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Reform Opportunities in Kentucky's Bail System





# Reform Opportunities in Kentucky's Bail System

Josh Crawford

## Introduction

Historically, the American bail system has been a tool that allowed courts to minimally intrude upon a defendant's liberty so as to ensure their appearance for all court proceedings. Additionally, it allowed courts the ability to detain defendants awaiting trial who posed such a risk to public safety that releasing them back onto the street would defy common sense. Posting a monetary bond emerged as a way for a defendant to have "skin in the game" and ensure required attendance.

However, a growing body of research suggests that monetary bail disproportionately imprisons the poor pre-trial<sup>1</sup>, and has been likened by some to modern day debtors prison.<sup>2</sup> Nationally, 34% of felony defendants are kept in jail ahead of trial solely because they are unable to pay a cash bond.<sup>3</sup> There were nearly 11 million admissions to jails in 2015.<sup>4</sup> At year's end, there were 434,600 inmates in jails across the country awaiting trial.<sup>5</sup> A 2015 study by the Vera Institute for Justice found that on any given day there are more than 730,000 people in local jails awaiting trial.<sup>6</sup> Disproportionally, these individuals are in the poorest third of Americans.<sup>7</sup> Researchers at the Prison Policy Initiative found that 60% of the individuals who could not afford their bail were among the poorest third of Americans; 80% fell into the bottom half.<sup>8</sup> According to their work, the average income, in adjusted 2016 dollars, of the average person who could not afford their bail is \$15,341.<sup>9</sup> As a result of this kind of

disproportionate impact, a number of local bail schemes have been held to be unconstitutional.<sup>10</sup>

Reformers point to two major problems with placing money at the center of a bail scheme; (1) a disproportionate negative impact on the poor, and (2) negative public safety outcomes. An examination of Kentucky, despite having taken steps to address some concerns related to the bail system, reveal both of those concerns to be true here. In 2016, there were 64,123 non-violent, non-sexual defendants detained in Kentucky because they could not afford their bail.<sup>11</sup> Meanwhile, 43 high risk, violent or sexual offenders were released after posting a monetary bail.<sup>12</sup>

### **Kentucky**

Kentucky has long been seen as a national leader on bail reform.<sup>13</sup> Unlike the Federal Constitution, the Kentucky Constitution grants an affirmative right to bail with sufficient securities in non-capital cases,<sup>14</sup> and case law states that money cannot be used to detain a defendant in a case bailable by law.<sup>15</sup> The

Kentucky Supreme Court, in *Atkins v. Regan*, explained that, “[t]he generally recognized objective of a peace bond is not to deprive of liberty but to exact security for the keeping of the peace.<sup>16</sup>” They further held that “[if] the amount required is so excessive as to be prohibitory, the result is a denial of bail.<sup>17</sup>”

### **The 1976 Bail Reform Act**

The 1976 Kentucky Bail Reform Act banned for-profit commercial bail bonding

#### **Key Statistic**

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services and created the Kentucky Pretrial Services Agency (KPSA) as part of the Administrative Office of the Courts (AOC). From then on the KPSA would prepare a report on the defendant through an interview to determine the likelihood of; (1) appearance at future proceedings and (2) committing new offenses. Among the factors considered are the defendant's ties to the community, criminal record, and ability to afford bond. A judge considers the Pretrial Service Report, but has the discretion to deviate from it, and then decides whom to release and under what conditions, including monetary bond.

### **The Move to Risk Assessment**

The 1976 reforms were a step in the right direction for Kentucky, but left one's ability to post money (or capital) at the center of the bail process.

With the signing of H.B. 463 in 2011, KPSA moved functionally from the interview-based model to a Risk-Assessment based model of determining likelihood of appearance and re-offense. The Risk Assessment tool utilizes vast sums of data collected across multiple jurisdictions – 1.5 million cases in over 300 jurisdictions – to try to objectively identify the factors that lead a defendant to not appear or commit a new offense. The tool then applies those factors objectively to an individual defendant. Kentucky defendants are then determined to be low, moderate, or high risk.

