



The American Council of Chief Defenders is a national community of criminal defense leaders

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## American Council of Chief Defenders’ Remarks

For Presentation at a Public Hearing of the  
National Institute of Corrections Advisory Board:

### Balancing Fiscal Challenges, Performance-based Budgeting and Public Safety

U.S. Department of Justice, 950 Pennsylvania Ave, NW, Washington, D.C,  
Main Conference Center 7<sup>th</sup> Floor

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by

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I am the public advocate for Kentucky’s statewide public defender program and chair of the American Council of Chief Defenders, an organization of chief defenders from across our country. I speak for the American Council of Chief Defenders, using examples from my Kentucky experiences that communicate the views of chief defenders across our nation.

We support an increased focus by defenders on being present at clients’ first court appearances, improving pretrial release advocacy<sup>1</sup>, proposing public defense-developed alternative sentencing, working for crime and sentence policy reforms that reduce incarceration, promoting collaborative systems that

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<sup>1</sup> See American Council of Chief Defenders *Policy Statement on Fair and Effective Pretrial Justice Practices* (June 4, 2011), in which chief defenders call “for a new commitment by all criminal justice stakeholders to ensure fair and appropriate pretrial release decision-making, and outline[...] key action steps for each pretrial actor.” In particular, this statement calls upon defenders to advance the following initiatives:

- Examine Pretrial Release Practices Within Their Own Jurisdictions to Identify Key Areas of Improvement.
- Identify and Implement National Standards and Best Practices.
- Develop Collaborative Efforts Among All Criminal Justice Stakeholders to Improve Pretrial Practices. Develop Effective Pretrial Litigation Strategies.”

In July 2012 the National Association of Criminal Defense Lawyers adopted its Policy on Pretrial Release and Limited Use of Financial Bond stating “A release decision should begin with consideration of personal recognizance release. An accused should be released on personal recognizance unless an evidentiary-based determination is made that personal recognizance will not reasonably assure the accused’s future appearance or that the accused represents a risk of imminent physical harm to others.”

reduce incarceration costs using evidenced-based methods and that respect the right of the accused to determine the objectives of the representation.<sup>2</sup> Reduction of incarceration costs without a reduction of safety is a matter of political will and is being achieved with commonsense practices which should be broadly replicated.

Traditionally, a public defender's role was viewed by the public defense and criminal justice communities primarily as one of seeking favorable adjudication as to conviction and sentence with little focus on the accused post-disposition. Increasingly, defenders and others see the public defender role more expansively to include the client's post-disposition interests.<sup>3</sup>

In addition to protecting the freedoms of the accused, public defense is central to our public safety. Because of the traditional view of the role of the defender, public defense has been underutilized in the effort to reduce incarceration costs while maintaining public safety. However, defenders have much to offer if the defense function is recognized and funded.

There are substantial financial benefits to society when public defense systems are properly funded. Public defenders who are competent, who have manageable workloads, and who have professional independence can ensure that the rights guaranteed by our Constitution are protected and can ensure that no one's liberty is taken unless and until they are proven guilty.

Public defenders lower costly incarceration rates for counties and states by

- being present at first appearances and advocating for pretrial release;<sup>4</sup>
- advocating for reduced sentences based on the facts of the case;
- developing alternative sentencing options that avoid incarceration and provide individually based treatment;
- assisting clients upon adjudication with reentry needs including, employment and housing; and
- Preventing expensive wrongful convictions.

There are commonsense, modest additional public policy changes to reduce incarceration costs:

- Reclassify misdemeanor offenses as recommended by the American Bar Association.<sup>5</sup> "This

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<sup>2</sup> ABA Model Rule of Professional Conduct Rule 1.2, Scope Of Representation And Allocation Of Authority Between Client and Lawyer, states "...a lawyer shall abide by a client's decisions concerning the objectives of representation...." The Comment to the rule states that the professional relationship between the attorney and client "confers upon the client the ultimate authority to determine the purposes to be served by legal representation...."

<sup>3</sup> See ABA Resolution 103E (February 12, 2007).

<sup>4</sup> The U.S. Department of Justice National Symposium on Pretrial Justice (2011) recommends the "[p]resence of a defense counsel at the initial appearance who is prepared to make representations on the defendant's behalf for the court's pretrial release decision."

<sup>5</sup> See *Strategies to Save States Money, Reform Criminal Justice & Keep the Public Safe* (2011) at [http://www.americanbar.org/content/dam/aba/events/criminal\\_justice/dialogpacket.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/criminal_justice/dialogpacket.authcheckdam.pdf)

The ABA further states:

Explosive growth in the number of misdemeanor cases has placed a significant burden on local and state court systems. Throughout the United States, defense attorneys and prosecutors are overburdened with minor cases, left with little time to focus on cases involving more serious offenses. As states continue to cut budgets, caseloads for prosecutors and defense attorneys become increasingly unmanageable. This extremely inefficient cycle burdens both attorneys and

- decriminalization of minor, nonviolent misdemeanors will allow police, prosecutors, and defense attorneys to focus on more serious cases, while also providing states with a stream of income derived from civil fines.”
- Reclassify lower level felonies to misdemeanors to reduce the counterproductive effect felony convictions have on those who seek employment upon completion of their sentences;<sup>6</sup>
- Modestly restrict parole board decisions by requiring parole boards to conduct, consider, and follow evidence based risk assessments;
- Modestly adjust violent offender laws and policies that require that people serve 85% of their sentences before being eligible for parole<sup>7</sup>
- Automatically restore the voting rights of people with felony convictions, at least upon completion of sentence.<sup>8</sup> This is important as preliminary data suggests that voting contributes to reduced recidivism.<sup>9</sup>

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American taxpayers, who are left footing the bill to fund our clogged court system. Taxpayers currently expend on average \$80 per inmate per day to lock up individuals accused of misdemeanors with little to no impact on public safety, *i.e.* as fish and game violations, minors in possession of alcohol, dog leash violations, and feeding the homeless. If states decriminalize these offenses and require the payment of civil fines, taxpayers will save money on court costs and incarceration and states will generate revenue through the collection of fines. Understanding that the unnecessary use of the criminal court resources to deal with minor infractions may unwisely drain state and local budgets, the ABA passed a resolution calling for governments to review misdemeanor provisions and, where appropriate, replace criminal penalties with civil fines or nonmonetary civil remedies.

Id.

[The National Association of Criminal Defense Lawyers has called for reclassification of minor crimes to civil penalties. “preceding text is highlighted] As the Supreme Court observed in *Argersinger*, “[o]ne partial solution to the problem of minor offenses may well be to remove them from the court system.” *Argersinger v. Hamlin*, 407 U.S. 25, 38 n.9 (1972). Many misdemeanor crimes do not involve significant risks to public safety, yet they result in high numbers of arrests, prosecutions, and people in jail. In fact, many do not involve any risk to public safety. The criminal justice system would operate far more efficiently if these crimes were downgraded to civil offenses. [*Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, (April 2009) at p. 27. It is found at: <http://www.nacdl.org/criminaldefense.aspx?id=20188&libID=20158>

<sup>6</sup> Some states, *e.g.*, Washington and Minnesota, divide crimes into three categories: felonies, gross misdemeanors, and misdemeanors. Some of the benefits of a gross misdemeanors classification are that it reduces prison population by lowering the sentence for many non-violent offenses; it helps reentry and reformation efforts by eliminating the Convicted Felon label; it holds offenders accountable with sentences of at least six months and up to two years; and it maintains jurisdiction in the felony court and with the state corrections agencies to avoid increases in county expenditures.

<sup>7</sup> Indiscriminate long sentences have limitations. “[O]ne of the best-established findings of criminology is that crime rates decline as individuals age. Crime is overwhelmingly the province of young males . . . This suggests that blanket policies of lengthy prison terms for serious crimes will generally be ineffective as a means of reducing crimes once offenders reach their thirties.” Richard Lippke, *Crime Reduction and the Length of Prison Sentences*, 24 *Law & Policy* 17, 23 (2002). Modifications to the Persistent Felony Offender and violent offender statutes can insure public safety and save money. An 85% parole eligibility, which is effectively a sentence of no parole, does not account for the fact that older inmates recidivate less. Prisoners are “less dangerous as they age,” and “more expensive to maintain.” Michael Vitiello, *Reforming Three Strikes' Excesses*, 82 *Wash. U.L.Q.* 1, 16-17 (2004).

- Provide federal financial incentives to achieve cost-effective reforms by states.<sup>10</sup>
- Rectify the imbalance in grant funding that reduces the capacity of public defense to meet those of its responsibilities that have the effect of saving incarceration costs. The United States Department of Justice should require that its criminal justice grant programs adopt a grant application requirement that applicants complete a “justice impact statement” if the grant project anticipates generating additional arrests and prosecutions. The “justice impact statement” should include an assessment of the impact of the award of the grant on law enforcement, the prosecution function, the indigent defense system, the courts, the probation function, and secure and community correctional facilities.<sup>11</sup>

Some public defender offices are providing community oriented defending<sup>12</sup> or “holistic representation”<sup>13</sup> such as the Bronx Defender, Neighborhood Defender Services of Harlem, and the Knoxville Tennessee public defender.

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<sup>8</sup> See Uggen, Shannon, Manza, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES 2010, [The Sentencing Project (July 12, 2012) which reports that by 2010, a record 5.85 million people were disenfranchised as a result of a felony conviction. The number of disenfranchised persons has increased dramatically along with the rise in criminal justice populations in recent decades, rising from an estimated 1.17 million in 1976 to 5.85 million today. Of the total disenfranchised population, about 45% – 2.6 million people – have completed their sentences, but reside in one of the 11 states that disenfranchise people post-sentence. In addition, 1 of every 13 African Americans of voting age is disenfranchised, and in three states – Florida, Kentucky, and Virginia – the figure is one in five.

<sup>9</sup> The research offers empirical evidence showing a relationship between voting and subsequent crime and arrest. See Uggen C. & Manza, J Voting and Subsequent Crime and Arrest: Evidence from a Community Sample. Columbia Human Rights Law Review, 36(1), 193-215, [http://www.soc.umn.edu/~uggen/Uggen\\_Manza\\_04\\_CHRLR2.pdf](http://www.soc.umn.edu/~uggen/Uggen_Manza_04_CHRLR2.pdf), (2004).

<sup>10</sup> The federal government’s financial incentives to promote state criminal law changes for the most part have urged more crime and more serious sentences, sometimes indiscriminately. While the federal financial incentive to have parole eligibility at 85% or higher no longer exists, its consequences in most states do. The Violent Offender Incarceration and Truth in Sentencing Incentive Grants Program (<http://www.ojp.usdoj.gov/BJA/grant/voitis.html>) has not been funded since FY 2004, and no further awards are anticipated.

<sup>11</sup> The vast majority of the United States Department of Justice funding is provided to law enforcement, which further exacerbates the resource imbalance in the criminal justice system that favors the judicial and prosecutorial functions over indigent defense. The American Bar Association in 1992 adopted a resolution that urges the establishment of appropriate mechanisms at the federal, state, territorial, and local levels to ensure the preparation of “justice system impact statements” that examine and analyze the funding, workload, and resource impact of proposed legislation and executive branch orders or actions for each and every element of the criminal and civil justice system, including, but not limited to, law enforcement, prosecution, public defense, probation, corrections, courts, civil legal services, and dispute resolution.

<sup>12</sup> See Brennan Center for Justice at [http://www.brennancenter.org/content/section/category/community\\_oriented\\_defender\\_network](http://www.brennancenter.org/content/section/category/community_oriented_defender_network).

<sup>13</sup> See ABA Resolution 103E (February 12, 2007) at 6-7. “Problem solving lawyering provides integrated services to clients; promotes collaboration between civil legal aid and public defense practitioners to help clients and communities; relies on other professionals such as social workers, mental health experts and mitigation specialists to address the accused person’s underlying problems.” See, e.g., Cait Clarke and James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve*, by 17 St. Thomas L. Rev. 781, 781 fn 3 (2005):

Other public defender programs, like Kentucky's, are actively developing and presenting alternative sentences as options to incarceration. This is being done primarily through the use of a public defense-employed social worker who, within the attorney-client privilege, assesses a client's underlying needs, uses evidence based motivational interviewing, and develops an individualized plan.

### **Public defense: first appearance, pretrial release, alternative sentence development**

#### **Lawyers make a difference**

The right to counsel is not an academic matter. It makes a difference to have a lawyer. Counsel is the gateway through which the other individual liberties are vindicated. Just as a judge, prosecutor, police officer, legislator, doctor, or teacher makes a difference, a defense lawyer makes a difference in the achievement of just outcomes arrived at through a fair process.

#### **Facts demonstrate that providing a lawyer at first appearance reduces jail costs**

The empirical evidence demonstrates that having counsel at the initial appearance before a judge improves the likely outcome for a criminal defendant. A defendant with a lawyer at first appearance:

- Is 2 ½ times more likely to be released on recognizance
- Is 4 ½ times more likely to have the amount of bail significantly reduced
- Serves less time in jail (median reduction from 9 days jailed to 2, saving county jail resources while preserving the clients' liberty interests)
- More likely feels treated fairly by the system.<sup>14</sup>

#### **Facts show that a person on pretrial release uses fewer correctional resources**

We know that one of the most important outcomes for our clients is pretrial release to the community. Studies show that, holding all other factors constant, individuals who are detained prior to trial suffer from greater conviction rates and more severe sentencing than those who are released prior to trial.<sup>15</sup>

#### **Alternative sentences**

Kentucky defenders began a pilot program in 2006 pairing social workers with attorneys to facilitate more efficient use of court time and probation resources, and reduce incarceration costs. The social workers assessed defendants' mental health and substance abuse needs and created an

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The holistic representation model does not change the fundamental and compelling value of getting an acquittal, less jail time, or avoiding prison altogether for a client. It merely adds the goal of making a long-term difference in the life of the client. By providing civil legal services to address offender's civil disabilities, defender offices are encouraged to see beyond the courtroom disposition of their criminal cases and address the underlying social issues hindering their client's successful reintegration into the community.

<sup>14</sup> See Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, "Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail," 23 *Cardozo L. Rev.* 1719 (2002).

<sup>15</sup> See Mary T. Phillips, Ph.D., *Bail, Detention, and Nonfelony Case Outcomes*, Research Brief Series no. 14, New York City Criminal Justice Agency, Inc. (2007) .

individualized viable community treatment option to relieve the courts' burden and the burden of custody for corrections and jails.

A Kentucky public defender social worker assesses clients then proposes an alternative sentence to the prosecutor and court. When approved, the social worker seeks to have the client placed in treatment and other social services to address addictions, mental health issues and social problems. We use case management approaches such as “motivational interviewing” within the attorney-client privilege, which are consistent with the evidence-based practices used in the state's mental health programs. In 2012, Kentucky courts accepted 85% of all the alternative sentencing plans prepared by our social workers.

**Defender alternative sentencing program reduces jail and prison costs:** Officials from the University of Louisville have evaluated the initial project and found that it demonstrated substantial savings and positive outcomes. DPA is receiving consultation from the University of Kentucky Center on Drug and Alcohol Research to help us better identify the specific effects of our program on the incarceration problems affecting our state.

#### **Kentucky's Three-Pronged Approach to Reducing Costs of Incarceration:**

In the last few years, all three branches of Kentucky's government have taken steps to try to reduce the burden being placed upon Kentucky's prison system by creating better outcomes for persons who are charged with a crime and persons ultimately convicted of a crime, without sacrificing the public safety. In fact, early returns show that there is a substantial savings being realized with increased percentages of persons released pretrial and persons being granted probation or other form of post-conviction release, while court appearance rates and re-arrest rates have remained the same.

#### **1. Legislative Enactment: HB 463**

Nicknamed the “Public Safety and Offender Accountability Act,” HB 463 was overwhelmingly passed by a Democratic House and a Republican Senate, after a bi-partisan task force spearheaded an effort to reduce Kentucky's prison costs and increase the public's return on its corrections investment by reducing recidivism and incarceration rate. The task force found that between 2001 and 2009:

- Adult arrest rates increased 32%;
- Drug arrests increased 70%;
- Kentucky used prison as opposed to probation or alternative sentences at a much higher rate than most other states;
- Technical offenders on parole were sent back to prison without a new felony provision nearly doubled; and
- Prison admissions for drug offenders rose from 30% to 38%.

As a result, Kentucky's annual spending on corrections rose to \$440 million in 2009, an increase of over 330% from the amount spent only twenty years earlier.

In an effort to reduce this massive overspending on incarceration, the task force proposed – and the General Assembly enacted – legislation which, if fully embraced by the judiciary and the executive branch, could result in a gross savings of \$422 million over 10 years, with a net savings accruing to \$218 million.

**More reading:** Sen. Tom Jensen (R – London), Rep. John Tilley (D – Hopkinsville), “HB 463 – Statement from the Sponsors,” *The Advocate*, June, 2011, available at [www.dpa.ky.gov](http://www.dpa.ky.gov), and contained in the appendix of this article.

The following is a summary of the key components of the legislation:

### **Pretrial Release Provisions**

- Makes some minor crimes (e.g., shoplifting) “non-arrestable,” and subject to a criminal summons only;
- Requires Administrative Office of the Courts’ (AOC) Pretrial Services Division and outside vendors (e.g., home incarceration companies) to use “evidence-based practices” to assess a defendant’s risk of flight, risk of failure to appear, or risk of public dangerousness;
- Amendment to HB 463 requires judges to “consider” the pretrial risk assessment, (discussed more fully below), but leaves courts with discretion to consider other evidence bearing on risk of flight, failure to attend court, or public dangerousness;
- Makes mandatory “own recognizance” or unsecured bonds if the defendant is a “low” or “moderate” risk to flee, fail to appear in court, or be a danger to the public;
- Imposes a bail credit provision which allows low or moderate risk arrestees who cannot make a cash or third-party unsecured bond to earn \$100 for every day served pretrial which shall be applied toward the bond amount.

**More reading:** B. Scott West, General Counsel, Kentucky Department of Public Advocacy, “Changes in Pretrial Release from HB 463: “The New Penal Code and Controlled Substances Act,” *The Advocate*, August, 2011, available at [www.dpa.ky.gov](http://www.dpa.ky.gov), and contained in the appendix of this article.

### **Drug Code Reforms**

- Distinguishes between the “trafficker” who sells for financial gain and the “peddler,” who sells only enough drugs to support a drug habit, by providing for less harsh penalties for the latter;
- Reduces prison time for low risk, non-violent drug offenders who possess drugs; and
- Restricts use of “Persistent Felony Offender” law (Kentucky’s “three strikes” law, though it begins with two strikes) by making it unavailable to enhance the penalties of a drug offense;
- Eliminates most penalty enhancements arising from convictions of subsequent offenses; and
- Reinvests related savings in increasing drug treatment for those offenders who need it.

### **Probation and Parole Provisions**

- Creates Deferred Prosecution; Eligible defendants will be able to have prosecution deferred for up to two years while participating in a probation-like program of supervision and treatment; Upon successful completion, the criminal charge will be dismissed and expunged;

- Makes probation “presumptive” for defendants who are convicted of a first or second offense of felony drug possession; probation is “mandatory” unless the sentencing court finds “substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amendable to community-based treatment, or poses a significant risk to public safety;”
- Mandates the use of “evidence-based practices” and calls for the development of a research-based validated Risk and Needs Assessment which will be used to determine supervision/treatment needs and progress on an individualized case plan developed for each supervised person; and
- Creates a system of “graduated sanctions” for persons on probation and parole, whereby revocations of full sentences will not have to occur in the event of a probation or parole violation.

**More reading:** Damon Preston, Deputy Public Advocate, Kentucky Department of Public Advocacy, “Changes in Criminal Law or Criminal Procedure in HB 463,” *The Advocate*, June, 2011, available at [www.dpa.ky.gov](http://www.dpa.ky.gov)., and contained in the appendix of this article.

The full text of Kentucky HB 463 can be accessed at <http://theadvocate.posterous.com/tag/hb463>; scroll down to last page and click on “HB 463” wherever it is highlighted in blue.

## **2. Judicial Branch Initiative: Development and Testing of an Objective Pretrial Risk Assessments, Now Employed by the Administrative Office of the Courts**

While Kentucky’s General Assembly was studying the over-incarceration problem and passing new law, Kentucky’s Judicial Branch, under the direction of the Pretrial Services Division of the Administrative Office of the Courts, was already pursuing an evidence-based and statistically valid method of predicting whether any given arrestee posed a low, moderate or high risk of failing to attend court or committing a new crime. Over the years, the Pretrial Service Division’s Chief Operating Officer, Tara Boh Klute, developed and improved a list of objectively verifiable questions which would determine a person’s likelihood to come to court and obey the conditions of bond.

To be “objective,” the questions had to be verifiable by an outside source, independent of any input by the arrestee or his family, either by use of an existing and available computer program, or by other readily available public source. Each question was assigned a point value, with the total accumulation of points determining into which category of risk – low, moderate, or high – the arrestee was placed.

The questions were developed and used for a period of time, and data was collected based upon the behavior of those who had been released pretrial. Kentucky believed that it had a valid tool for making risk determinations. However, statistical validation by an outside source was necessary. Thus, the AOC commissioned a study to measure the validity of the tool. The study was done by the Washington D.C. based JFA Institute, through a grant funded by the Bureau of Justice Assistance. The final report, entitled “Kentucky Pretrial Risk Assessment Instrument Validation” was prepared by James Austin, Roger Ocker and Avi Bhati of the JFA Institute.

The JFA study was the first independent examination of any Kentucky pretrial risk assessment tool since the inception of the statewide Pretrial Services program established in 1976. The study found that while

Kentucky enjoyed a relatively high release rate when compared to other states, the vast majority of those released remained arrest-free pending trial (93%), and appeared in court when required (92%).

