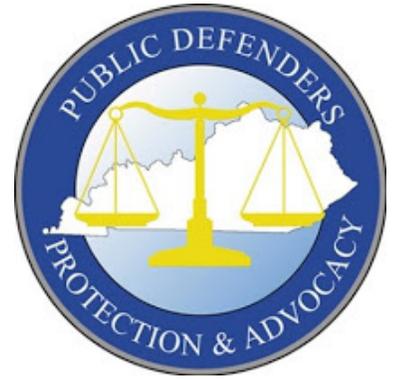


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# Bail Workgroup

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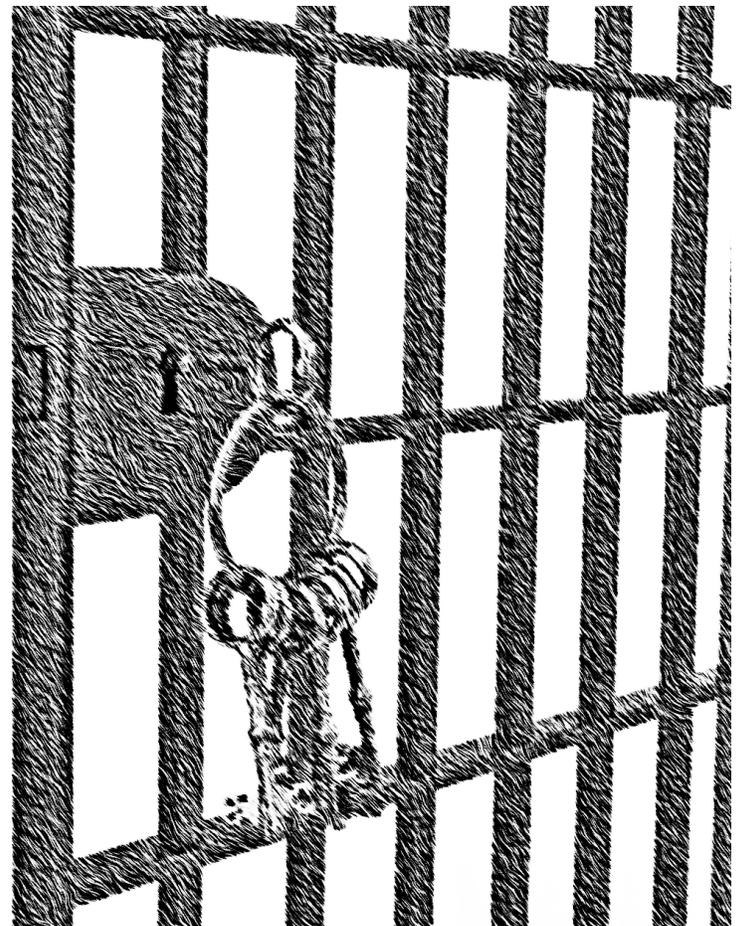
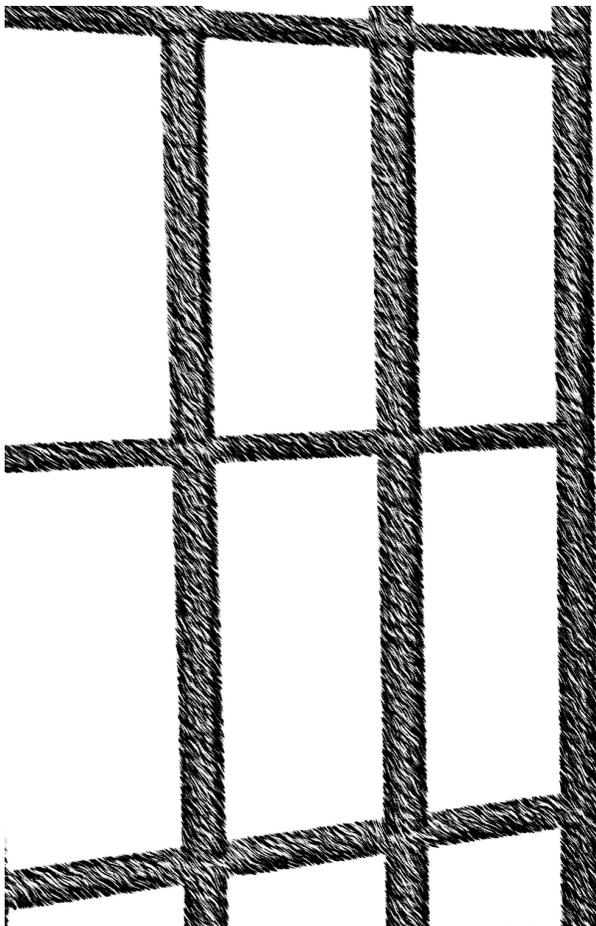


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## KENTUCKY BAIL GUIDE

FOR ADVOCACY AND APPEALS



Commonwealth of Kentucky  
Department of Public Advocacy  
Damon Preston, Public Advocate

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## INTRODUCING THE DEPARTMENT OF PUBLIC ADVOCACY BAIL PRACTICE GUIDE

This practice guide is intended as a quick reference manual to arguments commonly made and suggested in the context of pretrial release, including new constitutional arguments that are gaining ground nationally. This guide is an outline of the effective methods of challenging denial of pretrial release in Kentucky. Additional resources on pretrial release litigation may be found in DPA's Pretrial Release Manual, available at [https://dpa.ky.gov/Public\\_Defender\\_Resources/Pages/ppmanual.aspx](https://dpa.ky.gov/Public_Defender_Resources/Pages/ppmanual.aspx).

This guide will assist users in many ways. As an everyday reference, this guide will remind litigators of statute numbers and case names so pretrial release arguments that must be made in-court with little time to prepare are more robust likely to preserve important appellate issues. As a planning tool, this guide will aid in crafting motions and arguments that will be persuasive in individual cases. Lastly, as a research manual, this guide will help strategize the best way to approach individual judges with novel constitutional claims. Although not every argument listed here is appropriate in every case, many are applicable. Pretrial release litigation will only result in judicial relief for clients if defense counsel are adequately prepared to raise and preserve critical statutory and constitutional claims on behalf of their clients.



B. Scott West  
Deputy Public Advocate



Ray Ibarra  
Education Attorney Supervisor

### Thank you...

A lot of effort from a lot of people went into the making of this Kentucky Bail Guide. While this guide originated from the Kentucky Pretrial Release Manual of June 2013, much has been added, edited and revised from the original. Most importantly, this guide was vetted and improved, following a two-day Bail Workgroup meeting held in Frankfort in January 2019, by a dedicated force of twelve attorneys and faculty members from the field, handpicked by supervisors in the field. Accordingly, this guide represents the best of both the education and training world (the laboratory), and the place where actual bail advocacy is done (the trenches, both trials and post-trials). Thanks to all of the bail warriors out there who have labored to help make change in this critical area of constitutional law.

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# QUICK SUMMARY

The table below is a summary of the contents of this Bail Guide and is to be used as a quick-reference to bail arguments.

STATUTORY RELEASE		
Presumptive Release for Low & Moderate Risk on Assessment	KRS 431.066(3)&(4)	
Administrative Release Program Prior to Judicial Review	SC Order 2017-19	
Presumptive Release for POCS 1st Charges	KRS 218A.135	
Presumption of Release on Unsecured Bond	KRS 431.520 & RCr 4.10	
Factors on Bond; Must Consider Record and Ability to Post	KRS 531.525(1) & RCr 4.16	
Least Onerous Conditions Required	RCr 4.12	
REMEDIES - PROCEDURAL VEHICLES FOR BETTER BONDS		
In the Trial Court:	Adversarial Bond Hearing	RCr 4.40
To secure a better record or to bring in information to evaluate strength of the evidence.		
District to Circuit:	<i>Writ of Habeus Corpus</i>	KRS 419.020 et. seq.
To start early review of a release issue or educate a district judge.		
Circuit to Court of Appeals:	Bond Appeal	RCr 4.43
For expeditious review of an adverse Circuit Court bond decision.		
KEY PRETRIAL RELEASE CASES		
<i>Stack v. Boyle</i>	342 U.S. 1 (1951)	8th Amendment "Unreasonable Bail"
Bail set higher than reasonably calculated to fulfill the purpose of assuring the presence of the accused in court is excessive.		
<i>U.S. v. Salerno</i>	481 U.S. 739 (1987)	5th Amendment Due Process Clause
Sets federal procedure for denial of bond. After notice and a hearing with counsel, burden is on government to show specific danger to the community by clear and convincing evidence. In Kentucky, <i>Salerno</i> can be used to suggest procedure for denial of release on non-financial conditions which comply with the cases below.		
<i>Adkins v. Regan</i>	233 S.W.2d 402 (Ky. 1950)	KY. Const. Sec. 17
"If the amount required is so excessive as to be prohibitory, the result is a denial of bail."		
<i>Long v. Hamilton</i>	467 S.W.2d 139 (Ky. 1971)	KY. Const. Sec. 16 & 17
Intentionally setting a bond so high that a person seeking bail cannot make it is impermissible, even to protect the community. "Any attempt to impose excessive bail as a means to deny freedom pending trial of charges amounts to a punishment of a prisoner for charges upon which he has not been convicted and of which he may be entirely innocent. Such a procedure strikes a blow at the liberty of every citizen."		
<i>Abraham v. Comm.</i>	565 S.W.2d 152 (Ky. App. 1977)	KRS 431.525 & RCr 4.16
Courts have no discretion to ignore statutes on bond in the setting of bond. Courts must consider ALL factors on bond, not just one. Interprets KRS 431.525 but applies to Statutory Authority Generally, i.e. KRS 431.066.		
<i>O'Donnell v. Harris Cty TX</i>	892 F.3d 147 (5th Cir. 2018)	5th & 14th Amendments, Due Process & Equal Protection Clause.
<p><b>Due Process:</b> State created right to release scheme by Constitutional provision and statute. No sufficient procedures protected those rights where bond set per schedule without individual determination.</p> <p><b>Equal Protection:</b> Indigent persons at pretrial detention are entitled to intermediate scrutiny. Facts demonstrated no connection between effectiveness of monetary v. non-monetary bail, causing violation.</p> <p><b>Remedy:</b> Uncertain; county ordered to reform practice. Ability to post means what can be raised in 24 hours from any source. <i>See also Walker v. City of Calhoun, GA, 901 F.3d 1245 (11th Cir. 2019) (citing O'Donnell).</i></p>		

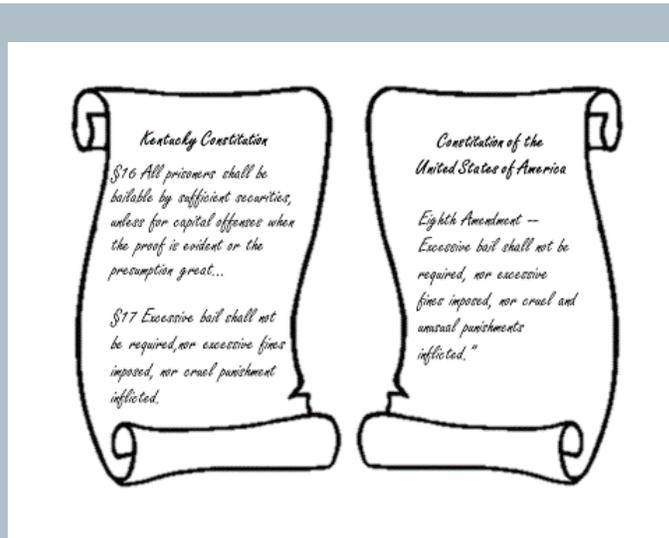
# Reasons for Robust Bail Advocacy

## Pretrial Release is the Number One Priority of Many Clients

The first thing that many jailed clients want to talk about is whether, how, and when he or she can be released from jail. This is more important than even the merits of the prosecution or any defense. The defender who only wants to talk about the facts of the case and leave issues of bond for later will find that many clients quickly lose interest in the conversation. Issues of release are here and now because the client is hoping to go home that day. Defenders are encouraged to talk about issues of bond first to comply with their clients' wishes and so that the client will be more attentive to a conversation about the merits of the case later.

