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Kentucky Pretrial Release Manual

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Lawyers Make a Difference at First Appearance and on Pretrial Release 3
Working for Release of Clients Pretrial.....4
Presumption of Innocence or Punishment Prior to Conviction: Which Will it Be?.....5
King Richard III, the Man Who Would Be King, "Old Hickory," and Francis Scott Key 6
Leadership Begins with You!.....7
Glenn McClister, Education Branch.....7
Chapter One: The Duty to Litigate Pretrial Release 8
Chapter Two: The Right to Counsel and the Importance of Early Appearance 12
Bail, First Appearance and.....13
the Presumption of Innocence.....13
Selected Right to Counsel and First Appearance Cases.....15
Chapter Three: Statutes and Rules Pertaining to Bail.....16
Chapter Four: Digest of Bail Cases.....22
Bibliography.....30
Chapter Five: Litigating Bail Issues.....31
Bail Hearings, Generally.....31
Conducting the Bond Hearing.....32
Oral v. Written Motions for Bond?.....32
How Many Motions?.....32
Evidence-Based Practices.....32
Particular Issues in Bail Litigation.....35
Chapter Six: Circuit Court Appeals.....40
Checklist for Circuit Court Bond Appeals.....42
Chapter Seven: District Court Appeals.....44
Checklist for Habeas Corpus Bond Appeals.....46
Chapter Eight: Mootness and Motions for Discretionary Review.....48
Chapter Nine: Federalizing.....49
the Argument for Bail.....49
Chapter Ten: Forms.....52
Acknowledgements.....76
Appendix 79
Initial Appearance of Counsel Vital to Client Pretrial Release: 80
Saving County Jail Costs, Increasing Efficiency.....80
Argersinger v. Hamlin: The Importance of Legal Representation in Misdemeanor Cases.....80
Changes in Pretrial Release from HB 463:.....82
"The New Penal Code and Controlled Substances Act".....82
HB 463 and its Impact on Kentucky Appellate Standards.....83
An Important Matter of Policy:.....85
Why Kentucky Appellate Courts Should Adopt De Novo Review of Pretrial Release Decisions.....85
Bond Appeals: Releasing the Client Should Not Moot the Issues…89
U.S. v. Salerno: The Due Process Required to Detain a Person.....91
Prior to Trial and the Indigent Defendant.....91
Leadership Begins with You!.....7
Chapter Two: The Right to Counsel and the Importance of Early Appearance 12
Chapter Eight: Mootness and Motions for Discretionary.....49
Time Behind Bars=$$$$$ Chart.....78
Appendix 79
HB 463 and its Impact on Kentucky Appellate Standards.....85

How to Use this Manual

The publication of this Pretrial Release Manual - along with renewed emphasis on bail advocacy at DPA training and educational events, and the greatest level of collaboration with other constituents in the criminal justice system who promote the value of pretrial justice (including, particularly, the Administrative Office of Courts' Pretrial Services Division) - heralds the arrival of the most comprehensive attempt to date to maximize the efforts in obtaining the pretrial release of the accused. This Manual serves this attempt by providing motivational, instructional and practical materials for use by the criminal practitioner whose client is in jail.

The reader will hopefully be motivated to embrace the idea that there is no such thing as a presumption of innocence where there is no pretrial release. The articles in the beginning of the Manual will hopefully inspire a change from a culture that resigns itself to the routine incarceration prior to trial of those who are too poor to afford a cash bond, into a culture that demands full attention to the constitutional rights to bail regardless of wealth or status.

Once motivated, the reader will find that the Manual serves as a treatise on bail, complete with statutory cites, rules and procedures, and case summaries. The treatise portion of the Manual is divided into chapters, with each dedicated to a particular stage of the bail advocacy process, from first appearance until final appeal. More than a mere restatement of the present law, the chapters address the cutting edge issues that pertain to release which are being discussed not only within the Commonwealth but also nationally, including, e.g., the trend toward moving to "evidence-based practices" and bail decisions based upon statistically validated assessments which predict with over ninety-percent accuracy an arrestee's risk to fail to come to court or to commit an offense while on bail. An Appendix contains articles which go into further detail into some of the issues discussed in the chapters.

Lastly, the Manual is a practice guide for pretrial release advocacy, and has form motions, briefs and writs relating to bail issues at all levels, including bail hearings, district court habeas proceedings and circuit court appeals. These forms appear in the last chapter of the Manual.

Let this Manual serve as a written testament to our renewed dedication to notions of justice, fairness and basic human dignity, guaranteed by the constitutions of our state and nation.

Jerry J. Cox
Chair, Kentucky Public Advocacy Commission
President-Elect, NACDL

Lawyers Make a Difference at First Appearance and on Pretrial Release

Criminal Defense Provides Public Value, Saves County Jail Costs, Helps Clients

As practitioners, we know the guarantees of our Bill of Rights do not implement themselves when a person's liberty is in jeopardy. A criminal defense lawyer representing an individual is needed to insure constitutional protections are provided. As Justice George Sutherland said in *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one."

Justice Requires Basic Fairness and Symmetry

This year is the 50th anniversary of *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) which held that counsel was indispensable: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

In our adversarial system of justice, lawyers are necessities not luxuries. There are reasons judges and prosecutors are lawyers, not lay persons. There are reasons the accused needs an attorney. *Gideon* teaches "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society…. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries." *Id*.

Remarkable Success in Kentucky

Through the combination of the PEW-inspired legislative reforms, a well-led Pretrial Release Division Research Center of the Kentucky Judiciary, and a statewide public defender initiative on pretrial release advocacy, Kentucky has become a national leader in increasing release rates while increasing appearance rates and not adversely affecting public safety. The first year of reform in Kentucky saw concrete statewide improvements:

- Release rate increased 5% from 65% to 70%
- Appearance rate remained at 89% statewide
- Public safety rate increased by 2% from 90% to 92%.
- Nonfinancial release increased 15% from 51% to 66%.

Applying an average cost of housing an inmate from the Kentucky's Auditor of Public Account's 2006 Report "Kentucky Jails: A Financial Overview," of $36.25, this 5% increased release rate saved counties over $25 million in jail costs in just one year.

Public Value of Criminal Defense

There is a larger lesson. Society profits from the substantial financial benefits when public defense systems are properly funded and criminal defense lawyers begin their representation at first appearance. Criminal defense lawyers who advocate at first appearance and public defenders who are competent, who have manageable workloads, and who have professional independence can ensure that the rights guaranteed by our Constitution are protected and can ensure that no one's liberty is taken unless and until they are proven guilty. *See* "The Cost of Representation Compared to the Cost of Incarceration: How Defense Lawyers Reduce the Costs of Running the Criminal Justice System," *KY Bench and Bar*, Vol.77, No. 2 (March 2013), pp. 19-23.

We are proud to be part of the reform that is advancing across our nation. See, *e.g.*, The Report of the 2011 National Symposium on Pretrial Justice convened by the Office of Justice Programs of the U.S. Department of Justice; American Council of Chief Defenders' *Policy Statement on Fair and Effective Pretrial Justice Practices* (June 4, 2011); Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers Concerning Pretrial Release and Limited Use of Financial Bond (July 28, 2012); and the sustained work of the Pretrial Justice Institute.

The publication of this *Kentucky Pretrial Release Manual* is a proud moment for the Kentucky Public Advocacy Commission.

With appreciation for your dedicated focus on release,

Jerry J. Cox
Chair, Kentucky Public Advocacy Commission
President-Elect, National Association of Criminal Defense Lawyers

Edward C. Monahan
Public Advocate

Working for Release of Clients Pretrial

Listening, Learning, Adapting for Our Clients

Amidst too few resources and too much work, making progress for clients is our responsibility as defense lawyers. Progress on problems that do not have easy answers is made by people who seek advice, assess and adapt. "It is not the strongest of the species that survives, nor the most intelligent," Charles Darwin is said to have observed, "but it is the one most adaptable to change." The harder the problem, the greater the challenge, the more difficult the future, the more important it is for each of us to adapt for the benefit of our clients. See generally, Ronald Heifetz, Alexander Grashow, Marty Linsky, *The Practice of Adaptive Leadership: Tools and Tactics for Changing Your Organization and the World* (2009).

That is the choice Kentucky public defenders are making on pretrial release advocacy. The changes were precipitated in part by the national intercession of the Pretrial Justice Institute's Tim Murray.

As defense lawyers, we understand our constitutional system. The values that inspire this system of justice are what motivate us in our representation of individual clients. With the help of Tim's *push for progress*, we are working harder in Kentucky to put our constitutional guarantees into effect at first appearance. The professional responsibility for our determination is compelling.

Release Pretrial Is a Big Deal for Our Clients

We know that one of the most important objectives for our clients is release pretrial. And release pretrial critically affects the outcome of the case. Studies show that, holding all other factors constant, individuals who are detained prior to trial suffer from greater conviction rates and more severe sentencing than those who are released prior to trial. *See* Mary T. Phillips, Ph.D., *Bail, Detention, and Nonfelony case Outcomes*, Research Brief Series No. 14, New York City Criminal Justice Agency, Inc. (2007).

Amy Bach, in *Ordinary Injustice: How America Holds Court* (2009) reminds us that the British system in the 18th century from which our revolution freed us "was not palatable to the American settlers; judges appointed by the Crown oversaw venomous prosecutions that resulted in conviction and execution of innocent people, and so, inevitably, the Americans sought to protect themselves against this kind of injustice." When our nation was formed, new Americans wanted what Akhil Reed Amar termed in *The Bill of Rights* (1998) "notions of basic fairness and symmetry" in the criminal justice process.

Lawyers Make a Significant Difference at First Appearance

Empirical evidence shows that having counsel at the initial appearance before a judge improves the outcomes for a criminal defendant. A defendant with a lawyer at first appearance:

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

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

Intercession of the Pretrial Justice Institute's Executive Director Mobilizes Improvements

All of the above is what Tim Murray, Executive Director, Pretrial Justice Institute, impressed upon me when he confronted me on April 28, 2010 in Columbia, South Carolina about the need for public defenders to do more at first appearance to help their clients get released and have better ultimate outcomes. Combined with Doug Colbert's challenge to defenders, this inspired a public defender pretrial advocacy initiative in Kentucky, this *Kentucky Pretrial Release Manual*, as well as the American Council of Chief Defenders *Policy Statement on Fair and Effective Pretrial Justice Practices* (June 4, 2011), http://www.nlada.org/News/NLADA_News/2011060651149874, outlining key steps for defenders, prosecutors, judges, pretrial release offices and policy makers:

- Examining pretrial release practices to identify key areas of improvement.
- Identifying and implementing national standards and best practices.
- Collaborating with criminal justice stakeholders to improve pretrial practices.
- Developing effective pretrial litigation strategies.

This *Kentucky Pretrial Release Manual* is one of our efforts to make more of a difference for our thousands of clients across Kentucky and also help lower the costs of incarceration. Because of an intervention, the Department of Public Advocacy has reenergized its efforts toward getting our clients of of Jail.

Thanks, Tim.

Edward C. Monahan
Public Advocate

Presumption of Innocence or Punishment Prior to Conviction: Which Will it Be?

In 1975, when then-Governor Julian Carroll signed into law legislation outlawing bail bonding for profit in Kentucky, the reverberations spread through the pretrial justice reform community. Hailed as a significant reform for Kentucky and a model for the nation, all eyes turned to the Commonwealth as the first state-wide pretrial services program was implemented to breathe life into Gov. Carroll's landmark legislation. Kentucky's historic changes in pretrial justice came at a time when pretrial reform was cresting nationally and were seen by many as a sign of things to come for other states. Over time, however, the reality of how we as a society treat those accused of crime trumped even Kentucky's then-radical approach to pretrial justice. Financial bond continued to serve as the predominant court-ordered form of pretrial release in Kentucky (and in the nation) despite its well-documented failure to do the very job pretrial release conditions are supposed to do. Jails in Kentucky continued to be filled with pretrial defendants unable to purchase their freedom. Why?

Money has been the currency of pretrial release in the U.S. for over a hundred years, perhaps because we know criminal defendants have so little of it. Many believe that money somehow will keep us safer, ensure appearance and send a message that crime has a "price." Despite decades of research that shows money bond results in high detention rates without any causal relationship improving court appearance rates or reducing crime while on release, most systems cling to the belief that money is a highly effective means of supporting the purposes of bail. (It should be noted that the criminal courts in Washington, D.C. stopped using money altogether decades ago, not because it was legislatively abolished but rather because of it's utter failure to support the purpose of bail.)

If you were to ask most lawyers or judges what is the purpose of bail, the answer would likely be "assure appearance in court and protect the community." While a statutory review would suggest that this answer summarizes the purpose of bail nicely, it omits a crucially important function of our bail system: **The protection of the accused against punishment prior to conviction.** This fundamental protection is almost always overlooked as we discuss failure to appear and rearrest rates in connection with pretrial release. But this very protection is what motivated the Founding Fathers to include bail in the Bill of Rights. Despite the framers' keen interest in protecting citizens from an arbitrary and abusive State, our nation's jails remain populated primarily with presumed-innocent, pretrial defendants. As you read this, nearly two out of every three inmates in America's jails are pretrial defendants who, if they had the funds, have essentially been released by the courts. Ironically, most of these defendants will actually be sent home on probation or other non-incarcerative sentences upon conviction. Yet while they are presumed innocent, we accept the detention of those too poor to secure release as the "way it's always been." We overlook the data that show defendants who are held pretrial suffer more stringent sentences than similar defendants who secure pretrial release. We shrug our shoulders at a system that punishes only those who cannot pay prior to conviction as one that is necessary and inevitable given our limited resources and staggering caseloads. Some worry that our ability to manage these caseloads would be severely impaired if a significantly greater percentage of defendants were released, while turning a blind eye to the coercive effect pretrial detention plays in forcing pleas. Over the past several years I have encountered innumerable judges, prosecutors and defense counsel who had no overt quarrel with a pretrial justice system that inherently discriminates against *most* of those who get arrested. I am sorry to report that more than one public defender has told me that their clients are "better off" in jail pretrial, thus avoiding the likelihood of getting into more trouble while awaiting disposition.

Timothy J. Murray
Executive Director, Pretrial Justice Institute

Timothy J. Murray is the Executive Director of PJI. He has worked as a criminal justice practitioner at the local, state and federal levels for 40 years. His extensive pretrial justice experience includes management and executive positions with the pretrial services systems in Washington, D.C., and Miami-Dade County, Florida. He was selected as PJI's Executive Director in 2006, and has provided technical assistance to hundreds of programs and organizations, nationally and internationally. He is a lifetime member of the National Association of Pretrial Services Agencies and is the proud recipient of the Association's most prestigious honor, the Ennis J. Olgiati Award.

When I met Ed Monahan a few years ago, I had all but given up trying to enlist the defense community as an ally in the quest for pretrial justice. As I recall, when Ed introduced himself as the Public Advocate, I responded with "You're a Public Defender? You're one of my worst enemies," (a greeting that would not have made my mother proud, I can assure you). My frustration with the defense community's tolerance for a system that is so profoundly broken was soon abated. In Ed, I found a lawyer who not only believes in the fundamental principles of justice but is willing to fight for those beliefs. He has taken that fight nationally in his role as chair of the American Council of Chief Defenders and to courtrooms of Kentucky as the Public Advocate. He has consistently challenged the defense community to confront the inequities of the current system and the play an active role in ensuring that pretrial release decisions are fair and consistent with law.

Now, as a result of HB 463, Kentucky finds itself once again itself at the forefront of pretrial justice reform. This time, however, there is a critical difference. The Kentucky Department of Public Advocacy has refused to allow the state's justice system to operate as though reform has not been legislated. With dogged determination, the DPA has refused to accept needless pretrial detention as a necessary evil of a busy justice system but instead has insisted that bail decisions regarding their clients be based upon measured risk – not the dollars they have in their pockets. The Department's vigorous pursuit of pretrial justice in Kentucky has indeed set the standard for other communities to emulate.

Is the struggle over? Are there no pretrial defendants in Kentucky who are jailed at the cost of their livelihoods and their homes, unable to even participate in the preparation of their own defense? Are there presumed innocent citizens jailed in Kentucky prior to conviction, who, if they simply had the money, would be free pending trial? Tragically, the answer is yes – but there are fewer than ever before. Are there now individuals, who are fighting everyday for the equitable treatment of the accused, for the safe and fair administration of justice while saving Kentucky taxpayers the costs of needless incarceration? In fact, there is an army of them – the Department of Public Advocacy. Thank you for your work.

Timothy J. Murray
Executive Director, Pretrial Justice Institute

B. Scott West
DPA General Counsel

King Richard III, the Man Who Would Be King, "Old Hickory," and Francis Scott Key

How the Right to Bail Came to the "Land of the Free."

At the time of this writing, the remains of King Richard III have just been found underneath a parking lot in Great Britain. European history buffs know that King Richard was the last of the Plantagenet Kings, killed in the Battle of Bosworth Field in 1485. His death ended the "War of the Roses," a thirty-year struggle between the House of York and the House of Lancaster – whose heraldic banners displayed white and red roses, respectively – to claim the throne of England. Richard's death and defeat at Bosworth Field gave the victory to Henry Tudor, the last claimant to the House of Lancaster, whose family reigned for the next century and a quarter.

The victor writes the history, so they say, and thus history has been unkind to King Richard III, who only ruled England for two short years. Shakespeare's play about him is unflattering to say the least, and stories of Richard's ineptitude, incorrigibility and incompetency have littered the pages of Europe's past. Nevertheless, public defenders should admire him and pay him homage as he is also credited with the creation of two institutions near to our hearts.

In 1483, Richard created the "Court of Requests," a court to which people too poor to hire a lawyer could apply to have grievances heard. It was a court of equity, rumored to be unappreciated among the existing common law judges.

Andrew Jackson

More importantly for purposes relevant to this manual, he is also credited with formalizing the "Right to Bail" in 1484, to protect suspected felons from imprisonment before trial and to protect their property from seizure during that time.

Wikipedia, without citation, claims that King Richard III's death is sometimes regarded as "the end of the Middle Ages." Whether it is or not, the Tudors – despite having vanquished the proponent of these two institutions – left the right to bail intact, and over the years strengthened the legal tradition of bail to the point that it would be developed into a constitutional right upon formation of the United States of America.

With special thanks to Nathan Goodrich, DPA Staff Attorney in Murray who brought this golden oldie case to my attention, we are able to see just how sacred this constitutional right to bail was regarded in the United States as early as 1836, when Andrew Jackson was nearly the nation's first assassinated president. Richard Lawrence – who was insane and thought himself to be King Richard III of England (ironic, huh?) – alleged that the United States owed him money for property stolen from him, and set out to kill the nation's president in retaliation. He fired a pistol at President Jackson when he stepped out of the Capitol; when it misfired, he drew another pistol, which also misfired. At that point "Old Hickory" took his walking cane and likely would have beaten the man to death had not the crowd tackled Lawrence and thrown him to the ground.

Richard III

When brought before the court at arraignment, the issue of bail was raised. Mr. Lawrence was prosecuted by none other than Francis Scott Key himself, who had already written the Star-Spangled Banner twenty-two years earlier. The arguments regarding bail are recounted in *U.S. v. Lawrence*, 26 F. Cas. 887 (1835):

> After inquiring as to his property and circumstances, the chief judge said to Mr. Key, the district attorney, that he supposed bail in $1,000 would be sufficient…
>
> Mr. Key seemed, at first, to acquiesce, but having conversed with some of the president's friends who stood round him, he suggested the idea that it was not impossible that others might be concerned who might be disposed to bail him, and let him escape to make another attempt on the life of the president, and therefore thought that a larger sum should be named.
>
> The chief judge then said that there was no evidence before him to induce a suspicion that any other person was concerned in the act; that the constitution forbade him to require excessive bail; and that to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law.

In the end, the man who would be King, Richard Lawrence, was unable to make the bail. Fortunately for him, he was found not guilty by reason of insanity after a jury trial. But even though he was not released pretrial, imagine a case holding that a bail larger than the prisoner could give would be "excessive bail," violative of the Eighth Amendment. If only Kentucky had such a case.

Assassination Attempt on Andrew Jackson

Kentucky does. Several, in fact.

In *Adkins v. Regan*, 233 S.W.2d 402 (Ky. 1950), Kentucky's highest court held: "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.*" (Emphasis added.)

Francis Scott Key

Again, in *Day v. Caudill*, 300 S.W.2d 45 (Ky. 1957), the court held: "The right to bail is a constitutional one, which has been safeguarded. Excessive bail is denounced. Kentucky Constitution, Section 17."

And finally, in *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971), the court held: "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. Such a procedure strikes a blow at the liberty of every citizen."

This trio of cases set the standard for a long period of time and highlighted the importance of pretrial release to the presumption of innocence.

So what happened? Why is it today that so many defendants, particularly poor ones, find themselves unable to make bail even for the most common misdemeanor charges? The data shows that, nationally, on any given day, in excess of 8,500 persons will find themselves in jail, unable to make bail for a crime that they so far are presumed innocent of committing.

With the publication of this manual, the Kentucky Department of Public Advocacy calls upon criminal defense attorneys, prosecutors, judges, legislators and all those who believe in the presumption of innocence to rethink their positions on the reasonableness of bonds, and give revival to the long held concept that there is no presumption of innocence without pretrial release.

With respect to criminal defense attorneys, DPA urges all of you to step up your pretrial advocacy. We hope with this manual to give you both the inspiration and the tools to do that effectively, zealously and immediately.

Good luck, and good representation!

B. Scott West
DPA General Counsel

Glenn McClister

Leadership Begins with You!

Glenn McClister, Education Branch

Some people think of leadership in terms of men and women of extraordinary talent facing times of extraordinary challenge or hardship. DPA does not ascribe to the "great person" theory of leadership. We believe every single person in DPA can resolve to be a leader right where he or she is. We are committed to constant innovation and improvement for the sake of our clients.

AOC Pretrial Services Division has the same attitude. DPA has watched as Pretrial Services has progressed into a national leader in the field of risk assessment and evidence-based decision-making. Pretrial Services is simply an exemplary government agency which has improved its methods and tools almost incessantly over the last decade.

Perhaps that contributes a bit to the remarkable relationship between Pretrial Services and DPA. We attend each other's conferences, we teach at each other's new employee training, and we keep each other informed about changes in the law affecting pretrial release. It is a remarkable relationship between two governmental agencies, and one which we hope is reflected down to the level of every field office we have. We at DPA recognize and respect the expertise and sophistication Pretrial Services brings to pretrial release decision-making, and we also understand that our goals are mutually reinforcing.

We are fortunate in Kentucky to work and train with an agency so progressive and accomplished. We owe much to AOC's Pretrial Services for the content of this manual, the success of our training, and the quality of our advocacy. We cannot afford - for the sake of our clients - to fail to take advantage of all they have to offer.

Chapter One: The Duty to Litigate Pretrial Release

Pretrial Release is the Client's Number One Priority.

Generally speaking, upon meeting an attorney the first thing the jailed client wants to talk about is whether and how he or she can be released from jail. Initially, this is more important than even the merits of the prosecution or any defense. The defense lawyer who first wants to talk about the facts of the case, leaving issues of bond for a later discussion, will find that the client quickly loses interest in the conversation. The client is distracted, wanting to talk about when he or she "will get out of here," and will give rushed answers to questions about the details of the case. This is because the success (or lack thereof) of the criminal litigation will occur *later.* Issues of release are here and now, because the client is hoping to go home *that day*. To break the ice with the client, it is better to talk about issues of bond first and foremost. Once that issue is settled, the client will be more attentive to a conversation about the merits of the case, and will undoubtedly give more thought and better answers to the questions asked.

Pretrial Release is a Constitutional Right…Three Times!

If the importance of a right can be gauged by whether there is a specific Constitutional guarantee tied to it, then pretrial release – which is featured in no fewer than three enumerated specific provisions – is an important right indeed. Throughout this manual it should never be forgotten during bond hearings, writs of habeas corpus, or circuit court appeals, that the client has a constitutional right to release (except in cases where death is a possible penalty and the presumption of guilt is great):

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.

These provisions and the state and federal cases which interpret them will be discussed throughout the Kentucky Pretrial Release Manual. The Constitutional provisions pertaining to bond should be referenced in any pleading worthy of filing.

National Standards Recommend A Strong Pretrial Release Practice.

The National Legal Aid and Defender Association, Guidelines for Pretrial Release Practice, which the Kentucky Department of Public Advocacy has adopted for use by its staff attorneys (see Policy 17.10), calls for a strong pretrial release practice. A portion of those guidelines – which, again, are DPA policy – are excerpted below:

NLADA Guidelines for Pretrial Release Practice

2.1: General Obligations of Counsel Regarding Pretrial Release

The attorney has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client.

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

* * *

[Selected] Commentary: "Where [the] accused is incarcerated, defense counsel must begin immediately to marshal facts in support of the defendant's pretrial release from custody, citing ABA Standards, *Providing Defense Services (3d ed.),* Standard 5-6.1 commentary.

2.2 Initial Interview

(a) Preparation:

Prior to conducting the initial interview the attorney, should, where possible:

(1) be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;

(2) obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available;

(3) be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;

(4) be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;

(5) be familiar with any procedures available for reviewing the trial judge's setting of bail.

(b) The Interview:

(1) The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.

(2) Information that should be acquired includes, but is not limited to:

(A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history;

(B) the client's physical and mental health, educational and armed services records;

(C) the client's immediate medical needs;

(D) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;

(E) the ability of the client to meet any financial conditions of release;

(F) the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals;

(3) Information to be provided the client includes, but is not limited to:

(A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;

(C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

(D) the charges and the potential penalties;

(E) a general procedural overview of the progression of the case, where possible;

(c) Supplemental Information:

Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:

(1) the facts surrounding the charges against the client;

(2) any evidence of improper police investigative practices or prosecutorial conduct which affects the client's rights;

(3) any possible witnesses who should be located;

(4) any evidence that should be preserved;

(5) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

2.3: Pretrial Release Proceedings

(a) Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.

(b) Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

(c) If the court sets conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.

(d) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical or psychiatric and security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs.

[Selected] Commentary: "Where [the] accused is incarcerated, defense counsel must begin immediately to marshal facts in support of the defendant's pretrial release from custody," citing ABA Standards, *Providing Defense Services (3d ed.),* Standard 5-6.1 commentary.

Kentucky Ethics Require a Strong Pretrial Release Practice.

The duties applicable to all attorneys include the duty to do a competent job, to be diligent, and to provide effective assistance of counsel.

A. Competence

Kentucky Supreme Court Rule 3.130(1.1) provides in part:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Comment (5): Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." [Bold lettering added.]

B. Diligence

Kentucky Supreme Court Rule 3.130(1.3) provides in part:

"A lawyer shall act with reasonable diligence and promptness in representing a client."

[Selected] Comment (1): A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor…

Decisions Regarding Unethical Bail Practices

A. Diligence in Pursuit of Bail

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. Specifically, the attorney waived a preliminary hearing to a grand jury over the objection of his client (Count 1), failed to communicate with his client concerning the status of the legal matter entrusted to him (Count 3), and – most important for purposes here – "fail[ed] to appear at his client's first arraignment and **fail[ed] to move the court for bond reduction at the second scheduled arraignment…**" (Count 2) [emphasis added]. The failures listed in Count 2 were specifically found to be a violation of Rule of Professional Conduct 1.3. It is unknown what the discipline would have been had Count 2 been the only count brought against the attorney; but a wholesale failure to show up and argue for bond at either of his client's first two court appearances is such a lack of disregard for his client's Constitutional rights, neither the KBA nor the Supreme Court would stand for it.

B. Ex Parte Communications

As of this writing, there is increased scrutiny of ex parte communications with judges as a result of the Kentucky Supreme Court's to-be-published opinion in *Commonwealth v. Wilson*, 2011-SC-000157-CL, decided September 20, 2012, which condemned in the strongest language possible an ex parte request to vacate or set aside an arrest warrant made by an attorney representing a criminal defendant to a judge. "The answer is an unequivocal no," the Court held, and went on to say that the case – which was a request by

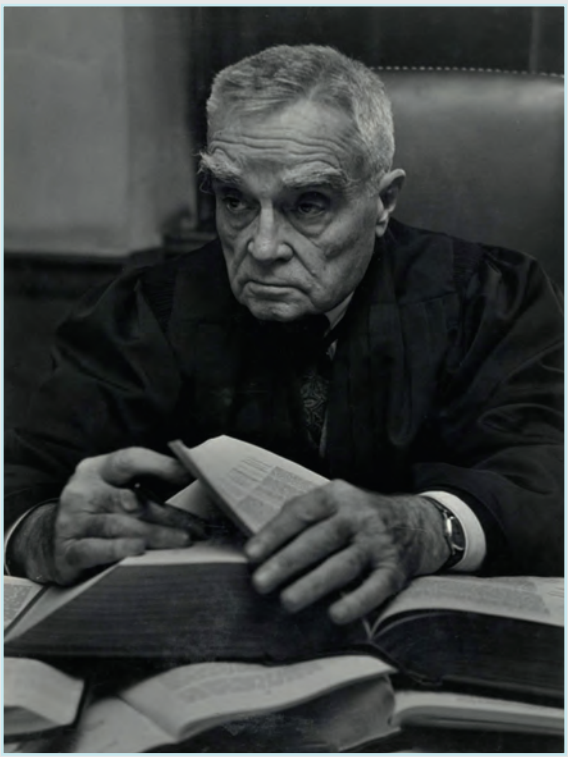
the Jefferson County Attorney for the Supreme Court to certify and answer a question of law – was a "vehicle for us to graphically depict the need to put this particular ex parte practice to rest."

According to the facts of this case, the defendant had been arrested on a warrant which had been issued after the spousal victim had been allegedly assaulted by the defendant. The next day, however, the defendant's attorney contacted the judge and stated that the victim had recanted her story. Thereupon, the warrant was withdrawn and a criminal summons issued instead. Being an ex parte communication, the Commonwealth was obviously neither present nor consulted prior to the withdrawal of the warrant, and a subsequent attempt by the Commonwealth to have the warrant reinstated was denied. Later, the defendant pled guilty to 4th degree assault.

In requesting a certification of the law, the Jefferson County Attorney and the defense apparently agreed that such ex parte communications by criminal defense lawyers with judges, after warrants have been issued, was a common practice in the Jefferson District Court. The Supreme Court stated that it was for this reason that they accepted the request. After discussion of the arguments for and against allowing the ex parte communication – including analysis of both the Kentucky Rules of Professional Conduct and similar cases in other states – the Court summarized succinctly its opinion on the practice of ex parte discussions of warrants going forward: "We forbid it."

The holding has raised some questions among criminal practitioners. It is practically common knowledge among the criminal defense bar that it is ethically permissible under Supreme Court Rule 4.300, Canon 3B(7) to have ex parte communications with a judge about the "initial fixing of bail" of a criminal defendant. The Supreme Court even acknowledges in its opinion that there are exceptions to the no ex parte rule, but states that the exceptions do not deal with "substantive matters." Yet, it would seem that a judge considered the initial fixing of bail would be obliged to consider the KRS 431.525 factors including whether the bond is commensurate with the nature of the offense charged and the reasonably anticipated conduct of the defendant if released. Analysis of these factors, it would seem, would at least scratch the surface of the "substantive" elements of the charge.

This raises the question: Had Wilson's lawyer, instead of asking the judge to vacate the arrest warrant, asked instead that the judge fix an "own recognizance" bail on the charge, and in the process told him that the nature of the offense was not as serious as it appeared, because the charges had been recanted, would not the communication, though ex parte, have been permissible? In the wake of *Wilson*, defense counsel seeking to get a client out of jail after he or she was served with a bench warrant should make sure the discussion with a judge relates only to an initial fixing of bail - or else, bring the Commonwealth in on the conversation.



"Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."

Judge Learned Hand

Chapter Two: The Right to Counsel and the Importance of Early Appearance

What Can a Lawyer Provide at First Appearance?

As the saying goes, eighty-five percent of being an effective lawyer is just showing up. To get your client a bond, you have to be there in court. For public defenders this means, at a minimum, being at the very next court appearance after being appointed. Yet, for the Sixth Amendment right to counsel to be fully realized, being effective may require being in court even *before* appointment, in anticipation of being appointed, especially when all signs point to indigency and eventual appointment by the court.

This year our country commemorates the fiftieth anniversary of the landmark case which breathed life into the criminal accused's Sixth Amendment right to counsel, *Gideon v. Wainwright,* 372 U.S. 335 (1963). Yet, fifty years into the decision there are still areas into which we need to make strides. One area is maximizing the benefits of being available at a client's first appearance.

And they go way beyond procuring a makeable bond.

If you have listened to Ed Monahan's speeches on first appearance, read Valetta Browne's article on pretrial release in last September's *The Advocate*, (reprinted below) you already know from Professor Douglas L. Colbert, Ray Paternoster and Shawn Bushway's article "Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail," published in the *Cardozo Law Review* in 2002 (found at http://digitalcommons.law.umaryland.edu/fac_pubs/291/), that a criminal defendant with a lawyer at first appearance is two and half times more likely to be released on recognizance, four and a half times more likely to have the amount of bail significantly reduced, and will serve less time in jail, with a median reduction from nine days in jail to two.

But how does this happen? What goes on – or can go on – at the first appearance that gives viability to the statistics quoted? Consider:

- **Opportunity to Argue for Bond:** When counsel is appointed at first appearance, counsel has an opportunity to argue for a bond that the client can make; hopefully, the lawyer will know what bond his client can make because there has been an opportunity to talk, something that obviously cannot happen if counsel is not present. While defendants are usually allowed to make some sort of bond argument to the judge, such arguments are generally not as skilled as those made by trained and/or experienced lawyers. Even if they are, if the bond is denied, typically any appeal from a denial will not be made until after the lawyer, once appointed, makes a second bond argument. This builds in another delay before relief can be sought.
- **Judges are More Free to Act:** Whether the accused has procured the services of paid counsel or is seeking appointed counsel, if the counsel is not there, a judge typically cannot act on the case now that he or she knows that a lawyer has been hired or requested. While in such instances a judge is not restricted from setting a lower bond in a case, the facts or circumstances which might persuade a judge from lowering a bond may not come out on the record, as the judge will want to keep a represented person from saying anything on the record that could damage the case. Can you imagine the reaction of an attorney who learns that his client was able to ramble on about the facts of his case even though the judge knew that the person was represented? Not knowing if the "rambling" will be helpful or harmful to the defendant's cause, the judge may shut down all talk on the record other than to enter a plea of "not guilty" to the charge.
- **Early Discovery:** Chances are, the second appearance on a case charged as a felony will be the preliminary hearing. The attorney present at first appearance will not only get an opportunity to learn key facts, or the identity of key witnesses, but may also be able to talk to the police officers involved in the case, if any. Facts learned during first appearance may make a difference in the preliminary hearing later. Even in the case of a misdemeanor, a lawyer may be more prepared to negotiate a better plea bargain at second appearance due to facts learned at first appearance.
- **Time-served Offers:** Often, the offense committed may be so minor that all the prosecutor wants from any defendant is the time served in jail. For a person who wants to plead guilty, and has already bonded out, it does not really matter when the offer is made or accepted. But to the person who has NOT bonded out, his time in jail will be increased by the length of time between his first appearance and his second appearance.