According to a study conducted by the Laura and John Arnold Foundation, in the first six months of implementation, new crimes committed by defendants on pre-trial release were down 15%, despite releasing a greater number of defendants awaiting trial.<sup>18</sup> Additionally, defendants flagged as likely to commit a new violent offense, were in fact sixteen times more likely to commit a new violent offense than those not flagged,

demonstrating the system's accuracy.<sup>19</sup>

Yet, judicial buy-in on the tool has been mixed. A 2015 investigation by reporter Alysia Santo with The Marshall Project found that while judges must explain why they set a monetary bail for defendants determined to be low or moderate risk, some simply write “flight risk” or “danger” and then impose financial conditions.<sup>20</sup> As a result, under the new Risk Assessment model, 70% of defendants were released, up only slightly from 68% pre-Assessment tool.<sup>21</sup>

### **Disproportionate Impact on Poor Defendants**

A growing volume of research suggests that use of a monetary bond disproportionately disadvantages the poor in our criminal justice system. A 2013 review

#### **Key Statistic**

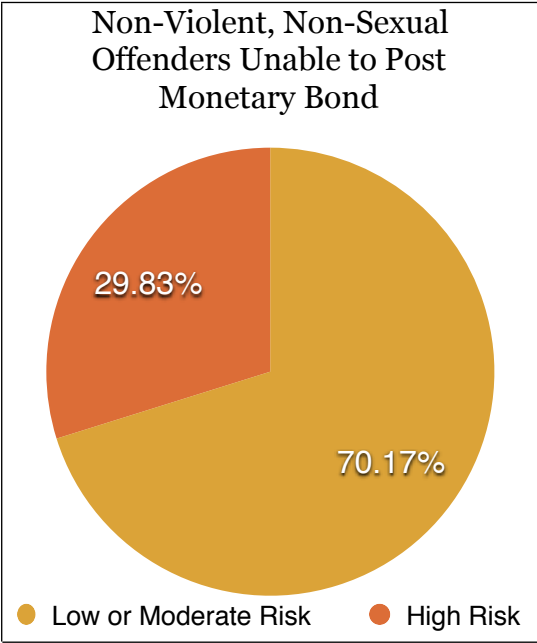
According to data obtained from the Kentucky Administrative Office of the Courts, in 2016, of defendants *not* charged with a violent or sexual offense, 30% – or 64,123 – were unable to post a monetary bond.

Of those 64,123 a total of 44,997, or just over 70%, were assessed as low or moderate risk. The average length of time spent in jail awaiting trial by these defendants was 109 days.

of New York City's jail system found that “more than 50% of jail inmates held until case disposition remained in jail because they couldn't afford bail of \$2,500 or less.”<sup>22</sup> Of non-felony defendants, 31% were held on bail amounts of less than \$500.<sup>23</sup> A national study using data from 2011 found that 60% of jail inmates were pre-trial detainees and 75% of those were charged with property, drug, or other non-violent offenses.<sup>24</sup> A 2016 study by the Prison Policy Initiative found that those detained in jails had a median annual income of \$15,109;

less than half of the median income of the general population and lower than the median income of those eventually convicted and imprisoned.<sup>25</sup>

According to data obtained from the Kentucky Administrative Office of the Courts (AOC)<sup>26</sup>, in 2016, of defendants *not* charged with a violent or sexual offense, 30% – or 64,123 – were unable to post a monetary bond. Of those 64,123 a total of 44,997, or just over 70%, were assessed as low or moderate risk. The average length of time spent in jail awaiting trial by these defendants was 109 days. This represents a total of nearly 5 million days spent in jail by defendants not charged with a violent or sexual offense, who were assessed as low or moderate risk. It also represents – using the \$31-a-day per diem – a total of \$152,044,863 spent to detain these individuals pre-trial.



These are individuals like David Stagner Jr., a 35 year old man from Mercer County, Kentucky, charged with the single misdemeanor of Public Intoxication. Mr. Stager was charged on July 27, 2017 and a cash bond was set he could not afford. On August 14, after being in jail for 18 days, was released on his own recognizance. One month later he plead guilty, was assessed a \$50 fine and \$194 in court costs. The full amount, \$244, is \$314 less than the total cost of his confinement – again using the \$31-a-day metric – all for a single misdemeanor count of Public Intoxication.

While many low and moderate risk individuals who have committed non-violent

and non-sexual offenses crowd Kentucky county jails, and are a financial strain on the system, there is virtually no evidence that the public safety benefits of keeping these individuals incarcerated outweigh the costs incurred to do so.

**The Effect on Public Safety**

Money being a central part of Kentucky’s bail system has led to a number of outcomes that should concern those of us who believe public safety is the most important function of state and local government.

In 2016, 4,945 defendants evaluated by the AOC had committed a violent or sexual offense, 901 or 18% of those defendants posted a monetary bond and were released despite their charged offense. Of that group, 43 were also high risk, meaning that under the current system, 43 high risk, violent or sexual offenders were back on the streets simply because they could afford to be.

