

# **Locked Up for Being Poor: The Need for Bail Reform in Kentucky**



A Briefing Report of the  
Kentucky Advisory Committee to the  
U.S. Commission on Civil Rights

November 2021

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Kentucky Advisory Committee to  
the U.S. Commission on Civil Rights

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The Kentucky Advisory Committee, as part of its responsibility to advise the Commission on Civil Rights issues within the state, submits this report, “Locked Up for Being Poor: The Need for Bail Reform in Kentucky.” The report was unanimously approved by the Advisory Committee on April 21, 2021.

Sincerely,

Enid Trucio-Haynes, *Chairperson*

## **Kentucky Advisory Committee to the U.S. Commission on Civil Rights**

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## I. EXECUTIVE SUMMARY

The Kentucky Advisory Committee (“Committee”) to the U.S. Commission on Civil Rights examined the pretrial detention and bail process in Kentucky. The Committee’s work focused on the impacts and uses of cash bail—that is, the money an individual must pay to secure their release from detention pretrial—in the state. As part of the inquiry, the Committee heard testimony on this topic from a diverse group of panelists during public meetings.

The use of cash bail is prevalent in Kentucky courts, posing significant challenges to low-income defendants. A study by the Pegasus Institute in 2016 found that over 64,000 nonviolent, nonsexual offenders—70 percent of whom were deemed to be at low to moderate risk for reoffending prior to trial—were detained in Kentucky for an average of 109 days pretrial because they could not afford to pay their bail.<sup>1</sup> The Committee heard several key themes throughout their inquiry which evidenced the need for cash bail reform in the state to achieve more equitable and effective public safety outcomes. These key themes included (1) the failure of Kentucky’s pretrial risk assessment tool to reduce pretrial detentions and provide reliable risk assessments; (2) the widely varied conditions of release for similarly situated defendants across the state; and (3) the negative consequences caused by unnecessary pretrial detention of low- to moderate-risk nonviolent and nonsexual alleged offenders.

Kentucky utilizes the Public Safety Assessment (PSA), a risk assessment tool used to determine whether an individual should be released pretrial, and if so, under what conditions.<sup>2</sup> Although the PSA was adopted to provide an evidence-based risk evaluation mechanism for cash bail determinations, judicial discretion has limited its effectiveness. Studies show that the PSA has not led to a decrease in pretrial detention, due in part to judges ignoring the risk assessment and continuing to require monetary bail for low- to moderate-risk detainees.<sup>3</sup> Judicial discretion notwithstanding, critics have long questioned the predictive reliability of such risk assessment tools, arguing that they lead to discriminatory outcomes. For example, a recent study found black people who did not reoffend prior to trial were twice as likely as white defendants to be classified as high risk by the PSA.<sup>4</sup>

In addition, studies show that pretrial release conditions vary significantly for similarly situated defendants across Kentucky.<sup>5</sup> A 2019 Lexington Herald-Leader report on bail data in Kentucky found that “the likelihood of a defendant being ordered to pay cash bail varies widely from county to county.”<sup>6</sup> For example, in 2019, the percentage of cases in which defendants were released before trial without monetary conditions ranged from 5 percent in McCracken County to

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<sup>1</sup> [https://files.texaspolicy.com/uploads/2020/10/26164735/Bail-Reform-in-Kentucky.pdf?\\_gl=1\\*1ulxedi\\*\\_ga\\*MjA2NTMzMjk2My4xNjI5NzI4Njk2\\*\\_ga\\_PY28GXYGQP\\*MTYyOTcyODY5NS4xLjAuMTYyOTcyODY5NS42MA..](https://files.texaspolicy.com/uploads/2020/10/26164735/Bail-Reform-in-Kentucky.pdf?_gl=1*1ulxedi*_ga*MjA2NTMzMjk2My4xNjI5NzI4Njk2*_ga_PY28GXYGQP*MTYyOTcyODY5NS4xLjAuMTYyOTcyODY5NS42MA..)

<sup>2</sup> Megan Stevenson, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 303, 309 (2018).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 305 (citing a study by ProPublica that found that black defendants who did not reoffend were more than twice as likely to be wrongly classified as high risk than white defendants).

<sup>5</sup> Daniel Desrochers and Beth Musgrave, *This lawmaker tried to reform Kentucky’s cash bail system. Here’s why he failed.* (June 14, 2019) at <https://www.kentucky.com/news/local/watchdog/article231477743.html#storylink=cpy>.

<sup>6</sup> *Id.*

68 percent in Martin County.<sup>7</sup> Consequently, the likelihood that a lower risk detainee is unnecessarily detained due to inability to pay cash bail varies significantly based on the location.<sup>8</sup>

Unnecessary pretrial detention of low- to moderate-risk individuals charged with nonviolent has significant consequences for individual detainees and the community. Detention based solely on the detainee's inability to pay bail can have extraordinary consequences, including the loss of wages, employment, and housing, as well as jeopardizing child custody. Further, data show that low- to moderate-risk defendants who are detained pretrial are nearly 40 percent more likely to commit new crimes before trial compared to low- to moderate-risk detainees who are detained for no more than 24 hours.<sup>9</sup> Additionally, the extended detention of the 64,000 nonviolent, nonsexual low-to moderate-risk detainees cost the state and taxpayers nearly \$150 million in detention expenses in 2016.<sup>10</sup>

From 2008-2018, Kentucky has continually ranked tenth in the U.S. for the most people incarcerated per capita.<sup>11</sup> In 2018, Kentucky's prison population grew at nearly four times the national average,<sup>12</sup> leading to nearly 73 percent of Kentucky jails being at or over capacity.<sup>13</sup> Experts agree that reforming the cash bail system in the state can not only alleviate this incarceration crisis, but also create a more just system. The Committee makes several recommendations, including eliminating cash bail unless there is *clear and convincing evidence* a defendant poses a danger to the community or is an established flight risk; shifting resources currently used for pretrial detention towards alternatives such as treatment for substance abuse and mental health issues; and gathering more research on the impact of Kentucky's cash bail system on communities of color.

