusive way the Department could be served. He contends that serving the Department's general counsel was proper under K.S.A. 60-205(b)(1), which states that if a party is represented by an attorney, service must be made on the attorney unless the court orders service on the party. But that statute applies to service of pleadings and other papers. It does not apply to service of process to commence an action. See K.S.A. 60-304; *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1272-73, 136 P.3d 457 (2006).

Finally, Gulick argues service was effective under

K.S.A. 60-203(c), which states that "[t]he filing of an entry of appearance has the same effect as service." Gulick argues his case is distinguishable from *Kuhn*, 47 Kan. App. 2d 241, 277 P.3d 1141, because there was no evidence in *Kuhn* that the defendant's attorney ever entered an appearance. Nevertheless, both the defendants in this case and in *Kuhn* filed an answer asserting that service of process was defective. 47 Kan. App. 2d at 242; It appears Gulick is arguing that answering is the same as entering an appearance, as there is no entry of appearance indicated in the record on appeal or the appearance docket.

Regardless, the Department raised [\*11] insufficient service in its answer. A party's attorney's knowledge that service was attempted does not show that the party knew the action was filed, and it does not show substantial compliance with the service statute. *Grimmett v. Burke*, 21 Kan. App. 2d 638, 643, 906 P.2d 156 (1995). Moreover, Kansas law clearly establishes that the defense of insufficient service is preserved when raised by an answer or a motion.

"K.S.A. 60-212 has abolished the old distinction between general and special appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. The defense of lack of jurisdiction of the person is waived only when it is not raised by motion or in the answer itself. This is clearly stated by the express terms of K.S.A. 60-212(h). The defense is then waived not because of defendant's voluntary appearance, but because of the failure to assert the defense within the time prescribed by the rules.' [Citation omitted.]" *City of Hutchinson v. Hutchinson, Office of State Employment Service*, 213 Kan. 399, 406, 517 P.2d 117 (1973).

See also *Haley*, 207 Kan. at 465 (stating a motion for extension of time to answer is not a waiver to the lack of jurisdiction [\*12] due to insufficiency of process; this jurisdictional defense is waived

only when it is not raised by motion or in the answer as expressly stated in K.S.A. 60-212[h]).

We, therefore, conclude that the district court did not err in dismissing this action. Furthermore, because we affirm the district court's dismissal, we need not address the merits of the Department's cross-appeal.

Affirmed.

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