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Accomplishments and Challenges in Kentucky's Pretrial Release System

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In Kentucky the two primary means for gaining pretrial release is to post bail or be released on one's own recognizance and be under the supervision of the state's pretrial service agency. In 1976, Kentucky created the Kentucky Pretrial Release Agency (now the Division of Pretrial Services of the Administrative Office of the Courts) to replace for-profit commercial bail bonding services and remains one of the few states that have outlawed commercial bail bonding. Being a state agency, all of the pretrial services functions, risk assessment and data are standardized throughout the state. Such a statewide structure greatly enhances the ability to make uniform and objective assessments to the court of the defendant's risk to fail to appear or be re-arrested for a new crime while on pretrial status.

The Role of Risk Assessment: The Division of Pretrial Services reports that each year about 200,000 defendants charged with either a felony or misdemeanor charge are assessed by the Division of Pretrial Services to determine their risk to either fail to appear or be re-arrested for another crime if released from pretrial custody. Of this detained population, about 65% are able to gain release from pretrial detention.

One of the reasons why Kentucky has such successful rates is its risk assessment instrument, which it has been using for a number of years. The instrument itself was designed based on other pretrial risk assessment instruments that have been validated in other jurisdictions. But the Division of Pretrial Services instrument had never been tested by an external agency on people who had been arrested, detained and subsequently released on pretrial status. Thus, it was decided to have the JFA Institute and the Pretrial Justice Institute conduct a validation study in 2010 to determine the extent to which the current instrument was valid.

The results of the JFA/PJI research showed that the current risk assessment systems are indeed predictive of failure to appear and/or pretrial re-arrest. Furthermore the courts pay attention to the risk level as persons assessed as "low risk" have a significantly higher release rate (see table).

Outcomes by Risk Level (Felony and Misdemeanor) - 2010

Risk Level	Total	Release Rate	Appearance Rate	Public Safety Rate
Low	33%	77%	94%	94%
Moderate	28%	59%	89%	88%
High	5%	48%	85%	82%

Challenges for the Future: This data shows that KY has high release rates and low FTA and re-arrest rates. However, **a high pretrial release and low failure rates also suggest that a higher proportion of pretrial defendants, especially the felony charged defendants, could be released without jeopardizing public safety**. This would require a greater use of supervised pretrial release for a person charged with felony cases - many of whom upon sentencing are placed on probation. But in so doing the local pretrial jail population could be significantly reduced. For example, of the 1,400 persons in pretrial detention at the Louisville Metro jail, about 85% are pretrial and most of these detainees are charged with felony level charges although the majority are property and drug crimes.

The extent to which Kentucky's pretrial population will be reduced will depend upon the ability of the Division of Pretrial Services to demonstrate to the public and the courts that it can safely manage these detained defendants in the community rather than keeping them in the jails. Thus far it has demonstrated it has the capacity and expertise to safely manage this population and should be afforded the opportunity to expand its services to other pretrial detainees still incarcerated.

Nation's Chief Defenders Call for Improving Pretrial Release

American Council of Chief Defenders Press Release

Edward C. Monahan
Public Advocate

On June 6, 2011, the American Council of Chief Defenders (ACCD) called for national standards to safely prevent unnecessary detention before trial and improve pretrial practices while reducing local government spending.

"It is not fair, prudent or cost-efficient to detain individuals who are presumed innocent when they are not a flight risk and pose no danger to citizens," said Ed Monahan, Kentucky Public Advocate and ACCD Chiarman. "I am committed to working with judges, prosecutors, and policymakers to improve the delivery of justice, repair the gaps in our pretrial process and prevent spending on unwarranted detention."

In a 1986 Supreme Court opinion, then-Chief Justice William H. Rehnquist stated: "In our society liberty is the norm, and detention prior to trial is the carefully limited exception." Yet, current pretrial release practices throughout the country frequently result in the unjust, unnecessary, expensive, and prolonged detention of many individuals prior to trial. "As chief defenders, we call upon ourselves and all defenders, prosecutors, judges, pretrial release officers and policymakers to continue reform of pretrial release practices, with a new commitment in our nation to ensure that pretrial release is indeed the norm," said Monahan.

The ACCD's Policy Statement on Fair and Effective Pretrial Justice Practices outlines key steps for defenders, prosecutors, judges, pretrial release officers and policy makers and contains four recommendations:

- Examine pretrial release practices to identify key areas of improvement.
- Identify and implement national standards and best practices.
- Collaborate with criminal justice stakeholders to improve pretrial practices.
- Develop effective pretrial litigation strategies.