## Pretrial Release is a Constitutional Right

Pretrial release is protected by three separate constitutional provisions.



## **Eighth Amendment of the United States Constitution**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### **Kentucky Constitution Section 16**

All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

### **Kentucky Constitution Section 17**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted.

## National Standards Recommend A Strong Pretrial Release Practice

The National Legal Aid and Defender Association's, *Performance Guidelines for Criminal Defense Representation*, which the Kentucky Department of Public Advocacy has adopted as policy (see Policy 17.10), calls for a strong pretrial release practice.

Guideline 2.1: "[t]he attorney has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client."

See also Related Standards: ABA Standards, *The Defense Function* (3d ed.), Standard 4-3.6; *Pretrial Release* (2d ed.) Standard 10-1.1. Mass. Publ. Counsel Ser., Manual, Sec. III, *Performance Guidelines*, Guideline 2.1(a); Guideline 2.3.

## Kentucky Ethics Require a Strong Pretrial Release Practice

The duties of competence (KY RPC 1.1) and diligence (KY RPC 1.3) incorporate the responsibility to advocate on matters important to the client including issues of pretrial release. In *Kentucky Bar Association v. Donsky*, 924 S.W.2d 257 (Ky. 1996), an attorney was suspended from the practice of law for six months after the KBA found that he had committed three counts of misconduct in his representation of a client by waiving a preliminary hearing to a grand jury over the objection of his client and failing to move the court for bond reduction at the second scheduled arraignment..." A failure to advocate pretrial release issues is unacceptable to DPA, the KBA, and the Kentucky Supreme Court.

# Statutory Framework for KY Pretrial Release

## Forms of Release Under the Rules of Criminal Procedure

Pursuant to RCr 4.04 and KRS 431.520, a charged person can be released on:

### **Personal or “own” recognizance (“ROR”)**



The incarcerated person is released on their own promise to appear. This, and an unsecured bond, are the bonds the court must grant unless the court believes such a bond would not reasonably ensure that the person would return to court or that the person is a danger to others. RCr 4.10; KRS 431.066

### **Unsecured bond**



This does not require putting down money or property. It simply specifies an amount of money the previously incarcerated person would owe if he fails to appear.

### **Nonfinancial conditions**



If the judge does not allow an ROR bond or unsecured bond, the judge can order home incarceration (KRS 431.517, KRS 532.220, RCr 4.12), substance abuse treatment (KRS 431.520(4)), work release or “weekends” (KRS 431.520(5), RCr 4.12), that the person remain in the custody of another (KRS 431.520(1), RCr 4.12), that the person not leave the area, or not associate with or contact certain other persons (KRS 431.520(2), RCr 4.12). The person released on nonfinancial conditions is to be informed of the conditions of his bail and be given a copy of the order. KRS 431.520, RCr 4.14. A court must consider

imposing electronic monitoring and home incarceration as conditions of bail when granting an ROR or unsecured bond to someone charged with a felony sex offense. KRS 431.520. The court must also make certain special findings if the offense is a violent offense, a sexual offense, or if it involves the violation of an EPO/DVO. KRS 431.064.

### **Surety bond**



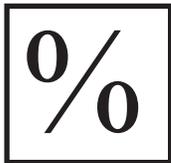
This bond does not require putting down money either, but someone other than the charged person must promise to pay to the court a certain amount of money if the charged person does not appear for later court proceedings. RCr 4.00(g). The surety has to be worth the amount promised. RCr 4.32.

### **Cash**



This means the entire amount of the bail is paid in cash. Someone posting a cash bond for the charged person can put it up in his own name or in the name of the charged person. Note that any time cash is deposited for bail, 10% of the amount deposited is applied to a bail fee and will not be returned. KRS 431.530(3), 431.532(2).

### **Ten percent**



This is also a cash bond, but the charged person, or whoever makes bail, needs only to come up with 10% of the total amount of the bail. As is true with a cash bond, 10% of the deposited amount is applied to a bail fee and will not be returned. KRS 431.530(3), 431.532(2).

### **Property**



The property must be in the Commonwealth of Kentucky, RCr 4.30(1), and the equity in it must be worth double the amount of the bond. RCr 4.04(1)(d)(v). It is very common to combine a property bond with a cash bond, e.g., “\$500.00/2x prop.” This is commonly referred to as “double property.” Unless the property is owned by a relative of the charged person, the property cannot have been used for bond within the last twelve months. KRS 431.535(3)(e), RCr 4.34(3). Sureties can put properties together, subject to

the same conditions. RCr 4.30. To put property up for bond, the owner must take the deed (which should show any encumbrances on the property) to the county property valuation office (PVA) and inform them that the property will be used for a bond. The PVA will give the property owner an assessment which he can then take to the Circuit Clerk. RCr 4.34. Once the property is posted for bond, the Commonwealth files a lien against it. KRS 431.535(5), RCr 4.36. Once the lien is filed, the property cannot be sold while it is being used for bond.

### **Bail Credit**

Unless determined ineligible by the court, regardless of the amount of bail set, the court shall permit the incarcerated person a credit of one hundred dollars (\$100) per day as a payment toward the amount of bail set for each day or a portion of a day that the charged person remains in jail prior to trial. KRS 431.066(5). Some sex offenses are ineligible for bail credit. 431.066(5)(b)(1). A court may determine a person ineligible for bail credit by finding that they present a flight risk or are a danger to others and making a written finding describing the reasons. 431.066(5)(b)(2). If a bond is to be partially secured by payment of ten percent (10%), the bail credit shall apply to the 10%, not the whole amount of the bond. The jailer shall be responsible for tracking credit earned. KRS 431.066.

### **Administrative Release Under Supreme Court Order 2017-19**

Persons charged with non-violent misdemeanors who score a low or moderate risk of flight and new criminal activity are subject to automatic pretrial release upon their “own recognizance” by pretrial services prior to judicial review.

To summarize the Order:

#### **Assessment**

Pretrial officers assess all verified and eligible incarcerated persons by use of the pretrial risk assessment on an FTA (“Failure to Appear”) scale of 0 to 7, and an NCA (“New Criminal Activity”) scale of 0 to 13. “[V]erified and eligible defendant” means a defendant who pretrial services is able to interview and assess, and whose identity pretrial services is able to confirm through investigation.” KRS 431.066(1). Each scale assesses at a “low,” “moderate,” or “high” risk.

#### **Own Recognizance Release for Low/Moderate Risk Persons**

Individuals charged with non-violent/non-sexual misdemeanor(s) whose risk scores have been assessed as low Risk or moderate risk on the FTA scale and low risk or moderate risk on the NCA scale will be eligible under the Schedule and therefore shall be released ROR automatically by the pretrial officer.

#### **Certain Exemptions Apply**

“Violent crimes” are those listed in Appendix B, and “sexual offenses” are those listed in Appendix C to Order 2017-01, and are not eligible for release under the schedule. The following persons are also not eligible under the schedule, and must go through the pre-existing bail hearing process: Aggravated DUI 1st (other than one aggravated by a refusal) or any second offense or greater DUI; Contempt of court; Violation of an order of conditional discharge of a misdemeanor; Violation of an order of probation of a felony; Persons who have previously failed to appear on the charge, or decline the pretrial services interview.

#### **Judicial Deviation**

Judges may deviate from the schedule, but only to expand the schedule to include certain non-violent, non-sexual Class D felonies, other than a charge of “fugitive from justice.” *See* Kentucky Supreme Court Order 2017-01 and 2017-19.

### **Setting the Amount of Bail**

KRS 431.525 governs the amount of bail, regardless of what type of bond is granted. Often constitutional arguments (addressed below in a separate section) inform the court’s evaluation of the factors in the statute. The statute provides that “[t]he 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.”

#### **(a) Sufficient to Insure Compliance with Conditions of Release**

The original reason for the setting of bail is to insure/ensure (i.e. to mayhto/tomatto) the client comes back to court. In *Stack v. Boyle*, 342 U.S.1, (1951), the Supreme Court reiterated the standard:

Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.

The holding of *Stack v. Boyle* is binding upon Kentucky Courts for two reasons:

- The Eighth Amendment “Excessive Bail” Clause and its interpretation has been incorporated to the States through the Fourteenth Amendment. *Schilb v. Kuebel*, 404 U.S. 357 (1971). In *Schilb*, the Court held “the Eighth Amendment’s proscription against excessive bail has been assumed to have application to the states through the Fourteenth Amendment.” *Id.* at 484, citing *Pilkinton v. Circuit Ct.*, 234 F.2d 45 (8th Cir. 1963) and *Robinson v. California*, 370 U.S. 660 (1965). In *McDonald v. City of Chicago*, 561 U.S. 742 at ns. 12, 13, (2010), the Court noted the excessive bail clause as incorporated in the Fourteenth Amendment, citing *Schilb*.
- *Stack v. Boyle* was adopted by Kentucky. In *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977), the Court of Appeals referenced *Stack v. Boyle*, and block-quoted portions of the opinion, including:

Petitioners’ 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...

