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CLERK OF THE LEAVENWORTH COUNTY DISTRICT COURT
CASE NUMBER: 2020-CV-000106

IN THE DISTRICT COURT OF LEAVENWORTH COUNTY, 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. 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.	Case No. 2020-CV-000106

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Petitioners, through their undersigned counsel, submit this reply brief in support of their Petition for Writ of Habeas Corpus.[1] On April 9, 2020, Petitioners filed this class action habeas petition challenging the unconstitutional conditions of confinement created by the Kansas Department of Corrections' ("KDOC") lack of preventative measures, testing, and treatment for COVID-19. Over the last 20 days since this suit was filed, Respondents' uncontrolled COVID-19 outbreak has swelled almost seven-fold and has spread to at least two new facilities.[2] The spread

[1] Petitioners hereby expressly incorporate all arguments and authorities raised in their reply brief in support of their Petition for Writ of Habeas Corpus filed with the Kansas Supreme Court on April 14, 2020.
[2] *Compare* Petition Ex. D (reporting a total of 23 confirmed cases at Lansing Correctional Facility), *with* Letter from Secretary Jeff Zmuda (April 28, 2020), https://www.doc.ks.gov/kdoc-coronavirus-

has already had deadly consequences, with the first KDOC inmate dying from COVID-19 on April 26, 2020.[3] Respondent Zmuda has predicted that KDOC's peak is still weeks away, meaning there will be more infections, more deaths, and more demands on limited resources in the weeks to come.[4]

While the virus has continued to spread, Respondents have done nothing to change the cramped confinement conditions and compelled, mass congregations to which Petitioners are subject. Inmates are still being forced to eat and sleep within inches of each other, to pay for soap, and to clean their cells with diluted disinfectant solution. Respondents have also acknowledged that Petitioners are receiving inadequate medical care,[5] but they have not identified or implemented any measures to increase their treatment capacity. Petitioners' risk of harm increases with every passing day KDOC's outbreak expands and they will continue to face unreasonable, unconstitutional exposure to this deadly virus absent the swift intervention of this Court.

For the reasons set forth below, Petitioners respectfully request the Court order the relief requested and any other relief the Court deems appropriate.

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updates/2020_April28_FamilyandResidentMessage_FINAL.pdf/view (identifying 76 staff and 77 residents testing positive across three separate facilities).

[3] KDOC Press Release, "Resident Death at Lansing Correctional Facility" (April 27, 2020) https://www.doc.ks.gov/kdoc-coronavirus-updates/2020_April27_LCFDeath.pdf/view.

[4] Email from Secretary Jeff Zmuda, dated April 23, 2020, attached as Exhibit O ("I would caution us that although the number of positive cases in the community may be hitting an apex, our first reported cases were identified weeks after the first reported cases in the state. As such, our peak for the number of active cases may still be a few weeks away").

[5] Tim Carpenter, *Kansas coronavirus update: Higher education grapples with academic, financial uncertainties; KDOC cans prison medical provider*, TOPEKA CAPITAL-JOURNAL (April 18, 2020) https://www.cjonline.com/news/20200418/kansas-coronavirus-update-higher-education-grapples-with-academic-financial-uncertainties-kdoc-cans-prison-medical-provider (KDOC identifying known issues with its medical provider due to ineffective care during the pandemic crisis, with the Secretary of Corrections "accus[ing] the company of failing to maintain an adequate stock of personal protective equipment for health staff and delaying until April 8 issuance of procedures for testing, isolating and treating coronavirus patients [… the KDOC Secretary] also claimed care at Lansing was undermined by a nursing shortage").

FACTUAL BACKGROUND

Prior to the first KDOC staff member testing positive, Respondents declined to adopt any measures to prevent the virus from infiltrating the facility. In particular, Respondents refused to implement screening or temperature checks for staff and failed to implement any social distancing measures for vulnerable inmates.[6] While Respondents have since adopted some precautions and claim these steps "cleave tightly" to CDC guidelines, they are patently insufficient in limiting the spread of the virus.

First, Respondents do not contest that they have failed to separate inmates at least six feet apart. Indeed, Respondents do not dispute that—regardless of whatever procedures Respondents have put in place during the pandemic—Petitioners are still required to sleep within a couple feet of up to a dozen other individuals, and to congregate in groups of a hundred or more people in order to exercise, leave their cells, or eat their meals. Petition Ex. F ¶ 4; Ex. H ¶¶ 4, 6; Ex. I ¶¶ 3, 4; Ex. J ¶¶ 3, 4; Ex. K ¶ 5 ; Ex. L ¶ 4; Ex. M ¶ 5. Instead, Respondents purport that their newly implemented 100-plus person cohorts are the only social distancing measures necessary to protect Petitioners. But Governor Laura Kelly and the Kansas Department of Health and Environment (KDHE) have established that gatherings of more than 10 individuals at a time are illegal in the broader community in light of the risks of pandemic spread.[7] Meanwhile, the CDC Guidance on

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[6] *Id.* ("Hyman said the Department of Corrections declined to implement screening or temperature checks at the Lansing prison gate until a staff member tested positive March 31. He said Corizon urged KDOC to lock down the prison in Lansing to contain what could form into an outbreak, but state officials declined").

[7] *See* Executive Order 20-18(1)(a) (banning mass gatherings "likely to bring together more than 10 people in a confined or enclosed space at the same time"), https://governor.kansas.gov/wp-content/uploads/2020/04/20-18-Executed.pdf; *see also 'Shame!' Kansas' top doctor blasts lawmakers' override of limit on religious gathering size*, FOX 4 (Apr. 8, 2020), https://fox4kc.com/tracking-coronavirus/shame-kansas-top-doctor-blasts-lawmakers-override-of-limit-on-religious-gathering-size/ (KDHE Secretary Norman noting "what the Public needs to do," which is to avoid gatherings of more than ten people).

Management of COVID-19 in Correctional and Detention Facilities directs carceral institutions to implement social distancing strategies that create six feet between all individuals for group activities, housing, meals, and recreation.[8] Cohorting is a last resort under CDC guidance and nowhere in the guidance are cohorts of 100 people validated.[9] Respondents' failure to comply with CDC distancing recommendations has led to more than a 5000% increase in infections in their facilities since their first reported cases at the beginning of this month.[10]

Second, Respondents do not controvert or contest that they are requiring inmates to pay for soap. Instead, they note that there is plenty of soap available in commissary.[11] CDC guidance instructs prisons to provide free and accessible soap.[12] But Respondents are still following their official policy of limiting access to soap only to those who can afford it.[13]

Finally, Respondents have conceded they lack adequate treatment for individuals who become infected by the virus. In an April letter, Respondent Zmuda admitted KDOC was unprepared for COVID-19 and lacked an adequate number of nurses to effectively serve the population of infected inmates.[14] These acknowledgments credit Petitioners' experiences with inadequate medical care in KDOC custody. *See* Ex. A ¶ 30; Ex. F ¶ 7; Ex. G ¶ 6; Ex. H ¶ 8; Ex. J

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[8] *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CENTER FOR DISEASE CONTROL, at 11 (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf.
[9] *Id.* at 11, 19.
[10] *Compare* Tiffany Littler, *3 Lansing Correctional Facility workers test positive for coronavirus*, KSNT (Mar. 31, 2020), https://www.ksnt.com/health/coronavirus/3-lansing-correctional-facility-workers-test-positive-for-coronavirus/ (reporting the first three cases at Lansing Correctional Facility), *with* Letter from Secretary Jeff Zmuda (April 28, 2020), https://www.doc.ks.gov/kdoc-coronavirus-updates/2020_April28_FamilyandResidentMessage_FINAL.pdf/view (identifying 76 staff and 77 residents testing positive across three separate facilities).
[11] Respondents' Appendix at 13.
[12] *CDC Guidance for Correctional and Detention Facilities*, *supra* note 8, at 8 ("Provide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing").
[13] *See* Supplemental Declaration of Monica Burch, attached as Exhibit P, ¶¶2-4.
[14] Carpenter, *supra* note 5 (Respondent Zmuda claimed in the letter to its medical provider that "care at Lansing was undermined by a nursing shortage").

¶ 6; Ex. L ¶ 7 (identifying concerning lack of responsiveness and unavailability of medical staff resources). Respondents have not identified any measures they have adopted to increase their capacity to treat inmates who contract the virus. Indeed since Respondent Zmuda acknowledged inadequate preparedness and staffing levels and terminated KDOC's medical provider less than two weeks ago,[15] Respondents have not identified that any additional staff have been hired or that any new protocols have been implemented.

Overall, Respondents have taken no steps to actually mitigate Petitioners' serious risk of exposure to the pandemic since it has infiltrated KDOC facilities, nor do they claim they have taken any meaningful steps to implement the required social distancing since the filing of this Petition. Respondents are continuing with business as usual while predicting that its peak outbreak is still weeks away.[16] In addition to the foregoing, Petitioners re-allege and incorporate by reference all the facts set forth in the Petition for Writ of the Habeas Corpus and Memorandum and Points of Authority.

CONTROVERTED FACTS

Petitioners find no dispute of material fact between the factual submissions of Respondents and Petitioners, and therefore does not controvert Respondents' factual assertions.

ARGUMENTS AND AUTHORITIES

1. The Kansas Supreme Court Properly Consolidated Petitioners Wilson, Trotter, and Burch's Claims in Its Transfer Order.

On April 14, 2020, the Kansas Supreme Court issued an order transferring jurisdiction to Leavenworth County District Court and consolidating the cases of all individually named

[15] *Id.* ("Kansas Department of Corrections is severing ties with the state prison system's medical provider amid the pandemic responsible for a one-week doubling of the number of infected employees and inmates at Lansing Correctional Facility" following "allegations by Jeff Zmuda, the state corrections secretary, that Corizon was unprepared for COVID-19").
[16] *See* Ex. O at 2.

Petitioners for the just and efficient resolution of this action. Respondents argue that the Kansas Supreme Court's transfer order consolidating the claims of Petitioners Wilson, Trotter, and Burch is somehow void because the Court declined to exercise jurisdiction on the merits of the case—an argument that is premised on the Supreme Court's supposed misunderstanding of its own authority.

The Kansas Supreme Court has explicit authority to decline to exercise jurisdiction *and* "order a case transferred to the appropriate district court." Kan. Sup. Ct. Rule 9.01(b); *see*, *e.g.*, *Orel v. Kan. Democratic Party*, No. 112,487, 2014 Kan. LEXIS 562, at *1-*3 (Kan. Sept. 23, 2014) (as this is an unpublished case, a copy of the case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04). If the decision to decline jurisdiction somehow voided the Court's authority to direct further proceedings of a case, Rule 9.01(b) would limit disposition to dismissals. However, the Kansas Supreme Court has the authority not only to order a case transferred but also to decide the location of the "appropriate district court" where the action should be heard. Here, the Kansas Supreme Court has ordered the case be transferred to a district court and determined that Leavenworth District Court is the appropriate jurisdiction for all petitioners to pursue their case. Respondents seek to selectively void the provisions of the order. They presumably are not arguing the directive to transfer the case is void, but rather only that the Kansas Supreme Court's order that the First Judicial District is the appropriate district court is void. This argument is inconsistent with the Supreme Court's plain authority and with common sense.

Respondents further argue that the Kansas Supreme Court lacks authority to consolidate this action. However, K.S.A. 60-242(c)(1) expressly empowers the Supreme Court to consolidate "civil actions arising out of the same transaction or occurrences" to "promote the just and efficient conduct of the actions." *See also*, *McHorse v. Eaks*, 27 Kan. App. 2d 817, 820, 7 P.3d 1272 (Kan.

App. 2000). Habeas corpus proceedings are civil actions. *Stahl v. Board of County Commissioners*, 198 Kan. 623, 627, 426 P.2d 134 (Kan. 1967); *Smith v. State*, 22 Kan. 922 (Kan. App. 1996). Consequently, habeas petitions are subject to consolidation by the Kansas Supreme Court under the plain meaning of the statute. *See*, *e.g.*, *Schneider v. City of Lawrence*, 56 Kan. App. 2d 757, 766-67, 435 P.3d 1173 (Kan. App. 2019) ("our Supreme Court has consistently held that the plain language of a statute controls how courts must interpret that statute").

Respondents present out of context dicta that the ordinary rules of civil procedure do not apply to habeas actions. But this language refers to the different pleading requirements in habeas corpus proceedings, specifically that summary dismissal is appropriate where the petitioner fails to allege shocking and intolerable conduct or continuing mistreatment. *See Swisher v. Hamilton*, 12 Kan. App. 2d 183, Syl. ¶ 1, 740 P.2d 95 (Kan. App. 1987) ("Proceedings on a petition for writ of habeas corpus filed pursuant to K.S.A. 60-1501 are not subject to the ordinary rules of civil procedure. According to K.S.A. 60-1505(a), '[t]he judge shall proceed in a summary way to hear and determine the cause.' In addition, the summary dismissal of a habeas corpus petition has been affirmed in a number of cases"); *White v. Shipman*, 54 Kan. App. 2d 84, 89-92, 396 P.3d 1250 (Kan. App. 2017) (explaining summary disposition prescribed under K.S.A. 60-1505 was inconsistent with discovery while noting "there may be K.S.A. 60-1501 proceedings where the record is not sufficient to resolve the issues raised in the petition"). Respondents' cases do not stand for the proposition that the rules of civil procedure never apply to the habeas actions; to the contrary, the Court of Appeals held the opposite in *White v. Shipman*.

Indeed, Kansas Courts have consistently recognized the applicability of the rules of civil procedures to habeas actions. *Holt v. Saiya*, 28 Kan. App. 2d 356, 362, 17 P.3d 368 (Kan. Ct. App. 2000); *Lynn v. Pryor*, No. 117,068, 2018 Kan. App. Unpub. LEXIS 406, at *27 (Kan. App. May

25, 2018) (applying K.S.A. 60-102 to habeas action); *Davidson v. Pryor*, No. 112,800, 2015 Kan. App. Unpub. LEXIS 720, at *720 (Kan. App. Aug. 28, 2015) (applying transfer of venue civil procedure rules in habeas corpus context); *Smith v. State*, No. 103,989, 2012 Kan. App. Unpub. LEXIS 40, at *35-36 (Kan. App. Jan. 20, 2012) (noting habeas motion "is a species of civil action to which the Kansas Code of Civil Procedure generally applies") (citing Supreme Court Rule 183) (as these are unpublished cases, a copy of each case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04); *Beaver v. Chaffee*, 2 Kan. App. 2d 364, 373, 579 P.2d 1217 (Kan. Ct. App. 1978).

Given the explicit directive of the Supreme Court's order, the court's plain authority pursuant to Rule 9.01(b), the plain language of K.S.A. 60-242, and extensive case law supporting the application of the rules of civil procedure to habeas actions, this court undoubtedly has jurisdiction over Petitioner Burch, Trotter, and Wilson's habeas actions.

2. Respondents' Myriad Standing Arguments are Unavailing and Cannot Bar this Court from Reaching the Merits of Petitioners' Claims.

Respondents take the position that several Petitioners lack standing because: (1) Petitioners Burch, Trotter, and Wilson live in prisons without a massive COVID-19 outbreak and therefore their claims are not ripe; (2) Petitioners Burch, Trotter, Wilson, Orr, Brooks, and Makthepharak do not claim to be medically vulnerable individuals and therefore suffer no constitutional injury; (3) Petitioner Brooks' cannot claim a constitutional injury for his detention in Respondents' facilities because he was denied parole by the Prisoner Review Board; and (4) Petitioner Teters' claim is now moot because he has contracted COVID-19 on Respondents' watch. Each of these standing arguments is wholly without merit.

First, Petitioner Burch, Trotter, and Wilson need not wait until there is a full-blown COVID-19 outbreak in their facilities to maintain an Eighth Amendment action against

Respondents. Instead, constitutional injury is established for standing purposes by Respondents' failure to take the requisite social distancing precautions. *See Helling v. McKinney*, 509 U.S. 25, 33-34 (1993) ("That the Eighth Amendment *protects against future harm* to inmates is not a novel proposition. . . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them") (emphasis added); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) ("[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease"); *see also Farmer*, 511 U.S. at 833 ("[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course"). Regardless, Petitioners Wilson and Trotter *do* live in a facility with reported COVID-19 cases and yet are still forced to congregate in groups of dozens if not hundreds of other residents. Respondents attempt to dismiss the substantial risk of harm to Petitioners by arguing that only one, perfectly quarantined resident at Topeka Correctional Facility has contracted the virus. Response at 8-9. But since that argument was made we know that another staff member and yet another resident at the facility have tested positive. *See* Letter from Secretary Jeff Zmuda (April 28, 2020), https://www.doc.ks.gov/kdoc-coronavirus-updates/2020_April28_FamilyandResidentMessage_FINAL.pdf/view. Furthermore, Petitioner Burch has indicated that Respondents are cross-pollenating staff from Ellsworth Correctional Facility and Lansing Correctional Facility—thereby increasing the likelihood of spread from Lansing to that facility. Ex. P ¶ 6. Petitioners have also offered conclusive evidence that prisons are serious incubators for the virus when compared with the community at large. *See* Ex. A ¶ 12; Ex. B ¶¶ 4-5; Ex. N at 13:3-8. Both as a matter of law and as a matter of fact, Petitioners Burch, Trotter, and Wilson have demonstrated a substantial risk of future injury that is ripe for judicial

determination. *See Helling*, 509 U.S. at 33; *Pack v. Artuz*, 348 F. Supp. 2d 63, 73 (S.D.N.Y. 2004) (noting that "a substantial risk of serious harm" is all that is required); *cf. United States v. Sanders*, No. 19-20037-01-DDC, 2020 WL 1528621, at *4 (D. Kan. Mar. 31, 2020) (inmates had only "general and speculative fears" of harm because the relevant federal facility had no cases of COVID-19 *and* the prison had already implemented appropriate distancing protocols and crowd limitations to prevent outbreak).[17]

Second, Respondents appear to argue that because Petitioners Burch, Trotter, Wilson, Orr, Brooks, and Makthepharak do not claim they are statistically likely to die if they contract COVID-19, they cannot demonstrate an Eighth Amendment injury. Response at 9-10. It is beyond cavil that conditions of confinement that needlessly expose residents to communicable disease—even a disease the prognosis for which is well short of a death sentence—still easily constitute an Eighth Amendment violation. *See*, *e.g.*, *Flanory v. Bonn*, 604 F.3d 249, 254 (6th Cir. 2010) (Eighth Amendment violation established for depriving plaintiff of toothpaste causing periodontal gum disease); *Masonoff v. DuBois*, 899 F. Supp. 782, 797 (D. Mass. 1995) ("rashes, burning, tearing eyes and headaches meets the objective part of the test for a violation of the Eighth Amendment"); *Satterwhite v. Dy*, No. C11-0528-JCC, 2013 U.S. Dist. LEXIS 9178, at *32 (W.D. Wash. Jan. 23, 2013) (even latent, non-active tuberculosis infection met Eighth Amendment constitutional harm requirements); *see also Helling*, 509 U.S. at 36 (exposure to second-hand smoke can establish an Eighth Amendment violation).

Petitioners have demonstrated that COVID-19 presents a risk of vital organ damage even where it is not lethal. Petition Ex. A ¶¶ 20, 21. But regardless, Governor Kelly's emergency social

[17] Nor can the substantial risk of harm seriously be doubted by Respondents. When Petitioners filed this case, Respondents had only 20 cases of the virus limited to one facility. Already, Respondents have 153 confirmed cases across three different facilities. *See supra* note 2.

distancing order to protect *anyone* in the community from contracting the virus establishes that contracting the virus is an injury of constitutional magnitude *per se* regardless of the person's risk profile. *See* Order 20-18(1)(a); *see also Helling*, 509 U.S. at 36 (constitutional violation for reckless exposure to any communicable disease that "today's society chooses not to tolerate").

Third, Respondents argue that Petitioner Brooks cannot seek habeas relief for his conditions of confinement because he has previously been denied parole. Effectively, the State suggests it has *carte blanche* to subject Petitioner Brooks to even patently unconstitutional treatment merely because he has been passed for parole in years past. This result is untenable and is a fundamental misapprehension of the law. It is true that the Prisoner Review Board is the appropriate body to sue for a deficient parole review process. *Torrence v. Kansas Parole Bd.*, 21 Kan. App. 2d 457, Syl. ¶ 1, 904 P.2d 581 (Kan. App. 1995). But habeas challenges to the constitutionality of conditions of confinement still remain appropriate against the Secretary of Corrections as the actual custodial authority. *See Humphrey v. Riggin*, No. 111,694, 2015 Kan. App. Unpub. LEXIS 42, at *1 (Kan. App. Jan. 23, 2015) (noting that an inmate passed by the PRB's review process was still "in the custody of the Kansas Secretary of Corrections at the El Dorado Correctional Facility") (as this is an unpublished case, a copy of the case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04); *see also* K.S.A. 60-1501(b) (noting habeas process to challenge confinement conditions for all those in KDOC custody). Accordingly, Petitioner Brooks' Eighth Amendment claim—having nothing to do with his previous Prisoner Review Board hearings—continues to be properly brought against Respondents.

Fourth, Respondents make the callous assertion that Petitioner Teters' claim is now moot because he—a cancer survivor with serious liver damage, high blood pressure, and diabetes (Ex. G ¶ 2)—had already contracted the virus just a day after he executed his initial declaration in this

case. That Mr. Teters has COVID-19 and faces an immediate and serious risk of death only highlights the ultimate need for the depopulation relief Petitioners are requesting. In fact, a resident with underlying health conditions who contracted COVID-19 while in custody at Lansing Correctional Facility died just this week. KDOC Press Release, "Resident Death at Lansing Correctional Facility" (April 27, 2020), https://www.doc.ks.gov/kdoc-coronavirus-updates/2020_April27_LCFDeath.pdf/view. Exceptions to the mootness doctrine therefore apply under these circumstances. *See Beaver v. Chaffee*, 2 Kan. App. 2d 364, 371-72, 579 P.2d 1217 (Kan. App. 1978) (identifying that petitioners are entitled to proceed in their habeas action to assert class claims notwithstanding any mootness of their own particular claim, particularly where the harms at issue are otherwise likely to evade review). Respondents cannot avoid liability in this action by exposing every single Petitioner to contracting the virus.

3. Petitioner Makthepharak Was Functionally Incapacitated and Therefore Necessarily Proceeded in this Action Through His Next Friend in Accordance with Kansas Law.

Petitioner Makthepharak appears through his next friend Kayla Nguyen because counsel had no means of obtaining Mr. Makthepharak's signature for the verified petition required to bring this emergency litigation. Signature collection was made impossible in light of non-visitation policies during the COVID-19 pandemic and absent any other means of obtaining his signature at the time. These "practical difficulties," as Respondents call them, are exactly the kind of total barrier to suit that render Mr. Makthephrak functionally incapacitated. *See* K.S.A. 60-1501(a) (allowing next friend standing in a habeas action on behalf of "allegedly incapacitated or incompetent persons"); *see also Warren v. Cardwell*, 621 F.2d 319, 321 n.1 (9th Cir. 1980) (finding next friend standing met where petitioner "could not sign and verify the petition because the prison was locked down") (internal quotation marks omitted). Furthermore, Ms. Nguyen has

submitted a sworn declaration that she has a close personal relationship with Petitioner Makthepharak, and that she will act in his best interests—thereby establishing her suitability as a next friend. Ex. M ¶¶ 3-4, 10.

4. Respondents Cannot Identify a Single Administrative Release Remedy Available to Petitioners and Therefore Administrative Exhaustion Was Clearly Futile.

Respondents have already admitted before the Supreme Court that there are exceptions to administrative exhaustion under K.S.A. 75-52,138. *See* Response to Supreme Court's Order, at 8 ("there are admittedly exceptions to the requirement of administrative exhaustion"). Now that it is clear those exceptions will apply to Petitioners, Respondents ask this Court to eliminate them altogether despite binding appellate precedent. *In re Pierpoint*, 271 Kan. 620, Syl. ¶ 2, 21 P.3d 964 (Kan. 2001); *see also Chelf v. State*, 46 Kan. App. 2d 522, 537, 263 P.3d 852 (Kan. App. 2011). This Court must reject Respondents' attempts to do so.

It should first be noted that whether administrative exhaustion is satisfied or excused is a pure question of law established on the face of the petition at initial review. *See*, *e.g.*, *Smith v. Norwood*, No. 118,779, 2018 Kan. App. Unpub. LEXIS 681, at *11 (Kan. App. Aug. 31, 2018) ("granting the motion for summary dismissal because Smith failed to properly exhaust his administrative remedies"); *Morris v. Cline*, No. 120,025, 2019 Kan. App. Unpub. LEXIS 149, at *9 (Kan. App. Mar. 8, 2019) (same) (as these are unpublished cases, a copy of each case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04); *see also* K.S.A. 75-52,138. Both this Court and the Kansas Supreme Court have already declared that the Petition is meritorious on its face— which is why Respondents have been twice ordered to address the

Petition— notwithstanding any ordinary proof of exhaustion requirements. As such, administrative exhaustion has already been deemed excused.[18]

Regardless, Petitioners have plainly demonstrated that they meet the futility exception to exhaustion based on the extraordinary remedies they request. Specifically, Petitioners request prison depopulation relief categorically unavailable via the Kansas Department of Corrections' grievance process. *In re Pierpoint*, 271 Kan. 620, Syl. ¶ 2 ("Exhaustion of administrative remedies is not required when administrative remedies are inadequate or would serve no purpose"); *see Chelf*, 46 Kan. App. 2d at 537 (excusing failure to exhaust where the Secretary of Corrections had no actual authority to grant the habeas relief requested but could merely make non-binding "recommendations").

Respondents only prove Petitioners' point by cataloguing a list of KDOC administrative release programs for which Petitioners would be ineligible even had they attempted the grievance process. Response at 14-15.[19] Indeed, every single one of the cited release programs is demonstrably futile for Petitioners because either: (1) the Secretary of Corrections could recommend Petitioners for the program but lacks the actual authority to order release[20]; or (2) Petitioners are categorically ineligible based on the particular program requirements.[21] Nor have

[18] Notably, the Kansas Supreme Court in its initial order posed not a single question about Petitioners' failure to exhaust administrative remedies—likely suggesting that exhaustion presented a non-issue for the Court based on the nature of the remedies sought. *See* Supreme Court Order Apr. 10, 2020.

[19] All IMPPs referenced by Respondents and cited by Petitioners are attached hereto as Exhibit Q, and provided in ascending numerical order.

[20] *See* K.S.A. § 22-3728 (identifying that the Prisoner Review Board, and not the Secretary of Corrections, decides who will be granted "functional incapacitation release"); K.S.A. § 22-3728 (Secretary may submit application, but PRB controls "terminal medical release" decision); IMPP 11-114 (requests to the court for sentence modifications—which are in the court's ultimate discretion); IMPP 11-104(III)(E) (Interstate Compact Transfer is in the ultimate discretion of the receiving state).

[21] *See* IMPP 11-126A (limiting "house arrest" program to only those who are within 120 days from release *and* in minimum custody, among other specific requirements); IMPP 11-108 (emergency furlough only available where an inmate's family members are seriously ill; job furlough only available for 48 hours for inmates granted parole to search for employment); IMPP 11-111 (programmatic furlough only available to those individuals participating in work release programs at Wichita Work Release Center or Hutchinson

Respondents identified a single established administrative release program through which any of the Petitioners could have obtained release after filing a grievance. Accordingly, the exception is established.

Finally, Petitioners reiterate that even if the grievance process could have afforded them the requested relief, the need for emergency relief rendered the grievance procedure futile. *See, e.g., Fuqua v. Ryan*, 890 F.3d 838, 848 (9th Cir. 2018). Respondents now admit that not more than one day after Petitioner Teters declared under oath that he feared Respondents were going to expose him to COVID-19 (Ex. G), he tested positive for the virus. Response at 2. The risk of immediate and irreparable harm to Petitioners therefore establishes the futility of first resorting to an entirely unavailing grievance process.

5. Petitioners' Exhibits Are Plainly Valid and Entitled to Full Weight in This Court's Determination.

Respondents argue that four of Petitioners' exhibits are inadmissible or ought to be given less weight by this Court because they involve hearsay. Petitioners will note that the affidavits submitted by Respondents in their Appendix suffer from precisely the same evidentiary hurdles. It is for this reason that the parties have waived admissibility objections so that the Court can consider and give the appropriate weight to all materials submitted by the parties. Nonetheless, we address the merits of each of the following four exhibits Respondents have raised objection two: Petitioners' Exhibits A, B, C, N.