> ***"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."***
>
> Chief Justice Rehnquist,
> *United States v. Salerno*, 481 U.S. 739 (1986)

Professor Doug Colbert

Professor Doug Colbert, University of Maryland. Professor Colbert and his comparison study on outcomes of defendants who have an attorney at first appearance and those who do not is often quoted by DPA attorneys who speak or write on the subject, including Public Advocate Ed Monahan and Richmond Directing Attorney Valetta Browne. As he has also studied Kentucky's pretrial release and first appearance practices, Professor Colbert graciously agreed to speak via video at the Kentucky Bar Association's Annual Conference in 2011, where he was part of a panel discussion on Pretrial Release in Kentucky: Challenges and Opportunities, along with Supreme Court Justice Will T. Scott, Public Advocate Ed Monahan, AOC Pretrial Division Regional Manager Kris Popichak, Circuit Judge Julia Adams (retired), Russell County Attorney Kevin Shearer, and DPA General Counsel B. Scott West. Professor Colbert's comments are excerpted below.

Bail, First Appearance and the Presumption of Innocence

Professor Doug Colbert, University of Maryland

I want to begin by thanking you for inviting me to this excellent panel and to address members of the Kentucky Bar Association who have shown a particular interest in enhancing the administration of justice in your pretrial justice system. I want to send a special welcome to his Honor, Justice Will T. Scott, for his efforts in this endeavor as well as to public defender Ed Monahan, to my co-panelists and to each of you who chose to attend today.

I am reminded of the flight attendant who often tells us when we are airline passengers, you had many choices but we are glad you chose us. I want to congratulate you for selecting this panel and for being part of this discussion. It is indeed a privilege to speak to you today. I would normally have taken advantage of your gracious offer to appear in person, but right now I am teaching an International Human Rights class in India to U.S. and India law students. I will leave it to others to engage in the give and take discussion and will take advantage of our modern technology of which I know very little and hope that this broadcast reaches you and adds to the success of this panel.

For the past 15 years, I have been following your state's pretrial release system. Ever since my Maryland law students and I decided to devote our efforts to improving our own pretrial justice system. I remember the first time I spoke to your former Governor, Julian Carroll, and learned of his role in eliminating the commercial bail bondsmen and relying instead on pretrial services to assist judges in this all important decision of pretrial release or bail. I am not in the habit of speaking to too many former governors and so I wanted to show the proper respect. I began my question by saying Governor Carroll, I wanted to ask you about, but I got no further before Governor Carroll interrupted and said, "Just call me Julian". I thought that must be a Kentucky custom, so I am going to encourage each of you that if you want to discuss any of the information today with me, call and just call me Doug or if you insist call me Professor Doug.

I do see that Kentucky is engaged in another pretrial reform measure today. One that allows eligible defendants charged with non-violent crimes to be given bail more quickly through a predetermined bail schedule. I congratulate Justice Scott and other proponents for looking for measures that will lead to a more efficient and cost saving measure in which people spend roughly 24 hours in jail rather than the 2, 3 or 4 days it usually takes before that first bail determination is made. Every local pretrial system has a stake in moving to greater efficiency and reducing the cost of pretrial detention, particularly if a defendant is charged with nonviolent offenses who do not represent a danger to the public. That's a goal that each of the principal players, judges, prosecutors, defendants and correction officials share in order to better manage their caseloads and the pretrial jail population. But the people who benefit most from a bail schedule are those who have the financial resources to afford bail. I want to address for a moment, the many people who lack the resources, both defendants and their families, particularly during the worse financial crisis in our nation in 80 years.

Now the law doesn't say that a judge must order bail that a defendant can afford, but it does require judges to consider a defendant's financial resources in reaching the proper determination. Sixty years ago the United States Supreme Court in *Stack v. Boyle*, talked about the fact that the 8th amendment prohibits an excessive bail and directed judges to make a reasonable calculation about what would be the proper amount for each individual defendant. My Access to Justice Clinical Law students do a terrific job providing judges with verified information about their client's residence, family, employment, where people are employed, or schooling. But they also address their client's limited financial resources. Most of the judges welcome this additional information because it allows them to make an informed decision and a more accurate one and often the judge will reduce the bail to an affordable amount or will rely on an unsecured bond or release somebody conditionally to pretrial services.

Like your state, however, Maryland does not guarantee the right to counsel for every person who's in jail. Unrepresented defendants, as I am sure most of you know, often don't know what to say and what not to say when they appear before a judge. Very few know anything about *Stack v. Boyle* or have ever heard about *Salerno v. United State,* a 1987 decision which justified pretrial detention where the government can show clearly and convincingly that a particular defendant represents a danger to the public. But what *Salerno* also reaffirmed is the very important statement made in *Stack* where the *Salerno* court said: "In our society, liberty is the norm and detention prior to trial is the carefully limited exception." That's why your state's laws and Maryland's speak to a defendant's release before trial as a general policy matter.

Based on the law, though, we have found that judges welcome this additional information because it allows them to feel more confident in their ultimate decision. I am one of those who believe that judges need as much help as possible. It is too easy to play the blame game with judges and they are easy targets for the media or for politicians whenever they should release somebody who may then be charged with a more serious crime. A defense lawyer adds to the information that pretrial has already provided the judge and often that will allow a prosecutor to make a recommendation that a defendant charged with a nonviolent, less serious crime should be released on recognizance. Together the principal players protect and shield the judge from public criticism and actually help the public understand the meaning of bail and the presumption of innocence that takes place when a person is accused of a crime.

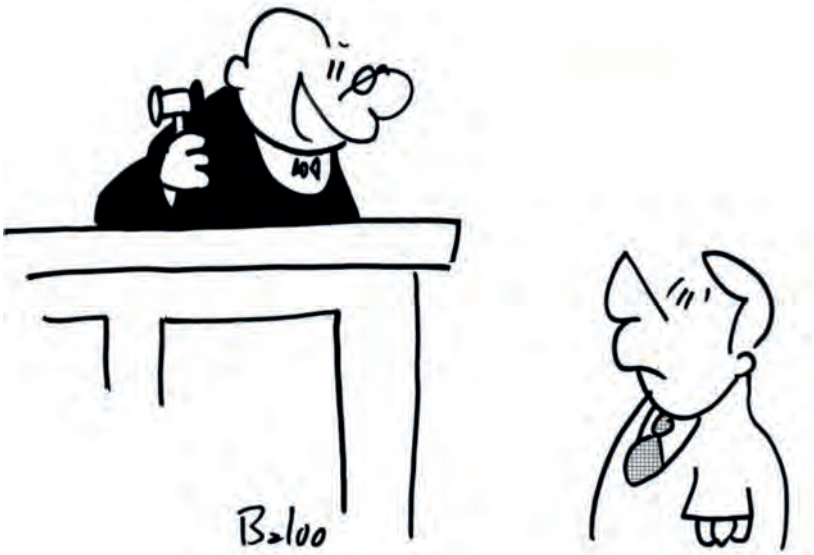
This may sound intuitive to most of you that when people have a lawyer they are more likely to receive a fair shake and are able to assist the judge in making the correct decision. But, in Maryland, we were able to gain a grant which allowed me to direct the Lawyers at Bail Project and we represented close to 4,000 defendants over an 18 month period. We had defense lawyers who represented people charged with nonviolent crimes at their bail hearing and I asked a criminologist, Ray Paternoster, to measure the difference a lawyer made compared to the control group charged with similar crimes and having similar backgrounds who were not represented by counsel. Professor Paternoster found and these results can be seen in a Cardosa Law Journal article that I wrote years ago. Professor Paternoster found that when defendants charged with nonviolent crimes are represented by counsel, they were 2 ½ times as likely to be released on recognizance. An additional group of defendants 2 ½ as many as those who did not have a lawyer saw their bail reduced to an affordable amount. Professor Paternoster's colleague, Shawn Bushway, who's an economist, measured the enormous cost savings that would result when people were represented at that initial bail hearing.

I say this to those of you out there who are public defenders and who are listening to this because proper representation means more than just being a warm body standing next to your client. You must do a great deal to provide the judge with additional information. It sometimes means installing telephones or being able to conduct an investigation from the court room or before a case is called. That is basically what my students were able to do and when they presented that information to a judge, it led to 2 out of 3 of their clients being released from custody as well.

I want to close by saying that each of the principal players in the pretrial justice system share an interest in promoting an efficient and effective justice system; one that both protects the liberty of an accused before trial and also protects the public's interest in safety and in fairness. Kentucky is already taking a very big step by guaranteeing a role for pretrial services during the investigation and recommendation stage. A prosecutor's participation also will ensure protection of the community and protect the rights of the individual. Now, I'm suggesting that you take the next big step and guarantee that every person accused of a crime is represented by a public defender at his or her initial bail hearing. By doing that, you will insure an important part of the community has greater faith in the integrity and fairness in our pretrial system. You will also be saving the taxpayer enormous money from the exorbitant costs of pretrial incarceration.

I thank you again for the opportunity to speak to you today. I want you to know that I would love to be informed about your future development in this area. I stand ready to assist and welcome your phone calls.

Thank you very much.



"Now, then — would you prefer a speedy trial or an *accurate* trial."

Selected Right to Counsel and First Appearance Cases

Federal Court Right to Counsel: *Powell v. Alabama*, 287 U.S. 45, 68 (1932): "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." 287 U.S., at 68-69.

State Court Right to Counsel: *Gideon v. Wainwright*, 372 U.S. 335 (1963): the right to counsel was extended to the states through the Fourteenth Amendment. Responding to Clarence Gideon's pro se motion, the Court reviewed the history of the right to counsel cases and came to the realization that anyone charged with a crime, even in state court, was entitled to counsel: "We accept…that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment…. While the Court at the close of its *Powell* opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable…. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

More than just Felonies: *Argersinger v. Hamlin*, 407 U.S. 25 (1972): The Supreme Court held that – absent a knowing and intelligent waiver – no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at trial. "Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution. In addition, the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result." 407 U.S. at 34.

More than just for trials (early entry): *West v. Commonwealth*, 887 S.W.2d 338 (Ky. 1994): The right to counsel attaches early in the case, and attaches to every "critical" stage of the case. Kentucky upheld KRS 31.110(1)'s mandate that "a needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed…a serious crime, is entitled to be represented by an attorney to the same extent as a person having his own counsel is so entitled."

The Right to Counsel Applies even where Jail Time is Suspended: *Alabama v. Shelton*, 535 U.S. 654 (2002): The United States Supreme Court held that "a suspended sentence that may end up in the actual deprivation of a person's liberty may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." The fact that an indigent person is offered conditionally discharged time rather than jail time to serve does not change the fact that the defendant must be advised of his right to counsel, and must either be represented by counsel or knowingly, voluntarily and intelligently waive counsel, or the conditionally discharged time may not thereafter be revoked.

Right to Counsel Attaches at Initial Appearance: *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008): The right to counsel attaches at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty, regardless of whether a prosecutor is aware of that initial proceedings or involved in its conduct. This case involved an action under 42 U.S.C. § 1983 filed against Gillespie County, Texas, where the plaintiff/criminal defendant contended that if the county had provided a lawyer within a reasonable time after a probable cause hearing, he would not have been indicted, rearrested, or jailed for three weeks. This holding reversed of finding of summary judgment for the civil defendant county, and remanded.

Waiver of Right to Counsel*: Iowa v. Tovar*, 541 U.S. 77 (2004): Although an accused may choose to forgo representation, any waiver of the right to counsel must be knowing, voluntary, and intelligent, reaffirming *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). The information a defendant must possess in order to make an intelligent election depends on a range of case-specific factors, including his education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding. See *Johnson*, *Id.* at 464.

Chapter Three: Statutes and Rules Pertaining to Bail

Bail is Only One Form of Authorized Release

Although the Kentucky Constitution provides that all non-capital offenses are bailable, the Rules of Criminal Procedure and KRS Chapter 431 provide for various forms of pretrial release. Pursuant to RCr 4.04, defendants can be released on personal recognizance, unsecured bail bond, or executed bail bond, all of which with or without non-financial conditions attached. Non-financial conditions must be the least onerous conditions necessary to insure the defendant's appearance as required, and can include, but are not limited to, placing the defendant in the custody of someone else, placing restrictions on travel, association with others, or place of abode during the period of release. RCr 4.12. The Court may also impose a requirement to return to custody after specified hours, allowing for the possibility of "work release" or "weekend custody." *Id.* These are available, in any combination:

1) Personal or "own" recognizance ("ROR"). 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, RCr 4.10, or unless the court finds that the person is a danger to others, KRS 431.066;

2) Unsecured bond. This does not require putting down money or property. It simply specifies an amount of money the defendant would owe if he fails to appear.

3) Nonfinancial conditions. If the judge does not allow either of the former, 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 defendant 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.

4) Surety bond. This bond does not require putting down money either, but someone other than the defendant must promise to pay to the court a certain amount of money if the defendant does not appear. RCr 4.00(g). The surety has to be worth the amount he promises to pay. RCr 4.32.

5) Cash. This means the entire amount of the bail is paid in cash. Someone posting a cash bond for the defendant can put it up in his own name or in the name of the defendant. Note that any time cash is deposited for bail, 10% of the amount deposited goes to a bail fee and the circuit clerk will not return it. KRS 431.530(3), 431.532(2). This applies to cash put down on the 10% bond below as well.

6) Ten percent. This is also a cash bond, but the defendant or whoever makes bail for him needs only to come up with 10% of the total amount of the bail.

7) 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 this with a cash bond, *e.g.*, "$500.00/2x prop." Unless the property is owned by a relative of the defendant, the property cannot have been used for bond within the last twelve months. KRS 431.535(3)(e), RCr4.34(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 tell them he needs to use the property for a bond. The PVA will give him 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.

Non-Bailable Offenses

A person cannot be held in jail prior to trial for a violation. The exceptions are certain motor vehicle offenses, Criminal Trespass 3rd Degree, Harassment, and Alcohol Intoxication. KRS 431.062. A person arrested for Alcohol Intoxication 1st or 2nd Offense cannot be held for more than 8 hours. KRS 222.204(c).

Every person is automatically eligible for some type of bail unless he is charged with a death penalty offense, in which case bail can only be denied when "the proof is evident or the presumption is great that the defendant is guilty." RCr 4.02(1).

Setting the Amount of Bail

KRS 431.525 sets out the conditions for establishing the amount of bail, and mandates that the amount 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.

What follows is an analysis of each in turn:

(a) Sufficient to Insure Compliance with the Conditions of Release

This is the ultimate reason for the setting of bail: To ensure the client comes back to court. For many, "sufficient" means "just that which is barely sufficient, and no more." Others believe in an over-abundance of sufficiency. In the federal system, the standard is that bond must not exceed that which is reasonably calculated to fulfill the purpose of having the accused return to court. In *Stack v. Boyle*, 342 U.S.1, 72 S.Ct. 1, 96 L.Ed. 3 (1951), the Supreme Court reiterated the standard:

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), 18 U.S.C.A., federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See *Hudson v. Parker*, 1895, 156 U.S. 277, 285, 15 S.Ct. 450, 453, 39 L.Ed. 424. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.
>
> The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. *Ex parte Milburn,* 1835, 9 Pet. 704, 710, 9 L.Ed. 280. 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.** See *United States v. Motlow*, 10 F.2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh circuit)[bold lettering added.]

Thus, the right to a makeable bond has long been recognized by the United States Constitution; but what about the states? Prior to 2010, had you asked a knowledgeable Constitutional scholar whether the Eighth Amendment's "excessive bail" clause had been applied to the states through the Fourteenth Amendment, as the "cruel and unusual punishment" clause has been, you likely would have gotten an answer ranging from "no," to "maybe," or "yes," depending upon how one interpreted *Schilb v. Kuebel*, 404 U.S. 357 (1971). In that opinion, the Supreme Court stated that "the Eighth Amendment's proscription against excessive bail has been assumed to have application to the states through the Fourteenth Amendment." *Id*. at 484. The Court cited to *Pilkinton v. Circuit Ct*., 234 F.2d 45 (8th Circ. 1963) and *Robinson v. California*, 370 U.S. 660 (1965) as the bases for this "assumption." However, the Court then stated that "we are not at all concerned here with any fundamental question of bail excessiveness," and did not reach the issue of whether the "assumption" of state application was well-founded, leaving the question of whether the clause had been incorporated into the states largely unanswered.

That all changed after *McDonald v. City of Chicago*, 78 USLW 4844, 130 S.Ct. 3020, 177 L.Ed.2d 894(2010), the case where the Supreme Court held that the Second Amendment applies to the states through the Fourteenth Amendment. As a precursor to its holding, the Court in two footnotes listed respectively those amendments and clauses which had been applied to the states, and those which had not. (*See id*. at ns. 12, 13). In the first list, the "excessive bail" clause appeared, with *Schilb* cited as the authority. Thus, the Supreme Court has now squarely put the "excessive bail" prohibition into the list of Amendments incorporated against the states.

If the Eighth Amendment now applies to the states, federal law interpreting its implementation must also apply to the states. Hence, *Stack v. Boyle* is good case law for arguing that any state court bond set above that which will ensure compliance with the court's conditions of bond is unconstitutional.

(b) Not Oppressive

In addition to the requirement of KRS 431.525(1)(b) and RCr 4.16(1) that bail not be "oppressive," the Kentucky Constitution mandates that bail not be "excessive." Section 17 of the Kentucky Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted." "Excessive" and "oppressive" seem to mean the same thing, there being no case law which distinguishes the two terms. In fact, cases cited in the annotations to RCr 4.16 are placed under the heading "Excessive Bail" even though the statute uses the word "oppressive."

What is oppressive (or, to use the Constitutional term, excessive)? How does one know when bail has been set unreasonably high?

In *Adkins v. Regan*, Ky., 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." From the facts of the case, it appears that the conduct if charged today would have amounted to assault in the fourth degree and terroristic threatening, although it also appears that the defendant should have had a meritorious self-defense case. The defendant in that case was prosecuted for having "cruelly beaten" his wife and having threatened his father-in-law. The defendant's version was that he had accidentally blackened his wife's eye while trying to take a knife away from her. In reviewing the amount of the bond 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.

Apparently, then, an analysis of what is oppressive begins with an examination of the poverty or wealth of the defendant (see (e) below). Twenty-five thousand dollars may be nothing to a millionaire, but twenty-five hundred dollars may be far beyond what an indigent defendant can afford. In essence, the court must look at *how dear* the amount of money necessary to post bail would be to the defendant. Just as in the story of the "Widow's Mite," told in the Gospels, the smallest amount of money is a great deal to someone who owns practically nothing. Hence, the factor concerning consideration of the 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. Examples of excessive bail can also be found in *Long v. Hamilton*, 467 S.W.2d 139 (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. It is ineffective to argue in response that a fourth degree assault is just a little assault, or that theft under $300 is just a tiny theft. To the victim, for whom the offense is personal, the gravity of the offense is of paramount importance, and any bond which the defendant could make would be too low. Thus, when possible, it is best to attempt to refer to some sort of an independent standard to gauge the gravity of the offense charged.

Misdemeanors: The Uniform Schedule of Bail

Although *Abraham, supra*, stands for the proposition that routinely setting bail at the same amount for the same charge abrogates the judge's responsibility to examine the RCr 4.16 standards, in district court there is nevertheless a starting point for determining the appropriate bail for a given charge. Appendix A to the Kentucky Rules of Criminal Procedure is the Uniform Schedule of Bail. It is a table which provides for each Penal Code misdemeanor the possible jail time it carries, the possible fine, a recommended bail, and the 10% deposit required in the event of a percentum deposit bond. The bail recommendations range from $50.00 to $2,000.00.

RCr 4.16(3) makes it clear that the Court's use of the uniform schedule of bail is permissive, not mandatory. However, in the event the Court in his discretion refuses to set bail in the amount prescribed by Appendix A, he must record his written reasons for his deviation. RCr. 4.20(2).

Of course, if the client still cannot gain release where bail is set in accordance with the schedule, further reduction of bond should be sought by the attorney. Again, the uniform schedule is a starting point, not the final destination, for determining bail. **[See Form 7.7 for a sample writ challenging a court's rigid adherence to a bond schedule.]**

Felonies: Other Bonds in the Jurisdiction

If the charge is a felony, obviously, the Uniform Schedule of Bail will not be helpful. However, one can find a standard by checking the bails set by the circuit judge for identical or nearly identical offenses and use those bails as a basis for comparison. Alternatively, one can check the bonds set by district or circuit judges in neighboring jurisdictions to see if the client's judge generally sets bails higher or lower by comparison. **[See Form 5.6 for a sample motion challenging bond based on similar bonds in the jurisdiction.]**

Some courts, like the court in Abraham, will set bond solely on the basis of the perceived seriousness of the offense. Where the other factors are ignored, this is an abuse of discretion. **[See Form 7.1 for an argument where the court considered impersonating a police officer to be so serious offense that anyone charged with the offense should be deemed a "danger to the public.]**

(d, part one) Considerate of the Past Criminal Acts of the Defendant…

If a client is being charged with his first offense, the attorney will want to trumpet this to the court. However, if the client has a list of priors as long as his leg, the attorney probably does not want to be the one to go out of your way to point out your client's criminal history to the Court. But the Judge will know about it, and the prosecutor will know about it, so you therefore have to be prepared to say something about it.

If the defendant has always made his court appearances, it is worth mentioning. If he has a spotted record of attendance, let the prosecutor dig that information up. Focus your attention on his most *recent* pattern of attendance, and see if that improves the overall average. (Remember how in your job interview you pointed out how well you did during your *senior* year of college?)

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. If your client is charged with his first theft case, and his priors consist primarily of public intoxication, argue that he essentially is a first time offender for a crime of this nature. Likewise, if this is your client's first assault charge, a history of misdemeanor theft should not be used to support the Commonwealth's attention that "if he is released, he will steal again."

(d, part two) …and Reasonably Anticipated Conduct of the Defendant if Released

While this factor is the "go to" factor for a prosecutor to argue that "if he is released, he will just commit another crime," this factor can also be the "softball" factor for the defendant. Virtually any reason for release can be squeezed into this factor. "She plans on getting her GED," or "he has a bed waiting in a rehab" are examples of conduct that the client can be reasonably expected to have, especially if the attorney can provide proof of enrollment in a GED class or a rehab.

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 defendant 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." Thus, when a prosecutor argues that certain factors urged by defense counsel in support of a bond reduction (such as the defendant's medical condition) are beyond the scope of RCr 4.16 and ought not to be considered, *Abraham* allows counsel to argue those factors as being relevant to the issue of reasonably anticipated conduct of the defendant.

Other factors which might also establish anticipated conduct could be the medical condition of family members whom the defendant is obligated – legally or morally – to support, ties to the church or community, a promising job prospect, the fact that he will lose social security disability payments if he is incarcerated longer than thirty days, or any other factor unique to an individual which supports an argument that he is more likely to stay in the community rather than flee the jurisdiction.

(e) Financial Ability of the Defendant to Make Bail

Public defenders already have a head start at proving the financial ability, or more aptly, financial inability, of the defendant to pay bail. Located in the court's file will be the affidavit of indigency and the Court's signature entitling the defendant to representation by the Department of Public Advocacy. Remind the court that in order to be appointed a public defender, the court must have already found him to be a "needy person" as defined in KRS 31.100 and 31.120. Pull the order appointing a lawyer and recite the contents to the Court, illustrating the lack of income and assets, and the abundance of debts and dependents.

Hired defense lawyers 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 make the client come back to court and behave himself in the meanwhile.

Setting the Manner in Which Bail May be Made

Prior to the enactment of HB 463 in 2011, KRS 431.520 and 431.525 were the only sections which addressed the manner in which a court would set bond. After determining the amount of bond based upon the five factors in KRS 431.525, the court then would decide whether to make the bond fully secured, partially secured, unsecured, or on own recognizance, using the options available under KRS 431.520.

However, with the enactment of KRS 431.066, a new section created by HB 463, after setting the *amount* of bond under KRS 431.525, the Court then SHALL grant an ROR or unsecured bond under KRS 431.066, unless it finds that the defendant is a high risk to flee, not return to court, or to be a danger to the public. If some other type of bail is appropriate, the court must impose the "least onerous conditions" reasonably likely to ensure a defendant's return to court. RCr 4.10, 4.12, KRS 431.066.

The passage of HB 463 created new bond statutes, beginning with KRS 431.066, which addresses bail for low and moderate risk defendants and provides for credit toward bail as follows:

- In considering pretrial release and bail, the 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.
- If the defendant 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 defendant released on unsecured bond or on the defendant's own recognizance subject to such other conditions as the court may impose.
- If the defendant 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 defendant 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 defendants on the same terms found in KRS 431.517.

Bail Credit

Regardless of the amount of bail set, the court shall permit the defendant 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 defendant remains in jail prior to trial. Upon the service of sufficient days in jail to have sufficient credit to satisfy the bail, the court shall order the defendant released from jail on the conditions specified in this section or chapter:

- The credit toward bail shall not apply to any person convicted of, pleading guilty to, or entering an Alford plea to a felony offense under KRS Chapter 510 (sex offenses), 529.100 involving commercial sexual activity, 530.020 (incest), 530.064(1)(a) (unlawful transaction with a minor first degree, illegal sexual activity), 531.310 (use of minor in sexual performance), 531.320 (promoting sexual performance by a minor) or who is a violent offender defined in KRS 439.3401, or who is determined by a court to present a flight risk or to be a danger to others.
- If the court determines the person shall not be released pursuant to the preceding paragraph, the court shall document the reasons for denying release in writing.
- 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 by a defendant.

Presumptive Probation Offenses

KRS 218A.135 requires ROR 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 defendant 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.

Misdemeanor Charges (Not Involving Physical Injury of Sexual Contact)

KRS 431.525 requires that when a person is charged with one or more misdemeanors not involving physical injury or sexual contact the amount of bail for all charges shall be encompassed by a single amount of bail which shall not exceed the amount of the fine and court costs for the one highest misdemeanor charged, unless the court makes a finding that the person is a flight risk or danger to others and the court documents the reasons for denying bail in a written order.

KRS 431.525 requires that when a person is convicted of a misdemeanor and receives a sentence other than a fine (jail, probation, conditional discharge) the amount of release on bail pending appeal shall not exceed double the amount of the maximum fine which could have been imposed for the one highest misdemeanor for which the person was convicted, unless the court makes a finding that the person is a flight risk or a danger to himself or others and the court documents the reasons for denying bail in a written order.

Supreme Court Guidelines for High Risk Defendants

KRS 27A.096 requires the Supreme Court to recommend guidelines for granting pretrial release, monitored conditional release, or pretrial supervision to moderate and high risk defendants (based on pretrial risk assessments) who would otherwise be detained prior to trial and require judges to consider the guidelines when setting the terms of probation.

Evidence-Based Practices

In addition to the evidence-based practices already put into effect (discussed more fully in the next chapter), effective July 1, 2013 will be a new section of KRS 27A requiring evidence-based practices in pretrial release programs: a review process for effectiveness in reducing failure to appear and criminal activity among those released prior to trial and identification of procedures scientifically proven

to reduce failure to appear and criminal activity. It is anticipated that this provision, which will apply to vendors seeking to do business with the state (e.g., home incarceration vendors), is already in existence with regard to the Administrative Office of the Courts' Division of Pretrial Services), based upon the General Assembly's adoption of the "high," "moderate," and "low" risk categories used in the statistically-valid pretrial risk assessment tool employed by the AOC, and the statutory language requiring a trial court to consider the report produced by the pretrial risk assessment tool.

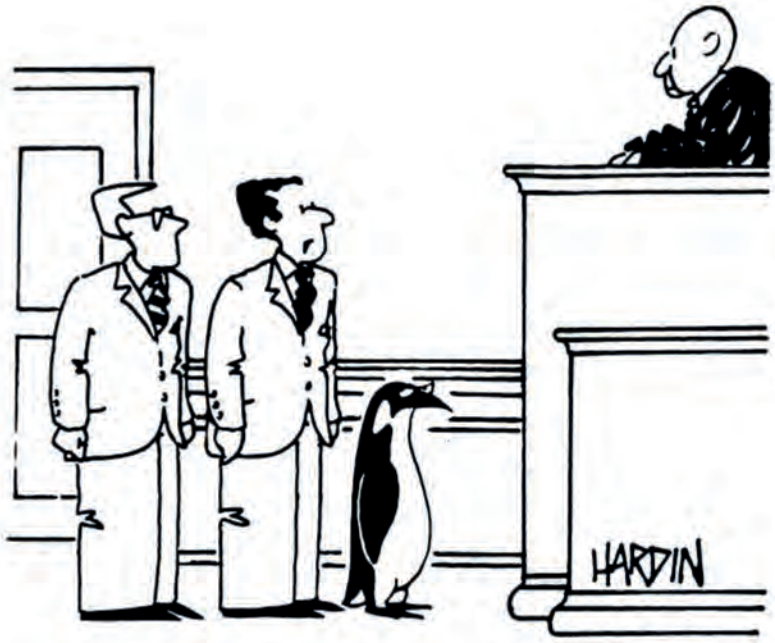
(For additional reading on HB 463 bond provisions see the Appendix.)

DUI

There are no recommendations for driving under the influence in the Uniform Schedule of Bail; it expressly provides that in "DWI" cases, "the bond shall be set by the court." Nevertheless, the schedule can be used as a reference to other similar offenses. Menacing, for instance, carries a recommendation of $1,000 bail with the percentum deposit being $100.

However, one can gauge the gravity of a DUI by reference to the penalty imposed. A third offense is tantamount to a Class A misdemeanor, and that bond for a third offense should be set commensurate with Class A misdemeanors in the bond schedule. Likewise, first and second offenses should be set commensurate with a Class B misdemeanor.

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 whether it is their first, second, third or fourth – 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 the matter of bond, Your Honor; I would point out that my client poses no risk of flight."

