

“IN THE INTERESTS OF JUSTICE”: THE CASE FOR REQUIRING KANSAS PROSECUTORS TO PROVIDE AN APPEALABLE, WRITTEN EXPLANATION WHEN DENYING DEFENDANTS PRE-TRIAL DIVERSION

*By: Sam Crawford**

I. INTRODUCTION

Everybody makes mistakes, whether we like to admit it or not. Perhaps you have gotten the time of an important work meeting wrong and missed it. This author, for one, consistently walks out of the house unintentionally with mismatched socks on. Most of the mistakes we make cause simple annoyance, or temporary consequences at worst. But some mistakes carry the potential to haunt their makers for the remainder of their lives—particularly mistakes that turn an ordinary individual into a criminal defendant.

Take, for example, the story of Ethan Scott.¹ Ethan, a twenty-year-old Kansan, and his two friends drove to a farm south of their hometown to pick up an ATV four-wheeler that one of Ethan’s friends was promised.² Unfortunately for the trio, the deal fell through.³ They began to return home empty-handed and

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¹ Ethan Scott’s story, as told in this Article, is fictional but inspired by the real facts surrounding David Morey’s pre-trial journey as told in a New Hampshire news article. *See* Paul Cuno-Booth, *A Felony Could Have Ruined His Life. This Program Gave Him a Second Chance.*, THE KEENE SENTINEL (Jan. 5, 2021), https://www.sentinelsource.com/news/local/a-felony-could-have-ruined-his-life-this-program-gave-him-a-second-chance/article_36b52fe2-ecfe-5348-a3de-24d1dbdc9613.html [https://perma.cc/7NVX-8TY9]. Factual substitutions were made to better reflect a potential Kansan’s pre-trial journey.

² *Id.*

³ *Id.*

disappointed.⁴ On their way back to town, however, the group saw two four-wheelers parked on the corner of a different farm with no owner in sight.⁵ Taking this as a sign of divine intervention, the trio took the four-wheelers for a joyride.⁶ They carefully placed the four-wheelers back where they found them hoping no one would notice that they were ever moved.⁷ Confident in their scheme, the trio decided to return and take them on another joyride the next day.⁸ But when they returned to park the four-wheelers this time, the owner was waiting for them with crossed arms and a scowl.⁹

For his part, Ethan was later charged with two counts of felony theft.¹⁰ Ethan, who had never faced a criminal charge before, began to face the reality of his situation and the potential consequences of his mistake. In Kansas, felony theft is a Level 9 felony¹¹ punishable by up to seven months in prison for each count;¹² Ethan could be sentenced to a year and a half prison term.¹³ If incarcerated, Ethan will be one of over 8,900 prisoners in the Kansas Department of Corrections (“KDOC”).¹⁴ He will also have a 26.77% chance of recidivating, or re-offending, meaning that this may not be the last time he sits behind bars.¹⁵ Further, if branded as a felon, he could face other stigmas and challenges throughout the remainder of his life including voter disenfranchisement, trouble obtaining housing, and scrutinization from potential employers.¹⁶

Incarceration is designed to punish and deter criminal conduct, but incarceration is also designed to rehabilitate offenders back into society.¹⁷ Mass incarceration, recidivism, and post-release stigma all cut against rehabilitating

⁴ Cuno-Booth, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ KAN. STAT. ANN. § 21-5801(b)(3) (2024).

¹² Because Ethan has no criminal history, a Severity Level 9 felony places him in a “Presumptive Probation” sentencing box at the cross of Severity Level 9 and criminal history I. *See* KAN. SENT’G GUIDELINES MANUAL: SENTENCING RANGE—NONDRUG OFFENSES app. E (KAN. SENT’G COMM’N 2024). Although probation is the presumed sentence, there is no guarantee that Ethan is sentenced to probation; the sentencing court may dispositionally depart his sentence upward from probation to prison. *See* KAN. STAT. ANN. §§ 21-6803(g), 6818(c) (2024).

Additionally, if Ethan is sentenced to probation but violates its terms, the court can revoke his probation and require him to serve the underlying prison sentence. *Id.* § 22-3716(b)(3)(B)(iii).

¹³ *See* KAN. SENT’G COMM’N, *supra* note 12.

¹⁴ *See* KAN. DEP’T OF CORR., ANNUAL REPORT FISCAL YEAR 2023 9 (showing the KDOC male population at 8,160 and female population at 767 for an overall KDOC population of 8,927 in Fiscal Year 2023).

¹⁵ *See id.* at 11 (showing that Kansas recidivism in 2019, the most recent year of data available, was 26.77%).

¹⁶ *See* Steven D. Bell, Note, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 8–11 (2014) (discussing how formerly incarcerated individuals face many challenges including disenfranchisement, receiving public assistance, obtaining housing, gaining employment, and others).

¹⁷ *See* State v. Proctor, 280 P.3d 839, 928 (Kan. Ct. App. 2012) (recognizing rehabilitation, in addition to retribution, deterrence, and incapacitation, as a goal of criminal sanctions).

former inmates.¹⁸ These issues have grasped the attention of Kansas lawmakers. Efforts to reduce mass incarceration and recidivism have been topics greatly discussed in the Kansas Legislature in recent years.¹⁹ So too has remedying the stigmas and challenges that formerly incarcerated people face after being released.²⁰ These efforts are incredibly important for criminal justice reform in Kansas, but they only address the problem after the damage is already done. It is often said that prevention is better than a cure.²¹ So what preventative measures exist to address the problems of mass incarceration, recidivism, and post-release stigma? Does Ethan have any other option except to hope for the judge's mercy?

Perhaps. For example, diversion programs offer a different path. "In the interests of justice," Kansas prosecutors may offer a defendant diversion as an alternative to criminal prosecution.²² In a diversion, prosecutors "divert" a criminal defendant to some form of supervised program instead of proceeding with prosecution.²³ Upon successful completion of the terms and conditions agreed to, the defendant's charges are dismissed with prejudice and the case is over.²⁴

Despite evidence showing that diversion programs benefit defendants and the community at large, the chances that a Kansas prosecutor diverts Ethan to a program are very low.²⁵ If Ethan's diversion application is denied, the

¹⁸ See Zoe R. Feingold, *The Stigma of Incarceration Experience: A Systematic Review*, 27 PSYCH. PUB. POL'Y & L. 550, 550 (2021) ("Compared to persons without prior legal system involvement, individuals with a history of incarceration are more likely to experience unemployment, poverty, and homelessness as well as psychological impairment, substance abuse problems, disruptions in health care access, and mortality in the weeks and years following release.") (citation omitted).

¹⁹ See CSG JUSTICE CENTER, THE JUSTICE REINVESTMENT INITIATIVE IN KANSAS: IMPROVING SUPERVISION AND EXPANDING DIVERSION 1 (2022) (discussing the Kansas Legislature's work in "developing appropriate policy recommendations that prioritize corrections spending on effective recidivism-reduction strategies").

²⁰ See *id.* (discussing proposals to remove prior offenders from the public online drug registry and improving post-release supervision resources).

²¹ *Prevention is better than cure*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/prevention%20is%20better%20than%20cure> [https://perma.cc/RST9-7Z76].

²² KAN. STAT. ANN. § 22-2907(a) (2024).

²³ See, e.g., Joseph B. Cox, Note, *Kansas Diversion: Defendant's Remedies and Prosecutorial Opportunities*, 20 WASHBURN L.J. 344, 344 (1981); KAN. STAT. ANN. § 22-2911(b) (2024).

²⁴ E.g., KAN. STAT. ANN. § 22-2909(a)(1) (2024). A case "dismissed with prejudice" bars the prosecutor from filing a later suit against the defendant based on the same charge and facts. See *With Prejudice*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁵ See KAN. JUD. ADMIN., ANNUAL REPORT ON THE COURTS OF KANSAS, SUMMARY OF FELONY CASELOAD FOR THE STATE YEAR ENDING JUNE 30, 2019 (2019), <https://kscourts.gov/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/2019-Felony-Caseload-Summary.pdf> [https://perma.cc/MG3Q-X9CG] (showing that out of 21,395 felony case dispositions, 1,222 were dispositioned by deferred adjudication/diversion, a total of 5.71%).

prosecutor is not required to explain why he was denied diversion.²⁶ Ethan may never know whether the prosecutor properly considered his age, clean record, willingness to cooperate, or any other potential mitigating circumstances—factors the prosecutor must consider under Kansas law.²⁷ Ethan will also not know whether the prosecutor denied Ethan's diversion based on mistaken facts. Without a written explanation, Ethan will have little to no chance of successfully appealing a diversion denial for either of these reasons.²⁸

"In the interests of justice" that the Kansas diversion statutes seek to effect, this Article discusses the case for requiring Kansas prosecutors, by statute, to provide an appealable, written explanation when denying defendants pre-trial diversion. Section II discusses background information on how Kansas diversion programs currently operate, what diversion reform has been considered, and the present challenges to appealing a diversion denial in Kansas courts. Section III introduces this Article's proposal with an eye toward other states that currently require an appealable, written explanation for diversion denials. Section IV discusses the effectiveness of this Article's proposal and addresses the counterarguments against it. Finally, Section V drafts a statutory provision of this Article's proposal for legislative consideration.

Although the Kansas Legislature has discussed various reforms to the state's diversion programs,²⁹ it has not considered implementing this Article's proposal. Moreover, no scholarship has specifically focused on requiring prosecutors to provide an appealable, written explanation when denying defendants pre-trial diversion.³⁰ This Article is the first to make this case and does so specifically for the state of Kansas.³¹

²⁶ See KAN. STAT. ANN. §§ 22-2906–2912 (2024) (containing no appealable, written requirement when denying defendants diversion).

²⁷ KAN. STAT. ANN. § 22-2908(a).

²⁸ See *infra* Section II.C for a discussion on the current challenges of appealing diversion denial in Kansas.

