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Ismaila Ceesay

University of Kentucky, ismaila.ceesay@uky.edu

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Recommended Citation

Ceesay, Ismaila, "From Bail Bondsmen to Risk Assessments: Assessing Kentucky's Pretrial Release Approaches" (2016). *MPA/MPP Capstone Projects*. 267.
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**From Bail Bondsmen to Risk Assessments:
Assessing Kentucky's Pretrial Release Approaches**



Abstract

As one of only four states that ban bail bond companies, Kentucky is an experiment in the “laboratory of democracy,” which is made even more interesting because the state has tried three different approaches to pretrial release—the Pre-1976 approach, the 1976 to 2011 approach, and the 2011 to present approach. An assessment of these approaches shows how state actions and inaction can affect the right to pretrial release and underscores the importance of adopting appropriate state pretrial release policies.

Ismaila Ceesay

**FROM BAIL BONDSMEN TO RISK ASSESSMENTS:
ASSESSING KENTUCKY'S PRETRIAL RELEASE APPROACHES**

By:

Ismaila Ceesay

A capstone project submitted to the faculty of the Martin School of Public Policy and Administration at the University of Kentucky as a final requirement to earn a Master of Public Administration degree with a focus in International Policy and Management.

Project Advisor:

Joseph L. Fink III

Committee Members:

Dr. Merl Hackbert

Dr. Dwight V. Denison

November 28, 2016

TABLE OF CONTENTS

SECTION I

A. INTRODUCTION	1
B. BACKGROUND—<i>IMPORTANCE OF PRETRIAL RELEASE</i>	2
C. OUTLINE OF PAPER	6

SECTION II

A. FEDERAL CONSTITUTIONAL REQUIREMENT	7
B. KENTUCKY CONSTITUTIONAL REQUIREMENT	9

SECTION III

A. BAILS BONDSMEN—FREEDOM IS NOT FREE	11
B. OBSTACLES—RESISTANCE TO THE BAIL BOND BILL	13
C. RESULTS FROM THE BAIL BOND BILL—HB 254	14

SECTION IV

A. RISK ASSESSMENT BILL—INJECTING OBJECTIVITY IN PRETRIAL RELEASE	17
B. RESISTANCE TO CHANGE	18
C. THE RISK ASSESSMENT TOOL—THE USE OF DATA IN PRETRIAL RELEASE	19
D. RESULTS FROM THE RISK ASSESSMENT BILL—HB 463	20

SECTION V

A. ANALYSIS	22
B. RECOMMENDATION	24
C. CONCLUSION	26
D. APPENDIX	I



SECTION I

A. Introduction¹

“Across this country, there are more people in jail...awaiting court action, than any other reason.”² This is offensive to the concept of “innocent until proven guilty”³ and contributed to the reasons why Kentucky made several changes to its pretrial release programs beginning with House Bill 254 (HB 254), (hereafter the Bail Bond Bill).⁴ Forty years after the Bail Bond Bill first overhauled Kentucky’s pretrial release practices, it is prudent to assess the state’s pretrial release approach by asking whether the state’s current pretrial release approach is better than its past approaches. Answering such a question calls for a searching look into Kentucky’s past and current pretrial release practices. This research takes that searching look and concludes that Kentucky’s current pretrial release practice, though imperfect, is the best Kentucky has tried so far.

¹ Ismaila Ceesay, J.D. and M.P.A. candidate 2016. Thank you to Dr. Fink and Dr. Toma. Thank you to my wife for her patience and support and to our boys for their understanding.

² Administrative Office of the Courts, *35 Years of Justice in Kentucky*, 2011 (in conjunction the Pretrial Justice Institute).

³ *Coffin v. United States*, 156 U.S. 432, 15 S. Ct. 394 (1895)

⁴ H.B. 254, Ky. Acts. 1 (1976), (as codified under Ky. Rev. Stat. Ann. § 431.510 (1) (West Supp. 2016)) (abolishing the practice of for-profit bail bond).

B. Background

i. Importance of Pretrial Release to Defendants and their Families

Pretrial release is crucial for a criminal defendant. If denied, it can have adverse effects on the defendant, the defendant's family, their community, and the state. "Until the 1960s, the Courts relied almost exclusively on the traditional money bail system."⁵ This meant that defendants could only be released pretrial in one of three ways: on the defendant's recognizance, on a secured money bond, or on an unsecured money bond. With this approach, the poor were, in essence, priced out of pretrial release while those who could afford it bought their pretrial release. Such inequity impacted the defendants' experience in the justice system for no reason other than the ability to pay. Furthermore, studies show increased challenges in defending against charges in jurisdiction where "money bail only" approaches are prevalent.⁶

"What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money."
Robert F. Kennedy

⁵ Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services*, Crime & Just. Inst. & the Nat'l Inst. of Corr., (2007).

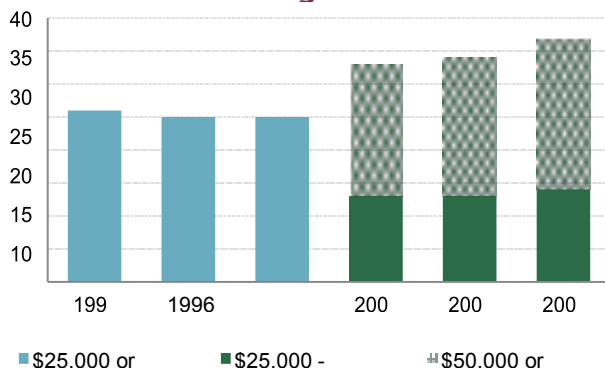
⁶ *Id.* (citing Arthur Beeley, *The Bail System in Chicago* (new impression ed. 1966)); Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031 (1954)(Money bail is the release of a defendant on the condition money is put up to guarantee the defendant's appearance for future court proceedings).