The Court of Appeals then stated, “[w]e believe that the decision of the Supreme Court holding such orders appealable is sound, and we adopt it.” In *Abraham*, the court also reversed a bail decision because there was “no basis for believing” that the amount of bail set in that case was the “least onerous condition reasonably likely to insure Abraham’s appearance at trial.”

### (b) Not “Oppressive”

While KRS 431.525(b) requires that a bail amount be “not oppressive,” the actual language in Section 17 of the Kentucky Constitution provides that “[e]xcessive bail shall not be required...,” which is language identical to the Eighth Amendment. This language implicitly imports the standard in *Stack v. Boyle*, above. In *Abraham*, the highest court in Kentucky explicitly approved of this requirement. For other examples of excessive bail see KRS 431.525(b) (to be constitutional, “excessive” and “oppressive” have to mean the same thing).

The Kentucky Courts provided some guidance on what is considered to be oppressive or excessive and in turn when bail is excessively high. In *Adkins v. Regan*, 233 S.W.2d 402 (Ky. 1950), Kentucky’s highest court held that a \$5,000 bond for “breach of the peace” was “so clearly disproportionate and excessive as to be an invasion of appellant’s constitutional right.” The court stated:

The generally recognized objective of a peace bond is not to deprive of liberty but to exact security for the keeping of the peace. Reasonableness in the amount of bail should be the governing principle. The determination of that question must take into consideration the nature of the offense with some regard to the prisoner’s pecuniary circumstances. If the amount required is so excessive as to be prohibitory, the result is a denial of bail.

*Id.* at 405. An analysis of what is oppressive begins with an examination of the poverty or wealth of the person seeking bail (discussed below). A client’s indigent status is extremely important in determining whether the set bail is “oppressive” or “excessive.” Excessive bail is a violation of the Eight Amendment to the United States Constitution, and sections 16 and 17 of the Kentucky Constitution. “Any attempt to impose excessive bail as a means to deny freedom pending trial of charges amounts to a punishment of the prisoner for charges upon which he has not been convicted and of which he may be entirely innocent.” *Long v. Hamilton*, 467 S.W.2d 139, 142 (Ky. 1971).



**(c) Commensurate with the Nature of the Offense Charged**

The prosecution often argues that the “gravity of the offense” alone necessitates a high bond, though it is just one of the five factors listed by KRS 431.525. Routinely setting bail at the same amount for the same charge abrogates the judge’s responsibility to examine the RCr 4.16 standards. *Abraham*, 565 S.W.2d 152. Any “standard” amount set for like offenses should be litigated, as such a standard constitutes an abuse of discretion and is arbitrary, arguably in violation of Section 2 of the KY Constitution. Even so, a particular client may be able to

get release if counsel can establish that the bond in the client’s case is set disproportionately higher than other bonds for similar offense in the jurisdiction, or neighboring jurisdictions.

**(d) Considerate of the Past Criminal Acts of the Accused ...**

The Pretrial Risk Assessment will have already taken into the consideration of past crimes, if any, of a charged person. If the client is still considered a “low” or “moderate” risk to reoffend, defenders are encouraged to argue that the significance of his past criminal acts has already been processed and has assessed him to be less than a high risk. Argue that this determination is evidence based and that prosecutorial or juridical assumptions about the client’s records are not.

If the client has always made court appearances, defenders are encouraged to highlight this to the Court. Focus attention on his most recent pattern of attendance, and see if that improves the overall average. Distinguish any prior acts from the present one by arguing that the nature of the offense is not like previous ones. In *Abraham*, the Court held that a judge must consider “the nature of his prior criminal record.” It is noteworthy that the Court did not hold that a judge must merely consider the length of the record. For example, if your client is charged with his first theft case, and all priors consist primarily of public intoxication, argue that your client is a first time offender for a crime of this nature. Similarly, if a client is charged with assault and has a history of theft, the defender should challenge any assertion by the Commonwealth that the person will commit theft if released.

**...and Reasonably Anticipated Conduct of the Accused if Released**

Arguments made by the Commonwealth that a client will commit another crime if released can be easily confronted by presenting to the Court the client’s intended conduct once released. A defender should present future plans of the client, such as an intention to seek education, or enter into treatment for use disorders or mental health conditions. This argument can be enhanced with proof of enrollment in classes or treatment. Indeed, the Court in *Abraham* chastised a trial judge for failing to consider certain facts which were relevant to determining the reasonably anticipated conduct of the accused in that case:



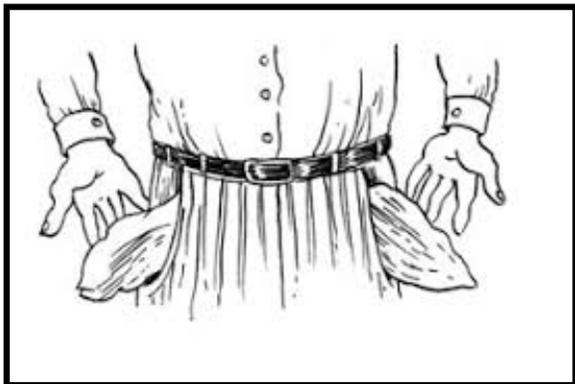
[T]he order of September 13, 1977, does not indicate that the trial court considered Abraham’s length of residence in Kentucky and at his present address, his marital status, his employment record, the date and nature of his prior criminal record, or his ability to raise \$75,000.00 in bail. All of these factors would be relevant to a determination of the conditions of Abraham’s release....

In addition, the order provides no basis for believing that \$75,000 bail is the least onerous condition reasonably likely to insure Abraham’s appearance at trial. RCr 4.12. These considerations of marital status, length of residence in the jurisdiction, and employment factors, while not separately listed in RCr 4.16, or KRS 431.525, are nevertheless relevant to help establish the defendant’s “reasonably anticipated conduct if released.”

*Id.* At 157.

When a prosecutor argues that factors urged by defense counsel in support of a bond reduction (such as the accused's medical condition) are beyond the scope of RCr 4.16 and ought not to be considered, *Abraham* allows defense counsel to argue those factors are relevant to the issue of reasonably anticipated conduct of the person seeking release. Other factors which might also establish anticipated conduct could be the medical condition of family members whom the person is obligated support either legally or morally, ties to the church or community, a promising job prospect, the loss of social security disability payments if incarcerated longer than thirty days, or any other factor unique to an individual which supports an argument that they are likely to stay in the community, rather than flee.

### (e) Financial Ability of the Incarcerated Person to Make Bail



The lack of consideration of the incarcerated person's ability to post bond violates the letter of *Stack v. Boyle*, and *Abraham*, as the well as KRS 431.525. Individualized consideration of a person's ability to post bond is also an essential component in avoiding unfair discrimination on the basis of poverty in violation of the equal protection clause. See, *ODonnell v. Harris Cty.*, 892 F. 3d 147 (5th Cir. 2018).

Persons who qualify for a public defender have already displayed to the Court a financial inability to post bond. To qualify for a public defender, the court must have already found the client to be a "needy person" as defined in KRS 31.100 and 31.120. Defenders are encouraged to use the Order appointing a public defender to illustrate the lack of income

and assets, and the abundance of debts and dependents. Hired counsel must resort to other avenues to show the lack of a client's resources. Often, a person will be able to prove that he almost qualified for a public defender. Income tax statements, wage statements, mortgage agreements and/or rental contracts can be introduced to show low income and high debt. The key is persuading the court that bond should be set relative to a person's ability to pay, and should not be a penny more than is necessary to ensure that a person will return to court and abide by conditions of release. *ODonnell* suggests that the figure relevant to this inquiry is all the money client could obtain within 24 hours including contributions of family and friends. *Id.* at 165.

### Setting the Manner in Which Bail May be Made, Regardless of the Amount

Pursuant to KRS 431.066 and 431.520, after setting the amount of bond under KRS 431.525, the Court then shall consider whether to then grant ROR or an unsecured bond. Alternatively, if it finds that the person is a high risk to flee, or not return to court, or to be a danger to the public, the Court shall consider whether to impose a financial or other restriction as a condition of bail. When making either consideration, the Court must impose the "least onerous conditions" reasonably likely to ensure a person will return to court. RCr 4.10, 4.12, KRS 431.066.

KRS 431.066, which addresses bail for low and moderate risk persons, requires the following:

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- (2) **Consideration of risk.** "[T]he court shall consider whether the defendant poses a risk of flight, is unlikely to appear for trial, or is likely to be a danger to the public if released. In making this determination, the court shall consider the pretrial risk assessment..."
- (3) **Low risk.** If the charged person "poses a low risk of flight, is likely to appear for trial and is not likely to be a danger to others, the court shall order the charged person released on unsecured bond or on the their own recognizance subject to such other conditions as the court may impose."
- (4) **Moderate risk.** If the charged person "poses a moderate risk of flight, has a moderate risk of not appearing for trial, or poses a moderate risk of danger to others, the court shall release the charged person under the same conditions" as a low risk defendant, "but shall consider ordering the defendant to participate in GPS monitoring, controlled substance testing, increased supervision, or other conditions as the court may order."

KRS 431.067 allows judges to order GPS monitoring when considering release for moderate and high risk persons on the same terms found in KRS 431.517. KRS 218A.135 requires ROR or an unsecured bond for those charged with offenses subject to presumptive probation at sentencing.

**QUICK GUIDE: BOND STATUTE, ANALYSIS & ARGUMENT GUIDE**

CLASSIFICATION	STATUTE	REQUIRED
All Persons	KRS 4.10, 4.12, KRS 431.520	ROR/Unsecured (default), then “least onerous conditions”
Low Risk	KRS 431.066(3)	ROR/Unsecured*
Moderate Risk	KRS 431.066(4)	ROR/Unsecured but court can consider GPS, drug testing, and increased supervision*
Misdemeanors without physical injury or sexual contact	KRS 431.525(4)	Bail cannot exceed the maximum fine + court costs on the highest misdemeanor charged*
Charge carrying a penalty of Presumptive Probation	KRS 218A.135(1)	ROR, unsecured*
All persons other than those convicted of or pleading to listed sexual or violent offense.	KRS 431.066(5)(b)	eligible for bail credit*

\* Unless a flight risk or danger to others.

NOTE: Pretrial services is now including whether a defendant is or is not eligible for bail credit in the pretrial report.

**Special Rule for Out-of-State Motorist DUIs**

KRS 431.523 limits the amount of bail that can be set in a DUI case for an out of state motorist. Non-residents of Kentucky charged with a DUI, regardless of level of offense, cannot be set higher than \$500 (which by statute must be set at cash only, or unsecured, with no other form of bail being acceptable), unless there is an accident involved in which there is physical injury or property damage, in which case bail shall be set at \$1,500. In the event of serious physical injury or death, bond must be set at \$5,000. In appropriate cases, constitutional challenges described below should be raised to this statute.