Additionally, there were some suggestions made to improve the questions or change the point value assigned to a question. These changes were implemented. Kentucky's original questionnaire and the changes made subsequent to the JFA study are shown below:

Question	Current	Revised
Does the defendant have a verified local address and has the defendant lived in the area for the past 12 months?	Yes = 0 No = 1	Yes = 0 No = 2
Does the defendant have verified sufficient means of support?	Yes = 0 No = 1	Yes = 0 No = 1
Did a reference verify that he/she would be willing to attend court with the defendant or sign a surety bond?	Yes = 0 No = 1	REMOVED
Is the defendant's current charge a Class A, B or C felony?	Yes = 1 No = 0	Yes = 1 No = 0
Is the defendant charged with a new offense while there is a pending case?	Yes = 5 No = 1	Yes = 7 No = 0
Does the defendant have an active warrant(s) for Failure to Appear prior to disposition? If no, does the defendant have a prior FTA for a felony or misdemeanor?	Yes = 4 No = 0	Yes = 2 No = 0
Does the defendant have a prior FTA on his or her record for a criminal violation or traffic offense?	Yes = 1 No = 0	Yes = 1 No = 0
Does the defendant have prior misdemeanor convictions?	Yes = 1 No = 0	Yes = 2 No = 0
Does the defendant have prior felony convictions?	Yes = 1 No = 0	Yes = 1 No = 0
Does the defendant have prior violent crime convictions crime?	Yes = 2 No = 0	Yes = 1 No = 0
Does the defendant have a history of drug/alcohol abuse?	Yes = 2 No = 0	Yes = 2 No = 0
Does the defendant have a prior conviction for felony escape?	Yes = 1 No = 0	Yes = 3 No = 0
Is the defendant currently on probation/parole from a felony conviction?	Yes = 2 No = 0	Yes = 1 No = 0
Did the defendant receive special education services in school for an emotional or behavioral problem?	Not Scored	Should be used when making recommendations for conditions of release.
Has the defendant ever spoken to a counselor or psychologist about a personal problem?	Not Scored	Should be used when making recommendations for conditions of release.

Kentucky's achievement of a statistically valid survey tool was widely applauded. Tim Murray, Executive Director of the Pretrial Justice Institute (PJI), said that "Kentucky's development of a validated statewide tool for assessing pretrial risk sets an evidence-based standard for other jurisdictions to emulate." Peter Kiers, President of the National Association of Pretrial Services Agency (NAPSA), stated that "[t]he pretrial

movement owes much to Kentucky as it demonstrates that individuals under arrest who are adequately assessed can be safely released into the community....”

**More reading:** Kentucky Administrative Office of the Courts Press Release, “Federal study validates risk-assessment tool used by Kentucky courts for pretrial release,” June 20, 2011, reprinted in *The Advocate*, August, 2011, available at [www.dpa.ky.gov](http://www.dpa.ky.gov), and included in the appendix of this article.

James Austin, Roger Ocker, Avi Bhati, “Kentucky Pretrial Risk Assessment Instrument Validation,” The JFA Institute, October 29, 2010, included in the appendix of this article.

Tara Boh Klute, Chief Operating Officer, Pretrial Services Division, Kentucky Administrative Office of the Courts, “Release Rates Vary, Failure Rates Remain Unchanged,” *The Advocate*, August, 2011, available at [www.dpa.ky.gov](http://www.dpa.ky.gov), and included in the appendix of this article.

The result of the use of the pretrial risk assessment, when combined with the changes made to law by HB 463, is that a higher percentage of persons have been released pretrial, while reappearance and safety rates have remained the same. According to AOC data:

- There were 244,494 cases (involving 180,938 individual defendants) handled by Pretrial Services from June 8, 2011 through June 8, 2012 compared to 267,719 cases (involving 198,091 individual defendants) over the same period of time in the previous year. (An individual defendant may have more than one case; in both years, the number of individual defendants equals 74% of the number of cases.);
- Of these cases, the defendants in 70% obtained pretrial release this year compared to 65% the previous year;
- Release rates for all three risk categories (low, moderate, high) increased at rates of 8%, 7%, and 1% respectively, averaging out to the 5% overall increase in release;
- Meanwhile, the overall appearance rate increased 1% from 89% to 90%, and the public safety rate increased 1% from 91% to 92%; and
- The average length of pretrial release was 62 days.

Using the 74% ratio of defendants to cases, as explained in the first bullet above, and applying an average cost of housing an inmate of \$36.25 (from Kentucky’s Auditor of Public Account’s 2006 Report entitled “Kentucky Jails: A Financial Overview”), the 5% increase in release saved Kentucky’s counties approximately **\$14,232,073** over the last year.

**More reading:** Tara Boh Klute, Chief Operating Officer, Pretrial Services Division: (1) Table showing June, 2011 through June, 2012 release, reappearance and re-arrest rates, included as an attachment to this article; (2) Table showing same data county-by-county (please note that Lexington and Louisville data are noted in Fayette and Jefferson Counties.)

### 3. Executive Branch Agency: Kentucky's Department of Public Advocacy's Zealous Litigation

Good ideas do not implement themselves. While HB 463 and the AOC's statistically valid pretrial risk assessment tool have been excellent advancements in pretrial release, probation and parole, there has not been wholesale buy-in to all of the advancements. Some courts continue to deny bail and probation, even where the statutes seemingly require it. Also, with the enactment of HB 463, there arises legal issues which ultimately will require judicial interpretation. What is the appropriate evidentiary standard to be used when bail or probation decisions are made? What is the appropriate standard of review on appeal? The answers to these questions have yet to be fully addressed by a court in a published opinion.

Kentucky's public defenders have stepped up their efforts to get for their clients favorable bond rulings from trial courts. Among the measures put into place during the last couple of years:

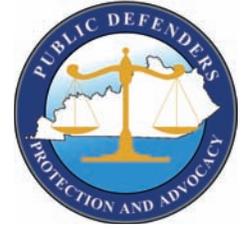
- Making enhanced bond motion practice a part of Kentucky DPA's annual strategic plan;
- Dedicating issues of *The Advocate* to bond practice;
- Developing a Pretrial Release Manual which, once developed, will stand as a treatise for bond practice available to any criminal practitioner in the state and beyond; and
- Engaging in a word of mouth campaign for pretrial release advocacy, including speaking at conventions, bar associations and other opportunities to explain the financial benefits that can accompany pretrial release, without a loss of public safety.

Kentucky's public defenders also have been appealing adverse bond decisions in appropriate cases in an effort to get these questions answered. In the last year, 68 appeals have been filed at the district and circuit levels. While not all have been successful, the results have been generally positive. In some cases, the mere filing of the appeal resulted in a bond reduction, or a plea offer too good to pass up.

**More reading:** Kentucky Department of Public Advocacy's List of District and Circuit Bond Appeals, included in the appendix of this article.

B. Scott West, General Counsel, Kentucky Department of Public Advocacy, "Top 10 FAQ's when Litigating HB 463 Pretrial Release on Behalf of the Accused," *Criminal Law Reform: The First Year of HB 463*, Kentucky Bar Association 2012 Annual Convention, June, 2012, included in the appendix of this article.

# The Advocate



www.dpa.ky.gov

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## Changes in Criminal Law or Criminal Procedure in HB 463

Damon Preston, Deputy Public Advocate

## HB 463 - Statement from the Sponsors

Sen. Tom Jensen (R - London)  
Rep. John Tilley (D - Hopkinsville)



Damon Preston  
Deputy Public Advocate

Revolutionary in its scope and concept, House Bill 463 will affect every facet of the criminal justice system, reforming counterproductive and expensive practices while protecting public safety and maintaining accountability for lawbreakers. Such grand promise will only materialize, however, if all players in the system are familiar with the new laws and are willing to ensure its full implementation. This article summarizes the various parts of the bill. Future editions of The Advocate will delve more deeply into specific provisions.

Generally, the most significant changes to the law in House Bill 463 can be broken into the following categories:

1. **Expansion of Pretrial Release** - Changes to the law will result in responsible expansion and consistency in the pretrial release of persons accused of crimes. The most significant advancement is the mandatory use of a "research-based, validated assessment tool" to measure a defendant's risk of flight or of posing a risk to the public. In most circumstances, defendants who are low or moderate risk will be released without financial bail being required. For moderate risk defendants, courts will be empowered to impose reasonable non-financial conditions to address any concerns raised by the assessment. Defendants who remain in jail pretrial will be entitled to a daily credit towards their bond, unless they are a flight risk or a risk to others.

Because of these changes, county jails will not bear the expense of housing pretrial defendants who are not a high risk. Further, low or moderate risk defendants who cannot post a financial bond will not serve additional jail time solely due to their poverty and those who are innocent will not serve time at all upon their release. Upon a conviction, a court can impose an appropriate sentence and the guilty person will be held accountable for their criminal activity.

2. **Reform of Criminal Drug Statutes** - The changes to the drug laws were made in recognition of some basic principles:
  - a. Not all trafficking offenses are equal,
  - b. Drug possession should be addressed through supervision and treatment, and
  - c. Subsequent offender sentencing enhancements are not appropriate in the drug possession context.

(continued on page 2)

Over the past decade, Kentucky has had one of the fastest growing prison populations in the country. Since 2000, the inmate population increased 45 percent, compared to 13 percent for the U.S. state

prison system as a whole. This growth has driven the state's corrections spending to \$440 million a year, an increase of over 330% over the last 20 years, despite the fact that the state's serious crime rate has been well below that of the nation and other southern states since the 1960s. It has been clear for some time that Kentucky cannot continue down the path we have taken during the last decade, when the crime rate remained relatively low, but the growth in our prison population far outpaced the national average.

In 2010, Kentucky lawmakers created the Task Force on the Penal Code and Controlled Substances Act to recommend changes we could make to the state's penal code and drug laws that would control the growth in corrections while maintaining public safety. In addition to our membership as co-chairs, the task force members were: Chief Justice John D. Minton, Jr., the Secretary of the Justice and Public Safety Cabinet J. Michael Brown, County Judge/Executive Tommy Turner, Tom Handy, a former prosecutor, and Guthrie True, a former public defender.

As co-chairs of the task force, we maintained an open, bipartisan, inter-branch, data-driven process involving considerable outreach to and participation from stakeholders representing diverse interests in the criminal justice and public safety areas, including judges, prosecutors, public defenders, victims' advocates, law enforcement officials, local government officials, jailers and others. The task force also received support and technical assistance from the experts at the nationally-respected, nonpartisan Public Safety Performance Project of the Pew Center on the States to develop fiscally sound, data-driven policy recommendations that will give taxpayers a better return on their public safety dollars.

For six months in 2010, we jointly led this bipartisan group of stakeholders from across state and local government on a quest to reduce Kentucky's prison costs and increase the public's return on our



Sen. Tom Jensen  
(R - London)



Rep. John Tilley  
(D - Hopkinsville)

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## Changes in Criminal Law or Criminal Procedure in HB 463

Damon Preston, Deputy Public Advocate (cont'd)

**Trafficking Offenses** - Thresholds were established to distinguish between low-level peddlers and higher-level traffickers. Defendants convicted of trafficking in amounts above the new thresholds will face the same range of penalties and enhancements as under the former law. Those convicted of trafficking in lower amounts will face lesser punishments. Separate trafficking incidents within a 90-day period may be aggregated to reach the new thresholds.

Thresholds for selected drugs:

Cocaine - 4 grams

Heroin or Methamphetamine - 2 grams

LSD, PCP, GHB, or Rohypnol - No threshold; any quantity is higher level

Other Schedule I or II Controlled Substances - 10 or more dosage units

Schedule III Controlled Substances - 20 or more dosage units

**Drug Possession** - Defendants charged with felony drug possession will face a possible penalty of one to three years (reduced from a range of one to five years), but will be subject to Deferred Prosecution or Presumptive Probation for first or second offenses with the legislature deeming Deferred Prosecution as the preferred alternative for first offenses.

**Deferred Prosecution** - Eligible defendants will be able to have prosecution deferred for up to two years while participating in a probation-like program of supervision and treatment. Upon successful completion, the criminal charge will not only be dismissed, but expunged and sealed as if the charge never existed. If a defendant fails in the deferral program, he/she can then be prosecuted as usual, with all other options remaining available as appropriate. In the event a prosecutor objects to an eligible defendant's participation in the program, the prosecutor must state on the record "substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety."

**Presumptive Probation** - For defendants who are convicted of a first or second offense of felony drug possession, probation is mandatory unless the sentencing court finds "substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety."

**Sentencing Enhancements** - Defendants convicted of trafficking drugs will still be subject to all former sentencing enhancements, but many enhancements for other drug offenders have been eliminated.

**Persistent Felony Offender (PFO)** - Felony drug possession can no longer be enhanced by PFO and a prior felony drug

possession conviction cannot be used as a predicate for later PFO enhancements unless the defendant has been convicted of a different felony since the drug possession conviction.

**Subsequent Offender Enhancements** - Raising the penalty for second or subsequent drug offenses have been eliminated from most non-trafficking statutes.

- Community Supervision Changes** - Community supervision encompasses probation, parole, and post-incarceration supervision. Under all three programs, a research-based validated Risk and Needs Assessment will be used to determine supervision/treatment needs and progress on an individualized case plan developed for each supervised person. When a supervised person demonstrates prolonged compliance and meets other conditions, he/she may be removed from active supervision. In the event of violations, a system of graduated sanctions will be developed to hold offenders accountable without court proceedings or Parole Board hearings being required for many technical violations. Revocation and re-incarceration for failure to abide by conditions of supervision is only authorized "when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the community."
- Re-entry or Post-Incarceration Supervision** - Almost every person who is incarcerated in prison will face a period of supervision upon their release. For sex offenders, the five-year period previously conditionally discharged now is reestablished as a period of supervision under the authority of the Parole Board. For certain "dangerous" offenders (those convicted of an A felony or capital offense, ineligible for parole, or who have a maximum security classification), an additional one-year period of supervision will be added to the end of their sentence. For everyone else, release on parole will be mandatory when a prisoner has 6 months remaining on his/her sentence unless the total sentence is 2 years or less or the person has less than 6 months to serve after final sentencing or recommitment after a violation of supervision.
- Arrest Powers** - With limited exceptions, law enforcement officers must issue citations for misdemeanors, even when committed in the officer's presence.
- Nonpayment of Fines** - Defendants found guilty of non-payment of fines may be sentenced to jail for nonpayment or nonappearance in court to address nonpayment, but may satisfy the unpaid fine at a rate of \$50 per day (or \$100 per day if working in community service while incarcerated).

Many other provisions of HB 463 make changes that fall outside these general categories. The full text of the bill and other resources to assist lawyers, judges, and others in understanding and implementing the bill are available at <http://theadvocate.posteros.com/tag/hb463>.

For pending cases involving offenses committed prior to June 8, 2011, defendants can "opt in" to most provisions of the new law under KRS 446.110, which states, in part: "...If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." For information on the requirements for a defendant to take advantage of a change in law, see *Commonwealth v. Phon*, 17 S.W.3d 106 (Ky. 2000).

## HB 463 - Statement from the Sponsors

Sen. Tom Jensen (R - London)

Rep. John Tilley (D - Hopkinsville) (cont'd)

corrections investment by reducing recidivism and incarceration rates. The task force conducted an extensive review of Kentucky's corrections data to identify what was driving increases in the state's prison population and costs, and the task force crafted recommendations for legislative reform based on that data.

### The Task Force identified four key drivers of Kentucky's prison growth:

**An Increase in Arrests and Court Cases.** While reported crime remained basically flat between 2001 and 2009, adult arrest rates increased 32 percent during that time, and drug arrests increased 70 percent.

**A High Percentage of Offenders Being Sent to Prison.** Kentucky uses prison as opposed to probation or other alternative sentences at a much higher rate than most other states.

**Technical Parole Violators.** Offenders on parole who are sent back to prison and who do not have a new felony conviction have nearly doubled as a percentage of prison admissions.

**Drug Offenders.** The Kentucky Department of Corrections reported that between 2000 and 2009, the percentage of all admissions that were drug offenders rose from 30 percent to 38 percent.

During the 2011 Regular Session of the General Assembly, we introduced identical bills in both the Senate and the House of Representatives. These bills incorporated the recommendations of the Task Force, as well as recommendations from other stakeholders. Now, as Kentucky works to implement those changes with the passage of House Bill 463 signed into law on March 3, those six months of work are about to pay off.

### The provisions in House Bill 463 focus on:

**Strengthening probation and parole** by basing key decisions on the risk posed by offenders, linking offenders to appropriate community resources, and improving parole and probation supervision.

**Modernizing drug laws** by distinguishing serious drug trafficking from peddling to support an addiction by establishing a proportionate scale of penalties based on quantity of drugs sold and by providing deferred prosecution, presumptive probation, and reduced prison time for low-risk, non-violent drug offenders who possess drugs and reinvesting related savings in increasing drug treatment for those offenders who need it.

**Supporting and restoring victims** by improving restitution and creating web-based tools to provide key information on offenders.

**Improving government performance** with better ways to measure and encourage a reduction in recidivism and criminal behavior.

The reforms in House Bill 463 are expected to bring a gross savings of \$422 million over 10 years by reducing the state's burgeoning prison population. Net savings of \$218 million will likely accrue over 10 years, with \$204 million to be reinvested in stronger probation and parole programs, expanded drug treatments and the addition of more pretrial services. Twenty-five percent of savings unrelated to changes in the drug laws will be put into a new local corrections assistance fund to help local jails, garnering full support from our counties.

Without the work of the Task Force on the Penal Code and Controlled Substances Act, the 2011 General Assembly would not have been able to pass the major criminal justice reforms found in House Bill 463 as quickly as we did. Changes to the penal code would likely have continued to be made in a piecemeal fashion. By including reauthorization of the task force as a provision of House Bill 463, lawmakers have ensured future deliberations without delay and with the best possible outcome for Kentucky.

Changes similar to those made in House Bill 463 have been implemented in other states, including Texas, Kansas and South Carolina, with much success. These states have seen a drop in both their crime rate and corrections costs. There is no reason to believe, based on the evidence, that Kentucky will not enjoy similar success under the most far-reaching criminal justice reforms Kentucky has seen in generations.

House Bill 463 is the result of nearly every major group affected by the changes in the law coming together to create something better. Kentucky will be better off because of its passage.



Governor Steve Beshear signs HB 463 into law.

Pictured from left to right: Robert Stivers, Senate Majority Leader; Chief Justice John D. Minton, Jr., KY Supreme Court; Sec. J. Michael Brown, Justice and Public Safety Cabinet; Tommy Turner, LaRue County Judge/Executive; Greg Stumbo, Speaker of the House; J. Guthrie True, defense attorney; Governor Steve Beshear; Representative John Tilley, Co-Chair; and Senator Tom Jensen, Co-Chair.



Chief Justice John D. Minton Jr. at the HB 463 signing ceremony.

Pictured from left to right: Sec. J. Michael Brown, Justice and Public Safety Cabinet; Greg Stumbo, Speaker of the House; Chief Justice John D. Minton, Jr., KY Supreme Court; Senator Tom Jensen, Co-Chair; and Senator David L. Williams, Senate President.



# Department of Public Advocacy

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# The Advocate



In addition to this new version of **The Advocate**, you can now access more **Advocate** content online, including:

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*In this issue:*

### **Changes in Criminal Law or Criminal Procedure in HB 463**

**Damon Preston**, Deputy Public Advocate

*“Revolutionary in its scope and concept, House Bill 463 will affect every facet of the criminal justice system, reforming counterproductive and expensive practices while protecting public safety and maintaining accountability for lawbreakers.”*

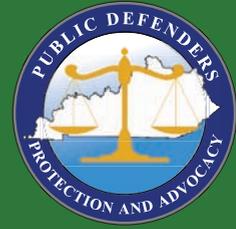
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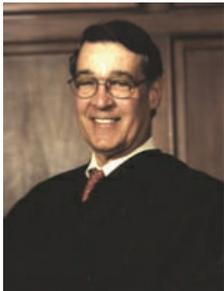
# The Advocate



www.dpa.ky.gov

August 2011

## KY Supreme Court Bail Pilot Project Extended and Amended: A program coming to your county DPA Staff Report



**Justice Will T. Scott**  
Kentucky Supreme Court Justice  
7th Supreme Court District  
Chair, Criminal Rules Committee

In 2009, the Kentucky Supreme Court Criminal Rules Committee recommended a 9-county piloting of a bail schedule to the Court. The goals were to increase release rates, to have release occur sooner for persons presumed innocent, and to save counties jail money.

The Kentucky Supreme Court in Administrative Order 2009-14 authorized a Bail Pilot Project in Bell, Boyd, Boone, Butler, Campbell, Edmonson, Kenton, Ohio and Pike Counties from January 1, 2010 to December 31, 2010 and extended this program in Administrative Order 2010-12 through June 30, 2011. In Administrative Order 2011-05 it was again extended through June 30, 2012 for further study and the impact of HB 463 on it with some changes. These Administrative Orders effectively amend the bail rules, RCr 4.00 et. seq.

The 2011 changes include:

Amended Uniform Schedule of Bail to be used in 9 counties except in Campbell "the class D felony Schedule shall not be used."

DUI 1st, AI, PI, Drinking in a Public Place and all violations have been deleted from the Schedule.

A new "one bail for all" calculation of bail is made as follows: except where there is at least one Class D felony and the number of crimes charged exceeds five, the bail for all will be the one bail for the highest crime charged.

The Schedule can be found at the <http://theadvocate.posterous.com> website.

AOC continues monitoring the Schedule for performance. A new AOC Report will be out in October 2011. Crimes covered by the Schedule are non-violent, non-sexual and generally 1st offense only. A Judge has the discretion to go below the Schedule. However, if a Judge goes above it, the reasons have to be recorded, creating a record for immediate appeal, if necessary.

The year-end analysis of the 9-county pilot reports pretrial incarceration time, failure rates, and cost savings to the counties. Justice Will T. Scott said that the Report "indicates that the Jailer operated Schedule practically ties Pretrial on reported Failure to Appear Rates (12% vs. 13%) and beats them by 2% on recidivism, while doing it on an average release time of 4 hours versus 35 hours for pretrial - even on Schedule qualified defendants. The statewide average is around 95-100 hours. So generally, on the types of crimes the Court has limited the Schedule to, it is outperforming the science-based release practices. That's the success of the Schedule as I see it."