Among the challenges faced by defendants incarcerated pretrial are the increased likelihood of being convicted of a felony when tried and of receiving longer sentences than defendants who were released pretrial.⁷ Defendants are likely to plead guilty when incarcerated pretrial in order to

A plea may be particularly appealing if the time they have already spent in jail will count toward the prospective sentence—*Justice Policy Institute.*

avoid maximum sentences⁸ or as a desperate effort to get out of jail. Prosecutors, who already enjoy inordinate power in the justice system, use the threat of bail denial through high dollar bail amounts to induce defendants to plead guilty. This imbalance in power is demonstrated the fact that the vast majority of cases never make it to trial. National data show that of all the felony charges in 2006, 68% were convicted but only 3% of those cases went to trial, 96% of those convictions were a result of guilty pleas.⁹

Figure 1: Increase in Number of Cases Assigned



It is clear that the challenges associated with pretrial detention are being experienced by more defendants than before. The justice system has sought progressively higher bail amounts since 1998 leading

⁷ Justice Policy Inst., *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, (Sept. 2012), (citing Eric Holder, Att’y Gen., Address at the National Symposium on Pretrial Justice (June 1, 2011)).

⁸ *Id.*

⁹ State Court Processing Statistics data as retrieved from the Felony Defendants in Large Urban Counties reports, 1992 – 2006.

to more pretrial confinement. *Figure 1* shows the Bureau of Justice Statistics data that average bail amounts increased by over \$30,000 between 1992 and 2006. In 2006, jail population in the 75 most populous U.S. counties had a median bail amount of \$10,000 which means that at least half of the population was assigned a minimum of \$10,000 in bail.

In October 2013, Kentucky truck driver David Jones was arrested on charges of distributing child pornography. He insisted he was innocent, and a judge set his bail at \$15,000 cash, far above what Jones could pay. That was soon bumped down to \$2,500 cash, as long as he could secure another \$22,500 with personal property. Fourteen months after Jones was first jailed, a judge lowered bail to just \$2,500 cash, which a relative paid and Jones was released. In April 2014, the charges were dropped. By then, Jones had lost his job and his apartment and missed his son's high school graduation—*The Marshall Project*

Pretrial incarceration may also have devastating effects on the defendants' families. Those incarcerated pretrial may lose their jobs, housing, and other privileges due to their absence.¹⁰ Safety nets like healthcare for themselves and their families may be lost or put in jeopardy, especially where they are the sole providers.¹¹ Their children may have to move out of their homes, which they can no longer afford and need to change schools as a result of pretrial incarceration.¹² These social turbulences affect the accused and their families in ways that can have deleterious effects on those who were never accused of a crime. These observations are made even more objectionable by the fact that such defendants are yet to be adjudicated or found guilty by a jury of their peers.

¹⁰ *Id.* at 3

¹¹ *Id.*

¹² *See Id.*

ii. Importance of Pretrial Release to States

Defendants incarcerated pretrial may lead to states having to provide social safety nets for their families in the form of government healthcare, subsidized nutrition, and other services. These costs are in addition to the costs of incarcerating the defendants pretrial. The situation is made even more acute because those incarcerated pretrial are also precluded from contributing to the states' economy. The confluence of these realities has led to ballooning costs of incarceration for many states including Kentucky.¹³ Despite the negative impacts on their budgets, states still incarcerate defendants pretrial because of the obligation to keep their citizens safe and ensure the carriage of justice. Reducing pretrial detention while ensuring public safety and the carriage of justice is a win-win for the state and defendants. Fewer defendants incarcerated pretrial means less state spending and more defendants spared the challenges associated with pretrial confinement.

iii. Importance of Kentucky's Pretrial Release Approaches

As one of only five states that does not permit professional bail bond companies to operate within their jurisdictions,¹⁴ Kentucky is an experiment in the "laboratory of democracy."¹⁵ Studying how Kentucky differs in its pretrial release approach to other states is a worthwhile exercise in determining the most effective

¹³ See discussion infra at Section III p. 15

¹⁴ The five states that prohibit professional bail bonds companies are: Kentucky, Massachusetts, Illinois, Oregon, and Wisconsin.

¹⁵ See, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 S. Ct. 371 (1932) (Justice Brandeis dissenting).

pretrial release program. The study of Kentucky's pretrial program is made more consequential because Kentucky has tried three distinct approaches to pretrial release—the Pre-1976 approach, the 1976 to 2011 approach, and the current approach to pretrial release.

C. Outline of Paper

This research examines Kentucky's different approaches to pretrial release and the successes it achieved in realizing the constitutional and legislative intents of pretrial release. It tracks the major changes in Kentucky's pretrial release program and highlights the reasons for these changes. The paper concludes by pointing out areas for improvement in Kentucky's current pretrial release approach and offers suggestions to address these challenges.

Section I introduces the topic and thesis of the paper and then provides a background on why it is important to discuss and understand pretrial release programs. The section also highlights the unique opportunity offered by Kentucky's use of different approaches to pretrial release over the decades. Section II discusses the constitutional mandates in pretrial release in both the federal system and in Kentucky. This Section identifies the constitutional underpinnings of pretrial release and answers the question whether pretrial release is an individual constitutional right. Section III begins by looking at the challenges that hindered the complete abidance to the constitutional requirements of pretrial release prior to 1976 and describes Kentucky's pretrial practices before the passage of the Bail Bond Bill. The section concludes by discussing the passage and results of the Bail Bond Bill. Section IV begins by discussing the introduction of

assessment tools, which sought to relegate subjective decision-making in favor of evidence-based objective decision-making in pretrial release. This section also discusses the passage of House Bill 463 (HB 463) (hereafter the Risk Assessment Bill),¹⁶ and highlights some of its consequential provisions to pretrial release. The section concludes with a look at the results of the Risk Assessment Bill. Section V concludes the paper by making a determination of which of Kentucky's approaches to pretrial release best achieves the identified constitutional and legislative intent. The section also offers recommendations on how to make the state's current practices of pretrial release more effective.