## Trial Court: Litigating Bail Issues

**Opportunities for Bail Hearings, Generally**

Every court allows argument on the issue of bond at some point, if not several points, during the criminal proceeding. Where attorneys are present at first appearance, many judges allow, and some prefer, that initial bond arguments be presented at that time. The Rules of Criminal Procedure offer several additional opportunities to litigate the issue of bail if the client has not been released. A defense attorney should consider filing a motion to reduce bail whenever the client’s circumstances have changed or a new development in the facts of the case arises which warrants asking for a new bail. The following instances are times when bail can (and should) be addressed if the client has not yet been released. Note that in the case of a felony charge some of these instances can occur twice: once in district court and once again in circuit.

**First Appearance / Arraignment (District or Circuit) (RCr 4.02)**

Setting bail at or before first appearance is a duty of the trial court. RCr 4.02. No written motion is necessary. Three things stand out from this rule:

- The Court has an affirmative duty to consider bail. In a non-death penalty case, even without any action from the charged person or his/her counsel, the court has a duty to consider an appropriate bail. This does not mean, however, that counsel is foreclosed from making a bond argument, formal (written) or informal (oral), whenever counsel appears with the client at arraignment. RCr 4.02(2).
- Commonwealth must prove both an aggravator and likely guilt. In a death penalty case, the defense has a right to a hearing on the issue of whether the presumption or proof “is great” that accused person is guilty of a death penalty case. This is a two-pronged hearing where both proof of an aggravator and proof of guilt is necessary. KY Const. Sec 16; see *Burton v. Commonwealth*, 212 S.W.2d 310 (Ky. 1948).

- “Probable cause” is insufficient. In a death penalty case, a preliminary hearing where the burden of proof is “probable cause” is insufficient to meet the “great” test. “A person accused of crime for which he might suffer the death penalty has the right to remain at liberty upon reasonable bail pending trial unless the Commonwealth shows his manifest guilt or produces evidence sufficient to create great presumption of guilt.” *Smiddy v. Barlow*, 288 S.W. 346 (Ky. 1956).

### **Mandatory Review After 24 Hours (District Court and Circuit Court if bond changed on Indictment) (RCr 4.38)**

If after twenty-four (24) hours from the imposition of conditions of release a person remains in detention, the Court must review bond conditions on incarcerated person’s written application, or may review on its own motion. Defenders, on behalf of their client, should style this request as a “Motion for Mandatory Bond Review After 24 Hours Pursuant to RCr 4.38.” This will avoid the motion being interpreted as the client’s one permissible request for an adversarial bond hearing under RCr 4.40(1). If the court declines to modify the bond, the Court shall record in writing the reasons for its decision. Pretrial release officers are directed to inform the court of incarcerated persons who are not released from jail after 24 hours.

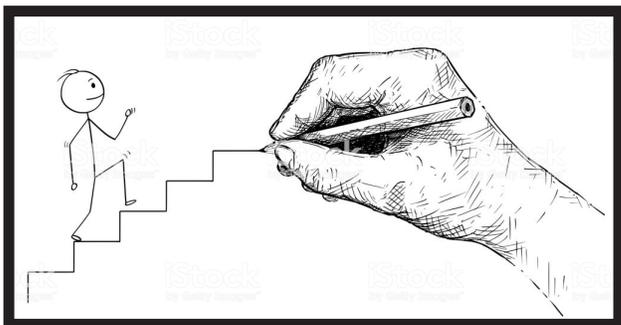


### **Adversarial Bond Hearing (District Court or Circuit Court) (RCr 4.40(1))**

If a client is still in custody after the initial consideration(s) of bond, counsel should file a motion for an “Adversarial Bond Hearing Pursuant to 4.40(1).” Pursuant to the rule, the court must grant a hearing the first time a defendant requests one. Subsequent adversarial hearings are at the discretion of the court. Courts usually interpret a burden on the requesting party (the client) at this stage to show that the bail set is excessive. Counsel should, however, argue that the constitutional nature of the right to pretrial release places a burden on the Commonwealth. See “Burden of Proof” section below. The defense may call prosecuting witnesses (or other witnesses who have information pertinent to an issue on bond) to the stand. *Kuhnle v. Kassulke*, 489 S.W.2d 833 (Ky.App. 1973).

### **Hearing on Change in Conditions / Raising Amount of Bond (RCr 4.40; 4.42)**

RCr 4.40 and 4.42 require that in order for a court to raise the bond of a charged person after release, the prosecutor must first make a motion for a hearing and prove the need for a modification of bond by clear and convincing evidence. *Brown v. Commonwealth*, 789 S.W.2d 748 (Ky. 1990). An exception to this rule is that when a person has already made bond in district court, a circuit court may raise the accused’s bond without such a hearing upon indictment by a grand jury. This is because indictment represents a change in the “defendant’s” status. *Sydnor v. Commonwealth*, 617 S.W.2d 58 (Ky. App. 1981); *Kuhnle v. Kassulke*, 489 S.W.2d 833 (Ky. App. 1973). In such an event, counsel should request a hearing under RCr 4.40 in the circuit court and argue, in conjunction with other potential arguments, that the change would not alter the charged person’s likelihood of appearing as required by RCr 4.40 and 4.42. Style such a motion as a request for a hearing pursuant to the rules cited in this section.



### **Preliminary Hearing in District Court (RCr 3.14)**

Following a preliminary hearing, or waiver of a preliminary hearing (note: waiver of a preliminary hearing is discouraged for several reasons, including in the context of pretrial release advocacy), upon a finding of probable cause to believe a felony has been committed, the Court shall bind the charged person to answer to the Grand Jury, “and commit the defendant to jail, release the defendant on personal recognizance or admit the defendant to bail if the offense is bailable.” Several aspects of this rule are noteworthy:

- Preliminary Hearings can be used to develop facts pertaining to bail. Facts developed during the preliminary hearing are testimonial evidence which the court can consider when making the required bond decision. Facts can be developed by the defense to show that the client is *not* a flight risk. A common example is trafficking or possession

cases where charges were delayed to protect a confidential informant or undercover officer. The delay in arresting the accused shows a belief by the police and prosecutor that the now charged person is not a flight risk or danger to the public. Defense counsel should bring out these facts during the cross-examination of the police officer.

- The District Court has a duty to consider bail after a preliminary hearing. If the prosecutor or the Court states that the purpose of a preliminary hearing is to determine probable cause, not to address issues pertaining to bail, cite to RCr 3.14. RCr 3.14 requires the Court to consider bail after a finding of probable cause. “The purpose of a preliminary hearing, or ‘examining trial,’ in this state – and its only purpose – is to determine whether there is sufficient evidence to justify detaining the defendant in jail *or under bond* until the grand jury has an opportunity to act on the charges.” *King v. Venters*, 595 S.W.2d 714, 714 (Ky. 1980)[emphasis added].
- District Court retains jurisdiction. Pursuant to RCr 4.54, bond issues remain with the district court after a preliminary hearing until an indictment has been returned.

### PRELIMINARY HEARING CAVEAT!!!

In *Bolton v. Irvin*, 373 S.W.3d 432 (Ky. 2012), the Kentucky Supreme Court held that following a preliminary hearing, a district court judge could change the bond, including increasing the amount, upon the evidence produced at the preliminary hearing, citing RCr 3.14(1). The rule contains no provision requiring the Commonwealth to put on clear and convincing evidence of a material change in circumstances which would warrant a change in bond. The court then relied upon the case of *Sydnor v. Commonwealth*, 617 S.W.2d 58, 59 (Ky. App. 1981), quoting *Kuhnle v. Kassulke*, 489 S.W.2d 833 (Ky.1973), and reiterated that the return of an indictment marks “the passing of a milestone in the criminal process” and “is sufficient to authorize the circuit court ... to take a fresh look at the question of bail and to exercise a new discretion as to the amount of bail.” Similarly, RCr 3.14(1) specifically contemplates that a finding of probable cause is a sufficient milestone to authorize the district court to take a fresh look at the question of bail.

*Bolton*, however, had not posted bond and was incarcerated at the time of the preliminary hearing. The court noted that:

RCr 4.42, which concerns enforcement and modification of conditions for a defendant who has already been released pending trial, also does not apply in this case. By its plain language, the rule applies ‘at any time following the release of the defendant and before the defendant is required to appear for trial...’ The rule provides additional protections for the liberty interests of a defendant who has already been granted pretrial release. It is therefore inapplicable to a defendant like Irvin who remained incarcerated pending trial.

*Id.* at 436. This language has been construed by some as dicta because the accused in that case had not posted bond. Nevertheless, whenever the district court remands a client who has already made bail back to jail, the criminal defense attorney should move to have the client’s bond left intact (absent a showing of clear and convincing evidence of a material change in circumstances which would warrant a change in bond).

In *Marcum v. Broughton*, 442 S.W.2d 307 (Ky. 1969), the Kentucky Supreme Court stated that its “view is that bail previously allowed may not be revoked without reason for the revocation.” In that case, the charged person had been on bond in the amount of \$10,000 from September, 1968 until February, 1969. The record did not indicate any unlawful conduct, he had made himself amenable to the processes of the court, and appeared at hearings as directed. *Marcum* therefore supplements *Bolton*, addressing the treatment of persons released on bond.

### Mechanics of a Bail Hearing

Whenever “bail hearing” is used in this practice guide, it means a full adversarial hearing, on the record, where evidence is adduced, and parties make arguments summarizing the evidence. Only at such a hearing can an effective record be created to provide appellate relief of an adverse decision.



The common practice of asking to be heard on bond informally does not constitute a “bail hearing.” Under that common practice, the attorney will make arguments which were crafted beforehand stating why the client should be released from custody. The prosecutor may then make arguments regarding the position on bail. The Court may or may not make an immediate ruling on the request for bail. Although all efforts to secure pretrial release for a client are laudable, this is not a “bail hearing” for the purposes of this Bail Guide.

### Written Motion Required

In almost every circumstance (except arguments made at first appearance), the hearing will be preceded by a written motion. Oral motions to reduce bond should be viewed as a last resort alternative to filing a written motion, not an informal precursor to filing a written one. If you argue a motion orally and it is immediately denied a written motion filed the next day may not be well received by the judge. Some important considerations when filing written motions:



- **Timing is crucial.** Under ideal circumstances, the lawyer has met with their client, knows about their life, family, assets, criminal record, and other relevant facts to put them in the best position to receive a reduced bond. The attorney may have had time to conduct independent investigation, and locate services or other proof that will enhance a bond argument. However, timing sometimes must be the controlling factor when deciding when to raise the issue of bond. If the client wishes to seek a bond reduction, the attorney must advise their client fully as to the pros and cons of the argument, but then defer to the wishes of their informed client. There may also be systemic realities that make an early bond argument appealing. If a prosecutor is agreeing to lowered bonds, a judge is making particularly lenient bond decisions on a particular day, or a jailer is encouraging reduced bonds to reduce the jail population, then timing considerations

may make an early bond argument beneficial to your client.