**Key Statistic**

Compared to individuals released within 24 hours of arrest, low-risk defendants held 2-3 days were 17% more likely to commit another crime within two years.

Detention periods of 4-7 days yielded a 35% increase in re-offense rates. And defendants held for 8-14 days were 51% more likely to recidivate than defendants who were detained less than 24 hours.

Additionally, a disturbingly large number of homicide defendants in Louisville have been released on the Home Incarceration Program (HIP). According to a May 2017 report by *Wave3 News* reporter Natalia Martinez, 26 homicide defendants were bonded out on HIP in the city of Louisville alone.<sup>27</sup> The chief reason according to her report was overcrowding in the Jefferson County jail.<sup>28</sup> This echoes and earlier *WDRB News* report in which a Jefferson District Court Judge stated, “[w]ith the jail crowding

issue, HIP is the easiest relief valve so if we can get more inmates into the program, that's fabulous.”<sup>29</sup> Under the current system, judges are either forced, or choose to, alleviate over-crowding issues by placing homicide defendants on home incarceration while moderate risk, non-violent, non-sexual offenders remain in custody. As of August 7, 2017, twenty-two homicide defendants remained on HIP.<sup>30</sup> Prior to his indictment, this included homicide defendant Deandre Williams, who admitted in a police report to intentionally committing the murder.<sup>31</sup>

Finally, a number of studies have suggested that low-risk individuals who are detained while awaiting trial actually reoffend at a higher rate than similarly situated low-risk offenders who are not. One such assessment, of money bail in Philadelphia and Pittsburgh courts, found that the imposition of money bail led to a 6%-9% yearly increase in recidivism.<sup>32</sup> Another national study found that;

[c]ompared to individuals released within 24 hours of arrest, low-risk defendants held 2-3 days were 17% more likely to commit another crime within two years. Detention periods of 4-7 days yielded a 35% increase in re-offense rates. And defendants held for 8-14 days were 51% more likely to recidivate than defendants who were detained less than 24 hours.<sup>33</sup>

While it is unclear *why* low-risk individuals detained pre-trial recidivate at higher rate than comparable defendants who are released, it clear from the data that it is the case. Of particular note is that *high-risk* defendants held while awaiting trail *did not* see an increase in re-arrest over other high-risk defendants who were released.<sup>34</sup> Whatever causes the criminogenic effect from pre-trial detention does not occur in high risk detainees. In other words, detaining low-risk defendants has negative public safety



implications not seen in high risk defendants, who should be held.

Taken together, the ability for wealthy, violent and sexual offenders to pay their way to freedom, the release of homicide suspects due to jail crowding, and the possible criminogenic effect on low-risk defendants of pre-trial detention, our current system possess unnecessary risks to public safety that undermine our justice system and makes the public less safe.

### **Policy Recommendations.**

While Kentucky has made important strides in making its bail system more fair and a better arbiter of who should be detained pre-trial, there is still work to be done. However, two changes could make Kentucky not only the leader in pre-trial innovation, but better reflect our priorities of public safety, justice, and fairness.

*1) Kentucky should transition its bail system to focus on offense and offender (offense-centric system), not on a defendant's financial means (means-centric system).*

The language proposed by the Governor's Criminal Justice Policy Assessment Council (CJPAC) would have moved Kentucky to a more pure Risk Assessment based model and eliminated monetary bond for non-violent, non-sexual offenders who were assessed as low or moderate risk. It would also give judges greater leeway in detaining violent and sexual offenders pre-trial.

The move would make the pre-trial process in Kentucky similar to existing models in New Jersey and Washington, D.C. While both systems are complex, and have faced some criticism, they have advocates that include the American Civil Liberties Union (ACLU), California Senator (and former CA Attorney General) Kamala Harris,

Senator Rand Paul, and Governor Chris Christie.<sup>35</sup> That is because in addition to granting non-monetary pre-trial release to low and moderate risk defendants not charged with violent or sexual offenses, the proposed CJPAC changes also give greater opportunities to prosecutors to request that violent and dangerous offenders be detained ahead of trial. This is largely what some have attributed to the near universal buy-in in the Washington D.C. courts around this model.<sup>36</sup>

In fact, the most high profile “failure” of the New Jersey bail reform – a murder committed by a defendant released without bail – is directly attributable to a prosecutor who could have asked that a defendant be detained without bail, but did not.<sup>37</sup>

The predictive success of these models has already been discussed, and an examination of Colorado’s risk assessment instrument found that low and moderate risk defendants with unsecured bonds actually appeared more frequently than comparable defendants who had a secured, monetary bond. When not clouded by monetary bail, this system could allow greater fairness in pre-trial detention in Kentucky, while enhancing public safety.