Correctional Facility with less than one year of their sentence remaining); K.S.A. § 75-5220(f) (authorizing discharge from sentence only if inmate has 20 days or less on their sentence); K.A.R. § 44-6-125(g) (authorizing restoration of good time credits under certain circumstances if applicable, but not actually authorizing any kind of automatic release); IMPP 11-128 (reduction of prison sentence only for those serving time for a short probation sanction, which applies to none of the Petitioners); K.S.A. 22-3730 (authorizing parental home confinement only for those with 12 months left on their sentence who also had physical custody of a minor child prior to incarceration, among other crime-specific requirements); K.S.A. § 76-3203(d) (inapposite provision authorizing furlough for juveniles from a juvenile detention facility).

Exhibit A amasses a compendium of published scientific articles, news reports, and court testimony regarding the COVID-19 crisis that were too numerous to cite to directly in Petitioners' Memorandum. Contrary to Respondents' claims of irrelevance, the materials cited speak to the harms COVID-19 poses to Petitioners. Furthermore, a large portion of the materials cited to in Exhibit A are scientific publications that would be subject to the learned treatise exception to the hearsay rule. *See* K.S.A. § 60-460(cc).

Exhibit B is the declaration of a doctor from the Kansas area who has worked on virus prevention and treatment in correctional settings. As such, the exhibit is easily relevant to Petitioners' claims regarding risk of COVID contraction in correctional settings. This expert declaration is also appropriate to consider in a summary proceeding. Notwithstanding Respondents' claims that the appropriate expert procedures have not been followed, under Kansas law unless the judge affirmatively decides to exclude expert testimony, the Court is empowered to consider this testimony without any preliminary inquiry. K.S.A. 60-456 (c) ("Unless the judge excludes the testimony, the judge shall be deemed to have made the finding requisite to its admission"). Because there are not actually any mandatory procedures to follow before submitting an expert's report or declaration, Exhibit B poses no such concern.

Exhibit C is a letter from countless faculty members at Johns Hopkins' Bloomberg School of Public Health, School of Nursing, and School of Medicine regarding the risks of COVID-19. As such, it is also clearly subject to the learned treatise exception to the hearsay rule as a "pamphlet" that is a "reliable authority on the subject." *See* K.S.A. § 60-460(cc).

Finally, Exhibit N is a court hearing transcript from the U.S. District of Kansas, in which Dr. Megha Ramaswamy, a doctor and professor of population health at the University of Kansas Medical School, addressed the likelihood that individuals in prisons in Kansas would contract

COVID-19. Dr. Ramaswamy's in-court statements do not constitute hearsay evidence, and contrary to Respondents' claims, they specifically address the likelihood of future and continued outbreaks at prison and jail facilities across the state of Kansas. Exhibit N is therefore relevant to the claims in the Petition.

6. Respondents Have Been Deliberately Indifferent to the Risk Posed by COVID-19.

Respondents have consistently disregarded the risk created by the current coronavirus pandemic since early March and have continued to fail to implement any meaningful sanitation and distancing protocols.[22] The Court need only look at the exponential spread of the virus since Respondents have implemented their purported preventative steps to see that they have not adopted reasonable measures to abate the risk Petitioners face. *See Wilson v. Williams*, No. 20-cv-00794, 2020 U.S. Dist. LEXIS 70674, at *7 (N.D. Ohio Apr. 22, 2020) (finding likely Eighth Amendment violation notwithstanding the kind of cohorting Respondents claim they have implemented during COVID-19 because even "with 150 family members, there are significant opportunities to increase the risk of spread. Within each housing unit there seems to be little chance of obstructing the spread of the virus").

Creating a new policy does not protect a prison from a finding of deliberate indifference. *Daskela v. District of Columbia*, 227 F.3d 433, 442 (D.C. Cir. 2000); *Ware v. Jackson Co.*, 150 F.3d 873, 882 (8th Cir. 1998). Moreover, a clearly ineffective policy does not defeat a claim of deliberate indifference. *Darrah v. Krisher*, 865 F.3d 361, 374 (6th Cir. 2017); *Kelley v. McGinnis*, 899 F.2d 612, 616 (7th Cir. 1990). Here, all Respondents have provided are ineffective policies on paper. While Respondents claim they have limited intra-prison movement by restricting inmates

[22] Petitioners also ask that the Court consider the discussion in Section I(A)-(B) of Petitioners reply brief before the Supreme Court herewith, which further addresses the substantive merits of Petitioners' claims.

to cohorts in certain facilities, they have no policy or protocols to actually allow for the physical distancing health experts have called for.

Failure to comply with public health guidance strongly indicates deliberate indifference under the Eighth Amendment. *See*, *e.g.*, *Hernandez v. Cty. of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015)(finding noncompliance with CDC guidelines for TB screenings constituted deliberate indifference, explaining "known noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference to a substantial risk of serious harm"); *Wilson*, 2020 U.S. Dist. LEXIS 70674, at *21 (holding prison's failure to separate inmates at least six feet apart, "despite clear CDC guidance" constituted deliberate indifference notwithstanding other purported preventative measures).

As noted above, Respondents' pattern of indifference towards COVID-19 is well-documented starting with their decision to disregard the advice of their own medical contractors to implement screening and lockdown procedures until staff and inmates became infected. *See supra* note 6. They claim that their procedures closely follow CDC guidelines for correctional facilities, but they have failed to comply with one of the most fundamental recommendations of making soap free and widely available. Ex. P ¶¶ 2-4; Supplemental Declaration of Tiffany Trotter, Exhibit R, ¶ 2. Moreover, while Respondents' protocols on paper may be consistent with some aspects of KDHE guidance, it appears they are selectively following them only when KDHE might be monitoring them. Ex. R ¶ 3. These circumstances are plainly sufficient to establish Respondents' deliberate indifference.

7. Petitioners' Requests for Relief Are Both Reasonable and Workable Under the Circumstances.

If Petitioners' present conditions of confinement establish an Eighth Amendment violation, it is for this Court to fashion Petitioners' remedies. Where a petition alleges Eighth Amendment

harms that flow directly from crowded conditions of confinement in prison, courts are empowered to: (1) order the release of petitioners; or (2) order substantial population reduction generally as the appropriate remedy. *See*, *e.g.*, *Warner v. Spaulding*, No. 18-cv-10850-DLC, 2018 U.S. Dist. LEXIS 163775, at *2 (D. Mass. Sept. 24, 2018) ("a court may order the release of prisoners to alleviate unconstitutional prison conditions caused by overcrowding"); *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2010 U.S. Dist. LEXIS 2711, at *35-*36 (N.D. Cal. Jan. 12, 2010) ("defendants shall reduce the population of California's thirty-three adult prisons as follows"); *Harris v. Pernsley*, 654 F. Supp. 1057, 1062, 1064 (E.D. Pa. 1987) (district attorney could not stay enforcement of consent order mandating release of hundreds of prisoners in response to conditions of confinement class action requiring population limits in prison facilities, and noting that although class members were not individually entitled to release, release was the remedy to cure "unconstitutional conditions of confinement"); *McCray v. Sullivan*, 399 F. Supp. 271, 275 (S.D. Ala. 1975) ("This Court finds that the State of Alabama has violated the Constitutional rights of the plaintiff class by confining them in overcrowded and understaffed prisons where their lives and safety are constantly in danger and that corrective measures are demanded" and placing the burden on the State to immediately reduce prison overcrowding before a date certain, or otherwise noting that the Court was "prepared to fulfill its obligations under the law by entering appropriate Orders based on the information presently available to it"); *James v. Wallace*, 406 F. Supp. 318, 332 (M.D. Ala. 1976) (in response to Eighth Amendment violations, barring *any* new prisoners from being incarcerated in Alabama facilities until they reduced incarcerated population to acceptable levels to ensure Eighth Amendment compliance and safety).

Notably, even absent class certification for the purposes of relief, this Court is empowered to order prison de-population that would release other KDOC residents as the remedy for

Petitioners' individual Eighth Amendment harms— which are purely the result of being unable to effectively socially distance in prison facilities without adequate space to do so. *See Brown v. Plata*, 563 U.S. 493, 531 (2011) (identifying that prison de-population that secures the release of other, non-plaintiffs is nonetheless valid as a prophylactic measure to ensure that plaintiffs are protected from the constitutional harms they suffered).

Respondents decry Petitioners' request for relief as a call for blanket release, despite the fact that Petitioners have amply clarified that they merely seek removal from KDOC facilities or de-population of those facilities—by any means the Court or Respondents deem appropriate. This will most often be a question of *how*, and not *whether*, an inmate will complete their sentence. *See Wilson*, 2020 U.S. Dist. LEXIS 70674, at *23 (granting release relief and noting "it bears repeating that the Petitioners are not asking the Court to dump inmates out into the streets" but instead merely seeking "other means of confinement"). Indeed, Respondents themselves have identified the plethora of ways in which they can achieve prison depopulation short of unbridled release through various administrative supervision and community confinement programs that Respondents have refused to meaningfully engage with, notwithstanding the pandemic crisis. *See* Exhibit Q (identifying many of these options). To the extent the Court does not order the individual Petitioners themselves released, this Court can and should order Respondents to rapidly identify eligible candidates for these pre-existing administrative supervision, home confinement, and release programs. This de-population relief would likewise protect Petitioners from living in spaces where it has otherwise been impossible to socially distance or avoid mass congregations during the COVID-19 pandemic.[23]

[23] Respondents' claim that certain KDOC facilities are already "under capacity" is not the relevant inquiry. Instead, the question is whether the facilities are sufficiently de-populated such that mass gatherings are no longer required and inmates have ample space such that they can distance themselves from cellmates and/or unit members.

Nor is this form of relief at all unusual in the current climate. *See Wilson*, 2020 U.S. Dist. LEXIS 70674, at *23; *see also* N.J. Supreme Court Consent Order, No. 84230, Sections B-C (N.J. Mar. 22, 2020); Hawaii Supreme Court Order, Office of Public Defender v. Connors et al., No. SCPW-20-0000200, at 4 (Haw. Apr. 2, 2020); *Elijah Little v. NYS Department of Corrections*, Docket No. 260154/2020 (N.Y. Sup Ct. Mar 25, 2020).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court order the release relief requested in the Petition or any other relief the Court deems just and proper.

Dated: April 29, 2020

Respectfully Submitted,

ACLU FOUNDATION OF KANSAS

/s/ Lauren Bonds

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2020, I electronically filed the foregoing with the Clerk of the District Court's electronic filing system which will serve all registered participants and a copy was also served by email, addressed to Jeff Cowger (jeff.cowger@doc.ks.gov), Natasha Marie Carter (natasha.carter@ag.ks.gov), Kristafer Ailslieger (Kris.Ailslieger@ag.ks.gov), and Fred W. Phelps, Jr (Fred.PhelpsJr@ks.gov), Counsel for Respondents.

/s/ Lauren Bonds
Lauren Bonds

CITED UNPUBLISHED DECISIONS

Humphrey v. Riggin

Court of Appeals of Kansas

January 23, 2015, Opinion Filed

No. 111,694

Reporter
2015 Kan. App. Unpub. LEXIS 42 *; 342 P.3d 2; 2015 WL 423964

ROY HUMPHREY, Appellant, v. DAVID RIGGIN, Chairman, Kansas Prisoner Review Board; and JOHNATHAN OGLETREE, Member, Kansas Prisoner Review Board; and JAMES HEIMGARTNER, Warden, El Dorado Correctional Facility, Appellees.

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 *Humphrey v. Riggin, 2015 Kan. LEXIS 322 (Kan., May 12, 2015)*

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

State v. Humphrey, 258 Kan. 372, 905 P.2d 644, 905 P.2d 664, 1995 Kan. LEXIS 169 (1995)

Disposition: Affirmed.

Counsel: Roy Humphrey, Pro se appellant.

John Wesley Smith, assistant attorney general, and Derek Schmidt, attorney general, for appellees.

Judges: Before MALONE, C.J., PIERRON and STANDRIDGE, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: Roy Humphrey is an inmate in the custody of the Kansas Secretary of Corrections at the El Dorado Correctional Facility in Labette County, Kansas. Humphrey appeals the dismissal of his writ of habeas corpus petition challenging the decision of the Kansas Prisoner Review Board (Board) to deny him parole. Finding no error, we affirm.

FACTS

In October 2013, Humphrey appeared before the Board for a parole suitability hearing. He was incarcerated as a result of several convictions, including one count of first-degree premeditated murder, two counts of aggravated assault, one count of unlawful possession of a firearm, and one count of possession with intent to sell unlawful substances. After considering the necessary statutory factors, the Board denied Humphrey's request for parole and deferred (or passed) reconsideration of the request to November 2016. The Board provided the following reasons for its decision: the serious **[*2]** nature and circumstances of the crimes, Humphrey's history of criminal activities, and the violent nature of the crimes.

In conjunction with the October 2013 hearing, Humphrey filed an action in mandamus alleging his parole eligibility date should have been November 2010 instead of November 2013. In that matter, Humphrey alleged a conflict of interest because David Riggin, as chair of the Board, was responsible for both calculating his parole eligibility date and deciding whether parole was suitable.

After receiving the Board's decision to pass, Humphrey filed

this K.S.A. 60-1501 petition challenging the Board's decision to deny him parole. The Board moved to dismiss the action, and Humphrey filed a brief opposing dismissal. The district court ultimately granted the Board's motion to dismiss without an evidentiary hearing. Based on Humphrey's petition and response to the motion to dismiss, the court found no indication that the Board's denial of Humphrey's parole was done in violation of applicable statutes or that the decision to do so was arbitrary or capricious.

ANALYSIS

A district court may summarily dismiss a petition for a writ of habeas corpus if the allegations in the petition establish no basis **[*3]** for relief or if the incontrovertible facts in the record show "no cause for granting a writ exists." Johnson v. State, 289 Kan. 642, 648-49, 215 P.3d 575 (2009). An appellate court reviews the summary dismissal of a habeas petition without any deference to the summary ruling. See 289 Kan. at 649.

To withstand summary dismissal of a petition seeking relief under K.S.A. 60-1501, the claim of harm or injury to a person being held in government custody must be rooted in "shocking and intolerable conduct or continuing mistreatment of a constitutional stature." 289 Kan. at 648. For example, a petition seeking relief for unlawful detention by a governmental agency is proper under K.S.A. 60-1501 because the detention is a constitutional violation. In his petition for relief, however, Humphrey does not claim unlawful detention but instead alleges the Board erred in denying his request for parole. Denying parole does not itself result in unlawful detention; rather, the prisoner simply must continue to serve a lawfully imposed term of incarceration. In Kansas, a prisoner has no protected legal right to parole from a criminal sentence. Gilmore v. Kansas Parole Board, 243 Kan. 173, 178-80, 756 P.2d 410, *cert. denied 488 U.S. 930, 109 S. Ct. 318, 102 L. Ed. 2d 336 (1988)*; see also Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 11-12, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979) (Nebraska statutory scheme provided parole shall be granted in certain circumstances—unlike Kansas law—thereby creating a liberty interest requiring **[*4]** some measure of due process protection). Because the opportunity for parole in Kansas is a privilege and not a constitutional right, we review a decision denying parole only to determine whether the Board complied with the applicable statutes and that its actions were not arbitrary or capricious. See Payne v. Kansas Parole Board, 20 Kan. App. 2d 301, 307, 887 P.2d 147 (1994).

In the petition he filed with the district court, Humphrey claimed the Board's decision to deny parole in his case was arbitrary and capricious because (1) there were conflicts of interest that may have contributed to the Board's decision; (2) the Board considered racially discriminatory factors in coming to its decision; and (3) the Board failed to request a clinical service report for review by the members before the hearing. On appeal, Humphrey challenges the district court's decision to summarily dismiss these claims without the benefit of discovery.

Conflicts of interest

Humphrey alleges he was deprived of his constitutional right to due process at the parole hearing based on two separate conflicts of interest that may have contributed to the Board's decision to deny parole. First, Humphrey claims a member of the Board used to be Humphrey's former unit team counselor at Lansing Correctional **[*5]** Facility. Second, Humphrey claims a member of the Board was named in Humphrey's mandamus action as the individual who incorrectly computed his parole eligibility date.

Notably, Humphrey provides no facts or details to explain the nature of the conflicts alleged or how they may have contributed to the Board's decision to deny parole. Conclusory allegations relating to potential conflicts of interest are insufficient to raise constitutional issues in habeas review. See e.g., Torrence v. Kansas Parole Board, 21 Kan. App. 2d 457, 459, 904 P.2d 581 (1995) (absent allegations of a specific statutory or constitutional violations, the motivations of individual Board members cannot be scrutinized on appeal).

Racial discrimination

Next, Humphrey alleges he was deprived of his constitutional right to due process at the parole hearing because the Board considered racially discriminatory factors in coming to its decision. Humphrey did not identify the factors that he believed to be discriminatory, citing to only "the Kansas Sentencing Commission." Humphrey clarified in his brief on appeal that he was citing to a 1991 report published by the Kansas Sentencing Commission. Specifically, Humphrey argues commentary within the report stating that nonwhites serve longer periods of **[*6]** time once incarcerated necessarily establishes that the Board considers racially discriminatory factors in making parole decisions. Although the argument presented by Humphrey is significantly flawed for a whole host of reasons, we need not discuss them here because he fails to allege, let alone identify, any racially discriminatory factors considered by the Board in denying parole in his particular case. Conclusory allegations of discrimination are insufficient to raise constitutional issues in

habeas review.

Clinical services report

Humphrey argues the Board's decision to deny parole was arbitrary and capricious because the Board failed to order either a clinical services report or LSIR assessment prior to conducting his hearing. *K.S.A. 2013 Supp. 22-3717(h)* mandates statutory considerations for each parole hearing. The statute provides in material part:

> "At each parole hearing and, if parole is not granted, at such intervals thereafter as it determines appropriate, the board shall consider: (1) Whether the inmate has satisfactorily completed the programs required by any agreement entered under *K.S.A. 75-5210a*, and amendments thereto, or any revision of such agreement; and (2) all pertinent information regarding such inmate, **[*7]** including, but not limited to, the circumstances of the offense of the inmate; the presentence report; the previous social history and criminal record of the inmate; the conduct, employment, and attitude of the inmate in prison; the reports of such physical and mental examinations as have been made, including, but not limited to, risk factors revealed by any risk assessment of the inmate; comments of the victim and the victim's family including in person comments, contemporaneous comments and prerecorded comments made by any technological means; comments of the public; official comments; any recommendation by the staff of the facility where the inmate is incarcerated; proportionality of the time the inmate has served to the sentence a person would receive under the Kansas sentencing guidelines for the conduct that resulted in the inmate's incarceration; and capacity of state correctional institutions." *K.S.A. 2013 Supp. 22-3717(h)*.

Although the statute requires the Board to consider this nonexhaustive list of pertinent information, the statute does not require the Board to order that specific physical or mental examinations be held and reports written prior to holding a parole suitability hearing. Cf. *Priest v. McKune, 178 P.3d 80, 2008 WL 713746 (Kan. App. 2008)* (unpublished **[*8]** opinion) (construing statute to require Board to consider clinical services report that had been requested by, and thereafter submitted to, the Board for consideration prior to the hearing). Indeed, a requirement that such reports be ordered prior to every hearing would unnecessarily expend resources with little utility in cases such as this, where the Board considered the statutory factors and determined that the circumstances of the crimes and criminal history outweighed the other factors.

Discovery

Finally, Humphrey argues the district court abused its discretion by denying him the opportunity to conduct discovery so that he could establish his age and the amount of time he already had served in prison weighed in favor of suitability for parole. But even if located, the discovery sought by Humphrey would have served no purpose because the district court has no authority to substitute its discretion for that of the Board. If there is a serious due process violation or if the Board abuses its discretion, the district court can only remand the case to the Board with instructions to grant the proper hearing and make the proper findings. *Swisher v. Hamilton, 12 Kan. App. 2d 183, 185, 740 P.2d 95*, *rev. denied* 242 Kan. 905 (1987). Given the discovery served no purpose, **[*9]** the district court did not abuse its discretion by denying the opportunity to secure it.

Affirmed.

End of Document

Morris v. Cline

Court of Appeals of Kansas

March 8, 2019, Opinion Filed

No. 120,025

Reporter
2019 Kan. App. Unpub. LEXIS 149 *; 435 P.3d 1183; 2019 WL 1087302

KENNETH LEE MORRIS II, Appellant, v. SAM CLINE, WARDEN, Appellee.

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 *Morris v. Cline, 2019 Kan. LEXIS 289 (Kan., July 22, 2019)*

Prior History: **[*1]** Appeal from Leavenworth District Court; GUNNAR A. SUNDBY, judge.

Disposition: Affirmed.

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

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

Judges: Before POWELL, P.J., LEBEN, J., and KEVIN BERENS, District Judge, assigned.

Opinion

MEMORANDUM OPINION

PER CURIAM: Kenneth Lee Morris II appeals the district court's summary dismissal of his petition for writ of habeas corpus. The district court dismissed the petition because Morris failed to assert deprivation of a constitutionally protected liberty interest. Morris concedes on appeal he did not plead, under the current caselaw, deprivation of any recognized liberty interests before the district court. But rather, he argues that the analysis of procedural due process violations should change so the level of disciplinary offense alleged is considered instead of merely the sanction imposed. Applying current precedent, we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Morris is an inmate at the Lansing Correctional Facility (LCF). On March 27, 2017, a correctional officer issued Morris a disciplinary report for allegedly **[*2]** possessing dangerous contraband. Morris denies he was served with the report. LCF held a hearing on the disciplinary report on April 3, 2017. The hearing officer found Morris guilty. The hearing officer imposed a sanction of 8 days of disciplinary segregation and 60 days of privilege restriction; the privilege restriction sanction was suspended for 180 days.

Morris appealed to the warden and the Secretary of Corrections. Both the warden and the Secretary approved of the hearing officer's decision below. Morris then filed with the district court a petition for a writ of habeas corpus under *K.S.A. 60-1501*. He argued that the hearing below violated his due process rights under the *14th Amendment to the United States Constitution*. Specifically, he argued that his due process rights were violated because the hearing officer denied Morris' request to call two witnesses, failed to accurately document the record, and made an unsupported finding that Morris possessed dangerous contraband. Morris alleged that as a result of the disciplinary conviction, LCF

expelled him from a special management transition program (SMU), thereby causing him to lose $12 per month in incentive pay from the program. Morris also claimed that as a result of the disciplinary conviction, **[*3]** he was forced to remove various personal property from his cell and pay for his photographs to be shipped to his wife. Finally, Morris argued that the disciplinary conviction resulted in him being held in segregation.

The district court summarily dismissed Morris' petition on July 5, 2017. The district court held that Morris' pleading and the file did not indicate "any liberty interest that would trigger court review." Morris filed a motion to alter or amend the judgment on July 27, 2017. The district court denied the motion on August 8, 2017.

Morris timely appeals.

STANDARD OF REVIEW

On appeal, Morris argues that the district court erred by summarily dismissing his petition for failure to identify a protected liberty interest at issue. When a district court summarily denies a petition for writ of habeas corpus, this court applies de novo review. *Johnson v. State, 289 Kan. 642, 648-49, 215 P.3d 575 (2009)*. "To avoid summary dismissal of a *K.S.A. 60-1501* petition, the petitioner's allegations must be of shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *289 Kan. at 648*. Even if a prisoner pleads that he or she was deprived of a constitutional right, summary dismissal is required if "it plainly appears from the face of the petition and **[*4]** any exhibits attached thereto that the plaintiff is not entitled to relief." *K.S.A. 2018 Supp. 60-1503(a)*; *Hogue v. Bruce, 279 Kan. 848, 850, 113 P.3d 234 (2005)*. When reviewing a habeas corpus petition, "courts must accept the facts alleged by the inmate as true." *279 Kan. at 850*.

ANALYSIS

Before the district court, Morris alleged due process violations. First, he argued that his due process rights were violated during the disciplinary hearing because of procedural errors and the denial of his request for two witnesses. Second, he argued that LCF employees made two unauthorized charges to his inmate account to mail personal property to his wife. He also claimed that he lost possession of his personal property items, a desk fan and an AM/FM radio. Finally, he claimed that his due process rights were violated because, as a result of his disciplinary conviction, he was expelled from the SMU program and lost $12 per month in incentive pay.

Our review is unlimited when determining whether an inmate's right to procedural due process has been violated, and we apply a two-step analysis to determine whether an inmate received the protections of due process. First, we must determine whether the State has deprived the inmate of life, liberty, or property. If an inmate has been so deprived, **[*5]** then we must determine the extent and nature of the process to which the inmate is entitled. *Washington v. Roberts, 37 Kan. App. 2d 237, 240, 152 P.3d 660 (2007)* (citing *Hogue, 279 Kan. at 850-51*.)

On appeal, Morris concedes that he did not plead, at the district court level, a recognized liberty interest, as defined by the current caselaw. Rather, Morris argues for a change in the analysis of whether due process was violated. He asserts "that the process due should be keyed to the level of offense, as utilized, and according to, the readily available administrative regulations, and not merely the sanction(s) imposed." Our Supreme Court first announced the two-step inquiry for procedural due process habeas claims in 1996 in *Murphy v. Nelson, 260 Kan. 589, 597-98, 921 P.2d 1225 (1996)*, and has applied it faithfully ever since. See *Johnson, 289 Kan. at 649*; *Hogue, 279 Kan. at 850-51*. "This court is duty bound to follow Kansas Supreme Court precedent unless there is some indication that the court is departing from its previous position." *State v. Beck, 32 Kan. App. 2d 784, 788, 88 P.3d 1233*, *rev. denied 278 Kan. 847 (2004)*. Morris provided no indication that our Supreme Court is departing from this precedent. Therefore, we will follow Supreme Court precedent and apply the two-step procedural due process analysis to Morris' claims.

Disciplinary Hearing Due Process

The hearing officer ordered two punishments in this matter, a 60-day privilege restriction, that **[*6]** was suspended, and 8 days of disciplinary segregation. Morris was never required to serve the 60-day privilege restriction. "Punishments never imposed do not implicate a protected liberty interest." *Hardaway v. Larned Correctional Facility, 44 Kan. App. 2d 504, 505, 238 P.3d 328 (2010)*. "[B]eing placed in disciplinary segregation does not implicate due process rights." *Anderson v. McKune, 23 Kan. App. 2d 803, 807, 937 P.2d 16*, *cert. denied 522 U.S. 958, 118 S. Ct. 387, 139 L. Ed. 2d 302 (1997)*. Based upon these precedents, Morris has not been deprived of life, liberty, or property. The district court was correct to dismiss Morris' due process claims with respect to the disciplinary hearing because neither of the punishments imposed implicate a protected liberty interest.

Collateral Consequences of the Disciplinary Violation

Morris also alleged that three collateral consequences of his disciplinary conviction implicated his liberty interests. First, he claimed that LCF impaired his liberty interests because it expelled him from the SMU program, rendering him ineligible for a $12 monthly incentive pay for program participation. Our Supreme Court has held that restrictions on eligibility for incentive pay do not constitute an atypical or significant hardship sufficient to trigger a liberty interest. *Stansbury v. Hannigan, 265 Kan. 404, 421, 960 P.2d 227, cert. denied 525 U.S. 1060, 119 S. Ct. 629, 142 L. Ed. 2d 567 (1998)*. Therefore, the district court was correct in finding that this allegation **[*7]** did not trigger a liberty interest.

Second, Morris alleged that he lost possession of certain personal property. "When an inmate is afforded the opportunity to possess personal property, he or she enjoys a protected interest in the ownership of that property that cannot be infringed without due process. However, the inmate has no protected right to possession of the property while in prison." *265 Kan. 404, 960 P.2d 227, Syl. ¶ 5*. Morris claims that as a result of his disciplinary conviction, he "lost" a desk fan and an AM/FM radio. It is unclear from the record what happened to these items, only that he was required to have them removed from his possession. Even construing the pleadings and record in the light most favorable to him, Morris has shown only that he was deprived of possession of the items, not deprived of ownership. Therefore, the district court was correct in finding that these allegations did not trigger a liberty interest.

Third, Morris alleged that as result of his sanctions he was forced to mail photographs to his wife, which resulted in unauthorized mailing fees to his account. He claimed LCF officials debited his prisoner account to cover the costs for mailing, even though Morris completed **[*8]** a property disposal form indicating his wife would pick up the property. Morris further alleged that his wife came to the prison multiple times to claim the property but prison officials would not let her take it. Accordingly, Morris alleged, LCF employees instead mailed the property and deducted the costs of mailing from Morris' inmate account without his authorization. Accepting Morris' allegations as true, he was deprived of property (his money) without due process.

Nevertheless, we cannot consider Morris' claims with respect to the unauthorized mailing fees.