The Report also discusses the differing viewpoints on bail schedules:

"When discussing the concept of bail schedules in general, pretrial practitioners, judges and the public are split philosophically. Advocates for bail schedules cite the positive aspects such as monetary and time savings for pretrial staff, a faster release from jail and a higher percentage of releases overall. Those opposed to bail schedules cite the negative aspects such as risk to public safety due to the lack of a risk assessment being conducted, limited judicial discretion in bail decisions, a step away from the use of evidence based practices and unfairness to the poor."

The full Report can be found at the <http://theadvocate.posterous.com> website.

## Kentucky's Method of Assessing Pretrial Risk of Flight, Reoffending Validated by Independent Study Group AOC Press Release



**Laurie K. Dudgeon**  
Director  
Administrative Office of the Courts

FRANKFORT, Ky. -- As Kentucky reforms its corrections system in favor of evidence-based practices, a federal study shows that the court system's method for helping judges determine whether to grant pretrial release is a proven success.

The study by the JFA Institute in Washington, D.C. found that Kentucky has a high pretrial release rate of 74 percent, with low rates of rearrest and failure to appear in court among individuals who were granted pretrial release. The study showed that 93 percent of individuals released remained arrest-free while awaiting trial and 92 percent of those released pending trial appeared in court when required.

(continued on page 2)

## Release Rates Vary, Failure Rates Remain Unchanged Tara Boh Klute

Chief Operating Officer, Division of Pretrial Services  
Administrative Office of the Courts



**Tara Boh Klute**  
Chief Operating Officer  
Division of Pretrial Services  
Administrative Office of the Courts

When looking at pretrial failure rates such as failure to appear and committing a new crime while on pretrial release, the one factor that remains predictive both locally and nationally is risk level. Although release rates vary across jurisdictions, failure rates remain consistent. Regardless of the alleged crime committed or the jurisdiction in which a defendant is charged, failure rates are consistent with risk levels. Low risk defendants return to court and do not commit new crimes while on pretrial release 94% of the time. Moderate risk defendants have an 89% success rate and even high risk defendants only fail 17% of the time<sup>1</sup>.

One of the anecdotal arguments often made by those who oppose pretrial release is that jurisdictions who release more defendants have higher pretrial failure rates than those jurisdictions who favor detention over release. The logic behind this argument is that by keeping defendants in jail, public safety is enhanced. However, the evidence shows that this is not the case.<sup>2</sup> Regardless of the release rate, the failure rates are consistent. The underlying predictor of failure has been shown to be the risk level. When an objective, validated risk instrument is utilized competently, the evidence shows that low and moderate risk defendants can be safely released into the community without jeopardizing public safety.

As shown in the chart on the next page, an analysis of 135,151 cases from July 1, 2009 to April 30, 2011 in four unique Kentucky jurisdictions including rural and urban areas, has shown that failure rates remain consistent regardless of release rates.

<sup>1</sup> Unpublished data from Administrative Office of the Courts, Division of Pretrial Services PRIM database; 527,183 cases analyzed from July 1, 2009 to June 30, 2011.

<sup>2</sup> Administrative Office of the Courts, Division of Pretrial Services PRIM database.

(continued on page 2)

## Kentucky's Method of Assessing Pretrial Risk of Flight, Reoffending Validated by Independent Study Group (cont'd)

The state's pretrial release, rearrest and failure-to-appear rates are among the best reported by any criminal justice program in the nation, according to the non-profit Pretrial Justice Institute (PJI).

The Administrative Office of the Courts, which operates the statewide pretrial services program, commissioned the study to measure the validity of the tool it uses to assess risk among pretrial defendants.

"The results are overwhelmingly positive," AOC Director Laurie K. Dudgeon said. "The study confirms that Kentucky judges are predicting who should be granted pretrial release with a high rate of accuracy. It also indicates that our risk-assessment tool is key to judges making reliable, informed decisions. I'm pleased that our pretrial process is saving Kentucky money but not at the expense of public safety."

The JFA study was the first independent examination of any Kentucky pretrial risk-assessment tool since the inception of the statewide Pretrial Services program in 1976. The study was funded by a Bureau of Justice Assistance grant and completed in late 2010.

Kentucky requires its pretrial officers to interview individuals within 12 hours of arrest. Pretrial officers perform an investigation and collect background information. Once they verify the information and conduct a background check, they complete an objective 13-question risk assessment and make a recommendation to the presiding judge on whether to grant pretrial release.

"Kentucky's pretrial release program is an invaluable tool for judges," said Pike County Family Court Judge Larry E. Thompson, president of the Kentucky Circuit Judges Association. "We depend on the information pretrial officers provide through the risk assessment to help us make decisions that will ensure the safety of citizens and protect the constitutional rights of those in the criminal justice system."

A defendant's release is based on an assessment of his or her flight risk, anticipated criminal behavior and danger to the community. These factors are measured by the defendant's family ties, employment, education, length of residence, criminal history and other related matters. The current risk-assessment tool was adopted in 2006 and is based on a point system used for two decades.

"Kentucky has excelled in the area of pretrial release," said Campbell County District Court Judge Karen A. Thomas, president of the Kentucky District Judges Association. "Its risk-assessment tool is one of the best in the country. The work done by Pretrial Services allows the criminal justice system to operate in a safe and efficient manner."

The PJI and the National Association of Pretrial Services Agencies also praised Kentucky for its achievements in the area of pretrial release.

"Kentucky's development of a validated statewide tool for assessing pretrial risk sets an evidence-based standard for other jurisdictions to emulate," PJI Executive Director Tim Murray said. "Basing a pretrial release decision on individualized, valid pretrial risk factors is a profoundly important step toward a fair, safe and effective pretrial justice system. Kentucky is to be congratulated for this important work and for the contribution it represents to the field."

"The pretrial movement owes much to Kentucky as it demonstrates that individuals under arrest who are adequately assessed can be safely released into the community during the pretrial process," NAPS President Peter C. Kiers said. "In 1976, the state made the bold and courageous move to eliminate commercial bail bonding and replace it with a statewide pretrial program. That decision has ultimately improved its criminal justice system and Pretrial Services continues working to improve the system today. The now-validated risk-assessment tool ensures that recommendations to the courts on pretrial release are consistent, objective and effective."

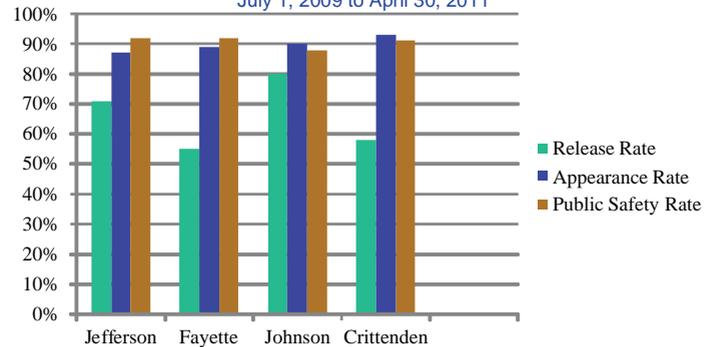
*"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."*

Chief Justice Rehnquist,  
*United States v. Salerno*, 481 U.S. 739 (1986)

## Release Rates Vary, Failure Rates Remain Unchanged (cont'd)

### Outcomes by County

July 1, 2009 to April 30, 2011



## Initial Appearance of Counsel Vital to Client Pretrial Release: Saving County Jail Costs, Increasing Efficiency

**Valetta Browne**

Directing Attorney, Trial Services, DPA



**Valetta Browne**  
Directing Attorney  
Trial Services, DPA

We know that lawyers make a difference and good lawyering really makes a difference.

Video Arraignments or Arraignment Dockets are the first time a person charged with a crime sees a Judge. Prosecutors and Pretrial Officers are present, and we public defenders need to be present for the indigent criminal defendant, too.

Arraignment is the first opportunity to see the AOC Pretrial Risk and Assessment Tool's results and advocate for bond reduction. This is especially vital in light of House Bill 463 and the changes that come with it. We Defenders must be present to advocate the correct application of the new statutes and represent indigent clients who are presumed innocent.

There are other practical benefits to a defender's appearance: we can speak to clients' family members, friends or employers present in the Courtroom, obtain client contact information, and answer questions such as where/how to post bond, and how to contact our office. We can inquire as to whether enhanceable offenses have been charged appropriately. We can facilitate obtaining verification of risk assessment criteria and supplement or correct the data.

The empirical evidence is clear. A criminal defendant with a lawyer at first appearance:

- Is 2 ½ times more likely to be released on recognizance;
- Is 4 ½ times more likely to have the amount of bail significantly reduced;
- Serves less time in jail (median reduction from 9 days jailed to 2, saving county jail resources while preserving the clients' liberty interests); and
- More likely feels that they had been treated fairly by the system.

Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, in their article "Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail," 23 *Cardozo L. Rev.* 1719 (2002). Full article can be found at <http://theadvocate.posterous.com>.

The judiciary agrees: according to Clark and Madison District Judge Earl-Ray Neal, "the Public Defender needs to be involved in the process at the earliest possible stage." Judge Neal also believes that "jail dockets run much better when an advocate is there," and that clients and their families are better informed. Judge Neal also asserts that the client's rights are better protected, as the possibility of a client confessing or making incriminating statements is far less likely when a lawyer is appointed to speak on his behalf.

Another District Judge in the 25th Judicial District, Hon. Charles W. Hardin, agrees: "By having an attorney present, they are able to determine what is in the best interest of the client and secure better outcomes." In Judge Hardin's opinion, "It would be hard to conduct a jail docket without a public defender."

The importance of the presence of a lawyer at first appearance cannot be overvalued. If the Courthouse doors are open and the Judge takes the bench for a criminal docket, a public defender should be there for indigent criminal defendants.

For if not us, then who?

## Changes in Pretrial Release from HB 463: "The New Penal Code and Controlled Substances Act"

Brian Scott West, General Counsel, DPA



**Brian Scott West**  
General Counsel, DPA

Many changes to the drug and penal codes were made by HB 463 involving reclassification of offenses, reformation of sentencing provisions, and other general changes which incorporate efficient and realistic methods for punishing and rehabilitating convicted lawbreakers, while at the same time promoting concerns of public safety. However, the new act also made changes in the law of pretrial release, reaffirming in a substantial way Kentucky's commitment to the age-old venerable constitutional principle of "innocent until proven guilty."

### I. Unsecured or "Own Recognizance" bonds for Low or Medium Risk Arrested Defendants Presumed. HB 463

created a new section KRS Chapter 431 which applies to any defendant arrested for any crime and which makes mandatory an unsecured or "own recognizance" bond for certain individuals. KRS 431.066(1) provides that "[w]hen a court considers pretrial release and bail for an arrested defendant, the court shall consider whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released." Subsections (2) and (3) provide generally that if the defendant poses a low or moderate risk of flight, is likely to appear for trial, and is not likely to be a danger to others, the court SHALL order the defendant released on unsecured bond or his own recognizance, and in the case of a moderate risk, the court shall consider ordering the defendant to participate in GPS monitoring, controlled substance testing, increased supervision, or other conditions.

**II. Pretrial Release for "Presumptive Probation" Drug Offenses.** HB 463 created a new section in the drug code, KRS 218A.135, which provides mandatory unsecured or "own recognizance" bond for persons who are charged with offenses that could result in "presumptive probation." KRS 218A.135(1). These offenses are described elsewhere in KRS Chapter 218A, but basically are trafficking in a controlled substance 3rd (under 20 units) and possession of a controlled substance in the 1st. These provisions shall not apply to a defendant who is found by the court to present a flight risk, or a danger to himself, herself, or others. KRS 218A.135(2). If a court determines that the defendant is such a risk, the court shall document the reasons for denying the release in a written order. KRS 218A.135(3). Impliedly, a finding of danger to himself, herself or others requires a finding that the defendant has done more than merely possess, transfer or sell drugs, since the provision applies ONLY to possession and trafficking offenses, and such limited findings would effectively write the word "shall" out of the statute.

**III. Credit Toward Bail for Time in Jail Presumed.** KRS 431.066(4)(a) provides that - regardless of the amount of bail set - the court shall permit a defendant a credit of one hundred dollars for each day, or any portion of a day, as payment toward the amount of bail set. Upon service of sufficient days to satisfy the bail, the Court SHALL order the release of the defendant from jail on conditions specified in Chapter 431.

Subsection (b), however, specifies that bail credit shall not apply to anyone who is convicted of, or is pleading guilty (or entering an Alford plea) to any felony sex offense under KRS Chapter 510, human trafficking involving commercial sexual activity, incest, unlawful transaction with a minor involving sexual activity, promoting or using a minor in a sexual performance, or any "violent offender" as defined in KRS 439.3401. Bail credit shall also be denied for anyone found by the court to be a flight risk or a danger to others. If bail credit is denied for any reason, the Court SHALL document the reasons in a written order. KRS 431.066(5).

**IV. Maximum Bail Rule for Multiple Misdemeanors.** KRS 431.525 has been amended to require - when a person has been charged with one or more misdemeanors - that the amount of bail for all charges shall be set in a single amount that shall not exceed the amount of the fine and court costs for the highest misdemeanor charged. KRS 431.525(4). When a person has been convicted of a misdemeanor and a sentence of jail, conditional discharge, probation, or any sentence other than a "fine only," the amount of bail for release on appeal shall not exceed double the amount of the maximum fine that could have been imposed for the highest misdemeanor of which the defendant stands convicted. KRS 431.525(5). Neither provision applies to misdemeanors involving physical injury or sexual conduct, or to any person found by the court to present a flight risk or to be a danger to others. KRS 431.525(4)-(6). If a person is found to present a flight risk or a danger to others, the court SHALL document the reasons in a written order. KRS 431.525(7).

**V. Judicial Guidelines for Pretrial Release of Moderate-Risk or High-Risk Defendants.** Most of the HB 463 pretrial release provisions refer to persons who are found to be at a "low risk" or "moderate risk" to flee, not come to court, or pose a danger to

others. However, the General Assembly also put language into the bill for those persons who are found to be high or moderate risk, and who otherwise would be ordered to a local correctional facility while awaiting trial. For those persons, the Supreme Court is required to establish recommended guidelines for judges to use when determining whether pretrial release or monitored conditional release should be ordered, and setting the terms of such release and/or monitoring. KRS 27A.096. Likewise, KRS 431.067 provides that, when considering the pretrial release of a person whose pretrial risk assessment indicates he or she is a moderate or high risk defendant, the court considering the release may order as a condition of pretrial release that the person participate in a GPS monitoring program.

**VI. Evidence-Based Practices.** Section 49 of HB 463 (not yet codified), effective July 1, 2013, specifies that the Supreme Court SHALL require that vendors or contractors who are funded by the state and who are providing supervision and intervention programs for adult criminal defendants use "evidence-based practices" to measure the effectiveness of their supervision and monitoring services. As used in this section, "evidence-based practices" means intervention programs and supervision policies, procedures, programs, and practices that scientific research demonstrates reduce instances of a defendant's failure to appear in court and criminal activity among pretrial defendants when implemented competently." Evidence-based practices are already being used by pretrial officers of the Administrative Office of the Courts. These assessments categorize a defendant as a low, moderate or high risk to flee, to not appear in court, or to pose a danger to the public. In KRS 446.010(33), "pretrial risk assessment" is defined as "an objective, research-based, validated assessment tool that measures a defendant's risk of flight and risk of anticipated criminal conduct while on pretrial release pending adjudication." AOC's assessment bases its results upon answers to objective, not subjective, questions and has already been validated by an independent, federally funded organization (the JFA Institute).

Nearly every decision made about pretrial release begins with a court finding as to whether the defendant is a low, moderate or high risk to flee, not appear, or pose a danger to the public (and in the case of "presumptive probation" offenses, danger to self), thereby incorporating into the judicial decision the risks found by the assessment. Bond decisions have never been more "based on evidence" than they will be now.

**VII. Appeal Standards.** HB 463 has effectively changed both the standards by which a bond will be reviewed by appellate courts, and the nature of relief in the event of a successful appeal. In the past, trial judges set the amount of bond and the manner of security based on a review of such factors as the seriousness of the charge, the criminal record of the accused, and the ability of the person to pay. On appeal, the reviewing court would decide whether the judge has abused his or her discretion. Thus, in *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971), where a \$150,000 bond had been set on a possession of heroin case, the court stated that while they would not "interfere in the fixing of bail unless the trial court has clearly abused its discretionary power," the amount in that case was unreasonable. The Court reversed with instructions to the trial court to "fix bail... in an amount less than \$150,000."

After HB 463, while the trial court still has discretion as to the amount of bond to be set (and may consider such factors as the nature of the offense charged, and the criminal record of the accused under KRS 431.525), the decision whether that bail should be unsecured or subject to own recognizance, or whether the bail credit shall apply (both under KRS 431.066), require findings based on evidence. Moreover, to the extent that there is no evidence sufficient to support a finding that someone is a flight risk or a danger to the public, for example, HB 463 creates a presumption of an unsecured or "own recognizance" bond as written "findings" are required to depart from the mandatory "shall" language requiring release. On appeal, a court will review the court's decision, and the evidence upon which it was based, and should apply decide whether the trial court's decision was against the great weight of the evidence. Stated another way, the trial court's findings must be supported by sufficient evidence to overcome the presumption of release.

If the judge's decision is found not to be grounded in evidence or is against the weight of the evidence, then the appellate court will still remand, but this time with instructions to unsecure the bond or place the defendant on "own recognizance."

The standard for bond appeals from district court to circuit court via habeas corpus was set in *Smith v. Henson*, 182 S.W.2d 666 (Ky. 1944), and appears never to have been an "abuse of discretion" standard: "[T]he primary, if not the only, object of habeas corpus is to determine the legality of the restraint under which a person is held... We must, therefore, view the proceeding to obtain bail by the method of habeas corpus as a test of the legality of the judgment or action of the court on the motion for bail..." The Circuit Court thus reviews the actions of the District Court with a view toward whether the action was legal or illegal.

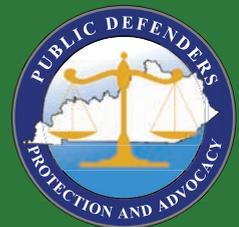
**VIII. Conclusion.** HB 463 has done much to reform the way that Kentucky's citizens charged with crimes are treated both prior to and after conviction. The General Assembly has breathed new life into the presumption of innocence without sacrificing concerns of public safety.



# Department of Public Advocacy

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General Counsel, DPA

# **Kentucky Pretrial Risk Assessment Instrument Validation**

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## Introduction

In 2009, the Kentucky Pretrial Services Agency (KPSA)) made a request to the Pretrial Justice Institute (PJI) to receive technical assistance on its risk assessment instrument. The PJI has an award from the Bureau of Justice Assistance, U.S. Department of Justice, to provide technical assistance for a wide variety of correctional agencies. The primary partner with PJI is the JFA Institute, which responds to all referrals made by PJI. One of JFA's organizational capabilities is to conduct validation studies of risk assessment instruments. For this reason the KPSA request was forwarded to JFA to complete.

The KPSA has been using a risk assessment instrument for a number of years. The instrument itself was designed based on other pretrial risk assessment instruments that have been validated in other jurisdictions. But the KPSA instrument had never been tested by an external agency on people who had been arrested, detained and subsequently released on pretrial status. Thus the task of this study was to determine the extent to which the current instrument was valid.

## Research Methods

Kentucky created pretrial services in 1976 to replace for-profit commercial bail bonding services and is one, of only a few states, that has outlawed commercial bail bonding. Unlike many other jurisdictions, KPSA is part of the state's court system. Furthermore, because it is a statewide agency, all of its functions and data are standardized. Such a statewide structure greatly enhances the ability to conduct a meaningful validation effort.

Data on the Kentucky pretrial release population were obtained and analyzed to assess the extent to which the instrument needed to be modified and, if so, what items needed to be dropped and what additional items needed to be introduced into a modified instrument.

The data used to complete this analysis were based on all cases where a pretrial interview was conducted by the various pretrial services agencies that are located throughout Kentucky. Specifically, there were 52,344 interviews conducted between July 1, 2009 and September 30, 2009. For these interviews, 38, 478 or 74% were released pre-trial. For each case, it was recorded where the person was re-arrested or failed to appear (FTA).

Table 1 shows the basic demographic attributes of the persons who were interviewed and released pretrial. Also included are the FTA, pretrial re-arrest rates, and a composite FTA/re-arrest rate. As in most jurisdictions, the FTA, re-arrest and combined rates are relatively low. Specifically, the FTA rate is 8%, the re-arrest rate 7%, and the combined rate 14%. The table also shows relative associations of each item and the three measures of success/failure on pretrial release.

Tables 2, 3, 4 and 5 repeat this type of analysis for measures that reflect the current charge (Table 2), substance abuse measures (Table 3), and mental health (Tables 4 and 5). In all of these tables there are some items that have no meaningful statistical relationships and others that do have a statistically significant relationship. However, it should be emphasized that because the base rates are so low, there will be few items that have very strong relationships with pretrial release outcomes.

Tables 6, 7, and 8 summarize this same analysis for the 13-item risk instrument. Here, one can see that the current instrument items and scale are associated with pretrial arrest and FTA rates. There are some items that either have a very modest association or have little variance in the scoring results. For example, item 3. ("Reference verified willingness to attend court or

sign surety bond”) has little if any statistical association with the failure rates. The table also shows two additional items (14 and 15), which were test items to see if that would add to the overall risk assessment instrument’s predictive capabilities. As indicated, they show that less than 2% of the assessed cases are being scored into one of the two categories. With such a lack of variance they are unlikely to have much predictive abilities.

In summary, the current 13-item instrument is producing a strong association between the risk levels of low, moderate and high and FTA and pretrial arrest rates. It is also noteworthy that the vast majority of the released defendants are either low (45%) or moderate risk (22%) to either Fail To Appear (FTA) or be re-arrested for a new crime while under pretrial release status.

### **Use of Special Conditions**

The data files also contained information on the use of special conditions. Table 9 shows the extent to which they are being used with most of the conditions being drug testing and special monitoring requirements. We also looked at those persons who received the special conditions of drug testing, special monitoring and notification requirements but are low risk cases. These three conditions have the most low risk cases to do such an analysis. As shown in Table 10, about half of the special condition populations are scored as low risk. More significantly, these low risk cases have higher failure rates than the “average” low risk pretrial releasee. While one cannot say that the special conditions caused the higher rates, the statistical association suggests that imposing such conditions is not beneficial.