- **Form motions.** Be careful not to overuse a “form” motion which is substantially identical in wording every time you file it. Form motions which have not been tailored to the facts and background of the accused are not persuasive. Additionally, a well-written motion will help organize the evidence which you will be introducing into the record at the hearing. Do not be concerned that by filing a fully fleshed-out motion that you are tipping off the prosecutors to the arguments you will be making. They already know them. Also remember that “the imperfect motion actually filed is better than the perfect motion still in your head,” (former Trial Division Director George Sorenberger) so reliance on form motions to get you started should not be avoided completely.
- **Make sure that you identify the specific Rule of Criminal Procedure which authorizes the bail hearing.** This very important because your client only get one “adversarial hearing” as of right under RCr 4.40, you must make certain that any motion filed under RCr 4.38 is not considered by the court to be that adversarial hearing. You can do this by clearly stating that the motion is pursuant to RCr 4.38.
- **Use your motion to preserve your record.** The motion is the first and best method of preserving arguments and federalizing constitutional claims. In front of a particularly unreceptive court, the written motion may be counsel’s only opportunity. Use your written motion strategically to alert the court that you intend to raise arguments with which the court may not be familiar and refer to your written motion generally during the hearing to ensure your claims are preserved.
- **How many motions?** You should make as many motions for bond reduction as changes in factual circumstances dictate. A change in factual circumstances is case specific and must be examined in light of your client, their circumstances, and the position of their case. The person who was once deemed a flight risk by the court might appear less of a risk if the client’s mother suddenly falls ill with a terminal illness. If a person charged with a DUI has just today served enough time to match the sentence that is usually given in exchange for a guilty plea, the Court might be more inclined to release him than he was a week ago. RCr 4.40 allows either party to apply in writing for a change of conditions of release any time before trial. The motion shall state the grounds on which the change is sought. This rule anticipates that release has been granted, but there is no reason why a relevant change in circumstances cannot justify filing another motion for bond reduction when there has been no release.

### Burden of Proof

The right to bail is a constitutional right so the right to release is presumed (except in capital cases) and therefore the burden of proof lies with the prosecutor. This is true even though the defense is often the party requesting reduction of bond. Both the Court and the Commonwealth should be reminded that it is the Commonwealth who has the burden to show that the bail set is reasonable under the 5th and 14th Amendment due process clause, the 8th Amendment, and Section 17 of the Kentucky Constitution.

KRS 431.520 provides in pertinent part:

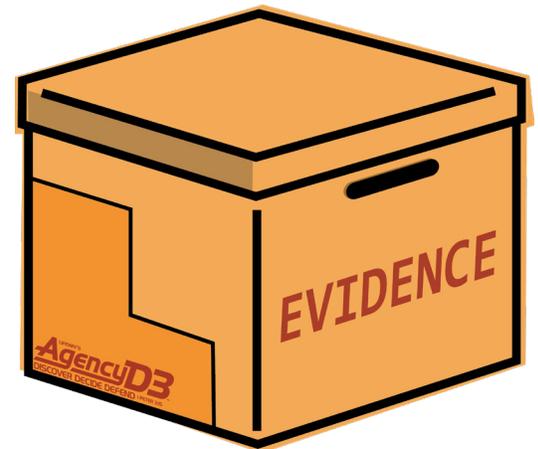
Any person charged with an offense shall be ordered released by a court of competent jurisdiction pending trial on his personal recognizance or upon the execution of an unsecured bail bond in an amount set by the court or as fixed by the Supreme Court as provided by KRS 431.540, unless the court determines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

There is no case directly on point placing the burden on the Commonwealth; however, the statute presumes a mandatory release on own recognizance unless a court makes the required legal determination, in which case the court may fashion conditions of release including financial conditions. A bond hearing is a hearing on whether the court is making that legal determination, and counsel can and should argue that the client enters the hearing with a presumption that he will be released unless the Commonwealth meets a burden of persuading the court that one of the exceptions listed in 431.520 or 431.066 applies and that the bail amount is not excessive.

**Presumption of Bail Offenses/Circumstances.** KRS 218A.135 also affords a charged person an additional presumption of bail, requiring own recognizance or unsecured bonds with nonfinancial conditions for any offense for which a conviction may result in presumptive probation (trafficking 3rd degree 1st offense, under 20 dosage units, possession of a controlled substance 1st and 2nd offense), unless the court finds the charged person to be a flight risk or a danger to himself or others, in which case the court shall document the reasons for denying release in a written order. Low and moderate risk clients will also rely on 431.033 (3) and (4).

### Competent Evidence

Bail hearings have historically not included the introduction of testimonial and documentary evidence into the record. This practice must not continue. We must encourage the practice of conducting bail hearings where the attorney introduces both documentary and testimonial evidence in support of release. This will not only help to persuade the Court but will also create a record for appeal in the event of a loss. Attorneys are encouraged to use skills already used during suppression hearings, competency hearings, *Daubert* hearings, and preliminary hearings to enhance arguments on behalf of clients at hearings for bond reduction.



- **Pretrial Risk Assessments.** KRS 431.066 provides that a court, “In making this determination [of low, moderate or high risk to flee, not come to court, or be a danger to the community], the court shall consider the pretrial risk assessment for a verified and eligible charged persons along with the factors set forth in KRS 431.525.” “Pretrial risk assessment” is defined in KRS 446.010 to mean “an objective, research-based, validated assessment tool that measures a accused’s risk of flight and risk of anticipated criminal conduct while on pretrial release pending adjudication.” An objective, validated assessment tool has evidentiary value. Great use can be made of putting the pretrial risk assessment tool into evidence, when the tool indicates a low or moderate risk for the client. RCr 4.08 allows a pretrial risk assessment to be placed in record *with the written consent of the client*, and whenever the report favors the accused, the entirety of the report should be placed into the record. Getting the pretrial risk

assessment report into the record should be as easy as asking that it be placed in the record. There is no foundation that needs to be laid, as the evidence rules does not apply in bond hearings. See KRE 1101(d)(5). The pretrial officer who made the report, however, should not be called to the stand. See *Couch v. Commonwealth*, 256 S.W.3d 7 (Ky. 2008). If a prosecutor calls a pretrial officer to the stand, for any reason, object.

Regardless of the scores, whenever possible, attorneys should obtain a printout of the pretrial risk assessment report and place it in the client file, regardless of whether the client consents to have it placed in the court record, or whether counsel chooses not to place it in the court record.

- **Witness Testimony Relevant to Bail Factors.** At a bond hearing, the person requesting bond reduction has a right to examine witnesses on the issue of bail “to the extent that the object of such an examination had any relevant bearing upon the factors which the court must consider under RCr 4.06 in determining the amount of bail.” *Kuhnle v. Kassulke*, 489 S.W.2d 833 (Ky. 1973). KRS 431.525(1) lists all bail factors for setting amount and any witness testimony that bears on any of these factors is competent evidence as to the amount of bail. Likewise, information on KRS 431.066 factors pertinent to whether bond shall be unsecured or subject to own recognizance are also relevant (e.g., risk of flight, risk of not coming back to court, and risk of being a danger to the community).
- **Testimony or other evidence relevant to the Client’s personal situation.** The following evidence was used by the court as competent evidence in either *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971), *Stack v. Boyle*, 342 U.S. 1 (1951), or both:
  - Marriage / Family Relationships;
  - Years of Residence in the County;
  - Financial Resources/Financial Ability of the accused; See KRS 431.525(1)(e);
  - Unemployment;
  - Health;
  - Reputation as a Principal Supplier of Drugs.
  - Client’s Veteran Status. RCr 4.06.
- **Evidence of the range of bail in similar cases within the jurisdiction.** When possible, put on the record the range of bail set in similar cases in the jurisdiction. This practice has historically been effective. “The record before us does not show the range in the amount of bail that has prevailed heretofore in narcotic cases in Jefferson County. In view of the many criminal cases from all over the Commonwealth that are reviewed by this court, we are not without knowledge of the amounts which are customarily required as bail generally,” *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971) (amounting to the appellate court taking judicial notice of the information which is “known” to the court).



#### Incompetent Evidence

The following evidence was held to be ERRONEOUSLY admitted into evidence:

- **Grand Jury Testimony.** Hearsay testimony from an alleged victim and Grand Jury recordings or minutes are not competent evidence. In *Young v. Russell*, 332 S.W.2d 629 (Ky. 1960), the Kentucky Supreme Court held that the hearsay testimony of the alleged victim and the grand jury minutes in a capital charge were not competent evidence with the Court further holding that “the better policy is to restrict the proof to that which is competent under the ordinary rules of evidence.”
- **Hearsay.** Although the rules of evidence do not apply, KRE 1101(d)(5), hearsay is disfavored in case law. See *Young v. Russell*, *supra*.
- **Statements made by Client to Pretrial Officers.** Such statements are privileged and confidential. See *Couch v. Commonwealth*, 256 S.W.3d 7 (Ky. 2008); RCr 4.08.
- **Ex Parte Communications.** The Court of Appeals should not have contacted probation and parole officer while reviewing the lower court’s decision. See *Commonwealth v. Peacock*, 701 S.W.2d 397 (Ky. 1985).
- **Evidence from outside the Record.** See *Commonwealth v. Peacock*, *supra*.

### Written findings required

If bond reduction is denied, counsel should insist on a written order describing the reasons for the court's ruling. "If there is to be meaningful appellate review, either the order or the record of the hearing should contain a statement of the circuit judge's reasons for refusing to reduce bail. *Cf. Hubbs v. Commonwealth*, 511 S.W.2d 664, 666 (Ky. 1974); *Lee v. Commonwealth*, 547 S.W.2d 792, 794 (Ky. App. 1977); *Weaver v. United States*, 405 F.2d 353, 354 (D.C.Cir.1968)." *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977); see also KRS 431.066(6), KRS 431.525(7), RCr 4.40(2), RCr 4.42(5). Failure to request a written order that states the reasons for the court's ruling may waive the client's right to challenge the reasoning of the trial court on appeal. Although the level of detail with which a court must make such an order is subject to debate, requesting a detailed order preserves the issue and may cause the court's silence in the order to be interpreted in as inadequate to support the ruling.