Chapter Four: Digest of Bail Cases

Digest of Kentucky Bail Cases

Constitutional Issues
- Presumption of innocence
  - Connection to pretrial release
  - Excessive bail prohibited
- Excessive bail
  - Generally
  - Amount found excessive
- Capital cases
  - Burden of proof
  - Competent evidence
  - Habeas corpus
  - Sufficiency of evidence
- Bond pending appeal
- Separation of powers
  - Source of judicial discretion
- Abolishment of bail bondsmen

Jurisdiction
- Concurrent Jurisdiction
  - District / Circuit Courts
  - Between Circuit Courts

Bail Hearings
- Change in conditions of bond
  - Defendant already on bail
  - Finding of probable cause after preliminary hearing
  - Grand jury indictment
  - When hearing is required
- Evidence
  - Circumstances favoring/not favoring release
  - Customary amounts of bail
  - Defendant's statements made to pretrial services
  - Ex parte communications
  - Grand jury testimony
  - Hearsay
  - Judicial notice
  - Record evidence
  - Witnesses
- Written findings required

Discretion of the court
- Abuse of discretion
- Bond pending appeal
- Factors concerning bail decisions
  - Emphasis on flight risk and complying with bail terms
  - Failure to consider all factors
- Initial setting of bail

Admitted to Bail
- Own Recognizance
- Medical purposes
- Return of bond
- Forfeiture
  - Excessiveness
  - Jurisdiction
  - Notice of hearing
  - Penalty clause

Appeals
- Habeas corpus
  - Generally
  - Capital cases
  - Necessity of motion filed in trial court
  - Standard of review
- Evidence
  - Judicial notice
  - Record evidence
- Mootness
  - Action by circuit court does not moot action by district court
  - Capable of repetition yet evading review
- Judicial notice
- Record evidence

Bonds pending appeal
- Discretion of the court
- Forfeiture
- Probation revocation order is a "final judgment"

Jail-time credit
- Home incarceration
- Medical purpose
- Rehabilitation Facility

Escape
- Home incarceration

Constitutional Issues

Presumption of innocence – Connection to pretrial release. A defendant in a criminal action is presumed innocent of any charge until convicted. 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. 8 *Am.Jur.2d*, "Bail and Recognizance," Section 4; 8 *C.J.S.* "Bail," Section 4. ***Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971)**

Presumption of innocence -- Excessive bail prohibited. Each case comprises a set of facts and circumstances peculiar to it and there is no rule of law which will automatically determine for every case the amount of bail which may be required without violation of the prohibition against excessiveness…. 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. Such a procedure strikes a blow at the liberty of every citizen. ***Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971)**

Excessive bail – Generally. "The right to bail is a constitutional one, which has been safeguarded. Excessive bail is denounced." Kentucky Constitution, Section 17. ***Day v. Caudill*, 300 S.W.2d 45 (Ky. 1957)**

Excessive bail - Generally. Each case comprises a set of facts and circumstances peculiar to it and there is no rule of law which will automatically determine for every case the amount of bail which may be required without violation of the prohibition against excessiveness…. 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. Such a procedure strikes a blow at the liberty of every citizen. ***Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971)**

Excessive bail -- Generally. "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." ***Adkins v. Regan*, 233 S.W.2d 402 (Ky. 1950)**

Excessive bail – Amount found excessive. Where a peace bond was set in the amount of $5,000, and defendant was committed to custody until such time as he could execute the peace bond, such bond was a bail bond, and thus was excessive where the testimony was that, on one occasion, the defendant had taken a knife away from his wife, and that in the scuffle for the knife, the wife accidentally received a black eye, and on another occasion, the defendant's wife had thrown a rock through the window of the automobile in which he was sitting, and that the defendant took another rock away from her, but never intentionally struck or threatened her. "Under the circumstances of this case, obviously bailable by law, it appears to us that the requirement of $5,000 bail is so clearly disproportionate and excessive as to be an invasion of appellant's constitutional right." ***Adkins v. Regan*, 233 S.W.2d 402 (Ky. 1950)**

Excessive bail – Amount found excessive. Bail set at $150,000 was excessive for person charged with trafficking narcotics. ***Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971)**

Excessive bail – Amount found excessive. Bail set at $25,000 was excessive for person charged with theft. ***Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977)**

Capital cases – Burden of proof. "The burden of proof was on the Commonwealth to establish evident proof of appellants' guilt or to establish a great presumption of their guilt. Each case must stand on its own facts. The proof offered in the face of the presumption of innocence is not sufficient to warrant a denial of the constitutional right to bail." ***Day v. Caudill*, 300 S.W.2d 45 (Ky. 1957)**

Capital cases – Burden of proof. "The only question is whether the proof of Damron's guilt is sufficiently evident, or the presumption of his guilt sufficiently great, within the meaning of Section 16 of the Kentucky Constitution, so that the denial of bail by the circuit court cannot be considered capricious or arbitrary." ***Damron v. Coleman*, 270 S.W.2d 170 (Ky. 1954).**

Capital Cases – Competent evidence. Where defendant had been admitted to $5,000 bail, on a motion by the Commonwealth to set aside bail order and hold defendant without bail in a capital case, the court held that the hearsay testimony of the alleged victim and the grand jury minutes were not competent evidence, and that "the better policy is to restrict the proof to that which is competent under the ordinary rules of evidence." [NOTE: This case was decided before the enactment of Kentucky Rule of Evidence 1101(d)(5) which provides that the rules of evidence do not apply with respect to "proceedings with respect to release on bail or otherwise." KRE 1101 is distinguishable from this case, which is concerned with a hearing on the issue of whether an *already released* person shall have bond revoked. RCr 4.40 provides that where the defendant has appeared when required at previous proceedings in the case, the Commonwealth "must demonstrate by clear and convincing evidence the need to modify existing conditions of release." A clear and convincing evidence standard implies use of the rules governing competency of evidence. Also, this case dealt with the issue of outright denial of bail under Ky. Constitutional Section 16, which requires a setting of bond except in a capital case "where the proof is evident," and which has been interpreted to require the Commonwealth to put on evidence of guilt.] ***Young v. Russell*, 332 S.W.2d 629 (Ky. 1960)**

Capital cases – Habeas corpus. "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)**

Capital cases – Sufficiency of evidence. Where evidence introduced in hearing on motion for bail showed defendant to not be guilty of murder, but only voluntary manslaughter in the event the jury did not find self-defense, the proof of guilt was not evident, nor the presumption great that the defendant had committed a capital offense, and thus was entitled to bail fixed at a reasonable sum. ***Burton v. Commonwealth*, 212 S.W.2d 310 (Ky. 1948)**

Capital cases – Sufficiency of evidence. Where the sole person who testified identified appellant as the person who killed the decedent, the proof was evident and the presumption great as to the ultimate guilt of appellant, who was charged with a capital offense, and thus the trial judge did not abuse his discretion in denying bail. ***Brooks v. Gaw*, 346 S.W.2d 543 (Ky. 1961)**

Capital cases – Sufficiency of evidence. Where there was testimony that defendant had pulled his vehicle alongside that of the decedent and fired a shotgun, killing decedent, the presumption of guilt was great and trial court was within discretion to deny bail. ***Schirmer v. Commonwealth*, 354 S.W.2d 748 (Ky. 1962)**

Capital cases – Sufficiency of evidence. Testimony of eye witnesses that defendant shot the decedent found sufficient to warrant denial of bail. ***Holland v. Asher*, 314 S.W.2d 947 (Ky. 1958)**

Capital cases – Sufficiency of evidence. Testimony of victim of a robbery and two other persons who positively identified defendant was sufficient evidence for the trial court to deny bond. ***Lycans v. Burke,* 453 S.W.2d 8 (Ky. 1970)**

Capital cases – Sufficiency of evidence. Where testimony offered in a hearing failed to establish any evidence of premeditated or willful killing, the proof offered was not evident nor the presumption great, and thus defendant was entitled to release from detention upon the execution of sufficient bail. ***Thacker v. Asher*, 394 S.W. 588 (Ky. 1965)**

Bond pending appeal – No constitutional right. There is no constitutional right to bail after conviction and pending appeal. ***Braden v. Lady*, 276 S.W.2d 664 (Ky. 1955)**

Separation of powers – Source of judicial discretion. The sources of judicial discretion are the statutes and the rules: "Great discretion is vested in the circuit judge respecting bail…. However, the record should demonstrate that the circuit judge did in fact exercise the discretion vested in him under the *statutes and rules* [emphasis added]. Thus, the legislature is at least part of the source of judicial discretion. ***Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977)**

Abolishment of bail bondsmen. The state of Kentucky's "police power…is as broad and comprehensive as the demands of society make necessary…It must keep pace with the changing concepts of public welfare. Certainly the legislature could take cognizance of the inherent evils and abuses of the compensated surety in the bail bond system." ***Stephens v. Bonding Ass'n of Kentucky*, 538 S.W.2d 580 (Ky. App. 1977)**

Abolishment of bail bondsmen. "The bail bonding business by compensated surety is not 'an ancient honorable and necessary calling,' but one whose evils have been tolerated because of deep-rooted antipathy against the confinement of persons entitled to a presumption of innocence pending trial. Bail bonding by compensated surety has never enjoyed a favorable status but exists because no better system has been provided. It does not have protection as an integral part of the judicial process that will require this court to invalidate a new system designed by the General Assembly to remedy the evils of the existing system and at the same time provide adequate guarantee of pretrial release." ***Stephens v. Bonding Ass'n of Kentucky*, 538 S.W.2d 580 (Ky. App. 1977)**

Jurisdiction

Concurrent jurisdiction – District courts/circuit courts. "The district court has limited jurisdiction to act in criminal cases… The district court may also commit a defendant charged with a felony or capital offense to jail or hold him to bail or other forms of pretrial release," *citing* KRS 24A.110(3). ***Commonwealth v. Yelder*, 88 S.W.3d 435 (Ky.App. 2002)**

Concurrent jurisdiction – Between circuit courts. Facts: The defendant was admitted to bond after his murder conviction was appealed to the Supreme Court. Thereafter, he fled the state. When his murder conviction was upheld by the Supreme Court, the circuit court issuing the bail issued a bench warrant for bail jumping. When this conviction was reversed because the Commonwealth had not proven that defendant had been ordered to appear, and had failed to do so, the sureties moved for remittance of the bond. The circuit court refused to remit the bail and instead deferred to the Franklin Circuit Court, under the rationale that KRS 44.020(2) – which requires a claim made against the state arising out of a court order must be brought against the state in Franklin Circuit Court – controlled. Held: The circuit court issuing the bail bond had exclusive jurisdiction over the remitting of a bail bond, and the Franklin Circuit Court only would get jurisdiction if the Department of Local Governments refused to remit the bond after getting an order to do so from the circuit court which issued the bond. ***Dunlap v. Commonwealth*, 911 S.W.2d 277 (Ky. App. 1995)**

Bail Hearings

Changes in conditions of bond – Defendant already on bail. "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." ***Bolton v. Irvin*, 373 S.W.3d 432 (Ky. 2012)**

Changes in conditions of bond – Defendant already on bail. "If [the circuit judge] believed that the defendant's work as a substitute teacher constituted a material change in her circumstances, the appropriate procedure was to hold an adversary hearing. After the hearing, he was entitled to change the defendant's terms of release only if clear and convincing evidence of the material change existed and a substantial risk of nonappearance was present. ***Alred v. Commonwealth, Judicial Conduct Com'n*, ___ S.W.3d___, 2012 WL 3000383, (Ky. 2012)(not yet final)**

Changes in conditions of bond – Defendant already on bail. Where the trial court granted a new trial to a defendant who was on bond during the trial, it was error to impose the condition of detention upon its decision to grant a new trial, in violation of RCr 4.40 where there was no motion of the commonwealth requesting or stating grounds for such change, and without a demonstration by clear and convincing evidence the need to modify existing conditions. ***Brown v. Commonwealth*, 789 S.W.2d 748 (Ky. 1990)**

Changes in conditions of bond – Defendant already on bail. "Our view is that bail previously allowed may not be revoked without reason for the revocation." In this case, the defendant had been on bond in the amount of $10,000 from September, 1968 until February, 1969. The record did not indicate that he conducted himself in any manner other than that required by law; he had made himself amenable to the processes of the court, and appeared at hearings as directed. ***Marcum v. Broughton*, 442 S.W.2d 307 (Ky. 1969)**

Changes in conditions of bond – Defendant already on bail. "If the Judge of the Knox Circuit Court had been acting in the matter in an initial fashion we would feel impelled to uphold the exercise of his discretion in determining whether or not the Commonwealth had sustained its burden [to prove that the defendant ought to be denied bail.] ***Marcum v. Broughton*, 442 S.W.2d 307 (Ky. 1969)**

Changes in conditions of bond – Defendant on own recognizance. A person admitted to release on "own recognizance" does not have a material change in conditions of bond if thereafter the court requires the defendant to appear for purposes of "in-patient" examination at Kentucky Correctional Psychiatric Center. ***Partee v. Commonwealth*, 2012 WL 95588 (Ky.App. 2012)****

Changes in conditions of bond – Finding of probable cause after preliminary hearing. RCr 3.05(1) permits the district court to set bail at the time of the initial appearance. RCr 3.14(1) then allows the district court to again set bail upon a finding of probable cause. In *Sydnor v. Commonwealth,* 617 S.W.2d 58, 59 (Ky.App. 1981)(quoting *Kuhnle v. Kassulke,* 489 S.W.2d 833 (Ky.1973) the Court of Appeals reiterated that the returning 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. Under the Rules of Criminal Procedure, the district court is specifically authorized to reconsider the question of bail following a finding of probable cause. ***Bolton v. Irvin*, 373 S.W.3d 432 (Ky. 2012)**

Change in conditions of bond – Grand jury indictment. "While RCr 4.40 and RCr 4.42 are substantially more specific and restrictive than the former rules with respect to the findings courts must make before they may order the amount of bail previously set by them increased, the requirements of those rules are not specifically made applicable to cases where a prosecution is commenced in district court but jurisdiction of the case is later transferred to a circuit court by the return of an indictment. *Kuhnle v. Kassulke, supra,* holds that the return of an indictment in circuit court, against a person already released on a bond fixed by a lower court is a change in that person's status sufficient to authorize the circuit court to take a fresh look at the question of bail and to summarily exercise a new discretion as to the amount of bail. ***Sydnor v. Commonwealth*, 617 S.W.2d 58, 59 (Ky.App. 1981)**

Change in conditions of bond – Grand jury indictment. Where a $1,000 bond was set on a case at preliminary hearing, and a grand jury indictment subsequently issued, the returning of the indictment "marked the passing of a milestone in the criminal process from arrest to possible ultimate conviction and to that extent it represented a change in his status. This change alone, in the opinion of this court, is sufficient to authorize the circuit court, before which the indictment was returned, to take a fresh look at the question of bail and to exercise a new discretion as to the amount of bail under the standards set forth in RCr 4.06. Under the rules another change of status occurs when one charged by an indictment has been convicted by a jury and the circuit court is likewise permitted to exercise a new discretion on the question of bail pending appeal." ***Kuhnle v. Kassulke*, 489 S.W.2d 833 (Ky. 1973)**

Changes in conditions of bond – When hearing is required. "If [the circuit judge] believed that the defendant's work as a substitute teacher constituted a material change in her circumstances, the appropriate procedure was to hold an adversary hearing. After the hearing, he was entitled to change the defendant's terms of release only if clear and convincing evidence of the material change existed and a substantial risk of nonappearance was present. ***Alred v. Commonwealth, Judicial Conduct Com'n*, ___ S.W.3d___, 2012 WL 3000383, (Ky. 2012)**

Evidence – Circumstances favoring/not favoring release. Circumstances brought into evidence favoring the accused included that (1) he was married and had a family, (2) that he had lived most of his lifetime in the county, (3) that he had not been shown to have sufficient resources to enable him to post a large bail. Circumstances brought into evidence increasing the probability of flight and which justify the requirement of a large bail included (1) previous felony convictions, (2) unemployment, (3) conviction of present charges could result in imposition of severe penalties, (4) reputation as a principal supplier of narcotics. ***Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971)**

Evidence – Customary amounts of bail. "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)**

Evidence – Defendant's statements made to pretrial services. Statements made by a defendant to a pretrial services officer, or information obtained by the pretrial services agency as a result of an initial interview or subsequent contacts, is deemed confidential under RCr 4.08; therefore it was error for the pretrial services officer, subpoenaed to the stand to testify on behalf of the Commonwealth about statements made by defendant with regard to his address at a trial on failing to register as a sex offender. However, error was unpreserved not palpable, as – given other testimony that came in at trial – there was no substantial possibility that Defendant would have received a different result at trial. ***Couch v. Commonwealth*, 256 S.W.3d 7 (Ky. 2008)**

Evidence – Ex parte communications. It is a long standing general rule that an appellate court will review only matters found in the record. *Wolpert v. Louisville Gas & Electric,* 451 S.W.2d 848 (Ky. 1970). Generally, in determining matters relating to bail, proof must be limited to that which is competent under the ordinary rules of evidence. *See Young v. Russell,* 332 S.W.2d 629 (Ky. 1960). Here the Court of Appeals did not limit its decision to material found in the record. It made direct, *ex parte* contact with the probation and parole officer and the trial judge and attempted to contact the prosecuting attorney. The Court of Appeals abused its discretion by basing its decision on improper and inadmissible *ex parte* communications. ***Commonwealth v. Peacock*, 701 S.W.2d 397 (Ky. 1985)**

Evidence –Grand jury testimony. Where defendant had been admitted to $5,000 bail, on a motion by the Commonwealth to set aside bail order and hold defendant without bail in a capital case, the court held that the hearsay testimony of the alleged victim and the grand jury minutes were not competent evidence, and that "the better policy is to restrict the proof to that which is competent under the ordinary rules of evidence." [NOTE: This case was decided before the enactment of Kentucky Rule of Evidence 1101(d)(5) which provides that the rules of evidence do not apply with respect to "proceedings with respect to release on bail or otherwise." KRE 1101 is distinguishable from this case, which is concerned with a hearing on the issue of whether an *already released* person shall have bond revoked. RCr 4.40 provides that where the defendant has appeared when required at previous proceedings in the case, the Commonwealth "must demonstrate by clear and convincing evidence the need to modify existing conditions of release." A clear and convincing evidence standard implies use of the rules governing competency of evidence. Also, this case dealt with the issue of outright denial of bail under Ky. Constitutional Section 16, which requires a setting of bond except in a capital case "where the proof is evident," and which has been interpreted to require the Commonwealth to put on evidence of guilt.] ***Young v. Russell*, 332 S.W.2d 629 (Ky. 1960)**

Evidence – Hearsay. Where defendant had been admitted to $5,000 bail, on a motion by the Commonwealth to set aside bail order and hold defendant without bail in a capital case, the court held that the hearsay testimony of the alleged victim and the grand jury minutes were not competent evidence, and that "the better policy is to restrict the proof to that which is competent under the ordinary rules of evidence." [NOTE: This case was decided before the enactment of Kentucky Rule of Evidence 1101(d)(5) which provides that the rules of evidence do not apply with respect to "proceedings with respect to release on bail or otherwise." KRE 1101 is distinguishable from this case, which is concerned with a hearing on the issue of whether an *already released* person shall have bond revoked. RCr 4.40 provides that where the defendant has appeared when required at previous proceedings in the case, the Commonwealth "must demonstrate by clear and convincing evidence the need to modify existing conditions of release." A clear and convincing evidence standard implies use of the rules governing competency of evidence. Also, this case dealt with the issue of outright denial of bail under Ky. Constitutional Section 16, which requires a setting of bond except in a capital case "where the proof is evident," and which has been interpreted to require the Commonwealth to put on evidence of guilt.] ***Young v. Russell*, 332 S.W.2d 629 (Ky. 1960)**

Evidence – Judicial notice. "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," (amounting to the appellate court taking judicial notice of the information which is "known" to the court. ***Long v. Hamilton,* 467 S.W.2d 139 (Ky. 1971)**

Evidence – Record evidence. It is a long standing general rule that an appellate court will review only matters found in the record. *Wolpert v. Louisville Gas & Electric,* 451 S.W.2d 848 (Ky. 1970). Generally, in determining matters relating to bail, proof must be limited to that which is competent under the ordinary rules of evidence. *See Young v. Russell,* 332 S.W.2d 629 (Ky. 1960). Here the Court of Appeals did not limit its decision to material found in the record. It made direct, *ex parte* contact with the probation and parole officer and the trial judge and attempted to contact the prosecuting attorney. The Court of Appeals abused its discretion by basing its decision on improper and inadmissible *ex parte* communications. ***Commonwealth v. Peacock*, 701 S.W.2d 397 (Ky. 1985)**

Evidence – Witnesses. At a bond hearing, where the burden of proof is on the defendant seeking bail, the defendant 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)**

Written findings required. "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)**

Discretion of the court

Abuse of discretion. "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). Even though the circuit judge had discretionary authority respecting bail, the record should clearly reflect that the circuit judge did give consideration to KRS 431.520 and RCr 4.10 and that the amount of any bail was determined according to the standards set forth in KRS 431.525 and RCr 4.16(1)." ***Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977)**

Abuse of discretion. "Each case comprises a set of facts and circumstances peculiar to it and there is no rule of law which will automatically determine for every case the amount of bail which may be required without violation of the prohibition against excessiveness. When the offense is bailable, the amount of bail to be required is a matter that addresses itself to the sound discretion of the court based upon the circumstances of that particular case." 8 *Am.Jur.2d*, "Bail and Recognizance," Section 68; 8 *C.J.S.* "Bail," Section 49; 4 *Wharton's Criminal Law and Procedure*, Section 1819. "Appellate 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."…

"As we have indicated there are many circumstances in this case which would justify the requirement of bail in a large amount to insure the appearance of the accused at trial but there was no evidence of intended flight or that the accused was a fugitive when arrested or any other circumstance so unusual as to require bail in an amount so greatly in excess of that generally required under similar circumstances. We therefore feel that the requirement of bail in the amount of $150,000.00 in this case was an abuse of discretion." ***Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971)**

Bond pending appeal. "One ironbound rule is the reviewing court will not substitute its judgment for that of the trial judge who is in a better position than we to size up the facts and circumstances which should control judicial discretion in fixing the amount of the appeal bond." **Braden v. Lady, 276 S.W.2d 664 (Ky. 1955)**

Factors concerning bail decisions – Emphasis on flight risk and complying with bail terms. "It is manifest that the amount of the bail should be that which in the judgment of the court will insure compliance with the terms of the bond. In determining that amount, the trial court should give due regard to the ability of the defendant to give bail, the nature and circumstances of the offense charged, the weight of the evidence against him, and the character and reputation of the defendant, but he should regard these factors only to the extent that they have a bearing upon the likelihood that the defendant will flee from the jurisdiction of the court or that he will comply with the terms of the bond." ***Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971)**

Factors concerning bail decisions – Failure to consider all factors. Where the court's order reflected that the court considered only the nature of the offenses, and did not consider other factors required to be considered by KRS 431.525 and RCr 4.16(1) (the defendant's past criminal record, his reasonably anticipated conduct if released, and his financial ability to give bail) the trial court did not consider all of the factors relevant to a determination of the conditions of defendant's release, and the court's order provided "no basis for believing that $75,000.00 bail was the least onerous condition reasonably likely to insure [defendant's] appearance at trial. ***Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977)**

Initial setting of bail. "If the Judge of the Knox Circuit Court had been acting in the matter in an initial fashion we would feel impelled to uphold the exercise of his discretion in determining whether or not the Commonwealth had sustained its burden [to prove that the defendant ought to be denied bail.] ***Marcum v. Broughton*, 442 S.W.2d 307 (Ky. 1969)**

Admitted to Bail

Own recognizance. A person released not on bail bond, but instead on "own recognizance" may nevertheless be subject to conditions of release. ***Partee v. Commonwealth*, 2012 WL 95588 (Ky.App. 2012)****

Medical purpose. A person who is incarcerated but admitted to bail for the limited purpose of getting medical treatment, and upon condition that he would return to jail thereafter, is "in custody" of the county. He is entitled to jail credit for the time spent at the hospital at which he received medical treatment, and the process of using "out on bond" to avoid a county having to pay medical expenses is a "sham," such that the defendant will not be viewed as being actually on bond, but is considered still in custody. ***Hospital of Louisa v. Johnson County Fiscal Court*, 2011 WL 1103054 (Ky. 2011)****

Return of bond. Where the defendant was released on a $40,000 cash bond that was partially secured by a 10 percent cash payment of $4,000, which was nominally posted by a surety who "undertook to ensure [defendant's] appearance at future court proceedings and submitted himself/herself to the jurisdiction of the court as to any forfeiture proceeding arising out of the bail bond," it was not an abuse of discretion to refuse to release the bond to defendant, even though the defendant in fact was the person who posted the money, and put the bond in another person's name only because she was a non-resident and could not lawfully post bond. ***Hart v. Commonwealth*, 2010 WL 199564 (Ky. App. 2010)****

Return of bond – Jurisdiction. Facts: The defendant was admitted to bond after his murder conviction was appealed to the Supreme Court. Thereafter, he fled the state. When his murder conviction was upheld by the Supreme Court, the circuit court issuing the bail issued a bench warrant for bail jumping. When this conviction was reversed because the Commonwealth had not proven that defendant had been ordered to appear, and had failed to do so, the sureties moved for remittance of the bond. The circuit court refused to remit the bail and instead deferred to the Franklin Circuit Court, under the rationale that KRS 44.020(2) – which requires a claim made against the state arising out of a court order must be brought against the state in Franklin Circuit Court – controlled. Held: The circuit court issuing the bail bond had exclusive jurisdiction over the remitting of a bail bond, and the Franklin Circuit Court only would get jurisdiction if the Department of Local Governments refused to remit the bond after getting an order to do so from the circuit court which issued the bond. ***Dunlap v. Commonwealth*, 911 S.W.2d 277 (Ky. App. 1995)**

Forfeiture – Excessiveness. Where the defendant violated a condition of bond that he not engage in drinking alcohol, but appeared at every court appearance, forfeiture of $5,000 of his $20,000 bond was not excessive, as purpose of posting bonds is both to secure the defendant's appearance at trial, but also to control the defendant's behavior while on pretrial release. KRS 431.545 plainly states that bond forfeiture is appropriate if a defendant "shall willfully fail to appear or shall willfully fail to comply with the conditions of his release...." ***Clemons v. Commonwealth*, 152 S.W.3d 256 (Ky. App. 2004)**

Forfeiture – Notice of hearing. Where the surety of a bond was given fewer than twenty (20) days' notice of a bond forfeiture hearing, as required by RCr 4.52, there was no palpable error where the issue was preserved at the trial level. ***Clemons v. Commonwealth*, 152 S.W.3d 256 (Ky. App. 2004)**

Penalty clause. Where appellant was released upon a bail bond pending appeal to which the judge attached the condition that a cash bond in the amount of $500 would be forfeited if the Defendant engaged in the sale of alcoholic beverages, and where after his release, appellant was arrested again for illegal possession

of alcohol, at which time the court revoked his bail and forfeited the $500 cash bond, such condition was not related to bail but was a "penalty clause" in the nature of a peace bond, constituted a fine for being arrested for an alcohol offense, and was required to be refunded to appellant. ***Johnson v. Commonwealth*, 551 S.W.2d 577 (Ky.App. 1977)**

Appeals

Habeas corpus – Generally. "The writ of habeas corpus is a constitutional protection against illegal restraint. United States Constitution, Article I, Section IX; Kentucky Constitution, Section 16. The purpose of the habeas corpus proceeding is to regain the liberty of a person who is being illegally restrained. As such, it has been used to regain the custody of a child, to attack a void criminal judgment, and to obtain bail. The writ should be issued upon a showing of probable cause to believe that a person is detained without lawful authority or is imprisoned when by law he is entitled to bail." ***Day v. Caudill*, 300 S.W.2d 45 (Ky. 1957)**

Habeas corpus – Generally. "The general rule is stated thus: 'It is a general rule that Habeas Corpus lies to procure the discharge upon bail in a proper amount of one who is held under excessive bail." ***Adkins v. Regan*, 233 S.W.2d 402 (Ky. 1950)**

Habeas corpus – Capital cases. "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)**

Habeas corpus – Capital cases. Where testimony offered in a hearing failed to establish any evidence of premeditated or willful killing, the proof offered was not evident nor the presumption great, and thus defendant was entitled to release from detention upon the execution of sufficient bail. ***Thacker v. Asher*, 394 S.W. 588 (Ky. 1965)**

Habeas corpus – Necessity of prior motion filed in trial court. In most instances application for bail in the usual manner is prerequisite to an application by the method of habeas corpus, which may be made to a judge other than the one who acted on the motion. ***Smith v. Henson*, 182 S.W.2d 666 (Ky. 1944)**

Habeas corpus – Standard of review. The proceeding to obtain bail by the method of habeas corpus must be viewed as a test of the legality of the judgment or action of the court on the motion for bail, and not as authorizing a trial de novo on the merits of the prisoner's claim, based upon the facts of his case. ***Smith v. Henson*, 182 S.W.2d 666 (Ky. 1944)**

Habeas corpus – Standard of review. "The circuit judge may accept prima facie the order of the county judge as a committing magistrate, giving it such weight as the circumstances authorize, but try the question of habeas corpus de novo. There are impelling reasons that the order of the county judge should not be regarded as res judicata, subject only to inquiry as to its reasonableness. First, the circuit judge is dealing with two of the most valuable of personal rights, recognized and established in the Bill of Rights as 'great and essential principles of liberty and free government.' Bill of Rights preceding Sec. 1, Kentucky Constitution. These are the right to bail pending trial and to habeas corpus. The accused is entitled to bail as a matter of unqualified right when charged with any criminal offense except one that may be punished by death. In a capital offense he has such right unless the Commonwealth shall produce proof of manifest guilt or evidence sufficient to create great presumption of guilt. Sec. 16, Kentucky Constitution. And the statutes make available the writ of habeas corpus where there is probable cause to believe the petitioner '*is* (right now) imprisoned when by law he is entitled to bail.' (Emphasis added.) Sec. 399, Criminal Code of Practice. Then, the presumption of innocence prior to conviction is a continuing one. Having the right at any time to resort to habeas corpus, if the petition sets forth legal justification for the issuance of the writ, the burden devolves upon the Commonwealth to prove facts showing the petitioner's detention without bond to be reasonable and lawful according to the standard prescribed. ***Duke v. Smith*, 253 S.W.2d 242 (Ky. 1952)**

Habeas corpus – Standard of review. The question for the circuit court sitting in appellate jurisdiction was "whether in denying the motion for bail, the [trial] court had acted illegally, such, for example, that he was without jurisdiction or his decision was capricious or arbitrary, or otherwise deprived the accused of a constitutional right." ***Smith v. Henson*, 182 S.W.2d 666 (Ky. 1944)**

Evidence – Judicial notice. "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," (amounting to the appellate court taking judicial notice of the information which is "known" to the court. ***Long v. Hamilton,* 467 S.W.2d 139 (Ky. 1971)**

Evidence – Record evidence. It is a long standing general rule that an appellate court will review only matters found in the record. *Wolpert v. Louisville Gas & Electric,* 451 S.W.2d 848 (Ky. 1970). Generally, in determining matters relating to bail, proof must be limited to that which is competent under the ordinary rules of evidence. *See Young v. Russell,* 332 S.W.2d 629 (Ky. 1960). Here the Court of Appeals did not limit its decision to material found in the record. It made direct, *ex parte* contact with the probation and parole officer and the trial judge and attempted to contact the prosecuting attorney. The Court of Appeals abused its discretion by basing its decision on improper and inadmissible *ex parte* communications. ***Commonwealth v. Peacock*, 701 S.W.2d 397 (Ky. 1985)**

Mootness – Action by circuit court does not moot action by district court. 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. ***Bolton v. Irvin*, 373 S.W.3d 432 (Ky. 2012)**

Mootness – Capable of repetition yet evading review. "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, 96 S.Ct. 2791, 49 L.Ed.2d 683 (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. ***Bolton v. Irvin*, 373 S.W.3d 432 (Ky. 2012)**

Bond pending appeal

Discretion of the court. Bail pending appeal is a matter that rests in the discretion of the trial court. The decision of the trial court regarding bail should not be disturbed by an appellate court unless it is clearly demonstrated that the trial judge failed to exercise sound discretion. ***Commonwealth v. Peacock*, 701 S.W.2d 397 (Ky. 1985)**

Discretion of the court. "[N]o hard and fast rule can be laid down by which the amount of an appeal bond may be fixed. Each case must be governed by its own peculiar facts and circumstances. First, the amount of the bond must be sufficient to secure the appearance of accused and his performance of whatever judgment the reviewing court may hold must be satisfied. Second, the seriousness and nature of the crime and the severity of the punishment must be considered. Third, the ability of the accused to give bond is important, and the good of the public as well as the rights of the accused must not be overlooked. One ironbound rule is the reviewing court will not substitute its judgment for that of the trial judge who is in a better position than we to size up the facts and circumstances which should control judicial discretion in fixing the amount of the appeal bond." ***Braden v. Lady*, 276 S.W.2d 664 (Ky. 1955)**

Forfeiture. Where appellant was released upon a bail bond to which the judge attached the condition that a cash bond in the amount of $500 would be forfeited if the Defendant engaged in the sale of alcoholic beverages, and where after his release, appellant was arrested again for illegal possession of alcohol, at which time the court revoked his bail and forfeited the $500 cash bond, such condition was not related to bail but was a "penalty clause" in the nature of a peace bond, constituted a fine for being arrested for an alcohol offense, and was required to be refunded to appellant. ***Johnson v. Commonwealth*, 551 S.W.2d 577 (Ky.App. 1977)**

Probation revocation order is a final judgment. Defendant appealed from an order revoking a felony probation, and the circuit judge granted a bond pending appeal. Commonwealth moved for a revocation of bond on ground that defendant did not appeal "final judgment" of conviction, but elected to take a probation instead, and that a probation revocation order was not a "final judgment," and the law allowed only for bonds pending appeal of final judgments. Held: "There is no judgment on conviction more final and definite than an order revoking probation." ***Commonwealth v. Hardin*, 317 S.W.2d 498 (Ky. 1958)**

Hearing, written findings, required. When a request for bail pending appeal is denied, the proper practice for the trial court is to follow the standards listed in RCr 4.16 by giving written reasons for the denial of a request for bail pending appeal. In all cases involving bail pending appeal, the court shall conduct an appropriate adversary hearing to determine the propriety of such request. ***Commonwealth v. Peacock*, 701 S.W.2d 397 (Ky. 1985)**

Jail-time Credit

Home incarceration. Where defendant was released on bail, with the condition of house arrest imposed, defendant was not entitled to credit for time served on house arrest. The General Assembly clearly intended to draw a distinction between house arrest as a pretrial condition, and house arrest as a form of sentencing, with no jail time credit given for the former. ***Tindell v. Commonwealth*, 244 S.W.3d 126 (Ky.App. 2008)** (legislatively overruled by KRS 532.245, enacted in 2012, which provides that time spent in pretrial home incarceration pursuant to KRS 431.517 shall be credited against the maximum term of imprisonment assessed to the defendant upon conviction.)

Medical purpose. A person who is incarcerated but admitted to bail for the limited purpose of getting medical treatment, and upon condition that he would return to jail thereafter, is "in custody" of the county. He is entitled to jail credit for the time spent at the hospital at which he received medical treatment, and the process of using "out on bond" to avoid a county having to pay medical expenses is a "sham," such that the defendant will not be viewed as being actually on bond, but is considered still in custody. ***Hospital of Louisa v. Johnson County Fiscal Court*, 2011 WL 1103054 (Ky. 2011)****

Rehabilitation facility. Where a defendant is admitted to bond on condition that he attend and complete an alcohol rehabilitation facility, and there is no record of participation and/or completion of the program, the trial court did not err in not awarding him 244 days jail-time credit for time allegedly spent at the facility. Where rehabilitation is ordered as a condition of release, it will not be considered to be another form of pre-sentence incarceration which may be ordered for by the court for persons in custody under KRS 532.120. ***Massey v. Commonwealth*, 2011 WL 112984 (Ky. 2011)****

Escape

Home incarceration. Where defendant was released on bail with a condition of release being that the defendant remain on home incarceration, *Stroud v. Commonwealth*, 922 S.W.2d 382, 284 (Ky. 1996) is applicable, even though *Stroud* applied to home incarceration as a punishment, not a condition of bond. The

distinction is of "no consequences," and thus, escape from home incarceration is an "escape from custody as defined by KRS 520.030." ***Weaver v. Commonwealth*, 156 S.W.3d 270 (Ky. 2005)**

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*Digest prepared by B. Scott West, General Counsel, Kentucky Dept. of Public Advocacy; neither text nor digest topics are based upon or taken from Thomas-Reuters West Publishing Co.'s copyrighted Key Numbering System.

***Kentucky CR 76.28(4)(c)* Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

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Chapter Five: Litigating Bail Issues

Bail Hearings, Generally

While the practice varies throughout the state, every court allows argument on the issue of bond at some point 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 point. Some courts require motions in writing, while others allow arguments to be presented orally. The statutes which allow for the various type of bond hearings are as follows:

A. Mandatory Review After Twenty-Four Hours (RCr 4.38)

If a defendant continues to be detained 24 hours from the time of the imposition of conditions of release because of inability to meet such conditions, the court that imposed the conditions must review them on **defendant's written application** or may do so on its own motion. If the court declines to modify them, the judge shall record in writing the reasons for that decision. It shall be the duty of the pretrial release officer to inform the court of those defendants in custody who are not released from jail after 24 hours. RCr 4.38. This is the first chance that an attorney has to try to get an unbonded client some bail relief. The form motion may, but need not at that time, discuss the reasons why the client cannot make the bond; the motion only must inform the judge which conditions the client cannot meet. [See Form 5.1.]

B. Adversarial Bond Hearings (RCr 4.40(1))

If a motion to review bond after twenty-four hours is unsuccessful, the attorney can file a motion for an "adversarial bond hearing." The court must grant a motion for an adversarial bond hearing the first time a defendant requests one. RCr 4.40(1). The burden is on the defendant to show that the bail set is excessive, and the defendant 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). [See Forms 5.2, 5.3, and 5.5 for sample adversary hearing briefs.]

C. Hearing on Change in Conditions / Raising Amount of Bond

RCr 4.40 requires that, in order for a court to raise the defendant's bond, 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 defendant has already made bond in district court, a circuit court may raise the defendant's bond without such a hearing upon the defendant's indictment by a grand jury, which represents a change in the defendant's status. *Snydor v. Commonwealth*, 617 S.W.2d 58 (Ky.App. 1981), *Kuhnle v. Kassulke*, 489 S.W.2d 833 (Ky.App. 1973).