## *2) The Home Incarceration Program (HIP) should be eliminated for homicide defendants*

While HIP is undoubtedly a useful tool in reducing jail crowding, and offers some defendants an opportunity to stay within the community while they await trial, it simply is not an appropriate tool in homicide cases. The placement of these defendants on HIP erodes public and law enforcement trust in the judicial process and undermines police efforts to apprehend future suspects.<sup>38</sup>

If a judge wishes to place a homicide defendant on HIP, they should have to make written findings as to why that defendant is not a danger to any witness in the case, or the public at large. While it is possible that these written findings could get abused, as was the case with the 2011 Bail reform, it is an appropriate limitation on judicial discretion in setting pre-trial release. Judicial discretion is the result of General Assembly statutes and Supreme Court rules, not inherent in judiciary via the Kentucky Constitution.<sup>39</sup>

### **Conclusion**

Kentucky has long been willing to take bold action on bail reform ahead of most of her sister states. From the 1976 elimination of commercial bail bondsmen to piloting of one of the country's first Risk Assessment tools, Kentucky has been willing to lead from the front. Now, two new bold reforms can save taxpayer dollars, ensure a more fair system of justice, and most importantly, better protect public safety.

#### ***About the Author***

*Josh received a bachelor's degree in Crime, Law, and Justice from Penn State University and a Juris Doctorate from Suffolk University Law School in Boston, Massachusetts. Josh has served as a Rule 3.03 student prosecutor for the Plymouth County District Attorney's Office, as a law clerk for Boston Municipal Court Justice Michael Coyne, and as a secondary lecturer at Penn State University. Before joining Pegasus Institute, he worked in the Sacramento County District Attorney's Office (CA).*



#### ***About Pegasus Institute***

*Pegasus Institute is a first of its kind, millennial-led, state-based think-tank. Our mission is to provide public policy research and solutions that help improve the lives of all Kentuckians. Pegasus Institute operates as an independent, non-partisan, privately funded research organization focused on state and local policies.*

## Footnotes:

<sup>1</sup> Heaton, P. S., Mayson, S. G., Stevenson, M. T., *The Downstream Consequences of Misdemeanor Pretrial Detention* (2017). Stanford Law Review, Vol. 69, Pg. 711, 2017; U of Penn, Inst for Law & Econ Research Paper No. 16-18.

<sup>2</sup> *Pretrial Incarceration: A Debtor's Prison*. (2013, May 06). Retrieved October 1, 2017, from <http://www.pretrial.org/pretrial-incarceration-a-debtors-prison/>

<sup>3</sup> Rabuy, B., & Kopf, D. (2016, May). *Detaining the Poor*. Prison Policy Initiative. available at <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>

<sup>4</sup> Milton, T. & Zeng, Z., *Jail Inmates in 2015* (Bureau of Justice Statistics, 2016).

<sup>5</sup> Id.

<sup>6</sup> Henrichson, C., Rinaldi, J., & Delaney, R., *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*. New York: Vera Institute of Justice, 2015.

<sup>7</sup> Rabuy, B., & Kopf, D. *Detaining the Poor*.

<sup>8</sup> Id.

<sup>9</sup> Id. (\$11,468 in unadjusted 2002 dollar).

<sup>10</sup> See *Walker v. City of Calhoun*, 2016 WL 361580 (N.D. Ga. 2016); *Jones v. City of Clanton*, 2015 WL 5387219, at \*4-5 (M.D. Ala.2015); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 767 (M.D. Tenn. 2015); *Pierce v. City of Velda City*, 2015 WL10013006, at \*1 (E.D. Mo. 2015); *Thompson v. Moss Point*, 2015 WL 10322003, at \*1 (S.D. Miss. 2015); *Mitchell v. City of Montgomery*, 2014 WL 11099432 (M.D. Ala. 2014).

<sup>11</sup> According to Mark Heyerly and a team at the Administrative Office of Courts.

<sup>12</sup> Id.

<sup>13</sup> Santo, A., *Kentucky's Protracted Struggle to Get Rid of Bail*, The Marshall Project (Nov. 12, 2015) available at [www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail?ref=collections](http://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail?ref=collections).