> "Normally, an inmate in the custody of the Secretary of Corrections must exhaust all administrative remedies provided by the Secretary of Corrections before filing a civil lawsuit against the State of Kansas. *K.S.A. 75-52,138*. The inmate is responsible for filing proof that his administrative remedies have been exhausted. *K.S.A. 75-52,138*." *Grissom v. Heimgartner, 416 P.3d 178, 2018 Kan. App. Unpub. LEXIS 318, *5, 2018 WL 1973740, at *2 (Kan. App.)* (unpublished opinion), *rev. denied 308 Kan. 1594 (2018)*.

Here, there is no evidence in the record that Morris pursued administrative remedies with respect to the unauthorized mailing fees. Morris appealed his disciplinary conviction to both the warden and the Secretary of Corrections. Neither of these appeals mentioned the mailing fees, and **[*9]** the mailing fees were not a punishment imposed for the disciplinary conviction. The mailing fees do not appear in the record until Morris complained about them in his petition to the district court. Because Morris did not file proof that he exhausted his administrative remedies with respect to the unauthorized mailing fees, the district court was correct to summarily dismiss this claim. While the district court was technically incorrect that Morris failed to adequately plead a liberty interest in the unauthorized charges to his account, it was nevertheless correct to dismiss Morris' petition. We affirms the district court for being right for the wrong reason with respect to the unauthorized mailing fee allegations. See *Love v. State, 280 Kan. 553, 563, 124 P.3d 32 (2005)*. Based on the foregoing, the district court's summary dismissal of the petition was correct.

Affirmed.

End of Document

Orel v. Kan. Democratic Party

Supreme Court of Kansas

September 23, 2014, Decided

No. 112,487

Reporter
2014 Kan. LEXIS 562 *

DAVID OREL, Petitioner, v. KANSAS DEMOCRATIC PARTY, JOAN WAGNON, IN HER OFFICIAL CAPACITY AS CHAIR OF THE KANSAS DEMOCRATIC PARTY, LEE KINCH, IN HIS OFFICIAL CAPACITY AS VICE CHAIR OF THE KANSAS DEMOCRATIC PARTY, AND JASON PERKEY, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE KANSAS DEMOCRATIC PARTY, Respondents.

Prior History: *Taylor v. Kobach, 334 P.3d 306, 2014 Kan. LEXIS 558 (Kan., Sept. 18, 2014)*

Judges: **[*1]** Lawton R. Nuss, Chief Justice.

Opinion by: Lawton R. Nuss

Opinion

ORDER

On September 18, 2014, this court granted Chad Taylor's original petition for writ of mandamus seeking to compel Kris Kobach, Kansas Secretary of State, to not include Taylor's name on the ballots as the Democratic Party candidate for the office of United States Senator in the November 4, 2014, general election.

Later that day, David Orel filed an original petition for writ of mandamus and memorandum in support seeking to compel the Kansas Democratic Party; Joan Wagnon, in her official capacity as Chair of the Kansas Democratic Party; Lee Kinch, in his official capacity as Vice Chair of the Kansas Democratic Party; and Jason Perkey, in his official capacity as Executive Director of the Kansas Democratic Party (the Respondents), to name a Democratic Party candidate whose name and party affiliation would appear on the ballots for the office of United States Senator in the November 4, 2014, general election.

Orel contends relief in mandamus is appropriate because the Respondents have a clear duty under *K.S.A. 25-3905(a)* to name a candidate to replace Taylor. He urges this court to grant his petition and compel Respondents to immediately name a replacement **[*2]** because of a federal statutory deadline requiring ballots be mailed to members of the armed forces and civilians living overseas 45 days before the general election.

According to Orel, that deadline originally fell on September 20, 2014. But Orel filed a Supplemental Notice on September 22, alleging that Kobach had extended the deadline for mailing overseas ballots. Based on Orel's filings, the court hereby orders the following:

> 1. Per *Supreme Court Rule 9.01(b)* (2013 Kan. Ct. Rule Annot. 83), this case is hereby transferred to the district court of Shawnee County, Kansas, the county where, according to Orel's Proof of Service and Supplemental Personal Service filed on September 19, Perkey "accepted service for all defendants [sic], including himself."
>
> 2. Transfer is appropriate because Orel's pleadings do not contain sworn evidence necessary to enable this court to make any of a myriad of legal determinations, including, but not limited to, ripeness, the nature of the parties, the existence of standing, and the propriety or adequacy of the mandamus relief requested. By contrast, in *Taylor v. Kobach, Case No. 112,431, 334 P.3d 306, 2014 Kan. LEXIS 558*, uncontroverted written communications were attached as exhibits to a sworn affidavit submitted **[*3]** with a pleading. Two exhibits enabled our statutory interpretation, a purely legal determination. See *Taylor v. Kobach*, Order of September 11, 2014:
>
> > "There is no need to refer this matter for fact finding by a judge of the district court or a

commissioner as authorized by *Supreme Court Rule 9.01(d)* (2013 Kan. Ct. Rule Annot. 83). The two pieces of evidence relevant to the controlling legal issue of the interpretation and application of *K.S.A. 25-306b(b)* are attached to Petitioner's sworn affidavit as Exhibits A and B."

BY ORDER OF THE COURT this 23rd day of September 2014.

/s/ Lawton R. Nuss

Lawton R. Nuss

Chief Justice

Smith v. Norwood

Court of Appeals of Kansas

August 31, 2018, Opinion Filed

No. 118,779

Reporter
2018 Kan. App. Unpub. LEXIS 681 *; 425 P.3d 373; 2018 WL 4167223

ANTHONY S. SMITH, Appellant, v. JOE NORWOOD, et al., Appellees.

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 *Smith v. Norwood, 2018 Kan. LEXIS 902 (Kan., Dec. 18, 2018)*

Prior History: **[*1]** Appeal from Labette District Court; JEFFRY L. JACK, judge.

Smith v. Roberts, 393 P.3d 1058, 2017 Kan. App. Unpub. LEXIS 261 (Kan. Ct. App., Apr. 14, 2017)

Disposition: Affirmed.

Counsel: Lucas J. Nodine, of Nodine Legal, LLC, of Parsons, for appellant.

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

Judges: Before MALONE, P.J., MCANANY and POWELL, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM: Former inmate Anthony S. Smith appeals the district court's summary dismissal of his *K.S.A. 2017 Supp. 60-1501* petition for writ of habeas corpus, in which he alleged that his conditional release date was incorrect. After a thorough review of the record, we conclude summary dismissal was proper because Smith failed to exhaust his administrative remedies. But even if Smith had properly exhausted his administrative remedies and stated a valid claim for relief, the issue raised is moot as Smith is no longer in the custody of the Secretary of Corrections. Accordingly, we affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts surrounding Smith's *60-1501* petition were previously discussed by another panel of this court in *Smith v. Roberts, 393 P.3d 1058, 2017 Kan. App. Unpub. LEXIS 261, 2017 WL 1367053, at *1-2 (Kan. App.)* (unpublished opinion), *rev. denied 306 Kan. 1320, 2017 Kan. LEXIS 455 (2017)*.

> "Anthony Smith entered prison in the early 1980s and was granted parole in 1991. While on parole, he absconded and a warrant was issued for his arrest in February **[*2]** 1993. He was apprehended on an absconder warrant and arrested for new crimes in May 1993. Smith was sentenced in August 1993 on his new crimes to a pre-guidelines sentence of 3 to 10 years, a term which was added to his sentences on several prior convictions, for an aggregate indeterminate sentence of 10 to 40 years. Due to 'delinquent time' (time between the date his absconder warrant issued and the date he was arrested on the warrant), he was given a conditional release date of November 19, 2009.
> "In January 1995, Smith was again granted parole and

again absconded. An absconder warrant was issued in August 1995. Smith was rearrested in February 1996 and booked into federal custody as he was also under a federal indictment. He remained in federal custody through the resolution of those charges in November 1996, when he was returned to the custody of the Kansas Secretary of Corrections. Due to delinquent time while in absconder status, Smith's conditional release date was adjusted to June 2, 2010.

"Smith was again paroled in November 2006. While on parole, he committed a new crime (Aggravated Battery — Reckless, Bodily Harm) based on an offense on September 30, 2010. For this conviction, **[*3]** he was sentenced to an 18-month determinate sentence, to be served consecutive to his aggregated indeterminate sentence. While Smith was on parole prior to his arrest for the September 30, 2010, offense, his conditional release date of June 2, 2010, passed.

"From June 11, 2013, through October 20, 2014, Smith engaged in a series of grievances and other correspondence alleging that the Kansas Department of Corrections (KDOC) was using an incorrect 'sentence begins date' for his aggregated indeterminate sentence of 10 to 40 years, which affected his conditional release date. He argued that his 'delinquent time' had not been calculated properly into his sentence. Smith received no relief. Among the responses Smith received were two letters from the warden. The first, dated July 15, 2013, stated Smith's conditional release date on his indeterminate sentences had passed on June 2, 2010, when he was out on parole, and he would not be given a new conditional release date. The warden's later response, dated June 11, 2014, informed Smith that his sentence computation is part of the classification decision making process. The warden also acknowledged to Smith that a similar May 2014 inquiry had **[*4]** informed Smith that his sentence computation had been reviewed in October 1993 and Smith was ineligible for conversion. Finally, the warden informed Smith that use of the grievance procedure for classifications is prohibited and that no further action could be taken.

"On November 4, 2014, Smith filed a petition for a writ of habeas corpus in district court. Smith alleged that the KDOC incorrectly calculated his conditional release date and his maximum release date and is unlawfully depriving him of his liberties. The district court issued a writ of habeas corpus on November 18, 2014, ordering Smith to be brought to court for an evidentiary hearing to consider the issue of the lawfulness of his custody. The State moved to dismiss because Smith had not shown that he had exhausted administrative remedies.

> "At the hearing, the State acknowledged that Smith had sent correspondence to the Secretary of Corrections, but it argued that the correspondence was not an appeal of a grievance. The State argued that the 2013 and 2014 grievance issues both involved Smith's desire to change his conditional release date so that he could be released. Smith argued that his 2013 grievance was about his inaccurate **[*5]** conditional release date based on an inaccurate sentence begins date relative to his aggregated sentence, but his 2014 grievance was about how his delinquent time during his periods in which he absconded was miscalculated, causing the KDOC to hold him past his correct conditional release date. The district court took the matters under advisement.
>
> "In its memorandum decision filed on June 1, 2015, the district court granted the State's motion to dismiss and denied Smith's request for a writ of habeas corpus. The court attached two documents to its decision: Smith's 2013 grievance form; and the warden's July 15, 2013, response to that grievance. The decision found as follows: The grievance filed in 2014 involved the same issue as that filed in 2013, since both involved recalculating Smith's conditional release date on his indeterminate aggregated sentence; the 2014 grievance was a 'rehash' of the 2013 grievance, which was not appealed to the Secretary; Smith did not exhaust administrative remedies regarding the 2014 grievance; Smith did not timely file his petition after a final decision regarding the 2013 grievance; and even if Smith exhausted administrative remedies and filed a timely **[*6]** petition, his argument regarding the necessity to recalculate his conditional release date was not meritorious."

That panel ultimately held:

> "[A]lthough Smith followed procedure in 2013, he did not appeal. When he appealed in 2014, he did not follow procedure. We find the district court's factual findings are supported by substantial, competent evidence supporting the conclusion that Smith failed to exhaust his administrative remedies before filing his petition for a writ of habeas corpus in November 2014. Accordingly, we affirm the district court's grant of the State's motion to dismiss and its denial of Smith's petition." *2017 Kan. App. Unpub. LEXIS 261, at *12, 2017 WL 1367053, at *4*.

On March 16, 2017, Smith filed a third habeas petition under *K.S.A. 60-1501* and again argued the same issue he raised in his prior two petitions: his release date was incorrect. However, because the warden failed to timely respond to

Smith's third petition, the district court issued writs of habeas corpus to the warden and Secretary of Corrections; they responded by filing a motion for summary dismissal. Ultimately, the district court granted the motion for summary dismissal, holding that Smith's petition was barred by res judicata.

Smith timely appeals.

DID THE DISTRICT COURT ERR **[*7]** IN DISMISSING SMITH'S 60-1501 PETITION?

We exercise unlimited review of a summary dismissal. *Johnson v. State, 289 Kan. 642, 649, 215 P.3d 575 (2009)*. Additionally, whether the doctrines of res judicata and mootness are applicable are questions of law over which this court exercises unlimited review. See *Cain v. Jacox, 302 Kan. 431, 434, 354 P.3d 1196 (2015)*; *State v. Montgomery, 295 Kan. 837, 841, 286 P.3d 866 (2012)*.

The district court dismissed Smith's third *60-1501* petition through the application of the doctrine of res judicata, holding that the issue had already been litigated. "Before the doctrine of res judicata will bar a successive suit, the following four elements must be met: (a) the same claim; (b) the same parties; (c) claims that were or could have been raised; and (d) a final judgment on the merits." *Cain, 302 Kan. 431, 354 P.3d 1196, Syl. ¶ 2*. Here, the first three elements were met, but it does not appear a final judgment was issued on the merits. Our court affirmed the dismissal of Smith's previous petition because he failed to exhaust his administrative remedies, which is not a decision on the merits of the petition. "A 'final decision' generally disposes of the entire merits of a case and leaves no further questions or possibilities for future directions or actions by the lower court." *Kaelter v. Sokol, 301 Kan. 247, 249-50, 340 P.3d 1210 (2015)*. Therefore, the doctrine of res judicata is not applicable here. However, if **[*8]** a district court reaches the correct result, its decision will be upheld even though it relied upon the wrong ground or assigned erroneous reasons for its decision. *Gannon v. State, 302 Kan. 739, 744, 357 P.3d 873 (2015)*. Thus, we will examine whether summary dismissal was appropriate on another ground.

To state a claim for relief under *K.S.A. 2017 Supp. 60-1501*, a petition must allege "shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Johnson, 289 Kan. at 648*. In addition, an inmate must file "proof that the administrative remedies have been exhausted" with his or her petition. *K.S.A. 75-52,138*. "[S]trict compliance with these exhaustive requirements" is required. *Corter v. Cline, 42 Kan. App. 2d 721, 723, 217 P.3d 991 (2009)*.

> "The administrative steps for filing a grievance and appealing it up the chain within the KDOC is detailed in *K.A.R. 44-15-102*. Essentially, an inmate begins the process by filing a grievance at the Unit Team level. The Unit Team then has 10 calendar days to reply. If the Unit Team does not reply within that timeframe, the inmate's grievance may be sent to the warden without the Unit Team's signature. *K.A.R. 44-15-102(a)*. If the inmate is not satisfied with the Unit Team's response, within 3 days of the response, the [inmate] may request that the grievance be transferred to the warden, attaching any and all documents used to attempt **[*9]** to solve the problem. *K.A.R. 44-15-102(b)*.
>
> "Upon receipt of the grievance by the warden, a serial number is assigned, as well as an acknowledgement of the date of receipt; the warden has 10 working days to answer the inmate's grievance. *K.A.R. 44-15-102(b)(3)(A)*. Any grievance may be rejected by the warden if it does not comport with the regulations. If rejected, the grievance shall be sent back to the Unit Team for an immediate answer to the inmate. *K.A.R. 44-15-102(b)(3)(F)*.
>
> "If no response from the warden is received by the inmate within the time allowed, any grievance may be sent to the Secretary of Corrections with an explanation of the reason for the delay. *K.A.R. 44-15-102(b)(3)(G)*. Grievances can be appealed to the Secretary within 3 [calendar] days if the warden's answer is not satisfactory, and the Secretary then has 20 working days to respond. If, however, a grievance is submitted to the Secretary without prior action by the warden, the Secretary may return the grievance to the warden. If the warden does not respond in a timely manner, the Secretary shall accept the grievance. *K.A.R. 44-15-102(c)*." *Smith, 2017 Kan. App. Unpub. LEXIS 261, at *9, 2017 WL 1367053, at *3*.

Here, Smith has yet again failed to properly exhaust his administrative remedies before filing his petition. On February 20, 2017, Smith filed his grievance at the Unit Team level, and the **[*10]** Unit Team timely responded to Smith's grievance on February 28, 2017. Smith then sent his grievance to the warden on March 6, 2017, who timely responded on March 9, 2017. However, Smith failed to timely appeal from the warden's response to the Secretary of Corrections as required by *K.A.R. 44-15-102(c)(1)*. Thus, based on the attachments to the petition before the district court, Smith failed to exhaust his administrative remedies.

Although a copy of the form Smith sent to the Secretary pertaining to this grievance does appear in the record on

appeal, there are three defects which mandate summary dismissal of Smith's petition. First, proof that Smith exhausted his administrative remedies must be supplied with his petition, and he failed to attach any such proof. See *K.S.A. 75-52,138*. Second, Smith sent his grievance appeal to the Secretary on March 13, 2017 — four calendar days after the warden's answer — rather than the required three calendar days. *K.A.R. 44-15-102(c)(1)*. Third, three days after Smith sent his grievance appeal to the Secretary, he filed his present *60-1501* petition in the district court, depriving the Secretary the permitted 20 working days to respond to Smith's grievance. See *K.A.R. 44-15-102(c)(3)*. Thus, the district court was correct, albeit for **[*11]** the incorrect reasons, in granting the motion for summary dismissal because Smith failed to properly exhaust his administrative remedies.

Finally, even if we assume that Smith had properly exhausted his administrative remedies and that his grievance has merit, this issue is now moot. An issue is moot when "it clearly and convincingly appears that the actual controversy has ceased and the only judgment which could be entered would be ineffectual for any purpose." *Montgomery, 295 Kan. 837, 286 P.3d 866, Syl. ¶ 3*.

Here, Smith's counsel states in his brief that Smith was paroled to a federal detainer on January 11, 2018; counsel also states that this information is reflected on the Kansas Department of Corrections website. Because Smith admits he is no longer in the custody of the Secretary of Corrections, any judgment that could be entered would be ineffectual and would not impact Smith's rights. As we lack the power to effectuate any possible remedy in the federal system, the issue raised in Smith's petition is moot.

Affirmed.

End of Document

Smith v. State

Court of Appeals of Kansas

January 20, 2012, Opinion Filed

No. 103,989

Reporter
2012 Kan. App. Unpub. LEXIS 40 *; 268 P.3d 11

JESSE SMITH, Appellee, v. STATE OF KANSAS, Appellant.

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 *Smith v. State, 2013 Kan. LEXIS 463 (Kan., May 20, 2013)*

Prior History: **[*1]** Appeal from Wyandotte District Court; JANICE D. RUSSELL, judge.

State v. Smith, 39 Kan. App. 2d 204, 178 P.3d 672, 2008 Kan. App. LEXIS 47 (2008)

Disposition: Affirmed.

Counsel: Kristianne N. Gray, assistant district attorney, Edmond D. Brancart, deputy district attorney, Jerome A. Gorman, district attorney, and Steve Six, attorney general, for appellant.

John M. Duma, of Olathe, for appellee.

Judges: Before ATCHESON, P.J., HILL and STANDRIDGE, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: The State asks us to overturn the district court's decision to grant habeas corpus relief to Jesse Smith and order a new trial. We are convinced that the district court's findings of fact are supported by substantial competent evidence and conclude those findings support its decision to grant Smith a new trial. We affirm.

Smith seeks habeas corpus relief after an unsuccessful direct appeal.

Smith is serving a prison sentence for rape. This court affirmed his conviction in *State v. Smith, 39 Kan. App. 2d 204, 178 P.3d 672*, *rev. denied 286 Kan. 1185 (2008)*, after rejecting Smith's challenges to the sufficiency of the evidence, the admission of certain evidence, the application of the rape shield statute, the jury instructions, and the sentence imposed. Although this court held the district court erred in refusing to instruct the **[*2]** jury on voluntary intoxication, it found the error harmless. *39 Kan. App. 2d at 212, 219*.

A brief review of the facts is helpful here. In July 2004, S.L. met Smith for dinner and drinks. S.L. considered Smith a friend and had no sexual or romantic interest in him. After dinner, the two visited several bars. S.L. drank between five and eight beers. Smith was also drinking during this time. At the end of the night and on the way home, S.L. passed out in Smith's vehicle. Smith indicated that it was not safe for S.L. to drive and offered her his bedroom, stating he would sleep on the couch. S.L. accepted Smith's offer. Smith gave S.L. a T-shirt and boxers to sleep in.

Before S.L. went to bed, she told Smith he could sleep on one

side of the bed. S.L. said this did not mean that it was okay for Smith to have sex with her. S.L. said she woke up during the night to find something by her hips but passed out again. S.L. later awoke to discover she had nothing on from the waist down. S.L. saw what appeared to be semen with a black pubic hair on her genital area. S.L. grabbed her clothing and left. S.L. attempted to call her boyfriend but hung up when he became upset about being awakened. The next **[*3]** day, one of S.L.'s coworkers urged her to see a physician, who then urged S.L. to go to the hospital for an exam. After attending a work function at a T-Bones game that night, S.L.'s father took her to the hospital, where she was examined and spoke to police.

At trial, L.S., a witness for the State, testified she met Smith in November 2000. Around Christmas 2000, L.S., Smith, and a group of people went drinking. L.S. said she was "very drunk" and that Smith suggested she come to his house, indicating L.S. could sleep in the bed and he would sleep on the couch. L.S. testified that once she got to Smith's apartment, he gave her a T-shirt. L.S. then went to the bedroom and went to bed. L.S. said that she passed out and the next thing she remembered was waking to find Smith on top of her having sexual intercourse with her. L.S. testified she was seeing a therapist during this time but did not report to the therapist what Smith did to her. L.S. testified that after Smith raped her, she began having a sexual relationship with Smith, he moved in with her, she became engaged to marry him, and the two made arrangements for a wedding; but the engagement was eventually broken off.

In his *K.S.A. 60-1507* **[*4]** motion, Smith claimed his trial attorney, Mark Sachse, was ineffective. Smith contended Sachse was unprepared for trial, failed to properly contact witnesses, was unavailable to speak with Smith prior to trial, and only cursorily cross-examined important witnesses. Smith also noted there were approximately 25 ethical complaints against Sachse prior to his representation of Smith and that Sachse was eventually disbarred from practicing law. Smith requested a new trial.

At an evidentiary hearing on Smith's motion, Smith, Carl Cornwell (a criminal defense attorney), and Sachse testified. After hearing the testimony, the district court granted Smith's motion and ordered a new trial, finding Smith was denied effective assistance of counsel. The district court reasoned that Sachse's preparation leading to trial was inadequate because he failed to follow up on Smith's request that he obtain L.S.'s psychiatric records and move for an independent psychiatric evaluation of L.S. The district court reasoned that L.S.'s testimony was "crucial" and "central to the state's case"—and that Sachse's failure to use basic tools to vigorously cross-examine L.S. undermined a finding that Smith received a **[*5]** fair trial. The court opined that the verdict might have been different had Sachse adequately prepared for trial.

We recite pertinent points of law.

Unusual, but not rare, the State appeals this *K.S.A. 60-1507* ruling. We first consider our standard of review. In *McHenry v. State, 39 Kan. App. 2d 117, 119-20, 177 P.3d 981 (2008)*, this court concluded that the same standard applies on a State's appeal as when the defendant appeals the denial of his or her *K.S.A. 60-1507* motion.

When the district court conducts a full evidentiary hearing on a *K.S.A. 60-1507* motion, the district court is required to make findings of fact and conclusions of law. On appeal, this court gives deference to the district court's findings of fact, accepting as true the evidence and any inferences that support or tend to support those findings. The court must only determine whether substantial competent evidence supports the district court's factual findings and whether those findings are sufficient to support the district court's conclusions of law. The district court's conclusions of law and its ultimate decision to grant or deny a *K.S.A. 60-1507* motion is reviewed under a de novo standard. *Bellamy v. State, 285 Kan. 346, 354-55, 172 P.3d 10 (2007)*; **[*6]** *McHenry, 39 Kan. App. 2d at 120*.

How we review an ineffective assistance of counsel claim is well settled. In *Crowther v. State, 45 Kan. App. 2d 559, 563-64, 249 P.3d 1214*, *rev. denied 293 Kan. , 2011 Kan. App. LEXIS 61 (2011)*, we explained:

> "To support a claim of ineffective assistance of counsel, a claimant must prove that (1) counsel's performance was deficient and (2) counsel's deficient performance was prejudicial and deprived the claimant of a fair trial in the underlying criminal proceeding. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. [Citation omitted.]
>
> "The first prong of the test for ineffective assistance of counsel requires a showing that counsel made errors so serious that his or her performance was less than guaranteed by the *Sixth Amendment to the United States Constitution*. [Citation omitted.] This prong requires a showing that counsel's representation fell below an objective standard of reasonableness, considering all the circumstances. Our scrutiny of counsel's performance must be highly deferential, and a fair assessment **[*7]** of attorney performance requires that every effort be made

to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. This court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

"The second prong of the test for ineffective assistance of counsel requires a showing that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation omitted.]"

We turn now to the merits of the argument. We examine five areas of complaint about Sachse's conduct:

- Lack of trial preparation;
- Failure to obtain and use psychiatric records and seek an evaluation;
- Cross-examination;
- Ethical complaints against Sachse; and
- Resulting prejudice to Smith.

Trial preparation.

At the hearing on this motion, both Smith and Cornwell testified that Sachse was unprepared for trial. The State argues that Sachse's testimony suggests otherwise. The State emphasizes **[*8]** Sachse's testimony that he met with Smith many times, considered possible defenses, filed motions, considered how he would deal with Smith's initial statement to police that he did not have sex with S.L. (although DNA evidence indicated he did), and reviewed Smith's statement with him.

There are two problems with the State's argument. First, the district court found Sachse's trial preparation inadequate for the specific reason that he failed to investigate L.S.'s psychiatric history. The other tasks that Sachse may have performed effectively are irrelevant to the issue most disturbing to the district court. Second, the State's argument requires this court to consider the inconsistencies between Smith's and Sachse's testimony. This court is not permitted to reweigh the evidence or pass on the credibility of the witnesses. *Flynn v. State, 281 Kan. 1154, 1163, 136 P.3d 909 (2006)*.

At the *K.S.A. 60-1507* hearing, Smith testified that from the time he retained Sachse until the time of trial, Sachse sent no letters or emails to him. Smith said Sachse made a "dozen" 1- to 2-minute phone calls to him, which were mostly about money, and that they met at Sachse's office five or six times. Smith **[*9]** said there were several months or long periods of time that Sachse would not communicate with him at all. Smith said that during the 1-month period prior to trial, Sachse only met with him the Friday before trial (which started on Monday) and it lasted 10-15 minutes. Smith said Sachse did not prepare him to testify or be cross-examined. Smith also said Sachse did not give him a copy of his statement to review before trial.

Cornwell testified that as an attorney specializing in criminal defense, he has tried between 250 and 300 criminal trials in the past 33 years and that 20 or 30 of those cases were rape cases. Cornwell said that when a defendant is going to testify in a criminal defense case such as a rape case, he starts prepping the defendant about 90 days before trial. Cornwell said he would have spent "hours" conducting a mock cross-examination with the defendant and that this was a "critical element" of trial preparation.

In our view, there is substantial competent evidence to support the district court's conclusion. Our Supreme Court has indicated that an attorney's failure to adequately prepare for trial, including the failure to prepare a witness for trial testimony, is a sufficient **[*10]** legal basis for finding his or her performance ineffective. *State v. Overstreet, 288 Kan. 1, 25, 200 P.3d 427 (2009)*; *State v. Davis, 277 Kan. 309, 327-29, 85 P.3d 1164 (2004)*.

Psychiatric Records and Psychiatric Evaluation.

It is necessary to recount some of the testimony given at the evidentiary hearing at this point. Smith testified that prior to trial, he informed Sachse that L.S. had been under psychiatric care and talked to Sachse about getting L.S.'s psychiatric records. Smith said Sachse did not file a motion or do anything to get the records. Smith also testified he told Sachse about a phone conversation he had with L.S. after he was charged with rape; during this conversation, L.S. threatened to ruin Smith's life. Smith said Sachse did not get a subpoena for the phone records or address the threat during L.S.'s cross-examination. Smith testified Sachse did not talk to him about hiring an expert witness to testify about rape trauma syndrome as it pertained to either S.L. or L.S.

Cornwell testified he was "generally aware" of the *K.S.A. 60-455* testimony L.S. provided at trial. Cornwell agreed he was aware that L.S. had been under psychiatric care for many years prior to her testimony **[*11]** in Smith's case and during the time she dated Smith. Cornwell asserted that he would have attempted to get L.S.'s psychiatric records and depending on what the records showed "particularly in a case like this," it could "hurt very bad." Cornwell believed it was below the standard of professional care for Sachse not to have

attempted to obtain L.S.'s psychiatric records.