### Constitutional Bail Arguments and Authorities

#### **Bail Set at an Amount to Detain is Excessive in Violation of the Eighth Amendment and Section 17 of the Kentucky Constitution**

In any case where the court has set bail at an amount which is so excessive as to be prohibitory as an individual person, there is no question that the bail is intended to detain. The Eighth Amendment to the Constitution of the United States and Kentucky Constitution §17 mandate "[e]xcessive bail shall not be required ..." Kentucky Constitution §16 mandates that "[a]ll prisoners shall be bailable by sufficient securities, unless for capital offenses..." The United States Supreme Court has expressly announced the function of setting bonds, which it has noted is "limited" and "must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Stack v. Boyle*, 342 U.S. 1, 5 (1951). "Bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment." *Id.*

The challenge is that there are no studies, figures, or other empirical evidence which exists which show a correlation between the amount of money bail set and the likelihood that a person who posts the bail will come to trial. "Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail," available at <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>, examines the analysis of this problem by the Justice Policy Institute in 2012. Although in the 1960s and 1970s the failure to appear rate among the 75 most populous cities ranged 6-9%, the failure to appear rate for felony cases in 2006 was at 22%. Yet, during this same period of time, the amount of money bail that had to be posted for released increased. According to "Bail Fail:"

The ability to pay money bail is neither an indicator of a defendant's guilt nor an indicator of risk in release...

The use of bail schedules is problematic because there is no definitive association between a particular accusation and the amount of money that would guarantee appearance at court for that offense. There is no official guideline for judges and officials who make up the schedules; consequently, even within a state, the amount of bail set for a charge may vary by county.

If no amount of bail can be said to be reasonably calculated to ensure the charged person's presence at trial, then any amount of money bail serves no purpose. Thus, under *Stack v. Boyle* (adopted by KY in *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977)), such a bail which results in the continued detention of the defendant is "excessive."

Kentucky's highest court, in *Long v. Hamilton*, 467 S.W.2d 139, 141, 142 (Ky. 1971), directly condemned the practice of setting bail higher than a person can make with an intent to keep the accused person incarcerated:

The allowance of bail pending trial honors the presumption of innocence and allows a defendant freedom to assist in the preparation of his defense. The objective of bail is to allow this freedom pending trial and yet guarantee that the defendant will be available for any proceeding necessary to the disposition of the charge... ***Any attempt to impose excessive bail as a means to deny freedom pending trial of charges amounts to a punishment of the prisoner for charges upon which he has not been convicted and of which he may be entirely innocent.*** (Emphasis added).

In Kentucky, “[r]easonableness in the amount of bail should be the governing principle. The determination of that question must take into consideration the nature of the offense with some regard to the prisoner’s pecuniary circumstances. ***If the amount required is so excessive as to be prohibitory, the result is a denial of bail.***” *Adkins v. Regan*, 233 S.W.2d 402, 405 (Ky. 1950) [emphasis added].

It may not be possible to get a judge to admit on the record that the amount set for bail is designed to detain the accused person. Often, the sheer amount (e.g., one million dollars for a non-capital murder case) serves to prove the intended point. Where the amount is low enough where some people of means might make the bail, but the indigent person cannot (e.g., \$10,000 in a drug trafficking case), it is important to inquire of the court just how exactly it is the court came to the conclusion that \$10,000 is the lowest amount sufficient to ensure the charged person’s presence at trial. Defenders are encouraged to ask the Court to commit the rationale to a written order.



### **Bail Set in at Amount to Detain without a Finding of Dangerousness by Clear and Convincing Evidence Violates Due Process and is an Abuse of Discretion**

Kentucky jurisprudence has long applied the abuse of discretion standard when reviewing appeals of bail decisions. In *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971), the court held that “the requirement of bail in the amount of \$150,000 in this case was an abuse of discretion,” while referencing 8 C.J.S. Bail § 51(1), which stated: “[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.” Courts, however, have no discretion to refuse to consider statutory frameworks and factors in setting bail. See *Abraham*, 65 S.W.2d 152 at 158 (Ky. App. 1977).

While the general standard of review may be “abuse of discretion,” the Court never has the discretion to override the Constitutional prohibition of unreasonable bail. Even were the only standard for review of bail decisions the “abuse of discretion” standard, there are limits to judicial discretion. First, although a court’s discretion must be within a “zone of reasonableness,” when a constitutional standard is at issue the abuse of discretion standard is not appropriate. As held in the United States Supreme Court seminal Eighth Amendment bail case of *Stack v. Boyle*, 342 U.S. 1 (1951):

Petitioners’ 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... [emphasis added.]

*Stack v. Boyle* was adopted as Kentucky jurisprudence by *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977), so even if this Eighth Amendment excessive bail case were not already incorporated to the states through the Fourteenth Amendment, it still represents the state of the law in Kentucky. As such, “excessive bail,” which is defined as a bail set so high as to be prohibitory, is prohibited. See *Adkins, supra*.

Further, there is no difference between denying bail outright and setting bail so high that the accused cannot make bail. As stated by the New Mexico Supreme Court, “intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.” *Brown v. State* [New Mexico], 338 P.3d 1276 (N.M. 2014).

Denial of bail, in turn, has a constitutional framework that should be used in bail reduction arguments. Although prohibited by KY Const. § 16, bail can be denied consistent with the federal constitution as described in *U.S. v. Salerno*, 481 U.S. 739 (1987). When courts explicitly or implicitly set bail to detain, counsel may argue that in addition to

violating section 16, such a procedure fails to comply with *Salerno's* requirement of: 1) an adversarial hearing with counsel, 2) at which the burden is on the prosecutor to prove a specific and articulable danger to the community posed by the accused, 3) by clear and convincing evidence.

### **Bail Setting Procedures that Fail to Consider the Financial Ability of the Accused Violates Equal Protection**

In most contexts, wealth-based distinctions are subject only to the rational basis review, because “[g]enerally speaking, an individual’s indigence does not make that individual a member of a suspect class for equal protection purposes.” *Driggers v. Cruz*, 740 F.3d 333, 337 (5th Cir. 2014)(citing *Maher v. Roe*, 432 U.S. 464 (1977)).

However, the 5th Circuit recently acknowledged that intermediate scrutiny applies to distinctions based on wealth that detain indigent criminal defendants. *ODonnell v. Harris Cty.*, 892 F.3d 147, 161-62 (5th Cir. 2018):

“[T]he Supreme Court has found that heightened scrutiny is required when criminal laws detain poor defendants because of their indigence. See, e.g., *Tate v. Short*, 401 U.S. 395 (1971) (invalidating a facially neutral statute that authorized imprisonment for failure to pay fines because it violated the equal protection rights of indigents); *Williams v. Illinois*, 399 U.S. 235, 241–42 (1970) (invalidating a facially neutral statute that required convicted defendants to remain in jail beyond the maximum sentence if they could not pay other fines associated with their sentences because it violated the equal protection rights of indigents). Reviewing this case law, the Supreme Court later noted that indigents receive a heightened scrutiny where two conditions are met: (1) “because of their impecuniness they were completely unable to pay for some desired benefit,” and (2) “as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973).

We conclude that this case falls into the exception created by the Court. Both aspects of the *Rodriguez* analysis apply here: indigent misdemeanor arrestees are unable to pay secured bail, and, as a result, sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration. Moreover, this case presents the same basic injustice: poor arrestees in Harris County are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond. Heightened scrutiny of the County’s policy is appropriate.”

The *ODonnell* Court found that an absolute deprivation of liberty based on wealth creates a suspect classification deserving heightened scrutiny. That heightened scrutiny requires a court to evaluate the government’s legitimate interest in a challenged policy or practice and then inquire whether there is a sufficient “fit” between the government’s means and ends. The court summarized the situation:

In sum, the essence of the district court’s equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County’s current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

*Id.* at 163. In summary, the setting of a standard or non-individualized bail which a person with means can make, but a poor person cannot, violates the equal protection clause of the 14th Amendment. See also *Walker v. City of Calhoun*, GA, 901 F.3d 1245 (11th Cir. 2018) (citing *ODonnell*) (holding that no heightened security for indigents applied in evaluating city’s bail practices precisely because they provided for an individualized determination on wealth within 48 hours).

**Bail Set Arbitrarily is an Abuse of Discretion**

Section 2 of the Kentucky Constitution provides:

Absolute and Arbitrary Power Denied. Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority.

Former DPA Public Advocate and University of Kentucky College of Law Professor Allison Connelly has referred to the section as a “sleeping giant with the potential to change our world.” See *The Advocate*, June 1992. While it can be difficult to see where Section 2 fits in the ordinary bail argument, there is at least a case which ties “abuse of discretion” to arbitrary actions. “The test for abuse of discretion is whether the trial [court’s] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

There are at least two places where arbitrariness seeps into bail decisions.

- **Bail is set in the amount of the alleged child support arrearages, theft, or property damage.** Bail set in amount based on an allegation of such values is arbitrary in several different ways which should be argued when seeking bond reduction. The first issue is that the Commonwealth and complaining witness unilaterally set the bail amount, without an opportunity to challenge the allegation. Similarly, setting the bail at the amount alleged indicates a presumption of guilt, rather than a presumption of innocence. Third, the bail may exceed the usual bail set in that jurisdiction for more serious offenses. In the case of flagrant non-support (Class-D felony), the amount alleged to be owed may far exceed the typically set bail for a person charged with a non-violent class B felony. Highlighting that same issue, two people both charged with Flagrant Non-Support will receive drastically different bond amounts, even if virtually identical in all other factors relevant to bail.
- **Bail set at a “standard amount” for a given offense in a jurisdiction.** In *Abraham v. Commonwealth*, 565 S.W.2d 152, 158 (Ky. App. 1977), the Court of Appeals held:

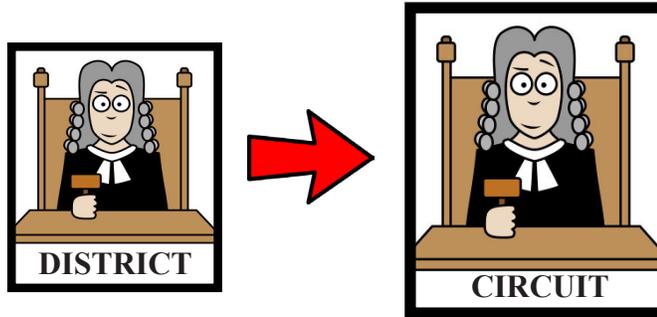
Great discretion is vested in the circuit judge respecting bail. When there has been an exercise of discretion by the circuit judge in fixing bail, that decision will not be disturbed by this court on appeal. *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971). However, the record should demonstrate that the circuit judge did in fact exercise the discretion vested in him under the statutes and rules. In the present case, the record shows only that the circuit judge always sets the bond at \$25,000.00 on every theft charge. This does not constitute the exercise of judicial discretion. See *Wyatt v. Ropke*, 407 S.W.2d 410 (Ky. 1966).