### **Can The Current Instrument Be Improved?**

There are two areas to be explored here. First is whether the current instrument can be made more efficient by reducing the number of items being used by the staff? Making the instrument more parsimonious would reduce the burden to staff without jeopardizing the validity of the instrument. Second, are there any items that are not being used that might enhance the validity of the instrument?

To answer these two questions required more sophisticated multivariate analysis. The first task was to re-weight the items included in the current instrument. In doing so, a few considerations should be pointed out:

1. When there was a conflict among the risk models, e.g., a variable has a negative effect on FTA but a positive effect on re-arrest, the re-arrest risk measure model was used to trump the FTA risk model. Examples include items #1 and #4.
2. In some cases, a slight change in the statistical significance cut-off value of 95% would have brought an item into the model (e.g., Risk Item 15). In such cases, the variable was included in the item in accordance with consideration 1 noted above.

Once a modified instrument was constructed, additional variables were included in the analysis—one variable group at a time—to assess their contribution to the discriminating power of the instrument. These additional variables included the following:

1. *Substance abuse related questions*: These variables did not add sufficiently to the model’s predictive power and were therefore ignored.
2. *Mental health related questions*: These variables did not add sufficiently to the model’s predictive power and were therefore ignored.
3. *Mental health history related questions*: As a group, mental health history related questions improved the explanatory power of the model. However, individually only two of them were found to be statistically significant. These include “Received special

education services in school for emotional/behavioral problems?” and “Spoken to counselor or psychologist about personal problem?”.

4. *Domestic violence related questions*: As a group, domestic violence related questions did improve the models. However, only two of them were statistically significant individually. These included “Any record of prior DV restraining order”) and “Was a weapon used?”. However, only a handful (1.2%) of suspects in the sample had affirmative responses to these questions.
5. *Removal of current risk instrument items*: The current risk instrument included items 1 through 13. Items 14 and 15 “Violated conditions of release in past 12 months—and if so, was bond revoked?” were deleted from the revised current instrument. These items were either statistically insignificant or had incorrect effect directions. Similarly, item 3 added little to the predictive attributes of the instrument. So all three can be removed from further consideration.

Based on the above considerations, one new version of the instrument was developed which simply removed item 3 and re-weighted the remaining 12 items. In addition to new weights for the revised risk assessment instruments, the cut-points needed to classify suspects as low, moderate, or high risk were modified as well. Tables 10 and 11 show these changes and provide the cut-points for the 12-item instrument.

Finally, Figures 1, 2, and 3 provide a side-by-side comparison of the current and the revised instruments on risk measures. In general, the modified version performs basically the same as the current version of the risk assessment instrument but without using item 3. It should also be emphasized that although some of the other items that have a significant bi-variate relationship but were excluded from the final instrument can be used as a basis for over-riding the risk level or making a final risk recommendation.

**TABLE 1  
FAILURE RATE BY DEMOGRAPHICS**

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
<b>Base</b>	<b>38,478</b>		<b>8.0%</b>	<b>7.0%</b>	<b>14.1%</b>
Sex					
Female	10,678	27.8%	7.7%	6.5%	13.3%
Male	27,695	72.0%	8.2%	7.3%	14.4%
Unknown	105	0.3%	3.8%	2.9%	5.7%
Race					
American Indian	117	0.3%	6.0%	3.4%	9.4%
Asian	64	0.2%	4.7%	3.1%	7.8%
Black	6,854	17.8%	9.8%	7.2%	16.0%
Other	738	1.9%	11.5%	2.0%	13.3%
Unknown	448	1.2%	5.8%	1.8%	7.4%
White	30,257	78.6%	7.6%	7.2%	13.8%
Marital Status					
Divorced	5,810	15.1%	7.6%	7.4%	13.9%
Married	7,889	20.5%	6.8%	6.2%	12.1%
Separated	2,501	6.5%	8.9%	8.3%	15.9%
Single	20,714	53.8%	8.5%	7.3%	14.9%
Unknown	1,112	2.9%	6.6%	3.1%	9.4%
Widowed	452	1.2%	8.8%	8.2%	15.7%
Education					
AA	607	1.6%	8.7%	6.1%	13.5%
BA/BS	906	2.4%	5.5%	4.0%	8.5%
Vocational	328	0.9%	7.6%	5.2%	11.9%
GED	3,760	9.8%	8.9%	8.9%	16.2%
HS	9,939	25.8%	7.4%	6.7%	13.3%
Less than HS	10,369	26.9%	9.1%	8.9%	16.8%
Null	6,782	17.6%	7.8%	4.8%	11.9%
Post graduate	334	0.9%	3.6%	3.6%	7.2%
Some college	5,453	14.2%	7.4%	6.6%	13.2%
On Supervised Probation					
No	36,379	94.5%	8.0%	6.8%	13.9%
Yes	2,099	5.5%	8.6%	10.5%	17.8%
Supplied an email address					
No	30,215	78.5%	7.9%	6.6%	13.5%
Yes	8,263	21.5%	8.7%	8.6%	16.0%
Verified Address					
No	11,492	29.9%	8.9%	5.7%	13.3%
Yes	26,986	70.1%	7.7%	7.9%	14.4%
Verified Occupation					
No	12,504	32.5%	9.1%	5.5%	13.8%
Yes	25,974	67.5%	7.5%	7.8%	14.2%

**TABLE 2  
FAILURE RATE BY CHARGE**

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
<b>Base</b>	<b>38,478</b>		<b>8.0%</b>	<b>7.0%</b>	<b>14.1%</b>
Charge Level					
Felony	9,122	23.7%	6.0%	10.1%	15.2%
Misdemeanor	26,346	68.5%	8.8%	6.4%	14.1%
O	1,512	3.9%	5.6%	2.8%	8.1%
V	1,356	3.5%	9.5%	5.0%	13.6%
Unknown	152	0.4%	9.9%	3.3%	12.5%
Charge Class					
A	14,388	37.4%	7.5%	6.9%	13.3%
B	12,650	32.9%	9.9%	6.0%	14.9%
C	2,091	5.4%	4.7%	11.0%	14.5%
D	6,317	16.4%	6.7%	9.7%	15.5%
X	2,880	7.5%	7.5%	3.9%	10.7%
Unknown	152	0.4%	9.9%	3.3%	12.5%

**TABLE 3  
FAILURE RATE BY SUBSTANCE ABUSE ITEMS**

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
<b>Base</b>	<b>38,478</b>		<b>8.0%</b>	<b>7.0%</b>	<b>14.1%</b>
Have you ever felt you should cut down on your drinking?					
No	25,182	65.4%	8.1%	7.2%	14.3%
Yes	8,007	20.8%	7.8%	8.8%	15.4%
Null	5,289	13.7%	7.8%	3.7%	10.9%
Have people annoyed you criticizing your drinking/drug use?					
No	29,230	76.0%	8.0%	7.2%	14.1%
Yes	3,959	10.3%	8.2%	10.3%	17.0%
Null	5,289	13.7%	7.8%	3.7%	10.9%
Have you felt guilty about your drinking/drug use?					
No	26,649	69.3%	8.0%	7.1%	14.1%
Yes	6,540	17.0%	8.2%	9.5%	16.4%
Null	5,289	13.7%	7.8%	3.7%	10.9%
Drink in the morning to get rid of hangover/use drugs to change effects of other drugs					
No	30,997	80.6%	7.9%	7.4%	14.3%
Yes	2,165	5.6%	9.6%	10.4%	18.3%
Null	5,316	13.8%	7.8%	3.7%	10.9%
Willing to participate in residential treatment					
No	27,179	70.6%	8.1%	7.1%	14.2%
Yes	6,008	15.6%	7.9%	9.8%	16.4%
Null	5,291	13.8%	7.8%	3.7%	10.9%

**TABLE 4  
FAILURE RATE BY MENTAL HEALTH ITEMS**

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
<b>Base</b>	<b>38,478</b>		<b>8.0%</b>	<b>7.0%</b>	<b>14.1%</b>
Past 30 days how often do you feel nervous					
None of the time	21,046	54.7%	8.1%	6.9%	14.1%
A little of the time	3,856	10.0%	7.7%	8.1%	14.6%
Some of the time	3,831	10.0%	7.9%	8.5%	15.2%
Most of the time	1,716	4.5%	7.4%	9.1%	15.2%
All of the time	2,737	7.1%	8.6%	10.0%	17.2%
Null	5,292	13.8%	7.8%	3.7%	10.9%
Past 30 days how often do you feel hopeless					
None of the time	27,050	70.3%	8.0%	7.3%	14.3%
A little of the time	2,195	5.7%	7.5%	8.0%	14.5%
Some of the time	1,972	5.1%	8.6%	9.4%	16.7%
Most of the time	870	2.3%	7.8%	8.6%	15.2%
All of the time	1,099	2.9%	9.3%	10.3%	18.5%
Null	5,292	13.8%	7.8%	3.7%	10.9%
Past 30 days how often do you feel restless or fidgety					
None of the time	23,839	62.0%	8.2%	7.2%	14.3%
A little of the time	2,839	7.4%	6.8%	7.7%	13.5%
Some of the time	3,180	8.3%	8.1%	8.7%	15.6%
Most of the time	1,364	3.5%	7.6%	9.0%	15.5%
All of the time	1,964	5.1%	8.9%	9.4%	16.8%
Null	5,292	13.8%	7.8%	3.7%	10.9%
Past 30 days how often do you feel so depressed nothing cheers you up					
None of the time	26,819	69.7%	8.1%	7.2%	14.3%
A little of the time	2,088	5.4%	8.0%	9.2%	16.2%
Some of the time	2,065	5.4%	7.5%	8.7%	15.5%
Most of the time	939	2.4%	6.8%	9.4%	15.1%
All of the time	1,275	3.3%	9.3%	8.5%	16.6%
Null	5,292	13.8%	7.8%	3.7%	10.9%
Past 30 days how often do you feel everything was an effort					
None of the time	27,194	70.7%	8.0%	7.3%	14.3%
A little of the time	1,742	4.5%	7.0%	9.8%	15.8%
Some of the time	2,016	5.2%	9.1%	8.7%	16.4%
Most of the time	908	2.4%	8.4%	8.1%	15.4%
All of the time	1,326	3.4%	8.1%	8.7%	15.7%
Null	5,292	13.8%	7.8%	3.7%	10.9%
Past 30 days how often do you feel worthless					
None of the time	28,903	75.1%	8.1%	7.3%	14.4%
A little of the time	1,344	3.5%	6.8%	10.5%	16.3%
Some of the time	1,445	3.8%	8.7%	8.0%	15.6%
Most of the time	598	1.6%	6.9%	8.9%	14.2%
All of the time	896	2.3%	9.4%	9.6%	17.6%
Null	5,292	13.8%	7.8%	3.7%	10.9%

**TABLE 5  
FAILURE RATE BY MENTAL HEALTH HISTORY**

<b>Item</b>	<b>N</b>	<b>%</b>	<b>FTA rate</b>	<b>Rearrest Rate</b>	<b>Either FTA or Rearrest</b>
<b>Base</b>	<b>38,478</b>		<b>8.0%</b>	<b>7.0%</b>	<b>14.1%</b>
Has doctor prescribed meds for emotional problem					
No	24,337	63.2%	8.0%	7.0%	14.1%
Yes	8,547	22.2%	8.0%	9.3%	15.9%
Have you been hospitalized for emotional problem					
No	29,448	76.5%	8.0%	7.3%	14.2%
Yes	3,443	8.9%	8.7%	10.0%	17.3%
Did you have special schooling for emotional problems					
No	30,953	80.4%	8.0%	7.3%	14.3%
Yes	1,937	5.0%	9.6%	11.6%	20.0%
Ever spoken to a counselor or psychologist					
No	24,335	63.2%	8.0%	6.9%	14.0%
Yes	8,551	22.2%	8.2%	9.4%	16.3%
Ever received treatment for drug/alcohol abuse					
No	26,476	68.8%	8.0%	7.1%	14.1%
Yes	6,417	16.7%	8.3%	9.8%	16.7%

**TABLE 6  
FAILURE RATE BY RISK ASSESSMENT SCORE ITEMS**

<b>Item</b>	<b>N</b>	<b>%</b>	<b>FTA rate</b>	<b>Rearrest Rate</b>	<b>Either FTA or Rearrest</b>
<b>1. Verified local address &amp; lived in area for past 12 months</b>					
No	2,856	7.4%	11.1%	6.3%	16.5%
Yes	24,227	63.0%	7.2%	8.1%	14.2%
<b>2. Verified sufficient means of support</b>					
No	13,798	35.9%	8.4%	9.1%	16.2%
Yes	13,287	34.5%	6.9%	6.7%	12.7%
<b>3. Reference verified willingness to attend court or sign surety bond</b>					
No	2,195	5.7%	8.7%	9.2%	16.5%
Yes	24,889	64.7%	7.6%	7.8%	14.3%
<b>4. Current charge class A, B or C felony</b>					
No	24,404	63.4%	8.0%	7.5%	14.4%
Yes	2,677	7.0%	4.6%	11.3%	14.8%
<b>5. Charged w/ new offense while case pending</b>					
No	21,258	55.2%	6.9%	5.6%	11.7%
Yes	5,822	15.1%	10.5%	16.4%	24.5%
<b>6. Active warrant or prior FTA</b>					
No	22,325	58.0%	6.6%	7.5%	13.2%
Yes	4,753	12.4%	12.5%	9.7%	20.3%
<b>7. Prior FTA for traffic violation</b>					
No	22,465	58.4%	6.9%	7.4%	13.4%
Yes	4,614	12.0%	11.5%	10.1%	19.7%
<b>8. Prior misdemeanor conviction</b>					
No	8,769	22.8%	6.3%	4.7%	10.4%
Yes	18,311	47.6%	8.3%	9.4%	16.4%
<b>9. Prior felony conviction</b>					
No	20,416	53.1%	7.1%	6.9%	13.1%
Yes	6,664	17.3%	9.3%	10.9%	18.6%
<b>10. Prior violent crime conviction</b>					
No	21,770	56.6%	7.4%	7.0%	13.4%
Yes	5,309	13.8%	8.7%	11.6%	18.8%
<b>11. History of drug/alcohol abuse</b>					
No	23,865	62.0%	7.5%	7.2%	13.7%
Yes	3,214	8.4%	9.1%	13.0%	20.4%
<b>12. Prior conviction of felony escape</b>					
No	26,536	69.0%	7.6%	7.8%	14.2%
Yes	541	1.4%	12.6%	14.4%	25.0%
<b>13. On probation/parole for felony conviction</b>					
No	24,933	64.8%	7.5%	7.6%	14.0%
Yes	2,142	5.6%	9.6%	11.0%	19.4%

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
14. Test Item: Violated conditions of pretrial release in last 12 mos.					
No	32,516	84.5%	8.1%	7.4%	14.5%
Yes	671	1.7%	7.6%	14.0%	20.3%
15. Test Item: If yes, was bond revoked?					
No	32,383	84.2%	8.0%	7.6%	14.6%
Yes	153	0.4%	5.2%	11.1%	15.7%

**TABLE 7  
FAILURE RATE BY RISK ASSESSMENT SCORE**

Risk Score	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
<b>Base</b>	<b>38,478</b>		<b>8.0%</b>	<b>7.0%</b>	<b>14.1%</b>
0	2,898	7.5%	4.0%	2.9%	6.8%
1	4,909	12.8%	4.9%	3.9%	8.4%
2	3,863	10.0%	6.5%	5.0%	10.8%
3	2,143	5.6%	7.0%	6.8%	12.7%
4	1,780	4.6%	7.1%	6.1%	12.1%
5	1,838	4.8%	8.9%	8.3%	16.4%
6	2,066	5.4%	8.9%	9.8%	17.4%
7	1,887	4.9%	9.9%	11.3%	19.3%
8	1,292	3.4%	10.8%	13.1%	22.0%
9	1,074	2.8%	11.6%	14.5%	23.9%
10	878	2.3%	10.6%	13.8%	22.0%
11	798	2.1%	12.4%	15.2%	24.6%
12	620	1.6%	12.1%	14.5%	25.0%
13	360	0.9%	11.7%	17.5%	26.9%
14	261	0.7%	13.0%	16.9%	26.8%
15	166	0.4%	10.2%	12.1%	28.3%
16	123	0.3%	15.4%	18.7%	30.9%
17	79	0.2%	11.4%	20.3%	29.1%
18	36	0.1%	11.1%	13.9%	25.0%
19+	18	0.0%	7.1%	35.7%	39.9%
Null	11,389	29.6%	8.9%	5.0%	13.2%

**TABLE 8  
FAILURE RATE BY SCORED RISK LEVEL**

<b>Risk Level</b>	<b>N</b>	<b>%</b>	<b>FTA rate</b>	<b>Rearrest Rate</b>	<b>Either FTA or Rearrest</b>
<b>Base</b>	<b>38,478</b>		<b>8.0%</b>	<b>7.0%</b>	<b>14.1%</b>
Low	17,311	45.0%	6.0%	5.0%	10.4%
Moderate	8,519	22.1%	10.4%	12.5%	20.9%
High	1,031	2.7%	12.1%	18.3%	57.8%
Ineligible	5,722	14.9%	8.4%	4.0%	11.8%
Not Verified	5,895	15.3%	9.4%	6.2%	14.8%

**TABLE 9  
FAILURE RATE BY RELEASE CONDITIONS**

<b>Item</b>	<b>N</b>	<b>%</b>	<b>FTA rate</b>	<b>Rearrest Rate</b>	<b>Either FTA or Rearrest</b>
<b>Base</b>	<b>38,478</b>		<b>8.0%</b>	<b>7.0%</b>	<b>14.1%</b>
Condition - Drug test					
No	37,621	97.8%	8.0%	6.9%	13.9%
Yes	857	2.2%	7.4%	14.6%	20.3%
Condition – Reporting					
No	37,253	96.8%	8.0%	6.8%	13.9%
Yes	1,225	3.2%	8.5%	13.1%	20.4%
Condition - Court Notify					
No	38,304	99.5%	8.0%	7.0%	14.1%
Yes	174	0.5%	10.3%	10.3%	17.8%
Condition – Curfew					
No	38,339	99.6%	8.0%	7.0%	14.1%
Yes	139	0.4%	6.5%	13.7%	17.3%
Condition - Home incarceration					
No	38,455	99.9%	8.0%	7.0%	14.1%
Yes	23	0.1%	8.7%	8.7%	17.4%
Condition - Mental health treatment					
No	38,471	100.0%	8.0%	7.0%	14.1%
Yes	7	0.0%	14.3%	28.6%	28.6%
Condition - drug/alcohol treatment					
No	38,455	99.9%	8.0%	7.0%	14.1%
Yes	23	0.1%	4.3%	17.4%	21.7%
Condition – Other					
No	38,251	99.4%	8.0%	7.0%	14.0%
Yes	227	0.6%	17.2%	12.3%	25.6%

**Table 10  
SUPERVISION CONDITIONS VS. RISK LEVEL**

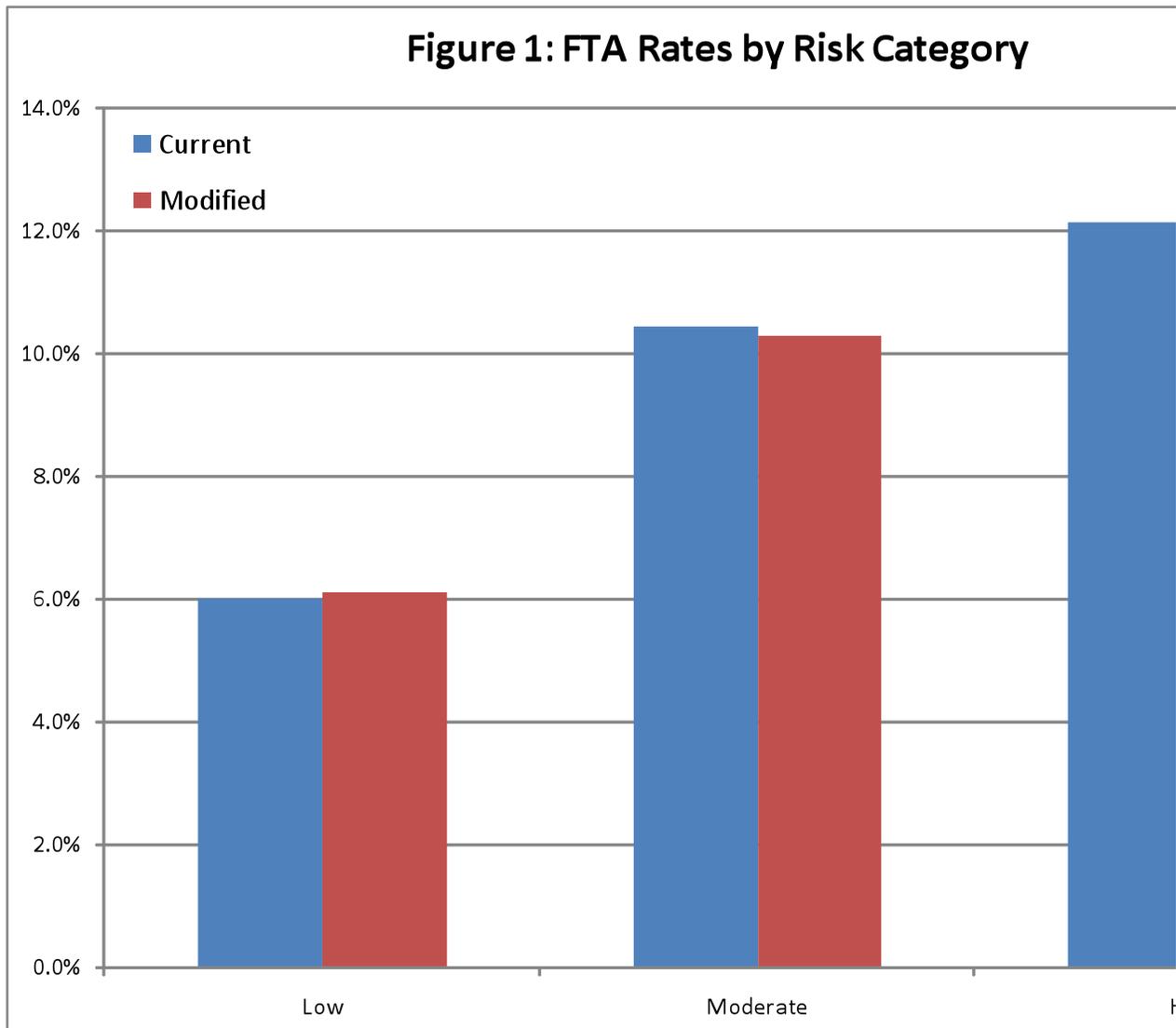
<b>Yes Condition</b>	<b>N</b>	<b>% of Special Conditions</b>	<b>FTA rate</b>	<b>Rearrest Rate</b>	<b>Either FTA or Rearrest</b>
<b>All Low Risk</b>	<b>17,311</b>		<b>6.0</b>	<b>5.0</b>	<b>10.4</b>
Low Risk Condition - Drug test	419	49%	7.2%	8.1%	14.3%
Low Risk Condition - Reporting	565	46%	3.4%	8.1%	13.6%
Low Risk Condition - Notification	82	47%	7.3%	6.1%	11.0%