D. Preliminary Hearing (RCr 3.14)

If a defendant waives a preliminary hearing, or if after a preliminary hearing the judge finds there is probable cause to believe a felony has been committed by the defendant, the judge at that time shall bind the defendant 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." As will be discussed in the section on evidentiary-based practices, facts developed during the preliminary hearing are testimonial evidence which the court can consider when making the required bond decision. While the prosecution will make the most of any facts developed during the hearing which show the client to be a flight risk or a danger to the public, facts can also be developed by the defense to show that the client is NOT a flight risk:

For example, in controlled-buy cases, police officers very often do not want to "burn" the identity of a confidential informant or an undercover police officer by making an arrest immediately following an alleged drug transaction. Whether because of issues of safety, or because the police want to re-use the informant over and over for future controlled buys, sometimes the police may wait weeks or months before the defendant may be arrested on the charge. In such cases, it can be argued that the Commonwealth, through its police, have already voted that the defendant is not a risk to flee or a danger to the public. At least, not so dangerous that it was worth arresting him immediately as opposed to allowing him to remain in the community arrest-free for such a long period of time. In such cases, this fact should be brought out on cross-examination of the police officer.

On occasion, either the prosecutor or the court will state that the purpose of a preliminary hearing is to determine probable cause, not to address bond issues. However, do not forget that by its very nature a preliminary hearing also touches on the issue of bond reduction. One often-quoted statement of the purpose of a preliminary hearing relates the strength of the evidence presented at a hearing directly to the issue of bond: "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). Thus, when appropriate, make a motion for bond reduction at the conclusion of the hearing, whether probable cause was found or not.

Pursuant to Rcr 4.54, bond issues remain with the district court after a preliminary hearing until an indictment has been returned.

Conducting the Bond Hearing

Should the hearing be by oral or written motion? Should witnesses be called? If so, which ones? Is there an evidentiary standard, and if not, should there be? How does the concept of "evidentiary-based practices" apply in a hearing? What findings are required to be placed into the record by the court, and must they be in writing or can they be oral from the bench? What is meant by "federalizing the motion" and how do I do that? How many bond motions can I / should I file? Finally, what has to be done in order to preserve an adverse ruling for appeal? These questions are discussed one by one below.

Oral v. Written Motions for Bond?

Often, by the time the defense attorney is retained by or appointed to the defendant, the 24 hours long ago will have passed and the issue of bond review is already ripe. If the attorney has been hired or appointed before arraignment, the client will likely want his attorney to ask for a bond reduction at first appearance, orally. Sometimes local rule or custom will mandate that bond motions must be made in writing, but usually it is the lawyer's call to decide whether to move for a reduction immediately or wait until a well-thought-out motion can be written. Oral motions to reduce bond should be viewed as an *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.

Timing is crucial. If the lawyer has just met the defendant, and knows little about his life, his family, his assets or his criminal record, the lawyer will be ill-prepared to articulate reasons sufficient to warrant a reduction in bond. Still, the client will want the lawyer to say something about bond to try to get him out of jail. Moreover, if the jail is particularly overcrowded that day, and the judge seems to be giving most defendants benefit of the doubt on bail decisions, it might be just the right time to request relief.

When you do file a written motion, 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 unpersuasive. If time is a consideration such that the lawyer cannot quickly tailor a written motion to his client's case, it might be useful to have a motion with blank lines into which can be written the facts and circumstances pertinent to this client's case. In such cases, the usual contents (case law, rules, statutes, etc.) remain in the body of the bond motion, for the court to review if needed, yet the court can immediately turn to the written section to find the particular reasons why this defendant is entitled to bail.

How Many Motions?

If at first you don't succeed, how many times should you try again? As many times as a change in factual circumstances permit, subject to trying the patience of the court. The person who was once deemed a flight risk by the court might appear less a risk if the defendant'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.

Evidence-Based Practices

As noted briefly in the previous chapter, in 2011 sweeping changes in the area of pretrial release were enacted by the General Assembly. In the Public Safety and Offender Accountability Act – known as "HB 463" for short – Kentucky began turning to the establishment of "evidence-based practices" in an effort to improve pretrial and post-conviction outcomes for arrestees, without sacrificing public safety, and reducing costs of incarceration in the process. HB 463 created new statutes governing pretrial release decisions, and made changes to existing ones,

Practice Tip: Avoid Unpersuasive Reasons to Grant Bond

Listed within older editions of the Department of Public Advocacy's *District Court Practice Manual* are some unpersuasive reasons to lower bond, things *not* to argue in court. Some of these are gems:

Defendant has to take care of his grandmother (but this doesn't slow down his party schedule or keep him from getting arrested monthly);

- Defendant professes to have a chronic illness (but his hobbies are drinking, fighting, hunting, fishing, fast women and fast cars);
- Defendant has to care for children (but her children are in juvenile court for dependency and truancy);
- Defendant has a doctor's appointment (because he got his wife to set one before he came to court);
- Defendant has bad nerves (After two terms on the bench, the judge probably feels pretty jumpy herself).

Often, you recognize an unpersuasive reason the moment it comes out of your mouth. While I have never been scolded by a judge for asking for a bond reduction, I came pretty close once when I asked the judge to release my client on home incarceration, which costs a defendant over $300 a month to rent the leg bracelet. The defendant was in jail for failing to pay $200 a month in child support. The absurdity seems so obvious in retrospect, but at the time…. Never mind.

focusing on the use of evidence in making determinations of whether a person was a low or moderate or high risk to flee, fail to come to court, or be a danger to the public if allowed out on bail.

Meanwhile, the Pretrial Division of the Administrative Office of the Courts (AOC), was busy getting its "pretrial risk assessment" tool – which is used by pretrial officers making bond recommendations to judges – statistically validated. Thanks to a grant from the Pretrial Justice Institute, the JFA Institute in Washington, D.C. took the Kentucky data on release, reappearance, and public safety, studied the assessment tool (a questionnaire consisting of objective inquiries into the charges and background of the arrestee, all of which could be verified independently of the answers given by the arrestee), and confirmed that the assessment tool did precisely what it claimed to do: Persons classified by the tool as a low or moderate risk of flight or reoffending did neither, in rates of 90% or above). Nevertheless, the JFA had tips on how to improve the statistical validity, and those suggestions were incorporated into the pretrial risk assessment tool.

In combination, the statutes created by HB 463 and the use of the improved and statistically valid pretrial risk assessment tool worked well together much of what it intended to accomplish. More arrestees are being released than ever before, while appearance rates and public safety rates have either remained the same or improved, while saving the state and counties approximately $25 million per year in the process.

A. Pretrial Services Risk Assessments

Although the statutory provisions created by HB 463 (particularly those in KRS 431.066) mandated that courts shall release a defendant on an "own recognizance" or unsecured bond if a defendant is found to be a "low" and "moderate" risk of flight, not to return to court, or to be a danger to the public, the terms "low" and "moderate" were not themselves defined. It is believed by these terms were chosen because they are the terms, along with the category of "high" used by the AOC's Pretrial Division in the pretrial risk assessment to indicate risk of flight or re-offending. However, it was not until an amendment to KRS 431.066, effective in July, 2012, that the terms were actually linked to pretrial risk assessment reports. In 2012, the General Assembly added the following language: "In making this determination [of low, moderate or high risk], the court shall consider the pretrial risk assessment for a verified and eligible defendant along with the factors set forth in KRS 431.525."

"Pretrial risk assessment" had already been defined by KRS 446.010 to mean "an objective, research-based, validated assessment tool that measures a defendant's risk of flight and risk of anticipated criminal conduct while on pretrial release pending adjudication."

Construed together, it is plain that the General Assembly intended to link the objective, validated assessment tool to determinations of low, moderate or high risk to flee, not attend court, or be a danger to the community.

For the criminal defense attorney at a bail hearing, it means that 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 arrestee.

Kentucky Rule of Criminal Procedure 4.08 allows a pretrial risk assessment to be placed in record with written consent of the defendant, and whenever the report favors the accused, the entirety of the report should be placed into the record.

Regardless of the score, 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.

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 hearsay rule does not apply in bond hearings. See KRE 1101(d)(5). The pretrial officer should not be called to the stand, as the AOC requires its officers to first be subpoenaed by sending a subpoena to the AOC's Frankfort Headquarters. Besides, there is little to be gained from putting a pretrial officer on the stand, since the only testimony allowed will be that pertaining to the form; rules of confidentiality prevent either the prosecution or defense from testifying as to conversations between a pretrial officer and the defendant. See *Couch v. Commonwealth*, 256 S.W.3d 7 (Ky. 2008). If a prosecutor calls a pretrial officer to the stand, object.

B. Other Competent Evidence for Bail Hearings

Listed below are evidence and testimony that either was allowed into a bail hearing by case law, or is allowed into evidence by Statute or Rule.

(1) Marriage / Family Relationships

Long v. Hamilton, 467 S.W.2d 139 (Ky. 1971);

Stack v. Boyle, 342 U.S. 1 (1951)

(2) Years Resident in County

Long v. Hamilton, 467 S.W.2d 139 (Ky. 1971);

Stack v. Boyle, 342 U.S. 1 (1951)

(3) Financial Resources / Financial Ability of Defendant

Long v. Hamilton, 467 S.W.2d 139 (Ky. 1971);

KRS 431.525(1)(e)

(4) Oppressive Bond Evidence

KRS 431.525(1)(b)

(5) Unemployment

Long v. Hamilton, 467 S.W.2d 139 (Ky. 1971)

(6) Health

Stack v. Boyle, 342 U.S. 1 (1951)

(7) Customary Amounts of Bail / Bail Granted to Others in Similar Circumstances

Stack v. Boyle, 342 U.S. 1 (1951)(comparing bail of co-defendants);

Long v. Hamilton, 467 S.W.2d 139 (Ky. 1971)(judicial notice taken of amounts of bail all over the Commonwealth)

(8) Veteran Status

RCr 4.06

(9) Penalties of Current Charges / Commensurate with Nature of Offense Charged

Long v. Hamilton, 467 S.W.2d 139 (Ky. 1971);

Conversion Table

KRS 431.525(1)(c)

(10) Prior Felony Convictions /Criminal Record

Long v. Hamilton, 467 S.W.2d 139 (Ky. 1971);

Stack v. Boyle, 342 U.S. 1 (1951);

KRS 431.525(1)(d)

(11) Flight Risk / Unlikely to Appear for Trial Evidence

KRS 431.066(2)

(12) Reputation as a Principal Supplier of Drugs

Long v. Hamilton, 467 S.W.2d 139 (Ky. 1971)

(13) Danger to the Community Evidence

KRS 431.066(2)

(14) Witness Testimony Relevant to Bail Factors

Kuhnle v. Kassulke, 489 S.W.2d 833 (Ky. 1973);

KRS 431.525(1) (lists all bail factors for setting amount);

KRS 431.066 (lists all bail factors pertinent to whether bond shall be unsecured or subject to own recognizance)

The following evidence was found upon appeal to have been ERRONEOUSLY admitted into evidence, but the decision doing so is probably not good law. These cases were decided before enactment of the Kentucky Rules of Evidence, specifically, KRE 1101(d)(5), which provides that the rules of evidence do not apply "to proceedings with respect to release on bail or otherwise." However, the Court is still the "gatekeeper" of evidence, and can decide whether to admit hearsay evidence based upon whether the evidence has the appropriate indicia of reliability. For example, Grand Jury testimony, which is made under oath and subject to penalties of perjury, may be found to be reliable and therefore admissible; however, "double" or "triple" hearsay based on gossip in the community may not be.

(15) Grand Jury Testimony

Young v. Russell, 332 S.W.2d 629

(16) Hearsay

Young v. Russell, 332 S.W.2d 629

The following evidence was found upon appeal to have been ERRONEOUSLY admitted into evidence either at the trial level or on appeal, and are probably STILL not allowed into evidence:

(17) Statements made by Defendant to Pretrial Officers (Privileged, Confidential)

Couch v. Commonwealth, 256 S.W.3d 7 (Ky. 2008)

(18) Ex Parte Communications (Court of Appeals should not have contacted probation and parole officer while reviewing the lower court's decision)

Commonwealth v. Peacock, 701 S.W.2d 397 (Ky. 1985)

(19) Evidence Not in the Record

Commonwealth v. Peacock, 702 S.W.2d 397 (Ky. 1985)

Particular Issues in Bail Litigation

1. When the Court Considers Only One Bail Factor When Setting Amount of Bail

KRS 431.525 requires the Court to consider five (5) factors when setting bail: The court cannot consider only one factor, e.g., the nature of the offenses charged against a defendant, when setting bail. The defendant's length of residence in the state and at his present address, his marital status, record of employment, prior criminal record (if any), and his ability to make bail are all factors which the court must consider. The record must demonstrate the court considered all these factors. RCr 4.10, 4.12, 4.16(1), KRS 431.520, 431.525(1).

In *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977), the trial court considered only one factor, the seriousness of the offense of theft, and set a $25,000 bond for a theft case, just as the court did in every theft case. In finding the bond to be illegal, the Court of Appeals held that "[g]reat discretion is vested in the circuit judge respecting bail… However the record should demonstrate that the circuit judge did in fact exercise the discretion vested in him under the statutes and rules. [*Abraham* at p. 158, emphasis added.]. See also "*Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951). [See Form 7.1 for an example of an appeal raising this point where the Court considered only the "nature of the offense charged.]

2. When the Bail Decision is Against the Weight of the Evidence

For defendants who are "low" or "moderate" risk to flee the jurisdiction, not to appear in court, or to be a danger to the public, KRS 431.066 provides that the court "shall" grant an unsecured or own recognizance bond, and apply the bail credit. The statute also provides that a court "shall" consider the pretrial risk assessment of the pretrial officer when making this determination. While the pretrial risk assessment cannot mandate the actions of the judge, they at least have to be taken into consideration by the court. No one disputes – in following the General Assembly's intent to move toward "evidence-based" practices in making bail decisions – that the court cannot consider other evidence in arriving at a decision whether a person is a low or moderate risk. Testimony taken in a hearing, for example, may elicit competent evidence on the issue of flight risk or public dangerousness.

However, in the event that there is NO other evidence on these issues, and therefore the only evidence which exists is the pretrial risk assessment which has found a low or moderate risk, a decision that a person is NOT a low or moderate risk is not only not based on evidence, but is contrary to the only evidence in the case. DPA believes that the General Assembly intended by its use of "shall" mandatory language to mean that a court must grant an unsecured or own recognizance bond if evidence contrary to the pretrial risk assessment is lacking.

3. When the Court Refuses to Put Findings on the Record

Despite the fact that KRS 431.066 (5) requires "written findings" by a judge when bail is denied in accordance with KRS 431.066(4), a court may require a cite to a case before putting such written findings on the record. In such event, the criminal defense attorney should be mindful of *Abraham v. Commownealth*, 565 S.W.2d 152 (Ky. App. 1997), which held, among other things, that "[i]f 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)."

4. When the Bail as Set Varies Widely from Bail Set in Similar Cases

Doing one's homework is key, here. Argument and case law take a second-seat to actual empirical evidence that others with similarly situated charges have had vastly different bonds. For example, where a client charged with wanton endangerment due to erratic driving during a DUI is set a $50,000 cash bond, while others in previous cases have been charged with the same thing and have been set $10,000 bonds, the successful bond motion and argument will have examples of the previous bonds placed in the record. This can

be done either by attaching actual copies of bond forms to the motion, or by referring to cases within the court's own division, and asking the court to take judicial notice of the previous cases.

Of course, the closest the cases are to the fact situation at hand, the more difficult it will be for the prosecution to distinguish the present case. For an example of a bond motion filed on this issue, see Form 5.6.

5. When a Bail Motion/Argument is Overruled Because of Separation of Powers

Sometimes, a court will take the position that the legislature, in enacting the mandatory "own recognizance" or "unsecured" bond provisions, went beyond the scope of its authority and violated the Constitutional Separation of Powers. Often, this will be phrased in the form of "the General Assembly has gone too far in trying to control judicial discretion over bonds," or some similar language, used to justify not giving an unsecured or own recognizance bond in the face of overwhelming evidence of low risk to either flee or be a danger to the community.

However, the source of judicial discretion in this area derives *not* from inherent constitutional authority, but from powers granted to the judiciary by the legislature. Kentucky's Constitution Sections 109, 110, 111, 112 and 113 – which create the judicial branch of government – do not specify that judges have inherent or particular authority over bail decisions. Sections 16 and 17 grant a right to bail and prohibit excessive bail, respectively, but do not otherwise specify how bail decisions are to be made.

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

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

Recall that KRS 431.525 set forth the factors which the courts were required to take into account when establishing the amount of bail:

(1) The amount of bail shall be:

(a) Sufficient to insure compliance with the conditions of release set by the court;

(b) Not oppressive;

(c) Commensurate with the nature of the offense charged;

(d) Considerate of the past criminal acts and the reasonably anticipated conduct of the defendant if released; and

(e) Considerate of the financial ability of the defendant.

Almost immediately after the 1976 Bail Bond Reform Act became effective, a challenge against "excessive bail" arose in a case where a judge had refused to determine bond using all of the Five Factors mandated by the legislature in KRS 431.525. In *Abraham v. Commonwealth,* 565 S.W.2d 152 (Ky. App. 1977), the trial court had considered only the nature of the offenses which the defendant was facing, and refused to make findings, as required by KRS 431.520 and RCr 4.10 that releasing Abraham on his own recognizance or upon an unsecured bail bond would not reasonably assure his appearance at trial.

Finding error, the Court of Appeals first relied upon *Stack v. Boyle*, 342 U.S. 1, 72 (1951) to hold that a bail decision was a "final judgment" appealable to a court of competent jurisdiction, upholding that portion of the Bail Bond Reform Act which allowed appeals, and quoted from that opinion as follows:

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

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

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

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

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

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

6. When an Unsecured Bond is Set, but Bail Credit is Denied

KRS 431.066 provides for the same findings when it comes to unsecuring a bond or allowing an own recognizance bond, and imposing bail credit for those who do not make bond. If a person is found to be a low or moderate risk of flight, to not return to court, or to be a danger to the public, he or she is entitled to both an unsecured/own recognizance bond AND bail credit, in the event that the client has a third party unsecured bond, but no third party to sign his or her name for the client. The General Assembly did not make the two provisions an "either / or" election by the judge. The plain language of the statute can only honestly be interpreted to provide for both or neither. An attorney litigating a decision where bail credit is allowed, but not an unsecured/own recognizance bond, or vice-versa, should appeal the finding and argue that the factual finding of low or moderate risk sufficient to grant the relief in the first instance, should also be sufficient to grant the relief in the other instance.

7. When the Court Remands an already Released Client to Jail after Preliminary Hearing

In *Bolton v. Irvin*, 373 S.W.2d 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 no other additional evidence than was produced at the preliminary hearing. The Court noted that RCr 3.05(1) permits the district court to set bail at the time of the initial appearance, and then RCr 3.14(1) then allows the district court to again set bail upon a finding of probable cause. 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. Under the Rules of Criminal Procedure, the district court is specifically authorized to reconsider the question of bail following a finding of probable cause.

However, in *Bolton*, the defendant 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."

This language has been construed as dicta, since, again, the defendant 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), and the client left at bail.

In *Marcum v. Broughton*, 442 S.W.2d 307 (Ky. 1969), Kentucky's highest court stated the rule for when someone had already posted bond: "Our view is that bail previously allowed may not be revoked without reason for the revocation." In that case, the defendant had been on bond in the amount of $10,000 from September, 1968 until February, 1969. The record did not indicate that he conducted himself in any manner other than that required by law; he had made himself amenable to the processes of the court, and appeared at hearings as directed.

Marcum v. Broughton is thus the "gap filler" for the so-called dicta in *Bolton*. To the extent *Bolton* does not address what happens to a defendant who has already made bond, *Marcum* does.

8. When the Court seta a "Cash Only" Bond

Viewing the bond statutes from a "strict constructionist" point of view, there is no such thing as a "cash only" bond. Look at Kentucky's language pertaining to how bond may be made below:

> **KRS 431.520 Release on personal recognizance or unsecured bail bond -- Conditions of release.**
>
> 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. When such a determination is made, the court shall, either in lieu of or in addition to the above methods of release, impose any of the following conditions of release:

(1) Place the person in the custody of a designated person or organization agreeing to supervise him;

(2) Place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) Require the execution of a bail bond:

(a) With sufficient personal surety or sureties acceptable to the court; in determining the sufficiency of such surety, or sureties, the court shall consider his character, his place of residence, his relationship with the defendant, and his financial and employment circumstances; or

(b) With the 10% deposit as provided in KRS 431.530; or

(c) With the deposit of cash equal to the amount of the bond or in lieu thereof acceptable security as provided in KRS 431.535;

It is subsection (3)(c) which allows the court to require a cash bond. Notice that while there is an "or" in the sentence, the phrase "cash only" does not appear. Then, KRS 431.535 provides how a "cash" bond can be made:

KRS 431.535 Cash, stocks, bonds, or real estate as security for bail.

(1) Any person who has been permitted to execute a bail bond in accordance with KRS 431.520(3)(c) may secure such bond:

(a) By a deposit, with the clerk of the court, of cash, or stocks and bonds in which trustees are authorized to invest funds under the laws of this Commonwealth having an unencumbered market value of not less than the amount of the bail bond; or

(b) By real estate situated in this Commonwealth with unencumbered equity, not exempt and owned by the defendant or a surety or sureties having a fair market value at least double the amount of the bail bond.

This provision means that a "cash" bond can be made by property, stocks or bonds. Clearly, stocks and bonds are not prevalent among our clients, but property can be.

Given the above, there is no provision allowing for a "cash only" bond. Arguably, RCr 4.04(d)(iii) allows a judge to post only a cash bond. However, this interpretation of the rule is at variance with the statute. Moreover, the statute has constitutional underpinnings because of Section 16 which guarantees a right to bail. Thus, it is NOT a procedural statute in which the legislature is overstepping its bounds which can therefore be ignored by the judiciary. In order to read RCr 4.04 to be consistent with statute, it must be interpreted to mean that a cash bond can be posted by putting up property. [See Form 4.4 for a motion for a property bond when the court has set a "cash only" bond.]

9. Where Conditions on Bond are so Restrictive, it Amounts to Being "in Custody"

Historically, clients have had little success in claiming that the conditions of bond were so onerous that it amounted to not being on bond at all. In *Cooper v. Commonwealth*, 902 S.W.2d 833 (Ky. App. 1995), the defendant argued unsuccessfully that he should be granted jail credit for time spent on "yard restriction," meaning that he would be free on bond, but unable to go beyond the confines of the yard of his home. The Court of Appeals rejected the argument that this condition was tantamount to no release at all, and denied him 81 days of jail credit for the time that he was required to stay within his home yard.

At the time that *Cooper* was decided, persons placed on "home incarceration" as a condition of pretrial release were not eligible for jail time credit, since KRS 532.210, which allowed credit for persons *sentenced* to home incarceration did not include time spent on pretrial release. That persons given home incarceration as a condition of pretrial release were not entitled to jail credit was reaffirmed in *Tindell v. Commonwealth*, 244 S.W.3d 126 (Ky. App. 2008), but legislatively overruled in 2012 with the enactment of KRS 532.245, which provides that time spent in pretrial home incarceration pursuant to KRS 431.517 (which also was enacted after *Cooper* was decided) shall be credited against the maximum term of imprisonment assessed to the defendant upon conviction.

Would *Cooper* – which analogized to home incarceration to reach its holding in 1995 – be decided the same way today, after KRS 532.245? Probably not. Assuming that one's "yard" is a normal-sized yard, and not a vast 50,000 acre farm, what is the practical difference between being confined to one's home and being confined to one's yard?

Other restrictions can be onerous as well. What if a defendant who is released pretrial is required to report daily at a time certain to the pretrial office for a drug screen at his or her own expense, or is required to check in three times a day in order to establish that the person has not left the city or county? What if a person is not technically confined to the home, but must wear an ankle bracelet so that his or her whereabouts are always known? Is this custody?

The issue may be ripe for renewing. In *Partee v. Commonwealth*, 2012 WL 95588 (Ky. App. 2012), at issue was whether a person who had been admitted to bail on her own recognizance could be ordered as a condition of continuing on bond – without a finding of a

change of conditions sufficient to warrant a change in bail under RCr 4.43 – to attend inpatient evaluation of her mental state at the Kentucky Correctional Psychiatric Center (KCPC). The Court found held that "*KRS 27A.360* creates a distinction between release on bail and release on any other form of pretrial release. Until that release on recognizance status is changed to some other form of pretrial release, it is clear that no change in the conditions of bail has occurred. Thus, it is clear that a person can be released on recognizance and still be subject to orders of the court." The court went on to characterize the defendant's situation as being permitted "to remain free on her own recognizance with the exception of being remanded to custody only for the purpose of being transported to KCPC for a mental health evaluation." Thus, it would appear that the period of time that the defendant was "in custody" would be subject to credit for jail time, despite being released on "own recognizance." Criminal attorneys who have clients in this situation should at least be filing for jail credit – prior to sentencing in the event of a conviction later – for the time that the client is not actually free.

There has never been a greater ability than now for the government to monitor persons released from jail. Technology has given us bracelets, microchips, and all manner of methods to determine where anyone is during any minute of the day, or for every minute of the day. When release results in a method of monitoring that is so restrictive, and so capable of readily monitoring a person in place, it might just be the time to see if the courts are willing to say that a client remains sufficiently "in custody" that jail credit ought to be awarded.

Chapter Six: Circuit Court Appeals

Appeals of bail decisions are unlike any other kind of appeals. In district court, appeals are through the venerable process of "writ of habeas corpus," not the typical appellate process available for appeal of a criminal case from district court to circuit court. In circuit court, appeals are done through the regular appellate process, but on an "expedited" basis, and there is a five page limit on the length of the brief. The rules pertaining to bond appeals are brief, and set out below.

RCr 4.43 Appellate review of bail; habeas corpus

(1) Any defendant aggrieved by a decision of the circuit court on a motion to change the conditions of bail may appeal that decision to the Court of Appeals pursuant to the following procedures:

(a) The notice of appeal from the order of the trial court shall be filed in the manner and within the time fixed by Rule 12.04.

(b) Upon the filing of the notice of appeal the clerk of the circuit court shall prepare and certify the original or a copy of such portion of the record as relates to the question of bail and is needed for the purpose of deciding the issue on appeal. The abbreviated record shall be filed with the clerk of the appellate court within 30 days after filing of the notice of appeal.

(c) The appellant shall within 15 days after filing of the record file the statement of appeal and brief required by Civil Rules 76.06 and 76.12. The brief shall be abbreviated and shall not exceed five (5) double-spaced typewritten pages. It shall be served on the local

Commonwealth's attorney and on the attorney general. No brief shall be required of the Commonwealth, but the Commonwealth may file a brief within 10 days after the date the appellant's statement of appeal and brief were filed, such brief not to exceed five (5)

double-spaced typewritten pages. No other briefs shall be filed unless requested by the appellate court.

(d) The appeal shall stand submitted for final disposition 10 days after the date on which the appeal was perfected by the appellant. The court shall proceed immediately to a hearing thereof and complete the same as soon as practicable.

(e) Neither the filing of the notice of appeal nor the pendency of the appeal shall stay further proceedings in the prosecution.

(2) The writ of habeas corpus remains the proper method for seeking circuit court review of the action of a district court respecting bail.

(3) This Rule 4.43 shall apply only to appellate review of bail conditions prior to entry of a judgment of conviction. After entry of a judgment of conviction, appellate review of bail on appeal shall be by intermediate motion filed pursuant to RCr 12.82 in the appeal of the conviction.

What is the Standard of Review? What Should it Be?

In Kentucky, the right to bail is constitutional, so a question of whether someone is lawfully entitled to bail given a set of circumstances is a mixed question of constitutional law and fact. As such, the appellate court reviewing a lower court's bond decision should be employing some level of de novo review. However, Kentucky case law has for decades applied an "abuse of discretion" standard when deciding whether a bail decision is lawful. Below, Tim Arnold describes how Kentucky got this erroneous standard of review in the first place. Then, Glenn McClister explains what the appropriate standard should and could be, based on federal precedents. Finally, there is a form paragraph which can be used in bond appeals to persuade appellate courts to adopt the appropriate standard of review for bond decisions.

Arguing "Abuse of Discretion"

Appellate courts, when reviewing lower court decisions involving mixed questions of fact and constitutional law, should employ a "de novo" standard of review, and not resort to the "abuse of discretion" standard of review. Nevertheless, until a court opinion recognizes the need for this change, litigators will have to prove that the lower court abused its discretion.

So what, exactly, is judicial discretion?

To begin with, it is important to remember that judicial discretion is not "plenary" discretion. According to Webster's Dictionary, "plenary" means "complete in every respect," being absolute and unqualified. Trial courts do not have absolute and unqualified discretion. Rather, their discretion is circumscribed by a variety of things.

- **Judicial Discretion Derived from Statutes and Rules:** First, the trial court's discretion is limited by both the laws passed by the General Assembly, and by the rules of practice set by the Supreme Court. In *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977), the Court of Appeals stated that "[g]reat 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***" [emphasis added]. Since the legislature enacts the statutes, and the Supreme Court makes the rules, trial court discretion is at the very least limited by acts of the General Assembly and the Supreme

Court. This is an important fact to remember because a criminal defense attorney must be armed to encounter the argument that a particular piece of legislation, say, HB 463, has "wrongfully interfered with judicial discretion." The fact is if it is the legislature which set the original bounds of discretion, it is the legislature which can change those boundaries. An argument that the legislative branch has violated the separation of powers by intruding into the powers of the judiciary branch must fail, since the judiciary branch itself has acknowledged that the General Assembly – at least, in part – is a source of the judicial discretion.

- **Must be within a "Zone of Reasonableness":** Second, judicial discretion is not plenary because it must be exercised within a zone of reasonableness. In *Abraham, supra*, the Court of Appeals noted that the proper procedure for challenging bail as unlawfully fixed if by "motion for reduction of bail and appeal to the Court of Appeals…" As the court noted, the properly filed motion "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." In so holding, *Abraham* incorporated this language from the federal bail case of *Stack v. Boyle*, 342 U.S. 1 (1951).
- **"There is No Discretion to Refuse to Reduce Excessive Bail":** From *Stack v. Boyle*, 342 U.S. 1 (1951), adopted by *Abraham, supra*. In *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971), an abuse of discretion was found when bail as required by the trial court was "greatly in excess of that generally required under similar circumstances." Thus, "excessive bail" and therefore an abuse of discretion can be established by looking at the given bail in relation to other bails.

Actions Cannot be Arbitrary: "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).

In short, the surest way to argue an abuse of discretion has occurred to demonstrate that the decision departs widely from a statute or rule, or a clearly established standard or norm for similar cases.

When the Appellate Court is Not Deciding the Bail Appeal "Expeditiously"

Notwithstanding the language of RCr 4.43(d) which requires an appellate court to "proceed immediately to a hearing thereof and complete the same as soon as practicable," to the criminal defense practitioner – along with his or her client waiting in the cell – "as soon as practicable" can seem like a very long time. In fact, it is the burden of the defense counsel not to let the bail languish for too long. How long is too long can be difficult to gauge, but criminal defense attorney should not be cowed into failing to inquire into an appeal that seems to be taking too long to be decided.

Recently, albeit in an unpublished opinion, the Court of Appeals footnoted a reminder that counsel has a duty to diligently pursue a decision from the appellate courts:

In *Partee v. Commonwealth*, 2012 WL 95588 (Jan. 13, 2012), a case which recognized the authority of a trial court to place conditions upon a defendant who has been released pretrial on "own recognizance," the Court of Appeals "paused" in a footnote to address a point made by the dissenting judge concerning the lack of expedition of the appellate court in making a bond decision. The court stated:

> We pause to address the dissent's "final point [which] warrants comment" regarding how this
>
> case has proceeded at the appellate level. There is no dispute that RCr 4.43 cases are required to be expedited…
>
> Although the case was assigned to the present panel on October 25, 2011, it was not expedited in any manner. Rather, on November 11, 2011 the then-presiding Judge designated the case for oral argument, which was to take place on January 18, 2012. **For reasons unknown, neither counsel for Partee nor the Commonwealth moved the Court to comply with RCr 4.43(1)(d) well after it should have become apparent to them that something was amiss with the timing** of the disposition of this appeal, particularly after receiving notice that an oral argument was set to be heard on January 18, 2012, nearly six months after the appeal should have been disposed. **We can empathize with counsel's reluctance to put the Court on notice of an error in its procedures, but we encourage counsel–particularly in a situation like the one presently under review–to do precisely that**. [Emphasis added.]

Defense counsel is not merely invited, but *encouraged*, to let the appellate court know whenever expedited procedures are obviously not being followed. Although *Partee* is not published, under Kentucky CR 76.28(4)(c), unpublished Kentucky appellate decisions rendered after January 1, 2003 may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. To the knowledge of the editor, there are no published decisions in the area of bond appeals which urge the defense attorney to contact the court if a bond appeal appears delayed. Thus, citation to this case is encouraged if a court enquires into the reasons for counsel's gentle (hopefully) reminder of the rule on expedited appeals. If used, remember that opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

Checklist for Circuit Court Bond Appeals

Step 1 – Is this 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.
- The circuit court has been presented with evidence justifying the request (e.g., the pretrial risk assessment) – *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 30 days old.

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

- Notice of appeal (which is on a slightly different form than the one used for regular criminal appeals) must be filed within 30 days from the order being appealed from.
- A designation of record is not required, but is highly recommended.
- Note: CR 76.42(1)(b) states that "No 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.

Step 3 – Await the Certification of Record: You must file the brief within 15 days of the date on the certification of record (a sample of which is enclosed). It is highly recommended that you not wait for the certification to be delivered to you, but that you check regularly with the clerk to see if the record has been certified.

Step 4 – Gather What You Will Need for the Brief: To prepare the brief, you will need the following:

- A copy of the tape of the hearing where the motion for reasonable bond was heard.
- A copy of any evidence (such as the pretrial risk assessment) which was filed in the record.

Step 5 – Prepare the Brief: Your brief is limited to five pages, 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.) Guidelines for preparing the brief are in the attached sample.

Step 5a – Appendix: The order which is being appealed must be the first attachment in the appendix. Thereafter, you can attach other documents (e.g., the pretrial risk assessment report, the AOC press release on the JFA Institute's validation study of the pretrial assessment report, any unpublished cases which meet the requirements of Kentucky CR 76.28(4)(c). 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 the attached sample. You must sign the certificate of service on the cover, or the brief will not be accepted.

Step 7 – File the Brief: To file the brief and "perfect" the appeal you need to submit the original and five copies to the Kentucky Court of Appeals on or before the 15th day after the record is certified. The brief is considered filed on the date that either of the following occurs:

- The date that the brief is received by the clerk of the Court of Appeals, OR
- 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. (If you take it to the postal service while they are still open, they will hand cancel the postage and mark the date received.)

Note that 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.

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 triggers the dates for all subsequent steps.

Step 8 – The Commonwealth's Reply: The Commonwealth is not required to file a reply. If they are to file, they must do so within 10 days. Note that reply briefs are not permitted in bond appeals.

