

An Important Matter of Policy:
Why Kentucky Appellate Courts Should Adopt *De Novo* Review of Pretrial Release Decisions

SUMMARY: Appellate standards of review are distinguished by the degree of deference which they show to the findings and rulings of a trial court. Which standard of review is appropriate to which kind of trial court finding or ruling is fundamentally a matter of judicial policy, both with regard to the allocation of power within the judiciary and the protection of cherished societal values as they are embodied in the law. The societal values at stake in pretrial release decisions and the need for a unified application of the law within the judiciary itself indicate that trial-level pretrial release decisions should be reviewed *de novo* by Kentucky appellate courts.

Choosing an Appropriate Standard of Review for Pretrial Release Decisions

Standards of review, like some standards of proof, are sometimes notoriously difficult to define.¹ Some commentators lament the inconsistency with which they are often employed.² Still, standards of review can generally be classified from the least deferential and most independent to the most lenient and deferential as follows:

- *De novo* review: (“What is the *right* answer?”) Appellate court decides the issue as if it had not been decided at all before.
- “Clearly erroneous” review: (“Is the judge *clearly* wrong, even if a better decision could have been made?”) This is a mid-line standard.
- “Abuse of discretion” review: (“Is the decision of the judge unreasonable, unfair, arbitrary, or unwarranted?”) This is the most deferential standard of review, which carries the least chance for correction if the decision is wrong.³

Most courts, state and federal, explain the choice of a particular standard of review in terms of the type of finding or ruling under review. Matters of fact are generally reviewed with deferential standards such as the “clearly erroneous” standard, while matters of law are usually reviewed less deferentially, with some version of a *de novo* standard. This distinction between matters of law and matters of fact – and the concomitant difference between the standards of review for each – is a universal feature of both state and federal law.

What is unfortunate about this approach to deciding an appropriate standard of review is that it quickly becomes very difficult to apply. Pure matters of fact and of law are usually only clearly identifiable in the most obvious cases, and an entire host of issues on review cannot be so neatly classified. The debate over what are matters of law and what are matters of fact has been going on for over a century.⁴

¹ See, for example, Kevin Casey, et al., Standards of Appellate Review in the Federal Circuit: Substance and Semantics, 11 Fed. Circuit B. J. 279 (2001-2002)

² See, for example, Cynthia Lee, A New “Sliding Scale of Deference” Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines, 35 Am. Crim. L. Rev. 1 (Fall, 1997); Amanda Peters, The Meaning, Measure, and Misuse of Standards of Review, 13 Lewis & Clark L. Rev. 233 (Spring 2009); Peter Nicolas, De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System, 54 Syracuse L. Rev. 531 (2004).

³ For a Kentucky case defining abuse of discretion in this manner, see Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

⁴ See Kelly Kunsch, Standard of Review (State and Federal): A Primer, 18 Seattle U. L. Rev. 11, 16 (Fall, 1994).

The United States Supreme Court has said that it knows of no rule or principle that would unerringly distinguish a factual finding from a legal conclusion.⁵

The sort of issues which defy easy classification as either matters of fact or of law are usually referred to as “mixed questions of law and fact,” but they are really “law application judgments” – i.e., instances of the application of law to facts. Ultimately, policy is the guiding factor in a choice of a standard of review of mixed questions of law and fact:

“[I]t seems misguided to assume, as many courts apparently do, that all law application judgments can be dissolved into either law declaration or fact identification. ... The real issue is not analytic, but allocative: what decision maker should decide the issue?”⁶

Even the law/fact distinction can be viewed as coming down to questions that are really between facts and policy:

“Some guidelines can be established, however. Where courts perceive the inquiry as empirical – revolving around actual events, past or future – the inquiry is labeled a question of fact; where the issue is primarily policy – centering on the values society wishes to promote – it becomes one of law.”⁷

So a standard of review reflects at least two different sorts of policy interests; the first is the appropriate institutional allocation of responsibility and decision-making between trial courts and courts of review, the second is the societal values at stake as represented in the law at issue. Of course, the two are connected; issues involving highly-cherished societal values as embodied in the law should require an allocation of judicial decision-making which allows *de novo* review, allocating power to courts of review.