**Table 11**  
**The Current And New Weighting Rules For The Revised Pretrial Risk Assessment Instrument.**

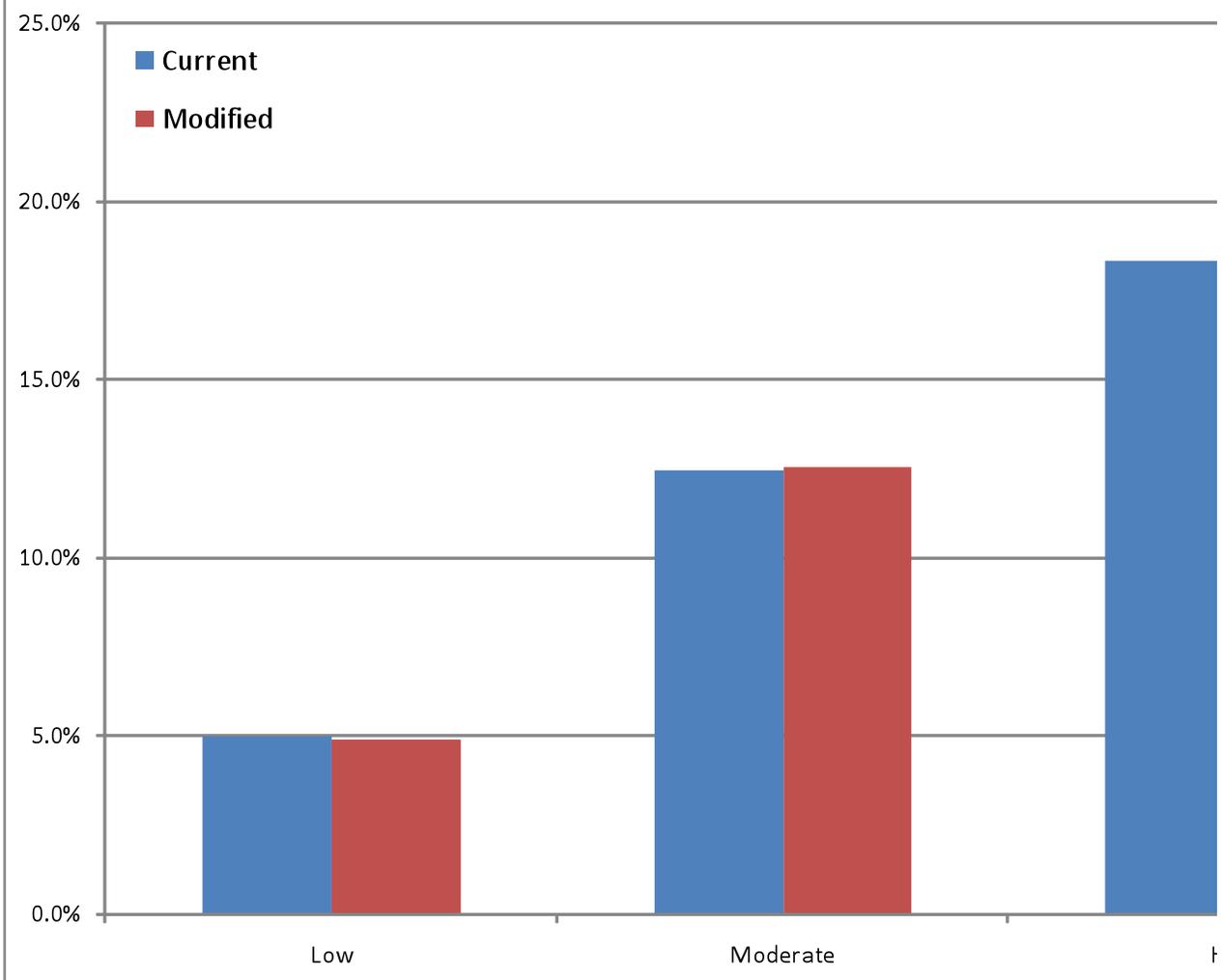
	Scoring Items	Current		Modified	
		Yes	No	Yes	No
1	Does the defendant have a verified local address and has the defendant lived in the area for the past twelve months?		1		2
2	Does the defendant have verified sufficient means of support?		1		1
3	Did a reference verify that he or she would be willing to attend court with the defendant or sign a surety bond?		1	Removed	
4	Is the defendant's current charge a Class A, B, or C Felony?	1		1	
5	Is the defendant charged with a new offense while there is a pending case?	5		7	
6	Does the defendant have an active warrant(s) for Failure to Appear prior to disposition? If no, does the defendant have a prior FTA for felony or misdemeanor?	4		2	
7	Does the defendant have prior FTA on his or her record for a criminal traffic violation?	1		1	
8	Does the defendant have prior misdemeanor convictions?	1		2	
9	Does the defendant have prior felony convictions?	1		1	
10	Does the defendant have prior violent crime convictions?	2		1	
11	Does the defendant have a history of drug/alcohol abuse?	2		2	
12	Does the defendant have a prior conviction for felony escape?	1		3	
13	Is the defendant currently on probation/ parole from a felony conviction?	2		1	
	Did you receive special education services in school for an emotional or behavioral problem?	Not Used			
	Have you ever spoken to a counselor or psychologist about a personal problem?	Not Used			
	Violated conditions of pretrial release in last 12 mos	Not Used			
	If yes, was bond revoked?	Not Used			

**Table 12:  
The Current And New Cut-Points For The Revised Pretrial Risk Assessment Instrument**

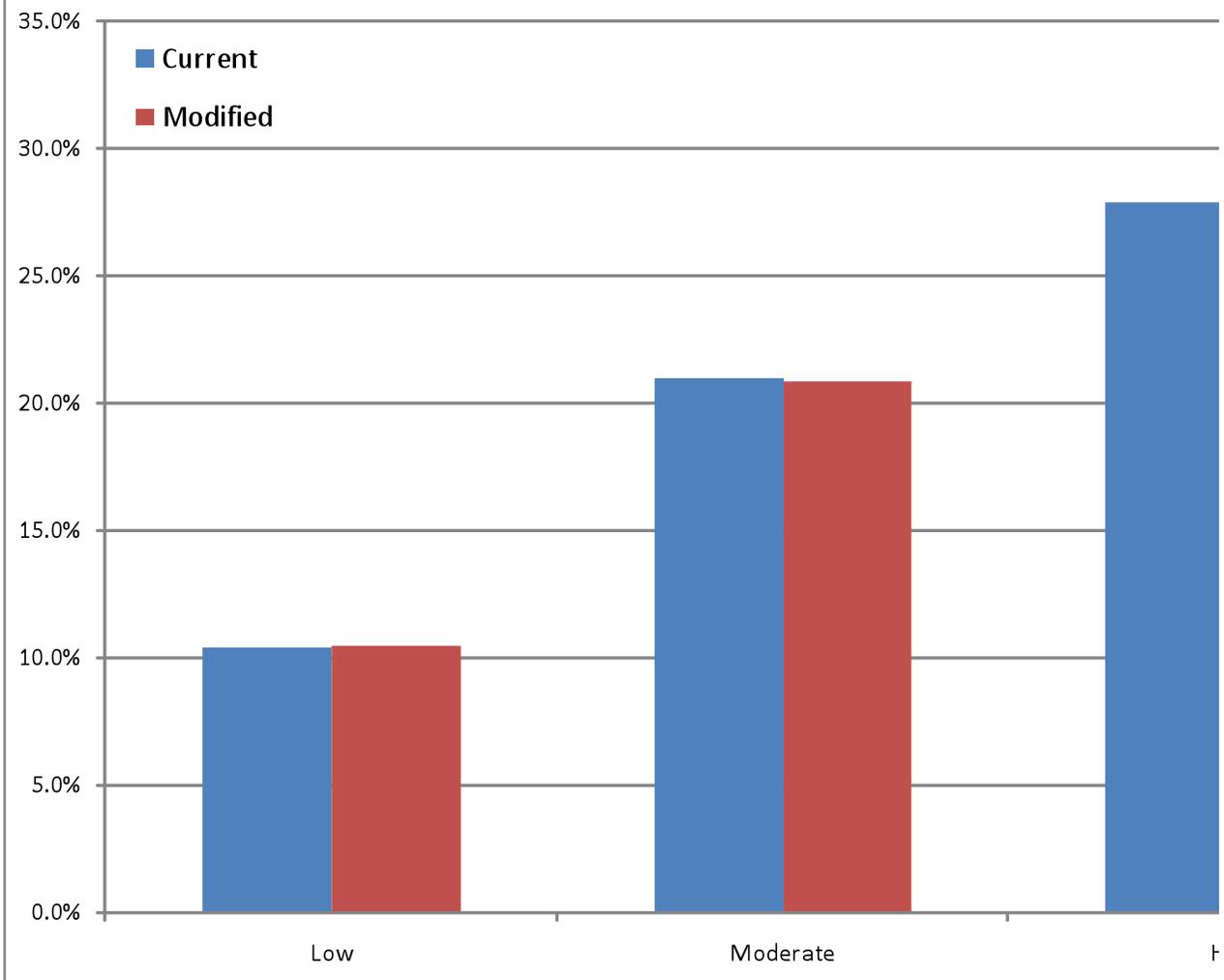
	Current	Modified
Low	0-5	0-5
Moderate	6-12	6-13
High	13-High	14-High



**Figure 2: Rearrest Rates by Risk Category**



**Figure 3: Combined Rearrest or FTA Rates by Risk Category**



## **Post-HB 463**

<b><i>June 8, 2011 to April 8, 2012</i></b>	
Cases	201,122
Defendants	149,408
Investigation Rate	87%
% Obtaining Pretrial Release (140,155)	70%
% of Non-Financial Rel's (ROR, USB, SUR)	66%
% who are still in cust awaiting trial as of 4-16-12	5%
% unable to make bail/held in jail until disp of case	25%
Case disposed within 48 hours of arrest	74%
Apperance Rate	90%
Public Safety Rate*	93%
Low Risk Release Rate	84%
Moderate Risk Release Rate	67%
High Risk Release Rate	50%
Low Risk Appearance Rate	93%
Moderate Risk Appearance Rate	89%
High Risk Appearance Rate	87%
Low Risk Public Safety Rate	95%
Moderate RiskPublic Safety Rate	91%
High Risk Public Safety Rate	88%
% of Cases that are a misd. Or less	71%
% of Def screened as having MH or SA issues	62%
Average Length on PT release	34 days
Average Length on MCR	72 days
MCR Referrals	8,617
Active MCR Caseload on 4-8-12	3,411
MCR Compliance Rate	86%
% of MCR that are Low Risk	42%
MCR Office Visits, Call-In, Curfew, Drug Tests	135,782

## **Pre-HB 463**

<b><i>June 8, 2010 to April 8, 2011</i></b>	
Cases	223,119
Defendants	164,912
Investigation Rate	83%
% Obtaining Pretrial Release (145,401)	65%
% of Non-Financial Rel's (ROR, USB, SUR)	50%
% who were still in cust awaiting trial as of 4-16-12	Less than 1%
% unable to make bail/held in jail until disp of case	35%
Case disposed within 48 hours of arrest	71%
Appearance Rate	89%
Public Safety Rate	91%
Low Risk Release Rate	76%
Moderate Risk Release Rate	60%
High Risk Release Rate	50%
Low Risk Appearance Rate	93%
Moderate Risk Appearance Rate	87%
High Risk Appearance Rate	81%
Low Risk Public Safety Rate	93%
Moderate RiskPublic Safety Rate	88%
High Risk Public Safety Rate	81%
% of Cases that are a misd. Or less	73%
% of Def screened as having MH or SA issues	58%
Average Length on PT release	112 days
Average Length on MCR	110 days
MCR Referrals	6,220
Active MCR Caseload on 4-8-11	2,319
MCR Compliance Rate	87%
% of MCR that are Low Risk	49%
MCR Office Visits, Call-In, Curfew, Drug Tests	106,319

Data from Administrative Office of the Courts, Division of Pretrial Servives PRIM case management system

\*Public Safety Rate is the percentage of defendants who have not been charged with a new crime while on pretrial release

2,397  
1092

29,463



# Pretrial Release and FTA Rate Measurement

Interviews from 06/08/2011 to 06/08/2012

## Release Rates

	Charge County	Total Cases	Total Cases Released	
1	OHIO	949	827	87.14%
2	CLINTON	438	369	84.25%
3	MARTIN	587	488	83.13%
4	JOHNSON	1345	1112	82.68%
5	RUSSELL	902	741	82.15%
6	LAWRENCE	510	417	81.76%
7	WASHINGTON	306	247	80.72%
8	BARREN	1804	1442	79.93%
9	BUTLER	425	338	79.53%
10	FLEMING	685	542	79.12%
11	OLDHAM	1404	1108	78.92%
12	CUMBERLAND	218	172	78.90%
13	METCALFE	269	212	78.81%
14	ADAIR	782	614	78.52%
15	MARION	1213	945	77.91%
16	EDMONSON	319	247	77.43%
17	BELL	2690	2081	77.36%
18	NICHOLAS	494	376	76.11%
19	WEBSTER	511	387	75.73%
20	GRAVES	2810	2119	75.41%
21	PENDLETON	538	404	75.09%
22	MAGOFFIN	646	485	75.08%
23	ROCKCASTLE	1362	1022	75.04%
24	MONROE	401	299	74.56%
25	HENRY	895	665	74.30%
26	TAYLOR	1148	852	74.22%
27	GREEN	358	265	74.02%
28	HARRISON	831	615	74.01%
29	TRIMBLE	380	280	73.68%
30	UNION	768	562	73.18%
31	MCCREARY	847	619	73.08%
32	BULLITT	3220	2352	73.04%
33	CASEY	613	445	72.59%
34	MARSHALL	998	722	72.34%
35	WHITLEY	2323	1678	72.23%

36	MEADE	1118	807	72.18%
37	HARLAN	2348	1690	71.98%
38	SPENCER	619	444	71.73%
39	JACKSON	805	570	70.81%
40	BOONE	6832	4808	70.37%
41	LETCHER	1508	1057	70.09%
42	JEFFERSON	47283	33042	69.88%
43	PULASKI	3840	2682	69.84%
44	HANCOCK	234	163	69.66%
45	BRACKEN	242	168	69.42%
46	MASON	1562	1084	69.40%
47	HARDIN	4302	2963	68.87%
48	GRAYSON	1032	710	68.80%
49	ALLEN	1223	839	68.60%
50	GALLATIN	692	474	68.50%
51	HART	1149	787	68.49%
52	CARTER	1569	1074	68.45%
53	HOPKINS	2997	2050	68.40%
54	TRIGG	645	439	68.06%
55	LARUE	587	397	67.63%
56	SCOTT	1869	1264	67.63%
57	MORGAN	664	449	67.62%
58	MCLEAN	262	177	67.56%
59	MUHLENBERG	1055	712	67.49%
60	PERRY	3017	2035	67.45%
61	FRANKLIN	2622	1764	67.28%
62	BRECKINRIDGE	623	417	66.93%
63	CLAY	2057	1376	66.89%
64	NELSON	1883	1259	66.86%
65	KNOX	2457	1629	66.30%
66	LYON	326	216	66.26%
67	ELLIOTT	300	198	66.00%
68	WOODFORD	751	495	65.91%
69	ROWAN	1821	1199	65.84%
70	SIMPSON	1483	970	65.41%
71	OWEN	482	314	65.15%
72	LESLIE	626	407	65.02%
73	OWSLEY	539	347	64.38%
74	HENDERSON	4163	2674	64.23%
75	MADISON	4410	2822	63.99%

76	BATH	591	378	63.96%
77	ANDERSON	1134	721	63.58%
78	WAYNE	829	527	63.57%
79	MENIFEE	258	164	63.57%
80	LIVINGSTON	351	222	63.25%
81	BALLARD	436	275	63.07%
82	CALLOWAY	1208	759	62.83%
83	CARROLL	1202	754	62.73%
84	ROBERTSON	75	47	62.67%
85	MERCER	935	579	61.93%
86	WARREN	5254	3244	61.74%
87	KENTON	9253	5708	61.69%
88	PIKE	5005	3075	61.44%
89	DAVIESS	6229	3826	61.42%
90	BREATHITT	1022	627	61.35%
91	SHELBY	2277	1391	61.09%
92	CALDWELL	583	356	61.06%
93	LAUREL	3575	2180	60.98%
94	BOURBON	1021	622	60.92%
95	KNOTT	649	393	60.55%
96	LEWIS	442	267	60.41%
97	LOGAN	1204	718	59.63%
98	CLARK	2215	1318	59.50%
99	LEE	830	493	59.40%
100	ESTILL	1209	715	59.14%
101	MONTGOMERY	1964	1160	59.06%
102	GRANT	1332	774	58.11%
103	BOYLE	2051	1189	57.97%
104	CRITTENDEN	261	151	57.85%
105	CHRISTIAN	4605	2627	57.05%
106	FLOYD	2564	1448	56.47%
107	HICKMAN	136	76	55.88%
108	WOLFE	612	342	55.88%
109	GARRARD	621	343	55.23%
110	LINCOLN	1442	791	54.85%
111	FULTON	634	344	54.26%
112	GREENUP	1267	687	54.22%
113	POWELL	1522	822	54.01%
114	BOYD	3090	1629	52.72%
115	JESSAMINE	3196	1666	52.13%

116	TODD	409	210	51.34%
117	CAMPBELL	5731	2926	51.06%
118	FAYETTE	15324	7427	48.47%
119	MCCRACKEN	4660	2208	47.38%
120	CARLISLE	141	60	42.55%

## FTA Rates

	Charge County	Total Cases	Total Cases Released	FTA	
1	MCLEAN	262	177	2	1.13%
2	CARLISLE	141	60	1	1.67%
3	CALLOWAY	1208	759	19	2.50%
4	OWEN	482	314	11	3.50%
5	BRACKEN	242	168	6	3.57%
6	SPENCER	619	444	17	3.83%
7	TODD	409	210	9	4.29%
8	HANCOCK	234	163	7	4.29%
9	MUHLENBERG	1055	712	31	4.35%
10	WASHINGTON	306	247	11	4.45%
11	MARSHALL	998	722	34	4.71%
12	UNION	768	562	28	4.98%
13	FLEMING	685	542	28	5.17%
14	TAYLOR	1148	852	47	5.52%
15	ANDERSON	1134	721	40	5.55%
16	MONROE	401	299	17	5.69%
17	PENDLETON	538	404	23	5.69%
18	TRIGG	645	439	25	5.69%
19	GREENUP	1267	687	41	5.97%
20	WOODFORD	751	495	30	6.06%
21	FULTON	634	344	21	6.10%
22	MCCREARY	847	619	38	6.14%
23	BALLARD	436	275	17	6.18%
24	GRANT	1332	774	48	6.20%
25	LIVINGSTON	351	222	14	6.31%
26	HARRISON	831	615	39	6.34%
27	LEWIS	442	267	17	6.37%
28	GRAVES	2810	2119	135	6.37%
29	CARROLL	1202	754	49	6.50%
30	BOYLE	2051	1189	78	6.56%
31	MENIFEE	258	164	11	6.71%
32	GALLATIN	692	474	32	6.75%
33	NELSON	1883	1259	87	6.91%
34	LYON	326	216	16	7.41%
35	METCALFE	269	212	16	7.55%
36	MERCER	935	579	45	7.77%
37	CLINTON	438	369	29	7.86%
38	BOURBON	1021	622	50	8.04%

39	MCCRACKEN	4660	2208	178	8.06%
40	GRAYSON	1032	710	58	8.17%
41	MORGAN	664	449	37	8.24%
42	WEBSTER	511	387	32	8.27%
43	JACKSON	805	570	48	8.42%
44	LOGAN	1204	718	62	8.64%
45	SHELBY	2277	1391	122	8.77%
46	NICHOLAS	494	376	33	8.78%
47	WHITLEY	2323	1678	148	8.82%
48	JESSAMINE	3196	1666	147	8.82%
49	MEADE	1118	807	73	9.05%
50	OHIO	949	827	75	9.07%
51	LETCHER	1508	1057	96	9.08%
52	LINCOLN	1442	791	72	9.10%
53	CALDWELL	583	356	33	9.27%
54	TRIMBLE	380	280	26	9.29%
55	HOPKINS	2997	2050	191	9.32%
56	CLARK	2215	1318	124	9.41%
57	MADISON	4410	2822	266	9.43%
58	DAVIESS	6229	3826	374	9.78%
59	BARREN	1804	1442	141	9.78%
60	LAUREL	3575	2180	218	10.00%
61	HENDERSON	4163	2674	270	10.10%
62	LEE	830	493	50	10.14%
63	BATH	591	378	39	10.32%
64	HARDIN	4302	2963	307	10.36%
65	MARION	1213	945	98	10.37%
66	GARRARD	621	343	36	10.50%
67	HICKMAN	136	76	8	10.53%
68	ROCKCASTLE	1362	1022	110	10.76%
69	ADAIR	782	614	67	10.91%
70	MASON	1562	1084	119	10.98%
71	HART	1149	787	87	11.05%
72	PERRY	3017	2035	226	11.11%
73	ESTILL	1209	715	80	11.19%
74	CRITTENDEN	261	151	17	11.26%
75	EDMONSON	319	247	28	11.34%
76	FLOYD	2564	1448	167	11.53%
77	OLDHAM	1404	1108	128	11.55%
78	CHRISTIAN	4605	2627	306	11.65%