Step 9 – Oral Argument: Oral argument will rarely be heard in these cases. If it is not requested, then it is highly unlikely. 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 bolster your client's claims. If you get oral argument in the Court of Appeals, contact the Appeals Branch in Frankfort for help preparing.

Step 10 – Await the Decision: 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.

Step 11a – 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) 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 – Consider Seeking Reconsideration or Discretionary Review: In the event that the ruling is adverse to your client, you should speak with an appellate attorney about seeking reconsideration or discretionary review. Note that the time for either is not necessarily expedited. (A Motion for Reconsideration or Petition for Rehearing generally takes between 1-3 months for the court to decide. 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).

Chapter Seven: District Court Appeals

Writs of Habeas Corpus, Generally

As stated in the previous chapter, district court appeals are through the venerable process of "writ of habeas corpus," not the typical appellate process available for appeal of a criminal case from district court to circuit court. One major difference is that in a normal appeal, the appellate court decides from the record created in the lower court, whether that record is complete or incomplete. In writ practice, however, there is opportunity to conduct more discovery or take more evidence.

Another major difference is that there is a perceived difference in the standard of review. While the current law in regular appeals applies an "abuse of discretion" standard [see the previous chapter why this is erroneous], case law has held that the standard of review in a writ case is closer to de novo. This makes sense when you think about it, because the appellate court in a writ case has the opportunity to conduct more discovery or hear more evidence. Both of these differences are discussed in this chapter.

Selected statutes Pertaining to Writs of Habeas Corpus, KRS 410.020 et seq.:

Most of the statutes pertaining to the defense attorney's duties and client's rights in a writ of habeas corpus proceeding are excerpted below in different font, followed by comments from the DPA editors. Omitted are the provisions pertaining to the duties of the County/Commonwealth's Attorney and/or the person – whether or not a public official – detaining the client.

KRS 419.020 Issuance of writs.

The writ of habeas corpus shall be issued upon petition on behalf of anyone showing by affidavit probable cause that he is being detained without lawful authority or is being imprisoned when by law he is entitled to bail. The writ may be issued by any Circuit Judge on any day at any time and his power to issue such writs shall be coextensive with the Commonwealth.

A frequent question is whether the court can be approached ex parte for the purpose of issuing the writ. The answer is "yes," in part because of the emergency aspect of seeking a writ (someone is ostensibly being illegally detained and it there may not be time to convene a meeting of judge, defense lawyer and prosecutor), but mainly because the writ itself is not a finding on the merits of the issue. It is merely a scrip of paper commanding someone to bring forth the client so that a hearing can be held. The Commonwealth will be served and invited to attend the actual hearing at which time the merits will be discussed.

Wilson v Commonwealth, discussed *supra* p. 10, should not be interpreted as prohibiting the ex parte obtaining of a writ of habeas corpus, even though the affidavit which sets forth the probable cause is a statement pertaining to the substance of the hearing that will take place after the issuance of the writ.

Historically, "the Great Writ" has always been procured ex parte. According to the legal encyclopedia *American Jurisprudence 2d,* "Habeas Corpus," §1, "[t]he purpose of the writ of habeas corpus ad subjiciendum is not to determine the guilt or innocence of a prisoner; the primary, if not the only, object of the writ is to determine the legality of the restraint under which a person is held," (*citing Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L.Ed. 547 (1952). Moreover,

> A court, justice or judge entertaining an application for a writ of habeas corpus must forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. The writ, or order to show cause, is directed to the person having custody of the person detained. In the United States Supreme Court habeas corpus proceedings, except in capital cases, are ex parte unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted (*Am. Jur. 2d*, "Habeas Corpus," §111, *citing* S.Ct. Rule 20(4)(b)).

The encyclopedia comments that "[i]t has been suggested that an answer should be required in every habeas corpus proceeding, in view of the usual petitioner's lack of legal expertise and the important functions by the return," but then notes that the law imposes a duty upon the courts to screen out frivolous applications and eliminate the burden that would be placed upon those having to respond. Am. Jur. 2d §122. In Kentucky, it is anticipated that the affidavit putting forth probable cause facts that a bond statute has been violated on its face will serve the purpose of providing the court with the facts sufficient to determine whether the request is frivolous.

Moreover, while a detained prisoner does not have to have a lawyer to file a writ, most cases do have the involvement of counsel, whether private or appointed. While this is not a guarantee that a filed petition for writ of habeas corpus will not be frivolous, it is hoped that the number of attorney-shepherded writs will be few and far between.

Remember, the writ itself must be accompanied by a petition to issue the writ which must be an acknowledged and verified petition that the person is being held wrongfully. This is akin to an affidavit in support of a search warrant which – though often prepared by a county attorney or Commonwealth's attorney instead of a police officer – contains only one version of events and is presented outside the presence of a defense attorney or the person whose property is being searched. The judge then must make a determination of probable cause and if such is found, will issue the warrant. Same thing for the issuance of a writ of habeas corpus; the accompanying verified petition must present probable cause, without which the judge likely will not sign the writ.

KRS 419.030 Signature -- Production of person -- Return of writ.

The writ must be signed by the judge issuing it and command the person having custody of or restraining the person in whose behalf it is issued to bring him personally before the Circuit Judge of the county in which the person is being detained at the time therein specified. The writ must be made returnable as soon as possible. [See Form 7.3]

Wilson v. Commonwealth, *supra* p. 95 should not be interpreted as prohibiting the ex parte obtaining of a writ of habeas corpus, even though the affidavit which sets forth the probable cause is a statement pertaining to the substance of the hearing that will take place after the issuance of the writ.

Historically, "the Great Writ" has always been procured ex parte. According to the legal encyclopedia *American Jurisprudence 2d,* "Habeas Corpus," §1, "[t]he purpose of the writ of habeas corpus ad subjiciendum is not to determine the guilt or innocence of a prisoner; the primary, if not the only, object of the writ is to determine the legality of the restraint under which a person is held," (*citing Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L.Ed. 547 (1952). Moreover,

> A court, justice or judge entertaining an application for a writ of habeas corpus must forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. The writ, or order to show cause, is directed to the person having custody of the person detained. In the United States Supreme Court habeas corpus proceedings, except in capital cases, are ex parte unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted (*Am. Jur. 2d*, "Habeas Corpus," §111, *citing* S.Ct. Rule 20(4)(b)).

The encyclopedia comments that "[i]t has been suggested that an answer should be required in every habeas corpus proceeding, in view of the usual petitioner's lack of legal expertise and the important functions by the return," but then notes that the law imposes a duty upon the courts to screen out frivolous applications and eliminate the burden that would be placed upon those having to respond. Am. Jur. 2d §122. In Kentucky, it is anticipated that the affidavit putting forth probable cause facts that a bond statute has been violated on its face will serve the purpose of providing the court with the facts sufficient to determine whether the request is frivolous.

Moreover, while a detained prisoner does not have to have a lawyer to file a writ, most cases do have the involvement of counsel, whether private or appointed. While this is not a guarantee that a filed petition for writ of habeas corpus will not be frivolous, it is hoped that the number of attorney-shepherded writs will be few and far between.

KRS 419.060 Service of writ.

(1) Service shall be made by delivering a copy of the writ personally to the person to be served, or if acceptance is refused, by offering personal delivery to such person.

(2) If the person to be served is absent from the place of detention, service shall be made by delivering a copy of the writ personally to the person having the person detained in immediate custody.

(3) If the person to be served conceals himself, or refuses admittance to the party attempting to serve the writ, it may be served by affixing a copy of it on some conspicuous place on the outside of his place of abode, or of the place where the party is confined or detained.

(4) The writ may be served at any time on any day. The return of the officer or person serving shall be proof of the time and manner of service.

Prior to serving a jailer, sheriff or appointed jail authority with a copy of the petition, it is always better to inform him or her that he is about to be served, and that while his or her name will be in the style of the motion, it is not actually a lawsuit against which he or she must defend. The jailer is being named in official capacity only, and the writ and petition in support should so reflect.

Others which will need to be served will be the client, the County Attorney and/or Commonwealth's Attorney if the local practice is that the Commonwealth Attorney appears on behalf of the county in writ cases or on felony cases.

Personal service is always preferred, and service should be done by an investigator or someone other than the attorney so that the attorney will not have to call him or herself to the stand in the event actual service is contested or disputed.

KRS 419.080 Production of person -- Exception for infirmity or illness.

The person commanded by the writ shall bring the detained person according to the command of the writ unless it is made to appear by affidavit that because of sickness or infirmity such person cannot be brought before the judge without danger to his health. If the judge is satisfied of the truth of the affidavit he may proceed and dispose of the case as if the party had been produced, or the hearing may be postponed until the party can be present.

KRS 419.090 Refusal to obey writ.

If the person commanded by the writ refuses to obey, he shall be adjudged in contempt of court.

Checklist for Habeas Corpus Bond Appeals

Step 1 – Is a Habeas Corpus 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's calendar (or docket sheet) which has the appropriate "findings" written upon it, and which is signed by the judge at the bottom, 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. The links will take you to a template for each document, which will have instructions on how to proceed.

- Affidavit of Probable Cause.[See Forms 7.2 and 7.4.]
- Petition for Writ of Habeas Corpus (including all attachments, which should include the evidence presented at the hearing in district court). [See Forms 7.1, 7.5, 7.6 and 7.7.]
- Writ of Habeas Corpus (A court order setting the hearing on the Petition). [See Form 7.3.]

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 you can 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. Please note that there is a viable venue challenge which the county attorney can make if you file the petition in a county other than where the client is being held, but the historically that challenge has not been made.

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. (Mail is not sufficient, and 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.) 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.

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, though there is nothing which completely prohibits the judge from taking evidence in one form or another.

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 Court of Appeals. Once the record is provided to them, it will be submitted to the "Motion Panel" (a rotating panel of three judges who hear motions and emergency actions) on the record alone, without briefing. In terms of what happens to your client . . . :

As noted above, there is no automatic stay pending appeal, so if you are successful, and 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 Sam Givens, 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.

Step 9b – Appeals by the Client: The process for habeas corpus appeals is set out in KRS 419.130, and is unusual.

First, prepare a notice of appeal, which will be in a different format than the one used in an ordinary criminal case.

Second, serve the notice of appeal on the jailer and county attorney.

Third, 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.

Finally, as noted above, 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.

Chapter Eight: Mootness and Motions for Discretionary Review

Mootness

After an appeal is filed, and in some instances even before an appeal is filed, something occurs which appears to make the bond appeal moot. Perhaps the Commonwealth makes a plea bargain offer too good to refuse; maybe the judge changes his or her mind and lowers the bond to something the client can now make. Maybe even 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 issue an order to show cause why the appeal should not be dismissed. Or, the court may just dismiss without hearing.

If the issue was a good one, and 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 criminal prosecutions in general tend to move quickly, especially when one's constitutional fast and speedy trial rights have been asserted, so it is possible that bond decisions can reoccur without capability of review.

Although 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, one recent Court of Appeals opinion decided a case which was argued to have become moot. A synopsis of the case is immediately below.

Also below is an article by Heather Crabbe and Shannon Smith, taken from their brief filed in an actual circuit court appeal. Although the case ultimately was dismissed, the dismissal occurred before the to-be-published case of *Mark Bolton, Dir. Metro Corrections v. Rickie Irvin*, 2010-SC-000520-DG (Ky. 2012), which – while producing a result with which criminal defense lawyers may not be happy – has nevertheless sprung new life into litigating mootness issues.

Mark Bolton, Dir. Metro Corrections v. Rickie Irvin, 2010-SC-000520-DG (Ky. 2012)

In Bolton, the issue before the Supreme Court was whether a district court may increase the amount of a defendant'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). [The impact of this holding is discussed in Chapter __ of this manual.]

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.

This language will pertain to almost any bond issue on appeal, and should be included as the first case cited.

Motions for Discretionary Review

Until published opinion(s) are rendered giving guidance and interpreting post-HB 463 statutes and assuming client consent, a motion for discretionary review should be filed in every case. See Form 8.1 for a sample MDR motion.

Chapter Nine: Federalizing the Argument for Bail

Despite best litigation efforts and an honest belief that the client should have been granted a makeable bail, there are times when the client simply is not released. Often there are good arguments to be made on appeal that the court has departed from the mandatory language of a state statute or court rule, or even has imposed an excessive bail under the Kentucky Constitution. Much of this manual is devoted to handling of appeals in such circumstances.

But don't forget to "federalize" the arguments for bail.

As previously stated in this manual, the Eighth Amendment to the Constitution of the United States prohibits excessive bail. But the Fourteenth Amendment also affords protection to the person who is neither a flight risk nor a danger to the public, but still cannot win release. Below are the arguments available for making arguments for release pursuant to the United States Constitution, which hopefully one day may lead to a United States Court opinion pertaining to bond which is binding upon all the states.

The Eighth Amendment

It has long been recognized that "[u]nless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 72 (1951). Yet, only a few years ago, had you asked a knowledgeable Constitutional scholar whether the Eighth Amendment's "excessive bail" clause had been applied to the states through the Fourteenth Amendment, as the "cruel and unusual punishment" clause has been, you likely would have gotten an answer ranging from "no," to "maybe," or "yes," depending upon how one interpreted *Schilb v. Kuebel*, 404 U.S. 357 (1971). In that opinion, the Supreme Court stated that "the Eighth Amendment's proscription against excessive bail has been assumed to have application to the states through the Fourteenth Amendment." *Id*. at 484. The Court cited to *Pilkinton v. Circuit Ct*., 234 F.2d 45 (8th Circ. 1963) and *Robinson v. California*, 370 U.S. 660 (1965) as the bases for this "assumption." However, the Court then stated that "we are not at all concerned here with any fundamental question of bail excessiveness," and did not reach the issue of whether the "assumption" of state application was well-founded, leaving the question of whether the clause had been incorporated into the states largely unanswered.

That question was resolved in *McDonald v. City of Chicago*, 78 USLW 4844, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), the case where the Supreme Court held that the Second Amendment applies to the states through the Fourteenth Amendment. As a precursor to its holding, the Court in two footnotes listed respectively those amendments and clauses which had been applied to the states, and those which had not. (*See id*. at ns. 12, 13). In the first list, the "excessive bail" clause appeared, with *Schilb* cited as the authority. Thus, the Supreme Court has now squarely put the "excessive bail" prohibition into the list of Amendments incorporated against the states.

Thus, the following language construing the meaning of the Eighth Amendment from Stack v. Boyle, supra, should be considered to have application to the states:

> 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 the accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.

In *Stack*, where defendants were charged under the Smith Act, 18 U.S.C. (Supp. IV) §§ 371, 2385, bail fixed in widely varying amounts of $2,500, $7,500, $75,000 and $100,000 were found to be excessive, demonstrating that one way to prove excessiveness is to show a variance to a norm.

The Supreme Court said more:

> Upon final judgment of conviction, petitioners face imprisonment of not more than five years and a fine of not more than $10,000. It is not denied that bail for each petitioner has been fixed in a sum much higher than that usually imposed for offenses with like penalties, and yet there has been no factual showing to justify such action in this case. The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn a conspiracy and will, in obedience to a superior, flee the jurisdiction. To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.

Recall that Kentucky's Constitution Section 17 also prohibits "excessive bail." But the criminal practitioner need not stop at Kentucky case law interpreting what is "excessive," but may also include *Stack*, while urging a violation of the Eighth Amendment, and therefore create the federal question that may one day lead to a federal court decision.

Finally, to short-circuit any counter-argument that the Eighth Amendment has not been formally held to apply to the states, but has merely been listed in a dicta footnote, recall that *Abraham v. Commonwealth,* 565 S.W.2d 152 (Ky. App. 1977) referred to *Stack* as authoritative, and found an "excessive" bail in that case.

The shorthand meme for federalizing a bail argument under the Eighth Amendment, suitable for printing on a silicone wrist brand, can be illustrated by the following:

8th + Stack + McDonald + Abraham = No Excess Bail in KY

"Ah, but wait!" goes the counter-argument. Even the Eighth Amendment has its limits. Justice Rehnquist, writing for the majority in *United States v. Salerno*, 481 U.S. 739, 752-753 (1987), expressed the limits of the Eighth Amendment:

> The Eighth Amendment addresses pretrial release by providing merely that "[e]xcessive bail shall not be required." This Clause, of course, says nothing about whether bail shall be available at all. Respondents nevertheless contend that this Clause grants them a right to bail calculated solely upon considerations of flight. They rely on *Stack v. Boyle,* 342 U.S. 1, 5 (1951)…
>
> In respondents' view, since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it violates the Excessive Bail Clause. Respondents concede that the right to bail they have discovered in the Eighth Amendment is not absolute. A court may, for example, refuse bail in capital cases. And, as the Court of Appeals noted and respondents admit, a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses.
>
> While we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.

The first answer to this limitation is that Kentucky's Constitution has more than just the "excessive bail" clause of the Eighth Amendment; Section 16, unlike the federal Constitution, *does* have an absolute right of bail except in capital cases, where the presumption of guilt is great.

The second answer is that the government's "other admittedly compelling interests" are also subject to regulation for reasonableness, which provides this segue way into discussions on the Fourteenth Amendment.

The Fourteenth Amendment

As previously noted, the Eighth Amendment, at least in the federal context, has been construed as not being "absolute." Such a holding was necessary in *Salerno, supra*, if the Supreme Court were to find that the government had a compelling interest in not letting Tony Salerno – the "underboss" of the Genovese Crime family, the family upon whom the *Godfather* movies were loosely based, supposedly – out of jail, where it was argued that he would continue to be a danger to the public, notwithstanding any amount of money put up for bond security.

After deciding that the Eighth Amendment did not forbid regulation of bail bonds on interests other than risk of flight or attendance at court, the *Salerno* court upheld detention without bail on the ground that Mr. Salerno's liberty interests were accommodated and protected by the "Due Process Clause" of the Fifth Amendment, which provides simply that "[n]o person shall be… deprived of life, liberty or property, without due process of law..."

> When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

With that, the Supreme Court blessed the finding that Tony Salerno was indeed such a threat to the community that his detention prior to trial without bond was justified. However, in so doing, the court had to impose the "clear and convincing evidence" standard upon the government, in order to give meaning to the Fifth Amendment protections of "due process of law." As the Court observed:

> The District Court held a hearing at which the Government made a detailed proffer of evidence. The Government's case showed that Salerno was the "boss" of the Genovese crime family of La Cosa Nostra, and that Cafaro was a "captain" in the Genovese family. According to the Government's proffer, based in large part on conversations intercepted by a court-ordered wiretap, the two respondents had participated in wide-ranging conspiracies to aid their illegitimate enterprises through violent means. The Government also offered the testimony of two of its trial witnesses, who would assert that Salerno personally participated in two murder conspiracies…
>
> The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. 18 U.S.C. § 3142(f). While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest.

Clearly, the burden required of the government in federal cases is stout; and that same burden is imposed upon the states, as well. This is because the "due process clause" of the Fifth Amendment has been incorporated fully to the states, not by a case decision, but by enactment of the Fourteenth Amendment, which provides in pertinent part: "No State shall… deprive any person of life, liberty, or property, without due process of law…" This language is substantively identical to the prohibition placed upon the federal government by the Fifth Amendment. Therefore, the language pertaining to the Fifth Amendment's Due Process Clause at issue in *Salerno* must be construed to be applicable to the states via the Fourteenth Amendment's Due Process Clause.

Consequently, where a person is being detained without bond (or a bond so excessive that it cannot be made) on the ground that the person is a danger to the public or a menace to society, the Salerno case and the Fourteenth Amendment should be invoked and preserved in the motion for bail.

One counter-argument to anticipate is that in Salerno, the defendant was given no bond, as opposed to an unreasonably high bond. Arguably, that is not the same. However, in Kentucky there is no difference between a setting of "no bond" and an unreasonably high bond. As was stated in *Adkins v. Regan*, 233 S.W.2d 402 (Ky. 1950):

> 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.

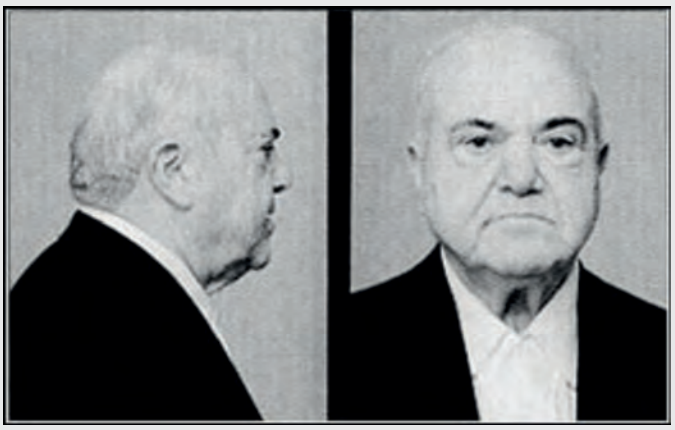
Thus, the shorthand meme for federalizing a bail argument under the Fourteenth Amendment, suitable for printing on a silicone wrist brand, can be illustrated by the following:

Salerno + 14th + _Adkins_ = Clear & Convincing Evid in KY

For additional information on the Salerno case and its impact on bail decisions in the state, see the article published in the December, 2001 issue of *The Advocate* by Public Defender Corp Fellow and DPA Staff Attorney Ray Ibarra, "*U.S. v. Salerno*: The Due Process Required to Detain a person Prior to Trial and the Indigent Defendant," in the Appendix of this Manual.

Anthony Salerno

The Fifth Amendment's Due Process Clause required the Government to prove by "clear and convincing" evidence that Tony Salerno, Underboss of the Genovese Crime Family Syndicate, was too high a risk to public safety to be allowed pretrial release. Aren't state governments required by the Fourteenth Amendment's Due Process Clause to meet the same burden?



Chapter Ten: Forms

Form 5.1 -- Motion for 24 Hour Mandatory Review

[The Client], through counsel, respectfully requests that this Court reduce his bond in this case for the following reasons:

[The Client] is indigent, as shown by his affidavit of indigency, of record. The currently set bond ($35,000 cash) is oppressive to him, and more than is reasonably necessary to secure his attendance at trial.

[The Client] has been unable to make bond since bail was set just over twenty-four hours ago. Pursuant to Kentucky RCr 4.28 [the Client] respectfully requests that this court reduce the bond to an "own recognizance bond," or $_____, unsecured or secured by a third party surety, or by payment of 10%.

[The Client] is a moderate risk of flight and/or danger to the public, as per the pretrial risk assessment. If released, [the Client] promises to attend all court proceedings and follow all conditions required by the Court.

WHEREFORE, [The Client] respectfully requests a bond reduction in this case.

Respectfully,

Attorney

Form 5.2 – Motion for Adversary Hearing / Bail Amount To Be Set In Accordance with KRS 431.525 Standards

Comes now [The Client], through counsel, and moves this Court to reduce the bond, presently set at $10,000 cash, to an "own recognizance" bond, alternatively, a surety bond in the amount of $10,000, or alternatively, a $5,000 / 10% bond.

I. Facts

Mr. Client is the father of _____, who was born on January 30, 1984. Between February and April, 1999, the child's mother instituted proceedings to have Mr. Client ordered to pay child support. According to the Commonwealth, in April, 1999, Mr. Client was assessed with arrears of $2,690.00, toward which he was to pay $30 a month, and a monthly amount of $269.00 for current support, which was to be paid beyond the child's 18th birthday, for so long as she remained in school. (As of date, the child is still in high school.)

Mr. Client made four payments in April and May of 1999 in the amount of $414.00. However, at approximately that time, legal and financial problems of a different nature, much of it related to a growing alcohol and drug dependency. These problems caused him to eventually lose his home, his income, and finally, his freedom. Most of 1999 was spent in and out of county jail for various crimes. In April, 2001, he was incarcerated for almost six months. Of course, while incarcerated, he was unable to make any payments toward child supports.

In September 14, 2001, he was probated into the [County Name] Court Services Department's "Punishment with Promise" Structured Day Program. Mr. Client was under the most intensive scrutiny that a probation program can impose. According to the program brochure, attached, Mr. Client had to abide by certain rules. While participating in the program, all offenders were required to:

- Report to the Structured Day Program facility in person 5 days a week or as directed by the staff;
- Complete and comply with a daily itinerary approved by the staff;
- Submit to random drug testing, conducted a minimum of once a week;
- Adhere to strictly enforced curfews;
- Complete a mandatory 72 hours of Community Service;
- Be employed or actively searching for employment;
- Submit to confinement in DETOX if ordered by staff;
- Complete all treatment ordered by the Court and staff;
- Attend and participate in any program ordered by the program.

While in the program, Mr. Client made great improvements in his life. In October, 2001, the Program Coordinator wrote a letter verifying that he was actively attending daily and "doing everything that [was] expected of him." He was still in the program when he was extradited to [County Name] in March, 2002. His AA sponsor, whose letter to the Court is attached to this motion, shows

that the people in North Carolina working with Mr. Client believe that he has a sincere intention of paying the child support he owes, once he reconnects with society as a productive, law abiding citizen.

II. Standards for Setting Bail

KRS 431.525 provides that the amount of bail shall be (1) sufficient to insure compliance with the conditions of release set by the court; (2) not oppressive, (3) commensurate with the nature of the offense charged, (4) considerate of the past criminal acts of defendant, (5) considerate of the reasonably anticipated conduct of the defendant if released, and (6) considerate of the financial ability of the defendant.

A. Sufficient to insure compliance with the conditions of the Court.

Ten thousand dollars is more than is necessary to insure compliance with conditions of the Court. A lesser amount would also be sufficient to insure compliance. Mr. Client realizes that if he flees and intentionally fails to return to court, for example, that he would be facing not only a flagrant non-support offense (for which he may have a defense given that his inability to pay for the last 2 – 3 years is demonstrable), but also a bail jumping offense (for which he would have NO defense).

B. Not Oppressive

Ten thousand dollars cash – not even a cash or property bond – is oppressive. A ten thousand dollars bond ensures he cannot get out of jail, period. He cannot make it. If he could make it, he could pay off his child support arrears and get out, possibly even avoiding a conviction on a felony altogether. Section 17 of the Kentucky Constitution states that "excessive bail shall not be required." RCr 4.16 provides that bail shall be sufficient to insure compliance with the Court, but shall not be "oppressive." Given Mr. Client's status as an indigent, $10,000 is far too much to expect him to be able to make, and is therefore oppressive.

C. Commensurate with the nature of the offense charged.

Flagrant non-support is the lowest class felony, and is a non-violent crime. Lower cash and property bonds for other crimes of equal or greater seriousness are routinely set by this Court.

D. Past Criminal Acts.

Mr. Client does have a criminal history – and therefore his entry into an intensive structured day program in North Carolina. However, his criminal history was predicated on use and abuse of alcohol, from which he was attempting to recover while on probation in North Carolina. He should be allowed to complete the program, and hopefully rehabilitate himself so that he commits no future criminal acts due to alcohol use.

E. Reasonably anticipated conduct if released.

This Court can order him to go back to the structured day program and complete it, and make current payments on his support. The obligation of current support will not continue for long, and soon each dollar of each payment will be going to retire arrears. Mr. Client believes he can pay off his entire arrears in three years or less.

F. Financial ability of the defendant.

He is represented by the public defender and therefore is indigent. He has lost all of his assets. However, if released, he may be able to get a job.

WHEREFORE, Defendant prays for an "own recognizance" bond, a $10,000 surety bond, or a $5,000 / 10% bond.

Respectfully,

Attorney

Form 5.3 – Post-Adversary Hearing Brief / Where Defendant Has Been Over-Charged in Indictment (Bail Not Commensurate with True Nature of the Offense) /

Comes now [The Client], and respectfully requests that her bond be consolidated with Indictment No. ___-CR-_____-005, and now asks that one bond be set in the amount of twenty-five thousand dollars ($25,000.00) cash or property, along with conditions of monitored conditional release (MCR).

I. Facts Determined at the Bond Hearing

In case no. 19-CR-00069-005, Ms. Client is charged with several offenses: Wanton Murder, Controlled Substance Endangerment to a Child, 1st Degree, Manufacturing Methamphetamine and Engaging in Organized Crime. These charges arise out of the death of a child who died as a result of drinking "Liquid Fire," a chemical which is used in the manufacture of methamphetamine. At the bond

hearing in this case, a co-defendant who is the mother of the deceased child testified regarding the involvement of Ms. Client. According to the under-oath testimony of the co-defendant:

- Ms. Client was not present at the trailer when Co-Defendant was there earlier, and when she got the "hint" that [two other co-defendants] were going to make meth;
- Later, when she did see Ms. Client present, she did not see Ms. Client actually making the meth or doing anything to cook the meth.
- The child was not present in the trailer at any time when Ms. Client was in the trailer.
- Co-Defendant thought that Ms. Client may have brought ephedrine to the cook, but this was because she knew that Ms. Client had either the day before or a few days earlier had bought some pseudo-ephedrine. She did not know if Ms. Client had brought any that day or not.
- Co-Defendant did not see Ms. Client handle or touch the Liquid Fire.
- Co-Defendant had left with someone else by the time the child had returned to the trailer.
- Ms. Client had dropped off her clothing to be laundered by Co-Defendant, something which she had done before.
- She did not know if Ms. Client had got any meth from the cook.

In short, there is no evidence that Ms. Client was actually involved in the cooking process by (1) cooking the meth itself, (2) actually supplying anything for the cook, or (3) participating in partaking of the finished product. Counsel is unaware of any statement by any other witness which states that Ms. Client had done any of these above three things.

II. Facts From New Evidence Supplied by Commonwealth

After the testimony was taken in the above described bond hearing, the Commonwealth supplied counsel with additional discovery as it pertained to Ms. Client and others. In the discovery is a "Meth Check" report which is a log of purchased ephedrine or pseudo-ephedrine. The last purchase made by Ms. Client is shown to be on _____, 2009, a full eleven (11) days prior to this cook. By contrast, one of the others involved in the cook, Mr. Anderson, is shown to have purchased ephedrine on _____, only 1 ½ to 2 days before the cook.

It is beyond reasonable belief that the ephedrine involved in the cook is the same ephedrine purchased by Ms. Client eleven days earlier.

In case no. ___-CR-_____-003, Ms. Client is charged with Manufacturing Methamphetamine and Engaging in Organized Crime. These charges are not based on anything other than Ms. Client's own statements given while being interviewed by the police on the alleged murder case. She was not caught manufacturing meth or even in possession of chemicals or equipment. She is charged solely upon her own statements.

III. Standards for Setting Bail

KRS 431.525 provides that the amount of bail shall be (1) sufficient to insure compliance with the conditions of release set by the court; (2) not oppressive, (3) commensurate with the nature of the offense charged, (4) considerate of the past criminal acts of defendant, (5) considerate of the reasonably anticipated conduct of the defendant if released, and (6) considerate of the financial ability of the defendant.

* * *

[Other sections of this brief have been omitted as duplicative of other forms in this Manual]

C. Commensurate with the nature of the offense charged.

It is understood that Ms. Client, in 09-CR-00099-005 faces a capital crime, an A felony, and two B felonies. However, when one looks at the facts so far adduced and the law regarding these charges, it is clear that she should be facing both lesser and fewer charges. Some of the below arguments are expected to be presented in a motion at an appropriate time.

<u>First, Ms. Client should not be facing a wanton murder charge</u>. Ms. Client denies that she supplied any ephedrine for the meth cook in this case. No one states that she supplied the Liquid Fire, used it, handled it, or touched it; but taking the facts in the most favorable light to the Commonwealth, the most that Ms. Client should be charged is reckless homicide, a Class D felony.

In the unpublished case of *Commonwealth v. Hall*, copy attached, which meets the requirements of CR 76.28(4)(c), the Court of Appeals reversed the wanton murder conviction of a mother who had allowed her two friends to giving lines of methadone to her thirteen year old son. Moreover, the mother had supplied a fifty-dollar bill to roll into a straw for the purpose of snorting the methadone. Before she went to bed, she learned that her son had additional methadone pills in his possession. Rather than taking them away, she told him: "Child, you don't need the [expletives deleted] methadones. Put the [expletives deleted] up. You've got school tomorrow. We're supposed to be straightening up."

Notwithstanding this statement, the child ingested the methadone pills and was found later to have overdosed on them. In reversing the wanton murder conviction, the court stated that the facts elicited at trial did not establish that the mother recognized a grave risk of death, and disregarded it.

In this case, Ms. Client was not only not at the scene when the child was there, she had no way of knowing the child would be there, or that someone else had poured a chemical into a cup, or that the child would drink from the cup. This case is even less of a wanton murder case than is *Hall*.

Second, murder and controlled substance endangerment to a child, 1st degree are multiplicitous counts. In order to establish that Ms. Client is guilty of Controlled Substance Endangerment to a Child, 1st Degree, the Commonwealth must prove that Ms. Client knowingly caused or permitted a child to be present during the possession of a hazardous chemical substance possessed with intent to manufacture methamphetamine, and that the child was placed in danger and died as a result thereof. (Of course, Ms. Client did not cause or permit any child to be anywhere near any methamphetamine manufacturing process). In order to convict Ms. Client of wanton murder, the Commonwealth must prove that Ms. Client engaged in an activity that amounts to aggravated wantonness, and that this activity caused the death of a child. However, the only activities for which Ms. Client stands accused are the same activities which would give rise to the conviction of Controlled Substance Endangerment to a Child. The Commonwealth – in alleging that the manufacturing of methamphetamine is an act of aggravated wantonness – has filed a charge for which there is in identity of elements with the CSE 1st degree. Defendant contends this is a multiplicitous charge, and the Commonwealth must elect which charge for which it is seeking a conviction.

Third, manufacturing methamphetamine and engaging in organized crime are multiplicitous counts. Engaging in Organized Crime is a charge which requires the Commonwealth to prove that one of the "traditional" offenses engaged in by "organized crime" is being committed or aided by the Defendant. There are six such traditional crimes: Extortion, Prostitution, Theft, Gambling, "Loan Sharking," and Drug Trafficking. None of these crimes are alleged in this indictment. Moreover, there is no evidence that any of these offenses were being committed. The only way that Commonwealth could make a colorable claim that any were committed is to say that manufacturing methamphetamine meets the definition of "trafficking" as that term is defined in KRS 218A. If so, then the Commonwealth must first prove as an element of Engaging in Organized Crime that Ms. Client first manufactured methamphetamine. This means that one whole offense is element of the other. Thus, each offense does not have an element that the other does not, because each element of manufacturing methamphetamine would be included Organized Crime count. Defendant contends this is a multiplicitous charge, and the Commonwealth must elect which charge for which it is seeking a conviction. This would be true in both 09-CR-00099 and -00069.