²⁹ See KAN. CRIM. JUST. REFORM COMM'N, REPORT OF THE KANSAS CRIMINAL JUSTICE REFORM COMMISSION TO THE 2022 KANSAS LEGISLATURE app. at 2–5 (2021); KAN. CRIM. JUST. REFORM COMM'N, REPORT OF THE KANSAS CRIMINAL JUSTICE REFORM COMMISSION TO THE 2021 KANSAS LEGISLATURE app. at 6–18 (2020).

³⁰ Scholarship surrounding diversion programs has called for other areas of diversion reform including reducing the financial costs of diversion programs, expanding diversion eligibility to other offenses, and navigating the difficulties of implementing diversion programs in rural areas. See Amy F. Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439 (2022); Sarah J. Long, Note, *The Case for Extending Pretrial Diversion to Include Possession of Child Pornography*, 9 U. MASS. L. REV. 306 (2014); Madison McWithey, Note, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part Two: External Constraints*, 61 B.C. L. REV. E-Supp. I.-49 (2020).

³¹ Diversion programs enacted by statute are well established in forty-four states and in the District of Columbia. *Pretrial Diversion*, NAT'L CONF. OF STATE LEGISLATURES (April 10, 2024), <https://www.ncsl.org/civil-and-criminal-justice/pretrial-diversion> [https://perma.cc/6BJC-Z22Q]. Although aimed at the Kansas Legislature, this Article's rationales could be applied to similar state statutes that do not require an appealable, written explanation requirement when denying defendants diversion.

II. BACKGROUND

Diversion programs were designed and developed with the recognition that it is not necessary, and may even be detrimental, to pursue formal prosecution for every criminal violation.³² As such, diversion programs often include treatment and prevention measures for the underlying cause of the criminal conduct including programs for drug use, driving under the influence (“DUI”), and other educational courses.³³ Some programs even facilitate restorative justice measures by requiring diverted defendants to meet with victims or community members and take responsibility for their criminal conduct.³⁴ Pre-trial diversion programs are most often used for misdemeanor charges³⁵ but are even more effective for those facing felony charges.³⁶ Diversion programs prevent an additional individual from being incarcerated in already overcrowded facilities.³⁷ Diversion programs also give individuals the tools needed to address and change their behavior.³⁸ Overall, pre-trial diversion programs are very successful in reducing conviction, mass incarceration, and recidivism rates.³⁹

³² U.S. DEP’T OF JUST., NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 74 (1973) (“[I]f all law violations were processed officially as the arrest-conviction-imprisonment model calls for, the system obviously would collapse from its voluminous caseloads. . .”).

³³ See MELISSA LABRIOLA, WARREN A. REICH, ROBERT C. DAVIS, PRISCILLIA HUNT, MICHAEL REMPEL & SAMANTHA CHERNEY, NAT’L CRIM. JUST. REFERENCE SERV., PROSECUTOR-LED PRETRIAL DIVERSION: CASE STUDIES IN ELEVEN JURISDICTIONS ix (2018) (noting that thirteen of the fifteen diversion programs studied provided some form of education about “relevant problem behavior”).

³⁴ See *id.* (noting five of ten studied jurisdictions had diversion programs facilitating restorative justice).

³⁵ See KAN. JUD. ADMIN., ANNUAL REPORT ON THE COURTS OF KANSAS, SUMMARY OF MISDEMEANOR CASELOAD FOR THE STATE YEAR ENDING JUNE 30, 2019 (2019), <https://kscourts.gov/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/2019-MisdemeanorCrimPending.pdf> [<https://perma.cc/2H5D-A8YE>] (showing that 19.7% of misdemeanors were dispositioned by diversion or deferred adjudication).

³⁶ Matthew W. Epperson, Leon Sawh, Sadiq Patel, Carrie Pettus & Annie Grier, *Examining Case Dismissal Outcomes in Prosecutor-Led Diversion Programs*, 34 CRIM. JUST. POL’Y REV. 236, 254 (2023) (“[P]eople charged with a felony . . . may be more motivated to complete the Diversion program and have their felony charge dismissed and avoid more serious consequences, compared to Diversion participants charged with misdemeanors.”).

³⁷ See WORLD PRISON BRIEF, *United States of America: Overview*, <https://www.prisonstudies.org/country/united-states-america> [<https://perma.cc/A4NE-ZJ8W>] (reporting U.S. county jail and state and federal prison populations are at 95.6% capacity).

³⁸ See LABRIOLA et al., *supra* note 33.

³⁹ See Robert C. Davis, Warren A. Reich, Michael Rempel & Melissa Labriola, *A Multisite Evaluation of Prosecutor-Led Pretrial Diversion: Effects on Conviction, Incarceration, and Recidivism*, 32 CRIM. JUST. POL’Y REV. 890, 905 (2021).

The Kansas Legislature first articulated an opportunity for diversion in 1978⁴⁰ as part of a significant package of corrections legislation.⁴¹ Tasked with examining existing pre-trial diversion programs in other states, the then-existing Special Committee on Corrections (“Committee”) recommended adopting a pre-trial diversion program.⁴² The Committee noted that the purpose of a diversion program is to offer an alternative method of rehabilitation to effect the offender’s future compliance with the law.⁴³ Ultimately, the Committee expressed that diversion should be granted in cases where it is “in the interests of justice” and “of benefit to the defendant and the community.”⁴⁴

“[I]n the interests of justice” continues to be the guiding standard for a prosecutor’s decision to grant or deny diversion under current Kansas law.⁴⁵ But the law surrounding Kansas diversion program requirements and diversion use has developed over the years. This Section focuses on what diversion currently looks like in Kansas, recent discussions surrounding diversion program reform, and the difficulty of challenging a diversion denial in Kansas courts.

A. Diversion in Kansas

Kansas law requires each district attorney to “adopt written policies and guidelines for the implementation of a diversion program.”⁴⁶ The various statutes governing diversion in Kansas impose certain requirements for each county’s diversion program while simultaneously granting prosecutors immense discretion in operating their respective programs.⁴⁷ Accordingly, this Section first focuses on the statutory requirements for Kansas diversion programs and then turns to the implementation of the program across Kansas counties.

1. Statutory Requirements for Kansas Diversion Programs

Kan. Stat. Ann. section 22-2906 *et seq.* defines the requirements for diversion programs.⁴⁸ As previously mentioned, section 22-2907(b) requires each district attorney to adopt a written policy implementing a diversion program.⁴⁹ Prosecutors may propose diversion to a defendant if diversion is “in

⁴⁰ See KAN. STAT. ANN. § 22-2907 (2024) (originally enacted as L. 1978, ch. 131, § 2 (1978)).

⁴¹ Cox, *supra* note 23, at 345.

⁴² See SPECIAL COMM. ON CORR., REPORT ON KANSAS LEGISLATIVE INTERIM STUDIES TO THE 1978 LEGISLATURE 48–49 (1978).

⁴³ SPECIAL COMM. ON CORR., *supra* note 42, at 48.

⁴⁴ *Id.* at 48–49.

⁴⁵ KAN. STAT. ANN. § 22-2907(a) (2024) (“[I]f it appears to the district attorney that diversion of the defendant would be in the interests of justice and of benefit to the defendant and the community, the district attorney may propose a diversion agreement to the defendant.”).

⁴⁶ *Id.* § 22-2907(b).

⁴⁷ See *infra* Section II.A.2.

⁴⁸ KAN. STAT. ANN. §§ 22-2906–2912 (2024).

⁴⁹ *Id.* § 22-2907(b).

the interests of justice” and “of benefit to the defendant and the community.”⁵⁰ Upon successful completion of the diversion agreement, the district court must dismiss the charges with prejudice.⁵¹

Section 22-2908(b) lists several criminal charges that are ineligible for diversion in Kansas.⁵² Those charged with severe crimes against other persons, such as Level 1, 2, or 3 person felonies,⁵³ are ineligible for diversion.⁵⁴ So are defendants facing a drug severity Level 1, 2, or 3 felony⁵⁵ charge.⁵⁶ Additionally, second-time DUI charges, DUI charges involving a commercial driver’s license-holding defendant, or DUI charges involving death are ineligible for diversion.⁵⁷ Further, certain domestic violence offenders are ineligible for diversion.⁵⁸ There are a wide-variety of eligible offenses, however, including felony theft⁵⁹ (luckily for Ethan), burglary,⁶⁰ possession of illegal substances,⁶¹ driving without a license⁶² and many others.

If a defendant is not precluded from diversion under section 22-2908(b), the prosecutor must consider several factors to determine whether diversion would be in the interests of justice.⁶³ Section 22-2908 enumerates twelve factors, including the nature of the crime, the defendant’s circumstances

⁵⁰ KAN. STAT. ANN. §§ 22-2907(a) (2024).

⁵¹ *Id.* § 22-2911(b).

⁵² *See id.* § 22-2908(b).

⁵³ In Kansas, those convicted of Level 1 person felonies face the highest possible penalties; possible penalties decrease as the level number increases. *See* KAN. SENT’G COMM’N, *supra* note 12. Person felonies are the most serious for criminal history purposes, which greater enhance the penalties for repeat offenders with person felony convictions on their record compared to those with nonperson felony convictions. *See id.*

⁵⁴ KAN. STAT. ANN. § 22-2908(b)(3) (2024). Level 1, 2, and 3 felonies encompass severe crimes such as rape, commercial sexual exploitation of a child, and aggravated robbery. *See id.* § 21-5503(b)(1)(A) (listing rape as a severity Level 1 person felony); *Id.* § 21-6422(b)(1)(B) (listing repeated commercial sexual exploitation of a child as a severity Level 2 person felony); *Id.* § 21-5420(c)(2) (“Aggravated robbery is a severity Level 3, person felony.”).

⁵⁵ Like Kansas nondrug felonies, drug felony penalties decrease as the level number increases. *Compare* KAN. SENT’G GUIDELINES MANUAL: SENTENCING RANGE—DRUG OFFENSES app. E (KAN. SENT’G COMM’N 2024), *with* KAN. SENT’G COMM’N, *supra* note 12.