79	BULLITT	3220	2352	275	11.69%
80	CLAY	2057	1376	162	11.77%
81	WAYNE	829	527	63	11.95%
82	BRECKINRIDGE	623	417	50	11.99%
83	ALLEN	1223	839	101	12.04%
84	GREEN	358	265	32	12.08%
85	BUTLER	425	338	41	12.13%
86	FRANKLIN	2622	1764	214	12.13%
87	MAGOFFIN	646	485	59	12.16%
88	CUMBERLAND	218	172	21	12.21%
89	HARLAN	2348	1690	207	12.25%
90	WARREN	5254	3244	398	12.27%
91	SIMPSON	1483	970	121	12.47%
92	BREATHITT	1022	627	79	12.60%
93	ROWAN	1821	1199	154	12.84%
94	MARTIN	587	488	63	12.91%
95	KNOTT	649	393	51	12.98%
96	BOYD	3090	1629	212	13.01%
97	ELLIOTT	300	198	26	13.13%
98	SCOTT	1869	1264	166	13.13%
99	MONTGOMERY	1964	1160	157	13.53%
100	CASEY	613	445	61	13.71%
101	LARUE	587	397	55	13.85%
102	KNOX	2457	1629	228	14.00%
103	POWELL	1522	822	118	14.36%
104	RUSSELL	902	741	109	14.71%
105	KENTON	9253	5708	854	14.96%
106	LAWRENCE	510	417	64	15.35%
107	CAMPBELL	5731	2926	450	15.38%
108	CARTER	1569	1074	166	15.46%
109	BELL	2690	2081	322	15.47%
110	HENRY	895	665	105	15.79%
111	WOLFE	612	342	54	15.79%
112	OWSLEY	539	347	57	16.43%
113	BOONE	6832	4808	792	16.47%
114	FAYETTE	15324	7427	1249	16.82%
115	JOHNSON	1345	1112	193	17.36%
116	PULASKI	3840	2682	475	17.71%
117	PIKE	5005	3075	567	18.44%
118	ROBERTSON	75	47	9	19.15%

119	JEFFERSON	47283	33042	6899	20.88%
120	LESLIE	626	407	85	20.88%

## Re-arrest Rates

	Charge County	Total Cases	Total Cases Released	Re-arrest	
1	HANCOCK	234	163	2	1.23%
2	HICKMAN	136	76	1	1.32%
3	OWEN	482	314	7	2.23%
4	BRECKINRIDGE	623	417	11	2.64%
5	HENDERSON	4163	2674	72	2.69%
6	MEADE	1118	807	22	2.73%
7	GREENUP	1267	687	21	3.06%
8	CARLISLE	141	60	2	3.33%
9	TODD	409	210	7	3.33%
10	GRAYSON	1032	710	24	3.38%
11	LYON	326	216	8	3.70%
12	HARDIN	4302	2963	116	3.91%
13	CALLOWAY	1208	759	30	3.95%
14	LAWRENCE	510	417	17	4.08%
15	CHRISTIAN	4605	2627	109	4.15%
16	BALLARD	436	275	12	4.36%
17	BOYD	3090	1629	74	4.54%
18	FULTON	634	344	16	4.65%
19	FLEMING	685	542	26	4.80%
20	MENIFEE	258	164	8	4.88%
21	CARROLL	1202	754	37	4.91%
22	GRANT	1332	774	38	4.91%
23	LOGAN	1204	718	36	5.01%
24	KNOTT	649	393	20	5.09%
25	BOONE	6832	4808	251	5.22%
26	HENRY	895	665	35	5.26%
27	GALLATIN	692	474	25	5.27%
28	LIVINGSTON	351	222	12	5.41%
29	ALLEN	1223	839	46	5.48%
30	LARUE	587	397	22	5.54%
31	ELLIOTT	300	198	11	5.56%
32	HART	1149	787	44	5.59%
33	SHELBY	2277	1391	78	5.61%
34	MCCRACKEN	4660	2208	125	5.66%
35	FRANKLIN	2622	1764	102	5.78%
36	MUHLENBERG	1055	712	43	6.04%
37	KENTON	9253	5708	351	6.15%
38	CAMPBELL	5731	2926	182	6.22%

39	WOODFORD	751	495	31	6.26%
40	TRIGG	645	439	28	6.38%
41	SIMPSON	1483	970	62	6.39%
42	NELSON	1883	1259	81	6.43%
43	BRACKEN	242	168	11	6.55%
44	MERCER	935	579	38	6.56%
45	DAVISS	6229	3826	255	6.66%
46	BREATHITT	1022	627	42	6.70%
47	WARREN	5254	3244	218	6.72%
48	LEWIS	442	267	18	6.74%
49	LAUREL	3575	2180	147	6.74%
50	FLOYD	2564	1448	98	6.77%
51	ROWAN	1821	1199	82	6.84%
52	ESTILL	1209	715	49	6.85%
53	LESLIE	626	407	28	6.88%
54	ANDERSON	1134	721	50	6.93%
55	CASEY	613	445	31	6.97%
56	MARTIN	587	488	34	6.97%
57	MAGOFFIN	646	485	34	7.01%
58	GRAVES	2810	2119	150	7.08%
59	MASON	1562	1084	78	7.20%
60	PERRY	3017	2035	147	7.22%
61	WASHINGTON	306	247	18	7.29%
62	CALDWELL	583	356	26	7.30%
63	LETCHER	1508	1057	78	7.38%
64	MARION	1213	945	70	7.41%
65	PIKE	5005	3075	231	7.51%
66	SCOTT	1869	1264	95	7.52%
67	BOYLE	2051	1189	90	7.57%
68	GARRARD	621	343	26	7.58%
69	OLDHAM	1404	1108	84	7.58%
70	UNION	768	562	43	7.65%
71	MCCREARY	847	619	48	7.75%
72	FAYETTE	15324	7427	576	7.76%
73	HOPKINS	2997	2050	159	7.76%
74	MADISON	4410	2822	222	7.87%
75	POWELL	1522	822	65	7.91%
76	BATH	591	378	30	7.94%
77	CRITTENDEN	261	151	12	7.95%
78	MARSHALL	998	722	58	8.03%

79	EDMONSON	319	247	20	8.10%
80	PULASKI	3840	2682	222	8.28%
81	SPENCER	619	444	37	8.33%
82	TAYLOR	1148	852	71	8.33%
83	KNOX	2457	1629	136	8.35%
84	PENDLETON	538	404	34	8.42%
85	MORGAN	664	449	38	8.46%
86	WEBSTER	511	387	33	8.53%
87	BUTLER	425	338	29	8.58%
88	ADAIR	782	614	53	8.63%
89	JOHNSON	1345	1112	96	8.63%
90	OWSLEY	539	347	30	8.65%
91	OHIO	949	827	72	8.71%
92	WHITLEY	2323	1678	147	8.76%
93	JESSAMINE	3196	1666	146	8.76%
94	BOURBON	1021	622	55	8.84%
95	TRIMBLE	380	280	25	8.93%
96	LINCOLN	1442	791	71	8.98%
97	HARLAN	2348	1690	152	8.99%
98	MCLEAN	262	177	16	9.04%
99	LEE	830	493	45	9.13%
100	JEFFERSON	47283	33042	3019	9.14%
101	HARRISON	831	615	57	9.27%
102	CUMBERLAND	218	172	16	9.30%
103	CARTER	1569	1074	101	9.40%
104	MONTGOMERY	1964	1160	110	9.48%
105	BELL	2690	2081	198	9.51%
106	BULLITT	3220	2352	225	9.57%
107	RUSSELL	902	741	74	9.99%
108	WAYNE	829	527	53	10.06%
109	CLARK	2215	1318	134	10.17%
110	WOLFE	612	342	35	10.23%
111	BARREN	1804	1442	153	10.61%
112	JACKSON	805	570	64	11.23%
113	CLINTON	438	369	43	11.65%
114	ROCKCASTLE	1362	1022	122	11.94%
115	GREEN	358	265	37	13.96%
116	METCALFE	269	212	30	14.15%
117	CLAY	2057	1376	195	14.17%
118	MONROE	401	299	46	15.38%

119	NICHOLAS	494	376	59	15.69%
120	ROBERTSON	75	47	8	17.02%



# **CRIMINAL LAW REFORM: THE FIRST YEAR OF HB 463**

CLE Credit: 1.0  
Wednesday, June 6, 2012  
10:45 a.m. - 11:45 a.m.  
Grand Ballroom  
Galt House Hotel  
Louisville, Kentucky

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**HB 463 -- STATEMENT FROM THE SPONSORS**  
Sen. Tom Jensen (R - London) and Rep. John Tilley (D - Hopkinsville)

---

Over the past decade, Kentucky has had one of the fastest growing prison populations in the country. Since 2000, the inmate population increased 45 percent, compared to 13 percent for the U.S. state prison system as a whole. This growth has driven the state's corrections spending to \$440 million a year, an increase of more than 330 percent over the last twenty years, despite the fact that the state's serious crime rate has been well below that of the nation and other southern states since the 1960s. It has been clear for some time that Kentucky cannot continue down the path we have taken during the last decade, when the crime rate remained relatively low, but the growth in our prison population far outpaced the national average.

In 2010, Kentucky lawmakers created the Task Force on the Penal Code and Controlled Substances Act to recommend changes we could make to the state's penal code and drug laws that would control the growth in corrections while maintaining public safety. In addition to our membership as co-chairs, the task force members were: Chief Justice John D. Minton Jr.; J. Michael Brown, the Secretary of the Justice and Public Safety Cabinet; LaRue County Judge/Executive Tommy Turner; Tom Handy, a former prosecutor; and Guthrie True, a former public defender.

As co-chairs of the task force, we maintained an open, bipartisan, inter-branch, data-driven process involving considerable outreach to and participation from stakeholders representing diverse interests in the criminal justice and public safety areas, including judges, prosecutors, public defenders, victims' advocates, law enforcement officials, local government officials, jailers and others. The task force also received support and technical assistance from the experts at the nationally-respected, nonpartisan Public Safety Performance Project of the Pew Center on the States to develop fiscally sound, data-driven policy recommendations that will give taxpayers a better return on their public safety dollars.

For six months in 2010, we jointly led this bipartisan group of stakeholders from across state and local government on a quest to reduce Kentucky's prison costs and increase the public's return on our corrections investment by reducing recidivism and incarceration rates. The task force conducted an extensive review of Kentucky's corrections data to identify what was driving increases in the state's prison population and costs, and the task force crafted recommendations for legislative reform based on that data.

**I. THE TASK FORCE IDENTIFIED FOUR KEY DRIVERS OF KENTUCKY'S PRISON GROWTH**

**A. An Increase in Arrests and Court Cases**

While reported crime remained basically flat between 2001 and 2009, adult arrest rates increased 32 percent during that time, and drug arrests increased 70 percent.

B. A High Percentage of Offenders Being Sent to Prison

Kentucky uses prison as opposed to probation or other alternative sentences at a much higher rate than most other states.

C. Technical Parole Violators

Offenders on parole who are sent back to prison and who do not have a new felony conviction have nearly doubled as a percentage of prison admissions.

D. Drug Offenders

The Kentucky Department of Corrections reported that between 2000 and 2009, the percentage of all admissions that were drug offenders rose from 30 percent to 38 percent.

During the 2011 Regular Session of the General Assembly, we introduced identical bills in both the Senate and the House of Representatives. These bills incorporated the recommendations of the Task Force, as well as recommendations from other stakeholders. Now, as Kentucky works to implement those changes with the passage of House Bill 463 signed into law on March 3, those six months of work are about to pay off.

**II. THE PROVISIONS IN HOUSE BILL 463 FOCUS ON:**

A. Strengthening probation and parole by basing key decisions on the risk posed by offenders, linking offenders to appropriate community resources, and improving parole and probation supervision.

B. Modernizing drug laws by distinguishing serious drug trafficking from peddling to support an addiction by establishing a proportionate scale of penalties based on quantity of drugs sold and by providing deferred prosecution, presumptive probation and reduced prison time for low-risk, non-violent drug offenders who possess drugs and reinvesting related savings in increasing drug treatment for those offenders who need it.

C. Supporting and restoring victims by improving restitution and creating web-based tools to provide key information on offenders.

D. Improving government performance with better ways to measure and encourage a reduction in recidivism and criminal behavior.

The reforms in House Bill 463 are expected to bring a gross savings of \$422 million over ten years by reducing the state's burgeoning prison population. Net savings of \$218 million will likely accrue over ten years, with \$204 million to be reinvested in stronger probation and parole programs, expanded drug treatments and the addition of more pretrial services. Twenty-five percent of savings unrelated to changes in the drug laws will be put into a new local corrections assistance fund to help local jails, garnering full support from our counties.

Without the work of the Task Force on the Penal Code and Controlled Substances Act, the 2011 General Assembly would not have been able to pass the major criminal justice reforms found in House Bill 463 as quickly as we did. Changes to the penal code would likely have continued to be made in a piecemeal fashion. By including reauthorization of the task force as a provision of House Bill 463, lawmakers have ensured future deliberations without delay and with the best possible outcome for Kentucky.

Changes similar to those made in House Bill 463 have been implemented in other states, including Texas, Kansas and South Carolina, with much success. These states have seen a drop in both their crime rate and corrections costs. There is no reason to believe, based on the evidence, that Kentucky will not enjoy similar success under the most far-reaching criminal justice reforms Kentucky has seen in generations.

House Bill 463 is the result of nearly every major group affected by the changes in the law coming together to create something better. Kentucky will be better off because of its passage.



Revolutionary in its scope and concept, House Bill 463 will affect every facet of the criminal justice system, reforming counterproductive and expensive practices while protecting public safety and maintaining accountability for lawbreakers. Such grand promise will only materialize, however, if all players in the system are familiar with the new laws and are willing to ensure their full implementation. This article summarizes the various parts of the bill. Future editions of The Advocate will delve more deeply into specific provisions.

Generally, the most significant changes to the law in House Bill 463 can be broken into the following categories:

**I. EXPANSION OF PRETRIAL RELEASE**

Changes to the law will result in responsible expansion and consistency in the pretrial release of persons accused of crimes. The most significant advancement is the mandatory use of a "research-based, validated assessment tool" to measure a defendant's risk of flight or of posing a risk to the public. In most circumstances, defendants who are low or moderate risk will be released without financial bail being required. For moderate risk defendants, courts will be empowered to impose reasonable non-financial conditions to address any concerns raised by the assessment. Defendants who remain in jail pretrial will be entitled to a daily credit towards their bond, unless they are a flight risk or a risk to others.

Because of these changes, county jails will not bear the expense of housing pretrial defendants who are not a high risk. Further, low or moderate risk defendants who cannot post a financial bond will not serve additional jail time solely due to their poverty and those who are innocent will not serve time at all upon their release. Upon a conviction, a court can impose an appropriate sentence and the guilty person will be held accountable for their criminal activity.

**II. REFORM OF CRIMINAL DRUG STATUTES**

The changes to the drug laws were made in recognition of some basic principles:

- A. Not All Trafficking Offenses Are Equal,
- B. Drug Possession Should Be Addressed through Supervision and Treatment, and
- C. Subsequent Offender Sentencing Enhancements Are Not Appropriate in the Drug Possession Context.

### **III. TRAFFICKING OFFENSES**

Thresholds were established to distinguish between low-level peddlers and higher-level traffickers. Defendants convicted of trafficking in amounts above the new thresholds will face the same range of penalties and enhancements as under the former law. Those convicted of trafficking in lower amounts will face lesser punishments. Separate trafficking incidents within a ninety-day period may be aggregated to reach the new thresholds.

Thresholds for selected drugs:

- A. Cocaine -- four grams
- B. Heroin or Methamphetamine -- two grams
- C. LSD, PCP, GHB or Rohypnol -- No threshold; any quantity is higher level
- D. Other Schedule I or II Controlled Substances -- ten or more dosage units
- E. Schedule III Controlled Substances -- twenty or more dosage units

### **IV. DRUG POSSESSION**

Defendants charged with felony drug possession will face a possible penalty of one to three years (reduced from a range of one to five years), but will be subject to Deferred Prosecution or Presumptive Probation for first or second offenses with the legislature deeming Deferred Prosecution as the preferred alternative for first offenses.

- A. Deferred Prosecution – Eligible defendants will be able to have prosecution deferred for up to two years while participating in a probation-like program of supervision and treatment. Upon successful completion, the criminal charge will not only be dismissed, but expunged and sealed as if the charge never existed. If a defendant fails in the deferral program, he/she can then be prosecuted as usual, with all other options remaining available as appropriate. In the event a prosecutor objects to an eligible defendant's participation in the program, the prosecutor must state on the record "substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety."
- B. Presumptive Probation – For defendants who are convicted of a first or second offense of felony drug possession, probation is mandatory unless the sentencing court finds "substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety."
- C. Sentencing Enhancements – Defendants convicted of trafficking drugs will still be subject to all former sentencing enhancements, but many enhancements for other drug offenders have been eliminated.

- D. Persistent Felony Offender (PFO) – Felony drug possession can no longer be enhanced by PFO and a prior felony drug possession conviction cannot be used as a predicate for later PFO enhancements unless the defendant has been convicted of a different felony since the drug possession conviction.
- E. Subsequent Offender Enhancements – Raising the penalty for second or subsequent drug offenses have been eliminated from most non-trafficking statutes.

## **V. COMMUNITY SUPERVISION CHANGES**

Community supervision encompasses probation, parole and post-incarceration supervision. Under all three programs, a research-based validated Risk and Needs Assessment will be used to determine supervision/treatment needs and progress on an individualized case plan developed for each supervised person. When a supervised person demonstrates prolonged compliance and meets other conditions, he/she may be removed from active supervision. In the event of violations, a system of graduated sanctions will be developed to hold offenders accountable without court proceedings or Parole Board hearings being required for many technical violations. Revocation and re-incarceration for failure to abide by conditions of supervision is only authorized "when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the community."

## **VI. RE-ENTRY OR POST-INCARCERATION SUPERVISION**

Almost every person who is incarcerated in prison will face a period of supervision upon their release. For sex offenders, the five-year period previously conditionally discharged now is reestablished as a period of supervision under the authority of the Parole Board. For certain "dangerous" offenders (those convicted of an A felony or capital offense, ineligible for parole, or who have a maximum security classification), an additional one-year period of supervision will be added to the end of their sentence. For everyone else, release on parole will be mandatory when a prisoner has six months remaining on his/her sentence unless the total sentence is two years or less or the person has less than six months to serve after final sentencing or recommitment after a violation of supervision.

## **VII. ARREST POWERS**

With limited exceptions, law enforcement officers must issue citations for misdemeanors, even when committed in the officer's presence.

## **IX. NONPAYMENT OF FINES**

Defendants found guilty of non-payment of fines may be sentenced to jail for nonpayment or nonappearance in court to address nonpayment, but may satisfy the unpaid fine at a rate of \$50 per day (or \$100 per day if working in community service while incarcerated).

Many other provisions of HB 463 make changes that fall outside these general categories. The full text of the bill and other resources to assist lawyers, judges, and others in understanding and implementing the bill are available at: <http://theadvocate.posterous.com/tag/hb463>.

**CHANGES IN PRETRIAL RELEASE FROM HB 463:  
"THE NEW PENAL CODE AND CONTROLLED SUBSTANCES ACT"**

Brian Scott West

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Many changes to the drug and penal codes were made by HB 463 involving reclassification of offenses, reformation of sentencing provisions, and other general changes which incorporate efficient and realistic methods for punishing and rehabilitating convicted lawbreakers, while at the same time promoting concerns of public safety. However, the new act also made changes in the law of pretrial release, reaffirming in a substantial way Kentucky's commitment to the age-old venerable constitutional principle of "innocent until proven guilty."

**I. UNSECURED OR "OWN RECOGNIZANCE" BONDS FOR LOW OR MEDIUM RISK ARRESTED DEFENDANTS PRESUMED**

HB 463 created a new section KRS Chapter 431 which applies to any defendant arrested for any crime and which makes mandatory an unsecured or "own recognizance" bond for certain individuals. KRS 431.066(1) provides that "[w]hen a court considers pretrial release and bail for an arrested defendant, the court shall consider whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released." Subsections (2) and (3) provide generally that if the defendant poses a low or moderate risk of flight, is likely to appear for trial, and is not likely to be a danger to others, the court SHALL order the defendant released on unsecured bond or his own recognizance, and in the case of a moderate risk, the court shall consider ordering the defendant to participate in GPS monitoring, controlled substance testing, increased supervision, or other conditions.

**II. PRETRIAL RELEASE FOR "PRESUMPTIVE PROBATION" DRUG OFFENSES**

HB 463 created a new section in the drug code, KRS 218A.135, which provides mandatory unsecured or "own recognizance" bond for persons who are charged with offenses that could result in "presumptive probation." KRS 218A.135(1). These offenses are described elsewhere in KRS Chapter 218A, but basically are trafficking in a controlled substance 3rd (under 20 units) and possession of a controlled substance in the 1st. These provisions shall not apply to a defendant who is found by the court to present a flight risk, or a danger to himself, herself or others. KRS 218A.135(2). If a court determines that the defendant is such a risk, the court shall document the reasons for denying the release in a written order. KRS 218A.135(3). Impliedly, a finding of danger to himself, herself or others requires a finding that the defendant has done more than merely possess, transfer or sell drugs, since the provision applies ONLY to possession and trafficking offenses, and such limited findings would effectively write the word "shall" out of the statute.

### **III. CREDIT TOWARD BAIL FOR TIME IN JAIL PRESUMED**

KRS 431.066(4)(a) provides that -- regardless of the amount of bail set -- the court shall permit a defendant a credit of one hundred dollars for each day, or any portion of a day, as payment toward the amount of bail set. Upon service of sufficient days to satisfy the bail, the Court SHALL order the release of the defendant from jail on conditions specified in Chapter 431.