Fourth, Ms. Client is, at most, a facilitator of manufacturing methamphetamine. Assuming the facts in the light most favorable to the Commonwealth, Ms. Client did not participate in the actual cooking of the meth, and at most – if the allegations of the Commonwealth were to be believed – Ms. Client supplied pseudo-ephedrine which ultimately was used to make the meth the subject of this litigation. Knowingly aiding and helping someone who is about to make meth is facilitation, not complicity or acting as a principal, and as such, she should be facing a class D felony, not a Class B felony.

In summary, Ms. Client is overcharged for her alleged involvement, even if the facts as being presented by the Commonwealth are true. Her bond should be commensurate with several class D felony charges, not Capital, Class A and Class B felonies.

WHEREFORE, Defendant prays that one bond be set in the amount of twenty-five thousand dollars ($25,000.00) cash or property, along with conditions of monitored conditional release (MCR).

Respectfully,

Attorney

Form 5.4 – Motion for Bond Reduction / "Cash Only" Bond

Comes now the Defendant, through counsel, and respectfully moves this Court to grant him a property bond option in the above captioned case. Defendant makes this motion pursuant to KRS Chapter 431, Section 16 of the Kentucky Constitution and the 8th Amendment to the U.S. Constitution. As grounds for this request, Defendant states the following:

On Month, Day, 2012, this Court reviewed the bond in this case and set it at $25,000 cash with conditions of house arrest and random drug testing. On Month, Day, 2012, defense counsel's request for a property option in the case was denied.

KRS 431.520 states as follows:

> 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. When such a determination is

made, the court shall, either in lieu of or in addition to the above methods of release, impose any of the following conditions of release:

(1) Place the person in the custody of a designated person or organization agreeing to supervise him;

(2) Place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) Require the execution of a bail bond:

(a) With sufficient personal surety or sureties acceptable to the court; in determining the sufficiency of such surety, or sureties, the court shall consider his character, his place of residence, his relationship with the defendant, and his financial and employment circumstances; or

(b) With the 10% deposit as provided in KRS 431.530**;** or

(c) With the deposit of cash equal to the amount of the bond or in lieu thereof acceptable security as provided in KRS 431.535;

Subsection (3)(c) allows the court to require a cash bond. While there is an "or" in the sentence, the phrase "cash only" does not appear.

Then, KRS 431.535 provides how a "cash" bond can be made:

(1) Any person who has been permitted to execute a bail bond in accordance with KRS 431.520(3)(c) may secure such bond:

(a) By a deposit, with the clerk of the court, of cash, or stocks and bonds in which trustees are authorized to invest funds under the laws of this Commonwealth having an unencumbered market value of not less than the amount of the bail bond; **or**

(b) By real estate situated in this Commonwealth with unencumbered equity, not exempt and owned by the defendant or a surety or sureties having a fair market value at least double the amount of the bail bond.

This provision means that a "cash" bond can be made by property, stocks or bonds.

Based on the above, the Defendant requests that the court grant him a property option on his bond. Currently, _____ County resident _____ is willing to post his property, which he owns outright and which has recently been valued at $120,000.00, for the Defendant's behalf.

WHEREFORE, the Defendant requests this Court to grant the relief sought herein.

Respectfully,

Attorney

Form 5.5 -- Motion for Bond Reduction / Rigid Adherence to Bail Schedule

Comes the Defendant, by and through counsel, and moves this Court to reduce the above defendant's bond in accordance with KRS 431.066 and other Constitutional and Statutory grounds. As grounds for such, counsel states as follows:

1.) Mr. Client is currently charged with Convicted Felon in Possession of a Firearm, Fleeing 1st degree, Carrying a Concealed Deadly Weapon, Resisting Arrest and Criminal Mischief. His bond is currently set at $13,000.00 full cash.

2.) Mr. Client's pretrial risk assessment lists him as a "moderate" risk at seven points. Pretrial recommends that he be released on his own recognizance or unsecured bond with special conditions in accordance with KRS 431.066.

3.) Mr. Client's bond is $13,000.00 full cash. This bond is unattainable for Mr. Client, as he is still in custody. Further, it appears that this bond is a result of the utilization of a "Uniform Schedule of Bail." Please see the attached schedule. Under *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. 1977) and the constitutional and statutory considerations cited therein, this practice seems to be contrary to the law. *Abraham* states, " [e]ven though the circuit judge has discretionary authority respecting bail, the record should clearly reflect that the circuit judge did give consideration to KRS 431.520 and RCr 4.10 and that the amount of any bail was determined according to the standards set forth in KRS 431.525 and RCr 4.16(1)." A bail that is set the same for all criminal defendants runs afoul of this case and the laws mentioned within it, as well as KRS 431.066. It would also violate Section 17 of the Kentucky Constitution and the Eighth Amendment of the United States Constitution. A bail that is the same for all may be attainable for one man and far out of reach of another based upon their individual economic circumstances.

4.) The bail schedule lists that Resisting Arrest shall be a bond of $2,000.00 10%. Fleeing 1st Degree shall be $5000.00 full cash. Resisting Arrest shall be $2,000.00 10%. Criminal Mischief 3rd Degree shall be $1,000.00 10%. Convicted Felon in Possession of a

Handgun shall be $7,500.00 full cash. These are exactly the amounts that appear beside each charge on the uniform citation. Further, they add up to $13,000.00. This amount is exactly Mr. Client's bond. Use of this "Uniform Schedule of Bail" is certainly clear from the above evidence.

5.) Use of such a bail schedule allows the wealthy to walk free and subjects the indigent to perpetual incarceration. If a well situated person would be able to post this type of bail with relative ease then Mr. Client's bond should be set in such a manner as to allow him the same opportunity.

6.) Additionally, RCr 4.12 states that if the Court imposes a bail with conditions, that those conditions will be the "least onerous conditions reasonably likely to insure the defendant's appearance as required." RCr 4.12. Similarly, RCr 4.16 states that bail "…shall not be oppressive and shall be commensurate with the gravity of the offense charged." RCr 4.16.

WHERETOFORE, Counsel asks this Court to reduce the Mr. Client's bond to an unsecured bond with special conditions as per KRS 431.066.

Respectfully,

Attorney

Form 5.6 -- Motion for Reconsideration of Bond Reduction / Bond Not Set In Accordance with Local Standards (Not Commensurate with Nature of Offense Charged)

Comes now the Defendant, by counsel, and respectfully requests that the Court reconsider the bond decision in this case denying a reduction from $50,000 cash or property.

At the time of the original oral bond motion, counsel for Defendant had not yet had an opportunity to research what bonds in this circuit were typical in cases where the highest charge was Wanton Endangerment 1st degree, as it is in this case, and was unable at that time to point to specific instances where bonds had been set at lower amounts. Since then, counsel has been able to determine the following bonds have been set in Wanton Endangerment 1st degree cases in the past:

1.	Defendant 1	10-CR-_____	WE1st x 3 (gun discharge)	$7,500 cash
2.	Defendant 2	09-CR-_____	WE1st x 3, (auto)	$7,500 cash
3.	Defendant 3	09-CR-_____	WE1st x 2 (auto)	$5,000 unsecured
4.	Defendant 4	08-CR-_____	WE1st, PFO2nd (auto)	$5,000 prop
5.	Defendant 5	08-CR-_____	WE1st x 4, PFO2nd (auto)	$20,000 cash
6.	Defendant 6	08-CR-_____	WE1st, Flee & Evade (auto)	$2,500 10%
7.	Defendant 7	08-CR-_____	WE1st x 2 (auto)	$5,000 10%
8.	Defendant 8	08-CR-_____	WE1st (auto)	$25,000 10%
9.	Defendant 9	08-CR-_____	WE1st x 3 (auto)	$5,000 cash
10.	Defendant 10	08-CR-_____	Assault 3d, WE2d	$10,000 10%

Some these cases involving an automobile were cases in which the police officers were in pursuit, and were the victims of the wanton endangerment charges. The only one which involved the discharge of a firearm at the direction of someone did not involve police officers. (However, it was determined at the preliminary hearing of this case that the police were conducting a stealth operation in this case, in that they parked the police cars several blocks down, and did not have lights flashing or sirens operating, so as not to alert Mr. Harris that they were the police, at the time they attempted to enter his home.)

Each of the above cases carried a penalty equal to or worse than the penalty that Mr. Client faces in the event of conviction, each of them had a bond setting appropriate to D felonies, and all of them had bonds which were significantly lower than the $50,000 bond set in this case.

WHEREFORE, Mr. Client respectfully requests the Court reconsider the bond motion of Defendant, and reduce the bond in this case to a $7,500 cash or property bond.

Respectfully,

Attorney

Form 6.1 -- Circuit Court Appellant's Brief Title Page

COMMONWEALTH OF KENTUCKY

KENTUCKY COURT OF APPEALS

FILE NO. _____-CA-_____

MR. CLIENT APPELLANT

V. APPEAL FROM [COUNTY NAME] CIRCUIT COURT

HON. [Judge's name], JUDGE

INDICTMENT NO. 11-CR-00200

COMMONWEALTH OF KENTUCKY APPELLEE

BRIEF FOR APPELLANT, MR. CLIENT

Submitted by:

_____

ATTORNEY

ASSISTANT PUBLIC ADVOCATE

[ADDRESS]

[CITY, KY, ZIP]

COUNSEL FOR APPELLANT

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. [Judge's name], Judge, [County name] Circuit Court, [County name] County Justice Center 120 E. Dixie Ave., Elizabethtown, KY 42701; the Hon. [Prosecutor's name], Commonwealth's Attorney, P.O. Box 1146 Elizabethtown, KY 42702-1146; the Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601, on August 29, 2011. The record on appeal has been returned to the Kentucky Court of Appeals.

_____

ATTORNEY

Form 6.2 -- Circuit Court Appellant's Brief (contents)

INTRODUCTION

This matter comes before the Honorable Court of Appeals concerning bond as set in [County name] Circuit Case No. __-CR-_____. Appellant, Mr. Client, supports the appeal of his bond as follows.

STATEMENT CONCERNING ORAL ARGUMENT

Counsel for Appellant respectfully requests [or does not request] that this matter be set for Oral Argument.

STATEMENT CONCERNING JURISDICTION

This is an appeal of the action of the [County name] Circuit Court Judge taken after an Adversarial Bond hearing. The Circuit Judge entered an order on [date] overruling the Defendant's Motion to Reduce Bond, referring to the Court's written findings at the time of indictment that the Defendant was a danger to others. As such, the Judge ordered the Defendant's bond to remain at $75,000 partially secured at 10% and denied bail credit for the same reasons. Appellant has filed an appeal within thirty days of the [date] Order.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION [Page number]

STATEMENT CONCERNING ORAL ARGUMENT [Page number]

STATEMENT CONCERNING JURISDICTION [Page number]

STATEMENT OF POINTS AND AUTHORITIES [Page number]

STATEMENT OF THE CASE [Page number]

ARGUMENT [Page number]

I.THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT WHEN THE COURT WILLFULLY REFUSED TO UNSECURE APPELLANT'S BOND, OR RELEASE HIM ON HIS OWN RECOGNIZANCE.

[Page number]

A.UNDER KRS 431.066 THE TRIAL COURT SHOULD RELEASE THE APPELLANT ON HIS OWN RECOGNIZANCE OR ON AN UNSECURED BOND BECAUSE [COUNTY NAME] COUNTY PRETRIAL SERVICES CLASSIFIED THE APPELLANT AS A LOW RISK

[Page number]

Abraham vs. Commonwealth, 565 S.W.2d 152, 158 (Ky. App. 1977) [Page number]

Kuhnle vs. Kassulke, 489 S.W.2d 833 (Ky. 1973) [Page number]

Long vs. Hamilton, 467 S.W.2d 139 (1978) [Page number]

CONCLUSION [Page number]

STATEMENT OF THE CASE

Appellant was indicted on May 31, 2011 on one count of manufacturing methamphetamine, first offense (complicity) and one count of possession of marijuana (complicity). (TR, Indictment) According to the indictment, he, alone or in complicity with another, allegedly knowingly and unlawfully manufactured methamphetamine or possessed the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine. (Id.) The indictment also alleges that the appellant, alone or in complicity with another, knowingly and unlawfully possessed marijuana. (Id.) On June 9, 2011, a written bond decision was issued by the Court. (TR, Judicial Release Decision and Conditions of Release) The appellant's bond was set at $75,000 partially secured at 10%. (Id.) In its reason for setting this bond, the Court found the appellant to be a danger to others due to the dangers of manufacturing methamphetamine and two prior misdemeanor convictions of Wanton Endangerment 2nd. (Id.)

On July 6, 2011, counsel for appellant filed a Motion to Reduce Bond and Review Eligibility for Bail Credit. (TR, Motion to Reduce Bond and Review Eligibility for Bail Credit) Included with the motion was a copy of the appellant's Pretrial Services Report with a signed authorization to disclose its contents, a copy of KRS 431.066, and a copy of the JFA Kentucky Pretrial Risk Assessment Instrument Validation. (Id.) The Pretrial Services Report assessed the appellant as a low risk. (Id.) On July 12, 2011 a hearing was held and the Court

overruled Appellant's motion to reduce bond and review eligibility for bail credit. On July 18, 2011, the Court entered an order overruling the appellant's motion to reduce bond for the reasons previously stated in its written bond decision. (TR, Order).

ARGUMENT

I THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT WHEN THE COURT WILLFULLY REFUSED TO UNSECURE APPELLANT'S BOND, OR RELEASE HIM ON HIS OWN RECOGNIZANCE.

$75,000 partially secured at 10% is unreasonable, more than necessary to assure Appellant's attendance at trial, and therefore, violates the Eighth Amendment of the Constitution of the United States, and Section 17 of the Constitution of Kentucky, as well as KRS 431.525, RCr 4.16 and KRS 431.066. .

A. UNDER KRS 431.066 THE TRIAL COURT SHOULD RELEASE THE APPELLANT ON HIS OWN RECOGNIZANCE OR ON AN UNSECURED BOND BECAUSE [COUNTY NAME] COUNTY PRETRIAL SERVICES CLASSIFIED THE APPELLANT AS A LOW RISK

"When a court considers pretrial release and bail for an arrested defendant, the court shall consider whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released." KRS 431.066(1).

FKRS 431.066(2) further instructs "[i]f the defendant poses 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 defendant released on unsecured bond or on the defendant's own recognizance subject to such other conditions as the court may order."

The appellant's pretrial risk assessment is low. The instrument used by pretrial services to determine the appellant's risk assessment takes into account the defendant's residency, seriousness of the crime (as in class of felony), prior violent crime convictions, probation or parole status, prior failures to appear, and prior escapes. The JFA Kentucky Pretrial Risk Assessment Instrument Validation and the appellant's Pretrial Services Report were included with the appellant's motion in this case.

The record must demonstrate that the court actually exercised the discretion vested in it. Abraham vs. Commonwealth, 565 S.W.2d 152, 158 (Ky. App. 1977), requiring a trial court to consider the factors set forth in KRS 431.525 and RCr 4.16(1). See Kuhnle vs. Kassulke, 489 S.W.2d 833 (Ky. 1973).

The appellant was never labeled a flight risk. The Court's written findings labeling the appellant as a danger to others refer to the dangers associated with the allegations in this case. "The allowance of bail pending trial honors the presumption of innocence and allows a defendant freedom to assist in the preparation of his defense." Long v. Hamilton, 467 S.W.2d 139, 141 (Ky. 1971). The appellant maintains his innocence in this case.

The Court's written findings also refer to the appellant's prior 2005 misdemeanor convictions for Wanton Endangerment 2nd. The pretrial services instrument considered this and the degree of felony alleged in this case and still classified the appellant as a low risk. Therefore, the appellant argues that KRS 433.066 was not followed, and that the appellant is entitled to be released on his own recognizance or on an unsecured bond because of his low pretrial risk assessment, subject to any other conditions the Court may impose.

CONCLUSION

For the above stated reasons, Appellant asks for a bond which is sufficient to ensure his appearance at future proceedings: An unsecured bond or own recognizance bond..

Respectfully Submitted,

_____

ATTORNEY
ASSISTANT PUBLIC ADVOCATE
DEPT. OF PUBLIC ADVOCACY
[ADDRESS]
[CITY, KY, ZIP]
[PHONE NUMBER]
COUNSEL FOR APPELLANT

APPENDIX

Tab Number	Item Description	Record Location
[Tab number]	Order Denying Bond Reduction	
[Tab number]	Pretrial Services Report	
[Tab number]	Press Release: Federal Study Validates Risk-Assessment Tool Used by Kentucky Courts for Pretrial Release	
[Tab number]	*Abraham v. Commonwealth*, 565 S.W.2d 152, 158 (Ky. App. 1977)	
[Tab number]	*Kuhnle v. Kassulke*, 489 S.W.2d 833 (Ky. 1973)	

Form 7.1 -- Petition for Writ of Habeas Corpus Where Court Considers Only One Bail Factor

COMMONWEALTH OF KENTUCKY

_____CIRCUIT COURT

CASE NO. 11-CI-_____

(relating to 11-F-_____)

[The Client] PETITIONER

V.

[Name of Jailer] RESPONDENT

IN HIS OFFICIAL CAPACITY AS _____ COUNTY JAILER

PETITION FOR WRIT OF HABEAS CORPUS

Comes now, _____ ("Petitioner"), by and through his counsel, Hon. _____, hereby states the following as his cause of action against _____ ("Respondent"):

This is a civil action, as hereinafter more fully appears, in which the Petitioner seeks the issuance of a Writ of Habeas Corpus, and the further relief set forth below. Petitioner is now being held in the _____County Detention Center in _____, Kentucky. He is being held with a bond that is unlawful pursuant to the 8th Amendment of the Constitution of the United States, Section 17 of the Kentucky Constitution and KRS 431.066, adopted as a result of House Bill 463.

Pursuant to KRS 419.020, an affidavit of probable cause in support of this Petition is attached hereto as Exhibit A. A more detailed explanation of Petitioner's grounds for this Petition is as follows:

On July 2, 2011, Petitioner was arrested on a warrant brought forth by Deputy _____ of the _____ County Sheriff's Department. He was charged with Criminal Possession of a Forged Instrument and Impersonating a Peace Officer. Upon arrest, the Petitioner's bond was set at $10,000 full cash by order of the _____ District Court. While incarcerated in the _____ County Detention Center, Petitioner was interviewed on July 3, 2011, by a representative from Pretrial Services. While meeting with pretrial services, Petitioner's criminal history was compiled and, once his information was validated, a risk

assessment was performed. The instrument used by pretrial services is evidence-based and has been validated through the JFA Institute. See Exhibit B. Petitioner scored a 6 on that instrument, placing him within the moderate category. It should be noted that moderate runs from 6 to 13, which means that Petitioner received the lowest possible score in this category. See Exhibit C.

1. Petitioner is being unlawfully held by the denial of an ROR bond with conditions as mandated by KRS 431.066 and in violation of the 8th Amendment to the Constitution of the United States.

Pursuant to HB 463 passed by the 2011 session of the Kentucky General Assembly, signed into law by Governor Steve Beshear and effective as of June 8, 2011, the Court shall order the defendant released on unsecured bond or on the defendant's own recognizance subject to such other conditions as the court may order.

KRS 431.066 states the following:

(1) When a court considers pretrial release and bail for an arrested defendant, the court shall consider whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released.

(2) If the defendant poses 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 defendant released on unsecured bond or on the defendant's own recognizance subject to such other conditions as the court may order.

(3) If the defendant 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 defendant under the same conditions as in subsection (2) of this section but shall consider ordering the defendant to participate in global positioning system monitoring, controlled substance testing, increased supervision, or such other conditions as the court may order.

In addition to the newly adopted law, the American Bar Association has issued "Criminal Justice Standards on Pretrial Release". See Exhibit D. Standard 10-1.1 states that the law favors the release of defendants pending adjudication of charges. Standard 10-1.4(d) states that financial conditions should not be employed to respond to concerns for public safety. Although these standards are not binding on the court, they serve as a guiding vessel for judges charged with the task of assigning bond to those that come before them charged with an offense.

The Eighth Amendment to the Constitution of the United States mandates "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

As outlined above, Petitioner scored a 6 on this risk assessment, putting him at a low moderate risk level. He falls under subsection 3, which mandates release as if he were low but with added conditions.

The pretrial risk assessment employed by the pretrial services division of the AOC, the results of which are reported above, meets the definition of "pretrial risk assessment" as that term is defined in KRS 446.010(33): "an objective, research-based, validated assessment tool that measures a defendant's risk of flight and risk of anticipated criminal conduct while on pretrial release pending adjudication." Thus, the finding of "moderate" with respect to the defendant's anticipated future conduct toward the public is based on evidence, and provides support for application of KRS 431.066, whereby persons who are moderate risks to the public should be granted an unsecured or own recognizance bond, along with other conditions that the court may require.

Accordingly, as with other defendants that fall within the moderate level of risk, pretrial services listed some possible additional conditions of release based upon an individualized assessment. In Petitioner's case, their recommendation was ROR with curfew monitoring, no illegal use of alcohol or controlled substances, report to pretrial services, court notification and no new arrest or violations.

The court rejected this recommendation of pretrial services and stated as his reason that "anyone that impersonates an officer is a danger to the community." Although finding that someone is a danger to others is an exception to setting the bond as unsecured or ROR, making that finding simply due to the charge itself, without any evidence in the record to support the finding, is unacceptable for several reasons.

First, if the legislature had intended for everyone charged with the charge of impersonating a peace officer to be immediately presumed a danger to others, a notation would have been made within the law stating as such. In fact, an exception has been made to several portions of the new law in the case of violent offenders, sex offenders, etc. No exception was carved out for this particular charge, leading us to conclude that this charge should be treated as any other class D felony.

In addition, the seriousness of this charge has already been taken into consideration with the risk assessment. Many of the questions asked involve the charges themselves. Basically, the judge has ruled as a matter of law, not evidence, that anyone who is charged with impersonating a police officer is per se a danger to the community. It is unfair and contrary to the purpose of the current law to classify someone as moderate risk and therefore eligible for release pursuant to the new law and also a danger to the community, making him ineligible for release, based upon the same information.

Third, a judicial declaration that "anyone" who is charged with a particular crime automatically is deemed to be a danger to the public is the very definition of arbitrariness, and reflects that the court has already made such a finding which would be binding on any persons who in the future will be charged with that crime. This is an abandonment of judicial discretion, not the exercise of it.

Finally, veering away from the current law is considered excessive bail in violation of the Eighth Amendment. Petitioner was found to be indigent by the Court and then a bail was imposed upon him with knowledge that it was out of his reach financially. The Court had reviewed the Affidavit of Indigency and knew that Petitioner was unable to post anything of substantial cash value. In order to continue to confine the petitioner further, a $5000 full cash or property bond was imposed by the Court.

Therefore, Petitioner is being held unlawfully in the _____County Detention Center on a bond that is inconsistent with the law.

WHEREFORE, Petitioner prays this Court to enter a Writ for Habeas Corpus directing _____, _____ County Jailer to release him from custody.

Respectfully Submitted,

_____

Attorney

Form 7.2 -- Affidavit in Support of Petition for Writ of Habeas Corpus (by attorney)

AFFIDAVIT OF PROBABLE CAUSE IN SUPPORT OF

PETITION FOR WRIT OF HABEAS CORPUS

I, _____, being duly sworn, do state the following:

1. I am an attorney with the _____Trial Office of the Department of Public Advocacy.

2. I have been assigned to represent _____ in this matter regarding his bond/pretrial release. I hereby verify that the Writ of Habeas Corpus and the Petition for Writ of Habeas was drafted under my direction, that I have read it, and that the factual statements therein are true to the best of my knowledge, information and belief.

3. I was present for _____ arraignment on July 5, 2011. Judge _____was scheduled to preside over in-custody arraignments on that date but refused to review _____ bond since Judge _____ previously set it. Judge _____ then agreed to review the issue of bond on that date.

4. At that review, _____ was given a copy of the Pretrial Services Report regarding _____. _____ was given a score of 6 on the risk assessment and was categorized as a moderate risk.

5. Over my objection, _____'s bond was set at $5000 full cash or property.

6. HB 463, 2011 Reg. Sess. (Ky. 2011) (enacted), which became effective on June 8, 2011, significantly changes KRS 431.066 in that now a defendant's bond shall be based upon a risk assessment performed by pretrial services. Someone scoring within the moderate range shall be given an ROR bond with added conditions as recommended by pretrial services. KRS 431.066 further states that any deviation from this prescribed bond shall be in writing and based upon a finding by the court that the defendant is a flight risk or a danger to others.

7. The only reason the Court deviated from the bond statute in this case is because of the nature of the charges against _____.

8. Pursuant to KRS 431.066, _____ should have been discharged from custody on an ROR or unsecured bond.

9. Affiant hereby incorporates by reference, as if fully set forth herein, the attached Petition for a Writ of Habeas Corpus showing that probable cause exists to believe that _____, _____ County Jailer, is unlawfully detaining petitioner.

FURTHER THE AFFIANT SAYETH NOT.

_____

ATTORNEY

Subscribed and sworn to before me on this the _____ day of

_____, 2_____.

_____

NOTARY PUBLIC, STATE-AT-LARGE

MY COMMISSION EXPIRES:_____

Form 7.3 -- Writ of Habeas Corpus

COMMONWEALTH OF KENTUCKY

_____ CIRCUIT COURT

CASE NO.: 11-CI-_____

(relating to 11-F-_____)

_____ PETITIONER

v.

_____ RESPONDENT

IN HIS OFFICIAL CAPACITY AS _____ COUNTY JAILER

WRIT OF HABEAS CORPUS

The Clerk, _____ Circuit Court, is directed to issue a Writ of Habeas Corpus commanding the respondent to produce the body of _____ through the _____County Detention Center before this court on the _____ day of _____, 2011, at _____ a.m./p.m.

_____

judge, _____ Circuit Court

Date: _____

Form 7.4 -- Affidavit in Support of Petition for Writ of Habeas Corpus (by client)

AFFIDAVIT IN SUPPORT OF

PETITION FOR WRIT OF HABEAS CORPUS

I, _____ do state the following:

1. I am the Petitioner listed in the attached Petition for Writ of Habeas Corpus.
2. I understand that the Pretrial Services report referred to within said Writ of Habeas Corpus is confidential.
3. I hereby give my consent to file that report within the record in support of said Writ of Habeas Corpus.

FURTHER THE AFFIANT SAYETH NOT.

_____

[The Client]

Form 7.5 – Petition for Writ of Habeas Corpus / Insufficient Evidence of Risk of Flight or Future Dangerousness

Comes now Petitioner, by counsel, and petitions this Court, pursuant to KRS 431.066, Section 16 of the Kentucky Constitution, and the Eighth Amendment to the United States Constitution and hereby moves this Court to enter an order to amend Petitioner's bond. As grounds, Petitioner states the following:

MATERIAL FACTS

1. On June 16, 2011, the police arrested Mr. Client on the charges of Trafficking a Controlled Substance 10 or more D.U., a class C felony Trafficking a Controlled Substance less than 10 D.U., a class D felony, first degree possession of a controlled substance which has a penalty of presumptive probation, and Trafficking within 1000 feet of a school, a class D felony.

2. Pretrial services met with Mr. Johnson on June 15, 2011, and classified him as a "Moderate risk level," recommending "RELEASE ROR/USB PER STATUTE," with the further recommendation of terms of release to include "CURFEW MONITORING; NOT TO CONSUME ANY ALCOHOL OR ILLEGAL DRUGS; REPORT TO PRETRIAL SERVICES; NO NEW ARREST OR VIOLATIONS; NO ILLEGAL USE OF ALCOHOL OR CONTROLLED SUBSTANCES; COURT NOTIFICATION; RANDOM DRUG TESTING."

3. On June 17, 2011, Judge [Name], [County Name] District Judge of Division 2, arraigned Mr. Johnson, and noted on the docket sheet "$50,000/ danger to others," with no other findings.

4. On June 22, 2011, Judge [Name], [County Name] District Judge of Division 1, held a preliminary hearing on the charges. The police testified to the following facts: (1) the current charges against Mr. Johnson arose from a two alleged sales of prescription pills to a confidential informant, once on May 4, 2011, where Mr. Client is alleged to have sold four (4) pills, and another alleged sale on June 15, 2011, where Mr. Client is alleged to have sold twelve (12) pills; (2) that these were the first and only controlled buys attributed to Mr. Client; (3) the police did not conduct any surveillance or monitoring for 42 days between the two buys; (4) the arrest took place without incident; (5) Mr. Client was not armed; (6) Mr. Client did not attempt to flee.

5. After the Court heard the commonwealth's evidence, it ruled that probable cause existed for the charges.

6. Mr. Client moved the court to modify his bond, and referred to the pretrial services report showing Mr. Client as a medium risk. He further pointed out to the court that the pretrial services report accounted for Mr. Client's criminal history, lack of any failures to appear, and the current charges. (Appendix 1.) No evidence was presented by the Commonwealth that Petitioner presented a danger to the community and the pretrial risk assessment accounts for the Petitioner's past criminal history in its evidence-based risk assessment. That risk assessment determines a defendant's likelihood to flee the jurisdiction, the likelihood to commit a new offense while out on bond, and whether that defendant might be a danger to others in the community.

7. At this preliminary hearing, no evidence was introduced to any of the following: (1) no evidence that Mr. Client fled from arrest; (2) no evidence that Mr. Client was a danger to others; and (3) no evidence that Mr. Client was unlikely to be present for trial.

8. Judge [Name] set his bond to $25,000 cash and held that (1) Mr. Client is a danger to others and (2) that Mr. Client was a flight risk. He further did not allow his bond to be unsecured or released to GPS monitoring.

APPLICABLE LAW

9. The purpose of bond is to reasonably ensure the person will return to court. RCr 4.10. The Court must impose the "least onerous conditions" reasonably likely to ensure a defendant's return to court. RCr 4.10; KRS 431.520.

10. While KRS 431.525 controls the amount of a person's bond and includes the nature of the current charges, whether bond is secured or unsecured is dictated by KRS 431.066. If the defendant poses 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 defendant released on unsecured bond or on the defendant's own recognizance

subject to such other conditions as the court may order. KRS 431.066(2). This statute controls regardless of the current charges and applies to misdemeanor and felony charges alike.

11. A court cannot assess a bail in excess of the statutorily required ROR or unsecured bond, straying from the recommendation of the evidence-based, pretrial services report, without finding the defendant a flight risk or a danger to others. KRS 431.066(2) and (3). In such cases, the court is required to document these reasons in a written order. KRS 431.525(6) and (7).

12. Regardless of the amount of the bail set, the court shall permit the defendant a credit of one hundred dollars ($100) per day as a payment toward the amount of the bail set for each day or portion of a day that the defendant remains in jail prior to trial. Upon the service of sufficient days in jail to have sufficient credit to satisfy the bail, the court shall order the defendant released from jail on the conditions specified in this section or in this chapter. KRS 431.066(4). If the court denies this jail credit for bail, the court shall document the reasons for denying the release in a written order. KRS 431.066(6).

ARGUMENT

13. The ruling that Defendant did not qualify for an unsecured bond as requested by counsel was not based on evidence and furthermore not properly documented pursuant to KRS 431.066(5).

14. No evidence exists at all to support the finding that Mr. Johnson is or was a flight risk at either his arraignment or preliminary hearing.

15. No evidence exists at all to support the finding that Mr. Johnson is or was a danger to others at either his arraignment or preliminary hearing. In fact, the police officers' choice to leave Mr. Client at large in the community, believing he sold drugs, without monitoring his actions for 42 days shows their lack of concern for his danger to the public.

16. Because Mr. Client poses a low risk of flight, is likely to appear for trial, and is not likely to be a danger to others, KRS 431.066(2) applies, Mr. Client's bond should be an unsecured bond with GPS monitoring, as per the recommendation from pretrial services.

17. The current bond of $25,000 is oppressive and illegal.

CONCLUSION

No other adequate remedy exists for Petitioner, and, should the District Court be allowed to impose such an illegal and oppressive bond, great harm and irreparable injury will result.

Wherefore, Petitioner moves this Court for an order amending Petitioner's bond.

Respectfully,

Attorney

Form 7.6 – Petition for Writ of Habeas Corpus / Championing Use of Pretrial Risk Assessment Tool as an Evidence-Based Practice / Reference to 8th Amendment

Comes now, Mr. Client ("Petitioner"), by and through his counsel, hereby states the following as his cause of action against the _____ County Jailer ("Respondent"):

This is a civil action, as hereinafter more fully appears, in which the Petitioner seeks the issuance of a Writ of Habeas Corpus, and the further relief set forth below. Petitioner is now being held in the _____ Detention Center in _____, Kentucky. He is being held with a bond that is unlawful pursuant to the 8th Amendment of the Constitution of the United States, Section 17 of the Kentucky Constitution and KRS 431.066, adopted as a result of House Bill 463.

Pursuant to KRS 419.020, an affidavit of probable cause in support of this Petition is attached hereto as Exhibit A. A more detailed explanation of Petitioner's grounds for this Petition is as follows:

On June 12, 2012, Petitioner was arrested on a warrant brought forth by Trooper _____, Kentucky State Police. He was charged with Trafficking in a Controlled Substance. Upon arrest, the Petitioner's bond was set at $5,000 full cash by order of the District Court. While incarcerated in the Detention Center, Petitioner was interviewed on June 13, 2012, by a representative from Pretrial Services. While meeting with pretrial services, Petitioner's criminal history was compiled and, once his information was validated, a risk assessment was performed. The instrument used by pretrial services is evidence-based and has been validated through the JFA Institute. Petitioner scored a 12 on that instrument, placing him within the moderate category.

1. Petitioner is being unlawfully held by the denial of an ROR bond with conditions as mandated by KRS 431.066 and in violation of the 8th Amendment to the Constitution of the United States.

Pursuant to KRS 431.066, the Court shall order the defendant released on unsecured bond or on the defendant's own recognizance subject to such other conditions as the court may order.

KRS 431.066 states the following:

(1) When a court considers pretrial release and bail for an arrested defendant, the court shall consider whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released.

(2) If the defendant poses 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 defendant released on unsecured bond or on the defendant's own recognizance subject to such other conditions as the court may order.

(3) If the defendant 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 defendant under the same conditions as in subsection (2) of this section but shall consider ordering the defendant to participate in global positioning system monitoring, controlled substance testing, increased supervision, or such other conditions as the court may order.

In addition to the newly adopted law, the American Bar Association has issued "Criminal Justice Standards on Pretrial Release". Standard 10-1.1 states that the law favors the release of defendants pending adjudication of charges. Standard 10-1.4(d) states that financial conditions should not be employed to respond to concerns for public safety. Although these standards are not binding on the court, they serve as a guiding vessel for judges charged with the task of assigning bond to those that come before them charged with an offense.

The Eighth Amendment to the Constitution of the United States mandates "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

As outlined above, Petitioner scored a 12 on this risk assessment, putting him at a moderate risk level. He falls under subsection 3, which mandates release as if he were low but with added conditions.