⁵⁶ KAN. STAT. ANN. § 22-2908(b)(3) (2024). Level 1, 2, and 3 drug felonies include drug crimes involving the sale or manufacture of drugs such as one kilogram or more of narcotics, the manufacture of a controlled substance (not meth or fentanyl), and the cultivation of narcotics of less than fifty plants. *See id.* § 21-5705(d)(1)(D) (listing the sale of narcotics of one kilogram or more as a Level 1 drug felony); *Id.* § 21-5703(b)(1) (listing the manufacturing of a controlled substance as a Level 2 drug felony); *Id.* § 21-5705(d)(8)(A) (listing the cultivation of narcotics of less than fifty plants as a Level 3 drug felony).

⁵⁷ KAN. STAT. ANN. § 22-2908(b)(1)–(2) (referencing the Kansas DUI statute); *see also id.* § 8-1567.

⁵⁸ KAN. STAT. ANN. § 22-2908(b)(4).

⁵⁹ *See id.* § 21-5801(b)(2).

⁶⁰ *See id.* § 21-5807(c)(1)(A)–(B).

⁶¹ *See id.* § 21-5706(c)(1).

⁶² *See id.* § 8-235(a).

⁶³ *Id.* § 22-2908(a).

or special characteristics, whether the defendant is a first-time offender, and any other mitigating circumstances present.⁶⁴ Prosecutors are not limited to considering only these factors.⁶⁵ But prosecutors must consider at least each of these twelve factors when deciding whether to grant or deny a defendant diversion.⁶⁶

2. *Use of Diversion in Kansas*

The language of sections 22-2906 *et seq.* allows prosecutors immense discretion in how they choose—or choose not—to implement their respective diversion programs. Some counties provide opportunities for numerous defendants whereas other counties limit defendants' eligibility by imposing additional disqualifications on top of the statutory disqualifications.⁶⁷ For example, Finney County only automatically disqualifies defendants from diversion according to Kansas statute.⁶⁸ Conversely Saline County imposes additional disqualifications that are not listed in the statute including disqualifying defendants charged with a mere traffic infraction.⁶⁹ Not only do programs differ in who may be eligible, but counties also have different diversion application processes.⁷⁰ Many counties do not even have a formal diversion application.⁷¹ Additionally, diversion application fees vary widely—ranging from \$0 to \$250.⁷²

Because each diversion program is run by the district attorney, determining how often diversion programs are being utilized is difficult. Statistics on diversion program use and success are relatively limited across the country.⁷³ Kansas is no different. Very few Kansas counties keep track of

⁶⁴ KAN. STAT. ANN. § 22-2908(a)(1)–(12).

⁶⁵ *Id.* § 22-2908(a).

⁶⁶ *Id.*

⁶⁷ See generally ACLU KAN., CHOOSING INCARCERATION: KANSAS PROSECUTORS' REFUSAL TO USE DIVERSION AND THE COST TO COMMUNITIES app. B at 25–30 (2017) (reporting which Kansas counties limit diversion eligibility to certain defendants).

⁶⁸ See FINNEY CNTY. ATTY'S OFF., *Finney County Diversion Program*, <https://www.finneycounty.org/DocumentCenter/View/7335/Diversion-Policy?bidId=> [<https://perma.cc/U4DQ-H3YD>].

⁶⁹ See SALINE CNTY., *Saline County Attorney Diversion Program Policy*, <https://www.salinecountyks.gov/diversion> [<https://perma.cc/2TCP-EP8L>].

⁷⁰ Compare OFF. OF THE DIST. ATT'Y, 18TH JUD. DIST. OF KAN., *Application for Pretrial Diversion Program*, <https://www.sedgwickcounty.org/media/58989/cr-diversion-application.pdf> [<https://perma.cc/TE32-86HV>], with DIST. ATT'Y DOUGLAS CNTY. KAN., *Adult Criminal Diversions, What Procedures Must I Follow?*, <https://www.douglascountyks.org/district-attorney/adult-criminal-diversions> [<https://perma.cc/PK93-VKXF>].

⁷¹ ACLU KAN., *supra* note 67 (reporting which Kansas counties offer formal diversion applications and which counties do not).

⁷² *Id.* (reporting each Kansas county's diversion application fees).

⁷³ Sean Flynn, Robin Olsen & Maggie Wolk, *Innovative Approaches to Diversion Data*, 9 CRIM. L. PRAC. 38, 38 (2020) (“[L]ess than one third of respondents reported collecting information about compliance with office policies on which cases should be diverted, referred to as a problem-solving court, or deferred.”).

application numbers and approvals.⁷⁴ Counties that do keep track of diversion use do not follow any uniform method for doing so. For example, former Labette County Attorney Stephen Jones once reported keeping a color-coded spreadsheet of diversions that have been offered, denied, and completed as his method to monitor the use and success of his diversion program.⁷⁵ But this information, and other internal diversion practice data that may exist, is not publicly available.

Turning to public information, the Office of Judicial Administration (“OJA”) in Kansas submits an annual report each year detailing each Kansas court’s caseload and case dispositions.⁷⁶ According to the OJA’s most recent report,⁷⁷ Kansas prosecutors offer diversions for misdemeanors at a rate of 19.7%.⁷⁸ That rate drops substantially for felonies, which prosecutors only grant diversions 5.7% of the time.⁷⁹ This is much lower than the 9% national average for granting diversions or other methods of deferring adjudication.⁸⁰ Sixteen Kansas counties did not grant any felony diversions at all.⁸¹ This low use of diversion in Kansas prevents many defendants and communities from obtaining the benefits of diversion programs.⁸²

⁷⁴ ACLU KAN., *supra* note 67, at 15 (“Of counties that responded to requests for information for this report, only 10 said that they keep any kind of running record of application numbers and approvals.”).

⁷⁵ ROBIN OLSEN, LEIGH COURTNEY, CHLOE WARNBERG & JULIE SAMUELS, URB. INST., COLLECTING AND USING DATA FOR PROSECUTORIAL DECISIONMAKING: FINDINGS FROM 2018 NATIONAL SURVEY OF STATE PROSECUTORS’ OFFICES 9 (2018).

⁷⁶ *Case Statistics*, KAN. JUD. BRANCH, <https://www.kscourts.org/Cases-Decisions/Case-Statistics> [<https://perma.cc/NRZ7-K8W9>].

⁷⁷ The last report available on the OJA’s website is from 2019—six years old as of this Article’s publication. KAN. JUD. ADMIN., *supra* note 35. The lack of publicly available data on diversion use in Kansas makes continuously improving diversion programs much more difficult and should be addressed. *See* ACLU KAN., *supra* note 67, at 2–3.

⁷⁸ KAN. JUD. ADMIN., *supra* note 35 (showing that out of 14,325 misdemeanor case dispositions, 2,818 were dispositioned by deferred adjudication/diversion, or 19.7%).

⁷⁹ KAN. JUD. ADMIN., *supra* note 25 (showing that out of 21,395 felony case dispositions, 1,222 were dispositioned by deferred adjudication/diversion, or 5.71%).

⁸⁰ BRIAN A. REAVES, U.S. DEPT. OF JUST., BUREAU OF JUST. STATS., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 24 (2013).

⁸¹ KAN. JUD. ADMIN., ANNUAL REPORT ON THE COURTS OF KANSAS, CRIMINAL CASE DISPOSITIONS BY JUDICIAL DISTRICT (2019), <https://kscourts.gov/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/2019-Criminal-Terms.pdf> [<https://perma.cc/2UYC-2M9T>] (listing that Atchison, Jewell, Washington, Elk, Greenwood, Rawlins, Wallace, Clark, Clay, Lane, Wichita, Reno, Ottawa, Sumner, Wilson and Woodson counties granted zero felony diversions in 2019).

⁸² Defendants who are denied diversion and reach the sentencing stage are sentenced to either probation or incarceration. *See* KAN. SENT’G COMM’N, *supra* note 12. Incarcerated defendants clearly miss out on the benefits diversion programs offer. *See* Davis et al., *supra* note 39. Defendants on probation also miss out on diversion program benefits, particularly because as the number of adults under probation rises, the lower the quality of supervision—all leading to high

B. Discussion Surrounding Kansas Diversion Reform

The low use of diversion programs in Kansas has prompted a response from both advocacy groups and the Kansas Legislature. In 2016, the American Civil Liberties Union (“ACLU”) of Kansas released a report heavily criticizing Kansas diversion programs in 2016 after surveying all of the state’s 105 counties.⁸³ The ACLU of Kansas report describes Kansas diversion programs “like a patchwork quilt, varying from county to county depending upon the proclivities of individual prosecutors.”⁸⁴ It further emphasizes that Kansas prosecutors grant felony diversions at a rate half the national average, directly contributing to more incarceration and costs to Kansans.⁸⁵ After identifying several problems with how Kansas diversion programs are implemented,⁸⁶ the report called upon both the Kansas Legislature and local prosecutors for diversion reform.⁸⁷

The ACLU of Kansas has also attempted to address the problems with Kansas diversion programs in the courtroom. In 2018, the ACLU of Kansas sued the Montgomery County Prosecutor “for failing to implement diversion programs in accordance with Kansas law and for pursuing the expensive and disproportionately harsh prosecution of individuals posing minimal community risks.”⁸⁸ Montgomery County agreed to make several diversion program improvements and settled the case,⁸⁹ but the ACLU of Kansas continues to call upon prosecutors to utilize diversion more often.⁹⁰

levels of probation program failure and future incarceration for new convictions. *See Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, PEW (Sept. 25, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities> [https://perma.cc/K3MR-CZZA].

⁸³ *See* ACLU KAN., *supra* note 67, at 2 (“Diversion works, but it is a strategy that is not being used effectively by elected prosecutors in Kansas. In fact, Kansas prosecutors use diversion at just half of the national average, or in about 5% of all felony cases, despite the fact that 94% of Kansans want their local prosecutor to use diversion *more* often.”).

⁸⁴ *Id.* at 10.

⁸⁵ *Id.* at 2, 9 (“Expanding the use of felony diversion would result in fewer people being sent into the state’s over-crowded prisons, and reduce expenditures on correctional facilities.”).