Cornwell also testified that courts will ordinarily conduct a *State v. Gregg, 226 Kan. 481, Syl. ¶ 3, 602 P.2d 85 (1979)*, hearing to obtain evidence of rape trauma syndrome. Cornwell said that it fell below the standard of reasonable professional care for Sachse not to have requested a *Gregg* hearing where L.S. had undergone psychiatric counseling for years and became engaged to Smith after being raped by him. Cornwell concluded that the failure to obtain L.S.'s psychiatric records and request a *Gregg* hearing could have affected the outcome of the case, and there was a possibility Smith would have been found not guilty had these things been done.

We first consider Sachse's failure to obtain L.S.'s psychiatric records. L.S. testified she was seeing a therapist after her divorce and during the time she was involved with **[*12]** Smith, but she did not report the rape to her therapist. L.S.'s failure to report the rape to her therapist—a fact that would undermine her allegation of rape—was disclosed to the jury even though her psychiatric records were not obtained and admitted at trial. Nevertheless, the psychiatric records may have contained *other* evidence that would have undermined L.S.'s credibility regarding her rape allegation. As the district court pointed out, L.S.'s testimony was indeed somewhat "bizarre" in light of her testimony that she was raped by Smith but went on to have a sexual relationship with him, live with him, and became engaged to marry him.

Regarding Sachse's failure to request a psychiatric evaluation of L.S., our Supreme Court has made clear that the district court may consider *any legitimate compelling circumstances* that would warrant a psychological evaluation. See *State v. Berriozabal, 291 Kan. 568, 580-85, 243 P.3d 352 (2010)*; *State v. Price, 275 Kan. 78, 80-87, 61 P.3d 676 (2003)* (citing and discussing *Gregg, 226 Kan. at 489-90*, and other cases). Moreover, the propriety of compelling a psychological evaluation of a sexual abuse victim depends upon the circumstances presented at **[*13]** trial. *Price, 275 Kan. at 83*. Certainly, the nature of L.S.'s testimony, along with the fact that she was under psychiatric care at the time of the alleged rape, constitutes a legitimate reason for at least requesting a psychological evaluation.

Sachse's failure to obtain L.S.'s psychiatric records and request a psychiatric evaluation under *Gregg* foreclosed the possibility that evidence to undermine L.S.'s credibility would be discovered. This sort of evidence was of particular value in this case, where the testimony of L.S. was, as this court on direct appeal observed, "most damning." *Smith, 39 Kan. App. 2d at 212*.

The facts alleged by L.S. are nearly identical to those alleged by S.L. Both women alleged Smith drove them to his residence after a night of mutual intoxication. Both women said Smith agreed to sleep on the couch and offered them a T-shirt. Both women claimed they passed out and awoke during the night to discover sexual conduct involving Smith. As this court pointed out in Smith's direct appeal, L.S. testified to conduct "identical" to that alleged by S.L. *Smith, 39 Kan. App. 2d at 212*.

Like the district court, this court cannot say with certainty whether L.S.'s psychiatric **[*14]** records and a psychiatric evaluation will contain evidence favorable to Smith. Nevertheless, this court must agree that Sachse's failure to even try to obtain this sort of evidence was objectively unreasonable in these circumstances. As this court indicated in *Mullins v. State, 30 Kan. App. 2d 711, 716-17, 46 P.3d 1222*, *rev. denied 274 Kan. 1113 (2002)*, defense counsel cannot make a strategic decision against pursuing a line of investigation when counsel has not obtained facts upon which such a decision could be made. When counsel lacks the information to make an informed decision due to the inadequacies of such an investigation, an argument of trial strategy is inappropriate. *30 Kan. App. 2d at 716-17*.

Before moving on, we next consider the arguments raised by the State on this point. The State first argues Cornwell's opinions are "presumptuous" because he had no direct personal knowledge of the evidence presented at trial and was only made generally aware of the facts through Smith's counsel. During Smith's testimony at the *K.S.A. 60-1507* hearing, defense counsel summarized L.S.'s testimony as follows: that she and Smith had engaged in a relationship several years prior to Smith's **[*15]** jury trial and that Smith had done something to her that she considered to be a sexual assault. Cornwell agreed that this was his understanding of L.S.'s testimony. Cornwell also agreed that he had been told L.S. was under some sort of psychiatric treatment for many years prior to her testimony in Smith's case.

That description of L.S.'s testimony accurately describes her testimony at trial. Moreover, the allegation that L.S. was under psychiatric treatment during the time she dated Smith (and at the time of the alleged rape) is supported by L.S.'s testimony. Although Cornwell was not present at the trial and was only made generally aware of the facts through Smith's counsel, it appears that Cornwell had the necessary facts upon which to base his professional opinion. Cornwell admitted that he did not know what L.S.'s psychiatric records would contain or if they would have made a difference; he agreed he did not know how L.S. would have tested in a psychiatric evaluation. The weight given to Cornwell's testimony was a task for the district court to determine. This court will not

reweigh the evidence. See *Flynn, 281 Kan. at 1163*.

Next, the State argues that in order to conclude there **[*16]** was a strong likelihood that the results of Smith's trial would have been different had Sachse requested the psychiatric records and moved for a psychiatric evaluation, it would have to be determined that the records actually exist (yet Smith has provided no evidence that they do), a judge would have to determine that the evidence obtained was relevant, and the evidence would have to be damaging to L.S.'s credibility. This argument touches on an argument that actually supports the grant of Smith's motion. Sachse deprived Smith of the opportunity to find out whether relevant evidence existed and whether it could be used in his favor at trial.

Also, the State contends that a *Gregg* evaluation would not have been granted on the mere basis that L.S. was seeing a therapist, and Cornwell did not understand the relationship between L.S. and Smith. The State says that in many cases, courts have upheld the district court's decision to deny a motion for a psychological evaluation "on substantially more specific allegations." Again, because the district court was not given the opportunity to review evidence that may have been uncovered from L.S.'s psychiatric records, this court cannot say whether **[*17]** the evidence would have warranted an evaluation. Moreover, when this court upholds a district court's decision to deny a motion for an evaluation, the court is operating under an abuse of discretion standard. See *State v. Blanchette, 35 Kan. App. 2d 686, 702, 134 P.3d 19*, *rev. denied 282 Kan. 792 (2006)*. We are now dealing with an ineffective assistance of counsel claim.

At the *K.S.A. 60-1507* hearing, the State provided no testimony to dispute Cornwell's testimony. The State's only witness, Sachse, provided no testimony that he had a legal or strategic reason for failing to investigate L.S.'s psychiatric history. See *Mullins, 30 Kan. App. 2d at 717*.

When asked what his trial strategy was with regard to L.S., Sachse stated his theory on rape victims is not to "beat them up." Sachse said he instead tried to point out that L.S.'s sequence of timing and facts did not make sense—specifically, why would a person be raped by someone and then become engaged to marry them. Sachse admitted that Smith told him L.S. was under psychiatric care, but he did not attempt to obtain her psychiatric records. Sachse explained that when the State moved (prior to trial) to admit L.S.'s *K.S.A. 60-455* testimony, **[*18]** he responded that L.S. was under psychiatric care and that he would attempt to argue she was unstable. Nevertheless, the trial transcript contains no evidence that Sachse did, in fact, attempt to suggest L.S. was unstable on cross-examination.

Sachse admitted that he knew what a *Gregg* motion was. He agreed that L.S.'s testimony was very damaging, and he was aware of her psychiatric history prior to trial. Sachse said he could not recall why he would not have asked for a medical evaluation of a person who was sexually assaulted, was under psychiatric treatment for years, and became engaged to the person who sexually assaulted her. He also could not recall why he did not get L.S.'s psychiatric records.

The district court may not disregard uncontroverted testimony unless it is shown to be untrustworthy. *Mullins, 30 Kan. App. 2d at 717*. Here, the State provided no evidence that Cornwell was untrustworthy but simply elicited Cornwell's admissions on cross-examination that he did not know what evidence was contained within L.S.'s psychiatric records, did not know for sure that the records would have made a difference, and it was "pretty easy to play Monday morning quarter back."

The district **[*19]** court did not err in finding Sachse was deficient for failing to request L.S.'s psychiatric records and move for an independent psychiatric evaluation.

Cross-examination.

The State next argues the trial transcript reflects that Sachse did not cross-examine S.L. and L.S. haphazardly and asked questions that clearly supported the theory of defense. The State misses the point. The district court found Sachse's trial preparation inadequate because he failed to investigate L.S.'s psychiatric history—not because his cross-examination was inadequate in general. When stating Sachse failed to use basic tools to vigorously cross-examine L.S., the district court was referring to Sachse's inability to cross-examine L.S. with evidence obtained from her psychiatric records—because he made no attempt to obtain this evidence. Where the district court made no general finding that Sachse's cross-examination was insufficient, we see no reason to address the State's arguments as to why it was sufficient in some aspects.

Ethical complaints against Sachse and casino records.

The State next claims the district court should not have considered the ethical complaints against Sachse when deciding whether he was **[*20]** effective. The record reveals the district court did not grant Smith's motion on the basis that ethical complaints had been lodged against Sachse. The district court simply commented on the ethical violations committed by Sachse, along with the fact that he had been suspended from the practice of law and disbarred, when setting forth the factual background of the case.

Even if the district court had considered Sachse's professional problems when determining he rendered ineffective assistance of counsel to Smith, the district court was not prohibited from doing so. In *State v. Wallace, 258 Kan. 639, 646, 908 P.2d 1267 (1995)*, our Supreme Court explained that an attorney's conduct which violates disciplinary rules does not constitute ineffective assistance of counsel as a matter of law, but that it is "one factor" that may be considered in the "totality of the circumstances."

The State argues *Wallace* is distinguishable from this case because the ethical complaints about Sachse were made by other clients—not Smith. The State also points out that the violations that formed the basis for his suspension and disbarment were not violations he committed as part of his representation of Smith. **[*21]** Although the State's arguments are factually correct, they are not persuasive.

At the *K.S.A. 60-1507* hearing, Sachse testified there were multiple ethics complaints pending against him when he represented Smith in 2005. When asked about the details of some of these complaints, Sachse did not deny any of the allegations. These complaints involved events that occurred during 2005—the year he represented Smith.

On August 23, 2005, approximately 2 months before Smith's trial, Sachse appeared before the Office of the Disciplinary Administrator and stipulated to multiple violations of the Kansas Rules of Professional Conduct. *In re Sachse, 281 Kan. 1197, 135 P.3d 1207 (2006)* (1-year suspension). These violations resulted from dealings Sachse had with clients during the 2002-2004 timeframe. In 2007, Sachse voluntarily surrendered his license to practice law in Kansas. *In re Sachse, 284 Kan. 906, 167 P.3d 793 (2007)*. At that time, a formal complaint had been filed against Sachse by the Disciplinary Administrator's office on 17 separate complaints; the formal complaint against him alleged multiple violations in the representation of numerous clients. *284 Kan. at 906*. The district court did not **[*22]** err in merely opining that Smith's case "was not the only legal business that Mr. Sachse was neglecting."

For the same reason, the district court did not err in commenting on evidence that Sachse made multiple trips to the Argosy Casino during his representation of Smith. Clearly, the district court's grant of Smith's motion did not rest solely on this evidence. Second, the record supports the district court's recitation of the dates Sachse appeared at the casino. In particular, the court noted *Sachse was at the casino two times during Smith's trial—a fact substantiated by the record and relevant to the issue of ineffective assistance of counsel*. Finally, this court has said that the great weight of authority is that a defense attorney's use of drugs or alcohol, for example, does not establish ineffective assistance of counsel per se. See *Johnson v. State, 42 Kan. App. 2d 1057, Syl. ¶ 3, 221 P.3d 1147 (2009)*. There is no authority suggesting a court may *not* consider an attorney's possible gambling addiction when determining that attorney was ineffective under the circumstances of a particular case.

Prejudice to Smith.

Finally, the State argues the district court erred in finding Smith **[*23]** was prejudiced by Sachse's performance. The State notes that on direct appeal, this court found that the evidence against Smith was overwhelming. See *Smith, 39 Kan. App. 2d at 212*.

Even so, despite the wealth of evidence against Smith at trial, the *K.S.A. 60-1507* court was correct when it stated this was a "weak case" without L.S.'s testimony. As the court noted, S.L. went out drinking with Smith, invited him to share the bed with her, and delayed reporting the rape until after she attended a T-Bones game and after her boyfriend (who testified he had just communicated to S.L. that they were no longer dating and he was seeing someone else) told her he was not going to believe she was raped unless she reported it. Moreover, Smith's defense at trial was that he could not remember having sex with S.L. because he was too intoxicated—not that he did not have sex with her. See *Smith, 39 Kan. App. 2d at 214*. Thus, DNA evidence that Smith and S.L. had sex was not particularly damning. Without L.S.'s testimony, there was a reasonable probability that Smith would have been found not guilty. Smith was prejudiced by Sachse's failure to at least attempt to obtain evidence that would have discredited **[*24]** L.S. See *Mullins, 30 Kan. App. 2d at 717-18*.

Additionally, the unrebutted testimony of Cornwell, qualified as an expert, undermines our confidence in the outcome of this case. Sachse's failure to obtain L.S.'s psychiatric records closed the door to a line of inquiry that, in Cornwell's words, could "hurt very bad." Sachse's failure to at least ask for a *Gregg* hearing left him incapable of exploring why L.S., who claimed Smith raped her, went on to have a sexual relationship with him, live with him for some time, and then become engaged to marry him. These unique facts and Cornwell's testimony create grave doubts about the outcome of this case.

The district court did not err in determining Sachse rendered ineffective assistance of counsel and granting Smith a new trial.

Affirmed.

Dissent by: ATCHESON

Dissent

ATCHESON, J., dissenting: I respectfully dissent and would reverse and remand to the district court for further proceedings, specifically discovery of the mental health care records of L.S. and then any additional hearings or briefing those records might prompt. I suggest remand out of what may be an overly abundant sense of fairness to Jesse Smith. Otherwise, I would opt to reverse and deny outright his **[*25]** motion under *K.S.A. 60-1507* on the basis he has failed to demonstrate the substandard performance of his trial counsel caused such prejudice that the jury's verdict convicting him of rape has been sufficiently undermined.

Judge Hill has ably laid out the material facts and the controlling law in his thorough opinion. I have no quarrel with those facets of the majority decision. And I agree that the record developed during the evidentiary hearing on Smith's 60-1507 motion amply demonstrates that the performance of Mark Sachse, his lawyer at trial, fell below the standard for adequate representation required in criminal cases by the *Sixth* and *Fourteenth Amendments to the United States Constitution*. But that is only the first step in a successful challenge to a conviction based on the constitutionally ineffective assistance of counsel. Smith must also show that Sachse's deficient performance deprived him of a fair trial. See *Crowther v. State, 45 Kan. App. 2d 559, Syl. ¶¶ 5-7, 249 P.3d 1214*, *rev. denied* 293 Kan. _ (2011). The present record fails to do so.

Smith points to Sachse's failure to adequately prepare him to testify in his own defense, Sachse's failure to obtain L.S.'s mental **[*26]** health records, and Sachse's failure to request a pretrial psychological examination of L.S. Smith fails to point out anything in his testimony at trial that would have been different had Sachse provided him with more or better preparation. Such a suggestion would be, at best, a two-edged sword. To argue now he would have testified materially differently at trial, Smith necessarily fosters the implication that his testimony was something less than correct (and forthright) the first time around. But more to the point, Smith cites no examples from his trial testimony that he now says would have "improved" with additional attention from Sachse. Smith likewise offers no specific information that he now says Sachse failed to elicit from him at trial. Granting that Smith has shown Sachse spent too little time working with him before trial, he does not suggest how things would have gone better had Sachse done his job. Smith comes up short in demonstrating any prejudice on that score for purposes of obtaining relief on a 60-1507 motion.

The failure to obtain records from L.S.'s therapist and to request an independent psychological exam of L.S. more or less fit together and may be reviewed in **[*27]** tandem. A couple of points bear repeating about L.S. First, she was not the complaining witness or victim in this case—S.L. was. After hearing about Smith's prosecution, L.S. came forward to say he had sexually assaulted her in circumstances strikingly similar to those S.L. had alleged. L.S. has a law degree and, when she testified at trial, was employed at a private firm doing insurance defense work.

There were some peculiar qualities to L.S.'s involvement with Smith and with his prosecution. After that particular sexual encounter with Smith, L.S. became romantically involved with him to the extent they planned to be married. L.S. had been seeing a therapist for an extended time before and during her relationship with Smith. The type of therapist and the reasons L.S. sought and continued in counseling were not developed at trial or in the record on the 60-1507 motion. She and her former husband began counseling because of marital problems. And L.S. continued individual therapy during and after their divorce.

But L.S. acknowledged at trial that she had not told her therapist about the encounter with Smith and had not reported it to the police at the time. At trial, L.S. explained she **[*28]** failed to discuss the encounter because she "felt like an idiot" and "totally blamed" herself for having gotten so drunk. L.S. came forward long after her breakup with Smith and only upon learning of his criminal prosecution for raping S.L.

The jury, therefore, was aware that L.S. hadn't promptly disclosed Smith's sexual assault of her to her therapist or to the police and that she later became his fiancee. The prosecutor brought out much of the information on direct examination of L.S. in the State's case. Sachse reemphasized those peculiarities in his cross-examination. While it is difficult to gauge a witness' credibility or jury appeal from a transcript, nothing in the record of L.S.'s trial testimony suggests someone suffering debilitating mental or emotional problems or given to bizarrely disordered thinking.

Smith did not obtain L.S.'s therapy records in the course of the proceedings on the 60-1507 motion. Neither we nor the district court deciding the motion has any idea what those records may contain. And any supposition about their content is pure speculation. Relief may not be granted in habeas proceedings based on speculation about witnesses or other evidence that *might* have **[*29]** been presented at the criminal trial. *Woodfox v. Cain, 609 F.3d 774, 808 (5th Cir. 2010)* (a

court will not consider habeas relief based on an argument trial counsel was ineffective in failing to call a potential witness without an evidentiary showing that the witness would have been available to testify and what the witness would have testified to); *Bible v. Ryan, 571 F.3d 860, 870-71 (9th Cir. 2009)* (argument in habeas proceeding that trial counsel should have investigated the possibility defendant suffered from organic brain dysfunction or disorder amounts to unavailing speculation absent evidence defendant *actually* has such an impairment); see *Haskin v. State*, No. 90,252, 2004 WL 292113, at * 1 (Kan. App. 2004) (unpublished opinion), *rev. denied 278 Kan. 844 (2004)*. The defendant seeking relief must produce that evidence in the habeas proceeding and show how it likely would have altered the outcome of the criminal trial.

Carl Cornwell, Smith's expert witness on standards for trial counsel in criminal cases, doesn't fill that gap. A highly experienced criminal defense lawyer, Cornwell testified at the 60-1507 motion hearing that L.S.'s therapy records could have been put to use on **[*30]** cross-examination. But that opinion depends upon the same kind of speculation that cannot support habeas relief in the first place. In rendering his opinion, Cornwell necessarily guessed about content of the records, just as the district court and the majority have done. The guess carries no more evidentiary force because it rolls out of the mouth of an expert witness. If the records contain nothing, as L.S. suggests, they would have been a stage prop at the trial—something Smith's lawyer could have waved around and dramatically thrown down on counsel table. Anything more is just wishful thinking that won't support 60-1507 relief.

It seems quite improbable the therapy records would have added much. Assuming L.S. testified correctly that she had not talked to her therapist about the sexual encounter, there would be nothing in the records about those circumstances. The jury already knew that much. It could be she was wrong. In that event, the records would contain some therapy notes about what she described or how she characterized the encounter. That version might differ from what she said at trial. Those discrepancies could factor into how the jurors assessed L.S.'s credibility. Finally, **[*31]** the records might show that L.S. was being treated for some condition—delusions or compulsive lying—that could affect the jurors' view of her credibility. Many (probably most) reasons people see therapists, including diagnosable DSM mental illnesses, would have no bearing on their truthfulness or their ability to accurately perceive and recall events.

The evidence fails to show any actual prejudice to Smith from Sachse's failure to obtain L.S.'s therapy records. What it does show is a guessing game about the content of documents nobody has seen. Smith really should be afforded no 60-1507 relief on that basis.

Sachse's failure to request a psychological evaluation of L.S. also seems difficult to tie to some actual prejudice to Smith. The standards for getting such an evaluation are rigorous, as they should be. See *State v. Berriozabal, 291 Kan. 568, 580-81, 243 P.3d 352 (2010)* ("[A] defendant is entitled to a psychological examination of a complaining witness on a showing of compelling circumstances.") (citing *State v. Gregg, 226 Kan. 481, 489, 602 P.2d 85 [1979])*. The Kansas courts have discussed psychological examinations specifically with respect to the complaining witnesses in sex **[*32]** crime prosecutions. But I fail to see why a witness offering testimony under *K.S.A. 60-455* as another victim of a defendant would be exempt from an otherwise permissible psychological examination for that reason alone. The Kansas Supreme Court has developed half a dozen criteria to guide trial judges in making the call on ordering an examination. *291 Kan. at 581*. The criteria consider the witness' demonstrable "mental instability" and "lack of veracity," whether the witness has lodged false allegations of sexual abuse against other persons, and indicators the witness may have an unusual understanding of "what it means to tell the truth." *291 Kan. at 581*. If the defense request looks to be a "fishing expedition," the trial court may weigh that against allowing the examination. *291 Kan. at 581*. In *Berriozabal*, the court also cautioned that an "allegation of mental instability does not support the ordering of a psychological evaluation absent some real evidence." *291 Kan. at 581*.

The 60-1507 record contains no evidence suggesting a district court would have ordered a psychological examination of L.S. Nothing suggests L.S. met *any* of the criteria outlined in *Berriozabal*. Merely because **[*33]** someone has seen a therapist, even for an extended time, does not of itself indicate "mental instability" of the sort required for an examination. In short, there is no reason to believe such a motion would have been granted. And there is no reason to conclude an examination would have shown L.S. suffered from a mental or emotional condition affecting her reliability as a witness. Again, Smith has proffered nothing to support that sort of inference, such as an affidavit from a psychologist or psychiatrist stating a professional opinion that someone acting as L.S. did with respect to her described encounter with Smith manifests symptoms of a mental illness impairing veracity or perception.

Ultimately, of course, L.S.'s therapy records might well shed light on her mental status in those respects either explicitly or by negative implication from the absence of any discussion of such impairments. The records, then, might have obviated the need for an independent psychological examination or

undercut any legal basis for ordering one under the *Berriozabal* standards. The therapy records or the testimony of L.S.'s therapist in the 60-1507 proceeding would have had a bearing on any prejudice **[*34]** to Smith resulting from Sachse's failure to request an examination. But, again, we are left with only speculation, not evidence.

In response to questions at oral argument, counsel for Smith said he did not obtain L.S.'s therapy records because the discovery tools to do so are not available in litigating 60-1507 motions. A published opinion from this court contains language suggesting civil discovery has no place in 60-1507 proceedings. *LaPointe v. State, 42 Kan. App. 2d 522, 551, 214 P.3d 684 (2009)*, *rev. denied 290 Kan. 1094 (2010)* ("We hold that the discovery rules of *K.S.A. 60-234(a)* [governing requests for production of documents and other tangible things] are not applicable in a *K.S.A. 60-1507* proceeding."). The *LaPointe* decision relied on *Moll v. State, 41 Kan. App. 2d 677, 689, 204 P.3d 659 (2009)*, *rev. denied 290 Kan. 1094 (2010)*, which held expert witness disclosure requirements of *K.S.A. 60-226(b)* do not apply to evidentiary hearings on 60-1507 motions. *LaPointe, 42 Kan. App. 2d at 548-49*. The *Moll* court also ventured that discovery typically would be unnecessary in habeas proceedings. *Moll, 41 Kan. App. 2d at 689* ("[T]he procedure authorized . . . under *K.S.A. 60-1507* does **[*35]** not specifically authorize extensive discovery."). In *LaPointe*, the court found the "liberal discovery procedures" for civil practice to be incompatible with "the purpose of a *K.S.A. 60-1507* proceeding" and, if allowed, could be abused. *LaPointe, 42 Kan. App. 2d at 550*.

I conclude, however, the law imposes neither a prohibition of discovery in 60-1507 proceedings nor an irrevocable curtailment of particular discovery devices. What I would call controlled discovery is available. See *Merryfield v. State, 44 Kan. App. 2d 817, 828-29, 241 P.3d 573 (2010)* (In reviewing a proceeding under *K.S.A. 60-1501*, the court indicated discovery might be available in postconviction actions if the relevant facts had not been developed in the underlying criminal case.). And this case demonstrates the undeniable benefit of that approach.

A 60-1507 motion is a species of civil action to which the Kansas Code of Civil Procedure generally applies. *Supreme Court Rule 183(a)* (2010 Kan. Ct. R. Annot. 255) (The motion "is governed by" civil procedure rules "insofar as applicable."). By its terms, *Rule 183* would permit civil discovery in some fashion. District courts have allowed discovery on 60-1507 motions. See **[*36]** *Shumway v. State, 228 P.3d 441, 2010 Kan. App. Unpub. LEXIS 269, *2, 2010 WL 1462712, *1 (Kan. App. 2010)* (unpublished opinion); *Stafford v. State, 186 P.3d 1227, 2008 Kan. App. Unpub. LEXIS 458, *1-2, 2008 WL 2717769, *1 (Kan. App. 2008)* (unpublished opinion), *rev. denied 287 Kan. 766 (2009)*; *Stanton v. State, 181 P.3d 589, 2008 Kan. App. Unpub. LEXIS 311, *2, 2008 WL 1847667, *1 (Kan. App. 2008)* (unpublished opinion).

But under *Rule 183*, discovery may be used only "as applicable" or appropriate. Discovery would be inapplicable upon the mere filing of a 60-1507 motion. Only if the district court deemed the motion sufficiently substantial to call for the appointment of counsel to represent the inmate would discovery enter the picture. Even then, the district court ought to approve any requested discovery, and the processes should be limited to essential matters. Depositions, for example, certainly would be rarities, given the trial record developed in the underlying criminal case.

In this case, the therapy records could have been subpoenaed for production in advance of the evidentiary hearing or at the hearing through *K.S.A. 60-245a*. The records also could have been covered by a protective order limiting their disclosure and dissemination as necessary to avoid undue intrusion on L.S.'s privacy. With **[*37]** the records in hand, neither the parties nor the district court would have had to speculate about their content or their significance to the 60-1507 motion. For that reason, I would remand to the district court to allow the parties to secure the records through authorized discovery. The district court could then determine if it needed to take additional evidence, hear further argument from counsel, neither, or both.

The district court and the majority of the panel on appeal would set aside a criminal conviction and order a new trial based more or less on the absence of those records from the evidence compiled on the 60-1507 motion and on essentially unfounded speculation that the records might have been put to effective use in Smith's defense. They also fail to consider the very real possibility the therapy records may no longer exist. L.S. moved to Colorado after her breakup with Smith. We might safely assume that she stopped seeing her therapist in the Kansas City area. I have no idea about the common practice among therapists in retaining detailed counseling records on past clients. But there may be a fair chance the records, now roughly a decade old, have been destroyed under a **[*38]** standard office procedure for purging closed files. The majority may be granting Smith a new trial based on a chimera.

Much of that uncertainty could be put to rest with a bit of controlled discovery. Deploying the discovery would be more judicious than immediately ordering a new trial on the criminal charge and, in the long run, would be no less fair to all concerned. Depending upon what the discovery might reveal, Smith could get a new trial.

End of Document

EXHIBIT O

From: Jeff Zmuda [KDOC] <Jeff.Zmuda@ks.gov>
Sent: Thursday, April 23, 2020 1:22 PM
To: KDOC_Everyone <KDOC_Everyone@ks.gov>
Subject: KDOC Update

Good afternoon,

This week holds special meaning for two groups within the Kansas Department of Corrections. First, it is National Crime Victims' Rights Week, a time to recognize and celebrate the advancements that have been made to support victims of crime across the nation. Our very own Office of Victim Services team is a phenomenal group, and last year 93% of crime victims indicated that they were treated with respect by our team. It is also National Volunteer Week. Although our volunteers can't be with us right now due to the virus, I want to recognize this group and the many contributions they make to those they serve. We couldn't do what we do without both our Victim Services Team and our volunteers. Thank you for what you do!

Here is the most current information regarding positive COVID-19 cases, those quarantined and those who have returned to work and general population. These numbers reflect totals accumulated over time.