SECTION II

A. Federal Constitutional Requirements

Being a fundamental part of the Framers' concept of liberty, pretrial release was made the law of the land by The Judiciary Act of 1789. And although it has never been interpreted by the courts to be an absolute right, it is enshrined in the Constitution of the United States in the Eight Amendment, which prohibits excessive bail, fines, and cruel and unusual punishment.¹⁷

"The denial of a citizen's liberty through the arrest process is the greatest single power the government maintains under the United States Constitution. The Framers of the Constitution knew that this power had been historically abused by European Governments and took specific action in the 'Bill of Rights' to ensure our government did not deny liberty without an opportunity for bail unless the defendant was charged with an offense punishable by death."—*KPSA Manual, 1978-1980.*

¹⁶ Public Safety and Offender Accountability Act, H.B. 463, 2011 Gen. Assemb., Reg. Sess. (Ky. 2011) [hereinafter H.B. 463].

¹⁷ U.S Const. amend. XIII

The Amendment provides that “[e]xcessive bail shall not be required”¹⁸ of accused persons prior to trial. This means that an accused person may be released before trial and excessive bail may not be used as a means of denying the accused pretrial release. The Supreme Court of the United States, hereafter SCOTUS, explained that bail was meant to ensure a defendant’s appearance at trial.¹⁹ Judges were able to release non-capital defendants on bail and enjoyed great latitude in setting the conditions of bail. Subsequent development in the criminal law made it permissible to deny bail to defendants deemed too dangerous to release in society. In *United States v. Salerno*, where SCOTUS validated the constitutionality of the Bail Reform Act of 1984,²⁰ the high court also pointed out that bail conditions only run afoul of the Eight Amendment if they are “excessive in light of the perceived evil.”²¹ This meant that if the facts of the case justified it, the possibility of bail may be foreclosed for non-capital defendants.

“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception...The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel.”
Justice Rehnquist

Understanding the federal approach to pretrial release is crucial to understanding Kentucky’s bail program. The Federal Constitution sets the floor for

¹⁸ *Id.*

¹⁹ *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

²⁰ 18 U.S.C. § 3142(e) (Also known as the Bail Reform Act of 1984).

²¹ *United States v. Salerno*, 481 U.S. 739, 754 (1987).

individual rights for all U.S. citizens but does not impose a ceiling on additional individual rights a state constitution may confer. This hierarchy is made possible by the Fourteenth and Tenth Amendment of the US Constitution. Under this arrangement The Judiciary Acts of 1789 and 1984 and all relevant federal case law provide pretrial rights that may not be infringed by Kentucky’s constitution but Kentucky may choose to confer more expansive pretrial rights to its defendants.

B. Kentucky Constitutional Requirement

Similar to the federal law, Kentucky permits bail for non-capital defenders but also allows the denial of bail where a defendant is considered too dangerous to be released to the public. Section 16 of the Kentucky Constitution states that “[a]ll prisoners shall beailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great.”²² Section 17 of the Kentucky Constitution further explains that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted.” These constitutional provisions are understood to be guiding principles similar to the Eight Amendment. In *Adkins v. Regan*, Kentucky’s highest court 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.”²³ The court went on to hold that “[if the amount required is so excessive as to be prohibitory, the result is a denial of bail,”²⁴ which is prohibited. The same court also said in *Long v. Hamilton* that “[e]ach case comprises a set of facts and circumstances peculiar to it and there is

²² Ky. Const. § 16.

²³ *Adkins v. Regan*, 313 Ky. 695, 700, 233 S.W.2d 402 (1950) (emphasis added).

²⁴ *Id.*

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.”²⁵

Kentucky law may be summarized to permit the detention of a defendant pending trial if it is determined that the defendant is too dangerous to be released to the community.²⁶ A notable difference between the federal and Kentucky pretrial release approaches is the requirement of “sufficient securities”²⁷ in the Kentucky Constitution versus a prohibition of “excessive bail” in the US Constitution.²⁸ This suggests that the Federal Law does not require monetary bail while Kentucky law does. It is clear, in both the Federal and Kentucky constitutional provisions, that if a bond is required, it may not be excessive. Hence the four main constitutional principles of bail in both Kentucky and the federal system are:

- a. Bail is a right in non-capital offenses;
- b. Bail may not be excessive;
- c. Bail is meant to ensure the appearance of the defendant in court proceedings;²⁹ and
- d. Dangerous defendants may be denied bail.³⁰

²⁵ *Long v. Hamilton*, 467 S.W.2d 139, 141 (Ky. 1971) (emphasis added).

²⁶ Ky. Rev. Stat. Ann. § 431.066(2) (West Supp. 2013).

²⁷ Ky. Const. § 16.

²⁸ U.S. Const. amend. XIII.

²⁹ Timothy R. Schnacke et al., Pretrial Justice Inst., *The History of Bail and Pretrial Release*, 5 (2010) (citing Spurgeon Kennedy et al., Pretrial Servs. Res. Ctr., *Pretrial Release and Supervision Program: Training Supplement*, 2 (1997)).

³⁰ Dangerousness may be to a specific person i.e. a potential witness to a crime or to the general public.

SECTION III

A. Bail Bondsmen—Seeking Profits from Detained Defendants

With the constitutional underpinnings of pretrial release as a backdrop, the pretrial program in Kentucky pre-1976 was very troubling. The state had no program of its own to handle pretrial bail and permitted professional bail bond companies to fill the void. These companies became so integrated into the state's judicial system that they were the only means of pretrial release for many.³¹

The Courier-Journal

VOL. 242, NO. 15

LOUISVILLE, THURSDAY MORNING, JANUARY 15, 1976

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Gov. Carroll proposes legislation to ban state's bail bond industry

By ED RYAN

Courier-Journal Staff Writer

FRANKFORT, Ky. — Gov. Julian Carroll announced yesterday that he was proposing legislation to outlaw the bail bond industry in Kentucky.

Before a crowded press conference, Carroll also painted a picture of backstage intrigue that included a "threatening" phone call in the night and a hastily launched state police investigation.

The governor called the press conference to announce that, at his request, a bill will be introduced in the General Assembly to "make illegal the practice of bail bonding for profit in the Commonwealth of Kentucky."

Carroll proposed a system that would allow an arrested person to post 10 per cent of his bond with the court clerk, rather than with a private bail bondsman. "This bill will outlaw commercial bail bonding in Kentucky," Carroll said emphatically.