⁸⁶ *See id.* at 10–17 (identifying lack of formal diversion policies, harsh eligibility guidelines, program secrecy, excessive fees, data limitations, program capacity challenges, and prosecutor refusal to use diversion programs as reasons why diversion is underused in Kansas).

⁸⁷ *Id.* at 18–19.

⁸⁸ *ACLU Sues Kansas County Prosecutor for Hiding Diversion Opportunities from Defendants and Failing to Combat Mass Incarceration*, AM. CIV. LIBERTIES UNION (June 8, 2018, 9:45 AM), <https://www.aclu.org/press-releases/aclu-sues-kansas-county-prosecutor-hiding-diversion-opportunities-defendants-and> [https://perma.cc/C2SZ-B3DV].

⁸⁹ Tim Carpenter, *ACLU Settles Diversion-Agreement Lawsuit with Montgomery County Prosecutor’s Office*, KAN. REFLECTOR (May 5, 2022), <https://kansasreflector.com/2022/05/05/aclu-settles-diversion-agreement-lawsuit-with-montgomery-county-prosecutors-office/> [https://perma.cc/B9ME-WY8P].

⁹⁰ *Id.* (quoting an ACLU staff attorney as stating “hopefully, more prosecutors will choose diversion and other alternatives over incarceration”).

The Kansas Legislature recently considered diversion program reform.⁹¹ In 2021, the Kansas Criminal Justice Reform Commission (“Commission”) was charged by the Kansas Legislature with analyzing Kansas diversion programs.⁹² As a result, the Commission created a Diversion Subcommittee (“Subcommittee”).⁹³ The Subcommittee considered several reform proposals including (1) permitting diversions to be granted before prosecutors file charges, (2) setting minimum statewide standards for diversion, and (3) providing a method for sealing or removing diversions from criminal records.⁹⁴ The Subcommittee, however, has not yet considered how to ensure prosecutors properly consider the section 22-2908 factors or how to address the challenges surrounding appealing a diversion denial.⁹⁵

C. Challenging Diversion Denial in Kansas Courts

Defendants can challenge a diversion denial in Kansas courts,⁹⁶ but those who do face an uphill battle. Prosecutors have immense discretion in determining how to conduct any individual case,⁹⁷ but prosecutors are not immune from judicial review of that exercise of discretion for arbitrariness.⁹⁸ While a prosecutor's discretion in this area is broad, Kansas courts have held that such discretion is subject to review at least for equal protection violations based on a particular classification of defendants.⁹⁹

Kansas law holds a prosecutor's denial of diversion to the same standard of review as a prosecutor's decision not to prosecute.¹⁰⁰ When reviewing diversion denials, Kansas courts evaluate the prosecutor's reasoning for arbitrariness or equal protection violations.¹⁰¹ Although Kansas law requires that prosecutors consider several factors before granting or denying a diversion,¹⁰² prosecutors do not have to explain how they weighed these factors or why they

⁹¹ See REPORT OF THE KANSAS CRIMINAL JUSTICE REFORM COMMISSION TO THE 2022 KANSAS LEGISLATURE, *supra* note 29.

⁹² See *id.* at 0-9.

⁹³ See *id.* at app. 2.

⁹⁴ *Id.*

⁹⁵ See *id.*

⁹⁶ See, e.g., *State v. Kacsir*, 251 P.3d 632, 635 (Kan. Ct. App. 2011) (reviewing a defendant's challenge that her diversion was denied arbitrarily and unreasonably).

⁹⁷ Charles E. MacLean, James Berles & Adam Lamparello, *Stop Blaming the Prosecutors: The Real Causes of Wrongful Convictions and Rightful Exonerations*, 44 HOFSTRA L. REV. 151, 156–57 (2015) (noting the numerous areas of a criminal case that prosecutors retain discretion and power over).

⁹⁸ *State v. Greenlee*, 620 P.2d 1132, 1139 (Kan. 1980).

⁹⁹ *Id.*

¹⁰⁰ *State v. Clinkenbeard*, 197 P.3d 904 (Table), 2008 WL 5401333, at *3 (Kan. Ct. App. 2008).

¹⁰¹ *Id.*; *Kacsir*, 251 P.3d at 635.

¹⁰² See KAN. STAT. ANN. §§ 22-2908(a)–(b) (2024).

denied an individual defendant's diversion application.¹⁰³ This makes challenging a diversion denial very difficult; prosecutors do not have to commit to a particular reason for denying a defendant diversion until challenged in court.¹⁰⁴

State v. Clinkenbeard illustrates this problem.¹⁰⁵ In *Clinkenbeard*, the defendant, Dylan Clinkenbeard, was charged with DUI in Shawnee County, Kansas.¹⁰⁶ Clinkenbeard applied for the DUI diversion program operated by the Shawnee County District Attorney but was subsequently denied.¹⁰⁷ The prosecutor initially stated diversion was denied because Clinkenbeard was "previously arrested for DUI in Shawnee County, where he was driving erratically through the neighborhood in which he was stopped."¹⁰⁸ On first blush, this appears to be a fair use of the prosecutor's discretion; prosecutors are well within their discretion to deny second-time DUI offenders diversion.¹⁰⁹ The problem? Contrary to the prosecutor's understanding, Clinkenbeard was never previously arrested for a DUI.¹¹⁰

When confronted at a later hearing, the prosecutor admitted the mistake of fact.¹¹¹ But instead of reconsidering the denial, the prosecutor re-justified it with new reasons. The prosecutor pointed to Clinkenbeard's other criminal history, his high blood alcohol content, and his reckless driving.¹¹² Clinkenbeard argued that the prosecutor should not have been allowed to re-justify the diversion denial with these new reasons.¹¹³ Clinkenbeard argued that the prosecutor had access to his criminal history report and the underlying facts of the offense, and could have articulated that as a reason in the original denial, but failed to do so.¹¹⁴

The Kansas Court of Appeals panel rejected Clinkenbeard's argument.¹¹⁵ After reviewing the limited caselaw on diversion denial challenges in Kansas,¹¹⁶ the court eventually discussed its denial of the abuse of prosecutorial discretion claim.¹¹⁷ The court concluded that "[a]lthough the original reason for denying diversion may have been wrong, the [prosecutor] was able to articulate specific factors for [his] decision."¹¹⁸

¹⁰³ See *Generally* KAN. STAT. ANN. § 22-2908 (containing no provision requiring prosecutors to provide a written explanation when denying defendants diversion).

¹⁰⁴ See *Clinkenbeard*, 2008 WL 5401333, at *1.

¹⁰⁵ See *id.* at *1–7.

¹⁰⁶ *Id.* at *1.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See KAN. STAT. ANN. § 22-2908(b)(1)(B) (2024) (disqualifying second-time DUI offenders from diversion eligibility).

¹¹⁰ *Clinkenbeard*, 2008 WL 5401333, at *1.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *5.

¹¹⁶ *Id.* at *3–4.

¹¹⁷ *Id.* at *5.

¹¹⁸ *Id.*

Notably, the court recognized that the prosecutor's ability to change the reasons for denying diversions is not ideal.¹¹⁹ The court cited the statute of another state that requires prosecutors to commit to their reasoning for denying diversion at the time of denial instead of on appeal.¹²⁰ "[I]t might be a better practice," the court noted, however, "this is not explicitly the law in Kansas."¹²¹

III. ADDRESSING THE PROBLEM: GUIDANCE FOR KANSAS FROM OTHER STATES

Section II of this Article reveals two interrelated problems that can both be addressed with one small step. First, the limited data available on the use of diversion in Kansas reveals that diversion use is incredibly low in Kansas, particularly for higher-level offenses where diversion offers the most benefits.¹²² Second, challenging a diversion denial is incredibly difficult because prosecutors do not need to commit to their reasoning for denying diversion until challenged in court.¹²³ Ensuring that Kansas prosecutors thoroughly consider the statutorily required factors laid out in section 22-2908 when determining whether to grant or deny diversion can help address both problems. Explicit law requiring prosecutors to provide an appealable, written explanation when denying defendants pre-trial diversion is a small step to improving diversion use in Kansas.

Requiring an appealable, written explanation is not a novel concept in the diversion context. This Section focuses on two states that presently require, by statute and caselaw, an appealable, written explanation when denying defendants diversion: Tennessee and New Jersey.¹²⁴ These two states can serve as examples for what this Article's proposal may look like in Kansas—both in statutory language and in practice. After reviewing these two states' programs, this Section summarizes what an appealable, written explanation requirement should look like in Kansas.

A. Tennessee

Tenn. Code Ann. section 40-15-101 *et seq.* governs diversion programs in Tennessee.¹²⁵ Like under the Kansas statute, Tennessee prosecutors must consider certain factors when determining whether to grant or deny a defendant

¹¹⁹ *Clinkenbeard*, 2008 WL 5401333, at *6.

¹²⁰ *Id.* at *6 (citing *State v. Lopes*, 673 A.2d 1379 (N.J. 1995)).

¹²¹ *Id.*

¹²² See *supra* Section II.A.2; see also Epperson et al., *supra* note 36.

¹²³ See *supra* Section II.C.

¹²⁴ *State v. Winsett*, 882 S.W.2d 806, 810 (Tenn. Crim. App. 1993) (citing Tenn. Code Ann. § 40-15-105 (2024)); N.J. STAT. ANN. § 2C:43-12(f) (2024).