- 62 LCF staff positive
- 1 TCF staff positive
- 58 staff in quarantine and being monitored for symptoms
- 5 staff have recovered and returned to work
- 50 LCF residents positive
- 1 WWRF resident positive (residing at LCF)
- 1 TCF resident positive
- 126 residents in quarantine and being monitored for symptoms
- 27 residents (positive) in quarantine and being monitored
- 20 residents have recovered and returned to general population

Yesterday in the Governor's press conference, Secretary Norman from Kansas Department of Health and Environment stated that he thought Kansas was right about at the peak of cases where folks have tested positive for the virus. That is really good news for Kansans. For our agency,

I would caution us that although the number of positive cases in the community may be hitting an apex, our first reported cases were identified weeks after the first reported cases in the state. As such, our peak for the number of active cases may still be a few weeks away. Let's stay the course and be diligent in our efforts to ensure that we remain healthy and limit the introduction and/or spread of the virus at all of our work units.

I appreciate the focus and effort so many of you have put forth to meet this current challenge. Keep up the great work!

Stay healthy…and safe.

Jeff Zmuda
Secretary of Corrections
714 SW Jackson St, Suite 300
Topeka, Kansas 66603
Jeff.zmuda@ks.gov
Phone: (785) 296-0183

Kansas
Department of Corrections

EXHIBIT P

SUPPLEMENTAL DECLARATION OF MONICA BURCH

Pursuant to K.S.A. § 53-601, I, Monica Burch, declare as follows:

1. My name is Monica (né Zachary) Ryan Burch. I am 31 years old and am from Manhattan, Kansas. I am currently incarcerated at Ellsworth Correctional Facility (KDOC #0108790). In the past several weeks, many of us who are residents in Ellsworth CF have, like the community outside of the facility, increasingly heard of the need to regularly engage in safety measures to protect ourselves against COVID-19. We know we must wash our hands often, avoid touching our faces, maintain proper hygiene, and stay 6 feet away from others to stop the spread of the virus, but our circumstances in Ellsworth CF make it difficult to do so.

2. For non-indigent individuals like myself, the only process for us to obtain soap is through commissary. At our facility, we must place commissary orders on Wednesdays, but we will not receive any commissary items until the following Tuesday. In other words, our commissary requests must be submitted at least six days in advance for us to receive the items we order.

3. Because I have been diligently following pandemic sanitation protocols, I ran out of my personal stock of soap in early April. I asked Staff Sergeant Smith for a bar of soap, citing the issue of the pandemic and the need to maintain cleanliness. I stated I would otherwise have to wait 6 days to obtain soap from the commissary. But Officer Smith refused to provide me with any soap. Officer Smith's refusal to provide me with soap was deeply troubling to me given the pandemic crisis, but his behavior was also consistent with Ellsworth CF's ordinary regulations regarding soap access— which have not changed in light of the COVID-19 pandemic.

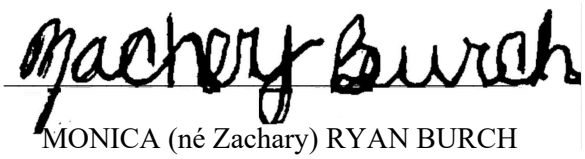
4. Following Officer Smith's denial, I had no choice but to borrow a bar of soap from a friend— which is technically a violation of KDOC's rules against "unauthorized dealing and trading." Had an officer witnessed or issued a disciplinary report for this soap exchange, I could have faced penalties including a fine, loss of good time, or disciplinary segregation. I would then have had a Class II disciplinary report on my KDOC record and no soap.

5. I am, like many people incarcerated at Ellsworth CF, increasingly concerned about our health and safety as the COVID-19 pandemic continues to develop, especially given how the virus has spread at Lansing Correctional Facility.

6. Earlier this month, we learned that a group of officers from Ellsworth were sent to Lansing CF to address a large disturbance there. But these officers returned to work at Ellsworth immediately—without any quarantine period. Many residents were skeptical that these officers, despite their claims they had not come into contact with anyone with COVID-19, had somehow avoided exposure. Many residents fear the officers are now exposing us to the virus, and that fear, coupled with our inability to adequately follow basic safety measures, led to some residents causing a disturbance in one of the Ellsworth cell houses in mid-April.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 16, 2020



MONICA (né Zachary) RYAN BURCH

EXHIBIT Q

KANSAS DEPARTMENT OF CORRECTIONS

A Safer Kansas through Effective Correctional Services

:KATHLEEN SEBELIUS, GOVERNOR ROGER WERHOLTZ, SECRETARY

LANDON STATE OFFICE BUILDING - 900 SW JACKSON
TOPEKA, KANSAS - 66612-1284
Telephone: 785-296-3317
Fax: 785-296-0014

Policy Memorandum[1]

This Policy Memorandum Issuance # 08-09-005

Effective Date Upon Issuance **Expiration Date Upon Reissuance of IMPP[2]**

_____ Addresses subject matter for which an IMPP will be forthcoming and assigned to Chapter(s) of the IMPP manual.

_____ Amends or modifies existing IMPP(s) #_____

__X__ Elaborates on the contents of IMPP(s) # 11-108_____

_____ Is for Staff Only __X__ Is for Both Staff and Inmates.

This policy memorandum is being issued as an expository briefing with regard to the purpose of certain provisions extant within this IMPP. In point, the provisions of the IMPP regarding furloughs, whether job or emergency, are applicable only to inmates participating in the work release program.

09-11-08

_____ Date:_____

Secretary of Corrections

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[1] **Note: To keep your IMPP Manual current, please place this Policy Memorandum in your manual at the appropriate location. If the memorandum addresses subject matter for which an IMPP will be forthcoming, place this issuance before the first IMPP in the Chapter indicated. If the memorandum addresses an existing IMPP, the issuance should be placed in front of the existing policy, just after any relevant statement(s) of annual review. If this memorandum is for both staff and inmates, it shall be immediately posted.**

[2] **Unless another Policy Memorandum or IMPP on this subject is issued, the requirements contained herein have no force and effect after the indicated expiration date.**

INTERNAL MANAGEMENT POLICY & PROCEDURES

STATEMENT OF ANNUAL REVIEW

IMPP # 11-108

Title: Job and Emergency Furloughs

The above referenced Internal Management Policy and Procedure (IMPP), issued effective **12-05-05** was reviewed during **September 2007** by the KDOC Policy & Regulation Review Panel. At the time of this annual review the Policy & Regulation Review Panel determined that: no substantive changes and/or modifications to this IMPP are necessary at this time, and the IMPP shall remain in effect as issued on the above stated date.

The next scheduled review for this IMPP is September 2008.

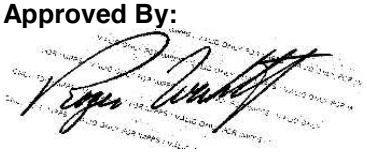
This statement of annual review shall be placed in front of the referenced IMPP in all manuals.

04-14-08

_____ _____

Policy and Procedure Coordinator Date

KANSAS DEPARTMENT OF CORRECTIONS

	INTERNAL MANAGEMENT POLICY AND PROCEDURE	**SECTION NUMBER** 11-108	**PAGE NUMBER** 1 of 3
		SUBJECT: **DECISION MAKING: Job and Emergency Furloughs**	
Approved By:  **Secretary of Corrections**		**Original Date Issued:**	**04-20-84**
		Current Amendment Effective:	**12-05-05**
		Replaces Amendment Issued:	**01-07-95**

POLICY

Inmates may, under limited circumstances, be eligible for job or emergency furloughs of up to 48 hours, excluding travel time. The purpose for the job or emergency furlough shall be verified by departmental staff. Emergency furloughs shall be limited to one furlough per emergency. Job and emergency furlough decisions shall take into consideration the public safety and applicable state law.

Any exception to this policy must be approved by the Deputy Secretary of Facility Management.

DEFINITIONS

Emergency Furlough: A furlough designed to allow an inmate to visit seriously ill members of the immediate family or to attend the funeral of an immediate family member.

Immediate Family Members: For purposes of this policy, immediate family members are limited to parents, step-parents, siblings, step-siblings, children, step-children, spouse, grandparents, or any person who filled the role of parent de facto with respect to the inmate, as confirmed by a review of the social history.

Job Furlough: A furlough of 48 hours or less (excluding travel time) designed to assist an inmate in securing employment after having been granted parole.

PROCEDURES

I. Job Furloughs

A. To be considered for a job furlough an inmate shall:

1. Have been granted parole by the Kansas Parole Board if release is controlled by an indeterminate sentencing structure;

2. Be within thirty (30) days of the projected release date if release is controlled by a determinate sentencing structure;

3. Meet all other applicable eligibility criteria for a programmatic furlough, per IMPP 11-111; and,

4. Have a pre-arranged job interview scheduled.

II. Emergency Furloughs

A. To be considered for an emergency furlough, the inmate shall:

1. Have been in the custody of the Secretary of Corrections for at least two (2) years:

a. Time spent on parole or post incarceration supervision shall be considered as time in custody of the Secretary of Corrections.

b. Any inmate who does not meet the two (2) year custody requirement may, if eligible for a programmatic furlough, apply for a programmatic furlough under emergency conditions, providing that all criteria for a programmatic furlough are met as established by IMPP 11-111.

2. Have minimum custody status and have been continuously classified as minimum custody for at least 120 days prior to the proposed furlough;

3. Have a suitable sponsor;

4. Have no class I or class II disciplinary convictions within the last 90 days; and,

5. Have a verified family emergency as stipulated in section II.B. of this IMPP.

B. If an immediate family member is severely ill, then the inmate may be approved for either:

1. A bedside visit in the hospital or residence of the affected immediate family member; or,

2. The opportunity to attend the funeral of the immediate family member.

C. The time limitation and the limit of one furlough per emergency shall be clearly explained to the inmate by a member of the unit team at the time that the application for an emergency furlough is submitted.

D. Prior to approval of an emergency furlough, the illness or death of the inmate's immediate family member shall be verified by facility staff through a reliable authority (e.g. physician, hospital administrator, or mortician).

III. Submission, Approval and Notification Procedures

A. Inmates meeting the criteria established for a job furlough or an emergency furlough, and desiring a job or emergency furlough, shall submit an application for furlough, as included with IMPP 11-111, through their unit team.

B. Designated facility staff shall review the application and verify suitability of the sponsor. Verification of the sponsor shall be accomplished in the following manner:

1. The designated staff member shall telephone the parole director or designee in the region where the proposed sponsor lives and provide the necessary information regarding the sponsor.

2. The parole director shall assign a parole officer to confirm the sponsor's address and to provide any other information that might be helpful in determining suitability.

C. The warden or designee may grant a job or emergency furlough provided that all criteria established in section I.A (Job Furlough) or section II.A (Emergency Furlough) are met and the warden or designee feels the furlough is in the best interest of the inmate and/or the community.

D. In the event the furlough is approved, the following notification procedures shall be carried out prior to the inmate's release to the furlough:

1. Upon final approval of the furlough, the designated facility staff shall ensure that the approved furlough sponsor has been informed of each and every condition of the furlough and has specifically acknowledged the same in writing.

2. The warden or designee shall notify the following individuals by telephone;

   a. The Deputy Secretary of Facility Management or designee;

   b. The parole director or designee within the parole region of release;

   c. The sheriff and county or district attorney in the county where the furlough is located; and,

   d. The city police in the city wherein the furlough is located.

E. If applicable, compliance with the victim notification requirements of IMPP 05-108 shall be met by the staff member designated responsible for such notification.

IV. Furlough Conditions And Violation Actions

A. All inmates granted furlough under the provisions of this policy shall comply with all conditions established by the Order of Furlough, per IMPP 11-111.

B. Violations of the conditions established by the Order of Furlough or deviation from the approved furlough plan shall be a Class I offense.

   1. Violation of any federal, state, or local laws or ordinances shall be cause for prosecution in a court of law in addition to any disciplinary action taken.

C. In response to violations of the conditions of furlough coming to the attention of departmental personnel during the course of a furlough, action may be taken in accordance with the applicable provisions of IMPP 11-111 as it pertains to departmental actions.

NOTE: The policy and procedures set forth herein are intended to establish directives and guidelines for staff, inmates and parolees and those entities who are contractually bound to adhere to them. They are not intended to establish state created liberty interests for employees, inmates or parolees, or an independent duty owed by the Department of Corrections to either employees, inmates, parolees, or third parties. This policy and procedure is not intended to establish or create new constitutional rights or to enlarge or expand upon existing constitutional rights or duties.

REPORTS REQUIRED

None.

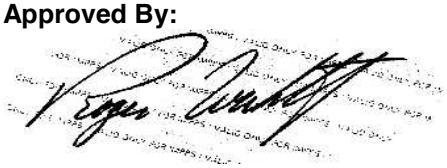
REFERENCES

KSA 75-5210 e, 75-5260, 75-5267
KAR 44-5-113, 44-12-1301
IMPP 05-108, 11-111
ACI 3-4389, 3-4391, 3-4392

ATTACHMENTS

None.

KANSAS DEPARTMENT OF CORRECTIONS

DOC Serving Kansas	**INTERNAL MANAGEMENT POLICY AND PROCEDURE**	**SECTION NUMBER** **11-110**	**PAGE NUMBER** **1 of 6**
		SUBJECT: **DECISION MAKING: Application for Release of Functionally Incapacitated Inmates or Release Pending Imminent Death**	
Approved By:  **Secretary of Corrections**		**Original Date Issued:** **09-23-02** **Current Amendment Effective:** **08-06-10** **Replaces Amendment Issued:** **01-21-04**	
Reissued By:  **Policy & Procedure Coordinator**		The substantive content of this IMPP has been reissued as per the appropriate provisions of IMPP 01-101. The only modifications within the reissue of this document concern technical revisions of a non substantive nature. **Date Reissued:** **09-19-11**	

POLICY

Applications for the release of inmates due to functional incapacitation as set forth within the provisions of K.S.A. 22-3728, or those inmates who have a prognosis of death within thirty days, as set forth within the provisions of L. 2010 ch. 107 (HB 2412), shall be considered in accordance with the respective statute, Kansas Administrative Regulations, and the procedures contained within this policy. Inmates serving a sentence for off-grid offenses are not eligible for release under the provisions of either statute. Those cases where the inmate has a terminal medical condition likely to result in death within 30 days shall be processed in a separate manner from other applications for functional incapacitation release,

DEFINITIONS

Functional Incapacitation/Imminent Death: A medical or mental health condition, including one rendering the inmate terminally ill to the extent that death is imminent, resulting in the afflicted inmate not posing a threat to the public. An inmate suffering from a terminal medical condition likely to cause death within 30 days must have such prognosis determined by a doctor licensed to practice medicine and surgery in Kansas.

PROCEDURES

I. Submission Of The Application

A. Any staff member of the Kansas Department of Corrections or the Kansas Parole Board, any contractor, inmate or inmate family member, may request an inmate's unit team to address the possibility of an inmate's release based on functional incapacitation pursuant to K.S.A. 22-3728, or due to a prognosis of the inmate's imminent death pursuant to L. 2010 ch. 107 (HB 2412).

B. An application for release based on functional incapacitation or imminent death shall be submitted in writing, and shall be processed through the inmate's unit team.

C. In the event that the unit team receives an application for release based on functional incapacitation or imminent death, a unit team counselor shall review the case, collect necessary information to assess the case, and discuss it with the unit team manager.

II. Initial Review

A. The unit team manager shall consult with the classification administrator who shall then consult with the appropriate Deputy Warden (or Warden) of the facility regarding the application.

B. The Warden or Warden's designee shall then consult with the Deputy Secretary for Facilities Management regarding the application.

C. The Deputy Secretary for Facilities Management shall review the facts in consultation with the Secretary of Corrections and the Chairperson of the Kansas Parole Board.

D. Once the Deputy Secretary has completed the informal review of the facts, he/she will notify the facility regarding whether or not to process the application at that time.

III. Processing The Application

A. Following such a review, if a decision to not process the application is made, this shall be documented in the inmate's central (or master) file.

B. If a decision is made to process the application, the procedures contained within this section shall be followed.

C. In the process of reviewing the application, information concerning the following factors as set out in K.S.A. 2-3728, L. 2010 ch. 107 (HB 2412) and K.A.R. 45-700-1 shall be collected.

- The person's age and personal history,
- The person's criminal history,
- The person's length of sentence and time the person has served,
- The nature and circumstances of the current offense,
- The risk or threat to the community if released,
- Whether an appropriate release plan has been established, and
- Any other factors deemed relevant by the board.

D. The following steps shall be taken to process an application for release based on functional incapacitation/imminent death. None of the decisions made within the framework of the process shall be subject to an appeal of any kind.

1. The inmate, or his or her legal guardian, shall execute an Authorization and Release of Medical Information form (Attachment A).

2. Medical Information for Application for Release of an Inmate Based on Functional Incapacitation/Imminent Death form (Attachment B) shall be completed, and signed by the department's Health Authority and/or Mental Health Director, as appropriate. A prognosis of death within 30 days must be made by a person licensed to practice medicine and surgery in Kansas.

   a. It is not necessary to include lengthy medical records; rather a thorough description of the inmate's medical condition should be provided, with a statement of how it impacts the question of whether the inmate has a condition, including (but not restricted to) one that renders the inmate terminally ill, resulting in the afflicted inmate being rendered incapable of causing physical harm.

3. The application in support of the request for release based on functional incapacitation shall be prepared by the inmate's unit team counselor, using the

Application for Release Based on Functional Incapacitation / Imminent Death form (Attachment C).

a. If the inmate's file does not include the prosecuting attorney's version of the most recent crime of conviction, the unit team counselor shall contact the prosecuting attorney's office and request that the prosecutor provide his or her version of the crime.

b. Except in those cases in which the inmate has a terminal medical condition which is likely to result in death within 30 days, the Unit Team Manager shall contact the Director of Victim Services who shall review any issues related to victim services and make such contact with any victim or survivor deemed necessary.

c. The unit team counselor shall confer with the IPO regarding a release plan.

(1) In this process, the release planning procedure described in IMPP 14-103 shall not be required.

(2) However, the IPO shall forward a proposed residence plan to the Parole Director of the region to which the offender will be released.

(a) The Parole Director shall direct such review of the residence plan deemed appropriate, and the Director or designee shall provide feedback to the IPO, including recommendations about the residence plan and any other conditions of release deemed appropriate.

4. The application shall be submitted to the facility Classification Administrator who shall then forward it to the Warden.

5. The Warden shall make the decision whether to initially approve or disapprove the application for the next step. The Warden may consult such staff as he/she deems appropriate.

6. If the Warden disapproves the application, it shall be returned to the unit team counselor with this decision for placement in the file. It shall be in the Warden's discretion how to notify the person who requested the application of this outcome.

a. Unless the requestor has been included by the inmate on the release of information (Attachment A), any notification provided the requestor shall not include specific medical and/or mental health data.

7. If the Warden approves the application, the Warden shall then forward the application and supporting attachments and other applicable documentation to the Office of the Deputy Secretary for Facilities Management. The Deputy Secretary will coordinate and facilitate processing of the application in Central Office including, but not limited to:

a. Distributing copies of the application and attachments for review and consideration to:

(1) Central Office Classification Manager

(2) Director of Release Planning

(3) Administrator of Sexually Violent Predator Act program who shall confer with the chair of the Prosecuting Review Committee, to advise that the application is being reviewed, and seek input about whether the inmate will be considered for prosecution as a sexually violent predator; and,

(4) Director of Victim Services.

b. Based on the review of available information, the Deputy Secretary shall make a decision regarding the application.

8. If the Deputy Secretary of Facility Management disapproves the application, it shall be returned to the Warden, and shall be in the Warden's discretion as to how to notify the person who requested the application of this outcome. Unless the requestor has been included by the inmate on the release of information (Attachment A) any notification provided the requestor shall not include specific details of medical and/or mental health data.

9. If the Deputy Secretary of Facility Management approves the application, it shall be forwarded to the Secretary of Corrections with a recommendation that the Secretary apply to the Kansas Parole Board for release of the inmate based on functional incapacitation.

10. Except in those cases in which the inmate has a terminal medical condition which is likely to result in death within 30 days, if, based on existing information, the Secretary wishes to continue with the application process, the Secretary shall:

a. Notify the prosecuting attorney and sentencing judge pursuant to the Notice Regarding Application of Inmate Based on Functional Incapacitation form (Attachment C), together with,

(1) The completed Medical Information for Application for Release of an Inmate Based on Functional Incapacitation;

(2) The inmate's release authorizing the release of medical information; and,

(3) Such further information as the Secretary deems appropriate

b. Notify the victim through the Director of Victim Services.

11. Except in those cases in which the inmate has a terminal medical condition which is likely to result in death within 30 days, based upon all assembled information, including any comments received from the prosecuting attorney, judge, and victim, the Secretary shall approve or disapprove the application.

a. Disapproved applications shall be returned to the Warden of the facility of origin with a statement as to why the application was disapproved.

b. Approved applications shall be forwarded to the Kansas Parole Board to be considered for release of the inmate based on functional incapacitation, in keeping with K.S.A. 22-3728. 2002 Sup. and K.A.R. 45-700-1.

c. Approved applications for inmates whose medical condition is likely to result in death within 30 days shall be forwarded directly to the chairperson of the Kansas Parole Board.

12. If an application for release due to functional incapacitation is disapproved at any point, up to and including by the Secretary of Corrections, any future application shall specifically address what has changed since the disapproval that warrants further consideration of an application for the release for the inmate based on functional incapacitation.

13. At any point in the application process, the reviewer may request additional information from a department employee, a family member, a health care provider, or any other person in possession of information relevant to the application process.

14. If the Board grants the request for release, the offender shall be supervised by the Division of Community and Field Services.

    a. If the inmate`s medical condition is likely to result in death within 30 days, the Sentencing Judge(s), Prosecuting Attorney(s) and the Director of Victim's Services shall be notified of the inmate`s pending release (Attachment E).

    b. The Parole Supervisor managing the case shall ensure that good time shall be awarded in accordance with IMPP 14-120. Questions regarding computation of good time shall be directed to the Sentence Computation Group.

    c. The offender's discharge date shall be presumed to be the projected discharge date unless otherwise adjusted.

IV. Inmates Released Due to Functional Incapacitation/Imminent Death May Have Their Supervision Revoked For Any Of The Following Reasons:

1. The individual presents a risk to public safety.

2. The individual fails to abide by the conditions of release.

3. The individual's illness or medical condition significantly improves.

4. If release was based upon the prognosis that death was imminent within 30 days and the individual does not die within 30 days of release.

NOTE: The policy and procedures set forth herein are intended to establish directives and guidelines for staff and offenders and those entities that are contractually bound to adhere to them. They are not intended to establish State created liberty interests for employees or offenders, or an independent duty owed by the Department of Corrections to employees, offenders, or third parties. Similarly, those references to the standards of various accrediting entities as may be contained within this document are included solely to manifest the commonality of purpose and direction as shared by the content of the document and the content of the referenced standards. Any such references within this document neither imply accredited status by a Departmental facility or organizational unit, nor indicate compliance with the standards so cited. The policy and procedures contained within this document are intended to be compliant with all applicable statutes and/or regulatory requirements of the Federal Government and the state of Kansas. This policy and procedure is not intended to establish or create new constitutional rights or to enlarge or expand upon existing constitutional rights or duties.

REPORTS REQUIRED

None.

REFERENCES

K.S.A. 22-3728 as amended by: L. 2010 ch. 107 (HB 2412)

IMPP 14-120
K.A.R. 45-700-1, 45-700-2

ATTACHMENTS

Attachment A - Authorization for Release of Medical Information for Application for Release of an Inmate Based on Functional Incapacitation/Imminent Death - 1 page

Attachment B - Medical Information for Application for Release of An Inmate Based on Functional Incapacitation/Imminent Death. - 1 page

Attachment C - Application for Release of an Inmate Based on Functional Incapacitation/Imminent Death. - 3 pages

Attachment D - Notice Regarding Application of Inmate Based on Functional Incapacitation - 1 page

Attachment E – Notice Regarding Release of Inmate Due to Functional Incapacitation - 1 page

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION FOR

APPLICATION FOR RELEASE OF AN INMATE BASED ON FUNCTIONAL INCAPACITATION/IMMINENT DEATH

The undersigned, _____, No. _____, or _____ as his/her legal guardian, hereby authorizes the KDOC Health Authority, including the following persons _____ to provide information to the Kansas Parole Board, the Kansas Department of Corrections, including the Secretary of Corrections, the Deputy Secretary of Facility Management, the Classification Administrator, the Director of Victim Services, the Director of Release Planning, the Administrator of the Kansas Sexually Violent Predator Act program, the Warden, Deputy Warden and Classification Administrator of the facility where I am housed, the Unit Team Manager of my unit, the Institutional Parole Officer and discharge planner of the facility where I am housed, the unit team counselor I have been assigned, the Parole Director of the parole region where I want to release, and any parole staff in that region who need to review my application or proposed residence plan, administrative and support staff of the Kansas Parole Board, and other employees or acting agents of the Kansas Department of Corrections who have a need to know: _____
_____
as well as the judge and prosecuting attorney on the case for which I am currently serving time, or designee, the victim(s) or survivor(s) of any of my crimes; and, the following other persons:
_____
_____
the medical or mental health information necessary to describe my current condition; to describe how my condition impacts my functional incapacitation~~;~~ /Imminent Death the source of the medical or mental health information; an opinion about whether my condition is likely or unlikely to improve and to provide input on my application for release based on functional incapacitation/Imminent Death.

I hereby agree to hold harmless the Kansas Department of Corrections, the KDOC Health Authority and acting agents, the Kansas Parole Board, the State of Kansas, any person named above by classification or name, and any of the heirs and assigns of said persons, on account of the release of this medical information for the purpose indicated herein.

_____ _____
Date Signature

I am the ☐ inmate ☐ inmate's legal guardian (check one).

_____ _____
Date Witness

Form 11-110-001

MEDICAL INFORMATION FOR APPLICATION FOR

RELEASE OF AN INMATE BASED ON FUNCTIONAL INCAPACITATION/IMMINENT DEATH

Inmate Name: _____ No: _____

An application has been submitted requesting this inmate's release due to functional incapacitation/__Imminent Death.__ ***Please provide the information requested below for consideration as part of the review process.***

The inmate's current medical/mental health condition is as follows:

The medical/mental health information that reflects the inmate's condition that relates to his/her functional incapacitation/Imminent Death is as follows:

The source of this medical/mental health information is:

In my medical opinion, it ☐ **is likely** ☐ **is not likely** (check one) that the patient's condition will improve. (If the inmate`s condition is likely to result in death within 30 days, please so indicate in comments).

Comment:

_____ _____

Date Signature of KDOC Health Authority or Director of Mental Health

A medical opinion the inmate's condition is likely to result in death within 30 days requires the signature of a person licensed to practice medicine and surgery in Kansas.

Form 11-110-002

APPLICATION FOR RELEASE OF AN INMATE BASED ON FUNCTIONAL INCAPACITATION/IMMINENT DEATH

Background Information

Inmate Name: _____ No: _____ Current Age: _____

This inmate is currently housed at _____ facility, and his/her custody is _____.

The inmate's current conviction is:

This inmate's criminal history is:

This inmate has served _____ of _____ of his/her current sentence.

The prosecuting attorney's version of the current crime is:

Release Plan

The proposed release plan for this inmate is (here include all contact that has been made to develop this information and the status of the viability of the release plan, e.g., housing is available, services are available, funds are available, etc.;

The residence plan has been reviewed by parole; their recommendation related to this residence plan is:

Information that is available about the victim's position about the offender's release based on functional incapacitation/imminent death:

Information that is available about the inmate's family situation/relationships and their position about the offender's release based on functional incapacitation/imminent death:

Recommendations about conditions of release:

Attachments: Information from prosecuting attorney (Not required if a prognosis of death is within 30 days or release)
Information from parole
Medical information form

Approval/Disapproval/Comment: (attach additional pages as necessary to reflect input from all reviewers)

☐ Approved ☐ Disapproved Comment:

_____ _____
Date Unit Team Manager

☐ Approved ☐ Disapproved Comment:

_____ _____
Date Warden

☐ Approved ☐ Disapproved Comment:

_____ _____
Date Deputy Secretary of Facilities Management

☐ Approved ☐ Disapproved Comment:

_____ _____
Date Secretary of Corrections

Additional attachments for KPB (Not required if the inmate has a prognosis of death within 30 days of release):

Response from prosecutor or judge
Response from victims
Recommendations of reviewing staff

NOTICE REGARDING APPLICATION OF INMATE BASED ON FUNCTIONAL INCAPACITATION

TO: Prosecuting Attorney: _____
Judge: _____
Director of Victim Services

FROM: Secretary of Corrections

DATE: _____

INMATE (Name & Number): _____

You are hereby notified that an application has been submitted to the Secretary of Corrections for consideration for release of the referenced inmate based upon functional incapacitation, pursuant to K.S.A. 22-3728, 2002 Supp. and K.A.R. 45-700-1.