<sup>14</sup> KY. Const. § 16.

<sup>15</sup> *Adkins v. Regan*, 233 S.W.2d 402 (Ky. 1950).

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Laura & John Arnold Found., *Results from the First Six Months of the Public Safety Assessment - Court in Kentucky* (2014, July). Available at <http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf>

<sup>19</sup> Id.

<sup>20</sup> Santo, A., *Kentucky's Protracted Struggle to Get Rid of Bail*, The Marshall Project (Nov. 12, 2015).

<sup>21</sup> Laura & John Arnold Found., *Results from the First Six Months of the Public Safety Assessment - Court in Kentucky* (2014, July).

<sup>22</sup> Ram Subramanian et al., Vera Inst. of Justice, *Incarceration's Front Door: The Misuse of Jails in America*, July 29, 2015, available at [https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy\\_downloads/incarcerations-front-door-report\\_02.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf)

<sup>23</sup> Id.

<sup>24</sup> Williams, R., *Bail or Jail: State Legislatures* (May 2012), available at <http://www.ncsl.org/research/civil-and-criminaljustice/bail-orjail.aspx>.

<sup>25</sup> Rabuy, B., & Kopf, D. *Detaining the Poor*.

- <sup>26</sup> Data was originally provided to Jenna Moll at the U.S. Justice Action Network and then verified by the author via Mark Heyerly and a team at the Administrative Office of Courts.
- <sup>27</sup> Martinez, N. (2017, May 11). Locked out of jail, murder suspects sent home instead. Retrieved from <http://www.wave3.com/story/35405409/locked-out-of-jail-murder-suspects-sent-home-instead>
- <sup>28</sup> Id.
- <sup>29</sup> Riley, J. (2013, November 14). New GPS monitors allow Metro Corrections to track released inmates at all times. Retrieved from <http://www.wdrb.com/story/23969744/metro-corrections>
- <sup>30</sup> McAlister, S. (2017, August 07). A closer look at home incarceration in Louisville, a judge speaks out. Retrieved from <http://www.whas11.com/news/local/a-closer-look-at-home-incarceration-in-louisville-a-judge-speaks-out/462628272>
- <sup>31</sup> Martinez, N. (2017, August 05). Outrage ensues after judge's decision to release murder suspect. Retrieved from <http://www.wave3.com/story/36068451/outrage-ensues-after-judges-decision>
- <sup>32</sup> Arpit Gupta, et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization* (May 2, 2016), available at <http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf>
- <sup>33</sup> Laura & John Arnold Found., Pretrial Criminal Justice Research (2013), available at <https://www.pretrial.org/download/featured/Pretrial%20Criminal%20Justice%20Research%20Brief%20-%20LJAF%202013.pdf>
- <sup>34</sup> Id.
- <sup>35</sup> Harris, K., & Paul, R. (2017, July 20). Kamala Harris and Rand Paul: To Shrink Jails, Let's Reform Bail. Retrieved from <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html>; Star-Ledger Editorial Board, (2017, August 04). On bail reform, Christie schools 'Dog the Bounty Hunter' | Editorial. Retrieved from [http://www.nj.com/opinion/index.ssf/2017/08/on\\_bail\\_reform\\_christie\\_schools\\_dog\\_the\\_bounty\\_hun.html](http://www.nj.com/opinion/index.ssf/2017/08/on_bail_reform_christie_schools_dog_the_bounty_hun.html)
- <sup>36</sup> *Moving Beyond Money: A Primer on Bail Reform*, Criminal Justice Policy Program, Harvard University, October 2016.
- <sup>37</sup> Star-Ledger Editorial Board, (2017, August 04). On bail reform, Christie schools 'Dog the Bounty Hunter' | Editorial. Retrieved from [http://www.nj.com/opinion/index.ssf/2017/08/on\\_bail\\_reform\\_christie\\_schools\\_dog\\_the\\_bounty\\_hun.html](http://www.nj.com/opinion/index.ssf/2017/08/on_bail_reform_christie_schools_dog_the_bounty_hun.html)
- <sup>38</sup> Martinez, N. (2017, August 05). Outrage ensues after judge's decision to release murder suspect. Retrieved from <http://www.wave3.com/story/36068451/outrage-ensues-after-judges-decision>
- <sup>39</sup> *Abraham v. Comm.*, 565 S.W.2d 152 (Ky. App. 1977) (“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.”)