Putting *Abraham*, *English* and *Wyatt* together, an abuse of discretion occurs whenever there is an arbitrary act done by the judge, and the setting of bond at the same amount on every similar charge constitutes an abuse of discretion.

# Bail Appeals

## Appeals from District Court to Circuit Court

Bail appeal from District Court to Circuit Court is done via Writ of Habeas Corpus. RCr 4.43(2). Writs of Habeas Corpus, generally, are governed by KRS 419.020, et. seq. The following is a checklist for preparing an appeal via Writ of Habeas Corpus:



### Step 1 – Determine that a Writ of Habeas Corpus is Appropriate

A habeas corpus action is only appropriate if all of the following are true:

- The case is presently in the district court.
- The district court has been asked to set a reasonable bond.
- The district court has been presented with evidence justifying the request (e.g., the pretrial risk assessment)
- The district court has entered an order denying the request for a more reasonable bond. The Court “docket sheet” or “calendar,” which has the appropriate “findings” written upon it and which is signed by the judge, suffices as a written order.

### Step 2 – Gather What You Will Need

In order to file a habeas corpus action, you will need the following:

- A copy of your motion to set a reasonable bond, if one was filed.
- A copy of all evidence presented at the hearing (including a tape of the proceedings, if evidence was presented through testimony).
- A copy of the district court’s ruling (including a tape of the proceedings, if the ruling was orally made.)
- The pretrial risk assessment report and your client’s written consent to allow it to be disclosed in your appeal of his bond.
- An affidavit of indigency from your client (in case an appeal is required).

### Step 3 – Prepare Your Documents

Below are the documents you will need to prepare in order to file your habeas corpus action successfully. Ensure that your petition includes a specific request for release of the client on named conditions that the client can in fact meet.

- Affidavit of Probable Cause.
- Petition for Writ of Habeas Corpus (including all attachments, which should include the evidence presented at the hearing in district court).
- Writ of Habeas Corpus (a court order setting the hearing on the Petition).

### Step 4 – Decide Where You Will File

If your client is being held in the same county where the criminal case is, then you must file your habeas petition in that county. If your client is being held in a different county, then both counties have jurisdiction to hear the writ petition and you can arguably choose whether to file it in the circuit court where the client’s case is being heard, or in the circuit court where the client is being held. However, there is a viable venue challenge which your local prosecutor can make to bring the case back to the county where the case is. As a result, the recommended route is to file in that county originally to prevent delay.

### Step 5 – Serve your documents

Service must be made on the jailer and the county attorney. Service should be in person or, at worst, by fax. If you choose to serve by fax, you must follow up to make sure that the fax was actually received and delivered to the jailer, or deputy jailer in charge if the jailer is absent. *Mail is not sufficient.*

Prior to serving your habeas corpus petition on the jailer, you may wish to call the jailer and let them know that this is not a complaint against the jail, or the jailer personally. Although not technically required, we recommend serving the Commonwealth Attorney as well. Judges regularly grant them additional time to respond if they ask to so giving them advance notice may save your client time waiting on a ruling.

### Step 6 – File Your Documents

This process will vary from circuit to circuit, but some rules to keep in mind are:

- There is no filing fee for filing a petition for writ of habeas corpus (CR 3.02(1)(a)).
- The Judge should decide whether or not to issue the writ and set a hearing based on contents of the Affidavit of Probable Cause.
- Under KRS 419.030, the hearing should be set “as soon as possible.” If the date is weeks away, consider talking with the Chief Regional Judge about assigning this case to a different judge who can hear it sooner.
- Try to get a copy of the order that day, so that it can be promptly served on all opposing parties.

### Step 7 – The Hearing

The hearing generally will be confined to argument on the writ, however, KRS 419.100 specifically allows for the taking of evidence and depositions as in civil cases. In appropriate cases, counsel may use this tool to obtain details about facts inappropriately ignored by the district court, including facts concerning the offense itself. See CR 26 through 37 on civil discovery and depositions.

### Step 8 – The Order

If the Court orders the release of your client, he is entitled to immediate release. The only way the Commonwealth can prevent this release is by seeking a stay and telling the court that it intends to appeal. The Court can refuse the stay, or set a bond pending the appeal and release the client based on that.

### Step 9a – Appeals by the Commonwealth

An appeal will go to the Kentucky Court of Appeals. Once the record is provided to them, it may be submitted to the “Motion Panel” (a rotating panel of three judges who hear motions and emergency actions) on the record alone, without briefing. If this is not done automatically, you may need to file a motion to the court of appeals to treat the case as a bail appeal under RCr 4.43.

There is no automatic stay of a release order pending appeal. If your client has been released, there is no action you need to take in conjunction with an appeal by the Commonwealth. If a stay has been granted pending appeal, you may ask the Court of Appeals to set aside the stay by motion filed with that court. Contact the Clerk of the Court of Appeals, for the caption and case number in that Court. The motion is in all other respects like a motion filed in circuit court, except that it will be decided on the pleadings alone and should not be noticed for a hearing. Information about pending Court of Appeals cases, including the step sheet, can be found at: <https://appellate.kycourts.net/CA/COADockets/>

### Step 9b – Appeals by the Client

The process for habeas corpus appeals is set out in KRS 419.130, and is unusual:

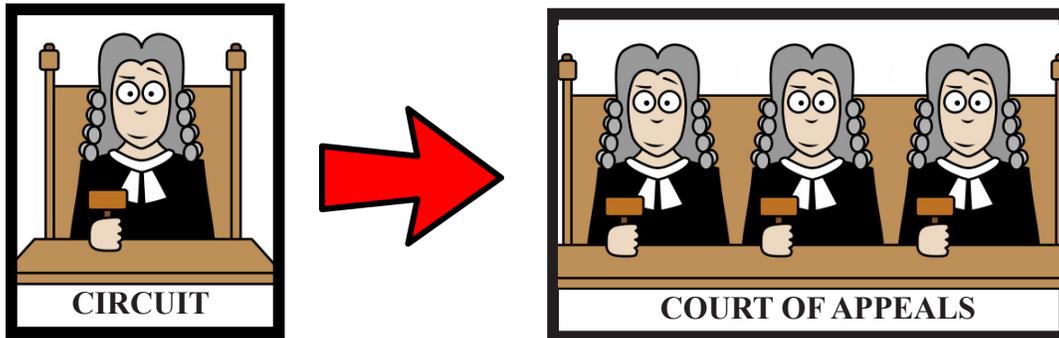
- Prepare a notice of appeal, which will be in a different format than the one used in an ordinary criminal case. It must be served within 28 days and filed within 30 days of the entry of the order denying release on the writ.
- Serve the notice of appeal on the jailer and county attorney.
- Wait two days, and then file the notice of appeal with the judge who heard the petition. (If you have not already been approved to proceed in forma pauperis, you will need to file that motion as well.)
- If the clerk will permit it, you are allowed to take the record from the Clerk’s office to the Court of Appeals in Frankfort (indeed, this is what the statute contemplates). However, most clerk’s offices will prefer to use their internal procedures.

- Once the case is in the Court of Appeals there is no briefing or other motion practice required. The case will be decided based on the record you already made. Regularly check the step sheet at the link listed above to ensure you don't miss communication from the court.

**Appeals from Circuit Court to Court of Appeals**

Bail appeal from Circuit Court to the Court of Appeals is via expedited appeal rules, which differ from those of a regular criminal appeal. RCr 4.43. The following is a check list for preparing a bail appeal from a Circuit Court bail decision:

**Step 1 – Determine that an Appeal is Appropriate / Ten (10) Days to File an Appeal**



An appeal from a bond decision is only appropriate if all of the following are true:

- The case is presently in the circuit court.
- The circuit court has been asked to set a reasonable bond, usually in the form of a formal hearing.
- The circuit court has been presented with evidence justifying the request (e.g., the pretrial risk assessment and/or other witness testimony) and that evidence is in the court record.
- The circuit court has entered an order denying the request for a more reasonable bond.
- That order is less than 10 days old.
- Note: if the order is more than 10 days old, you can ask the court to re-issue the Order with a new date. In the alternative, you can file a motion for exention of time to file the notice of appeal. Contact the DPA Appeals Branch for guidance on this issue.

**Step 2 – File Notice of Appeal and Designation of Record**

- A notice of appeal must be filed within ten (10) days from the entry of the order being appealed from. This notice is similar the one filed after a trial, but with slight modifications to indicate that it is an appeal from a bail decision.
- File a “designation of record.” This is not required but is highly recommended. The designation of record tells the court clerk what they are looking for and should include in the record. A court clerk who knows exactly what he or she is looking for will be able to prepare a copy of the record more quickly and expeditiously.

COMMONWEALTH OF KENTUCKY  
[COUNTY] CIRCUIT COURT  
CASE NO. [ CASE NO.]

COMMONWEALTH OF KENTUCKY PLAINTIFF  
V. **NOTICE OF EXPEDITED BOND APPEAL**  
**UNDER RCR 4.43**

[CLIENT] DEFENDANT

\* \* \* \* \*

Comes now [CLIENT], by and through his counsel, [ATTORNEY], and gives notice to the Commonwealth of his intention to take an expedited bond appeal to the Court of Appeals from the final and appealable Order of the [COUNTY] Circuit Court entered on [DATE], which denies [CLIENT] his previously granted bail credit and finds him to be a [INSERT IF APPLICABLE: flight risk and danger to others].

The Appellant is [CLIENT], represented by [ATTORNEY], Assistant Public Advocate,

3. Note: CR 76.42(1)(b) states that “[n]o filing fee shall be payable in a criminal proceeding in which the appellant or appellants are represented by the Public Defender.” The Clerk of the Court of Appeals has confirmed that they do not check for a filing fee in DPA cases. If the clerk refuses to file the appeal without a new IFP order, direct them to this rule, or seek another IFP order from the Court.

COMMONWEALTH OF KENTUCKY	PLAINTIFF
V.	
<b>DESIGNATION OF RECORD</b>	
[CLIENT]	DEFENDANT

---

Comes now the Appellant, [CLIENT], by counsel, and for his designation of record, hereby designates the following for his designation of record in this expedited bond appeal under RCr 4.43:

- 1) The video and audio recording of arraignment hearing dated [DATE].
- 2) Written Findings Regarding Bond entered [DATE].
- 3) Defendant’s Motion for Emergency Hearing on Bail Credit filed [DATE].
- 4) Order entered [DATE].