With this notification you will receive information regarding the inmate and the application for release due to functional incapacitation.

These documents provide information about the inmate's medical condition, and reflect the basis for submitting the application, as well as the release plan proposed. If the Kansas Parole Board finds that the inmate lacks the capacity to cause physical harm by virtue of his/her medical condition, and concludes that release is appropriate in consideration of all the factors set out in the statute and regulations, the inmate will be released subject to conditions imposed by the Board, and will be under supervision similar to post-release, conditional or parole release.

If you would like to provide input to the Kansas Parole Board regarding this application, please send your comments to:

Secretary of Corrections
900 SW Jackson, 4th Floor
Topeka, KS 66612
ATTENTION: Functional Incapacitation Applications

Your comments should reach the Secretary of Corrections **no later than:**
_____.

If you have questions, please do not hesitate to contact me by calling 785.296.3310.

Thank you.

Attachments

NOTICE REGARDING RELEASE OF INMATE BASED ON IMMINENT DEATH

TO: Prosecuting Attorney: _____
Judge: _____
Director of Victim Services

FROM: Secretary of Corrections

DATE: _____

INMATE (Name & Number): _____

You are hereby notified that the aforementioned inmate was released from incarceration on (date) by the Secretary of Corrections due to a medical illness that will likely result in the inmate`s death within 30 days of release. This release was pursuant to L.2010 ch. ___ Sec. ____ (HB 2412)

The attached documents provide information relative to the inmate's medical condition, and reflect the basis for the release. The inmate is subject to conditions imposed by the Kansas Parole Board, and will be under supervision similar to post-release, conditional or parole release.

If you have questions, please do not hesitate to contact me by calling 785.296.3310.

Thank you.

Attachments

INTERNAL MANAGEMENT POLICY & PROCEDURES

STATEMENT OF ANNUAL REVIEW

IMPP # 11-111

Title: Programmatic Furloughs for Work Release Participants

The above referenced Internal Management Policy and Procedure (IMPP), issued effective **12-05-05** was reviewed during **September 2007** by the KDOC Policy & Regulation Review Panel. At the time of this annual review the Policy & Regulation Review Panel determined that: no substantive changes and/or modifications to this IMPP are necessary at this time, and the IMPP shall remain in effect as issued on the above stated date.

The next scheduled review for this IMPP is September 2008.

This statement of annual review shall be placed in front of the referenced IMPP in all manuals.

04-14-08

_____ _____

Policy and Procedure Coordinator Date

KANSAS DEPARTMENT OF CORRECTIONS

	INTERNAL MANAGEMENT POLICY AND PROCEDURE	**SECTION NUMBER** 11-111	**PAGE NUMBER** 1 of 10
		SUBJECT: **DECISION MAKING: Programmatic Furloughs for Work Release Participants**	
Approved By:  **Secretary of Corrections**		**Original Date Issued:**	**04-20-84**
		Current Amendment Effective:	**12-05-05**
		Replaces Amendment Issued:	**01-07-01**

POLICY

Programmatic furloughs may be granted to certain inmates participating in work release as part of a structured release program providing a systematic decrease in supervision and a corresponding increase in the individual inmate's responsibility. (ACO 2-CO-4G-01, ACI 3-4391) Eligibility for furlough consideration shall be determined by the severity of the crime of conviction and shall be restricted to work release inmates with: one year or less remaining to serve on the his/her sentence; minimum custody classification status for at least sixty days; no Class I or II disciplinary convictions within sixty [60] days; and current or recent participation in self-improvement or work activity with satisfactory performance. Offenders returned to custody for violation(s) of conditions of post-incarceration supervision, pursuant to K.S.A. 75-5217, shall not be considered eligible for programmatic furloughs. An approved sponsor shall be a requirement for all furloughs.

Furlough applicants shall be reviewed and screened against criteria, which limit the potential threat to public safety and indicate some legitimate purpose for the furlough release while considering the program needs of the inmate.

Except for adjustments as may be approved to facilitate facility operations or inmate program needs, programmatic furloughs shall not exceed five (5) days in length, including travel time, and shall be authorized no more frequently than every sixty (60) days.

DEFINITIONS

Programmatic Furlough: Authorized release of an inmate on work release status into the community, in the care of an approved sponsor, for enhancement of the inmate's correctional program.

PROCEDURES

I. Applicability/General Guidelines

A. Unless special provisions are specifically said to address a particular segment of the inmate population, this IMPP shall apply to inmates participating in work release who are housed in the Wichita Work Release Facility or the Hutchinson Correctional Facility work release unit. (ACI 3-4392)

B. Offenders shall not be considered eligible for programmatic furlough if one of the following conditions apply:

1. Offenders convicted of the offenses listed in Attachment “A” (including attempt, conspiracy, and solicitation to commit the listed offenses) until after the first parole eligibility date and parole hearing subsequent to their most recent admission.

2. Offenders convicted after 7-1-93 of the offenses listed in Attachment A (including attempt, conspiracy, and solicitation to commit the listed offenses).

3. Offenders returned to custody for violations of conditions of post-incarceration supervision pursuant to K.S.A. 75-5217.

C. The work release inmate's first furlough to a particular sponsor shall have the approval of the Secretary of Corrections or designee.

1. Approval of subsequent furloughs to the same sponsor at the same address within twelve (12) months of the pre-furlough investigation shall rest with the warden, unless the prospective furloughee is serving a conviction for first degree murder or as otherwise notified by the Secretary of Corrections or designee.

a. The Secretary's approval and the warden's authority to approve subsequent furloughs shall be withdrawn any time a work release inmate's projected or anticipated release date changes to the point the work release inmate is no longer one year or less from release.

b. Prior to approving any subsequent furlough, the work release inmate's projected or anticipated release date shall be re-checked and verified as being within one year.

D. Re-verification of the furlough sponsor shall be completed when the sponsor changes, the sponsor's address changes, or at least every twelve (12) months from the date of the last investigation.

1. The first furlough following a re-verification shall require an approval/disapproval action by the Secretary or designee.

E. The following provisions shall be applicable for all work release inmates:

1. To be eligible for furlough consideration, the inmate must be employed full time.

a. For purposes here, full time shall be defined as a minimum of thirty (30) hours per week.

2. Furloughs shall not exceed forty-eight (48) hours in length, including travel time, except that:

a. Travel time may be added to the length of the furlough, if the furlough destination is more than fifty (50) miles from the facility.

3. Furloughs shall be requested and granted only to coincide with the work release inmate's scheduled days off from community employment.

4. Furloughs may be granted on a weekly basis, or as determined by the facility warden.

5. Furloughs shall begin after 8:00 a.m. and end by 9:00 p.m. on the days of departure and return.

6. Program participants shall be limited to one (1) furlough sponsor and one (1) furlough sponsor investigation, except as provided by Section I.D. of this IMPP, during the time they are in the work release program.

7. Work release participants shall have been continuously classified as minimum custody for at least sixty (60) days.

8. The work release participant shall have no Class I or II disciplinary convictions within sixty (60) days, nor any Class III disciplinary convictions within thirty (30) days, nor any pending disciplinary reports.

    a. This requirement shall apply to both the application and implementation dates of the furlough.

9. The work release participant shall be currently participating in recommended treatment/self-help programs.

10. The inmate's request for a programmatic furlough shall relate directly to the inmate's parole plan.

II. Request and Approval Process

A. Initial facility actions.

1. Work release inmates desiring a programmatic furlough shall submit an application to their unit team at least seventy (70) calendar days in advance of the desired date of the furlough, using Part I of the Application for Furlough (Attachment B, Form #11-111-001).

    a. Work release facilities may reduce the processing time required for furlough applications by work release inmates by establishing procedures which reduce the number of days for actions described at Sections II.A.2. (unit team review), II.A.4. (PMC review), II.C.2. (Warden review) and II.E.1. (Warden implementation).

    b. No reduction in the allotted processing time for action by the field service or central office staff shall be permitted.

2. The unit team shall review the furlough application within ten (10) calendar days of receipt to determine if the furlough eligibility requirements of the policy and Section I. of this IMPP have been met.

3. If the applicant meets the eligibility requirements, the unit team shall forward the application to the Program Management Committee with appropriate comments on Part II of the application.

    a. If the applicant does not meet the eligibility requirements, the application shall be rejected and the work release inmate notified in writing by the unit team, using the Furlough Disapproval Notice (Attachment C, Form #11-111-002).

4. Review and action by the Program Management Committee shall occur within ten (10) calendar days of receipt.

    a. The decision of the Program Management Committee shall be recorded on Part III of the Application for Furlough and forwarded to the unit team.

    b. If the furlough application is denied by the Program Management Committee, the work release inmate shall be notified in writing by the unit team using the Furlough Disapproval Notice (Attachment C, Form #11-111-002).

    c. If the furlough application is approved by the Program Management Committee, the approval shall be regarded as tentative, pending the results of the pre-furlough investigation.

5. Upon receiving tentative approval from the Program Management Committee, the unit team shall prepare a detailed narrative on the Furlough Plan Form (Attachment D, Form #11-111-003).

    a. The furlough plan narrative shall, at a minimum, include the following information:

        (1) A summary of the work release inmate's offense, sentence structure, and parole eligibility date, conditional release date, or maximum sentence date (whichever is applicable for furlough eligibility purposes);

        (2) A summary of the work release inmate's institutional adjustment, progress, performance, and disciplinary record;

        (3) Complete sponsor information, which includes name, address, telephone number, and relationship to the work release inmate;

        (4) A statement of the purpose of the furlough, planned activities, and how the proposed furlough will benefit the work release inmate and enable him/her to re-establish family and community ties; and,

        (5) A summary of previous furloughs the work release inmate has taken, including comments on the results of previous furloughs to the current and other sponsors.

6. The unit team shall request a pre-furlough investigation by the appropriate parole office.

    a. The request shall be made on the Pre-Furlough Investigation Request (Attachment E, Form #11-111-004).

        (1) The work release inmate application and four (4) copies of the proposed furlough plan shall be attached.

7. The unit team shall, on those cases where the work release inmate's release is subject to a KPB decision, forward a copy of the furlough plan and copy of the Pre-Furlough Investigation - Official's Comments (Form #11-111-006) to the Kansas Parole Board (KPB). (Cases where the work release inmate's release is governed by a determinate sentence pursuant to the Sentencing Guidelines Act are specifically excluded from this process.)

    a. The above materials shall be forwarded at the same time the pre-furlough investigation is requested.

    b. Comments by the KPB should be recorded on the comments form and returned directly to the requesting facility as noted on the form within twenty one (21) days of receipt.

    c. Upon receipt, KPB comments shall be handled in the same manner as those of other officials from whom comments were obtained.

8. If the furlough sponsor is an out-of-state resident:

    a. The unit team shall determine the suitability of the sponsor and the furlough plan; and,

b. Field service actions in such cases shall be as outlined in Procedure III.B.2.

B. Field service actions.

1. The assigned district parole officer shall complete a pre-furlough investigation. This investigation shall consist of an interview with the proposed sponsor to:

a. Determine the suitability of the sponsor;

b. Determine the adequacy of housing and transportation arrangements;

c. Review and explain the conditions of furlough and the sponsor's responsibilities as outlined on the Furlough Sponsor's Agreement (Attachment F, Form #11-111-005); and,

d. Obtain the sponsor's signature on two (2) copies of the Furlough Sponsor's Agreement (Attachment F, Form #11-111-005).

2. The assigned parole officer shall contact the local police, sheriff, and county/district attorney.

a. This portion of the investigation shall be completed by forwarding a copy of the furlough plan to the identified officials, with a copy of the Pre-Furlough Investigation - Official's Comments (Attachment G, Form #11-111-006);

(1) Comments by the identified officials shall be recorded on this form.

(a) These comments shall be returned directly to the requesting work release facility as noted on the form.

(2) The assigned parole officer shall include in the investigation report comments of the victim or victim's family if the work release inmate was convicted of an offense listed in Attachment A.

(3) The investigation report and Furlough Sponsor's Agreement shall be returned to the unit team within twenty-one (21) days of receipt.

3. Post-furlough investigations shall not be routinely requested.

a. If irregularities are brought to the attention of work release facility staff, a post-furlough investigation request may be made to the appropriate district parole office.

b. Post-furlough investigations shall be completed and returned to the requesting work release facility within fifteen (15) working days.

C. Facility actions after investigation.

1. The Program Management Committee shall review the furlough plan and pre-furlough investigation report within seven (7) calendar days of their receipt from the investigating parole officer.

2. The warden shall review the furlough application and plan, the pre-furlough investigation report, and the Program Management Committee's recommendation, within seven (7) calendar days of receipt.

3. If the warden determines that the risk of violence is minimal while the work release inmate is on furlough and that the furlough would be appropriate, the warden's approval shall be recorded on the Warden's Furlough Recommendation (Attachment H, Form #11-111-007).

4. If the warden determines that the furlough would not be appropriate, the warden's disapproval of the furlough shall be recorded in writing on the Furlough Disapproval Notice (Attachment C, Form #11-111-002).

   a. In providing such notice, general information may be given as to the reasons for the denial. However, no specific information about why the furlough was denied or who specifically recommended denial shall be provided.

   b. The warden's decision shall be final and shall not be subject to appeal.

5. Upon approval by the warden, the following documents shall be forwarded to the Secretary of Corrections or designee:

   a. The work release inmate's furlough application;

   b. The furlough plan;

   c. The signed sponsor's agreement;

   d. The official's comments form;

   e. The pre-furlough investigation report;

   f. The completed order of furlough prepared for signature; and,

   g. The warden's furlough recommendation.

D. Central office actions.

1. The Secretary of Corrections or designee shall review these documents and render a decision within ten (10) calendar days of receipt.

2. If the furlough is approved, the white (original) copy of the order of furlough shall be returned to the warden.

   a. The yellow copy of the order of furlough shall be retained by the Secretary or designee.

   b. The pink copy shall be forwarded to the appropriate parole office and shall serve as notice of the furlough approval.

3. If the furlough is disapproved by the Secretary or designee, the work release inmate shall be notified in writing through the Furlough Disapproval Notice (Attachment C, Form #11-111-002).

   a. The original and one copy of this notice shall be forwarded to the warden.

   b. A copy of the notice shall be retained by the Secretary's designee.

4. If a furlough is disapproved, the work release inmate shall not submit another application for a period of six (6) months, unless an earlier date is specified in the notice of disapproval.

E. Furlough implementation.

1. The warden shall have at least five (5) calendar days after approval by the Secretary to implement the furlough.

2. If any significant detail of the proposed furlough must be changed after the order of furlough is signed, the warden or designee shall advise the Secretary or designee, who shall approve or disapprove the change.

   a. If the change is approved, a new order of furlough shall be issued reflecting the change.

   b. The Secretary or designee may authorize the warden to sign the amended order of furlough if time does not allow for resubmission to the central office.

   c. In no instance shall a work release inmate be released with an order of furlough that has been altered, corrected, or gives the appearance that it has possibly been falsified.

3. When approval of a furlough has been given, the warden or designee shall notify the individuals listed below prior to the work release inmate being released, using the Official Notification of Furlough (Attachment I, Form #11-111-008). If there is not sufficient time to make this notification by mail, initial notification shall be by telephone or teletype, followed by mail notification. Telephone or teletype notification shall be noted on the mail notification form. The individuals to be notified are:

   a. The facility health authority or designee (within five days of the furlough effective date);

   b. The police department in the community to which the furlough has been granted;

   c. The county sheriff in the county to which the furlough has been granted;

   d. The furlough sponsor; and,

   e. The district parole officer.

4. The furlough sponsor shall be provided with a copy of the inmate's furlough agreement in addition to the above notification.

5. The victim(s) of the offense shall be notified in accordance with K.S.A. 22-3818 and IMPP 05-108. In cases where victim notification is required, the inmate shall not be released on furlough until the notification letter has been mailed, and sufficient time has been given for it to be received. Five (5) days shall be considered the minimum amount of time for the victim notification letter to be received.

   a. Consistent with IMPP 05-108, when a work release participant is released on furlough, notification of the victim shall not be required if the victim(s) was notified of the inmate's placement in work release and

advised that furloughs may be granted to the inmate without further notice as a part of the work release program.

6. Prior to the work release inmate's departure on a furlough the facility health authority or designee shall provide the inmate with counseling regarding communicable diseases and other relevant medical issues or precautions.

   a. The facility health authority or designee shall notify the inmate's unit team when the counseling session has been completed.

   b. The facility shall not implement the furlough without such notification by the health authority or designee.

7. Transportation for approved furloughs shall be provided by:

   a. The approved furlough sponsor; or,

   b. At the warden's discretion, a commercial bus may be used.

      (1) When commercial bus is the approved mode of transportation, the scheduled departure and arrival times shall be specified on the application prior to submission.

8. All transportation costs associated with the furlough shall be the responsibility of the work release inmate and/or the furlough sponsor.

9. A furlough that has been approved by the Secretary may be canceled prior to implementation due to disciplinary infractions by the work release inmate or other just cause, as determined by the warden. Such cancellations shall not require the concurrence of the Secretary.

III. Subsequent Furloughs To A Previously Approved Sponsor

A. The warden of each work release facility shall issue general orders, which outline the furlough application submission and approval process for subsequent furloughs.

B. At a minimum, the application process shall include:

1. A review of furloughs previously granted;

2. A current assessment of the work release inmate's performance and disciplinary record;

3. Contact with the sponsor and verification that the sponsor will be available for supervision for the proposed furlough;

4. A review and verification of transportation arrangements; and,

5. Verification that the work release inmate's projected or anticipated release date is still within one year.

C. The Application for Furlough (Attachment B) shall be submitted for each subsequent request.

1. A copy of the order of furlough for any subsequent furloughs granted by the warden shall be forwarded to the Deputy Secretary of Facility Management or designee.

D. If the proposed furlough is denied at the facility level, that decision shall be final, and the work release inmate shall be advised in writing of that decision and of when the inmate may apply again for such consideration.

IV. Furlough Conditions and Violation Actions

A. Conditions and consequences of violations.

1. While on furlough, each participant shall obey all federal, state, and local laws or ordinances, as well as all conditions contained in the Order of Furlough (Attachment J, Form #11-111-009).

2. Violation of any condition of the order of furlough, or deviation from the approved furlough plan, shall be a Class I offense.

3. Violation of any federal, state, or local laws or ordinances shall be cause for disciplinary action and/or prosecution in a court of law.

B. Departmental actions.

1. If, in the course of a furlough, violations of the conditions of furlough are reported to, become known, or are suspected by an employee of the department, such information shall be immediately reported to the warden of the releasing work release facility.

   a. Information regarding alleged violations may be received from the sponsor, local law enforcement personnel, district parole officers, and/or members of the general public.

   b. When appropriate, facility staff may ask the district parole officer to investigate the facts and circumstances surrounding the alleged violation and report the findings.

2. A furlough may be terminated prior to the scheduled end of the furlough if the warden believes the inmate has violated any rule or condition of furlough.

   a. In the event the decision is made to terminate the furlough prior to the scheduled time, the furloughed work release inmate shall be given either written or verbal notice of the time the furlough is to end, and where the work release inmate should surrender himself/herself.

   b. In the event the work release inmate cannot be located to be given notice, the notice shall be left at the residence to which the inmate was furloughed.

3. Based on the district parole officer's findings, the warden or designee shall determine if the furlough participant should be arrested and detained. This determination shall be conveyed to the regional parole director who shall advise the district parole officer of the decision.

   a. Upon receiving a decision to arrest and detain a furlough participant, the district parole officer shall prepare an Order to Arrest and Detain and deliver it to local law enforcement authorities.

   b. The district parole officer shall prepare a furlough incident report detailing the facts and circumstances surrounding the alleged violation and the actions taken.

(1) This report shall be prepared and submitted on the first working day following the issuance of the order to arrest and detain.

4. Upon being notified of the furlough participant's apprehension, the district parole officer shall notify facility staff of the violator's whereabouts and availability for transportation, and of the status of other possible charges.

5. Work release facility staff shall advise the department's transportation coordinator of the need to return the furlough participant to the appropriate DOC facility.

   a. The transportation coordinator shall be provided with the work release inmate's name and number, current location, and availability for transportation, and the name of the facility granting the furlough.

6. Work release facility staff shall forward a complete report to the Deputy Secretary of Facility Management describing the furlough termination action, within three (3) days of that action.

NOTE: The policy and procedures set forth herein are intended to establish directives and guidelines for staff and offenders and those entities who are contractually bound to adhere to them. They are not intended to establish State created liberty interests for employees or offenders, or an independent duty owed by the Department of Corrections to either employees, offenders, or third parties. This policy and procedure is not intended to establish or create new constitutional rights or to enlarge or expand upon existing constitutional rights or duties.

REPORTS REQUIRED

None.

REFERENCES

K.S.A. 22-3818, 75-5210 (e), 75-5217, 75-5267
IMPP 05-108
ACO 2-4G-01
ACI 3-4391, 3-4392

ATTACHMENTS

Attachment A - Offenses For Which Inmates Shall Not Be Granted A Furlough Unless Certain Conditions Exist, 3 pages
Attachment B - Application For Furlough, 1 page
Attachment C - Furlough Disapproval Notice, 1 page
Attachment D - Furlough Plan, 1 page
Attachment E - Pre-Furlough Investigation Request, 1 page
Attachment F - Furlough Sponsor's Agreement and Work Release Facility Telephone Numbers, 2 pages
Attachment G - Pre-Furlough Investigation - Official's Comments, 1 page
Attachment H - Warden's Furlough Recommendation, 1 page
Attachment I - Official Notification of Furlough, 1 page
Attachment J - Order of Furlough, 1 page

Offenses For Which Inmates Shall Not Be Granted A Furlough Unless Certain Conditions Exist

STATUTE	CRIME
21-3604	Abandonment of a Child
21-3609	Abuse of a Child
21-3609	Abuse of a Child
21-3719	Agg Arson
21-3411	Agg Assault Law Enforcement Officer
21-3415	Agg Batt Against a Law Enforcement Officer
21-3504	Agg Indecent Liberties with a Child
21-3511	Agg Indecent Solicitation of a Child
21-3422a	Agg Interference With Parental Custody
21-3833	Agg Intimidation Witness/Victim
21-3611	Agg Juvenile Delinquency
21-3405a	Agg Vehicular Homicide
21-3410	Aggravated Assault
21-3414	Aggravated Battery
21-3716	Aggravated Burglary
21-3810	Aggravated Escape from Custody
21-3603	Aggravated Incest
21-3421	Aggravated Kidnapping
21-3427	Aggravated Robbery
21-3518	Aggravated Sexual Battery
21-3506	Aggravated Sodomy
21-3433	Aircraft Piracy
21-3406	Assisting Suicide
21-3417	Attempted Poisoning
21-3601	Bigamy

STATUTE	CRIME
21-3428	Blackmail
21-3612	Contributing to the Misconduct/Deprivation of a Child
21-3407	Criminal Abortion
21-3606	Criminal Desertion
21-3509	Enticement of a Child
21-3610b	Furnishing Alcoholic Bev. to a Minor
21-3514	Habitual Promoting Prostitution
21-3602	Incest
21-3503	Indecent Liberties With a Child
21-3504	Indecent Liberties With a Child
21-3422	Interference With Parental Custody
21-3404	Involuntary Manslaughter
21-3404	Involuntary Manslaughter
21-3420	Kidnapping
65-4126(2)	MF, PO, DI O SA OF DE, ST O HA DR
65-4126(3)	MF, PO, DI O SA OF DE, ST O HA DR
21-3401	Murder 1st
21-3402	Murder 2nd
65-4127a(2)	POS/DI OP, OP O NAR DR (2D OFF)
65-4127a(3)	POS/DI OP, OP O NAR DR (3D OFF)
21-3605	Non-support of a Child
21-3513	Promoting Prostitution
21-3519	Promoting Sexual Perfor/Minor
21-3502	Rape
21-3502	Rape
21-3426	Robbery

STATUTE	CRIME
21-3516	Sexual Exploitation of a Child
21-3516	Sexual Exploitation of a Child
21-3419	Terroristic Threat
21-3826	Trafficking Contraband in a Penal Inst
21-3403	Voluntary Manslaughter

Attachment B, IMPP 11-111
Effective 12-05-05

KANSAS DEPARTMENT OF CORRECTIONS
Application For Furlough

Check the type of furlough for which application is being made

_____ PROGRAMMATIC _____ JOB _____EMERGENCY

Inmate Name: _____ Inmate #: _____ Date:_____

Facility: _____ Current Custody: _____ PE Date: _____

BEGINNING DATE OF FURLOUGH: _____ ENDING DATE _____
mo day yr mo day yr

Sponsor's Name: _____ Relationship _____

Sponsor's Address:_____
Street City State Zip

_____ (_____)_____
County Phone

Reason for Furlough:_____

_____

_

****

UNIT TEAM REVIEW

Previous furlough to this sponsor: _____ No _____ Yes (Date) _____

Date of last field investigation of this sponsor: _____

Meets basic eligibility criteria established by IMPP 11-111:

____ Yes ____ No (If No explain) _____

Comments: _____
_____

_____ Recommend Approval (Complete Furlough Plan and forward to PMC)

_____ Do Not Recommend Approval

****

PROGRAM MANAGEMENT COMMITTEE REVIEW

Comments: _____
_____
_____
_____
_____

_____Recommend Approval _____ Do Not Recommend Approval

Form #11-111-001

KANSAS DEPARTMENT OF CORRECTIONS

Furlough Disapproval Notice

TO: _____ _____
(Inmate Name) (Number)

Your request for furlough to begin _____ and end_____
mo day yr mo day yr
has been disapproved.

The reason(s) for disapproval is (are): _____

_____

_____

_____

_____ _____
Signature Date

Form #11-111-002

KANSAS DEPARTMENT OF CORRECTIONS

Furlough Plan

Name: _____ Number: _____ DOB: _____

Offense(s):_____ Sex: _____

_____ PE Date: _____

_____ Controlling Sent: _____

Sentence Begins Date: _____ Furlough Dates: _____ to _____
mo day yr mo day yr

Comments/Recommendations:

_____ _____
Prepared By Date

THIS FORM NOT BE GIVEN TO THE APPLICANT

KANSAS DEPARTMENT OF CORRECTIONS
Pre-Furlough Investigation Request

TO: District Parole Office Date: _____
mo day yr

_____
(City)

FROM: Records Office _____
(Facility Unit)

SUBJ: _____ _____
(Inmate Name) (Number)

The above referenced inmate meets the eligibility criteria for programmatic furlough as established in IMPP 011-111. Tentative approval has been given by the facility for a furlough. You may, therefore, assume that institutional adjustment is such to merit consideration. Final approval of a furlough is contingent upon the investigation of the furlough plan and sponsor.

We respectfully request that you conduct a field investigation of the inmate's furlough plan and sponsor. Your investigation of this proposed sponsor will be valid for a period of 12 months (unless the sponsor moves) and may be used in conjunction with subsequent furloughs during this period.

Along with your investigation report, please include the comments of the local police, sheriff, and district/county attorney. Also, we ask that you review the conditions of furlough and sponsor's responsibilities with the proposed sponsor and return a signed sponsor's agreement.

VICTIM'S COMMENTS REQUESTED: Yes No (Circle one)

Last Known Address: _____

SENTENCE INFORMATION

Offense(s):_____
_____

Aggregate/Controlling Sentence:_____

County of Conviction: _____

SPONSOR INFORMATION

Sponsor's Name: _____ Relationship_____

Sponsor's Address: _____
Street City State Zip

_____ (_____)_____
County Phone

Furlough Begins: _____ Furlough Ends: _____
mo day yr Time mo day yr Time

Additional Comments:

Requested Reply Date: _____
mo day yr

Form #11-111-004

KANSAS DEPARTMENT OF CORRECTIONS
Furlough Sponsor's Agreement

The Department of Corrections assumes a serious responsibility when it allows an inmate to leave the facility on furlough. Part of this responsibility rests with the person who serves as sponsor. As a proposed furlough sponsor, you are asked to read and acknowledge that you understand both the conditions of the furlough and your responsibilities as a sponsor.