The bill was to be introduced yesterday afternoon by House Majority Leader Bobby Richardson, D-Glasgow, but "typ-

ing problems" delayed the introduction until next week.

After reading a prepared statement about the bill, Carroll said he felt "compelled" to relate "a couple of circumstances that have occurred in the last 24 hours."

Carroll said a member of his family (a brother in the governor's hometown of Paducah) received a telephone call at 3:30 a.m. yesterday from "an employee of one of the bail bondsmen in Kentucky."

The governor went on to say that the "bail bondsman"—who Carroll said was calling from the Frankfort Holiday Inn—told his brother that "if I persisted in my effort to introduce this bill and support its passage, they would take to The Courier-Journal certain derogatory information that they have on me."

Carroll said the "incident" was reported to the Kentucky State Police, "and I'm sure that the individual who made

the threat has already been visited" by the state police.

Late yesterday, John Nichols, Carroll's press secretary, said the state police had interviewed the governor's brother and the person who allegedly made the call.

Nichols said a state police report will be sent to the governor's office today and "will be shared" with the Franklin County commonwealth's attorney.

Neither Carroll nor Nichols would reveal the name of the brother or the person who allegedly made the call. But The Courier-Journal learned last night that Neil Carroll, a brother who worked in Julian Carroll's recent campaign for governor, was the one who received the call.

Neil Carroll, now working as an accountant in Paducah, would say only, "I have no comment about that matter."

The governor challenged the "bail bondsmen" to give The Courier-Journal the so-called "derogatory" information.

"I have no fears of any derogatory information that they have that could damage my reputation or the reputation of my family," Carroll said.

Carroll also told newsmen that one "and possibly two" members of his staff have been told "that money was available should they decide to assist the (bail bond) industry in seeing that this legislation is not passed."

He charged that the bail bond industry is "prepared to spend whatever is necessary to see that this legislation doesn't pass."

"Well, I can tell you that they've got their hands full."

In the background of yesterday's developments are the long-time differences between two Paducah men—Gov. Carroll and Jimmy Johnson, president of the Johnson Bonding Co., the state's largest bail bond operation.

Reached yesterday, Johnson said Carroll's proposed legislation outlawing the bail bond industry "would open the state to a Mafia operation in bail bonding. If you want to turn bail bonding over to the Mafia, this is the bill to pass."

Johnson said he supported Carroll for

See CARROLL

Back page, col. 2, this section

Courier-Journal News Reports of Harassment by Bail Bond Companies

³¹ See supra note 2 (Governor Carroll explaining the level of opposition to HB 254 by the professional bondsmen).

While enjoying the state's *imprimatur*, their sole motive was profit. Use of extrajudicial means to secure clients and ensure payments was commonplace. The preamble to the Bail Bond Bill evokes scenes from a Wild West movie with hired guns rounding up bail jumpers with orders to bring them in dead or alive. It reads as a serious indictment to the existence of the bail bond companies and underscored the corrosive effect they had in Kentucky's justice system.

"WHEREAS, bail bondsmen have, in large part, pre-empted those constitutional mandates and have reaped huge profits from the bail bonding business to the detriment of the rights of many citizens and have been a major cause of corruption in the administration of justice; and

WHEREAS, the present system has become so dominated by the bail bondsmen that pretrial release of defendants on their own recognizances in cases involving minor offenses has been discouraged without regard to the likelihood that most defendants will appear as ordered by the court if released on their own recognizances, all for the purpose of creating profits for the bail bondsmen; and

WHEREAS, in many instances the present system financially burdens lower income persons charged with minor offenses by virtually requiring them to pay for the services of a bail bondsman without regard to the likelihood that they will appear as ordered by the court if released on their own recognizances; and

WHEREAS, the present system has otherwise fostered wide-spread abuse of the laws and of the rights of the citizens of this Commonwealth through the corruptive influences of the bail bondsman in violation of the spirit of the Kentucky Constitution guaranteeing the equal administration of justice.

Preamble to the Bail Bond Bill.

B. Obstacles—Resistance to the Bail Bond Bill

The Bail Bond Bill intended to do away with professional bonding companies and it was met with stiff resistance. The bonding companies, prosecutors, judges, and jailers cried foul and tried to stop the legislation as they successfully did before. The reasons for resistance for some in law enforcement, especially judges, stemmed from the notion that the proposed changes were a move towards being soft on crime. But there were also charges of some law enforcement officials being in the pocket of the bondsmen and resisting out of self-interest.³²

However, there was no mistaking the bail bond companies' stance on the matter. They did all they could to derail the bill. They tried bribery, blackmail, threats, and political smears to scuttle the bill without success. Governor Carroll, the champion of the Bail Bond Bill, took the brunt of their fury. He was accused of pushing the bill as a retaliation for being refused campaign donations.³³ Members of his staff were offered cash³⁴ to help derail the bill and his family's safety was threatened³⁵ requiring twenty-four-hour security by the state police for his two daughters who were attending Murray State University at the time.³⁶

The Bail Bond Bill succeeded mainly because the bill's champion was a governor and not just a legislator, as was the case the in previous attempts.

³² See supra note 4.

³³ Ed Ryan, *Defenders of Bail System Assail Carroll's proposal*, Courier J., January 1976.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

Governor Carroll³⁷ marshaled broad support, including leaders in both chambers of the General Assembly, the Kentucky Bar Association, several prominent judges and prosecutors, and defense attorneys. The coalition of support held firm and saw the bill through despite the onslaught from opponents. The bill's promise was "to provide for a uniform workable system for affording persons charged with bailable offenses their constitutional rights to pretrial release that will insure appearances as ordered by the courts without imposing undue hardships upon those persons."³⁸ Thus, the legislative intent behind pretrial release closely mirrored the Kentucky's constitutional mandate.

C. Results from the Bail Bond Bill—HB 254

Although the Bail Bond Bill tried to address the role of money in pretrial release by abolishing the bail bond companies, which perpetrated all "manner of evil,"³⁹ money still continued to play a role in Kentucky's pretrial release. Old habits die hard and some judges still preferred money bails for pretrial release. Defendants were still being released mainly on money or property bonds, which had disparate effects on the poor, the same population that suffered the most from the practices of the erstwhile bail bond companies.

