The Advocate

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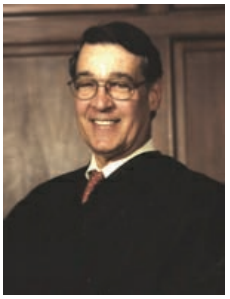
August 2011

KY Supreme Court Bail Pilot Project Extended and Amended: *A program coming to your county*

DPA Staff Report



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

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

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

The 2011 changes include:

> Amended Uniform Schedule of Bail to be used in 9 counties except in Campbell "the class D felony Schedule shall not be used."
>
> DUI 1st, AI, PI, Drinking in a Public Place and all violations have been deleted from the Schedule.
>
> A new "one bail for all" calculation of bail is made as follows: except where there is at least one Class D felony and the number of crimes charged exceeds five, the bail for all will be the one bail for the highest crime charged.

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

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

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

The Report also discusses the differing viewpoints on bail schedules:

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

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

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

AOC Press Release

Laurie K. Dudgeon
Director
Administrative Office of the Courts

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

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

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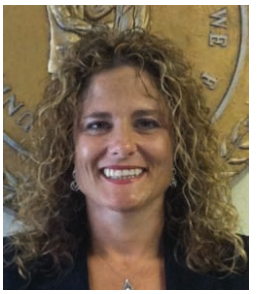
Release Rates Vary, Failure Rates Remain Unchanged

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



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

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

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

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

[1] Unpublished data from Administrative Office of the Courts, Division of Pretrial Services PRIM database; 527,183 cases analyzed from July 1, 2009 to June 30, 2011.
[2] Administrative Office of the Courts, Division of Pretrial Services PRIM database.

(continued on page 2)

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

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

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

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

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

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

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

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

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

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

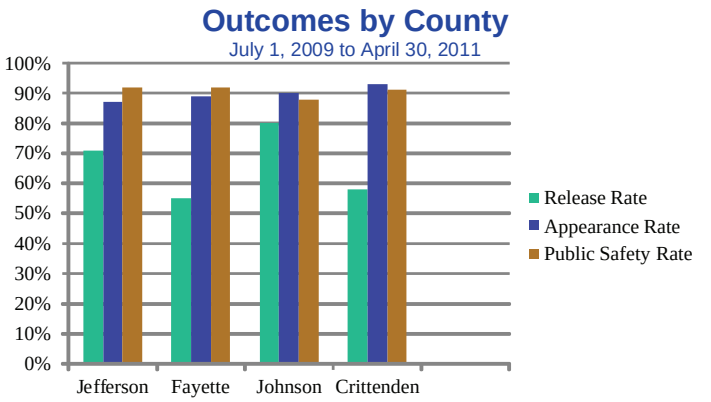
"Kentucky's development of a validated statewide tool for assessing pretrial risk sets an evidence-based standard for other jurisdictions to emulate," PJI Executive Director Tim Murray said. "Basing a pretrial release decision on individualized, valid pretrial risk factors is a profoundly important step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

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

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

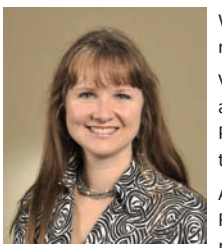
Chief Justice Rehnquist,
United States v. Salerno, 481 U.S. 739 (1986)

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



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

Valetta Browne
Directing Attorney, Trial Services, DPA



Valetta Browne
Directing Attorney
Trial Services, DPA

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

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

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

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

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

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

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

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

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

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

For if not us, then who?

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

Brian Scott West, General Counsel, DPA

Brian Scott West
General Counsel, DPA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Kentucky UNBRIDLED SPIRIT

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The Advocate

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