¹²⁵ TENN. CODE ANN. §§ 40-15-101–107 (2024).

diversion, including all evidence that tends to show that the defendant is amenable to correction and not likely to commit additional crimes.¹²⁶ After consideration, Tennessee prosecutors are required, by caselaw, to respond to and inform the defendant of the final decision.¹²⁷ If pre-trial diversion is denied, prosecutors are required to provide defendants with a formal, written explanation.¹²⁸

Tennessee courts have explained the rationale behind imposing a written explanation when denying defendants pre-trial diversion.¹²⁹ Tennessee courts recognize that without such a requirement, certiorari review of a decision to deny diversion is severely limited.¹³⁰ To facilitate effective review, prosecutors must provide in their written denial: “1. [a]n enumeration of all the evidence considered; 2. [t]he reason for denial: that is, an enumeration of the factors considered and how some factor(s) controlled the decision and some explanation of why certain factors outweighed others; and 3. [a]n identification of any disputed issue of fact.”¹³¹

Accompanied with a written explanation, denied defendants also have a statutory right to petition the trial court for review of the denial under an abuse of prosecutorial discretion standard.¹³² Upon review, “the trial court should examine each relevant factor in the pretrial diversion process” to determine whether the prosecutor actually considered that factor and whether the prosecutor’s findings are “supported by substantial evidence.”¹³³ The trial court must focus on the prosecutor’s methodology rather than “the intrinsic correctness” of the prosecutor’s decision.¹³⁴ If the trial court finds that the prosecutor abused their discretion, the trial court may order the prosecutor to place the defendant on diversion.¹³⁵ If unsuccessful at the trial court level, defendants may appeal that decision to the Tennessee Court of Criminal Appeals and the Supreme Court of Tennessee.¹³⁶

Statutorily requiring prosecutors to explain diversion denial ensures that eligible defendants are not improperly denied diversion in Tennessee.¹³⁷ In *State v. McKim*, the Supreme Court of Tennessee granted review of Steven McKim’s diversion denial for a criminally negligent homicide charge.¹³⁸ McKim, a youth minister, was facing the charge due to the tragic death of his seven-month-old

¹²⁶ *State v. Webb*, 2011 WL 5332862, at *6 (Tenn. Crim. App. 2011).

¹²⁷ *Id.*

¹²⁸ *Winsett*, 882 S.W.2d at 810 (citing TENN. CODE ANN. § 40-15-105 (2024)).

¹²⁹ *See, e.g., id.*

¹³⁰ *See, e.g., id.* (“If the decision is to deny pretrial diversion, a recognition of the limited nature of certiorari review mandates that this response be formal and written.”).

¹³¹ *Id.*

¹³² TENN. CODE ANN. § 40-15-105(b)(3) (2024).

¹³³ *State v. Yancey*, 69 S.W.3d 553, 559 (Tenn. 2002).

¹³⁴ *Yancey*, 69 S.W.3d at 558–59.

¹³⁵ TENN. CODE ANN. § 40-15-105(b)(3).

¹³⁶ *State v. McKim*, 215 S.W.3d 781, 784 (Tenn. 2007) (explaining the procedural history of the diversion denial appeal in Tennessee at the trial court, Tennessee Court of Criminal Appeals, and the Tennessee Supreme Court levels).

¹³⁷ *See id.* at 788.

¹³⁸ *Id.* at 785–786.

daughter who was mistakenly left in a hot car for approximately two hours.¹³⁹ In his explanation denying McKim diversion, the prosecutor opined that “criminally negligent homicide should not be a divertible offense.”¹⁴⁰ After reviewing the factors a prosecutor is permitted to consider for a diversion application, the court concluded that the prosecutor committed an abuse of discretion by relying on his own opinion, noting that it was “a clearly irrelevant factor” to consider.¹⁴¹ The court further noted that the prosecutor erroneously did not consider McKim’s amenability to correction, but rather the prosecutor’s own opinion of what should be a divertible offense.¹⁴²

After the ruling, McKim was granted diversion on the condition that he serve fifty hours of community service and pay a \$100 fine.¹⁴³ McKim was able to return to his family to grieve the tragic loss of their daughter, instead of his family being further torn apart by the improper opinion of an individual prosecutor.¹⁴⁴ “Make no mistake,” a reporter on the case noted after the final decision was rendered, “McKim is serving a lifelong sentence at home.”¹⁴⁵

B. New Jersey

Originally a New Jersey Supreme Court Rule,¹⁴⁶ N.J. Stat. Ann. section 2C:43-12 *et seq.* governs diversion programs in New Jersey.¹⁴⁷ Like under the Kansas statute, New Jersey prosecutors are required to consider various factors when deciding to grant or deny diversion.¹⁴⁸ These factors are enumerated in section 2C:43-12(e).¹⁴⁹ A few of these factors include the motivation and age of the defendant¹⁵⁰ and the existence of personal problems and character traits that

¹³⁹ *McKim*, 215 S.W.3d 781 at 784–85; *Bartlett Youth Minister Won’t Serve Time for Leaving Daughter in Hot Car*, WMC ACTION NEWS 5 (Mar. 6, 2007, 2:58 PM), <https://www.actionnews5.com/story/6184936/bartlett-youth-minister-wont-serve-time-for-leaving-daughter-in-hot-car/> [<https://perma.cc/R69M-6PM2>].

¹⁴⁰ *Id.* at 788–89.

¹⁴¹ *Id.* at 788–90.

¹⁴² *Id.* at 788.

¹⁴³ *Bartlett Youth Minister Won’t Serve Time for Leaving Daughter in Hot Car*, *supra* note 139.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See* N.J. Ct. R. 3:28 (1970) (current version at N.J. Ct. Rs. 3:28-1–10 (2024)).

¹⁴⁷ N.J. STAT. ANN. §§ 2C:43-12–22 (2024). Notably, New Jersey refers to its diversion programs as “pretrial intervention” programs. *Id.* § 2C:43-12. “Diversion” itself has a negative connotation, as if defendants are simply avoiding consequences of their own actions. *See Diversion*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“A deviation or alteration from the natural course of things[.]”). Perhaps Kansas should also consider renaming diversion to “intervention” for adult offenders, a step the Kansas Legislature has already taken for its juvenile diversion programs. *See* S.B. 367, §§ 28(j), 53(b)(2), 2015–2016 Reg. Sess. (Kan. 2016) (enacted) (renaming Kansas juvenile diversion programs to “immediate intervention” programs).

¹⁴⁸ *Compare* N.J. STAT. ANN. § 2C:43-12(e), *with* KAN. STAT. ANN. § 22-2908(a) (2024).

¹⁴⁹ N.J. STAT. ANN. § 2C:43-12(e).

¹⁵⁰ *Id.* § 2C:43-12(e)(3).

may be related to the defendant's crime that may be better addressed by treatment rather than incarceration.¹⁵¹ After considering these factors, if a diversion application is denied, the prosecutor must precisely state the prosecutor's findings and explain the facts and reasons for the denial.¹⁵² The statement of reasons "must demonstrate that the prosecutor has carefully considered the facts in light of the relevant law."¹⁵³ Denied applicants have a statutory right to appeal such a denial to the judge assigned to the case.¹⁵⁴

The New Jersey Supreme Court has clearly articulated the rationales behind the written, appealable explanation requirement.¹⁵⁵ N.J. Stat. Ann. section 2C:43-12(f) serves four primary purposes: "(1) [i]t facilitates effective judicial review; (2) it assists in evaluating the success of the [diversion] program; (3) it affords the defendant the opportunity to prepare a response; and (4) it dispels suspicions of arbitrariness."¹⁵⁶ To ensure these rationales are fully realized, a prosecutor's rejection letter typically addresses each of the factors listed in N.J. Stat. Ann. section 2C:43-12(e).¹⁵⁷

Upon review of a diversion denial, New Jersey courts review the prosecutor's denial and written explanation for a gross abuse of prosecutorial discretion.¹⁵⁸ Even if there is no gross abuse of discretion, a court may remand to the prosecutor for reconsideration if the court finds the denial was "arbitrary, irrational, or otherwise an abuse of discretion."¹⁵⁹

Statutorily requiring prosecutors to explain diversion denial ensures that eligible defendants are not improperly denied diversion in New Jersey. In *State v. K.S.*, the Supreme Court of New Jersey granted review of the defendant's diversion denial, which the defendant had applied for when charged with DUI and third-degree aggravated assault of a law enforcement officer.¹⁶⁰ The defendant's application was initially reviewed by a diversion program director, who recommended denial because of the "assaultive nature of the offense" and the defendant's "past anti-social behavior" based on prior, but dismissed, assault charges against him.¹⁶¹ The prosecutor adopted this recommendation and sent the required written denial to the defendant explaining why.¹⁶² The defendant appealed the denial, arguing that the prosecutor improperly relied on the defendant's prior record of dismissed charges and failed to consider his bipolar disorder when evaluating his diversion application.¹⁶³

¹⁵¹ N.J. STAT. ANN. § 2C:43-12(e)(5).

¹⁵² *Id.* § 2C:43-12(f).

¹⁵³ *State v. Wallace*, 684 A.2d 1355, 1359 (N.J. 1996).

¹⁵⁴ N.J. STAT. ANN. § 2C:43-12(f) (2024).

¹⁵⁵ *See, e.g., State v. Nwobu*, 652 A.2d 1209, 1215 (N.J. 1995).

¹⁵⁶ *Id.*

¹⁵⁷ *See State v. Hayden*, 2017 WL 3255364, at *8 (N.J. Super. Ct. App. Div. Aug. 1, 2017).

¹⁵⁸ *Id.* at *5–6.

¹⁵⁹ *State v. Wallace*, 684 A.2d 1355, 1358 (N.J. 1996).

¹⁶⁰ *State v. K.S.*, 104 A.3d 258, 261 (N.J. 2015).

¹⁶¹ *Id.* at 261–64.

¹⁶² *K.S.*, 104 A.3d at 261.

¹⁶³ *Id.* at 262.

The court reversed the prosecutor's denial.¹⁶⁴ First, the court concluded that the prosecutor's heavy reliance on the defendant's prior dismissed charges to conclude he was violent and dangerous was improper.¹⁶⁵ Second, the court noted that the prosecutor had briefly considered the defendant's bipolar disorder but did not thoroughly consider it.¹⁶⁶ The court ultimately held that the prosecutor's denial was based on "consideration of inappropriate factors or not premised upon a consideration of all relevant factors."¹⁶⁷ The defendant's case was remanded back to the prosecutor for reconsideration.¹⁶⁸

The court's decision regarding this defendant's diversion denial ensured that his application was considered properly by the prosecutor. Without the written explanation, the court would likely not have been able to ensure the prosecutor properly followed the statute—a problem that New Jersey courts have recognized since the diversion program's early days.¹⁶⁹ Overall, the written explanation requirement promotes prosecutorial accountability in New Jersey.¹⁷⁰

C. An Appealable, Written Explanation Requirement for Kansas

Both Tennessee's and New Jersey's written, appealable explanation requirements for diversion denial are effective at ensuring defendants are not denied diversion without adequate consideration.¹⁷¹ The Kansas Court of Appeals itself noted the effectiveness of New Jersey's written requirement, citing it as "a better practice" in the diversion process.¹⁷² New Jersey's diversion statute precisely codifies the written portion of the requirement.¹⁷³ Tennessee's statute makes clear that defendants have a statutory right to judicial review of

¹⁶⁴ *K.S.*, 104 A.3d at 266.