The new law created the Kentucky Pretrial Services Agency (KPSA) as part of the Administrative Office of the Courts (AOC) and made it the anchor for pretrial services. The new pretrial process was supposed to work in the following way: An

³⁷ Governor Carroll failed in his attempts to substantially regulate the bail bond companies as a legislator from Lexington.

³⁸ See note 3 (Preamble).

³⁹ *Id.*

arrested and charged person will be transferred into corrections custody and have a bond set by a judge within twenty-four hours of being arrested unless the charge is a capital offense.⁴⁰ The KPSA would prepare a report on the defendant through an interview to determine the likelihood of: (1) a failure to appear for future proceedings (FTA) and (2) new criminal acts (NCA). Amongst 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. A judge's decision to deny bail or set a prohibitive bail is given a very deferential standard of review—*abuse of discretion*—when challenged. The bond hearing may be done electronically if it is not possible to see a judge within the twenty-four hours but if a defendant is denied bond and not released, he/she will appear before a judge for an initial appearance where the judge will inform the defendant of the right to enter a plea, have counsel appointed if indigent, and set the next court hearing. If bail is set, the judge may allow the defendant to put up 10% of the amount in order to be released and if the conditions of bail were fulfilled, that amount would be returned minus 10%, which was considered an administrative fee. A defendant failing to fulfill bail conditions increases his/her criminal charges and may be asked to remit the whole amount of bail and be incarcerated.

⁴⁰ See Ky. Const. § 16; Ky. R. Crim. P. 4.02(1); Kentucky Supreme Court Order 2012–12, Emergency Suspension of 12–hour time restriction imposed by RCrs 4.20(1), available at http://courts.ky.gov/courts/supreme/Rules_Procedures/201212.pdf

Another dimension of the financial concerns in Kentucky's new pretrial release practices was the cost of abolishing the professional bond companies. The legislative debate prior to the Bail Bond Bill's passage included the wisdom of abolishing a practice that cost nothing to the state in favor of a program that would impose a financial burden to the state. Defenders of professional bondsmen highlighted this argument in an attempt to appeal to fiscally minded legislators to no avail. Projections of what the KPSA would cost Kentucky ranged from \$6 million to \$40 million depending on whom you asked but proponents of the bill made promises that the new KPSA would not be a financial burden to the state. Furthermore, abolishing the bondsmen caused the loss of jobs of 232 licensed bonding agents in the state and an additional 800 employees in support positions.⁴¹ The impact of economics on the passage of the Bail Bond Bill should not be overlooked as an overarching concern for the state in the 1970s was the ballooning prison population and rising costs resulting from the war on drugs.⁴²

Although this research was unable to find reliable data on the changes that the Bail Bond Bill ushered in, reports and news stories from local newspapers paint a very informative picture. Despite the persisting challenges still plaguing pretrial release in Kentucky, e.g. poor defendants having no way of posting bail in the absence of a professional bail bond company, the new pretrial approach was preferable. The state's justice system was freed of the fetters imposed by the bondsmen and only officials of the judiciary had a say on who was released pretrial.

⁴¹ Ed Ryan, *Defenders of Bail System Assail Carroll's proposal*, Courier J., January 1976.

⁴² See Robert G. Lawson, *Difficult Times in Kentucky Corrections-Aftershocks of a "Tough on Crime" Philosophy*, 93 Ky. L.J. 305, 323 (2005).

Gone were the days when a judge's relationship with the bail bond companies affected pretrial release decisions.⁴³ Bail bond agents no longer harassed and terrorized defendants and their families when a court proceeding was missed.⁴⁴ And the instances of theft in order to pay a bail bond company were eliminated.⁴⁵ As to the problems that the state still faced in pretrial release, the state's next criminal code reform would aim to rectify them along with several other concerns.

SECTION IV

A. Risk Assessment Bill: Injecting Objectivity in Pretrial Release

In addition to the challenges faced by Kentucky's pretrial release program, the state was also facing a lot of pressure from its prison population. "Kentucky's inmate population saw a 45% growth between 2000 and 2010, compared with 13 percent in the US prison system as a whole."⁴⁶ This increase took place while the crime rate remained at 1974 levels in Kentucky. The increase in inmates led to an increase in incarceration spending from \$140 million in fiscal year 1990 to \$440 million in fiscal year 2010, a 314% increase in spending.⁴⁷ The state saw pretrial release as an area where some savings can be made. With another major effort, Kentucky reformed its criminal laws and introduced a major change in its pretrial release practice in 2011. The reform vehicle, Public Safety and Offender

⁴³ See supra note 2.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Pretrial Justice Institute, *Safe, Fair and Effective Pretrial Justice is Crucial to Law Enforcement*, <http://www.pretrial.org/safe-fair-and-effective-pretrial-justice-is-crucial-to-law-enforcement/>.

⁴⁷ See Legis. Research Comm'n, Report of the Task Force on the Penal Code and Controlled Substances Act, Research Memorandum No. 506, at r (ky.20n).

Accountability Act (HB 463), (herein referred to as the Risk Assessment Bill),⁴⁸ was meant to “maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior”.⁴⁹ The Risk Assessment Bill mandated the state “utilize evidence-based practices to reduce the likelihood of future criminal behavior.”⁵⁰ In essence, the state was implementing a practice that preferred the predictability of algorithms over the subjective determination of judges in making pretrial release decisions.