Other policy considerations regarding the appropriate standard of review include the values of finality, of economy, and the need for a unified body of law and for guidance to the trial courts. Regarding the value of a unified body of law, the Supreme Court said that without heightened, *de novo* review of trial court determinations of reasonable suspicion and probable cause, trial judges would reach different results even when there was no significant difference in the facts. “Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.”⁸

Kentucky courts use the matter of law/matter of fact distinction to explain the choice of particular standards of review, and do not address mixed questions of law and fact as a third type of category. Instead, Kentucky courts consider mixed questions of law and facts - cases involving the application of the law to facts - as simply another type of matter of law, requiring heightened, independent, *de novo* review: an appellate court reviews the application of the law to the facts and the appropriate legal standard *de novo*, Carroll v. Meredith, 59 S.W.3d 484 (Ky.App. 2001); the construction and application of statutes is a matter of law and may be reviewed *de novo*, Osborne v. Commonwealth, 185 S.W.3d 645 (Ky. 2006), Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth Transportation Cabinet, 983 S.W.2d 488 (Ky. 1998); a question of law is presented for *de novo* review where the relevant facts are undisputed and the issue on appeal becomes the legal effect of those facts, Revenue Cabinet v. Comcast Cablevision of the South, 147 S.W.3d 743 (Ky. App. 2003).

⁵ Pullman-Standard v. Swint, 456 U.S. 273, 288, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

⁶ Henry Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 237 (March, 1985).

⁷ Kunsch, at 22.

⁸ Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

Appellate Review of Constitutional Facts

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.”⁹

The idea that decisions regarding constitutional facts require heightened judicial scrutiny can be traced back to Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932). “Stripped of its jurisdictional features, the case embodies the view that some judicial tribunal must independently review facts implicating constitutional rights.”¹⁰

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.”¹¹

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.”¹²

Although federal courts have never delineated the specific constitutional concerns which must be protected by heightened independent appellate review, federal courts have expressly required some form of *de novo* review in a number of cases requiring the adjudication of facts effecting constitutional rights. For example: whether an award of punitive damages was excessive, violating due process and the Eighth Amendment prohibition against cruel and unusual punishment, Cooper Industries v. Letterman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2000); whether a fine in a criminal case was excessive, violating the Eighth Amendment prohibition against cruel and unusual punishment, United States v. Bajakajian, 524 U.S. 321, 336, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998); whether otherwise protected speech was uttered with actual malice in a libel case, Bose Corporation v. Consumers Union of the United States, Inc., 466 U.S. 485, 501, 104 S.Ct.1949, 80 L.Ed.2d 502 (1984); whether otherwise protected speech contained obscene material, Jacobellis v. Ohio, 378 U.S. 184, 190 and n.6, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); whether a person is “in custody” for purposes of the right

⁹ The term ‘constitutional fact’ was coined by Professor Dickinson in his article, *Crowell v. Benson: Judicial Review of Administrative Determinations of ‘Constitutional Fact,’* 80 U. Pa. L. Rev. 1055 (1932). The term refers to any mixed question of law and fact when constitutional rights turn on the factual determination. See Judah Shechter, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 Colum. L. Rev. 1483 (Nov. 1988). For more discussion of *de novo* review of constitutional facts, see also Arthur Lawson, *The Doctrine of ‘Constitutional Fact,’* 15 Temp. L. Q. 185 (1941); Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Review in Federal Appellate Courts*, 50 Duke L. J. 1427 (2001); Rachel Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655 (1988); Bryan Adamson, *Federal Rule of Civil Procedure 52(A) as an Ideological Weapon?*, 34 Fla. St. U. L. Rev. 1025 (Summer, 2007).

¹⁰ Shechter, at 1486-87.

¹¹ *Crowell*, at 296.

¹² *Crowell*, at 295.

to habeas review, Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995); whether the performance of defense counsel was reasonable in a criminal case, effecting the right to an attorney, Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); whether a potential conflict existed in a case of multiple representation, effecting the right to an attorney, Cuyler v. Sullivan, 446 U.S. 335, 341, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); whether a defendant waived his constitutional rights, Brewer v. Williams, 430 U.S. 387, 403-404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); whether pretrial identification procedures were sufficiently non-suggestive, Sumner v. Mata, 455 U.S. 591, 597, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); the correctness of trial court determinations of reasonable suspicion and probable cause, Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), and United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *de novo* review of whether hearsay statements violated the Confrontation Clause of the Sixth Amendment, Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).