¹⁶⁵ *Id.* at 265–66 ("Use of prior dismissed charges alone as evidence of . . . a pattern of anti-social behavior, where defendant's culpability or other facts germane to admission into [diversion] have not been established in some way, constitutes an impermissible inference of guilt.") (citation omitted).

¹⁶⁶ *Id.* at 266.

¹⁶⁷ *Id.* (quotations omitted).

¹⁶⁸ *Id.*

¹⁶⁹ *State v. Leonardis*, 363 A.2d 321, 336 (N.J. 1976) ("Too often the rationale for discretionary decisions is undisclosed and unstated. Simply requiring written statements for each decision forces the process to become more open while it also permits administrative or judicial review.").

¹⁷⁰ *Id.* ("The first step in establishing accountability is to disclose the basis of decisions.").

¹⁷¹ See *supra* Sections III.A, III.B.

¹⁷² *State v. Clinkenbeard*, 197 P.3d 904 (Table), 2008 WL 5401333, at *6 (Kan. Ct. App. 2008).

¹⁷³ See N.J. STAT. ANN. § 2C:43-12(f) (2024). Tennessee's written explanation requirement derives from caselaw, rather than Tennessee's statute itself. See *State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn. 1983) ("Such factors must, of course, be clearly articulable and stated in the record . . .").

the diversion denial.¹⁷⁴ Because both statutes contain clear language to generate this Article's proposal, the Kansas Legislature should turn to both statutes to formulate its own written, appealable explanation requirement.

The Kansas Legislature should turn to N.J. Stat. Ann section 2C:43-12(f) for statutory language imposing a written explanation requirement when denying Kansas defendants pre-trial diversion.¹⁷⁵ The Kansas Legislature should require prosecutors to "precisely state [their] findings and conclusion," "include the facts upon which the application is based," and "include . . . the reasons offered for the denial."¹⁷⁶ This portion of the proposed statute should explicitly refer prosecutors to Kan. Stat. Ann. section 22-2908(a) which enumerates the factors that Kansas prosecutors must consider when making the diversion decision.¹⁷⁷ Additional language should require Kansas prosecutors to then rely on the section 22-2908 factors when explaining their reasoning for denying a defendant diversion.

The rationales for creating a written explanation requirement can only be realized if the Kansas Legislature also codifies a right to appeal the written explanation. Accordingly, the Kansas Legislature should turn to Tenn. Code Ann. section 40-15-105(b)(3) to formulate a statutory right to appeal a diversion denial for judicial review of the written explanation.¹⁷⁸ This portion of the proposed statute should clearly state that the defendant has a right to appeal or petition for a writ of certiorari "to the trial court for an abuse of prosecutorial discretion."¹⁷⁹ This portion should also detail that the reviewing court may either remand the diversion denial for reconsideration¹⁸⁰ or "order the prosecuting attorney to place the defendant in a diversion status."¹⁸¹ Overall, taking guidance from both New Jersey and Tennessee will ensure that any new legislation passed in Kansas is effective.

IV. EFFECTIVENESS OF THE SOLUTION

Requiring prosecutors to provide an appealable, written explanation when denying defendants diversion has proven successful in Tennessee and New

¹⁷⁴ See TENN. CODE ANN. § 40-15-105(b)(3) (2024). New Jersey's diversion statute also codifies a right to appeal a diversion denial but does not state the appropriate standard of review or grant the trial court the ability to place the defendant on diversion status. *Compare id.*, with N.J. STAT. ANN. § 2C:43-12(f) (2024).

¹⁷⁵ See N.J. STAT. ANN. § 2C:43-12(f).

¹⁷⁶ See *id.*

¹⁷⁷ KAN. STAT. ANN. § 22-2908(a) (2024).

¹⁷⁸ TENN. CODE ANN. § 40-15-105(b)(3).

¹⁷⁹ *Id.*

¹⁸⁰ As the New Jersey Supreme Court has noted, remand to the prosecutor for reconsideration consistent with the reviewing court's opinion may be a more appropriate remedy than a court ordering diversion status. See *State v. K.S.*, 104 A.3d 258, 264 (N.J. 2015) ("A remand to the prosecutor affords an opportunity to apply the standards set forth by the court 'without supplanting the prosecutor's primacy in determining whether [diversion] is appropriate in individual cases.'" (citation omitted)).

¹⁸¹ TENN. CODE ANN. § 40-15-105(b)(3).

Jersey.¹⁸² Adopting this requirement in the Kansas diversion statute will also prove successful in Kansas. This Section discusses how an appealable, written explanation requirement has several benefits, making it an effective solution. This Section then addresses potential counterarguments against the solution, ultimately concluding that the requirement is justified.

A. Benefits of an Appealable, Written Explanation Requirement

To address the problems with diversion use in Kansas, this Article sought a solution that would ensure Kansas prosecutors thoroughly consider the factors laid out in section 22-2908 when determining whether to grant or deny diversion.¹⁸³ Not only does an appealable, written explanation achieve this goal, such a requirement has additional benefits. There are three primary benefits to this Article's proposal: (1) accountability of prosecutors, (2) transparency to stakeholders, and (3) facilitation of plea-bargaining negotiation.

1. Accountability of Prosecutors

Each district attorney in Kansas is ultimately responsible for whether a defendant may be granted diversion.¹⁸⁴ Currently, the Kansas diversion statute makes holding prosecutors accountable in the diversion process difficult, if not impossible, as demonstrated in *State v. Clinkenbeard*.¹⁸⁵ The Kansas Court of Appeals in *Clinkenbeard* noted that a written statement could be “a better practice” and facilitate appellate review.¹⁸⁶ An appealable, written explanation requirement will hold prosecutors accountable for their implementation of diversion programs.

Kan. Stat. Ann. section 22-2908 clearly mandates that prosecutors “shall consider at least the following factors” when making the diversion decision.¹⁸⁷ By requiring paper proof of prosecutor consideration of the section 22-2908 factors, prosecutors will need to carefully consider each case and commit to their reasoning early in the proceedings. Denied defendants will then have an opportunity to evaluate the prosecutor's reasoning for any errors or abuses of discretion. Finally, the initial right to appeal to the trial court gives courts the ability to hold prosecutors accountable. The court will be able to turn

¹⁸² See *supra* Sections III.A, III.B.

¹⁸³ See *supra* Section III.C.

¹⁸⁴ KAN. STAT. ANN. § 22-2907 (2024).

¹⁸⁵ See *State v. Clinkenbeard*, 197 P.3d 904 (Table), 2008 WL 5401333, at *5–6 (Kan. Ct. App. 2008) (holding that the prosecutor did not abuse his discretion in denying Clinkenbeard diversion, despite the prosecutor changing his reasoning between the initial denial and the court hearing).

¹⁸⁶ See *id.* at *6 (citing *State v. Lopes*, 673 A.2d 1379 (N.J. 1995)).

¹⁸⁷ KAN. STAT. ANN. § 22-2908(a) (2024) (emphasis added).

to the prosecutor's written explanation as a proper record of evidence to review, without the prosecutor adding to or changing the reasoning later.

If an abuse of discretion is found, courts will have two options to hold the prosecutor accountable: (1) remand back to the prosecutor for proper consideration of the section 22-2908 factors or (2) grant the defendant diversion itself. Both options ensure that prosecutors properly conduct the diversion decision analysis, whether by being ordered to reconsider with court guidance or by being directly overruled on the diversion decision by the court itself.

2. *Transparency to Other Stakeholders*

An appealable, written explanation requirement will certainly shed light on the prosecutor's diversion decision process for each individual defendant applying for diversion. But prosecutors and defendants are not the only parties impacted by individual adjudications; community members also have a stake in prosecutorial decisions.¹⁸⁸ The Kansas Legislature recognizes the community's interest in the diversion context by adding it as a factor in section 22-2908.¹⁸⁹ Requiring an appealable, written explanation will also provide transparency to the diversion process for community members.

Kansas district attorneys are elected officials.¹⁹⁰ Increasingly, communities are becoming concerned that prosecutors make decisions based on self-interests, including re-election or to advance their political careers.¹⁹¹ Although the diversion decision is not nearly as public as trial, diversion can be an incredibly controversial and public topic of discussion within the community.¹⁹² Kansans desire for pretrial diversion to be used more often.¹⁹³ When defendants who are deemed worthy by the public are denied diversion, the community can turn to the prosecutor's written explanation for the reasons why. Additionally, the public can turn to the written explanations to determine

¹⁸⁸ See Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 622 (2019) ("It is important for the public to engage in informed discussion of the work of all public officials, including prosecutors.").

¹⁸⁹ See KAN. STAT. ANN. § 22-2908(a)(8).

¹⁹⁰ See *id.* § 22a-102.

¹⁹¹ Green, *supra* note 188, at 604.

¹⁹² See *Bartlett Youth Minister Won't Serve Time for Leaving Daughter in Hot Car*, *supra* note 139; Pierre Thomas, Aaron Katersky & Lucien Bruggeman, *Hunter Biden Updates: Plea Deal on Tax Charges Potentially Ends DOJ Probe*, ABC NEWS (June 20, 2023), <https://abcnews.go.com/US/live-updates/hunter-biden-charges/?id=98765518> [<https://perma.cc/24N2-CHLX>] (discussing Hunter Biden, son to President Joe Biden, entering into a pretrial diversion agreement); *Ray Rice OK'd for Diversion Program*, ESPN.COM NEWS SERVS. (May 20, 2014), https://www.espn.com/nfl/story/_/id/10960822/ray-rice-baltimore-ravens-accepted-pretrial-diversion-program [<https://perma.cc/7754-MHE6>] (discussing former Baltimore Ravens running back Ray Rice's pretrial diversion agreement).