CONDITIONS OF FURLOUGH

1. The participant is not authorized to cross a state boundary without the approval of the Secretary of Corrections.
2. The participant is prohibited from consuming alcohol or entering an establishment where alcohol is served and consumed.
3. The participant is not allowed to operate a motor vehicle.
4. The participant is prohibited from writing and cashing checks.
5. The participant is prohibited from making installment purchases or negotiating a contract.
6. The participant is prohibited from possessing a firearm or other dangerous weapon.
7. The participant is prohibited from associating with known felons or ex-offenders.
8. The participant shall not leave the county of furlough unless specific permission is indicated on the order of furlough.
9. The State of Kansas is responsible only for emergency medical treatment an inmate receives while on furlough. Any non-emergency examination or treatment an inmate receives while on furlough shall be the inmate's responsibility unless authorization is given in advance by medical personnel of the Department.
10. The participant shall remain in the company of the furlough sponsor at all times.
11. There may be other special conditions specifically stated on the order of furlough.

SPONSOR'S RESPONSIBILITIES

1. Ensure that the furloughee strictly abides by all the conditions of furlough.
2. Remain with the furloughee at all times during the furlough.
3. Ensure that the furloughee obeys all federal, state, and local laws.
4. Notify the facility immediately if the furloughee departs from the furlough plan or conditions of furlough at any time, or, if the furloughee becomes involved in any serious difficulty during the furlough or experiences problems that affect the ability to function properly.
5. Ensure that the furloughee returns to the facility at or before the ending time of the furloughs specified on the order of furlough.

I hereby acknowledge that I have read and understand the conditions of furlough and sponsor's responsibilities. I also understand that the furloughee's failure to adhere to the conditions of furlough shall be grounds for disciplinary action against the inmate and may result in denial of future furloughs.

_____	_____	_____	_____
Sponsor's Signature	Date	Witness' Signature	Date

WORK RELEASE FACILITY TELEPHONE LISTING

Hutchinson Correctional Facility ..... (316) 662-2321

Wichita Work Release Facility ..... (316) 265-5211

KANSAS DEPARTMENT OF CORRECTIONS

Pre-Furlough Investigation - Official's Comments

TO: _____ Date:_____
(Official's Name) (Title)

FROM: District Parole Office: _____

SUBJ: _____ _____
(Inmate Name) (Number)

_____ Do Not Object to Furlough

_____ Object to Furlough

_____ Prefer to Make No Comment

ADDITIONAL COMMENTS:

In order for your comments to be considered, please return this form to:

RECORDS OFFICE -_____ (Facility)

_____ (Address)

_____

on or before: _____.
(Date)

THIS FORM IS NOT TO BE GIVEN TO THE INMATE

Form #11-111-006

KANSAS DEPARTMENT OF CORRECTIONS
Warden's Furlough Recommendations

TO: Secretary's Designee Date: _____
mo day yr

FROM: _____ _____
(Warden) (Facility)

SUBJ: _____ _____
(Inmate Name) (Number)

Attached hereto are the following documents completed in regard to a furlough for the above referenced inmate.

(Please check attachments)

_____ Inmate's Furlough Application

_____ Furlough Plan Narrative prepared by the Unit Team

_____ Pre-Furlough Investigation Request

_____ Official's comments obtained during the pre-furlough investigation

_____ Furlough Sponsor's Agreement signed by the furlough sponsor

_____ Completed Order of Furlough prepared for Secretary's signature

_____ _____

_____

Comments:

Be advised that I have carefully reviewed these documents. I believe that, based upon information available, the risk of violence while on furlough is minimal.

Approval of this furlough is recommended.

_____
Warden's Signature

Form #11-111-007

From: Record Clerk

_____
Facility

_____
Address

_____
Name

_____
Agency

_____

_____

RE: Furlough of Inmate

_____ _____
Name of Inmate Date of Birth

Please be advised that the above inmate is to be granted furlough from _____ to

_____.

Furlough Sponsor Information/Destination:

_____
Name

_____
Address

_____
City County

_____
Telephone #

Telephone contact made ____ ____ Person Contacted_____ Date_____
Yes No

_____
Records Clerk

Form #11-111-008

KANSAS DEPARTMENT OF CORRECTIONS
Order of Furlough

To: _____ _____
(Warden) (Facility)

You are hereby authorized to release _____ on furlough beginning _____/_____ and ending
(Furloughee) Time Date

_____/_____ unless the furlough is terminated at an earlier time by an authorized official and the inmate is given either
Time Date
written or verbal notice of that action. If the furlough is terminated, the inmate shall surrender him/herself at the time and place designated in the notice.

Name of Sponsor _____ Relationship to Inmate_____

Address of Sponsor_____
Street City County

Type of Furlough: ____ Emergency ____ Job ____ Programmatic
In addition to all federal, state, and local laws or ordinances, the following special restrictions are imposed on the furloughee:

1. Authorization to cross a state boundary by the Secretary of Corrections is ___Approved ___Disapproved
2. Prohibited to consume alcohol or enter any establishment where it is consumed.
3. Authorization to leave county of furlough by Secretary of Corrections' Designee. ____ Approved ___Disapproved
4. Not allowed to cash or write checks.
5. Not allowed to make purchases by installment plan or negotiate contracts.
6. Not allowed to have in his/her possession any firearm or other dangerous weapon.
7. The State of Kansas shall only be responsible for emergency medical treatment an inmate receives while on furlough. Any non-emergency medical examination or treatment an inmate receives while on furlough shall be the inmate's responsibility unless authorized, in advance, by medical personnel of the Department.
8. Not allowed to operate a motor vehicle while on furlough.
9. No inmate shall associate with known felons or ex-offenders.
10. The furloughee shall remain in the company of the furlough sponsor at all times.
11. Other_____

Secretary of Corrections

By: _____ _____
Secretary's Designee Date

I, _____ have read and understand the procedures and conditions concerning furloughs, and hereby acknowledge all terms rules and conditions of my furlough. I know that any furloughed inmate who willfully fails to return to the designated place of confinement at the time specified in the Order of Furlough, or at an earlier time if so directed, verbally or in writing, by an authorized Department of Corrections official, shall be deemed an escapee and fugitive from justice, and upon conviction shall be guilty of a felony as set forth in current Kansas Statutes. I understand and agree that I have no due process protection upon termination of a furlough and that I may be transferred to a facility designated by the Secretary or designee in the event said conditions of this order are violated, public safety warrants it, or my status in the program is or becomes incompatible with the goals of the program, or for other good cause as determined by the Secretary of Corrections or designee. (K.S.A. 75-5269; K.S.A. 21-3810)

Signed _____

Witness_____ Date _____

FURLOUGHEE MUST CARRY A COPY OF THIS ORDER AT ALL TIMES WHILE ON FURLOUGH.
(A copy of this Order is to be mailed to the area Parole Office.)

Form #11-111-009

KANSAS DEPARTMENT OF CORRECTIONS

	INTERNAL MANAGEMENT POLICY AND PROCEDURE	**SECTION NUMBER** **11-114**	**PAGE NUMBER** **1 of 5**
		SUBJECT: **DECISION MAKING: Recommendation for Sentence Modification Pursuant to KSA 21-4603**	
Approved By: ***/S/*** **Secretary of Corrections**		**Original Date Issued:** **10-01-83** **Current Amendment Effective:** **02-21-97** **Replaces Amendment Issued:** **11-07-95**	
Reissued By: **Policy & Procedure Coordinator**		The substantive content of this IMPP has been reissued as per the appropriate provisions of IMPP 01-101. The only modifications within the reissue of this document concern technical revisions of a non substantive nature. **Date Reissued:** **03-31-11**	

POLICY

Recommendations may be submitted to a sentencing court, on the behalf of an inmate, for the modification of sentences imposed for a crime committed prior to July 1, 1993, in accordance with K.S.A. 21-4603. Such recommendations shall be developed with consideration to ensure that the interest of public safety is not jeopardized, and only in circumstances of exceptional merit. Requests for such recommendations may be through the warden's initiative or as a result of informal requests by the Management Team.

DEFINITIONS

Management Team: A panel of Central Office management staff designated by the Secretary. Currently, this panel is comprised of the: Secretary; Deputy Secretaries; Chief Legal Counsel; Staff Assistant to the Secretary; Public Information Officer; Human Resources Manager; and Fiscal Officer.

Recommendation for sentence modification: A recommendation from the Secretary of Corrections to the sentencing court that consideration be given to a modification of the term of an inmate's sentence to further the rehabilitative process, correct a sentencing inequity, or for some other defined purpose. Applies only to those inmates sentenced for crimes committed prior to July 1, 1993.

PROCEDURE

I. Initiating the Sentence Modification Process

A. The warden of each facility shall be the sole initiator of any formal recommendation to the Secretary of Corrections for the modification of the sentence of an inmate.

1. The warden shall base the recommendation on a report from the Unit Team which is approved by the Program Management Committee.

B. The Secretary of Corrections shall be the sole initiator of any formal request to the sentencing court for the modification of the sentence of an inmate.

C. Solicitations from the Secretary or Management Team shall ordinarily be in response to judicial or legislative inquiry and shall not be construed as a statement of support for sentence modification.

II. Justifications for the Sentence Reduction Recommendation

A. Factors to be considered in making a recommendation for modification of sentence are those listed below:

1. The sentence imposed is for a crime committed prior to July 1, 1993.

2. A sentencing inequity exists in which a sentence imposed under a previous version of the criminal code exceeds that which could be imposed for the same offense under the current version of the criminal code.

3. A change in approach by the court, a miscalculation of sentence, or other change by the court in which the recommendation of the Secretary is necessary to restore the jurisdiction of the court and such recommendations in keeping with K.S.A. 21-4601.

4. A special inmate medical or psychiatric condition exists which requires a parole to a special treatment program.

5. An inmate's medical condition has been diagnosed as terminal.

6. An inmate who is confined in a federal facility while under a Kansas sentence and cannot qualify for participation in a particular program or work release because of the inmate's Kansas parole eligibility date, but whose case merits reduction of the minimum sentence to advance the parole eligibility and permit the rehabilitation process to proceed.

7. The inmate has sincerely taken advantage of available counseling and other programs as recommended by the initial Classification Committee and/or the unit team and has completed all or most of the elements of the Inmate Program Agreement.

8. The inmate's behavior and attitude indicate a likelihood that the inmate can live in society in a law abiding manner.

9. A parole eligibility date which is established and controlled by statute and for which neither the alternative of direct recommendation and certification of parole eligibility by the Secretary, nor adjustment by the Kansas Parole Board, is possible.

10. In conjunction with other factors, an inmate who has served an appropriate period of time for the commission of a crime.

11. A fundamental change in the inmate has occurred which amounts to rehabilitation that is extensive and complete and there is the likelihood that further incarceration would have a negative impact on the inmate.

12. Other factors such as:

    a. Respect for the law as it may be affected by the specific facts of the case;

    b. Family and community support available to the inmate;

    c. The inmate's employability and a need of financial support for the inmate's family;

    d. The proper expenditure of the taxpayers' money; and/or,

    e. Other social and community related factors.

B. If the behavior and attitude of the inmate are unacceptable, successful completion of the elements of the Inmate Program Agreement shall not alone be adequate basis for a recommendation for sentence modification.

C. If the inmate's adjustment, behavior and attitude indicate the likelihood of a successful return to the community, the failure to complete all the elements of the Inmate Program Agreement shall not preclude a recommendation for sentence modification unless:

1. The inmate has refused to enter into an agreement; or,

2. The inmate refuses to complete an agreement.

D. A modification of sentence shall not be offered or promised to any inmate as an incentive to improve the inmate's performance, nor as a reward for any particular act of heroism or assistance to correctional personnel.

1. The inmate shall be informed that the modification of sentence does not guarantee a favorable parole action.

III. Documentation

A. In the event the warden determines that a recommendation for a modification of sentence should be submitted, the warden shall support the recommendation with sufficient justification substantiated by reports and records, including the following documentation:

1. A comprehensive progress report describing the inmate's:

a. Custody status;

b. Sentence and parole eligibility structure;

c. Adjustment history;

d. Program involvement and outcome;

e. Medical/health considerations (if applicable); and,

f. General circumstances which reflect other factors supporting the request.

2. An informal preliminary release plan as established by the facility and the inmate; and,

3. A mental health evaluation and report indicating the mental status of the inmate which:

a. Shall include the results of at least one projective test as clinically indicated in the judgment of the examining clinician; and,

b. Shall describe what the inmate's mental status was at the time of entry into the correctional system, changes which have occurred, characteristics and diagnosis at the present time, and prognosis for the future.

B. All facility reviews and actions (approvals and disapprovals) regarding sentence modifications shall be recorded in the Unit Team file.

IV. Processing Recommendations

A. A three (3) member committee, appointed by the Secretary and comprised of wardens and regional parole directors, shall meet at least two (2) times per year to review recommendations regarding sentence modifications.

1. The Secretary shall designate one warden as chairperson of the committee.

2. In addition to the three (3) members appointed to the committee, the Department's Chief Legal Counsel shall designate a departmental attorney to serve in a non-voting advisory capacity.

3. Special meetings of the committee may be called by the Secretary as necessary to expedite the processing of emergency or other special attention cases.

4. In those situations where a recommendation being considered originated at a warden member's facility, the Secretary of Corrections shall appoint an alternate member to the committee.

    a. The alternate member shall serve to review, discuss and vote on any cases where such a conflict of interest is involved.

5. Committee meetings may be held via teleconference following each members independent review of case materials.

B. The materials supporting the recommendation for the modification of sentence, accompanied by a written statement from the warden of the facility, shall be forwarded to the designated committee chairperson.

    1. Wardens of other facilities where the inmate has been housed shall provide comments in writing when requested by the committee.

C. The committee recommendation on each case shall be forwarded to each deputy secretary, who shall review the recommendation and submit a written opinion to the Secretary.

D. The Secretary of Corrections shall review the committee's recommendation, supporting documentation, written statements from each deputy secretary, and, other information available and make a decision.

E. If the Secretary approves the recommendation, the legal section shall submit the recommendation to the Court.

    1. If the recommendation is disapproved by the Secretary, the Deputy Secretary of Facility Management or designee shall inform the inmate and referring warden in writing of the denial.

        a. Such notification shall occur within ten (10) working days from the date the denial decision is made.

F. The Secretary of Corrections shall be represented by the department's legal counsel as necessary in all court hearings resulting from the recommendation.

    1. Legal counsel shall be responsible for submitting the Secretary's recommendation to the court and shall appear at court hearings on the matter as required.

G. If the inmate is represented in the matter by Legal Services for Prisoners, Inc., or privately retained counsel, the Secretary may refer the matter to that attorney for representation of the inmate.

    1. Such representation shall not be required.

H. The warden and facility staff recommending the modification shall be available to testify in court in support of the recommendation.

I. If the court denies the request, the legal section shall inform the inmate and referring warden in writing of the reasons for the denial.

    1. Such notification shall occur within ten (10) working days from the date the denial decision is made by the court.

V. Other Provisions and Requirements

A. If the court grants the modification but does not order the inmate's release, the matter of parole shall be subject to a hearing before the Kansas Parole Board.

1. If the inmate becomes eligible for parole as a result of a favorable decision by the court, the facility shall schedule the inmate for an appearance before the Kansas Parole Board.

B. If the sentence modification was recommended for the purpose of advancing the inmate's parole eligibility date to allow participation in a federal program, or to allow observation of performance under a less structured environment, participation in the programs shall proceed following the modification of sentence.

C. Unless further participation in training or observation in a less structured environment is required, and upon attaining parole eligibility, a pre-parole report shall be prepared as soon as practical and the inmate scheduled for a hearing before the Kansas Parole Board.

NOTE: The policy and procedures set forth herein are intended to establish directives and guidelines for staff and offenders and those entities that are contractually bound to adhere to them. They are not intended to establish State created liberty interests for employees or offenders, or an independent duty owed by the Department of Corrections to employees, offenders, or third parties. Similarly, those references to the standards of various accrediting entities as may be contained within this document are included solely to manifest the commonality of purpose and direction as shared by the content of the document and the content of the referenced standards. Any such references within this document neither imply accredited status by a Departmental facility or organizational unit, nor indicate compliance with the standards so cited. The policy and procedures contained within this document are intended to be compliant with all applicable statutes and/or regulatory requirements of the Federal Government and the state of Kansas. This policy and procedure is not intended to establish or create new constitutional rights or to enlarge or expand upon existing constitutional rights or duties.

REPORTS REQUIRED

None.

REFERENCES

KSA 21-4601, 21-4603

ATTACHMENTS

None.

KANSAS DEPARTMENT OF CORRECTIONS

Kansas Department of Corrections	**INTERNAL MANAGEMENT POLICY AND PROCEDURE**	**SECTION NUMBER** 11-125A	**PAGE NUMBER** 1 of 4
		SUBJECT: DECISION MAKING: Offenders Eligible for Discharge from the Prison Portion of a Sentence Pursuant to K.S.A. 75-5220	
Approved By:  Secretary of Corrections		**Original Date Issued:** 08-19-15	
		Replaces Version Issued: N/A	
		CURRENT VERSION EFFECTIVE: 08-19-15	

APPLICABILITY:	X ADULT Operations Only	_ JUVENILE Operations Only	_ DEPARTMENT-WIDE

POLICY STATEMENT

In order to ensure that scarce resources are not unnecessarily expended for transportation and processing of offenders with only a minimal period of the prison portion of their sentence left to serve, the Secretary of Corrections may, at the time the notice provided for in K.S.A. 75-5218 and amendments thereto is received, order that certain offenders with 20 or less days remaining to be served on the prison portion of their sentence(s) be released as provided by K.S.A. 75-5220 and amendments thereto. This early discharge from the prison portion of the sentence(s) shall not result in time being added to the period of post release supervision.

DEFINITIONS

Sentence Computation Unit (SCU): Trained staff assigned to review court documents for accuracy and completeness and compute sentences of offenders committed to the Kansas Department of Corrections.

PROCEDURES

I. Eligibility Criteria

A. Offenders who are 20 days or less from the projected release date on the prison portion of their sentence may be released directly from the county jail through relinquishment of custody to the county sheriff, providing that none of the following exclusionary criteria apply:

1. Documented misconduct in the county jail;

2. Need for mental health/medical discharge planning services; and/or,

3. Presents a threat to either staff or the community at large.

B. Offenders who are 20 days or less from the projected release date on the prison portion of their sentence who meet one (1) or more of the following criteria may be released directly from the county jail through relinquishment of custody to the county sheriff, upon review by the Secretary:

1. Additional felony convictions or pending felony charges other than those for which the individual is being considered for release; and/or,

2. Convicted of a sex offense.

C. Offenders who are 20 days or less from the projected release date on the prison portion of their sentence, and who do not meet criteria listed in either Section I.A or I.B. above, may be released

directly from the county jail through relinquishment of custody to the county sheriff, upon review by either the Secretary or his/her designee.

II. Verification of Eligibility Procedures

A. It shall be the responsibility of staff assigned to the Department`s Sentence Computation Unit (SCU) to make a determination as to whether or not an offender is eligible for release/discharge on the prison portion of his/her sentence as authorized by statute.

B. At the time an SCU staff member receives notification that an offender may be eligible for release on the prison portion of his/her sentence pursuant to K.S.A. 75-5220 and amendments thereto, they shall:

1. Request copies of the sentencing documents for review.

2. Compute the sentence and apply all applicable Good Time Credits.

C. If the offender is within 20 days of release on the prison portion of his/her sentence with the application of earned Good Time Credits, SCU staff shall:

1. Confirm that the offender meets none of the criteria set forth in Section I.A. above;

2. Request the Inmate Booking Sheet from the sending county; and

3. Verify with county presence of any detainers. This information will determine offender's eligibility to receive gratuity or not.

D. If the offender remains eligible for release, SCU staff shall advise the Secretary or his/her designee that the offender has 20 days or less to serve on the prison portion of his/her sentence and is eligible for release as provided by K.S.A. 75-5220 and amendments thereto.

E. Upon notification from the Secretary that an offender has been approved for release, the SCU staff shall notify the county jail that the inmate meets the criteria of K.S.A. 75-5220 and amendments thereto and advise them not to schedule the offender for admission to the KDOC.

1. If the Secretary disapproves the request for release, SCU staff shall advise the county jail to schedule the offender for admission to the KDOC.

III. Processing the Release of Offenders

A. For offenders who do not have a post release supervision obligation, the SCU staff shall:

1. Generate an Inmate number (KDOC #) if there is not already an existing KDOC #.

2. Create and Enter the following OMIS Data:

a. Master Record or modify as applicable;

b. Movement Codes;

c. Journal Entry Information;

d. Sentence Record Summary; and

e. Create the Good Time Log.

3. Notify appropriate EDCF RDU staff in the case of male offenders, or TCF staff in the case of female offenders, for entry into release and gratuity, if applicable;

4. Notify Victim's Services, as needed;

5. Send “Letter Relinquishing Custody-Discharge” (Attachment A) via e-mail or fax;

6. Requests file fingerprint cards and photos;

7. Image documents;

8. If the offender has a conviction for a sex offense, notify the Sex Predator Commitment Act Administrator; and,

9. Request a Discharge Certificate from the Prisoner Review Board.

B. For offenders who have a post release supervision obligation, the SCU staff shall:

1. Contact the Parole Office assigned to that county and request that offender be provided with:

a. Conditions of PRS; and

b. Reporting Instructions.

2. Establish date of release.

3. On the date that the offender is set for release from the county jail, perform procedures in Section III.A.1. through 4. and 6. through 9. above.

a. Additionally, the SCU staff shall send “Letter Relinquishing Custody-PRS Obligation” (Attachment B) via e-mail or fax.

4. Make the necessary adjustments to the Sentence Record Summary Discharge Dates (Items 475, 476, 477 and 478).

C. For offenders serving a period of post release supervision, the supervising parole officer shall request a Post Release Certificate from the Prisoner Review Board.

IV. If an offender previously approved for release from the prison portion of his/her sentence subsequently becomes ineligible, the SCU staff shall:

A. Notify jail officials;

B. Notify parole staff, if applicable; and

C. Delete offender from OMIS using Maintenance Program - SB346 Offenders in Last 7 Days.

NOTE: The policy and procedures set forth herein are intended to establish directives and guidelines for staff and offenders and those entities that are contractually bound to adhere to them. They are not intended to establish State created liberty interests for employees or offenders, or an independent duty owed by the Department of Corrections to employees, offenders, or third parties. Similarly, those references to the standards of various accrediting entities as may be contained within this document are included solely to manifest the commonality of purpose and direction as shared by the content of the document and the content of the referenced standards. Any such references within this document neither imply accredited status by a Departmental facility or organizational unit, nor indicate compliance with the standards so cited. The policy and procedures contained within this document are intended to be compliant with all applicable statutes and/or regulatory requirements of the Federal Government and the state of Kansas. This policy and procedure is not intended to establish or create new constitutional rights or to enlarge or expand upon existing constitutional rights or duties.

REPORTS REQUIRED

None.

REFERENCES

K.S.A. 75-5218 and amendments thereto; 75-5220 and amendments thereto

ATTACHMENTS

Attachment	Title of Attachment	Page Total
A	Letter Relinquishing Custody – Discharge	1 page
B	Letter Relinquishing Custody – PRS Obligation	1 page

Letter Relinquishing Custody-Discharge

DATE

CONTACT (contact's e-mail address)
XXXXX County Sheriff's Office

Fax #: XXX/XXX-XXXX
Phone #: XXX/XXX-XXXX

RE: OFFENDER, KDOC #
XXXXX County Case XXXXX

On DATE, the Sentence Computation Unit for the Kansas Department of Corrections (KDOC) received file-stamped copies of the Journal Entries associated with the above-referenced case.

We have reviewed the documents and have determined that this offender has satisfied the XX-month prison sentence that was ordered to be served in case XXXXX. The court has ordered that the offender not serve a period of post-release supervision for said case. Because the offender has satisfied this sentence, the KDOC is relinquishing custody to the XXXXX County Jail and the offender can be released for this case number. There is no need to transport the offender to the KDOC's Reception and Diagnostic Unit. **If there is an active detainer from another jurisdiction that has been lodged on this offender, release should be to that detainer.**

IT IS YOUR OFFICE'S RESPONSIBILITY TO CONDUCT A WANTS-AND-WARRANTS CHECK, PURSUANT TO K.S.A. 22-4605, PRIOR TO RELEASE OF THIS SUBJECT.

Please forward certified copies of the Court documents, a photograph of the offender and a fingerprint card to my attention.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

SIGNATURE
TITLE
Sentence Computation Unit

Letter Relinquishing Custody-PRS Obligation

DATE

CONTACT (contact e-mail address)
XXXXX County Sheriff's Office

Fax #: XXX/XXX-XXXX
Phone #: XXX/XXX-XXXX

RE: OFFENDER, KDOC #
XXXXX County Case XXXXX

On DATE, the Sentence Computation Unit for the Kansas Department of Corrections (KDOC) received file-stamped copies of the Journal Entries associated with the above-referenced case.

We have reviewed the documents and have determined that this offender has satisfied the XX-month prison sentence that was ordered to be served in case XXXXX. The court has ordered that the offender serve a period of post-release supervision for said case. Because the offender has satisfied the prison portion of this sentence, the KDOC is relinquishing custody to the XXXXX County Jail and the offender can be released for this case number after being contacted by KDOC Parole Staff. There is no need to transport the offender to the KDOC's Reception and Diagnostic Unit. **If there is an active detainer from another jurisdiction that has been lodged on this offender, release should be to that detainer.**

IT IS YOUR OFFICE'S RESPONSIBILITY TO CONDUCT A WANTS-AND-WARRANTS CHECK, PURSUANT TO K.S.A. 22-4605, PRIOR TO RELEASE OF THIS SUBJECT.

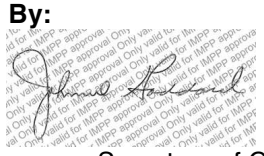
Please forward certified copies of the Court documents, a photograph of the offender and a fingerprint card to my attention.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

SIGNATURE
TITLE
Sentence Computation Unit

KANSAS DEPARTMENT OF CORRECTIONS

Kansas Department of Corrections	**INTERNAL MANAGEMENT POLICY AND PROCEDURE**	**SECTION NUMBER** 11-126A	**PAGE NUMBER** 1of 8
		DECISION MAKING: House Arrest Program	
Approved By:  Secretary of Corrections		Original Date Issued: 02-15-16 Replaces Version Issued: N/A CURRENT VERSION EFFECTIVE: 02-15-16	

APPLICABILITY:	X **ADULT Operations Only**	_ **JUVENILE Operations Only**	_ **DEPARTMENT-WIDE**

POLICY STATEMENT

Pursuant to K.S.A. 21-6609, the Secretary of Corrections may implement a house arrest program for offenders in his or her custody. Offenders who meet the criteria set forth in this policy may be transferred to house arrest to promote offender management, transitional and release planning, and risk reduction. Recommendations for placement of offenders on house arrest shall be made based upon each individual offender's degree of risk to the community, and without regard to an offender's race, national origin, gender, or religion. Placement shall be approved by the Secretary of Corrections or designee. Offenders assigned to house arrest shall be considered inmates. House arrest sanctions may include, but are not limited to, rehabilitative restitution in money or in kind, curfew, community service, deprivation of nonessential activities or privileges, other appropriate restraints on the offender's liberty, or revocation of house arrest status and return to prison. Offenders absconding house arrest status shall be placed on escape status.

DEFINITIONS

House Arrest: an individualized program in which the freedom of an offender is restricted within the community, home or non-institutional residential placement and specific sanctions are imposed and enforced.

Approved Destination: a specific physical address that has been approved by the parole officer and is included in the approved itinerary. May include employers, service providers, places of worship, and retail stores to which the offender may need to travel in the course of his or her day.

PROCEDURES

I. House Arrest Selection Criteria:

A. In order to be considered for transfer to House Arrest, offenders must meet the following criteria:

1. The offender cannot be serving any indeterminate or off-grid sentence.

2. The offender cannot be managed as a sex offender.

3. The offender cannot have a history of absconding on post incarceration supervision as an adult.

4. The offender cannot have disabled or attempted to disable the monitoring device while on electronic monitoring.

5. The offender's most recent termination from a recommended program cannot be “refusal to enter,” “refusal to participate” or terminated due to “disciplinary/poor performance”:

6. The offender must have no disciplinary convictions for any of the following as defined in attachment “D” of the KDOC Custody Classification Manual:

   a. An R1 rule infraction in the past 3 years,

   b. An R2 rule infraction in the past six months, or

   c. Two or more R3 and/or R4 rule infractions within the past 6 months.