Kentucky appellate courts conduct *de novo* review of trial court decisions of mixed law and fact in most of these cases.¹³

A few recent Supreme Court cases have strongly suggested that *de novo* review is appropriate when the resolution of a mixed question of fact and law affects constitutional rights. In *Bose*, 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.”¹⁴ The court said,

“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.”¹⁵

The court described how fact-finding can become inextricably entwined in the application of the law and, that when constitutional rights are at stake, the court must do an independent review:

¹³ Kentucky adopted the *de novo* review required by *Cooper* in Sand Hill Energy v. Ford Motor Co., 83 S.W.3d 483 (Ky. 2002), *overruled on other grounds*; forfeiture determinations done outside the presence of a jury are reviewed for clear error factually and *de novo* with regard to the trial court’s application of the law, e.g., Hibbens v. Commonwealth, *unpublished*, 2007 WL 4212345, citing Monin v. Monin, 156 S.W.3d 309, 315 (Ky. App. 2004); review of a jury finding of actual malice is heightened, independent, *de novo* review, Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc., 179 S.W.3d 785 (Ky. 2005); whether a defendant is in custody is “a mixed question of law and fact to be reviewed *de novo*,” Commonwealth v. Lucas, 195 S.W.3d 403, 405 (Ky, 2006); whether the Fifth Amendment right against self-incrimination is properly applied to a situation is reviewed *de novo*, Welch v. Commonwealth, 149 S.W.3d 407 (Ky. 2004); *Strickland* was adopted by Kentucky in Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985), and requires *de novo* review; suppression issues are reviewed for clear error/substantial evidence (RCr 9.78) and the application of the law to the fact is reviewed *de novo*, Owens v. Commonwealth, 291 S.W.3d 704, 707 (Ky. 2009), Kentucky adopted *Ornelas* in Baltimore v. Commonwealth, 119 S.W.3d 532, 539 (Ky.App. 2003) and conducts *de novo* review of the application of the law, Bauder v. Commonwealth, 299 S.W.3d 588 (Ky. 2009); whether a defendant knowingly and voluntarily waived a right is subject to *de novo* review, Mounce v. Commonwealth, *unpublished*, 2011 WL 112421.

¹⁴ Kentucky’s CR 52.01 is almost identical: “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 the credibility of the witnesses.” Kentucky’s RCr 9.78 is similar: “If supported by substantial evidence the factual findings of the trial court shall be conclusive.”

¹⁵ *Bose* at 501.

“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.”¹⁶

The court also said, “[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact finding function be performed in the particular case by a jury or by a trial judge.”¹⁷

In *Ornelas*, the court said that “as a general matter determinations of reasonable suspicion and probable cause (for seizures and searches without warrants) should be reviewed *de novo* on appeal,”¹⁸ and disposed of the case by directing the Court of Appeals to conduct a *de novo* review on remand.¹⁹ In *Bajakajian*, the court rejected the defendant-respondent’s argument for an abuse of discretion standard and, citing *Ornelas*, said that “the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate.”²⁰ In *Lilly*, the four-justice plurality cited the *Ornelas* requirement of *de novo* review and said that the court’s prior Sixth Amendment opinions had “assumed, as with other fact-intensive, mixed questions of constitutional law, that independent review is ... necessary ... to maintain control of, and to clarify, the legal principles governing the factual circumstances necessary to satisfy the protections of the Bill of Rights.”²¹

So we have recent Supreme Court cases disposing of both clearly erroneous and abuse of discretion standards of review and requiring *de novo* review instead, in “constitutional fact” cases involving mixed questions of fact and law implicating the rights contained in the constitution. Although none of the cases provide a detailed analysis of the applicability of the *de novo* requirement to the states, the language in *Bose* is especially clear in grounding the necessity of *de novo* review in the constitutional issue at stake. 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.

Decisions Regarding Pretrial Release Are Constitutional Fact Decisions

Both the United States and the Kentucky constitutions prohibit excessive bail.²² The Eighth Amendment to the United States Constitution’s prohibition against excessive bail has been applied to the states

¹⁶ *Bose* at 501, n. 17.