Subsection (b), however, specifies that bail credit shall not apply to anyone who is convicted of, or is pleading guilty (or entering an Alford plea) to any felony sex offense under KRS Chapter 510, human trafficking involving commercial sexual activity, incest, unlawful transaction with a minor involving sexual activity, promoting or using a minor in a sexual performance, or any "violent offender" as defined in KRS 439.3401. Bail credit shall also be denied for anyone found by the court to be a flight risk or a danger to others. If bail credit is denied for any reason, the Court SHALL document the reasons in a written order. KRS 431.066(5).

### **IV. MAXIMUM BAIL RULE FOR MULTIPLE MISDEMEANORS**

KRS 431.525 has been amended to require -- when a person has been charged with one or more misdemeanors -- that the amount of bail for all charges shall be set in a single amount that shall not exceed the amount of the fine and court costs for the highest misdemeanor charged. KRS 431.525(4). When a person has been convicted of a misdemeanor and a sentence of jail, conditional discharge, probation, or any sentence other than a "fine only," the amount of bail for release on appeal shall not exceed double the amount of the maximum fine that could have been imposed for the highest misdemeanor of which the defendant stands convicted. KRS 431.525(5). Neither provision applies to misdemeanors involving physical injury or sexual conduct, or to any person found by the court to present a flight risk or to be a danger to others. KRS 431.525(4)-(6). If a person is found to present a flight risk or a danger to others, the court SHALL document the reasons in a written order. KRS 431.525(7).

### **V. JUDICIAL GUIDELINES FOR PRETRIAL RELEASE OF MODERATE-RISK OR HIGH-RISK DEFENDANTS**

Most of the HB 463 pretrial release provisions refer to persons who are found to be at a "low risk" or "moderate risk" to flee, not come to court, or pose a danger to others. However, the General Assembly also put language into the bill for those persons who are found to be high or moderate risk, and who otherwise would be ordered to a local correctional facility while awaiting trial. For those persons, the Supreme Court is required to establish recommended guidelines for judges to use when determining whether pretrial release or monitored conditional release should be ordered, and setting the terms of such release and/or monitoring. KRS 27A.096. Likewise, KRS 431.067 provides that, when considering the pretrial release of a person whose pretrial risk assessment indicates he or she is a moderate or high risk defendant, the court considering the release may order as a condition of pretrial release that the person participate in a GPS monitoring program.

## **VI. EVIDENCE-BASED PRACTICES**

Section 49 of HB 463 (not yet codified), effective July 1, 2013, specifies that the Supreme Court SHALL require that vendors or contractors who are funded by the state and who are providing supervision and intervention programs for adult criminal defendants use "evidence-based practices" to measure the effectiveness of their supervision and monitoring services. As used in this section, "evidence-based practices" means intervention programs and supervision policies, procedures, programs, and practices that scientific research demonstrates reduce instances of a defendant's failure to appear in court and criminal activity among pretrial defendants when implemented competently." Evidence-based practices are already being used by pretrial officers of the Administrative Office of the Courts. These assessments categorize a defendant as a low, moderate or high risk to flee, to not appear in court, or to pose a danger to the public. In KRS 446.010(33), "pretrial risk assessment" is defined as "an objective, research-based, validated assessment tool that measures a defendant's risk of flight and risk of anticipated criminal conduct while on pretrial release pending adjudication." AOC's assessment bases its results upon answers to objective, not subjective, questions and has already been validated by an independent, federally funded organization (the JFA Institute).

Nearly every decision made about pretrial release begins with a court finding as to whether the defendant is a low, moderate or high risk to flee, not appear, or pose a danger to the public (and in the case of "presumptive probation" offenses, danger to self), thereby incorporating into the judicial decision the risks found by the assessment. Bond decisions have never been more "based on evidence" than they will be now.

## **VII. APPEAL STANDARDS**

HB 463 has effectively changed both the standards by which a bond will be reviewed by appellate courts and the nature of relief in the event of a successful appeal. In the past, trial judges set the amount of bond and the manner of security based on a review of such factors as the seriousness of the charge, the criminal record of the accused, and the ability of the person to pay. On appeal, the reviewing court would decide whether the judge has abused his or her discretion. Thus, in Long v. Hamilton, 467 S.W.2d 139 (Ky. 1971), where a \$150,000 bond had been set for a charge of possession of heroin, the court stated that while they would not "interfere in the fixing of bail unless the trial court has clearly abused its discretionary power," the amount in that case was unreasonable. The Court reversed with instructions to the trial court to "fix bail ... in an amount less than \$150,000."

After HB 463, while the trial court still has discretion as to the amount of bond to be set (and may consider such factors as the nature of the offense charged, and the criminal record of the accused under KRS 431.525), the decision whether that bail should be unsecured or subject to own recognizance, or whether the bail credit shall apply (both under KRS 431.066), require findings based on evidence. Moreover, to the extent that there is no evidence sufficient to support a finding that someone is a flight risk or a danger to the public, for example, HB 463 creates a presumption of an unsecured or "own recognizance" bond as written

"findings" are required to depart from the mandatory "shall" language requiring release. On appeal, a court will review the court's decision, and the evidence upon which it was based, and should decide whether the trial court's decision was against the great weight of the evidence. Stated another way, the trial court's findings must be supported by sufficient evidence to overcome the presumption of release.

If the judge's decision is found not to be grounded in evidence or is against the weight of the evidence, then the appellate court will still remand, but this time with instructions to unsecure the bond or place the defendant on "own recognizance."

The standard for bond appeals from district court to circuit court via habeas corpus was set in Smith v. Henson, 182 S.W.2d 666 (Ky. 1944), and appears never to have been an "abuse of discretion" standard: "[T]he primary, if not the only, object of habeas corpus is to determine the legality of the restraint under which a person is held. ... We must, therefore, view the proceeding to obtain bail by the method of habeas corpus as a test of the legality of the judgment or action of the court on the motion for bail." *Id.* at 668-669. The Circuit Court thus reviews the actions of the District Court with a view toward whether the action was legal or illegal.

## **VIII. CONCLUSION**

HB 463 has done much to reform the way that Kentucky's citizens charged with crimes are treated both prior to and after conviction. The General Assembly has breathed new life into the presumption of innocence without sacrificing concerns of public safety.

## TOP 10 FAQ'S WHEN LITIGATING HB 463 PRETRIAL RELEASE ON BEHALF OF THE ACCUSED

B. Scott West

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As the changes to pretrial practice that HB 463 brought about turn one year old, there are lots questions which are often asked, but remain unanswered. Or stated another way: these questions might be answered, but depending upon who you ask – a defense attorney, a prosecutor or a judge – you get *different* answers. In the hopefully near future, all of our questions will be answered in the form a published court opinion suitable for citing, or new legislation. Meanwhile, here are the top ten questions, in this defense attorney's opinion, that need to be answered, along with what I believe are the answers.

And by the way, I think these answers are correct, and have the force of law behind them.

### 1. HOW MUCH DOES HB 463 LIMIT JUDICIAL DISCRETION?

One way to interpret HB 463 is that the legislature intended only to “tighten up” the present practice without effecting any real change in pretrial release. Another is that the legislature did intend real and sweeping changes in the areas of pretrial release and sentencing, in an effort to reduce the ever-increasing costs of incarcerating Kentucky's citizens charged with a crime. The latter interpretation seems to be the correct one, as evidenced by the statements of bill sponsors Sen. Tom Jensen and Rep. John Tilley that full implementation of HB 463 is “expected to bring a gross savings of \$422 million over ten years by reducing the state's burgeoning prison population.” Such anticipated savings could only be realized if HB 463 is enforced to the full extent of the mandatory “shall” language contained therein.

HB 463 has limited judicial discretion in a number of ways:

- Bonds must be decided upon evidentiary factors that tend to prove whether a defendant is low, moderate or high risk to flee, not attend court, or be a danger to the public;
- Where there is a presumption of release on own recognizance (“O.R.”), unsecured bond, or bail credit, there must be some finding of flight risk, risk of non-appearance at trial, or public dangerousness for this presumption to be overcome; hence, if there is no evidence one way or the other, the mandatory “shall” provision for release must prevail;
- Judges cannot merely rely upon the KRS 431.525 factors that they were required to consider prior to passage of HB 463 (e.g., “nature of the offense” or the “criminal record”) to overcome evidence of low risk or moderate risk absent evidence in the particular case that the defendant is high risk. Stated another way, if a judge says “everyone charged with assault 1<sup>st</sup> degree is a flight risk,” or “anyone with three felonies on their record is automatically a danger to the public,” this is not evidence-based,

and the presumption of O.R., unsecured bond and bail credit should prevail. Actually, this was never the case anyway since Abraham v. Commonwealth, 565 S.W.2d 152 (Ky. App. 1977), held that consideration of any *one* of the Five Factors without considering the others was an abuse of discretion. Judges were never free to “use discretion” to ignore the other legislative-set factors.

**2. AREN'T THE PRETRIAL RELEASE PROVISIONS OF HB 463 AN UNCONSTITUTIONAL VIOLATION OF SEPARATION OF POWERS, BECAUSE THE LEGISLATURE IS LIMITING INHERENT JUDICIAL DISCRETION?**

I have heard, anecdotally, that many people oppose some of the mandatory provisions of HB 463 as they relate to bail because it treads too far into inherent judicial power and discretion, perhaps even to the point of being a violation of the separation of powers between the judicial branch and the legislative branch. I strongly disagree. *The source of judicial discretion in this area derives not from inherent constitutional authority, but from powers granted to the judiciary by the legislature.*

Kentucky's Constitution Sections 109, 110, 111, 112 and 113 – which create the judicial branch of government – do not specify that judges have inherent or particular authority over bail decisions. Sections 16 and 17 grant a right to bail and prohibit excessive bail, respectively, but do not otherwise specify how bail decisions are to be made.

Instead, judicial discretion over how to decide bail has come from legislative enactment. In 1976, the General Assembly passed the “1976 Bail Bond Reform Act.” Portions of this act relating to the setting of bail were codified in KRS 431.520 and .525.

KRS 431.520 provided, in part:

Any person charged with an offense shall be ordered released by a court of competent jurisdiction pending trial on his personal recognizance or upon the execution of an unsecured bail bond in an amount set by the court or as fixed by the Supreme court as provided by KRS 431.540, **unless the court determines, in the exercise of its discretion**, that such a release will not reasonably assure the appearance of the person as required.

KRS 431.525 set forth the factors (which I will refer to as the “Five Factors”) which the courts were required to take into account when establishing the amount of bail:

- (1) The amount of bail shall be:
  - (a) Sufficient to insure compliance with the conditions of release set by the court;
  - (b) Not oppressive;

- (c) Commensurate with the nature of the offense charged;
- (d) Considerate of the past criminal acts and the reasonably anticipated conduct of the defendant if released; and
- (e) Considerate of the financial ability of the defendant.

Almost immediately after the 1976 Bail Bond Reform Act became effective, a challenge against “excessive bail” arose in a case where a judge had refused to determine bond using all of the Five Factors mandated by the legislature in KRS 431.525. In Abraham, *supra*, the trial court considered only the nature of the offenses which the defendant was facing, and refused to make findings, as required by KRS 431.520 and RCr 4.10 that releasing Abraham on his own recognizance or upon an unsecured bail bond would not reasonably assure his appearance at trial.

Finding error, the Court of Appeals first relied upon Stack v. Boyle, 342 U.S. 1 (1951) to hold that a bail decision was a “final judgment” appealable to a court of competent jurisdiction, upholding that portion of the Bail Bond Reform Act which allowed appeals, and quoted from that opinion as follows:

The proper procedure for challenging bail as unlawfully fixed is by motion for reduction of bail and appeal to the Court of Appeals from an order denying such motion. **Petitioner’s motion to reduce bail did not merely invoke the discretion of the District Court setting bail within a zone of reasonableness, but challenged the bail as violating statutory and constitutional standards ... As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a “final decision” of the District Court.** [Abraham at 154, emphasis added].

Later in the opinion, the Court of Appeals made it clear that the discretion given the courts were from a legislative grant:

Great discretion is vested in the circuit judge respecting bail... However the record should demonstrate that the circuit judge did in fact exercise the **discretion vested in him under the statutes and rules.** [Abraham at 158, emphasis added].

If the discretion is vested in the trial judge via statutes, then the discretion is vested via an enactment of the legislature, as the legislature alone creates statutes; and while the opinion also stated that discretion was vested in court rules as well, it is well known that court rules which are at variance with a statute must yield to the authority of the statute. See Hodge v. Ford Motor Co., 124 S.W.3d 460, 464 (Ky. App. 2003) (*citing* Dawson v. Hensley, 423 S.W.2d 911, 912 (Ky. 1968)); American Tax Funding, LLC v. Gene, 2008 WL 612360 (Ky. App. 2008).

Thus, in Abraham, the Court of Appeals did not support the trial judge's decision to consider *only one* of the Five Factors, but rather found that the trial judge had abused his discretion by not considering *all* of the Five Factors, and found that he had failed to utilize the discretion granted to him by the legislature when the trial court was found to "always set the bond at \$25,000 on every theft charge." *Id.* at p. 158. Abraham is interesting also because the Court of Appeals did *not* rule that the 1976 Bail Bond Reform Act was an overreach by the legislature or a violation of the separation of powers. Instead, the court fully set out in footnotes the entirety of the statutes, and decided the case by how the trial judge followed the statutes.

Abraham is still the law of the Commonwealth, and holds that judicial discretion in bail determinations is precisely that discretion which is created by legislative enactment, and not inherent in the judicial powers afforded by the Kentucky Constitution.

**3. ISN'T KRS 431.525 INCONSISTENT WITH KRS 431.066 IN THAT THE FORMER PROVISION HAS FIVE FACTORS AND THE LATTER HAS TWO TO THREE FACTORS?**

No. KRS 431.525 is the statute which refers to setting the "amount" of the bond. KRS 431.066 is the statute which determines, based on certain risk factors, whether a bond will be unsecured, or subject to own recognizance. If a judge, in his/her discretion thinks that the nature of the offense and the criminal history warrants a dollar amount, the judge will set that amount, and then refer to KRS 431.066 and make the bond "unsecured" if the statutory considerations require it. Likewise, if the nature of the offense is "not so bad" relative to other crimes, and there is no criminal history, the judge may choose to set a zero amount bond under KRS 431.525, in which case the "O.R." provision of KRS 431.066 would apply.

**4. IF A CLIENT GETS AN UNSECURED BOND, DOES HE ALSO GET BAIL CREDIT?**

Why not? The statute does not provide the court with an "either/or" election with regard to persons who would qualify under both provisions. A particular defendant who has been found to be low or moderate risk may qualify for BOTH provisions. Thus, if the court unsecures the bond with a third-party surety bond, but the defendant does not have anyone who is willing to sign to let the defendant out, the defendant should still be benefitting from the bail credit portion of the statute, and earning time toward release. If your client has been given a third-party unsecured surety bond, but cannot get a release, you should be arguing that KRS 431.066 does not give the court an "election" between the two, and that both provisions should be applied to the client.

**5. SHOW ME WHERE BAIL DECISIONS ARE SUPPOSED TO BE BASED ON "EVIDENCE-BASED PRACTICES."**

A frequent question our attorneys get from prosecutors, judges, or others is "where in HB 463 does it say that pretrial practice is 'evidentiary-based?'" After all, HB 463 amended KRS 446.010 to include a definition of "evidence-based

practices” to mean “policies, procedures, programs and practices proven by scientific research to reliably produce reductions in recidivism when implemented competently.” It does not specifically refer to pretrial release. Moreover, Section 1 of the bill provides that “all supervision and treatment programs provided for defendants shall utilize evidence-based practices to reduce the likelihood of future criminal behavior,” but does not use the term “evidence-based” in a similar way to discuss the pretrial release provisions of the bill. Finally, the term “evidence-based” is used almost exclusively in sections of the bill that deal with treatment, recovery and supervision programs.

HB 463 perhaps could have more clearly stated that pretrial release practices must now be based on evidence. However, what was passed still seems to make clear that evidence-based practices are to be applied in pretrial release practices based upon the following:

- HB 463 also amends KRS 446.010 to add a definition of “pretrial risk assessment” which means “an objective, research based, validated assessment tool that measures a defendant’s risk of flight and risk of anticipated criminal conduct while on pretrial release pending adjudication.” Thus, the concept of practices proven by scientific research seems to be incorporated in both definitions. The expectation is that pretrial risk assessment reports have evidentiary value if they are objective and validated, and that they thus are an “evidence-based” practice;
- KRS 431.525 and 431.066 are amended/created using the terms “low,” “moderate,” and “high” with respect to the risk of flight, not appearing in court, or being a danger to the public. These terms are the classifications found in the pretrial risk assessment, and we believe that these terms are intended to reference the findings of the pretrial risk assessment. That does not mean that other evidence cannot be considered; but we believe it does mean that the General Assembly intended to incorporate into the judge’s consideration and findings the results of the pretrial risk assessment; and
- The one section of HB 463 which *does* deal with pretrial release is the creation of a new section of KRS Chapter 27A (not codified as of yet) which defines “evidence-based practices” to mean “intervention programs and supervision policies, procedures, programs, and practices that scientific research demonstrates reduce instances of a defendant’s failure to appear in court and criminal activity among pretrial defendants when implemented competently.” This provision applies to future vendors or contractors who will provide supervision and intervention programs in the area of pretrial release. The Supreme Court must establish a process for reviewing the objective criteria for vendor or contractor evidence based practices, audit for effectiveness, provide an opportunity to improve performance, and mechanism to “defund” any contractor whose criteria for supervision does not meet the definition of “evidence-based practice.” The effective date for implementing the first part of this newly created statute is July 1, 2012. DPA believes it makes no sense that the General Assembly would require such evidence-based practices for purposes of pretrial release for future vendors and contractors, but would not institute

the same requirement for the presently existing AOC Division of Pretrial Release. Thus, we believe that “evidence-based practices” have been incorporated into the present pretrial release statutes, when all above are construed together.

**6. DO JUDGES HAVE TO ACCEPT THE FINDINGS OF THE PRETRIAL RISK ASSESSMENT REPORT?**

No. According to Timothy Murray, Executive Director of the Pretrial Justice Institute, a pretrial risk assessment tool is an evidentiary tool, but it is not the end all, be all evidence of a person’s risk of flight, not coming to court or being a public danger. No court is absolutely bound by the finding, and no jurisdiction in the United States considers it to be. But the pretrial risk assessment report is of SOME evidentiary value; and where there is an absence of evidence on the other side of the issue, it ought to carry the day. When a judge weighs the evidence, and there is only evidence supportive on one side, that side should carry the burden, especially if there is a presumption of release that can only be overcome by evidence to the contrary.

**7. AREN’T THE LOW RATES OF NONAPPEARANCE AND REOFFENDING THE RESULT OF GOOD JUDICIAL DECISIONS RATHER THAN A STATISTICALLY VALIDATED PRETRIAL RELEASE RISK ASSESSMENT?**

One might think so. Since not all low- or moderate-risk people are released, and since the flight and reoffending rates of those who ARE released are so low, it might cause one to believe that the low rates are the result of judges recognizing, correctly, that the low- and moderate-risk people who are NOT bonded have correctly been identified by the judge in his/her discretion as persons who if released would fail to appear or reoffend, and that those rates would be higher had they been released.

However, statistically, that has not been the case. According to an article by Tara Boh Klute, Chief Operating Officer of the Administrative Office of the Courts’ Division of Pretrial Services, published in DPA’s The Advocate under the title of “Release Rates Vary, Failure Rates Remain Unchanged,” the evidence shows that “[r]egardless of the release rate, the failure rates are consistent. ... When an objective, validated risk instrument is utilized competently, the evidence shows that low and moderate risk defendants can be safely released into the community without jeopardizing public safety.

Ms. Klute includes a chart which analyzed 135,151 cases from July 1, 2009, through April 30, 2011, in four unique Kentucky jurisdictions including both rural and urban areas (Jefferson, Fayette, Johnson and Crittenden Counties). Ranging from a low rate of release in Fayette County of under 55 percent to a high rate of release in Johnson County of 80 percent, the appearance rates for all four counties ranged from 87 percent to 92 percent, while the public safety rate ranged from 88 percent to 91 percent.

**8. WHAT IS THE STANDARD FOR DECIDING WHETHER SOMEONE IS A DANGER TO THE PUBLIC?**

If the legislature has mandated an “evidence-based practice” for determination of bail, the next question becomes “what is the evidentiary standard that should be employed at the hearing to determine risk?”

DPA believes that the standard is “clear and convincing evidence,” based upon United States Supreme Court authority which interprets the Eighth Amendment’s “excessive bail” clause to require a finding of “clear and convincing evidence” if the defendant is being detained, or not granted bail, due to risk of being a danger to the community.

It has long been recognized that “[u]nless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” Stack v. Boyle, 342 U.S. 1 (1951). Yet, prior to last year, had you asked a knowledgeable Constitutional scholar whether the Eighth Amendment’s “excessive bail” clause had been applied to the states through the Fourteenth Amendment, as the “cruel and unusual punishment” clause has been, you likely would have gotten an answer ranging from “no,” to “maybe,” or “yes,” depending upon how one interpreted Schilb v. Kuebel, 404 U.S. 357 (1971). In that opinion, the Supreme Court stated that “the Eighth Amendment’s proscription against excessive bail has been assumed to have application to the states through the Fourteenth Amendment.” *Id.* at 484. The Court cited to Pilkinton v. Circuit Ct., 324 F.2d 45 (8<sup>th</sup> Cir. 1963) and Robinson v. California, 370 U.S. 660 (1965) as the bases for this “assumption.” However, the Court then stated that “we are not at all concerned here with any fundamental question of bail excessiveness,” and did not reach the issue of whether the “assumption” of state application was well-founded, leaving the question of whether the clause had been incorporated into the states largely unanswered.