B. Resistance to Change

As could be expected, the proposal to yet again change Kentucky’s pretrial practices was resisted by some in spite of the Bill’s bi-partisan support in Frankfort.⁵¹ But the resistance was negligible in comparison to the

Fayette County’s prosecutor, Ray Larson, with a bumper sticker he created in response to recent penal reform laws in Kentucky.
ALYSIA SANTO/THE MARSHALL PROJECT



resistance staged against the Bail Bond Bill. Some of the resistance could be attributed a hawkish belief in the adage, “if you do the crime you have to do the time.” A natural reluctance to deviate from the tried and true, which may be explained by the term “local legal culture” also

⁴⁸ H.B. 463, ch. 2, Ky. Acts. 4 (2011) (as codified in Ky. Rev. Stat. Ann. § 196.288(1) (West Supp. 2013)).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Tara Boh Klute & Mark Heyerly, Ky. Pretrial Servs., Report on Impact of House Bill 463: Outcomes, Challenges and Recommendations 4–6 (2012).

may contributed to the resistance.⁵² Some prosecutors and judges rehashed the familiar arguments that the changes proposed by the Risk Assessment Bill were a soft on crime approach, which was anathema to some.

C. The Risk Assessment Tool—The Use of Data in Pretrial Release

Risk assessment tool research and development began in the 1950s.⁵³ The instruments used data collected from many jurisdictions to identify predictive characteristics that affect FTAs and NCAs. KPSA utilized the pretrial risk assessment tool by collecting extensive personal information about defendants through an interview and investigation.⁵⁴ After defendants' identity was confirmed by a third party, ⁵⁵ the KPSA worker would put together data that included the defendants' residency history, work history and status, current charge, legal status, any substance abuse history, any criminal record, any prior FTAs, mental health history, community and family ties, educational level, and any prior escape convictions.⁵⁶ The risk assessment tool helps KPSA categorizes defendants according to risk level as follows: low risk of FTA, moderate risk of FTA, or high risk of FTA. This information is then given to a judge with a recommendation that, (1) defendants considered low risk be released on unsecured bond or personal recognizance, (2) defendants deemed moderate risk be released under the same conditions as a low risk defendant with the addition of supervision like GPS

⁵² See Francis T. Cullen et al., *Eight Lessons from Moneyball: The High Cost of Ignoring Evidence—Based Corrections*, 4 *Victims & Offenders* 197, 210–11 (2009).

⁵³ Cynthia A. Mamalian, Pretrial Justice Inst., *State of the Science of Pretrial Risk Assessment* 7 (2011).

⁵⁴ See Ky. Rev. Stat. Ann. § 431.515 (West Supp. 2013).

⁵⁵ 93 *Id.* app. B, at 3. See also Ky. R. Crim. P. 4.06.

⁵⁶ See Klute & Heyerly, *supra* note 51.

monitoring or controlled substance testing, and (3) high risk defendants be dealt with as the judge sees fit using the Kentucky Supreme Court's guidelines.

Utilizing a risk assessment tool did not change Kentucky's criminal trial process as outlined in Section III. Rather, the bill changed the method in which KPSA reached its recommendation and significantly buttressed the impact of KPSA's report in pretrial release decisions. Judges were expected to consider and abide by KPSA's pretrial report unless they have a subjective reason to deviate from it under KRS section 431.066.⁵⁷ Judges may decline to follow KPSA's recommendations by reducing in writing their objections to the recommendations. Upon appellate review, the standard of review would still be an abuse of discretion, as it was under the Bail Bond Bill, but the reviewing court would now have the benefit of a written record to review. Hence, the hope is that trial judges will be more mindful of whom to deny bail.

D. Results from The Risk Assessment Bill—HB 463

Prior to passing the Risk Assessment, Kentucky experimented with risk assessment tools created for other jurisdictions. The successes from these experimental uses contributed to the establishment of a bipartisan task force to look at Kentucky's prison admissions data. The task force commissioned the JFA Institute to validate Kentucky's risk assessment tool and that validation offered an invaluable opportunity to assess Kentucky's risk assessment tool. *Figure 2* illustrates the predictive strength of the assessment tool. The data suggest that the

⁵⁷ *Id.*; Ky. Rev. Stat. Ann. § 431.520 (West Supp. 2013).

risk assessment tool was very accurate in predicting FTAs and NCAs for low risk offenders but was overly cautious in predicting NCAs for high risk defendants. The predictive strength of the model weakens as the number of defendants released and time-span increases.

Figure 2: Comparison Between Predictive Model and Actual Results						
	2011 Predictive Model		Nov. 2012 to Oct. 2013		Jul. 2013 to Jun. 2015	
	FTA	NCA	FTA	NCA	FTA	NCA
Low Risk	5%	8%	5%	8%	9%	7%
Moderate Risk	10%	16%	10%	15%	18%	12%
High Risk	19%	25%	19%	14%	23%	16%
<i>Data from KPSA courtesy of Tara Blair</i>						

Confidence in the risk assessment was not felt statewide. Some counties utilized the tool and increased their pretrial release while others did not. This discrepancy is illustrated by *Appendix B: Outline Map of Kentucky 120 Counties and their Release Rates*.⁵⁸ These data suggest that many counties still relied on judges' discretion and money bail. Defendants' in such counties would have fared better at the time of the bail bondsmen because they could have secured their release albeit by getting into debt with a bondsman.

⁵⁸ Robert Veldman, Note, *Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation*, 102 Ky. L.J. 777-813 (2014).

The lowest average county release rate in Kentucky between June 2011 and June 2013 was McCracken County at 46.48%. The highest average release rate over the same time period was Russell County at 84.93%. These figures are not outliers. Seventy-nine counties had an average release rate below the 69.35% state average and seven counties had release rates above 80%. Demographics cannot be used to justify the disparities. Counties with similar communities had dissimilar release rates. For example, Jefferson County released 69.54% of its 92,921 total cases from June 2011 to June 2013. Fayette County, the next largest caseload, released 47.46% of its 30,356 total cases. Similarly, adjacent rural counties also differ greatly. Rockcastle County released 74.85% of its 2,433 total cases while Lincoln County released 53.24% of its 2,453 total cases.

Veldman

Section V

A. Analysis

The stated goals of Kentucky Pretrial Service Agency are, “[t]o assist the court in making informed pretrial release decisions, to effectively supervise defendants in order to support safe communities and to ensure that defendants meet court obligations while maintaining the constitutional presumption of innocence and the right to reasonable bail.”⁵⁹ These are laudable goals and provide a fair barometer to judge Kentucky’s three approaches to pretrial release.