7. The offender must have a KDOC facility assessed LSIR score of 23 or lower.

   a. If an offender is 24 or higher on the latest RDU admission LSIR, unless an updated LSIR was completed specifically for purposes of determining what programming should be provided, s/he is not eligible for house arrest consideration.

   b. The Secretary or designee may make an exception on a case-by-case basis for an offender above 24, provided the offender has successfully completed recommended programming in a KDOC facility that addresses elevated risk/need as identified by the LSIR or other approved risk/needs assessment instrument.

8. The offender must be classified minimum custody for at least 30 continuous days prior to placement on house arrest.

9. The offender must be 120 days or less from his or her projected release date.

10. The offender must be free of any felony and/or misdemeanor detainers.

11. The offender must have an approved residence plan to which he or she can release.

   a. If the offender’s minor children will be in the home, the offender must have completed a parenting program approved by the KDOC, and there must not be an order in place prohibiting the offender’s contact with the minor children.

12. The offender must have access to funds in a sufficient amount to cover the cost of medical and dental care, daily living expenses, rent deposit and utilities if applicable, and administrative supervision fees for the first 30 days on house arrest status.

13. The offender must have a plan for meeting his/her financial needs beyond 30 days, whether it is a plan for employment/job search, a plan to access benefits for which s/he is eligible, or some other plan indicating a realistic means of meeting financial obligations beyond 30 days.

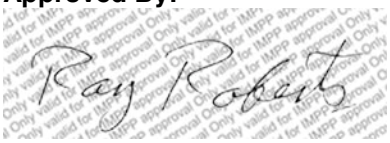
II. House Arrest Referral Procedures

A. Any offender who meets the requirements of Section I.A. may submit an Application for Placement on House Arrest, using the “Application for Placement on House Arrest” (Attachment A).

B. An Application for Placement on House Arrest must be submitted at least ninety (90) days prior to the date of transfer to house arrest.

C. The date of transfer to house arrest shall be no more than ninety (90) days prior to the offender’s release date.

KANSAS DEPARTMENT OF CORRECTIONS

Kansas Department of Corrections	**INTERNAL MANAGEMENT POLICY AND PROCEDURE**	**SECTION NUMBER** **11-128**	**PAGE NUMBER** **1 of 2**
		SUBJECT: **DECISION MAKING: Application of Sanction Credit Pursuant to K.S.A. 22-3716**	
Approved By:  **Secretary of Corrections**		**Original Date Issued:**	**07-12-13**
		Current Amendment Effective:	**07-12-13**
		Replaces Amendment Issued:	

POLICY

Offenders who receive a probation sanction pursuant to subsection (c) of K.S.A. 22-3716, and amendments thereto remanding the defendant to the custody of the secretary of corrections for a period of 120 days or 180 days, may have the sanction reduced by up to 50% at the discretion of the secretary of corrections.

DEFINITIONS

Sanction Credit: reduction in the prison portion of the probation violation sanction ordered by the sentencing court. Eligible inmates may receive no more than 60 days on a 120 day sanction and no more than 90 days on a 180 day sanction. Days of sanction credit shall not be credited towards the satisfaction of the underlying prison term.

Sentence Computation Unit: A work unit of the Facility Management Division of the Kansas Department Of Corrections charged with the interpretation and computation of sentencing orders from the District Court.

OMIS: Offender Management Information System

PROCEDURES

I. Eligibility Criteria

A. An inmate may be eligible for Sanction Credit if the following criteria are met:

1. The inmate is incarcerated only for a probation sanction of 120 days or 180 days pursuant to KSA 22-3716;

2. The inmate's prison portion of their underlying prison sentence does not expire prior to completion of the 120 day or 180 day sanction; and

3. The inmate has maintained good conduct while serving the probation sanction

II. Procedure

A. The Sentence Computation Unit shall review the sentencing documents from the District Court prior to admission of the offender to determine the length of sanction ordered by the sentencing court, the amount of Sanction Credit that may be applied to reduce the duration of the probation sanction, and to verify that the offender has enough time remaining to serve to approve admission to a Kansas Department of Corrections(KDOC) Facility.

1. The Sentence Computation shall notify the Sheriff's Department holding the probation violator of the approval or disapproval for admission to KDOC.

2. Upon the offenders admission to the Reception and Diagnostic Unit the Sentence Computation Unit shall enter the sanction data into the sentence summary in OMIS.

3. The earliest release date shall include the sanction credit that is available to earn on the sanction portion of the sentence. Inclusion of this Sanction Credit does not imply that the inmate has already earned the Sanction Credit but rather provides some guidance as to earliest release date available if the inmate maintains good conduct during the service of the imposed sanction.

B. The Classification Administrator, for each facility shall notify the Sentence Computation Unit within 5 calendar days of any behavior by the inmate that would prohibit the earning of one or more day/s of Sanction Credit.

1. Upon receiving such notification from the Classification Administrator, the Sentence Computation Unit shall review the information to determine the amount of sanction credit that should be withheld and make necessary adjustments in the Sanction Credit Log in OMIS.

2. The Sentence Computation Unit shall notify the facility Classification Administrator of any changes to the date of release for inmates at their facility who are serving a 120 day or 180 day probation violation sanction.

3. The Classification Administrator, or their designee, shall provide notice to the inmate of the change in their release date.

4. The Classification Administrator, or their designee, shall provide notice to the supervising community corrections agency of any changes in the type of release or the release date of inmates serving a probation violation sanction.

NOTE: The policy and procedures set forth herein are intended to establish directives and guidelines for staff and offenders and those entities that are contractually bound to adhere to them. They are not intended to establish State created liberty interests for employees or offenders, or an independent duty owed by the Department of Corrections to employees, offenders, or third parties. Similarly, those references to the standards of various accrediting entities as may be contained within this document are included solely to manifest the commonality of purpose and direction as shared by the content of the document and the content of the referenced standards. Any such references within this document neither imply accredited status by a Departmental facility or organizational unit, nor indicate compliance with the standards so cited. The policy and procedures contained within this document are intended to be compliant with all applicable statutes and/or regulatory requirements of the Federal Government and the state of Kansas. This policy and procedure is not intended to establish or create new constitutional rights or to enlarge or expand upon existing constitutional rights or duties.

REPORTS REQUIRED

None.

REFERENCES

K.S.A. 21-3716

ATTACHMENTS

none

D. An Application for Placement on House Arrest shall be processed as follows:

1. The application shall be submitted by the Unit Team Counselor to the Unit Team Manager for initial review. The UTM shall ensure that the application complies with the provisions of this policy. If it does, the UTM shall submit the application to the Classification Administrator for review.

2. The Classification Administrator shall determine whether the application complies with this policy and make an initial determination as to the suitability of the offender for placement on house arrest. If the Classification Administrator concludes that the application should proceed, the Classification Administrator shall send it to the facility R3 Coordinator for processing of the proposed residence plan for approval or disapproval by parole. The residence plan shall be submitted within one week, and parole shall respond within fourteen (14) calendar days of submission.

3. Simultaneously with submitting the residence plan to parole for approval or disapproval, the R3 Coordinator or designee shall contact Victim Services to obtain input about any victim issue. Any identified issue shall be reviewed by the R3 Coordinator with the Classification Administrator to determine whether the application should proceed, and if so, whether any special condition regarding any victim issue should be recommended as part of the application.

4. The information provided by Victim Services shall not be provided to any party outside of the R3 Coordinator, the Classification Administrator, and the Deputy Secretary of Facility Management and his/her designee without approval from the Victim Services Director.

5. If a residence plan is approved, the Classification Administrator shall submit the application to the Warden or designee for review. At the time of submission, the Classification Administrator shall include any recommended special conditions, above and beyond those set out in this policy, upon which the offender should be placed on house arrest.

6. If the Warden or designee concludes that the application complies with this policy, and the offender is a suitable candidate for consideration, the Warden shall forward the application for consideration to the Deputy Secretary of Facilities Management or designee for review.

7. If the Deputy Secretary of Facilities Management or designee concludes that the application complies with this policy, and the offender is a suitable candidate, the application shall be forwarded to the Secretary of Corrections with a recommendation for approval.

8. The final decision to grant or deny the application shall rest with the Secretary of Corrections.

E. If the application is approved, the offender shall be required to complete and sign the "Conditions Of House Arrest" (Attachment B).

1. Offenders refusing to accept the conditions of house arrest shall not be transferred to house arrest.

F. If the application is denied, the offender shall be notified in writing, using the “Notice of Denial of Application for Placement on House Arrest” (Attachment C).

1. The notice of denial shall not include any information provided by Victim Services.

2. Parole Office will be notified of the denial.

G. Any decision to deny the application at any stage is final and not subject to appeal.

III. Release to Community if an Application is Approved

A. The release checklist shall be initiated in accordance with IMPP 11-121.

B. The following notifications shall be made by facility staff:

1. Sheriff and district or county attorney of the county in which the offender is to be placed under house arrest;

2. Chief Law enforcement officer of any incorporated city or town in which the offender is to be placed under house arrest;

3. Office of Victim Services, no less than seven (7) days prior to offender's transfer to house arrest; and

4. Notification to parole staff regarding approval for house arrest transfer.

a. When approval has been granted by the Deputy Secretary of Facility Management to transfer an offender to house arrest, the classification administrator or designee shall request reporting instructions from the parole officer.

b. On the date of the offender's transfer to house arrest, parole staff shall be notified of the transfer.

C. OMIS Movement codes for transfer to house arrest shall be entered by facility records staff.

D. The offender shall be given his/her Conditions of House Arrest, using the previously signed "Conditions of House Arrest" (Attachment B), prior to his/her transfer to house arrest.

IV. Supervision

A. As a condition of house arrest the offender shall consent to be monitored by a home telephone verification procedure.

B. House Arrest offenders will meet in person with the parole officer once per month, unless documented case management needs or issues exist that indicate a need for additional supervision or support services.

C. Supervision services provided shall include:

1. Review and approval of the written itineraries (Attachment D) to identify locations and times when offenders may be away from their residence.

a. Approved destinations may include but are not limited to: family reintegration meetings, parent-teacher conferences & other parenting related activities, medical appointments, dental appointments, employment, employment search, and shopping for food and necessities.

b. Verbal changes to the written itinerary may be authorized by the parole officer, as needed.

2. Urinalysis testing in accordance with IMPP 14-112A.

3. Employer notification in accordance with IMPP 14-117A and employment verification no less than once per month.

4. Collateral contacts no less than once per month.

5. Supervision fees will be charged, using fee code A, in accordance with IMPP 14-107A.

6. Response to violations per section V. and in accordance with IMPP 14-137.

D. The supervision officer shall provide information needed for good time awards to the designated facility staff for approval and entry into OMIS.

V. Responding to Violations

A. Parole officers shall respond to all violations of house arrest conditions. When responding to violations, the offender's risk to public safety shall be considered.

1. When the parole officer has determined that a violation has occurred, a response shall be initiated immediately.

2. If there is a risk to public safety or potential for escape/absconding, the offender shall be placed into local detention to await the outcome of the violation investigation.

3. An offender is considered to be an escapee when one or more of the following occurs:

a. Violations of written itineraries that cannot be resolved within two (2) hours;

b. The offender has moved from his or her approved residence without permission;

c. The offender fails to report, and the parole officer cannot contact the offender within two (2) hours; or

d. The parole officer receives reliable information that the offender has left the area.

B. Return to Correctional Facility

1. When violations occur that are determined to be severe enough to warrant return to a correctional facility, parole staff shall:

a. Issue an Order to Arrest and Detain; and

b. Notify local EAI or local law enforcement and arrange for the offender to be taken into custody and transported to the local detention center/jail.

2. After the offender has been taken into custody and secured at a local jail and/or detention facility, parole staff shall:

a. Complete OMIS movement codes to indicate that the offender is in local detention;

b. Issue a violation report detailing the violations; and

c. Present the offender with a Statement of Charges and a copy of the Violation report.

3. An offender shall have the right to have a preliminary hearing or waive the preliminary hearing.

a. If probable cause is established at a preliminary hearing, Officers shall create a transport memo to notify facilities that the offender is available for return to the facility.

b. If probable cause is established, a completed revocation packet shall be submitted to the Prisoner Review Board (PRB) in accordance with IMPP 14-141A.

4. The offender shall have a final hearing before the Prisoner Review Board (PRB).

a. The offender shall have the right to waive the final hearing before the PRB.

5. Offenders who violate one or more conditions of supervision are also subject to discipline pursuant to K.A.R. 44-12-1002, Violation of published internal management policies and procedures or published orders, with reference to this IMPP, and violation of any condition of supervision shall be a Class I offense.

a. Upon the offender's waiver of the final hearing before the PRB and return to a facility, or upon final revocation of the offender's house arrest status by the PRB, the offender's assigned Unit Team Manager may choose to initiate the disciplinary process and proceed to issue a Class I disciplinary report and have it served upon the offender.

(1) In the event of final revocation based upon a finding of violation of one or more conditions of house arrest by the PRB, the written findings of the PRB shall also constitute a prima facie finding of violation of K.A.R. 44-12-1002 with reference to this IMPP, which the offender may attempt to rebut during any disciplinary hearing incident to the charge.

VI. Escape Procedures

A. Once an escape has been declared, staff will follow the steps outlined in "Escape Procedures" (Attachment E).

B. Once an escape has been declared, the Parole Officer shall notify the Winfield Correctional Facility with the relevant information. This information will include:

1. The date, time, and reason for the initial electronic alert if applicable;

2. The date, times, and locations checked by the Parole Officer before declaring the escape; and

3. Any information obtained that may be germane to the escape.

C. Staff at WCF shall initiate the following escape procedures upon notification of the House Arrest escape:

1. An NCIC entry shall be initiated;

2. Facility EAI Special Agents will be notified; and

3. An escape flier shall be prepared and posted on the Internet.

D. Once the escape plan has been initiated, WCF Special Agents shall:

1. Ensure that an escape warrant has been issued;

2. Gather basic intelligence information that may assist in locating the escapee; and

3. Contact the KDOC EAI Director for transfer of the case to another facility or field office as determined by location.

E. During normal duty hours, the Parole Officer who declared the escape shall be copied on all developments in the case. After normal duty hours, the Parole Duty Officer shall be advised of case developments.

VII. Offenders Completing House Arrest

A. When an offender reaches his or her sentence discharge date while on house arrest:

1. Facility staff shall follow the process for offenders discharging their sentence while incarcerated.

2. The discharge certificate shall be forwarded to the supervising parole officer.

3. The supervising parole office shall submit goodtime awards to the facility for approval and entry into OMIS.

4. Facility staff shall complete the appropriate OMIS movement records.

B. When an offender reaches his or her release date while on house arrest:

1. Facility staff shall follow the process for offenders releasing to the community.

2. The release certificate shall be forwarded to the supervising parole officer to obtain the offender's signature.

3. The supervising parole office shall submit final goodtime awards to the facility for approval and entry into OMIS.

4. Facility staff shall complete the appropriate OMIS release movement records.

5. Facility staff shall activate the post release good time log if applicable.

NOTE: The policy and procedures set forth herein are intended to establish directives and guidelines for staff and offenders and those entities who are contractually bound to adhere to them. They are not intended to establish State created liberty interests for employees or offenders, or an independent duty owed by the Department of Corrections to employees, offenders, or third parties. Similarly, those references to the standards of various accrediting entities as may be contained within this document are included solely to manifest the commonality of purpose and direction as shared by the content of the document and the content of the referenced standards. Any such references within this document neither imply accredited status by a departmental facility or organizational unit, nor indicate compliance with the standards so cited. The policy and procedures contained within this document are intended to be compliant with all applicable statutes and/or regulatory requirements of the Federal Government and the state of Kansas. This policy and procedure is not intended to establish or create new constitutional rights or to enlarge or expand upon existing constitutional rights or duties.

REPORTS REQUIRED

None.

REFERENCES

K.S.A. 21-6609
K.A.R. 44-12-1002
IMPP 11-113, 11-121, 14-107A, 14-112A, 14-117A, 14-137, 14-139A, 14-141A

ATTACHMENTS

Attachment	Title of Attachment	Page Total
A	Application For Placement On House Arrest	3 page(s)
B	Conditions of House Arrest	2 page(s)
C	Notice Of Denial Of Application For Placement On House Arrest	1 page(s)
D	House Arrest Weekly Itinerary	2 page(s)
E	Escape Procedures	1 page(s)

APPLICATION FOR PLACEMENT ON HOUSE ARREST

offender Name & #:_____ Date: _____

Unit Team Counselor Name & Phone #: _____

1. What is the offender's release date (mandatory or released by Prisoner Review Board)? ____/___/__

2. Will the offender be 120 days or less from his/her release date when placed on house arrest? ☐ Yes ☐ No
   If not, not eligible to proceed.

3. What is the proposed date for placing the offender on house arrest? ___/___/____

4. Is the offender serving a sentence that includes a conviction for an indeterminate or off-grid crime??
   ☐ Yes ☐ No?

   If so, not eligible to proceed.

5. What is the offender's current conviction & criminal history?

6. Has the offender been passed by the Prisoner Review Board within the past six months? ☐ Yes ☐ No
   If so, not eligible to proceed.

7. Is the offender managed as a sex offender? ☐ Yes ☐ No
   If so, not eligible to proceed.

8. Has the offender absconded from post incarceration supervision as an adult or disabled a GPS monitoring device while on electronic monitoring as an adult, at any time? ☐ Yes ☐ No
   If so, not eligible to proceed.

9. Has the offender been terminated from any of the following recommended programs, with "refusal to enter," "refusal to participate," or "terminated due to disciplinary/poor performance" as the most recent termination?

   a. Sex Offender Treatment ☐ Yes ☐ No
   b. Substance Abuse Treatment ☐ Yes ☐ No
   c. Vocational Training ☐ Yes ☐ No
   d. Education (Literacy or GED) ☐ Yes ☐ No
   e. Pre-Release Reintegration ☐ Yes ☐ No
   f. Work Release ☐ Yes ☐ No

10. What programs has the offender successfully completed in the latest incarceration?

11. Has the offender been convicted of any of the following as defined in attachment "D" of the KDOC Custody Classification Manual?

    a. An R1 rule infraction in the past 3 years ☐ Yes ☐ No
    b. An R2 rule infraction in the past six months ☐ Yes ☐ No
    c. Two or more R3 and/or R4 rule infractions within the past 6 months ☐ Yes ☐ No

    If so, not eligible to proceed.

12. What is the offender's DR history in the latest conviction?

13. What is the offender's KDOC facility LSIR score?_____
    NOTE: If no KDOC facility LSIR score, an LSIR must be completed as part of this application.

14. Will the offender be classified minimum custody for at least 30 continuous days prior to placement on house arrest?

☐ Yes ☐ No

If not, not eligible to proceed.

a. Current custody classification _____

b. Is this application dependent upon a custody exception. ☐ Yes ☐ No

15. Does the offender have any felony or misdemeanor detainers pending? ☐ Yes ☐ No

If so, not eligible to proceed.

16. Proposed residence plan? ***An approved residence plan is mandatory to be eligible to proceed.***

17. Does the offender have minor children? ☐ Yes ☐ No

a. Are they authorized contact with their minor children? ☐ Yes ☐ No

b. Have they completed a KDOC approved Parenting Program? ☐ Yes ☐ No

18. Proposed plan to meet financial obligations:

a. Does the offender have savings in hand sufficient to satisfy the first thirty (30) days of financial obligations, including the cost of medical and dental care, daily living expenses, rent deposit and utilities if applicable, electronic monitoring and administrative supervision fees for the first 30 days on house arrest status?

☐ Yes ☐ No

If not, not eligible to proceed.

b. What is the offender's plan to meet financial obligations beyond the first thirty (30) days, including all those named above, plus any restitution, child support, court costs, driver's license/ID fees, living expenses, and/or other financial obligations?

19. Why does the offender believe s/he is a good candidate for house arrest?

20. Why does the Unit Team Counselor believe the offender is a good candidate for house arrest?

I, _____, #_____, make the above application for placement on house arrest. I have read the "Conditions of House Arrest," and agree to follow those conditions, as well as any special conditions imposed, if my application for placement on house arrest is granted.

_____	_____	_____	_____
Date	offender Signature	Date	Signature of Unit Team Counselor, witnessing offender signature

Processing of Application for Placement on House Arrest

• Review by Unit Team Manager (state name and contact number):

_____ Approved _____ Disapproved Date _____ Signature _____

• Review by Classification Administrator (state name and contact number):

_____ Approved _____ Disapproved Date _____ Signature _____

• Review by R3 Coordinator (state name and contact number):

____ Residence plan submitted and either approved or disapproved:

____ Application submitted to Victim Services; feedback:

____ Any recommended special conditions, after review with Classification Administrator?

Date _____ Signature _____

• Review by Warden or designee (state name and contact number):

_____ Approved _____ Disapproved Date _____ Signature _____

• Review by Deputy Secretary of Facilities Management or designee (state name and contact number):

_____ Approved _____ Disapproved Date _____ Signature _____

• Review by Secretary of Corrections:

_____ Approved _____ Disapproved Date _____ Signature _____

CONDITIONS OF HOUSE ARREST

You have been approved for placement on house arrest, as of _____ (date). You will be under the supervision of a parole officer, and your placement and continued status on house arrest is subject to these conditions, to which you must agree in writing below in order to be placed on house arrest, and with which you must comply to continue to be on house arrest status. **Your failure to agree to and abide by these conditions will subject your status on house arrest to being denied or revoked.**

A **Reporting, travel, residence and employment**: Upon release from the institution, I agree to report as directed to my assigned parole officer and follow his/her instructions in reporting on a regular basis and to continuously maintain my assigned and approved residence and employment. If it becomes necessary that I change either residence or employment, I will obtain advance permission from my parole officer. Travel to and from my approved destinations shall be by the most direct route between the approved destination and my residence. I consent to be monitored by a home telephone verification procedure. I will not leave the state of Kansas.

B. **Laws**: I shall obey all federal and state laws and municipal and county ordinances, including the Kansas Offender Registration Act and the DNA Collections Act. I shall notify my parole officer at the earliest opportunity if I have law enforcement contact for any reason.

C. **Weapons**: I will not own, possess, constructively possess, purchase, receive, sell or transport any firearms, ammunition or explosive device, or any device designed to expel or hurl a projectile capable of causing injury to persons or property, or any weapon prohibited by law.

D. **Personal Conduct**: I will not engage in assaultive activities, violence, or threats of violence of any kind.

E. **Narcotics/Alcohol**: I will not possess, use, or traffic in any controlled substance, narcotics or other drugs as defined by law, except as prescribed to me by a licensed medical practitioner. I will not consume any mind-altering substance, including, but not limited to, alcoholic beverages, wine, beer, glue, or paint. I agree and consent to submit to a blood, Breathalyzer and/or urine test at the direction of the parole officer. I will not tamper with, falsify or dilute such a test.

F. **Association**: I will not associate with persons engaged in illegal activity and will obtain prior written permission from the parole officer and institutional director to visit or correspond with offenders of any correctional institution.

G. **Employment**: I agree to secure and maintain reasonable, steady employment within 45 days of my release from prison or residential treatment unless excused for medical reasons or an extension of time is given by my parole officer. I agree to notify my employer of my current and prior (non-expunged) adult felony convictions and status as an offender.

H. **Costs**: I agree to pay restitution, court costs, supervision fees, and other costs as directed by my parole officer.

I. **Treatment/Counseling**: I agree to comply with my relapse prevention plan and the recommendations of any treatment or counseling or assessment program which I have completed during my incarceration or while under supervision. I agree to follow any directives given to me by my parole officer regarding evaluations, placement and/or referrals. I agree to submit to polygraph examinations as directed by my parole officer and/ or treatment provider.

J. **Victim**: I agree to have no contact with the victim(s) in my case(s) or the victim's family by any means including, but not limited to, in person, by phone, via computer, in writing, or through a third party without the advance permission of my parole officer.

K. **Search**: I agree to submit to search by parole officer(s) of my person, residence, and any other property under my control.

L. **Law Enforcement Contact:** I agree that if a law enforcement official presents him/herself at my residence where I am on house arrest, I will respond to the door and truthfully answer any questions posed to me by the law enforcement officer.

M. **Special Conditions**: I agree to abide by any special conditions(s) set forth below, as well as to comply with instructions which may be given or conditions imposed by my parole officer from time to time as may be governed by the special requirements of my individual situation.

N. **House Guests**: I agree not to have more than two (2) persons at my residence where I am on house arrest, other than myself and any actual resident, at any time without the advance permission of my parole officer.

Special Conditions:

Reporting Instructions:

_____ _____
Date Signature of offender

_____
Print Name & Number of offender

_____ _____
Date Signature of KDOC staff witnessing signature

_____
Print Name & Position & Contact # of person witnessing

NOTICE OF DENIAL OF APPLICATION FOR PLACEMENT ON HOUSE ARREST

To: Offender _____ #_____

Date:

From: Classification Administrator

Subject: Application for Placement on House Arrest

You are hereby notified that your Application for Placement on House Arrest has been **DENIED**.

You are further notified that this decision is final and is not subject to appeal.

You may be eligible to submit a new application at some point in the future, consistent with KDOC policy and Kansas law. See your assigned correctional counselor or Unit Team Manager when you again believe that you are eligible.

cc Master File
Parole Office

HOUSE ARREST WEEKLY ITINERARY

Name and Number _____

Monday ***(date)*** _____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Tuesday ***(date)*** _____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Wednesday ***(date)*** _____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Thursday ***(date)*** _____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Friday ***(date)*** _____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Saturday *(date)* _____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Sunday *(date)* _____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

Destination: _____ Reason: _____
Leave and Return Times: _____ Transportation Method:_____

_____ _____
Offender Signature Date

_____ _____
Approved By Date

Comments:

_____

_____

_____

_____

Escape Procedures

A. Once an escape has been declared, staff will follow the steps outlined below.

B. Once an escape has been declared, the Parole Officer shall notify the Winfield Correctional Facility with the relevant information. This information will include:

1. The date, time, and reason for the violation of written itinerary, if applicable;

2. The date, times, and locations checked by the Parole Officer before declaring the escape; and

3. Any information obtained that may be germane to the escape.

C. Staff at WCF shall initiate the escape procedure upon notification of the House Arrest escape.

1. An NCIC entry shall be initiated.

2. Facility EAI Special Agents will be notified.

3. An escape flier will be prepared and posted on the Internet.

D. Once the escape plan has been initiated, WCF Special Agents shall:

1. Ensure that an escape warrant has been issued;

2. Gather basic intelligence information that may assist in locating the escapee; and

3. Contact the KDOC EAI Director for transfer of the case to another facility or field office as determined by location.

E. During normal duty hours, the Parole Officer who declared the escape shall be copied on all developments in the case. After normal duty hours, the Parole Duty Officer shall be advised of case developments.

EXHIBIT R

SUPPLEMENTAL DECLARATION OF TIFFANY TROTTER

Pursuant to K.S.A. § 53-601, I, Tiffany Trotter, declare as follows:

1. My name is Tiffany Trotter. I am 29 years old and am from Montgomery County, Kansas. I am currently incarcerated at Topeka Correctional Facility (KDOC# 0123604). In the past several weeks, many of us who are residents in Topeka CF have, like the community outside of the facility, increasingly heard of the need to regularly engage in safety measures to protect ourselves against COVID-19. We know we must wash our hands often, avoid touching our faces, maintain proper hygiene, and stay 6 feet away from others to stop the spread of the virus. But our circumstances in Topeka CF make it difficult to do so.

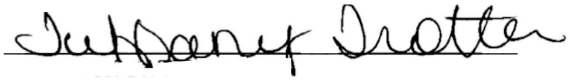
2. We are still unable to socially distance and are continuously in close proximity with other residents. There is regularly 150 to 200 people in the yard at a time. Nothing has changed in how many of us eat in the chow hall for breakfast and dinner— we still eat with our entire dorm as we did before the pandemic. I also believe our current access to soap at Topeka CF is inadequate. While there is some soap available in the hand dispensers, our access depends on staff providing it to us after we submit a request.

3. For lunch, we now go to the cafeteria and then bring the meals back to our cells to eat. I recently asked UTM Patterson why we do this only at lunch—but not at any other meal— and he said that is because the Kansas Health Department comes during the lunch hour to observe Topeka CF compliance with their requirements for managing COVID-19.

4. I am very fearful for my health and safety at Topeka CF, which is still crowded, and my risk factors for COVID-19 include my history of smoking and my compromised immune system due to my anti-depressants. As I live in a communal quadrant with 22 other people with only 3 to 4 feet between each of our bunk beds, I know that if one of the people in my area contracts COVID-19 from the staff or someone else, it is highly likely I will catch this very contagious virus.

I declare under perjury that the foregoing is true and correct.

Executed on: April 27, 2020



TIFFANY TROTTER