¹⁷ *Bose* at 501. Statements like these have led Professor LaFave to cite *Bose* and comment that, “[t]he Supreme Court’s rulings on standards of appellate review are sometimes constitutionally grounded and thus applicable to the states,” and says of *Ornelas* as well, “the analysis (in *Ornelas*) certainly suggests that this is the case as to the *Ornelas* holding.” 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, §11.7(c), at 445-46 (4th ed. 2004).

¹⁸ *Ornelas* at 699.

¹⁹ *Ornelas* at 700.

²⁰ *Bajakajian* at 336, n. 10.

²¹ *Lilly* at 136.

²² Eighth Amendment to the United States Constitution, §17 of the Kentucky Constitution.

through the Fourteenth Amendment.²³ The Kentucky Constitution requires that all non-capital cases be “bailable by sufficient securities.”²⁴

Setting a bail at an amount beyond that necessary to ensure a defendant’s return to court is a denial of the defendant’s constitutional rights, state and federal. “[B]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant’s presence at trial] is ‘excessive’ under the Eighth Amendment.”²⁵

Bail decisions are constitutional facts involving mixed questions of law and fact. Whether the defendant is employed, has previous convictions, has previously failed to appear, and the seriousness of the offense are straightforward questions of fact. But none of these facts in themselves justify the imposition of a bond so high that the defendant must remain incarcerated prior to trial. To justify such a bond, the court must make a factual/legal finding that the defendant is either a “flight risk” or a “danger to others.”²⁶ It is this constitutional fact which should be subject to *de novo* appellate review.

Summary Review of Considerations Favoring *De Novo* Review of Pretrial Release Decisions

1. Recent Supreme Court cases strongly suggest *de novo* review is constitutionally mandated when a constitutional right turns on a mixed question of law and fact, even in instances when lower standards of review may have previously been thought appropriate.
2. The factual/legal determinations in question bear upon a deeply cherished societal value: the presumption of innocence. With very limited exceptions, no one should be deprived of his or her liberty without having been found guilty of the crime with which he or she is charged.
3. The need for guidance and unified application of the law is great. The problem which the Court referred to in *Ornelas* is a problem in Kentucky. Different decisions regarding pretrial release are being made based on often almost identical sets of facts. The men and women being granted pretrial release in one county are being denied pretrial release in the next county over. Only *de novo* appellate review will rectify this situation.
4. Proportionality requires *de novo* review of bail decisions. With all the other mixed questions of fact and law already under *de novo* review in Kentucky, there is no good reason to continue to limit review of bond decisions to the overly deferential abuse-of-discretion standard.
5. As a matter of institutional policy, the appellate standard of bond review needs to be unified with other standards of bond review. Habeas review of bond is clearly *de novo* under Kentucky law.²⁷ The judge can allow discovery, take evidence, and order release of the defendant. Sixth Circuit review of bond decisions is *de novo*.²⁸

An independent review of lower court decisions to release or detain defendants will encourage the lower courts to consider alternatives to detention. The reviewing court should not feel bound to the

²³See the list of protections applied to the state under the Fourteenth Amendment listed in McDonald v. City of Chicago, 78 USLW 4844, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), notes 12, 13.

²⁴ §16 of the Kentucky Constitution.

²⁵ Stack v. Boyle, 342 U.S. 1, 5, 72 S.Ct. 1, 3, 96 L.Ed. 3 (1951).

²⁶ See for example KRS 218A.135 and KRS 431.066(2)&(3).

²⁷These are the characteristics of a *trial de novo*. KRS 419.100.

²⁸ “A review of case law in the eleven circuits reveals that all circuits but one have concluded that a district court must conduct *de novo* review of a magistrate judge’s order of pretrial detention. Matthew Hank, District Court Review of a Magistrate Judge’s Pretrial Detention Order, 33 UWLA L. Rev. 157 (2001).

lower court decision and should feel free to amend or modify the terms of release as if it were the initial decision maker.²⁹

²⁹ Michael O’Neill, A Two-Pronged Standard of Appellate Review for Pretrial Bail Determinations, 99 Yale L. J. 885 (Jan. 1990).