⁵⁹ Kentucky Court of Justice website, *Pretrial Service*, <http://courts.ky.gov/courtprograms/pretrialservices/Pages/default.aspx> (emphasis added).

Kentucky's pre-1976 approach to pretrial release was a disaster and offers only lessons of how not to approach pretrial release. The justice system was compromised by an industry whose tentacles penetrated deep enough to have judges in their pockets for the purpose of setting high bail amounts for defendants who could not afford it.⁶⁰ The Bail Bond Bill brought about needed change and its results show that the worst symptoms of the that era were eradicated with the abolition of the bail bond industry.

The introduction of the risk assessment tool into the state's pretrial release program was experimental and it eventually got pursued statewide because of the its perceived success. But the program had its drawbacks. It was meant to save the state money by reducing the number of defendants jailed but the state continues to outpace national incarceration rates. Evidence of subjectivity was rampant as similar counties show very different release rates indicating that the application of justice was not uniform in the state. However, the introduction of objectivity into the pretrial release decision, no matter how minimal and uneven, was an improvement.

Kentucky is seen as a leader in pretrial release reform and has collaborated with organizations to create assessment tools. One such collaboration is with the Arnold Foundation and it yielded an assessment tool called the Public Safety Assessment-Court (PSA-Court).⁶¹ The PSA-Court uses only nine data points

⁶⁰ See supra note 2

⁶¹ TJAF, *Developing a National Model for Pretrial Risk Assessment*, 2013 (in collaboration with the Arnold Institute).

instead of the fourteen that Kentucky's prior assessment required. This is seen as an improvement by pretrial service practitioners but it also poses significant concerns. Because of proprietary interests, the special calculations or algorithms that formed Kentucky's prior assessment tools were never disclosed and the PSA-Court is no different. Few independent verifications of these tools have been made, making the assessment tool a black box that no one can access let alone challenge. We should be concerned about the accuracy of the data in these instruments especially knowing how shorthanded and overworked the justice system employees are. Basing pretrial release decisions on a machine using secretive methods has the feel of science fiction but there is nothing fictional about the possible repercussions of bail denial to a defendant.

B. Recommendations

Kentucky still struggles with pretrial release because it has not managed to entrenched in the justice system as well as the bail bondsmen were. The following recommendations will help in make pretrial release a presumption in Kentucky as the Kentucky Constitution and the Kentucky legislature intended:

1. Amend the Kentucky Constitution to permit non-money bonds and then eliminate money bonds for misdemeanor crimes;
2. Change the Kentucky Supreme Court's rule of an abuse of discretion standard of review for a denial of bail to a de novo standard; and
3. Encourage prosecutors to consider Kentucky Pretrial Service Agency's pretrial release report in agreeing or opposing bail.

The Kentucky Constitution requires the posting of “sufficient securities”⁶² for a bailable offense. This is a hurdle in creating a regime of non-money bailable offenses. The legislature should amend the Constitution and then eliminate money bails for all misdemeanors. Eliminating this class of crimes from pretrial incarcerations will reduce the jail population where it is most needed. It will do so without endangering the public or substantially increasing FTAs because misdemeanor crimes are not crimes whose perpetrators are likely to be dangerous to the public. Furthermore, the punishment for bail jumping is sufficient deterrence for most defendants accused of misdemeanors.

If a judge’s decision to deny bail is reviewed by an appellate court, the standard of review should be a de novo standard⁶³ instead of an abuse of discretion standard. This will require the Kentucky Supreme Court to change its rule and will put a fresh set of eyes on the facts of a case where bail is sought but denied. Such a rule change will cause trial courts to be cautious about denying pretrial release especially when combined with the requirement that their reason to deny pretrial release be memorialized in writing.

The next most consequential actors in pretrial release, after judges, are prosecutors and they need to be encouraged to create a culture of pretrial release. With their wide discretion and complete immunity, prosecutors are able to use pretrial release as a weapon against defenders and it will be an uphill battle to have

⁶² See supra 22

⁶³ Dictionary Law.com, “De novo” means starting over, as in a trial de novo. An appellate body looks at the facts of the case instead of relying on the findings of a lower court. Available at <http://dictionary.law.com/default.aspx?selected=489#ixzz48YLqoJD9>.

them give up such an effective tool. However, a prosecutor's job is to see that justice is carried out and if incarcerating defendants pretrial has a tendency to minimize the possibility of that happening, then it should be avoided whenever possible. Prosecutors should be encouraged to consult and consider KPSA's pretrial release report before opposing any bail.

These recommendations will improve Kentucky's pretrial release approach and keep the state at the forefront of pretrial justice for defendants. They will minimize the number of defendants incarcerated pretrial, which will save the state money, protect defendants from the pitfalls of pretrial incarceration, and spare families the evils that may arise from a breadwinner being incarcerated pretrial. These recommendations will also ensure the statutory intent of Kentucky's laws and protect the constitutional rights of defendants.

C. Conclusion

Kentucky's current pretrial release is the best approach the state has tried. The first did not cost the state money and the second was experimental. Currently, not all defendants enjoy the benefits of Kentucky's improved pretrial processes. For KPSA to oversee a uniform application of pretrial release across the state, the legislature, Judiciary, and Executive branches need to make changes in the way they currently deal with pretrial release. Kentucky's forty-year experiment shows that it is not easy to change an entrenched state practice but it is possible.

APPENDIX

Appendix A: Section 431.066. Pretrial release and bail options of verified and eligible defendant—Assessment of flight risk, likelihood of appearing at trial, and risk of danger—Credit toward bail for time in jail.

- i. For purposes of this section, “verified and eligible defendant” means a defendant who pretrial services is able to interview and assess, and whose identity pretrial services is able to confirm through investigation.
- ii. When a court considers pretrial release and bail for an arrested defendant, the court shall consider whether the defendant constitutes a
 - i. flight risk,
 - ii. is unlikely to appear for trial, or
 - iii. is likely to be a danger to the public if released.