¹⁹³ ACLU KAN., *supra* note 67, at 17 (finding that 94% of Kansans surveyed support local prosecutors using diversion more often).

whether campaign promises are kept or not.¹⁹⁴ Overall, a written explanation gives the diversion process greater transparency to members of the community. In turn, this informed public inquiry will encourage prosecutors to use their power wisely.¹⁹⁵

3. *Facilitation of Plea-Bargaining Negotiation*

While accountability and transparency are readily apparent benefits of an appealable, written explanation requirement, it also benefits defendants beyond the diversion process by facilitating plea-bargaining negotiation. Writing an explanation for diversion denial using the section 22-2908 factors will help Kansas prosecutors recognize factors that weigh in favor of the defendant.¹⁹⁶ Perhaps the defendant is a young adult who is incredibly remorseful for his not-so-bright decision to borrow some four-wheelers with his buddies, like Ethan, who has a high probability of cooperating with and benefiting from a diversion program.¹⁹⁷ Despite factors such as these being present, the prosecutor could still legitimately find that a defendant is ineligible for diversion.¹⁹⁸

But even if defendants are ultimately ineligible for diversion, providing a written explanation places these mitigating factors in the prosecutor's mind.¹⁹⁹ These mitigating factors may help, with a defense attorney's advocacy, influence prosecutors to plea the defendant to a lesser charge or recommend a lesser sentence.²⁰⁰ Both defendants and prosecutors in future cases will similarly

¹⁹⁴ For example, Douglas County Attorney Suzanne Valdez ran her campaign partially on the promise of "prosecuting serious crimes." See Abby Shepherd, *District Attorney-Elect Suzanne Valdez Details Her Plans Once in Office*, U. DAILY KANSAN (Nov. 11, 2020), https://www.kansan.com/news/district-attorney-elect-suzanne-valdez-details-her-plans-once-in-office/article_a184fb1a-2449-11eb-83a3-8fee8cf4f38d.html [<https://perma.cc/RH3Q-25SB>]. One of the section 22-2908 factors is "[t]he nature of the crime charged and the circumstances surrounding it" and a written explanation requirement denying diversion could reveal that the diversion was denied because of the seriousness of the crime. See KAN. STAT. ANN. § 22-2908(a)(1) (2024).

¹⁹⁵ Green, *supra* note 188, at 625.

¹⁹⁶ See Wesley MacNeil Oliver & Rishi Batra, *Standards of Legitimacy in Criminal Negotiations*, 20 HARV. NEGOT. L. REV. 61, 102 (2015) ("Even in decisions where a prosecutor denies diversion, that prosecutor may find some factors that weigh in favor of the defendants.").

¹⁹⁷ See Cuno-Booth, *supra* note 1.

¹⁹⁸ See *State v. Hogan*, 2022 WL 1276124, at *2–4 (N.J. Super. Ct. App. Div. 2022) (finding diversion denial appropriate, despite the presence of mitigating factors); *State v. Farley*, 2023 WL 6855854, at *3, *8 (Tenn. Crim. App. 2023) (finding diversion denial appropriate, despite the defendant's amenability to correction, lack of criminal record, and other mitigating factors).

¹⁹⁹ Oliver & Batra, *supra* note 196.

²⁰⁰ See Megan S. Wright, Shima B. Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS. L. REV. 2133, 2155–56 (2022) (discussing factors prosecutors consider when charging cases that defense attorneys may highlight during plea negotiations).

benefit from this requirement. New defendants can point to a prosecutor's identification of a specific factor as mitigating in a previous case to negotiate a plea when the same factor is present in their case.²⁰¹ Further, judicial opinions resulting from appeals of a prosecutor's written explanation will provide both defendants and prosecutors with authority and guidance on whether specific mitigating factors warrant diversion or lesser charges.²⁰²

B. Addressing Potential Counterarguments

An appealable, written explanation when denying diversion requirement does raise a few practical counterarguments. But these counterarguments are either justifiable or avoidable. This section addresses concerns surrounding the appealable, written explanation requirement's impact, or lack thereof, on (1) prosecutorial discretion, (2) prosecutorial workload, (3) the courts' workload, and (4) improving diversion program utilization itself.

1. Prosecutorial Discretion

Former U.S. Attorney General Robert Jackson once said that the "prosecutor has more control over life, liberty, and reputation than any other person in America."²⁰³ Prosecutorial power derives from the vast array of decisions prosecutors must make and the lack of restrictive legal limitations on these decisions.²⁰⁴ Kansas courts recognize that the diversion decision primarily belongs to the prosecutor, comparing the decision to a prosecutor's decision not to prosecute a case.²⁰⁵ Courts are often reluctant to interfere with prosecutorial discretion, raising separation of powers and the need for flexibility concerns.²⁰⁶

Prosecutors serve as an extension of the executive branch and, as such, even the United States Supreme Court tries not to unnecessarily impair prosecutorial discretion.²⁰⁷ Concededly, requiring an appealable, written requirement may result in more courts overturning prosecutorial decisions. But "the doctrine of separation of powers does not prevent court intervention in appropriate circumstances."²⁰⁸ The appealable, written explanation requirement provides prosecutors with an opportunity to demonstrate and exercise their discretion. Further, the abuse of prosecutorial discretion standard of review will ensure that ordinary discretion is given its due weight. Ultimately, courts are

²⁰¹ Oliver & Batra, *supra* note 196.

²⁰² *See id.* ("[T]he judicial decisions provide another source of appropriate criteria for prosecutors to consider in deciding whether leniency ought to be granted.").

²⁰³ Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. Rev. 171, 171 (2019).

²⁰⁴ Green, *supra* note 188, at 597.

²⁰⁵ *See* State v. Clinkenbeard, 197 P.3d 904 (Table), 2008 WL 5401333, at *3 (Kan. Ct. App. 2008).

²⁰⁶ Brandon K. Crase, Note, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 480 (2007).

²⁰⁷ *Id.* (citing United States v. Armstrong, 517 U.S. 456, 465 (1996)).

²⁰⁸ State v. Mulleneaux, 512 P.3d 1147, 1153 (Kan. 2022) (quoting Comprehensive Health of Planned Parenthood v. Kline, 197 P.3d 370, 395 (2008)).

required to prevent prosecutorial abuse of the judicial process.²⁰⁹ Therefore, any impact an appealable, written explanation requirement may have on the separation of powers doctrine is justified.

Prosecutors also need to maintain flexibility to allow for the effective use of their limited resources to seek justice.²¹⁰ Imposing an appealable, written explanation requirement could be seen as inhibiting the need for flexibility by imposing an additional step for prosecutors to complete before finalizing diversion decisions. But as an “administrator of justice,”²¹¹ the prosecutor is not merely a “case-processor.”²¹² Rather, the prosecutor “should seek to reform and improve the administration of criminal justice.”²¹³ The appealable, written explanation requirement would improve the administration of criminal justice in Kansas.²¹⁴ Therefore, any impact on the prosecutor’s need for flexibility is justified.

2. Prosecutorial Workload

Inherent from this Article’s proposal is the pushback that requiring a written explanation will add to the work that prosecutors already conduct daily. County prosecutors in Kansas have noted the impact of having limited resources for the vast amount of cases they must handle.²¹⁵ Even the Kansas Attorney General’s Office is not immune to resource shortages, such as lack of staff.²¹⁶ Arguably, an appealable, written explanation requirement adds another responsibility to prosecutors’ workloads that may prove burdensome.

Any potential burden, however, is relatively avoidable. Each prosecutor’s office can develop a standard form for the written explanation requirement that can be filled out for an individual case.²¹⁷ As prosecutors continue to generate written explanations, they will become more familiar and

²⁰⁹ State v. Schamp, 262 P.3d 358 (Table), 2011 WL 5143056, at *3 (Kan. App. 2011) (citation omitted).

²¹⁰ Crase, *supra* note 206.

²¹¹ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION standard 3-1.2(a) (AM. BAR ASS’N 2017).

²¹² CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION standard 3-1.2(f) (AM. BAR ASS’N 2017).

²¹³ *Id.*

²¹⁴ See *supra* Section III.C.

²¹⁵ See, e.g., Krista Blaisdell, *Attorney*, GEARY CNTY., <https://www.gearycounty.org/202/Attorney> [<https://perma.cc/KZ7R-4JZX>] (explaining how “the limitations placed on [the] office by the sheer volume of numbers” impacts the actions of the Geary County Attorney Krista Blaisdell’s office).

²¹⁶ Andrew Bahl, *Kansas Attorney General’s Office Fighting Exodus. Can Kris Kobach Turn it Around?*, TOPEKA CAP. J. (Mar. 27 2023), <https://www.cjonline.com/story/news/state/2023/03/26/kris-kobach-kansas-attorney-general-office-struggles-with-staffing/70011872007/> [<https://perma.cc/TX6C-54N2>].

²¹⁷ Kansas prosecutors, such as the Sedgwick County Attorney, develop standard forms for several areas of the prosecutor’s work. See *Forms*, SEDGWICK CNTY., <https://www.sedgwickcounty.org/district-attorney/forms/> [<https://perma.cc/EJ6W-DWJ6>].

efficient with the process. Further, if this Article's proposal is adopted by the Kansas Legislature, Continuing Legal Education events can be created to educate Kansas prosecutors on the process before it is implemented.²¹⁸

Additionally, deficiencies in statutes naturally require modifications, even if such modifications impose additional burdens. The New Jersey Supreme Court noted that New Jersey's diversion program has its own history of deficiencies that warranted modification.²¹⁹ Quoting Justice Brandeis, the court noted that programs such as diversion should be continuously developed by addressing deficiencies.²²⁰ The Kansas diversion statute itself is guided by "the interests of justice."²²¹ The interests of justice are furthered with an appealable, written explanation requirement. Therefore, any impact this requirement may have on prosecutorial workload is justified.