"Kentucky has led the way in pretrial best practices since abolishing commercial bail bonding in 1976," said Tara Boh Klute, chief operating officer for the Division of Pretrial Services of the Kentucky Administrative Office of the Courts. "For years Kentucky has been using - and improving - a pretrial assessment process that predicts with great accuracy who should be released pretrial." Communities can lower jail costs while ensuring that only those who pose significant risks of flight or danger are detained. "I strongly support the ACCD's call for national standards that will help states use evidence-based tools to fairly determine who can be released pretrial without compromising public safety."

"Pretrial detention has harsh consequences, including the loss of jobs, homes, and family ties. Research reveals that, all other factors being equal, individuals who are detained prior to trial experience more severe ultimate outcomes," said Jo-Ann Wallace, president and CEO of the National Legal Aid & Defender Association. "The heavy reliance by many upon monetary bond as a pretrial release condition disproportionately affects the poor and minorities, undermines the concept of justice in America and wastes limited state and local government revenue."

"I commend the ACCD and the National Legal Aid and Defenders Association for their call to reform our nation's pretrial justice systems," said Timothy J. Murray, Executive Director, Pretrial Justice Institute. "These justice professionals know all too well of the inequities, waste and dangers of our current cash-based bail systems. Today in America, more people are in jail because they cannot afford to pay their bail bond than for any other reason. Ironically, the overwhelming majority of these individuals will not be sentenced to jail or prison once their cases are resolved. ACCD's Public Policy on Pretrial Justice provides a blueprint for that assurance while providing equal justice for all."

HB 463 and its Impact on Kentucky Appellate Standards

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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.

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

Glenn McClister, Education Branch

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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.

I. Choosing an Appropriate Standard of Review for Pretrial Release Decisions. Standards of review, like some standards of proof, are sometimes notoriously

difficult to define. Some commentators lament the inconsistency with which they are often employed. 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.

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

What is unfortunate about this approach to deciding an appropriate standard of review is that it quickly becomes very difficult to apply. Pure matters of fact and of law are usually only clearly identifiable in the most obvious cases, and an entire host of issues on review cannot be so neatly classified. The debate over what are matters of law and what are matters of fact, has been going on for over a century. *See* K. Kunsch, "Standard of Review: A Primer," 18 Seattle V. L. Rev. 11, 16 (Fall, 1994). The United States Supreme Court has said that it knows of no rule or principle that would unerringly distinguish a factual finding from a legal conclusion. *See Pullman-Standard v. Swint*, 456 U.S. 273, 288, 102 S. Ct. 1781, 72L. Ed. 2d 66 (1982).

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?" H. Monaghan, "Constitutional Fact Review," 85 Colum. L. Rev. 229, 237 (March, 1985).

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." *Kunsch, Supra*, at 22.

So a standard of review reflects at least two different sorts of policy interest. 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.

Kentucky courts use the matter of law/matter of fact distinction to explain the choice of particular standards of review, and usually do not address mixed questions of law and fact as a third type of category. Instead, Kentucky courts usually 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. See *Carroll v. Meredith*, 59 S.W.3d 484 (Ky.App. 2001).

II. De Novo 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."

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."

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

"In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of the supreme function." *Id*: at 296.

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." *Id*. At 295.

A more recent Supreme Court case strongly suggested that de novo review is appropriate when the resolution of a mixed question of fact and law affects constitutional rights. In *Bose Corporation v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501, 104 S.Ct.1949, 80 L.Ed.2d 502 (1984), the Court of Appeals reviewing the proceedings in District Court had failed to follow the clearly erroneous standard of review laid out in federal rule 52(a), which says that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The Supreme Court held:

"But Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.... "At some point, the reasoning by which a fact is 'found' crosses the line between the application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment." *Id*. At 501.

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. An abuse of discretion, or other more deferential standard, is not appropriate when constitutional rights are at stake, even if the question of whether a right has been infringed is fact-dependent**.

III. Decisions Regarding Pretrial Release Are Constitutional Fact Decisions. Both the United States and the Kentucky constitutions prohibit excessive bail. The Eighth Amendment to the United States Constitution's prohibition against excessive bail has been applied to the states through the Fourteenth Amendment. *See McDonald v. City of Chicago*, 78 USLW 4844, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), notes 12, 13. 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. "[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." *Stack v. Boyle*, 342 U.S. 1, 5, 72 S.Ct. 1, 3, 96 L.Ed. 3 (1951) (prior to *U.S. v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697, which held "community danger," in appropriate circumstances, can be considered when setting bond.)

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." It is this constitutional fact which should be subject to de novo appellate review. 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. In this way, both the Eighth Amendment's and Kentucky Constitution § 17 prohibitions against excessive bail can be preserved.

An expanded version of this article, complete with additional case authority and endnotes, is available in the online edition of
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