That all changed two years ago in McDonald v. City of Chicago, 130 S.Ct. 3020 (2010), in which the Supreme Court held that the Second Amendment applies to the states through the Fourteenth Amendment. As a precursor to its holding, the Court in two footnotes listed respectively those amendments and clauses which had been applied to the states, and those which had not. (See *id.* at nn. 12-13). The “excessive bail” clause appeared in the first list, with Schilb cited as the authority. Thus, the Supreme Court has now squarely put the “excessive bail” prohibition into the list of Amendments incorporated against the states.

If the Eighth Amendment now applies to the states, federal law interpreting its implementation must also apply to the states. Thus, when the Bail Reform Act of 1984 was interpreted by the Supreme Court in U.S. v. Salerno, 481 U.S. 739 (1987), its holding must be also applicable to the states.

The Bail Reform Act of 1984, as then written, added a new consideration in making bond decisions on federal cases. Going further than HB 463 in Kentucky does, the act provided that if a person was a “danger to community,” he could be detained by a high bond that was more than reasonably calculated to secure his attendance in court without violating the Eighth Amendment. The provision of this act was being employed to hold Salerno, who was the alleged “boss” of the

Genovese crime family. The government persuaded the district court that no condition or combination of conditions would ensure the safety of the community or any person, given his reputation as the head of a criminal syndicate. His detention was upheld:

In a full-blown adversary hearing, the Government must convince a neutral decision maker **by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community** or any person. 18 U.S.C. §3142(f)....

On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. **When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.** *Id.* at 750-51 [emphasis added].

Subsequent decisions have shown this to be a very high standard for a violation of Eighth Amendment not to occur. If you read the cases that follow Salerno, you will see that it takes a great deal of evidence before you can be found to be a danger to the community. See Foucha v. Louisiana, 504 U.S. 71 (1992), where Louisiana was found not to have met the "clear and convincing evidence" burden to detain a non-convicted person charged with a crime. In that case the future dangerousness was based upon an alleged diagnosis of an anti-social personality.

Thus, HB 463's "danger to the public" exception to mandatory O.R., unsecured bond, or bail credit, to be constitutional, must follow same standard the federal courts have to follow and be subject to a "clear and convincing evidence" standard, or fail under the Eighth Amendment.

A detailed article on this point is planned for publication in an upcoming issue of The Advocate.

## 9. WHAT IS THE STANDARD OF REVIEW ON APPEAL?

Good question. The answer is not so simple because previous court decisions have got it wrong. The opinions appear to impose an "abuse of discretion" standard; but the standard is of dubious origin, because it was borrowed from a case which decided the issue of bond post-conviction. Tim Arnold, Post-Trial Services Division Director of DPA, in his article "HB 463 and Its Impact on Kentucky Appellate Standards," published in the October issue of The Advocate, explains:

In Braden v. Lady, 276 S.W.2d 664, 667 (Ky. 1955) Kentucky's Highest Court discussed the discretionary nature of bonds pending appeal, finding that "[o]ne ironbound rule is the reviewing court will not substitute its judgment for that of the trial judge who is in a better position than we to size up the facts and circumstances which should control judicial discretion in fixing the amount of the appeal bond." The sole issue in the case involved bond on appeal, and in fact, the Court went out of its way to observe that authorities "deal[ing] with appearance bonds before trial....have little bearing on the question" of appeal bonds. Braden, *supra* at 666.

Nevertheless, in the subsequent case of Long v. Hamilton, 467 S.W.2d 139, 141 (Ky. 1971), the High Court relied on Braden and the resources cited therein in resolving a pretrial bond matter, concluding that "[a]ppellate courts will not attempt to substitute their judgment for that of the trial court and will not interfere in the fixing of bail unless the trial court has clearly abused its discretionary power." Long, *supra* at 141. This language has governed subsequent decisions concerning the appellate review of bond.

Obviously, the reliance on Braden for appeals of pretrial bonds is both unfortunate and misplaced, and has resulted in a standard of review which overstates the level of deference to be given to the trial court's decision. Unlike pretrial release issues, where the Court is required to take action, bond pending appeal is not a right at all, is afforded no constitutional protection, and has always been completely at the discretion of the Court. By contrast, when interpreting the federal equivalent to §17, the Supreme Court has noted that "there is no discretion to refuse to reduce excessive bail . . . ." Stack v. Boyle, *supra* at 6.

Fortunately, as Mr. Arnold points out, the choice of language in Long and the apparent adoptions of a deferential standard "has not signaled an abandonment of the appellate court's duty to review bond decisions," resulting in a majority of bond cases published since 1950 reversing trial court decisions on bond release.

Although Long is still on the books as good law, it is questionable whether it survives the case law interpreting the Eighth Amendment, which, as explained in no. 8 above, we now know to be incorporated to the states. With the right to bail being a constitutional right involving mixed questions of law and fact, the standard going forward should be one not of blind deference to the trial court, but one of *de novo* review. Glenn McClister of DPA's Education Branch explains in his article "An Important Matter of Policy: Why Kentucky Appellate Courts Should Adopt *De Novo* Review of Pretrial Release Decisions," published in the October issue of The Advocate.

Undoubtedly the most important types of mixed questions of law and fact to society are those questions which affect the enjoyment of a constitutional right. These rights are the legal embodiment of many if not all of our most cherished societal values. When the

answer to a mixed question of law and fact effects the enjoyment of a constitutional right, the mixed question of law and fact is often referred to as a “constitutional fact.”

The idea that decisions regarding constitutional facts require heightened judicial scrutiny can be traced back to Crowell v. Benson, 285 U.S. 22 (1932). “Stripped of its jurisdictional features, the case embodies the view that some judicial tribunal must independently review facts implicating constitutional rights.”

In Crowell, the court took it for granted that heightened independent review of constitutional questions was constitutionally mandated, including mixed questions of law and fact:

“In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of the supreme function.”

The Court said that to deny appellate courts this ability, “...would be to sap the judicial power as it exists...wherever fundamental rights depend, as not infrequently they do depend, as to facts, and finality as to facts becomes in effect finality in law.”

A more recent Supreme Court case strongly suggested that *de novo* review is appropriate when the resolution of a mixed question of fact and law affects constitutional rights. In Bose Corporation v. Consumers Union of the United States, Inc., 466 U.S. 485, 501 (1984), the Court of Appeals reviewing the proceedings in District Court had failed to follow the clearly erroneous standard of review laid out in federal rule 52(a), which says that: “Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.” The Supreme Court held:

“But Rule 52(a) does not inhibit an appellate court’s power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.... “At some point, the reasoning by which a fact is ‘found’ crosses the line between the application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment.”

The language in Bose is especially clear in grounding the necessity of *de novo* review in the constitutional issue at stake. [For other decisions discussing *de novo* review in the context of constitutional rights, see the longer version of this article in the online issue of The Advocate.] If *de novo* review is a “constitutional responsibility,” and not just a necessity under some power held by only the Supreme Court or by only federal courts, then the requirement of *de novo* review applies to the states. An abuse of discretion, or other more deferential standard,

is not appropriate when constitutional rights are at stake, even if the question of whether a right has been infringed is fact-dependent.

**10. DO APPEALS BECOME MOOT IF THE PERSON IS RELEASED OR PLEADS WHILE THE APPEAL IS PENDING?**

The defense attorney representing a client should not automatically assume so, and should do everything in his or her power to keep the issue alive, especially where the client has not yet pled and could be subjected to the same bail provisions again at any time in the event of a change in bond conditions. While there are few cases on point involving bond decisions, there is some case law in the area of criminal detention and other criminal matters of short duration (*voir dire*, contempt proceedings) which provides some standards for determining whether an issue that has become moot may nevertheless be decided by the court sitting in appellate jurisdiction, so long as (1) there are legal interests of the accused which are continuing, or (2) the issue is capable of reoccurring yet evading review. The following is from an upcoming article by Heather Crabbe (DPA Boone County Trial Office) and Shannon Smith (DPA Appellate Branch) that will be published in The Advocate, both the printed and online editions. It is substantially the same argument made by them in the bond appeal that was rejected last year in the Court of Appeals, Commonwealth v. Medina-Santiago, 11-CR-001420 (Boone Circuit), which dismissed the case on the same day that the Appellant disclosed that his entire case had been dismissed.

**Continuing Legal Interests of the Accused.** In a case where a defendant is unable to make bond, but then released, his bond can be changed by the trial court at any time for almost any reason. When this happens, the defendant may be placed back on the original bond that he was unable to make and is thus threatened with an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. Therefore, the defendant's bond appeal is not moot.

In Rosales-Garcia v. Holland, 322 F.3d 386 (6<sup>th</sup> Cir. 2003), the Sixth Circuit held that a Cuban citizen's appeal of the denial of his *habeas* petition, in which he challenged his indefinite detention following revocation of his immigration parole and pending Cuba's acceptance of his return, was not rendered moot when he was released from detention and paroled into United States, inasmuch as he was still "in custody" for purposes of *habeas* statute, and relief sought, if granted, would make a difference to his legal interests, in that he would no longer be subject to possibility of revocation of parole "in the public interest." *Id.*

In Jones v. Cunningham, 371 U.S. 236 (1963), the United States Supreme Court held that a paroled prisoner was in the custody of his state parole board for the purposes of 28 U.S.C. §2241: "While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the

meaning of the *habeas corpus* statute.” *Id.* at 243; see also DePompei v. Ohio Adult Parole Auth., 999 F.2d 138, 140 (6<sup>th</sup> Cir. 1993). ...

**Capable of Repetition Yet Evading Review.** Another reason that bond appeals should not be held to be moot following the release of a client is that often rulings resulting in “excessive bonds” are often capable of repetition yet evading review. An action is capable of repetition yet evading review if the challenged action cannot be fully litigated prior to its expiration and there is a reasonable expectation that the complaining party will be subject to the same action. Commonwealth v. Hughes, 873 S.W.2d 828, 830-31 (Ky. 1994). “The decision whether to apply the exception to the mootness doctrine basically involves two questions: whether (1) the ‘challenged action is too short in duration to be fully litigated prior to its cessation or expiration and [2] there is a reasonable expectation that same complaining party would be subject to the same action again.” Philpot v. Patton, 837 S.W.2d 491, 493 (Ky. 1992).

As to the first question, the issue is whether the nature of the action renders the time frame too short to permit full litigation of the issues through the appellate process. Disputes involving pretrial bond decisions are too short in duration to litigate prior to their expiration. In Lexington Herald-Leader Co. v. Meigs, 660 S.W.2d 658, 660 (Ky. 1983), the Kentucky Supreme Court found the problem of media exclusion from *voir dire* capable of repetition, yet evading review. The Court quoted the United States Supreme Court’s determination that “because criminal trials are typically of ‘short duration,’ such an order will likely ‘evade review.’ *Id.* (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, (1982)).

Likewise, in Riley v. Gibson, 338 S.W.3d 230 (Ky. 2011), the media was denied access to a juror contempt hearing. The case was unquestionably moot by the time the writ had been filed with the appellate court as the hearing the media sought access to was over. However, the appellants believed the writ would serve to bar the exclusion of the media in future contempt proceedings. The Court agreed with the appellants.

## Award-winning defender program promotes reduced jail and prison costs; more can be saved

**Addiction rages:** The scope of the drug problem in Kentucky is enormous. Kentucky overincarcerates substance abusers at great expense. The abuse of drugs reflects the presence of an addictive disease that is more cost effectively managed through the use of treatment and other social services - not simply incarceration. Defenders play an important role in responding to this crisis.



Left to Right: Becky Gary (Hopkinsville), Joanne Sizemore (London), Jessica Dial (Columbia), Heather Stapleton (Prestonsburg), Rena Richardson (Madisonville), Abena Amoah (Covington), Rachel Pate (Owensboro), Kita Clement (Bowling Green).

**Defenders provide sentencing options:** DPA began a pilot program in 2006 paring social workers with attorneys to facilitate more efficient use of court time and probation resources, and reduce incarceration costs. We began this pilot to assess defendants' mental health and substance abuse needs and to plan viable community treatment options to relieve the courts' burden and potentially the burden of custody for corrections and jails. Our social workers assess clients then propose an alternative sentence to the prosecutor and court. When approved, the social worker seeks to have the client placed in treatment and other social services to address their addictions, mental health issues and social problems. We use case management approaches like Motivational Interviewing within the attorney client privilege, which are consistent with the evidence-based practices used in the state's mental health programs. In 2012, Kentucky courts accepted 85% of all the alternative sentencing plans prepared by our social workers.

**Defender alternative sentencing program reduces jail and prison costs:** Findings from evaluators from the University of Louisville have evaluated the initial project and demonstrated substantial savings and positive outcomes. DPA is receiving consultation from the University of Kentucky Center on Drug and Alcohol Research to help us better identify the specific effects of our program on the incarceration problems affecting our state.

In other studies in the state, an active substance user of alcohol and other drugs costs the nation about \$40,000 per year according to estimates from the Substance Abuse and Mental Health Administration (SAMHSA). Once an individual achieves abstinence, he becomes less of a burden on society and, if employed contributes to society. The return on the investment is a savings of \$3.25 for every dollar invested or a net of \$100,000 per DPA social worker. More critically for this project, is the potential reduction in costs of incarceration that will result from diverting individuals from jail or prison to community-based services.

**More savings are possible:** Many clients benefit from treatment provided by the Department of Corrections. However, many clients who are not yet incarcerated might be good candidates for diversion so they never wind up in prison for drug related and similar offenses. This is where the defense attorneys can work within a therapeutic justice model to offer the courts a way to divert potential inmates into community service users instead. By achieving sound referrals and follow-up for our clients we can not only get them out of jail, but hopefully prevent them from going to jail. Thus we are picking up a greater level of responsibility for our clients. DPA is doing its share toward responsibly managing the demand on prison resources in Kentucky. More funding is necessary if DPA is to realize the full potential of its alternative sentencing program. Each fulltime social worker hired in this program needs only to prevent 2.5 person years of prison to cover the salary and fringe benefit cost for an entire year. Savings greatly in excess of that have been achieved.

**Kentucky Justice and Public Safety Cabinet Social Worker Grant:** DPA received a federal stimulus grant in 2009 to hire five alternative sentencing social workers placed in the following offices: Columbia, Lexington, London, Madisonville and Pikeville. When the grant expired in March 2012, DPA hired four of these social workers into positions vacated by DPA social workers who retired or took employment elsewhere. DPA now has eight social workers. The data from their work in FY12 is below.

### DPA Alternative Sentencing Social Worker Cases, July 1, 2011 - June 30, 2012

Social Worker	Location	# Clients Referred	# Plans Presented	# Plans Accepted	Veterans Served	Involuntary w/Denovos
Rachel Pate	Owensboro	242	117	88	6	4
Joanne Sizemore	London	111	105	105	3	0
Heather Bartley	Pikeville	111	51	37	6	0
Abena Amoah	Covington	141	80	68	4	0
Cherl Richardson	Madisonville	96	96	85	2	0
Jessica Dial	Columbia	79	41	35	0	0
Becky Gary	Hopkinsville	73	62	56	4	56
Lillie Adams(Intern)	Morehead	32	17	12	0	0
Kita Clement	Bowling Green	168	51	40	2	0
<b>TOTAL</b>		<b>1053</b>	<b>620</b>	<b>526</b>	<b>27</b>	<b>60</b>
<b>Adults Served</b>		<b>931</b>	<b>555</b>	<b>471</b>		
<b>Juveniles Served</b>		<b>122</b>	<b>65</b>	<b>55</b>		

DPA's Program received National Criminal Justice Association's 2011 Outstanding Criminal Justice Program Award for the Southern Region.

**KY criminal justice leaders support the alternative sentencing program:** One way to evaluate the quality of a Kentucky criminal justice program is to hear what people throughout the system think of it from the Justice Cabinet, Judges, Prosecutors, Jailers, Legislators and statewide organizations looking at the state's budget decisions. Some of their thoughts follow:



**J. Michael Brown**

*"The Kentucky Alternative Sentencing Social Worker Program received a national award from the National Criminal Justice Association as an innovative means to help promote criminal justice initiatives in the country, including a reduction in incarceration costs. There is no doubt that the DPA Alternative Sentencing Social Worker Program is one that actually does work and does produce."*

**J. Michael Brown**, Secretary, Justice and Public Safety Cabinet, Frankfort



**Rep. Jesse Crenshaw**

*"The public defender Alternative Sentencing Social Worker Program is an excellent program."*

**Representative Jesse Crenshaw**, Lexington



**Rep. John Tilley**

*"Good ideas don't implement themselves. The first time I heard the idea of the defender alternative sentencing pilot program, and saw it in action myself, I knew it was a winner and I think the numbers bear that out. So count me in on support for it."*

**Representative John Tilley**, Hopkinsville



**Rep. Brent Yonts**

*"I fully support the DPA Alternative Sentencing Social Worker Program and its ability to save money and lives. We need to fund it across the state."*

**Representative Brent Yonts**, Greenville



**Rep. Johnny Bell**

*"I would like to see the DPA Alternative Sentencing Social Worker Program go into effect across the state. The return on it is \$3.52 for every \$1.00 invested. To think about anything we can invest a dollar in and get three and a quarter return goes right along with the spirit of what we are doing with 2011's HB 463. If we don't try to find the ability to implement a program with such great return, and move forward to a system of fairness and equality, I think we are not completing the cycle. I think [the DPA Alternative Sentencing Social Work Program] is one of the best ideas and best things that I've heard, aside from HB 463 and I think it flows right along with it. I really hope that we can get that implemented and I think the return on that would be tremendous. In the end I believe that actually spending that money would cause us to save a great deal. I'm strongly in support. I really think it's a wonderful idea and I support it wholeheartedly. I hope we can get this implemented."*

**Representative Johnny Bell**, Glasgow



**Andrew C. Self**

*"It is my privilege to work with an outstanding DPA staff here in Christian County. In my experience, the excellent work performed by the local DPA social worker is extremely beneficial to the court and certainly to the attorneys in that office as well. On a regular basis, I communicate with and often rely on the information obtained by the social worker in making important decisions regarding probation, treatment and incarceration. It would be a tremendous loss to my court and our community if the local DPA office did not have a social worker to provide so many essential services."*

**Andrew C. Self**, Judge, Christian Circuit Court, Hopkinsville



**Mary Hammons**

*"If inmates have someone like the DPA alternative sentencing social worker, they can get out of jail and go on to rehab or other treatment. DPA social worker interventions with inmates who have mental illness and who are charged with misdemeanors, often because of their (untreated) illness, help reduce the chance that they will end up with more serious charges without treatment. Adults, who are mentally challenged often go in the general population and are often taken advantage of by others- their family or other inmates. If they have a social worker to plead their case" often more appropriate placements or treatment for them is arranged."*

**Mary Hammons**, Knox County Jailer



**John Paul Chappell**

*"I love the DPA Alternative Sentencing Social Worker, Joanne Sizemore. If we had more Joanne Sizemores we could do so much more about drugs and other problems that plague those on court dockets. Having a social worker involved is making a difference, leading to genuine reform in people's lives, which is what we want."*

Judge Chappell and Knox County Assistant Attorney Gilbert Hollin estimated that "80 to 95%" of Knox County District Court cases are a result of addiction issues.

**John Paul Chappell**, Chief Judge, Knox and Laurel District Courts



**Jay Wethington**

*"DPA alternative sentencing social worker Rachel Pate continues to provide invaluable service to the court in Owensboro. Her work is consistently exemplary."*

**Jay Wethington**, Chief Circuit Judge, Owensboro



**James C. Brantley**

*"Our DPA social work program has been instrumental in locating and accessing treatment programs. Rena Richardson, MSW, is an integral part of our drug court staff, whose input is always appreciated and valued. In short it appears that this is a program that works, and should be maintained."*

**James C. Brantley**, Circuit Judge, 4th Judicial Circuit, Madisonville



**Chris Cohron**

*"Mrs. Clement has built an excellent track record on finding treatment options for defendants that had exhausted all traditional avenues. Her work has provided all parties and the Court another viable option to appropriately address the issues of defendants."*

**Chris Cohron**, Commonwealth Attorney, Bowling Green



**John R. Grise**

*"The DPA social work program gives Warren Circuit Court options other than jail to deal with drug addiction and the crimes from it. Kita Clement's keen ability to find scarce in-patient and long term treatment options allows us to tailor a more effective response to drug crimes than incarceration alone, ultimately making communities safer and saving taxpayers the high cost of prison."*

**John R. Grise**, Circuit Judge, 8th Judicial Circuit, Division 2, Bowling Green



**Van Ingram**

*"The DPA alternative sentencing social workers provide much needed individualized sentencing options to prosecutors and judges. The DPA program is a proven way to help defendants change behavior and not re-offend, saving the state significant incarceration costs. If the program is expanded, more defendants would be helped and more savings would result."*

**Van Ingram**, Executive Director, Kentucky Office of Drug Control Policy, Frankfort



**Brian Wiggins**

*"The social work program has provided invaluable assistance to the judicial system. Ms. Richardson has routinely furnished this Court with evaluations and assessments of criminal defendants suffering from drug dependency. These assessments have assisted the Court in determining appropriate alternatives to incarceration. In addition, Ms. Richardson serves as a member of our drug court team and her insight during staff meetings is highly valued. For these reasons alone, the social worker program should continue."*

**Brian Wiggins**, Circuit Judge, 45th Judicial Circuit, Greenville



**Bryan Sunderland**

*"Our members are interested in it from a budgetary standpoint, as you all well know from our Leaky Bucket Report and our work on HB463, in support of that. We want to look at it as making sure our spending priorities in the state are in order. When the public advocate came to the Kentucky Chamber of Commerce, I think my initial reaction when Dave Adkisson and I met with him was, we don't come asking for line item appropriations, we look at the big picture, how the state operates and how that impacts the businesses across the state, but one thing that we've shared with you is our spending principles and the idea that state government ought to be investing and we ought to be looking at a fact based, results first, type approach, like we worked with the PEW Foundation. We reviewed the materials from the U of L study and this is completely consistent with HB 463, the idea that we can invest a small amount for a larger return. This is a way to honestly help implement HB 463, so I don't stand here as a member of the business community asking for a specific dollar amount, but I do encourage you as you all look at the budget to seriously consider this program because it certainly looks like a way to help continue implement HB 463."*

**Bryan Sunderland**, Vice President of Public Affairs, Kentucky Chamber of Commerce