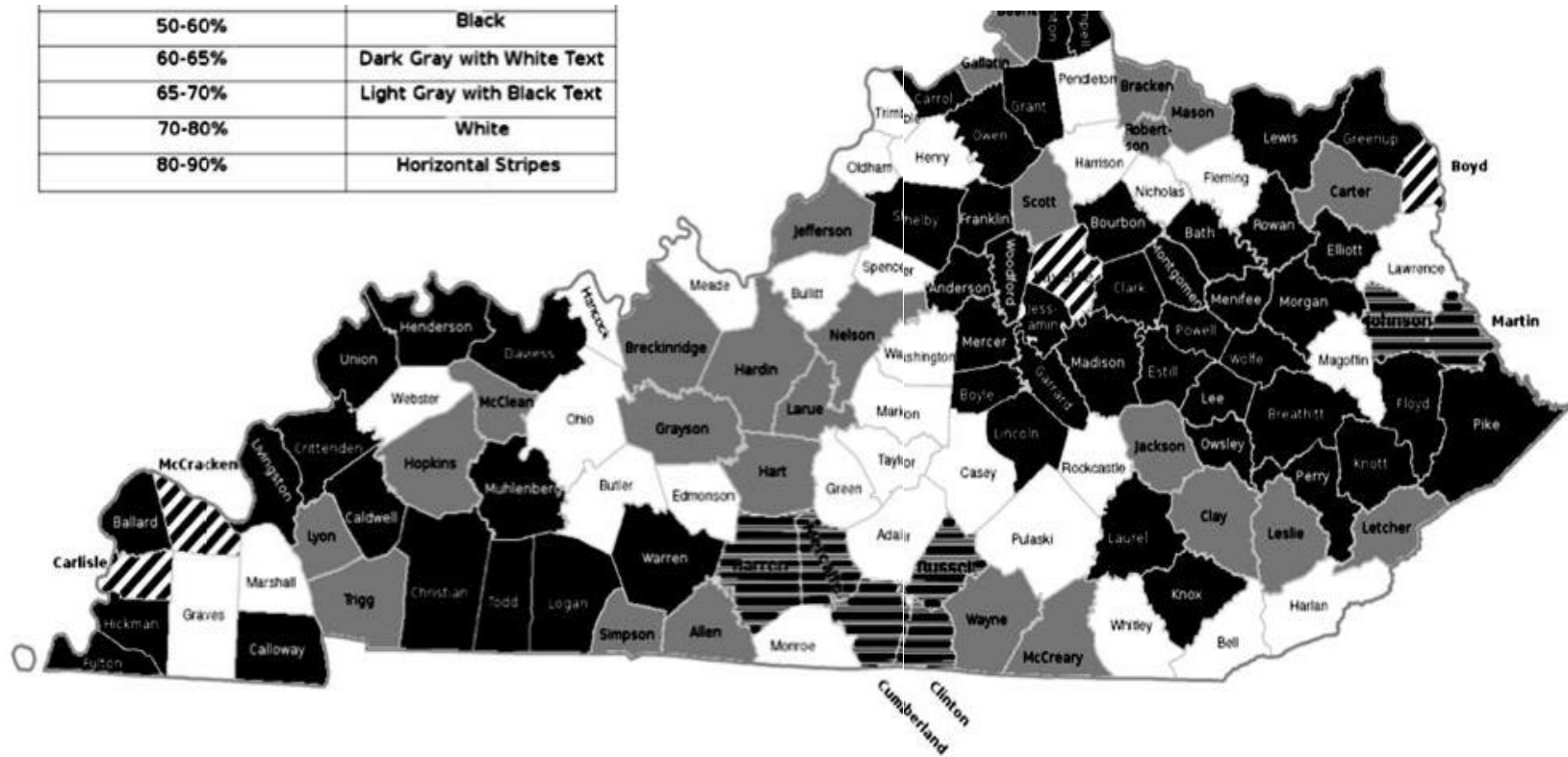
In making this determination, the court shall consider the pretrial risk assessment for a verified and eligible defendant along with the factors set forth in [KRS 431.525](#).

- i. If a verified and eligible 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.
- ii. If a verified and eligible 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 (3) 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.
- iii.
 1. The provisions of paragraph (a) of this subsection shall not apply to:
 1. Any person convicted of, pleading guilty to, or entering an Alford plea to a felony offense under KRS Chapter 510, [KRS 529.100](#) involving commercial sexual activity, [KRS 530.020](#), [530.064\(1\)\(a\)](#), [531.310](#), or [531.320](#), or who is a violent offender as defined in [KRS 439.3401](#); or
 2. A defendant who is found by the court to present a flight risk or to be a danger to others.

- i. If a court determines that a defendant shall not be released pursuant to subsection (5) of this section, the court shall document the reasons for denying the release in a written order.

(Ky. Rev. Stat. Ann. § 431.066 (West Supp. 2013) (emphasis added)).

Appendix B: Outline Map of Kentucky 120 Counties and their Pretrial



Robert Veldman, Note, *Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation*, 102 Ky. L.J. 777-813 (2014).

Appendix C: Constitutional Authorities

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 §16

All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great.

Kentucky Constitution §17

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

Federal Law: 18 U.S.C §3141-3150

“There is a presumption of pretrial release ‘unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any person or the community.’

- i. The judicial officer must impose the least restrictions which will assure personal appearance and the safety of the public.”

Appendix D: Legal Terminology Explained

Imprimatur—explicit approval of the state.

Standard of Review—the level of scrutiny applied by an appellate court on a lower court's decision.

Compelling Evidence Standard—a standard of review that is more rigorous than a mere preponderance of evidence.

De Novo—an appellate review where a reviewing court looks at all the relevant evidence to determine if a lower court made the right determination.

Difference between Bail and Pretrial Release—Bail is a form of pretrial release. There are other pretrial releases that are not bails e.g. executive release.

Difference between Prisons and Jails—Prisons are long term facilities that typically hold adjudicated felons while jails are locally operated, short term facilities that hold inmates awaiting court proceedings or sentenced to less than a year. A majority of jail inmates are yet to be tried.

SCOTUS—Supreme Court of the United States

FTA—Failure to Appear

NCA—New Criminal Activity