### Step 3 – Request and Obtain a Certified “Copy” of the Record

Upon the filing of the notice of appeal, the clerk of the circuit court has fourteen (14) days from the filing of the notice of appeal to prepare and certify a copy of such portion of the record or proceedings as relates to the question of bail, and is needed for the purpose of deciding the issue on appeal. The copy may include, but is not limited to:

1. The trial court’s order,
2. The motion,
3. Any responses thereto, and
4. Any video/audio recording of the hearing on the motion being appealed.

Again, it is highly recommended that you be proactive in this process. Check with the clerk regularly to ensure that the record has been certified and make yourself available to answer questions so that the certification is done properly. A designation of record, while not required, is recommended so that the Clerk has guidance as to what the Court of Appeals will need in their determination.

### Step 4 – Prepare the Brief

Counsel is advised to begin briefing once the appellate process has been initiated. This is because upon the filing of the copy of the record, the appellant’s brief is due within ten (10) days. The brief must:

1. Be no more than five (5) pages in length, starting at the statement of the case, and ending at the signature line. (The introduction is in a separate section and does not count towards the page limit.)
2. Be double-spaced typewritten pages, and shall otherwise comply with the requirements of Civil Rule 76.12.
3. Include the order that is the subject of the appeal as the first attachment in the Appendix.
4. Contain other documents in the Appendix as are necessary (e.g., the pretrial risk assessment report, any unpublished cases which meet the requirements of Kentucky CR 76.28(4)(c), and the usually lengthier motion for bail reduction). Remember to cite to your attachments so you are not required to include those materials within your page limit.
5. All attachments must have a tab which extends beyond the border of the brief.

### Step 6 – Prepare the Cover Page

The cover page should be red (not pink), and prepared in accordance with any regular appellate brief. You must sign the certificate of service on the cover, or the brief will not be accepted.

### Step 7 – File the Brief

The rules require your brief to be filed, with 5 additional copies, no later than the 10th day after the record is certified. If you do not follow these rules, then the brief is not properly filed or “perfected.” The brief is considered filed on the date that either of the following occurs:

**COMMONWEALTH OF KENTUCKY  
KENTUCKY COURT OF APPEALS  
FILE NO. [FILE NO.]**

**[CLIENT NAME] APPELLANT**

v. **APPEAL FROM [COUNTY] CIRCUIT COURT  
[JUDGE NAME] JUDGE  
INDICTMENT NO. [CIRCUIT COURT CASE NUMBER]**

**COMMONWEALTH OF KENTUCKY APPELLEE**

---

**BRIEF FOR APPELLANT, [CLIENT NAME]**

---

Submitted by:  
**[ATTORNEY NAME]  
[ADDRESS]  
[PHONE NUMBER]**

**COUNSEL FOR APPELLANT**

**CERTIFICATE REQUIRED BY CR 76.12(6):**

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the [JUDGE NAME], Circuit Judge, [COUNTY], [ADDRESS]; the [COMMONWEALTH'S ATTORNEY NAME], Commonwealth's Attorney, [ADDRESS OF CWA], and to be served by messenger mail to Hon. Andy Beshear, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on [DATE OF SERVICE]. The record on appeal has been returned to the Kentucky Court of Appeals.

[SIGNATURE OF ATTORNEY]  
[NAME OF ATTORNEY]

1. The date that the brief is received by the clerk of the Court of Appeals, or
2. The date that the brief is delivered the United States Postal Service, to be delivered by registered (not certified) mail. The date received by the Postal Service must be clearly visible on the outside of the package. Note: If you cannot deliver the brief to the postal service while they are still open, they will modify the date to indicate the following day.

If you checked the record out from your clerk’s office, you are required to certify that you have returned it before filing the brief. It is recommended that you make a copy of the certified record when it is received, and then return the original to the Court.

If there is a defect in the brief, it will be returned to you by the Clerk of the Court of Appeals, with a “deficiency notice” explaining the defect and asking you to submit a corrected copy within 10 days. The submission of the corrected copy will cause delay in all subsequent steps.

### Step 8 – The Commonwealth’s Response

The Commonwealth is not required to file a response, but if they do so, they must file within ten (10) days of receiving the Appellant’s brief. A reply is the brief filed by the responding party when an appeal sought. Note that a reply brief is not permitted in bail appeals. A reply brief is a brief filed by the party seeking appeal, as a rebuttal to the response filed by the appellee.

### Step 9 – The Appeal Shall Stand Submitted

On the earlier of ten (10) days of the filing of the Appellant’s Brief, or the filing of the Commonwealth’s Response, the case shall be submitted for decision to the Court of Appeals.

### Step 10 – Oral Argument

Oral argument will not be held unless requested by a party or ordered by the Court *sua sponte*. Counsel should therefore make a strategic decision whether to seek oral argument. This is indicated in the brief, prior to the beginning of the five pages of substance. If it is not requested, then it is highly unlikely that argument will be granted. If it is requested, there is a possibility that an interested motion panel will set the case for a quick oral argument. If so, it is an opportunity to reinforce your client’s claims. If you are granted oral argument in the Court of Appeals, contact the DPA Appeals Branch in Frankfort for help preparing.

### Step 11 – Wait

When all briefs are filed, the Court of Appeals will assign the case to the “motion panel” (a rotating panel of three judges who hear motions and other emergency actions). When the decision is rendered, you will be served with a copy. The time it takes the Court to render an opinion can be days, or months.

### Step 11a – You Won, Get Your Client out of Custody

If the Court of Appeals ruling is an “Opinion” or an “Opinion of the Court” then it is not final and enforceable until all possible challenges (such as a petition for rehearing or motion for discretionary review to the Kentucky Supreme Court) have failed, or the time to file such challenges has expired. See CR 76.30(2). If the Court of Appeals ruling is an “Opinion and Order” or an “Order,” then it is immediately enforceable. CR 76.38(1). The Commonwealth would have to ask the appellate court to stay the ruling in order to suspend its application.

**Step 11b – You Lost, Consider a Motion for Discretionary Review**

RCr 4.43(1)(g) does not permit the filing of a motion for reconsideration in the Court of Appeals. In the event that the ruling is adverse to your client, you should speak with an appellate attorney about seeking discretionary review or evaluating other options. Note that the time for review is not necessarily expedited. A Motion for Discretionary Review generally takes between 6-10 months for the court to decide, and if the motion is granted, will often take a year or longer to be briefed and decided. This timeline is included so you can properly advise your client and make an appropriate strategic decision.

**Mootness**

After an appeal is filed, and in some instances even before an appeal is filed, an event in the case may appear to render the appeal moot. For example, the client accepts a favorable plea, the judge reduces bond, or the case is dismissed. In such cases, the prosecutor may file a motion to dismiss the appeal as moot. The court acting on its own may also issue an order to show cause why the appeal should not be dismissed as moot.

If the issue is capable of reoccurring, defense counsel should file a response to the motion to dismiss or order to show cause, or a motion to reconsider if already dismissed, in an effort to get an adjudication on the merits. Bond determinations, by their nature, occur quickly and early in the case. But prosecutions in general tend to move quickly, especially when one's constitutional speedy trial rights have been asserted, so it is likely adverse bond decisions can reoccur without capability of review.

Several DPA attorneys have attempted to get appellate courts to consider bond issues on cases where the client has either made a reduced bond, pled guilty, or had his or her case dismissed, only to have the court dismiss the case as moot. Defense counsel's best argument against mootness is found in *Bolton v. Irvin*, 373 S.W.3d 432 (Ky. 2012). The KY Supreme Court found that a bail decision made in the context of a preliminary hearing was "capable of repetition yet evading review," and so did not render the case moot. The issue before the Supreme Court was whether a district court may increase the amount of an accused person's bail following a preliminary hearing. The court ruled that a district court may, because a reconsideration of bail following a finding of probable cause is authorized by Kentucky RCr 3.14(1). To arrive at this holding, however, the Supreme Court had to deal with the fact that the Court of Appeals had dismissed the case as moot, because the bond order appealed from had been from district court, and the circuit court had thereafter set a bond which seemingly mooted the appeal of the district court bond. In holding that the issue was still properly in issue, the Supreme Court stated:

Before turning to the merits of this case, we must first address whether the Court of Appeals properly dismissed the case as moot. This Court has previously recognized that "jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'" *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658, 661 (Ky. 1983) (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976)). That is to say, a technically moot case may nonetheless be adjudicated on its merits where the nature of the controversy is such that "the challenged action is too short in duration to be fully litigated prior to its cessation or expiration and . . . there is a reasonable expectation that the same complaining party would be subject to the same action again." *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992) (quoting *In re Commerce Oil Co.*, 847 F.2d 291, 293 (6th Cir. 1988)).

The time between Irvin's arrest and his indictment (including his first appearance in district court and his preliminary hearing) was of short duration. The timeline in this case is typical of cases throughout the Commonwealth, and a district court order modifying a bail bond in a felony case will almost always be superseded before the issue can be fully litigated. In addition, any increase in bail following a finding of probable cause by the district court can be challenged by means of a writ of habeas corpus. In fact, the record in this case indicates that another division of the Jefferson Circuit Court reached a different conclusion on this issue. There is therefore a reasonable expectation that the same complaining party will be subject to the same action again. Under the doctrine that issues capable of repetition yet evading review may be properly decided, the fact that the district court order was superseded by the circuit court arraignment order does not render this case moot.

## **Is “Abuse of Discretion” the Appropriate Standard of Review for a Constitutional Question?**

Contributed By Glenn McClister

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 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 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.” 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:

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 judgement.

In *Ornelas v. United States*, 517 U.S. 690 (1996), 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,” and disposed of the case by directing the Court of Appeals to conduct a *de novo* review on remand.

In *United States v. Bajakajian*, 524 U.S. 321, 336, (1998), the court rejected the 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.”

In *Lilly v. Virginia*, 527 U.S. 116, (1999), 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.”

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. The language in *Bose* is especially clear in grounding the necessity of *de novo* review in the constitutional issue at stake. Because *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, the requirement of *de novo* review applies to the states in equal force.



# I WANT YOU TO MAKE A BAIL ARGUMENT

## Kentucky Bail Guide

A Special Edition of The Advocate

Kentucky Department of Public Advocacy's Journal of Criminal Justice Education & Research

The Advocate's Kentucky Bail Guide provides education and research for persons serving indigent clients in order to improve client representation and ensure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission, and values.

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