The pretrial risk assessment employed by the pretrial services division of the AOC, the results of which are reported above, meets the definition of "pretrial risk assessment" as that term is defined in KRS 446.010(33): "an objective, research-based, validated assessment tool that measures a defendant's risk of flight and risk of anticipated criminal conduct while on pretrial release pending adjudication." Thus, the finding of "moderate" with respect to the defendant's anticipated future conduct toward the public is based on evidence, and provides support for application of KRS 431.066, whereby persons who are moderate risks to the public should be granted an unsecured or own recognizance bond, along with other conditions that the court may require.

Accordingly, as with other defendants that fall within the moderate level of risk, pretrial services listed some possible additional conditions of release based upon an individualized assessment. In Petitioner's case, their recommendation was ROR or USB with random drug testing, no illegal use of alcohol or controlled substances, report to pretrial services, court notification, maintain employment and no new arrest or violations.

Finally, veering away from the current law is considered excessive bail in violation of the Eighth Amendment. Petitioner was found to be indigent by the Court and then a bail was imposed upon him with knowledge that it was out of his reach financially. The Court had reviewed the Affidavit of Indigency and knew that Petitioner was unable to post anything of substantial cash value. In order to continue to confine the petitioner further, a $5000 full cash or property bond was imposed by the Court.

Therefore, Petitioner is being held unlawfully in the Graves County Detention Center on a bond that is inconsistent with the law.

WHEREFORE, Petitioner prays this Court to enter a Writ for Habeas Corpus directing the _____ County Jailer to release him from custody.

Respectfully,

Attorney

Form 7.7 – Petition for Writ of Habeas Corpus / Rigid Adherence to Bond Schedule / Evidence-Based Practices /Discusses Kentucky Constitution and Eighth Amendment

Comes now, Mr. Client, ("Petitioner"), by and through his counsel, and states the following as his cause of action against _____, in his capacity as _____ County Jailer ("Respondent"):

This is a civil action in which the Petitioner seeks the issuance of a Writ of Habeas Corpus, and the further relief set forth below. Petitioner is now being held in the _____ County Detention Center in _____, Kentucky. He is being held with a bond that is unlawful pursuant to the 8th Amendment of the Constitution of the United States, Section 17 of the Kentucky Constitution and KRS 431.066, adopted as a result of House Bill 463.

Pursuant to KRS 419.020, an affidavit of probable cause in support of this Petition is attached hereto as Exhibit A. A more detailed explanation of Petitioner's grounds for this Petition is as follows:

On December 30, 2011, the Petitioner was arrested by Detective _____of the _____ Police Department. He was charged with Trafficking in a Controlled Substance, both 1st and 2nd Degrees and within 1000 feet of a school, wanton endangerment and fleeing or evading (along with other minor charges). Upon arrest, the Petitioner's bond was set at $88,335.00 full cash, by order of the District Court. That bond has remained at the same amount since the action was instituted. Further, the Petitioner was ruled indigent by order of the District Court when the court appointed the Kentucky Department of Public Advocacy. The Petitioner has been incarcerated since December 30, 2011 because he is unable to post the outrageous cash bond set by the District Court.

Pretrial Services conducted a pretrial interview with the Petitioner on December 30, 2011. The report, compiled as a result of the interview, states that Mr. Client poses a "moderate risk." Pretrial Services recommended that Mr. Client be released on his own recognizance or on an unsecured bond and abide by special conditions.

A. Petitioner is being unlawfully held by the denial of an ROR bond with conditions as mandated by KRS 431.066 and in violation of the 8th Amendment to the Constitution of the United States.

Pursuant to HB 463 passed by the 2011 session of the Kentucky General Assembly, signed into law by Governor Steve Beshear and effective as of June 8, 2011, the Court shall order the defendant released on unsecured bond or on the defendant's own recognizance subject to such other conditions as the court may order.

KRS 431.066 states the following:

(1) When a court considers pretrial release and bail for an arrested defendant, the court shall consider whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released.

(2) If the defendant poses 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 defendant released on unsecured bond or on the defendant's own recognizance subject to such other conditions as the court may order.

(3) If the defendant 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 defendant under the same conditions as in subsection (2) of this section but shall consider ordering the defendant to participate in global positioning system monitoring, controlled substance testing, increased supervision, or such other conditions as the court may order.

Petitioner scored an 11 on the pretrial report, putting him at a moderate risk level. This mandates release on an unsecured bond if the defendant is not a danger or a flight risk, with special conditions that may be added by the Court.

The pretrial risk assessment employed by the pretrial services division of the AOC, the results of which are reported above, meets the definition of "pretrial risk assessment" as that term is defined in KRS 446.010(33): "an objective, research-based, validated assessment tool that measures a defendant's risk of flight and risk of anticipated criminal conduct while on pretrial release pending adjudication." Thus, the finding of "moderate" with respect to the defendant's anticipated future conduct toward the public is based on evidence, and provides support for application of KRS 431.066, whereby persons who are moderate risks should be granted an unsecured or own recognizance bond with special conditions attached if the court sees fit.

Again, in the Petitioner's case, their recommendation was that Mr. Client be released on his own recognizance or on an unsecured bond in accordance with the statute and abide by the special conditions listed on the pretrial report. Those special conditions were "no new arrests or violations, no use of alcohol or controlled substances, and report to pretrial services."

At the preliminary hearing, the defense made a motion to reduce the bond. The Court found that Mr. Client was a flight risk since he was a resident of Michigan and a danger to the community.

The point of bond is to ensure a defendant's appearances in court and to ensure the safety of others if the defendant poses a risk of danger. Bond should not be excessive or utilized as a tool to keep defendants in a perpetual state of incarceration pretrial. Here, this bond is extremely excessive.

Further, treating residents of different states differently violates several tenants of long established Federal case law and the United States Constitution (such as the privileges and immunities clause).

Finally, veering away from HB 463 in this manner should be considered excessive bail in violation of the Eighth Amendment. Petitioner was found to be indigent by the Court and then a bail was imposed upon him with knowledge that it was out of his reach financially. The Court had reviewed the Affidavit of Indigency and knew that Petitioner was unable to post anything of substantial cash value.

B. The Uniform Bail Schedule is being used illegally.

Fayette County utilizes a bail schedule. Counsel obtained a copy of this bail schedule as a result of a KORA request. A copy of this bail schedule is attached to this Writ. It should be noted that this bail schedule has absolutely no constitutional foundation and the use of this bail schedule actually violates constitutional principles. A bail schedule was utilized in this case as is evident from the bonds set as opposed to codefendants.

Mr. Client's bond was $88,335.00 full cash. On the bail schedule attached to this petition, Fleeing and Evading 1st Degree is $5000.00. Wanton Endangerment 1st Degree is $5000.00. Tampering with Physical Evidence is $3000.00. Possession of Marijuana and Possession of Drug Paraphernalia are both $1000.00 10%, or $100.00 each. Careless Driving is $100.00. No operator's license is $50.00. This comes to a grand total of $13,350. $88,335.00 minus $13,350 equals $74,985. This is almost exactly the bond of a codefendant in this case, _____. [Co-defendant]'s bond is $75,000 full cash. He is charged with only three counts of trafficking in 11 F 3842. As such, it is clear that the other charges Mr. Client faces were assigned bond utilizing the standardized bond schedule attached to this petition.

Further, on a previous bond writ, the County Attorney produced a memoranda that stated the standardized bond schedule amount for all trafficking charges would be $25,000.00, full cash. Therefore, the three trafficking charges Mr. Client faces would each have a $25,000 bond each (or $75,000.00 total). Utilizing this, it becomes extremely clear that Mr. Client's bond was the result of a formal and standardized bond schedule system.

A formal bond schedule system runs clearly afoul of the tenants of both Section 16 of the Kentucky Constitution, and the Eight Amendment to the United States Constitution. Specifically, the Eighth amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Here, the bail schedule utilized has clearly resulted in an excessive bail being imposed. Further, using a bail schedule in general results in unconstitutional bails across the board. The rich will be able to afford a bail, sometimes at any cost. The poor may have a problem posting $100.00.

The point of bail is to ensure the defendant shows up in court to answer for the charges alleged. *Long v. Hamilton*, 467 S.W.2d 139 (Ky.1971) provides "[a] defendant in a criminal action is presumed innocent of any charge until convicted. 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."

Excessive bail is prohibited, and HB 463 has made clear that certain offenses are to be presumed bailable (such as these non-violent offenses charged). Using a bail schedule shows a complete abdication of the duty imposed on courts to grant an attainable bail that ensures the accused returns for court. To the rich, a monetary bail may not be enough to make them return for court. To the poor, it means perpetual imprisonment and lack of ability to effectively formulate a defense. Each accused should be entitled to a neutral arbiter finding a monetary or non-monetary bail that is both attainable and enough of an insurance to show up for court. This requires an individualized assessment of an accused means. Finding a "one size fits all" bail is not only a boon to those accused person's that are wealthy, but a failure to those with indigent status.

Therefore, Petitioner is being held unlawfully in the Fayette County Detention Center on a bond that is inconsistent with the law.

WHEREFORE, Petitioner prays this Court to enter a Writ for Habeas Corpus directing _____, _____ County Jailer to release him from custody.

Respectfully,

_____

Attorney

Form 7.8 - Petition for Writ of Habeas Corpus on Issue of No Hearing on Change of Conditions of Bond

Petition for Writ of Habeas Corpus

Comes now [Client's name] ("Petitioner"), by and through counsel, who hereby states the following as her cause of action against [Local Jailer] ("Respondent"):

This is an original civil action regarding _____ District Court, Case No. __-F-_____. The petitioner is before this Court seeking a Writ of Habeas Corpus or other appropriate order requiring respondent [County Name] County Jailer, the [County Name] County Detention Center, its staff, agents and servants to release the unlawfully detained petitioner from custody. Petitioner's

request is pursuant to the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Sections Two, Eleven, Sixteen and Seventeen of the Constitution of Kentucky, and the Kentucky Rules of Criminal Procedure.

The real parties in interest are the petitioner, the respondent, and the Commonwealth of Kentucky. As grounds for this motion, counsel submits the following statement of facts:

1. On _____, 20___, the petitioner was arraigned on charges of Possession of a Controlled Substance, 1st Degree; Drug Paraphernalia; Carry a Concealed Deadly Weapon; and, DUI 1st Offense. The Honorable Judge [Name], [County Name] District Court, appointed DPA to represent the petitioner. An order of indigency was placed in the record, and a preliminary hearing was scheduled for _____, 20___ before the Honorable Judge _____, _____ District Court.
2. At arraignment, the petitioner's bond was set at $2500 unsecured and a district court holder was placed on a pending case, _____-F-_____.
3. On _____, 20___, the petitioner appeared in front of the Honorable [Name], [County Name] District Court, for a preliminary hearing. This was her second appearance on the preliminary hearing docket as the officer had failed to appear on _____, 2012. At that time the petitioner had waived days and her bond had been set at $5000 unsecured with no conditions.
4. On _____, 20___, the arresting officer in ___F-_____ again failed to appear and Judge _____ lifted the no bond holder placed on ___-F-_____, reinstating her previous bond.
5. According to the latest pretrial report (see attached), at 1:30 PM on _____, the Honorable Judge [Name] sua sponte amended the petitioner's bond on __-F-_____ from $2,500 unsecured to cash. Defense counsel was not provided notice of the change and a hearing was not conducted.
6. Defense counsel was made aware of the bond amendment on Friday _____, 20___ when contacted by her client who is unable to post bond.

Memorandum of Authority in Support of Writ of Habeas Corpus

Petitioner is entitled to the issuance of a Writ of Habeas Corpus because Petitioner/Defendant has been unlawfully detained due to an improper exercise of judicial discretion and authority. Judge [Judge's Name] actions are contrary to Kentucky law as examined in *Brown v. Com.*, 789 S.W. 2d 748, 750 (Ky. 1990). His actions are also contrary to the United States and Kentucky Constitutions, and are in clear violation of the Kentucky Rules of Criminal Procedure as set forth in RCr 4.40 and 4.42. As this is an issue regarding a judge acting erroneously within his jurisdiction, a writ is the appropriate remedy. *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky.2004).

In *Brown* the Kentucky Supreme Court is clear that conditions of release can only be made upon a motion by the Commonwealth, and with a demonstration by clear and convincing evidence of the need to modify existing conditions. 789 S.W. 2d at 750. In support of this holding the Court cites directly to the text of RCr. 4.40, which clearly states, "(1) The *defendant or Commonwealth* may by written motion apply for a change of conditions of release" and in subsection (3) that, "the Commonwealth must demonstrate by clear and convincing evidence the need to modify existing conditions of release "(emphasis added). There is no such motion in the record, nor is there a record establishing the clear and convincing evidence needed to modify the bond.

Furthermore, the action of the Court violated the Defendant's fundamental due process rights by amending the bond with no notice to the Defendant and no hearing. Both RCr 4.40 and 4.42 require that the Court conduct a hearing with notice prior to amending the conditions of a Defendant's bond. Under RCr 4.42, "(5) Before the court may make the findings required for change of conditions or forfeiture of bail under this rule, the defendant and the defendant's surety or sureties shall be granted an adversary hearing comporting with the requirements of due process." The District Court's actions are in clear violation of the plain reading of RCr 4.40 and 4.42, as well as violating the Defendant's right to due process and reasonable bail.

Wherefore, petitioner prays that this Court enter a Writ for Habeas Corpus directing the _____ County Jailer to release the petitioner from custody.

Most respectfully submitted,

_____

Attorney

Form 8.1 -- Motion for Discretionary Review of a Decision of the Court of Appeals

Comes the Movant, by counsel, pursuant to CR 76.20, and requests this Court to grant discretionary review of the Kentucky Court of Appeals decision in [style of case, case number] which was rendered on [date]. Mr. Client delineates the grounds for this Motion below.

THE JURISDICTIONAL FACTS

1. The name of the Movant is Mr. Client. Counsel for the Movant is Hon. Heather Crabbe, Assistant Public Advocate, [county name] County Trial Office, Department of Public Advocacy, 8311 US 42, Ste. 210, Florence, Kentucky 41042.

2. The name of the Respondent is the Commonwealth of Kentucky. Counsel for the Respondent is Hon. _____, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

3. The date of final disposition of Mr. Client's appeal by the Court of Appeals is _____].

4. Neither Movant nor the Respondent has a Petition for Rehearing or a Motion for Reconsideration pending in the Court of Appeals.

5. No supersedeas bond or bail on appeal has been executed. Mr. Client's case was dismissed in its entirety by order of the [county name] Circuit Court on [date].

MATERIAL FACTS OF THE CASE

Appellant was indicted on [date] on three counts of attempted murder (complicity) and one count of assault in the 2nd degree (complicity). According to the indictment, he allegedly attempted to cause the death of three people by shooting at them with a firearm. The indictment also alleges he intentionally caused physical injury to another by means of a deadly weapon and/or dangerous instrument. During the preliminary hearing held on [date], several important facts were stated on the record by the Commonwealth's witness, Police Officer [name]. The Circuit Court Judge considered this evidence in making his bond decision.

It is uncontroverted that the Appellant is from Puerto Rico and speaks limited English. He was at a public pool with his co-defendants, when an argument ensued (in English) with the former co-workers of his co-defendants regarding a work related matter. It is alleged that Appellant and the co-defendants got in a vehicle and followed the former co-workers in their car. Appellant was in the backseat, and the two co-defendants were in the front.

According to Officer [name], one of the codefendants began to shoot at the other vehicle, causing it to ultimately wreck. Officer [name] testified that the two co-defendants were identified as both the shooter and the driver, while Appellant had not been identified by anyone as doing anything unlawful or harmful. Upon a search of the vehicle, officers found firearms in the immediate area of Appellant's co-defendants, but nothing in the backseat with the Appellant. Further, both co-defendants had permits to carry a concealed deadly weapon. Notably, Officer [name] testified that the Appellant was the least culpable of all involved.

However, the District Court Judge set Appellant and the two co-defendants' bond at the same amount ($250,000 cash only) even though the testimony presented evidence that Appellant was the least culpable and was not identifiable in relation to any wrongdoing. Once Appellant was indicted, counsel filed a motion for an adversarial bond hearing. The Assistant Commonwealth's Attorney and counsel for Appellant agreed to allow the judge to listen to the preliminary hearing recording in lieu of having the hearing. The Circuit Court Judge reviewed the recording of the preliminary hearing and issued an Order holding that: 1) the Defendant was classified as a low risk through [county name] County Pretrial Services 2) the Defendant was a flight risk 3) the Defendant was a danger to others due to the severity of his current charge, and 4) the Defendant was denied bail credit for all the aforementioned reasons.

On appeal to the Kentucky Court of Appeals, Appellant raised essentially two issues – the amount of bond as set and the denial of bail credit. The Court of Appeals dismissed Mr. Mr. Client's claims as moot because the Circuit Court eventually lowered his bond and he was able to post the reduced amount. [Case citation and number].

QUESTION OF LAW

Did the Court of Appeals err in dismissing Mr. Client's bond appeal as moot due to his eventual release on a reduced pretrial bond after having been incarcerated on an unconstitutionally excessive bond with no bail credit?

REASONS FOR GRANTING REVIEW

1. This Court should grant discretionary review because the Court of Appeals incorrectly found that Mr. Mr. Client's appeal was moot simply because he posted bond.

Two Hundred and Fifty Thousand Dollars ($250,000) cash was unreasonable, more than necessary to assure Appellant's attendance at trial, and therefore, violative of the Eighth Amendment of the Constitution of the United States, and Section 17 of the Constitution of Kentucky, KRS 431.525 and RCr 4.16. The fact that Mr. Mr. Client's bond was reduced does not make the issue moot. It is an issue that is capable of repetition yet evading review. Had the Court of Appeals considered the merits of the appeal, it would have been apparent that the Circuit Court seemed to have taken into account the Appellant's strong ties to Puerto Rico, which is violative of Article IV, Section 2 of the United States Constitution regarding privileges and immunities. Further, the trial court found that the Appellant was a risk to others simply based on the nature of the allegation against him which is violative of the Due Process Clause of the 14th Amendment to the United States Constitution.

A. The Court of Appeals erred in refusing to find this issue is one that is capable of repetition yet evading review.

Although the trial court lowered Appellant's bond from $250,000 cash only to $25,000 partially secured at 10% on August 25, 2011 (months after his May arrest date) and Mr. Mr. Client was able to post this amount securing his freedom, this does not change the fact that Appellant was unlawfully detained for three months prior to his bond reduction. If the trial court would have given Mr. Mr. Client the bail credit to which he was entitled, no money would have needed to have been posted and he would have been released as a result of receiving that credit. Although all charges against Mr. Mr. Client were ultimately dismissed, this issue should still be reviewed as being capable of repetition yet evading review.

An action is capable of repetition yet evading review if the challenged action cannot be fully litigated prior to its expiration and there is a reasonable expectation that the complaining party will be subject to the same action. *Commonwealth v. Hughes,* 873 S.W.2d 828, 830-31 (Ky.1994). "The decision whether to apply the exception to the mootness doctrine basically involves two questions: whether (1) the 'challenged action is too short in duration to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that same complaining party would be subject to the same action again.' " *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992).

As to the first question, the issue is whether the nature of the action renders the time frame too short to permit full litigation of the issues through the appellate process. Disputes involving pretrial bond decisions are too short in duration to litigate prior to their expiration. In *Lexington Herald-Leader Co. v. Meigs,* 660 S.W.2d 658, 660 (Ky. 1983), this Court found the problem of media exclusion from voir dire capable of repetition, yet evading review. The Court quoted the United States Supreme Court's determination that "because criminal trials are typically of 'short duration,' such an order will likely 'evade review.' Id. (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 1982)).

Likewise, in *Riley v. Gibson*, 338 SW3d 230 (Ky. 2011), the media was denied access to a juror contempt hearing. The case was unquestionably moot by the time the writ had been filed with the appellate court as the hearing the media sought access to was over. However, the appellants believed the writ would serve to bar the exclusion of the media in future contempt proceedings. The Court agreed with the appellants.

The case *sub judice* is analogous to the aforementioned cases in that Mr. Mr. Client's situation is equally capable of repetition, yet evading review. Pretrial bond hearings carry the same inherent immediacy and expiration as voir dire or juror contempt hearings. As per §11 of the Kentucky Constitution, defendants have the right to a fast and speedy trial. Under RCr 9.02, the trials of all persons in custody under arrest shall be held as promptly as reasonably possible. The very nature of our criminal process could prohibit one from obtaining the benefit of any relief a higher court could give him prior to trial once the issue of bond becomes moot. For example, Mr. Mr. Client's trial was initially scheduled for September 19, 2011. The Court of Appeals would not have considered his case until October of 2011. Technically, his appeal would have become moot if he had been tried in September. The people of the Commonwealth should not be punished because of the tardiness of the system in producing cases that are "ripe" for review.

As to the second question, Kentucky courts have focused on the probability of the same controversy arising again. See *Lexington-Fayette Urban County Government v. Lexhl, LP*, 315 S.W.3d 331, 334 (Ky.App.,2009). In *Meigs*, supra, the matter involved a trial court's closure of *voir dire* proceedings in a criminal prosecution involving the death penalty. This Court recognized that individual criminal trials are typically of a short duration, but the trial courts are faced with death penalty actions on a regular basis. "The problem of when to hold individual *voir dire* in such cases, together with the important questions this raises related to public access, and more particularly news media access, to criminal trials, will likewise be with us." *Id.* at 661. Thus, this Court addressed the merits of the claim even though the particular criminal prosecution had concluded. See e.g. *Fletcher v. Commonwealth,* 163 S.W.3d 852 (Ky.2005) (Court addressed constitutionality of public services continuation plan where same situation had recurred three times in past ten years); and *Woods v. Commonwealth,* 142 S.W.3d 24 (Ky.2004) (Court addressed authority of judicially-appointed guardian to make health care decisions on behalf of the patient even though patient had already died).

Here, the issue raised by Appellant is such that it is not only likely and capable of repetition, but certain to be repeated. The trial courts are faced with pretrial bond decisions on a regular basis. This issue is not unique or specific in nature. A similarly-situated party will be subject to the same action again, and indeed, this precise factual scenario could be duplicated. There are similarly situated defendants, both in the present and the future, that need the benefit of a ruling on the issues presented by this appeal. Such a ruling could prevent a defendant from remaining in custody prior to trial, as was the case with Mr. Mr. Client.

Since this issue is a preliminary one, it is likely to evade review if not addressed at this stage of the proceedings. Because a live case or controversy on these facts would likely continue to evade the Court's adjudication in the future, the Court of Appeals erred in dismissing Appellant's appeal.

B. The Court of Appeals should have addressed the merits of the appeal and should have considered the risk assessment performed by [county name] County Pretrial Services.

A federal study has statistically validated the Kentucky court system's method of classifying defendants pretrial. The study by the JFA Institute in Washington found that Kentucky has a high pretrial release rate of 74% with low rates of rearrest and failure to appear in court among individuals who were granted pretrial release. The instrument used by pretrial takes into account the defendant's residency, seriousness of the crime (as in class of felony), prior violent crime convictions, probation or parole status, prior failures to

appear, and prior escapes. After considering all of this information, the Appellant was still classified as a low risk. The Judge's findings to the contrary seem to have been arbitrary as it was not based on the pretrial risk assessment tool, which is the only true evidence in the record as to the Defendant's risk of reoffending.

The record must demonstrate that the court actually exercised the discretion vested in it. *Abraham vs. Commonwealth*, 565 S.W.2d 152, 158 (Ky. App. 1977), requiring a trial court to consider the factors set forth in KRS 431.525 and RCr 4.16(1). See also *Kuhnle vs. Kassulke*, 489 S.W.2d 833 (Ky. 1973). The trial court's findings go against the weight of the evidence.

It is also interesting that the Appellant's bond was set at $250,000 full cash before pretrial services classified him. This would mean the trial court refused to consider the risk assessment performed by pretrial services once they were able to classify Appellant. The $250,000 bond as set by the trial court was excessive in light of the classification by pretrial services, which runs afoul of the Eighth Amendment of the Constitution of the United States, Section 17 of the Constitution of Kentucky, KRS 431.525 and RCr 4.16.

The trial court's finding that the Appellant was "a danger to others due to the severity of his current charge" infers that the court did not give Appellant the presumption of innocence as is required by the Due Process Clause of the 14th Amendment to the United States Constitution and *Taylor v. Kentucky*, 436 US 478 (1978). Further, as stated by the Kentucky Court of Appeals in *Abrams v. Commonwealth*, 254 Ky. 68 (Ky. App. 1934):

> The purpose of requiring bail bonds is not to enrich the treasury, but to secure the administration of justice…the primary object of the law is to punish the criminal. The bond is allowed to be given **for the convenience of a person not yet proved to be guilty,** and to protect the state against the expense of keeping such persons in jail.

The trial court's refusal to allow for the bail credit runs afoul of not only the spirit of House Bill 463, but also the mandate in the *Abrams* decision. The Court of Appeals failed to consider this argument.

C. The Court of Appeals should have considered merits of the appeal and should have considered that citizens from Puerto Rico should be entitled to the same rights as all other U.S. Citizens.

As stated in the trial court's Order, the Judge considered argument from counsel for the Appellant and the Commonwealth. Both sides addressed the Appellant's ties to Puerto Rico, an American territory with the same extradition practices as the rest of the United States. See *Puerto Rico v. Branstad,* 483 U.S. 219, 107 S. Ct. 2802, 97 L. Ed. 2d 187 (1987), stating that the Extradition Clause applies to all U.S. territories. It is only reasonable to believe the trial court considered this issue when determining bond. As Mr. Client is a natural born citizen of the United States it would be a violation of the United States Constitution, Article IV, Section 2, Clause 1 to treat him in a different manner than the court treats citizens of its own state. Under the Privileges and Immunity clause, the citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. This specific Constitutional principle regarding Puerto Rico is codified under U.S. Code § 737: Privileges and Immunities. The Court of Appeals failed to consider the merits of this argument.

D. The Court of Appeals should have considered the merits of the appeal and should have considered that the Commonwealth failed to prove why Mr. Mr. Client is a flight risk.

Appellant should not have been deemed a "flight risk" because of the strength of the merits of his case. If it is true that defendants flee because they believe they will be convicted, then it ought also be true that defendants who believe they will win their case will not flee. Appellant believed he could have prevailed (and he did in fact prevail by way of dismissal) on the merits due to the statutory elements that must have been met in order for the Commonwealth to prevail on the theory of complicity. Mr. Mr. Client's mere presence was not enough; the Commonwealth must show "specific intent to promote or facilitate the commission of the offense." *Harper v. Commonwealth*, 43 S.W.3d 261 (2001) and *McIntosh v. Commonwealth*, 582 S.W.2d 54 (1979). It was unlikely that Appellant would have fled on this case given the testimony that was already in the record. The nature of the offense was not enough to find flight risk or future dangerousness. See *Abraham vs. Commonwealth*, 565 S.W.2d 152, 158 (Ky. App. 1977). The Court of Appeals failed to consider the merits of this argument.

CONCLUSION

Mr. Client was prejudiced by the Court of Appeals' dismissal of his appeal. He requests that this Court accept review of the Court of Appeals' Opinion in this case.

Respectfully submitted,

_____

ATTORNEY

Notes

Notes

Acknowledgements

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B. Scott West

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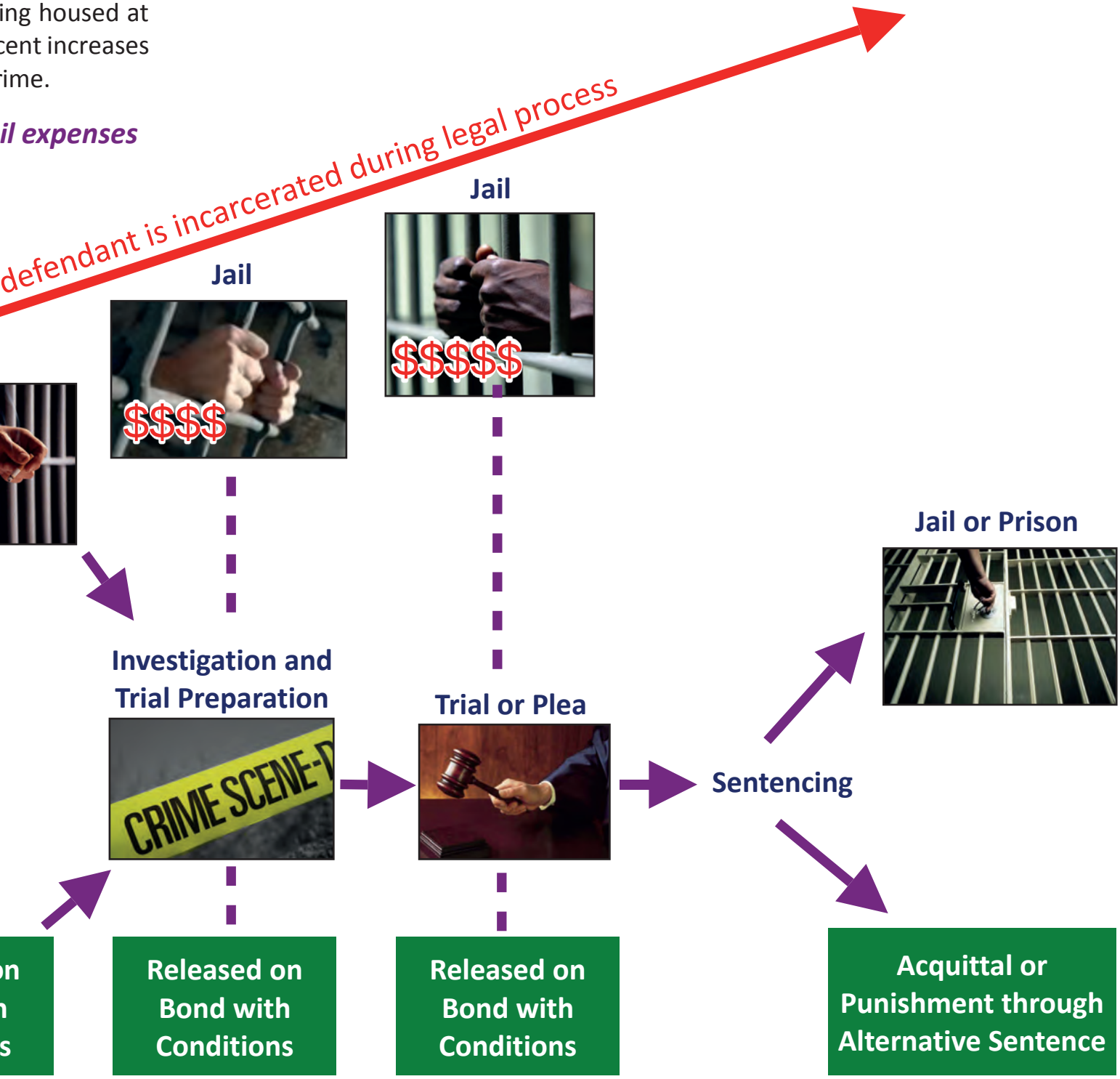

th of time spent on pretrial release, according to the AOC

Appendix

Chapter Two: The Right to Counsel and the Importance of Early Appearance

Browne, Valetta, Directing Attorney, Richmond Trial Office, DPA: "Initial Appearance of Counsel Vital to Client Pretrial Release: Saving County Jail Costs, Increasing Efficiency," *The Advocate,* August, 2011.

Graham, Ashley, Public Defender Corps Fellow, Covington Trial Office, DPA: *"Argersinger v. Hamlin:* The Importance of Legal Representation in Misdemeanor Cases," *The Advocate*, December, 2011.

Chapter Three: Statutes and Rules Pertaining to Bail

West, B. Scott, General Counsel, DPA: "Changes in Pretrial Release from HB 463: 'The New Penal Code and Controlled Substances Act,'" *The Advocate,* August, 2011.

Chapter Six: Circuit Court Appeals

Arnold, Tim, Post-Trial Division Director, DPA, "HB 463 and its Impact on Kentucky Appellate Standards," *The Advocate,* October, 2011.

McClister, Glenn, Education Branch, DPA, "An Important Matter of Policy: Why Kentucky Courts Should Adopt De Novo Review of Pretrial Release Provisions," *The Advocate,* October, 2011.

Chapter Eight: Mootness and Motions for Discretionary Review

Crabbe, Heather, Boone County Trial Office, DPA, and Shannon Dupree Smith, Appellate Branch, DPA, "Bond Appeals: Releasing the Client Should Not Moot the Issues," *The Advocate*, November, 2011.

Chapter Nine: Federalizing the Argument for Bail

Ibarra, Ray, Public Defender Corps Fellow, Covington Trial Office, DPA, "*U.S. v. Salerno:* The Due Process Required to Detain a Person Prior to Trial and the Indigent Defendant," *The Advocate*, November, 2010.

Valetta Browne

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

Valetta Browne, Directing Attorney, Trial Services, DPA

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

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

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

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

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

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

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

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

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

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

For if not us, then who?

Ashley Graham

***Argersinger v. Hamlin*: The Importance of Legal Representation in Misdemeanor Cases**

Ashley Graham, Public Defender Corps Fellow, Covington Trial Office

In its unanimous opinion, *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), the United States Supreme Court clearly states that a defendant's Sixth Amendment right to counsel is attached by the time of entering a guilty plea. Although the Court notes that the trial judge is not required to follow an exact script, it outlines a basic starting point for ensuring a "knowing" and "intelligent" waiver of the right to counsel: "The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Id.* Later in its opinion, the Court adds another layer to this baseline instruction by requiring that the colloquy incorporate advice based on "case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Id.* at 88 (citation omitted). In short, a defendant who intends to enter a guilty plea and waive his right to counsel deserves constitutionally-required individualized attention.

Misdemeanor cases have been overcrowding court dockets and creating mammoth caseloads for at least the past thirty years. *See* Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, Nat'l Assoc. of

Criminal Defense Lawyers, April 2009, *available at* www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808. Factor in an overall lack of resources, and the shortcomings of the criminal justice system become glaringly apparent: "An inevitable consequence . . . is the almost total preoccupation . . . with the movement of cases. . . . 'Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way.'" *Argersinger v. Hamlin*, 407 U.S. 25, 34-35 (1972) (citations omitted). Aside from these systemic pressures, a closer look at the indigent-misdemeanant population reveals numerous internal and personal pressures weighing on the individuals. We see that they too are motivated to resolve their cases as quickly as possible (*i.e.*, kids to feed, rent to pay, jobs to work, addictions to satisfy). The misdemeanor defendant's mentality of "I just want to go home today" often means that his first appearance before the judge is also his last.