3. *The Courts' Workload*

Inherent in many proposals for criminal justice reform is the counterargument that courts must take on more work to implement the proposal. Trial courts throughout the United States are overworked,²²² creating several problems including delayed case resolutions,²²³ inadequate court budgets,²²⁴ and the need to expand existing courts.²²⁵ Kansas courts are not immune to this

²¹⁸ For example, the University of Kansas School of Law hosts a "Recent Developments in the Law" CLE program each spring. UNIV. OF KAN. SCH. OF L., *Recent Developments in the Law CLE*, UNIV. OF KAN., <https://law.ku.edu/recent-developments> [<https://perma.cc/8RMC-23CH>].

²¹⁹ See *State v. Leonardis*, 363 A.2d 321, 339–40 (N.J. 1976) (explaining that the deficiencies identified in the New Jersey diversion program warranted modification, not dissolution of the entire diversion program).

²²⁰ *Id.* (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

²²¹ KAN. STAT. ANN. § 22-2907(a) (2024).

²²² See CT. STATS. PROJECT, *CSP STAT Overview: Caseload Detail – Grand Total*, COSCA, NAT'L CTR. STATE CTS. (Oct. 2024), <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-overview> [<https://perma.cc/2ZS7-MRST>] (reporting the incoming trial court caseload in thirty-five states and outgoing caseload in twenty-five states, most of which have more incoming cases than outgoing cases).

²²³ See Tanya Settles, *Justice Delayed: The Growing Impact of Judicial Backlogs*, AM. SOC'Y PUB. ADMIN. (Sept. 20, 2024), <https://patimes.org/justice-delayed-the-growing-impact-of-judicial-backlogs/> [<https://perma.cc/WV8A-ECMR>]. This problem is perhaps the most concerning issue with overworked courts, as the legal maxim goes: "justice delayed is justice denied." *Id.*

²²⁴ See "1,000 Cases Each Day:" Chief Justice Mike McGrath's *State of the Judiciary*, 36 MONT. LAW. 20, 21 (2011) (discussing how overworked courts with inadequate budgets are "bad for business" and "inevitably result in delay and court backlogs"); see also *Proposed FY 2024 Funding Levels Would Hurt Courts and Public, Letter to Congress Says*, U.S. CTS. (Aug. 1, 2023), <https://www.uscourts.gov/data-news/judiciary-news/2023/08/01/proposed-fy-2024-funding-levels-would-hurt-courts-and-public-letter-congress-says> [<https://perma.cc/6R2E-42R9>] (discussing how inadequate budgets and federal court caseloads greatly impact federal criminal defendants' access to representation).

²²⁵ See, e.g., Hon. Alan D. Scheinkman, *Finding the Perfect Number*, 17 JUD. NOTICE 46, 57 (2022) (advocating to increase the number of justices sitting on New York Appellate Court panels to handle the "crushing" caseload).

situation.²²⁶ Several county court systems in Kansas do not have enough attorneys to handle the current caseload, placing the state court system “on the verge of a constitutional crisis.”²²⁷

But this Article’s proposal would not contribute to a constitutional crisis in Kansas. As explained, requiring prosecutors to write an explanation denying diversion would facilitate the plea bargaining process,²²⁸ resolving cases well before a trial—which places the highest burden on court systems.²²⁹ Further, only written denials involving abuse of prosecutorial discretion are appealable under this Article’s proposal.²³⁰ This Article presumes that most prosecutors, with the help of a standard form, would properly exercise their discretion when writing a diversion denial explanation, thus limiting the number of possible appeals.²³¹ Successful appeals could also result in quicker case resolutions by requiring prosecutors to properly divert defendants instead of taking the case to trial.²³² Put together, these factors would alleviate the Kansas court system’s workload instead of adding to it.

Even if this Article’s proposal placed an additional burden on courts, the need for criminal justice often outweighs the comfort of the courts. The Kansas Legislature implemented its diversion program to facilitate “the interests of justice,” subjecting the court system to a completely new program it had not worked with before.²³³ Courts play a crucial role in remedying deficiencies in our system, especially in experimental programs to improve the criminal justice system as a whole.²³⁴ Courts should be involved in—and review—programs designed to further criminal justice such as diversion programs.²³⁵ Although perhaps burdensome up front, reviewing appealable, written explanations when

²²⁶ See SUZANNE TALLARICO & JOHN DOUGLAS, KANSAS COURT SERVICES OFFICER WEIGHTED WORKLOAD STUDY: FINAL REPORT iii (Nat’l Ctr. State Cts. 2018) (finding that Kansas courts need approximately 115 additional court services officers to manage the caseload properly).

²²⁷ KAN. RURAL JUST. INITIATIVE, COMMITTEE FINAL REPORT TO THE KANSAS SUPREME COURT 17 (2024).

²²⁸ See *supra* Section IV.A.3.

²²⁹ Both felony and misdemeanor cases that go to a bench or jury trial take significantly longer to process than cases resolved by plea or diversion. See BRIAN J. OSTROM, LYDIA E. HAMBLIN, RICHARD Y. SCHAUFFLER & NIAL RAAEN, TIMELY JUSTICE IN CRIMINAL CASES: WHAT THE DATA TELLS US 25 (Nat’l Ctr. State Cts. 2022) (reporting felony and misdemeanor disposition times by median days and disposition type).

²³⁰ See *supra* Section III.C.

²³¹ Attorneys cannot not “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous.” Kan. R. Prof’l Conduct 3.1.

²³² See *supra* Section III.C (permitting courts to order the prosecutor to divert the defendant).

²³³ KAN. STAT. ANN. § 22-2907(a) (2024); see also Cox, *supra* note 23, at 345.

²³⁴ See *State v. Leonardis*, 363 A.2d 321, 340 (N.J. 1976).

²³⁵ *Id.* at 336 (“If diversion programs are to perform as they are intended, then the decisions of those referring to these programs must be subject to review and evaluation.”).

denying pretrial diversions would likely alleviate the burden of the courts in the long-term by improving diversion use.

4. *Improving Diversion Program Utilization*

The ultimate issue for any proposed legal reform is whether it will even work. One of the problems identified by this Article is the alarmingly small use of diversion programs by Kansas prosecutors.²³⁶ The Kansas diversion statute, even with an appealable, written explanation requirement, leaves prosecutors with immense discretion to implement their respective programs.²³⁷ While prosecutors must consider “at least” the factors in sections 22-2908, prosecutors are allowed to consider other factors.²³⁸ And even the enumerated factors in section 22-2908 are incredibly broad.²³⁹ A key question, therefore, is whether an appealable, written explanation requirement will improve the rate diversion is used in Kansas given the breadth of discretion prosecutors have in this area.

An appealable, written explanation requirement alone is unlikely to completely “fix” the low use of diversion in Kansas. Improving the diversion use rate will likely require several areas of reform including tracking diversion use more clearly, standardizing applications across the state, and reducing diversion fees for defendants, among others.²⁴⁰ Each of these proposals should be explored and discussed within the Kansas legal community but are simply beyond the scope of this Article. Ultimately, this Article is designed to spark a legal discussion surrounding diversion reform in Kansas. By taking the small step of requiring an appealable, written explanation when denying diversion, Kansas can begin to improve diversion programs across the state.*

²³⁶ See *supra* Section II.A.2.

²³⁷ See KAN. STAT. ANN. §§ 22-2907(a)–(b), 2908(a) (2024).

²³⁸ *Id.* § 22-2908(a).

²³⁹ Several of the section 22-2908 factors contain incredibly broad language. See, e.g., KAN. STAT. ANN. §§ 22-2908(a)(1), (a)(12).

²⁴⁰ ACLU KAN., *supra* note 67, at 18–19. The ACLU of Kansas has called for numerous diversion program reforms at both the state legislature and individual prosecutor levels. See *id.*

* Remainder of the page is left intentionally blank to facilitate convenient use of the Draft Statutory Provision included in Section V.

V. DRAFT STATUTORY PROVISION

The following is draft legislation implementing this Article's proposal. This statute is drafted as if it were its own provision, but because it directly references the section 22-2908 factors, adding this language to section 22-2908 is advised.

- (a) After considering at least the factors in K.S.A 22-2908(a), if the county or district attorney determines that it is not in the interests of justice or benefit to the defendant or community to grant the defendant diversion the county or district attorney shall precisely state the findings and conclusion in a written memoranda which shall include:
 - (1) the facts upon which the application is based; and
 - (2) the reasons, based on K.S.A. 22-2908(a) or otherwise, offered for denial.
- (b) Upon receiving the written memoranda denying diversion, the defendant shall have the right to petition for a writ of certiorari to the district court for an abuse of prosecutorial discretion. If the district court determines that the county or district attorney has committed an abuse of discretion in failing to divert, the district court may:
 - (1) remand the diversion decision to the county or district attorney for proper reconsideration; or
 - (2) order the county or district attorney to place the defendant on diversion on the terms and conditions as the trial court may order.
- (c) The defendant may further appeal the district court's decision to the appropriate appellate court.

While this Article has chosen specific language from the New Jersey and Tennessee statutes, the two statutes are ultimately offered as guides for Kansas lawmakers. An exact copying of this language is not necessary to gain the benefits of an appealable, written explanation requirement.

VI. CONCLUSION

An appealable, written explanation requirement when denying defendants diversion furthers the “in the interests of justice” standard on which the Kansas diversion statute is premised.²⁴¹ This requirement will facilitate judicial review of diversion denials and commit prosecutors to their reasoning for denying diversion at an early stage—improving prosecutorial accountability. This requirement will also ensure prosecutors properly evaluate the section 22-2908 factors—improving diversion program transparency. Additionally, this requirement will present the mitigating factors of a defendant’s case to both the prosecutor and defense attorney—facilitating diversion arguments and plea-bargaining negotiations. Overall, this requirement can serve as a first step to improving the low usage rate of diversion by Kansas prosecutors and give defendants like Ethan a true chance of rehabilitation.

²⁴¹ See generally KAN. STAT. ANN. § 22-2907(a) (2024).