At arraignment, this misdemeanor defendant probably (hopefully) will be informed of the charges against him and receive some kind of offer from the prosecution. He may be asked if he has an attorney but will not be appointed counsel unless he affirmatively requests a public defender. This defendant stands alone at the podium, under an impression that the prosecutor's offer is set to expire in about 30 seconds, and pleads guilty to just end the whole matter. He leaves with a fine and term of probation, which may seem like a slap on the wrist until he tries to get employment, education, housing, or loans, or is picked back up by the system in the next two years when he still has time on the shelf.

Without information or thought about the collateral consequences of a conviction, misdemeanor defendants are making these hasty plea decisions every day. Judges and lawyers should not be taken in by this same short-term thinking. Yes, court will take longer and public defenders will get appointed to more cases. Taking a step back with an eye on the big picture reveals how the rush to resolve cases also runs the inevitable risk of backlogging the system down the road.

Consider the following example based on the facts in *Dixon v. Commonwealth*, 982 S.W.2d 222 (Ky. App. 1998). The defendant, Mr. Jones, is arrested under KRS 189A.090 for driving on a DUI-suspended license, second offense and receives an offer of time served. To complicate matters, Mr. Jones already pled guilty last year to a DUI first and had his license suspended for 90 days. Like the defendant in *Dixon*, Mr. Jones failed to complete the necessary alcohol treatment classes to get his license back. Six months later, he is arrested for driving on a DUI-suspended license, first offense, and pleads guilty – without counsel – at arraignment. Another six months passes and Mr. Jones – still without a license – is picked up on his second offense under KRS 189A.090 (above). Thinking that he is in fact "guilty" of the crime charged (after all, he was caught driving with a license that was suspended because of his DUI), the time-served offer sounds pretty good. A third offense is a felony, but for now, Mr. Jones gets to go home instead of going to jail. Without any sort of waiver colloquy, he forgoes his right to counsel and takes the offer.

Unfortunately, Mr. Jones is not guilty of either offense for driving on a DUI-suspended license. The Kentucky Court of Appeals held in *Dixon* that "KRS 189A.070 provides for a specific license suspension period based upon the number of violations of [the DUI law]. Once the suspension period has expired, one whose license has been suspended can reapply for his driving privileges once he has complied with KRS 189A.070(3), by completing an alcohol abuse treatment program." 982 S.W.2d at 224. Basically, Mr. Jones was "conditionally eligible" for reinstatement of his driving privileges after the 90 day suspension period, *id.*; his license remained suspended only because of his failure to complete the treatment program. Therefore, instead of being prosecuted under KRS 189A.090, Mr. Jones should have been charged both times with driving on a suspended license under KRS 186.620(2), which does not enhance to a felony.

When Mr. Jones is picked up for his third offense, he is charged with a felony and is appointed counsel. His attorney will now have to file a motion to have the two prior convictions set aside for enhancement purposes under *Boykin v. Alabama*, 395 U.S. 238 (1969), and KRS 189A.310: "A court may ... order that a prior conviction not meeting applicable case law regarding admissibility of a prior conviction cannot be used to enhance criminal penalties including license suspensions...."

In what universe does this support judicial economy? What could have been forestalled by appointing counsel at the earliest opportunity has now caused the system to come to a screeching halt and to start backtracking in order to remedy the situation. Even if Mr. Jones decided to proceed *pro se* and plead guilty, the trial judge should have informed him of the collateral consequences, including the potential enhancement or the danger of pleading to something of which he may or may not be guilty – regardless of the facts as he believes them to be.

The reality is that a colloquy takes up some of the court's time and appointment of counsel adds another client to a public defender's caseload. Perhaps a better solution is to shift the focus to the types of misdemeanor cases that are actually ending up in district court and question whether those cases are best handled by the criminal justice system. *See also Decriminalization of Minor Offenses*, A.B.A. Criminal Justice Section, *available at* http://www2.americanbar.org/sections/criminaljustice/CR203800/PublicDocuments/minoroffenses.pdf (urging the decriminalization of minor crimes, which clog court calendars and waste prosecutorial resources that could be spent on investigation and more serious cases, and imposing civil citations to generate a stream of income for states). As long as poverty and unemployment rates continue to hover around all-time highs and the trend of over-criminalization wins out in state legislatures, we can expect the crisis of the misdemeanor docket to persist. The fact of the matter, however, is that an informed waiver and appointment of counsel are also part of every individual's basic constitutional guarantees and part of our jobs as judges and lawyers.

B. Scott West
DPA General Counsel

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

Brian Scott West,
General Counsel, DPA

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

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

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

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

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

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

V. Judicial Guidelines for Pretrial Release of Moderate-Risk or High-Risk Defendants. Most of the HB 463 pretrial release provisions refer to persons who are found to be at a "low risk" or "moderate risk" to flee, not come to court, or pose a danger to others. However, the General Assembly also put language into the bill for those persons who are found to be high or moderate risk, and who otherwise would be ordered to a local correctional facility while awaiting trial. For those persons, the Supreme Court is required to establish recommended guidelines for judges to use when determining whether pretrial release or monitored conditional release should be

ordered, and setting the terms of such release and/or monitoring. KRS 27A.096. Likewise, KRS 431.067 provides that, when considering the pretrial release of a person whose pretrial risk assessment indicates he or she is a moderate or high risk defendant, the court considering the release may order as a condition of pretrial release that the person participate in a GPS monitoring program.

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

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

If the defendant poses a low or moderate risk of flight, is likely to appear for trial, and is not likely to be a danger to others, the court SHALL order the defendant released on unsecured bond or his own recognizance, and in the case of a moderate risk, the court shall consider ordering the defendant to participate in GPS monitoring, controlled substance testing, increased supervision, or other conditions.

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

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

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

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

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

Tim Arnold

HB 463 and its Impact on Kentucky Appellate Standards

Tim Arnold, Post-Trial Division Director

It has long been recognized that "[u]nless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 72 U.S. 1, 3 (1951). The Eighth Amendments' prohibition against excessive bail has been held to apply to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 U.S. 3020, n. 12 (2010). Moreover, Kentucky has its own constitutional equivalents - § 16, which provides that all non-capital offenses shall be "bailable by sufficient securities", and § 17, which provides that "excessive bail shall not be required...." These provisions alone have provided a legal basis to challenge a trial court's decision respecting bond.

For most of Kentucky's history a person who wished to challenge a decision concerning pretrial release did by filing a writ of habeas corpus. In general, these writs did not give rise to a new bond proceeding, but instead were based on a review of the record on which the court relied in setting bond, or the description of that record by the parties. *See, e.g., Adkins v. Regan*, 233 S.W.2d 402 (Ky. 1950)(relying on the unrefuted statements in Appellant's brief, because no transcript had been made of the lower court testimony); *Thacker v. Asher*, 394 S.W.2d 588 (Ky. 1965)(relying on record of proceedings before the quarterly court); *Marcum v. Broughton*, 442 S.W.2d 307 (Ky. 1969) (relying on record created in initial bond proceeding); *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971)(relying on record in initial bond proceeding).

The standard employed in a writ of habeas corpus appeal was defined in *Smith v. Henson*, 182 S.W.2d 666 (Ky. 1944): "[T]he primary, if not the only, object of habeas corpus is to determine the legality of the restraint under which a person is held… We must, therefore, view the proceeding to obtain bail by the method of habeas corpus as a test of the legality of the judgment or action of the court on the motion for bail…."

Shortly after Kentucky amended its constitution to modernize judicial proceedings, Kentucky adopted the approach taken by the United States Supreme Court in *Stack v. Boyle*, *supra*, and found that an appeal of a bond decision in circuit court may be taken directly to the Kentucky Court of Appeals. In *Abraham v. Commonwealth*, 565 S.W.2d 152 (1977), the court established an expedited procedure for directly appealing a bond decision in the Circuit Court. Habeas corpus remains the appropriate method to challenge the decisions of the District Court. *Id*., at 156. Those rules were subsequently codified in RCr 4.43.

As the review of bond is an exercise in appellate review, appellate standards of review apply. On appeal, factual findings generally must be supported by substantial evidence in the record, and legal conclusions may be reviewed de novo. *Blades v. Commonwealth*, 339 S.W.3d 450 (Ky. 2011). "Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence has sufficient probative value to induce conviction in the minds of reasonable men." *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky.2008)(internal citations and quotations omitted). Findings which are not supported by substantial evidence are said to be "clearly erroneous." *Id*. Where the court's decision is an exercise of discretion, the appellate court will review the matter for an abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

In *Braden v. Lady*, 276 S.W.2d 664, 667 (Ky. 1955) the High Court discussed the discretionary nature of bonds pending appeal, finding that "[o]ne ironbound rule is the reviewing court will not substitute its judgment for that of the trial judge who is in a better position than we to size up the facts and circumstances which should control judicial discretion in fixing the amount of the appeal bond." Subsequently, in *Long v. Hamilton, supra*, the High Court relied on *Braden* and the resources cited therein in resolving a pretrial bond matter, concluding that "[a]ppellate courts will not attempt to substitute their judgment for that of the trial court and will not interfere in the fixing of bail unless the trial court has clearly abused its discretionary power." *Long, supra* at 141. This language has governed subsequent decisions concerning the appellate review of bond.

However, the reliance on *Braden* appeals of pretrial bonds is both unfortunate and misplaced, and has resulted in a standard of review which overstates the level of deference to be given to the trial court's decision. As the Braden Court noted, authorities "deal[ing] with appearance bonds before trial… have little bearing on the question" of appeal bonds. *Braden, supra* at 666. Unlike pretrial release issues, where the court is required to take action, bond pending appeal is not a right at all, is afforded no constitutional protection, and has always been completely at the discretion of the Court. By contrast, when interpreting the Eighth Amendment, the Supreme Court has noted that "there is no discretion to refuse to reduce excessive bail ..." *Stack v. Boyle, supra* at 6.

Fortunately, the choice of language in *Long* has not signaled an abandonment of the appellate court's duty to review bond decisions. Quite the contrary, in a majority of the bond cases published since 1950 involving non-capital offenses, the appellate court reversed the trial court's decision on pretrial release: *Adkins v. Regan, supra* ($5000 peace bond excessive); *Marcum v. Broughton, supra* (Modification of $10,000 bond inappropriate in the absence of a violation of terms and conditions of release); *Lunsford v. Commonwealth*, 436 S.W.2d 512 (Ky. 1969)($15,000 peace bond excessive); *Long v. Hamilton, supra* ($150,000 bond in narcotics case excessive); *Kuhnle v. Kassulke*, 489 S.W.2d 833 (Ky. 1973)(Trial court erred by denying hearing on motion to reduce bond); *Abraham v. Commonwealth, supra* (Trial court erred by setting bond based only on the offense). In light of this history, there is reason to believe

that appellate courts will try to phrase the standard of review in bond cases with more precision, especially as the issue of pretrial release gains more attention.

Most importantly, regardless of the standard for determining whether a bond is constitutionally excessive, the statutory framework for bond decisions is imposing more readily enforceable limitations on a trial court's ability to set bond. Under the new HB 463 provisions, certain decisions are no longer discretionary with the court. A person who is low or moderate risk, or who charged with a drug offense for which presumptive probation applies, shall be released on his or her own recognizance or on an unsecured bond, unless the court makes certain findings based on the evidence presented at the bond hearing. KRS 218A.135; KRS 431.066(2) and (3). Where a financial bond is authorized, the Court is required to give the defendant credit of $100 a day towards the bond amount, for each day the defendant serves, except in certain limited circumstances. KRS 431.066(4). In setting a bond amount, the court is required to ensure that the amount meets the criterion of KRS 431.525(1). All of these provisions are phrased in mandatory language, so the decisions of the trial court will be reviewed to determine whether factual findings are supported by substantial evidence in the record. The court's opinion that an individual is really a flight risk, or a danger to others, is unlikely to withstand scrutiny unless there is evidence in the record to support that belief.

In short, there has never been a more pressing need to challenge pretrial release decisions which run afoul of Kentucky law. Given the history of such challenges, and the current legal landscape, there is every reason to expect that the appellate courts will continue to perform the essential function of protecting the presumption of innocence by ensuring that reasonable bonds are set in all cases.

Glenn McClister

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

Glenn McClister, Education Branch

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

Choosing an Appropriate Standard of Review for Pretrial Release Decisions

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

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

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

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

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

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

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

century[4]. The United States Supreme Court has said that it knows of no rule or principle that would unerringly distinguish a factual finding from a legal conclusion[5].

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

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

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

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

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

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

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

Appellate Review of Constitutional Facts

Undoubtedly the most important types of mixed questions of law and fact to society are those questions which affect the enjoyment of a constitutional right. These rights are the legal embodiment of many, if not all, of our most cherished societal values. When the answer to a mixed question of law and fact effects the enjoyment of a constitutional right, the mixed question of law and fact is often referred to as a "constitutional fact."[9]

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

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

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[4] See Kelly Kunsch, Standard of Review (State and Federal): A Primer, 18 Seattle U. L. Rev. 11, 16 (Fall, 1994).
[5] *Pullman-Standard v. Swint*, 456 U.S. 273, 288, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).
[6] Henry Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 237 (March, 1985).
[7] Kunsch, at 22.
[8] *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).
[9] The term 'constitutional fact' was coined by Professor Dickinson in his article, *Crowell v. Benson*: Judicial Review of Administrative Determinations of 'Constitutional Fact,' 80 U. Pa. L. Rev. 1055 (1932). The term refers to any mixed question of law and fact when constitutional rights turn on the factual determination. See Judah Shechter, De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights, 88 Colum. L. Rev. 1483 (Nov. 1988). For more discussion of do novo review of constitutional facts, see also Arthur Lawson, The Doctrine of 'Constitutional Fact,' 15 Temp. L. Q. 185 (1941); Adam Hoffman, Note, Corralling Constitutional Fact: De Novo Review in Federal Appellate Courts, 50 Duke L. J. 1427 (2001); Rachel Pine, Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights, 136 U. Pa. L. Rev. 655 (1988); Bryan Adamson, Federal Rule of Civil Procedure 52(A) as an Ideological Weapon?, 34 Fla. St. U. L. Rev. 1025 (Summer, 2007).
[10] *Shechter*, at 1486-87.

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of the supreme function."[11]

The Court said that to deny appellate courts this ability, "…would be to sap the judicial power as it exists…wherever fundamental rights depend, as not infrequently they do depend, as to facts, and finality as to facts becomes in effect finality in law."[12]

Although federal courts have never delineated the specific constitutional concerns which must be protected by heightened independent appellate review, federal courts have expressly required some form of *de novo* review in a number of cases requiring the adjudication of facts effecting constitutional rights. For example: whether an award of punitive damages was excessive, violating due process and the Eighth Amendment prohibition against cruel and unusual punishment, *Cooper Industries v. Letterman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2000); whether a fine in a criminal case was excessive, violating the Eighth Amendment prohibition against cruel and unusual punishment, *United States v. Bajakajian*, 524 U.S. 321, 336, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998); whether otherwise protected speech was uttered with actual malice in a libel case, *Bose Corporation v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501, 104 S.Ct.1949, 80 L.Ed.2d 502 (1984); whether otherwise protected speech contained obscene material, *Jacobellis v. Ohio*, 378 U.S. 184, 190 and n.6, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); whether a person is "in custody" for purposes of the right to habeas review, *Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995); whether the performance of defense counsel was reasonable in a criminal case, effecting the right to an attorney, *Strickland v. Washington*, 466 U.S. 668, 698. 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); whether a potential conflict existed in a case of multiple representation, effecting the right to an attorney, *Cuyler v. Sullivan*, 446 U.S. 335, 341, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); whether a defendant waived his constitutional rights, *Brewer v. Williams*, 430 U.S. 387, 403-404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); whether pretrial identification procedures were sufficiently non-suggestive, *Sumner v. Mata*, 455 U.S. 591, 597, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); the correctness of trial court determinations of reasonable suspicion and probable cause, *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), and *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *de novo* review of whether hearsay statements violated the Confrontation Clause of the Sixth Amendment, *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).

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

A few recent Supreme Court cases have strongly suggested that *de novo* review is appropriate when the resolution of a mixed question of fact and law affects constitutional rights. In *Bose*, the Court of Appeals reviewing the proceedings in District Court had failed to follow the clearly erroneous standard of review laid out in federal rule 52(a), which says that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[14] The court said,

> "But Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.[15]

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

> "At some point, the reasoning by which a fact is 'found' crosses the line between the application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment."[16]

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[11] *Crowell*, at 296.

[12] *Crowell*, at 295.

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

[14] Kentucky's CR 52.01 is almost identical: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky's RCr 9.78 is similar: "If supported by substantial evidence the factual findings of the trial court shall be conclusive."

[15] *Bose* at 501.

[16] *Bose* at 501, n. 17.

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

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

So we have recent Supreme Court cases disposing of both clearly erroneous and abuse of discretion standards of review and requiring *de novo* review instead, in "constitutional fact" cases involving mixed questions of fact and law implicating the rights contained in the constitution. Although none of the cases provide a detailed analysis of the applicability of the *de novo* requirement to the states, the language in *Bose* is especially clear in grounding the necessity of *de novo* review in the constitutional issue at stake. If *de novo* review is a "constitutional responsibility," and not just a necessity under some power held by only the Supreme Court or by only federal courts, then the requirement of *de novo* review applies to the states.

Decisions Regarding Pretrial Release Are Constitutional Fact Decisions

Both the United States and the Kentucky constitutions prohibit excessive bail.[22] The Eighth Amendment to the United States Constitution's prohibition against excessive bail has been applied to the states through the Fourteenth Amendment.[23] The Kentucky Constitution requires that all non-capital cases be "bailable by sufficient securities."[24]

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

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

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

1. Recent Supreme Court cases strongly suggest *de novo* review is constitutionally mandated when a constitutional right turns on a mixed question of law and fact, even in instances when lower standards of review may have previously been thought appropriate.
2. The factual/legal determinations in question bear upon a deeply cherished societal value: the presumption of innocence. With very limited exceptions, no one should be deprived of his or her liberty without having been found guilty of the crime with which he or she is charged.
3. The need for guidance and unified application of the law is great. The problem which the Court referred to in *Ornelas* is a problem in Kentucky. Different decisions regarding pretrial release are being made based on often almost identical sets of

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[17] *Bose* at 501. Statements like these have led Professor Lafave to cite *Bose* and comment that, "[t]he Supreme Court's rulings on standards of appellate review are sometimes constitutionally grounded and thus applicable to the states," and says of *Ornelas* as well, "the analysis (in Ornelas)certainly suggests that this is the case as to the Ornelas holding." 6 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §11.7(c), at 445-46 (4th ed. 2004).
[18] *Ornelas* at 699.
[19] *Ornelas* at 700.
[20] *Bajakajian* at 336, n. 10.
[21] *Lilly* at 136.
[22] Eighth Amendment to the United States Constitution, §17 of the Kentucky Constitution.
[23] See the list of protections applied to the state under the Fourteenth Amendment listed in McDonald v. City of Chicago, 78 USLW 4844, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), notes 12, 13.
[24] §16 of the Kentucky Constitution.
[25] *Stack v. Boyle*, 342 U.S. 1, 5, 72 S.Ct. 1, 3, 96 L.Ed. 3 (1951).
[26] See for example KRS 218A.135 and KRS 431.066(2)&(3).

facts. The men and women being granted pretrial release in one county are being denied pretrial release in the next county over. Only *de novo* appellate review will rectify this situation.

4. Proportionality requires *de novo* review of bail decisions. With all the other mixed questions of fact and law already under *de novo* review in Kentucky, there is no good reason to continue to limit review of bond decisions to the overly deferential abuse-of-discretion standard.

5. As a matter of institutional policy, the appellate standard of bond review needs to be unified with other standards of bond review. Habeas review of bond is clearly *de novo* under Kentucky law.[27] The judge can allow discovery, take evidence, and order release of the defendant. Sixth Circuit review of bond decisions is *de novo*.[28]

An independent review of lower court decisions to release or detain defendants will encourage the lower courts to consider alternatives to detention. The reviewing court should not feel bound to the lower court decision and should feel free to amend or modify the terms of release as if it were the initial decision maker.[29]

Heather Crabbe

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Bond Appeals: Releasing the Client Should Not Moot the Issues

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This year's enactment of HB 463 prompted significant change in the way criminal defense attorneys advocate pretrial release for clients. The legislature deviated substantially from the bond consideration factors previously provided to the judiciary (compare new KRS 431.066 to 431.525 prior to the latter's amendment). Hopefully, the result will prove to be a great deal many more persons released from jail pretrial under the presumption of innocence. Nevertheless, a corollary result of HB 463 has been a greater number of appeals than ever before, both by writ of habeas corpus at the district court level, and by regular appeal to the Court of Appeals at the circuit court level.

Sometimes, perhaps as a result of the appeal being filed, an agreement on bail is reached which frees the client. In that event, is the appeal now moot? Can the court sitting in appellate jurisdiction continue to decide the issues of bond that were presented prior to the client's release, or must the appeal be dismissed?

Present published case law suggests that the appeal can still go forward to a decision, and the issue of bond is not moot until the final disposition of the case. For one reason, a person who is free on bond is still subject to having his bond modified or revoked at any time, which would bring back into question whether the bond has been properly decided. While not specifically addressing issues of bond, cases involving the wrongful detention of defendants have held that the release of such individuals did not deprive the courts of deciding the issues of law which resulted in their detention in the first place.

Continuing Legal Interests of the Accused

In *Rosales-Garcia v. Holland,* 322 F.3d 389 (6th Cir. (Ky) 2003), the Sixth Circuit held that a Cuban citizen's appeal of the denial of his habeas petition, in which he challenged his indefinite detention following revocation of his immigration parole and pending Cuba's acceptance of his return, was not rendered moot when he was released from detention and paroled into the United States, inasmuch as he was still "in custody" for purposes of habeas statute, and relief sought, if granted, would make a difference to his legal interests, in that he would no longer be subject to possibility of revocation of parole "in the public interest." *Id.*

In *Jones v. Cunningham,* 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), the United States Supreme Court held that a paroled prisoner was in the custody of his state parole board for the purposes of 28 U.S.C. § 2241: "While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the meaning of the habeas corpus statute...." *Jones,* 371 U.S. at 243, 83 S.Ct. 373; *see also DePompei v. Ohio Adult Parole Auth.,* 999 F.2d 138, 140 (6th Cir.1993).

In *Spencer v. Kemna,* 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), the Court addressed the issue of mootness: "The parties must continue to have a personal stake in the outcome of the lawsuit. This means that, throughout the litigation, the plaintiff must have

[27] These are the characteristics of a trial de novo. KRS 419.100.
[28] "A review of case law in the eleven circuits reveals that all circuits but one have concluded that a district court must conduct de novo review of a magistrate judge's order of pretrial detention. Matthew Hank, District Court Review of a Magistrate Judge's Pretrial Detention Order, 33 UWLA L. Rev. 157 (2001).
[29] Michael O'Neill, A Two-Pronged Standard of Appellate Review for Pretrial Bail Determinations, 99 Yale L. J. 885 (Jan. 1990).

suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* (quotations and citations omitted).

In a case where a defendant is unable to make bond, but then released, his bond can be changed by the trial court at any time for almost any reason. When this happens, the defendant may be placed back on the original bond that he was unable to make and is thus threatened with an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. Therefore, the defendant's bond appeal is not moot. Given the fact that House Bill 463 is new law and there are no written opinions regarding it yet, all parties in this matter should want guidance from the higher Court as to how it is to be applied if the Circuit Court judge should ever be asked to review the Appellant's bond again.

Capable of Repetition, Yet Evading Review

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

As to the first question, the issue is whether the nature of the action renders the time frame too short to permit full litigation of the issues through the appellate process. Disputes involving pretrial bond decisions are too short in duration to litigate prior to their expiration. In *Lexington Herald-Leader Co. v. Meigs*, 660 S.W.2d 658, 660 (Ky. 1983), the Kentucky Supreme Court found the problem of media exclusion from voir dire capable of repetition, yet evading review. The Court quoted the United States Supreme Court's determination that "because criminal trials are typically of 'short duration,' such an order will likely 'evade review.' Id. (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 1982)).

Likewise, in *Riley v. Gibson*, 338 SW3d 230 (Ky. 2011), the media was denied access to a juror contempt hearing. The case was unquestionably moot by the time the writ had been filed with the appellate court as the hearing the media sought access to was over. However, the appellants believed the writ would serve to bar the exclusion of the media in future contempt proceedings. The Court agreed with the appellants.

Bond appeal cases are analogous to the aforementioned cases because they are equally capable of repetition, yet evading review. Pretrial bond hearings carry the same inherent immediacy and expiration as voir dire or juror contempt hearings. As per §11 of the Kentucky Constitution, defendants have the right to a fast and speedy trial. Under RCr 9.02, the trials of all persons in custody under arrest shall be held as promptly as reasonably possible. The very nature of our criminal process could prohibit one from obtaining the benefit of any relief a higher court could give him prior to trial once the issue of bond becomes moot.

In one appeal filed by the authors, the client's initial trial was scheduled for September 19, 2011. The Court of Appeals motion panel assigned to hear the bond appeal, however, was not scheduled to meet until October, 2011. Technically, his appeal would have become moot if he had been tried in September. The people of the Commonwealth should not be punished whenever bond appeals, despite expedited review, nevertheless fall behind speedy trials on the calendar.

As to the second question, Kentucky courts have focused on the probability of the same controversy arising again, even where the harm contemplated would not necessarily arise with respect to the original defendant. See *Lexington-Fayette Urban County Government v. Lexhl, LP*, 315 S.W.3d 331, 334 (Ky.App.,2009).

In *Meigs*, supra, the matter involved a trial court's closure of *voir dire* proceedings in a criminal prosecution involving the death penalty. The Kentucky Supreme Court recognized that individual criminal trials are typically of a short duration, but the trial courts are faced with death penalty actions on a regular basis. "The problem of when to hold individual *voir dire* in such cases, together with the important questions this raises related to public access, and more particularly news media access, to criminal trials, will likewise be with us." *Id.* at 661. Thus, the Supreme Court addressed the merits of the claim even though the particular criminal prosecution had concluded. See e.g. *Fletcher v. Commonwealth,* 163 S.W.3d 852 (Ky.2005) (Supreme Court addressed constitutionality of public services continuation plan where same situation had recurred three times in past ten years); and *Woods v. Commonwealth,* 142 S.W.3d 24 (Ky.2004) (Supreme Court addressed authority of judicially-appointed guardian to make health care decisions on behalf of the patient even though patient had already died).

The issue of a criminal defendant being unable to bond out of jail is not only likely, but certain to be repeated. The trial courts are faced with pretrial bond decisions on a regular basis. This issue is not unique or specific in nature. And regardless of the reasons why a particular individual is not released (perhaps due to a finding of flight risk or danger to the community or both) there are certain to be similarly situated defendants, both in the present and the future, that need the benefit of a ruling on the issues presented appeals.

Ultimately, the Courts will interpret the bond statutes as modified by HB 463 and render opinions that provide guidance for the citizenry of the Commonwealth, and the defendants who are brought to answer for charges in the courts of this state. Until we have ample

authority upon which the criminal bar and the trial courts can make decisions, the appellate courts should continue to decide cases whenever a question of law that has yet to be decided appears before them, and not dismiss on ground of mootness merely because the client has been released. The issue, most likely, will rise again.

Ray Ibarra

U.S. v. Salerno: The Due Process Required to Detain a Person Prior to Trial and the Indigent Defendant

Ray Ibarra, Public Defender Corps Fellow, Covington Trial Office

Recent Supreme Court cases have reinforced the long held assumption that the Eighth Amendment prohibition on excessive bail applies to the states through the Fourteenth Amendment. *See McDonald v. City of Chicago*, 130 S.Ct. 3020, 3034-35, n.12 (2010); *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). In *U.S. v. Salerno,* 481 U.S. 739 (1987), the court also applied the Due Process Clauses of the Fifth and Fourteenth Amendments to the constitutional limitations on which defendants can be permissibly detained without bond. This article outlines the impact of this constitutional limitation on Kentucky's detention and bond statues, specifically addressing why this limitation should prevent indigents from being detained with cash bonds unless the test for pretrial detention in *Salerno* is met.

The Constitutional Floor: Two Limits on Pre-Trial Detention

The Supreme Court addressed the constitutionality of pre-trial detention without bond in *Salerno*. Prior to *Salerno*, the Court had established that the Eighth Amendment prohibits setting bail higher than what is reasonably calculated to assure that the accused will appear at trial. *See Stack v. Boyle* 342 U.S. 1 (1951). In *Salerno*, the Court recognized that the Fifth and Fourteenth Amendments also prohibited pretrial detention without due process. *Salerno*, 481 U.S. 739. Due process requires, among other things, a showing of compelling governmental interest in pretrial detention. *Id*.

In *Salerno, t*he Court took up the question whether future dangerousness to others could be a compelling governmental interest sufficient to deny bail consistent with the Fifth and Eighth Amendments, and if so, under what circumstances. It held that the protection of the community was a sufficiently compelling governmental interest which might overcome the defendant's pretrial liberty interest. *Salerno*, 481 U.S. at 752. The Bail Reform Act of 1984, 18 U.S.C §3141, et seq., reviewed in *Salerno*, was held not to violate the Eighth Amendment reasonable bail clause on a similar basis. *Id.* at 754-55. As to other due process requirements, in order to detain a person pretrial, the Act required the government to show that no conditions of release or bond could assure the appearance of the person in court and provide for the safety of the community. 18 USC 3142(e); *Salerno*, 481 U.S. at 750. It required (1) the government to apply for an evidentiary hearing in which the government would have to make this showing by clear and convincing evidence and (2) the defendant was represented by counsel. 18 USC 3142(f). The Court reasoned that the Act's requirement of a hearing at which the government must demonstrate dangerousness by clear and convincing evidence sufficiently protected the due process rights of defendants who were entitled to release. Only where the government could meet its burden at this hearing did the governmental interest in pretrial detention outweigh the defendant's liberty interest and his right to reasonable bail. *Id.* at 750, 754-55.

Prior to *Salerno*, the Court had required clear and convincing evidence in other cases as the basis for overcoming liberty interests in the detention context. In *Addington v. Texas*, 441 U.S. 418 (1979), the Court required clear and convincing evidence of dangerousness to others as the standard of proof for involuntary commitment of the mentally ill. It required clear and convincing evidence as the standard for post-trial confinement of those acquitted on the ground of insanity in *Foucha v. Louisiana*, 504 U.S. 71 (1992). In both cases, the Supreme Court stressed the importance of the right to a hearing and the clear and convincing evidence standard. *Addington,* 441 U.S. 418, 431-33; *Foucha*, 504 U.S. 71, 79-80. The right to a hearing, counsel, and proof by clear and convincing evidence is common to all these situations and provides additional rationale for the standard set forth in *Salerno*.

If *Salerno* sets the constitutional floor for pre-trial detention, then Kentucky law must be interpreted to require a hearing in which the Commonwealth, by clear and convincing evidence, establishes that the defendant poses a danger to others or a risk of flight prior to detention, whenever the Commonwealth seeks a bond higher than necessary to assure appearance. Kentucky law already substantially complies with these requirements. The requirement of reasonable bail found in the Eighth Amendment is echoed in Section 17 of the Kentucky Constitution and is also codified in rule and statute. KRS 431.520; RCr 4.12. Defendants must be admitted to bail in all cases except those involving capital offenses when the Commonwealth proves at a hearing that the proof of guilt is evident. KY Const § 16; RCr 4.02. The second section of this article addresses the situation of the indigent defendant and argues that it presents a special need to comply with the due process requirements of *Salerno*.

The Indigent Case: Inability to Pay is Not a Compelling Governmental Interest

The indigent defendant is a special case in which the defendant may be held prior to trial for reasons having nothing to do with the compelling governmental interest required by *Salerno*. Implied in the requirement of *Stack v. Boyle* that bond be set at an amount

calculated to assure the defendant's presence at trial is a demand that judges evaluate the ability of the defendant to post bond. 342 U.S. at 3-5. Federal law prohibits the setting of a bail which will result in the pretrial detention of the defendant simply because of an inability to pay. 18 U.S.C. § 3142(c)(2). Kentucky statues codify this constitutional requirement by including ability to post bond as a factor in the bond amount. *See* KRS 431.525(1)(e); RCr 4.16(1). In practice, however, cash bonds are too often set for indigent defendants, resulting in pretrial detention of the person due solely to an inability to pay.

An indigent defendant usually cannot post a sizeable cash bond. Release on recognizance or an unsecured bond is often necessary to avoid pretrial detention, the result of an inability to pay. Before a payable bond can be denied an indigent defendant, there must be compliance with the test laid out in *Salerno*. Any less violates the Eighth Amendment right to reasonable bail and the Fifth and Fourteenth Amendments' due process rights to remain at liberty absent a compelling reason by the government for detention demonstrated by clear and convincing evidence.

The system established by the Legislature to determine when release on recognizance can be denied in large part complies with the *Salerno* test for pre-trial detention. Pretrial release is the default presumption. KRS 431.520. When conditions are placed on the defendant's release, they are required to be the least onerous conditions reasonably likely to assure the defendant's appearance. RCr. 4.12. Judges are required to release on recognizance or unsecured bond those defendants which evidence based measures show to be a low or moderate risk of dangerousness or flight. KRS 431.066(2)&(3). For those defendants detained, bail credit ensures eventual release unless a finding is made, on the record, that they are a danger to others or a flight risk. KRS 431.066(4). In short, release without a cash bond must be granted in all cases except those in which the judge makes a finding that the defendant meets one of the two criteria which justify overcoming his due process and Eighth Amendment rights to pretrial liberty under *Salerno*.

The law must be interpreted to require that any pretrial detention based on a finding of future dangerousness must include the right to a hearing, with counsel, in which the Commonwealth bears the burden of proof by clear and convincing evidence. Defendants are entitled to an adversarial hearing on bond, RCr. 4.40, and *Salerno* and the other detention cases decided by the Court provide the standard of proof. The clear and convincing evidence standard is already required in Kentucky when the Commonwealth moves to revoke or increase bond. RCr. 4.40(3) & RCr. 4.42(3)&(4). Likewise, when the Commonwealth seeks to effectuate the pretrial detention of an indigent defendant by the setting of a cash bond the defendant cannot pay, it bears the burden of showing by clear and convincing evidence at the bond hearing or at a subsequent adversarial hearing set pursuant to RCr. 4.40, that the defendant is a flight risk or a danger to others.

It is the odd function of our bond system to infuse the importance of wealth into the courtroom, where the law strives so diligently to remove all taint of bias or prejudice. Our respect for liberty drives us all to want those who are a danger to society to remain detained and those who can be released safely to be so released. Following the pre-trial detention procedure prescribed in *Salerno* before the setting of a cash bond takes wealth out of the equation and pursues that goal directly.

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