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<sup>7</sup> <https://kypolicy.org/disparate-justice-where-kentuckians-live-determines-whether-they-stay-in-jail/>

<sup>8</sup> *Id.*

<sup>9</sup> [https://files.texaspolicy.com/uploads/2020/10/26164735/Bail-Reform-in-Kentucky.pdf?\\_gl=1\\*1ulxedi\\*\\_ga\\*MjA2NTMzMjk2My4xNjI5NzI4Njk2\\*\\_ga\\_PY28GXYGQP\\*MTYyOTcyODY5NS4xLjAuMTYyOTcyODY5NS42MA..](https://files.texaspolicy.com/uploads/2020/10/26164735/Bail-Reform-in-Kentucky.pdf?_gl=1*1ulxedi*_ga*MjA2NTMzMjk2My4xNjI5NzI4Njk2*_ga_PY28GXYGQP*MTYyOTcyODY5NS4xLjAuMTYyOTcyODY5NS42MA..)

<sup>10</sup> [https://files.texaspolicy.com/uploads/2020/10/26164735/Bail-Reform-in-Kentucky.pdf?\\_gl=1\\*1ulxedi\\*\\_ga\\*MjA2NTMzMjk2My4xNjI5NzI4Njk2\\*\\_ga\\_PY28GXYGQP\\*MTYyOTcyODY5NS4xLjAuMTYyOTcyODY5NS42MA..](https://files.texaspolicy.com/uploads/2020/10/26164735/Bail-Reform-in-Kentucky.pdf?_gl=1*1ulxedi*_ga*MjA2NTMzMjk2My4xNjI5NzI4Njk2*_ga_PY28GXYGQP*MTYyOTcyODY5NS4xLjAuMTYyOTcyODY5NS42MA..)

<sup>11</sup> The April 2019 reports by The Vera Institute and the U.S. Department of Justice [Bureau of Justice Statistics](#) both reached the same conclusion about Kentucky's incarceration rates: from 2008-18, most states reduced the number of incarcerated people due to a relatively low crime rate, however Kentucky increased incarcerations. Kentucky saw an 11.2 percent increase in its state inmate population from 2008 to 2018, compared to an 8.5 percent drop on average for the 50 states overall as well as the federal government, which runs its own prison system, according to the Vera Institute [analysis](#). With an incarceration rate of 540 state inmates per 100,000 residents, Kentucky ranked tenth in the nation. John Cheves, *Prison populations are falling in most states, but ballooning in Kentucky. Here's why*. (April 25, 2019) at <https://www.kentucky.com/news/politics-government/article229666564.html#storylink=cpy>.

<sup>12</sup> John Cheves, *Prison populations are falling in most states, but ballooning in Kentucky. Here's why*. (April 25, 2019) at

<https://www.kentucky.com/news/politics-government/article229666564.html#storylink=cpy>.

<sup>13</sup> Ashley Spalding, Ashley Spalding, Research Director, Kentucky Center for Economic Policy, Aug. 20 Briefing Transcript at 12.

## II. BACKGROUND

The U.S. Constitution and the Kentucky Constitution recognize the fundamental protection of liberty for people accused of committing a criminal act and who have been detained by the government until their trials.<sup>14</sup> The U.S. Constitution protects people charged with criminal acts from “excessive bail.”<sup>15</sup> The Kentucky Constitution provides a right to bail for people who have been charged with a public offense and have been taken into custody, except for certain serious crimes.<sup>16</sup>

When a person is charged with one or more criminal acts, they may be detained by the state or federal government prior to their trial, which may not occur for several weeks or months. Bail is a form of a contract between a person accused of a crime and the government, which allows for the person to be released from custody prior to trial in exchange for something of value that is intended to ensure the person will appear in court and will comply with the court’s orders. The bail may be returned upon an individual’s compliance with all court proceedings. The amount of bail is different for each individual based upon a number of factors that vary from state to state. Some states have schedules or risk assessment tools to determine whether an individual should pay bail at all, be released through other means, or remain in custody, as well as to provide guidance for the amount of bail. Bail is based upon a judge’s discretion and they typically set the amount of bail.

According to The Bail Project, a national nonprofit organization, nearly half a million people are held daily in jail cells across the U.S. who have not been convicted of a crime and are waiting for their criminal cases to move forward.<sup>17</sup> Studies on pretrial detention have found that even a small number of days in custody awaiting trial can have many negative effects, increasing the likelihood that people will be found guilty, harming their housing stability and employment status and, ultimately, increasing the chances that they will be convicted on new charges in the future.<sup>18</sup> In 2018, nearly one in two adults in the U.S. have had a loved one who has been detained in jail.<sup>19</sup>

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<sup>14</sup> U.S. Const. amend. VIII. The Eighth (VIII) Amendment prohibits “excessive bail,” the imposition of “excessive fines,” and the infliction of “cruel and unusual punishments.”

<sup>15</sup> *Id.*

<sup>16</sup> Ky. Const. §§ 16, 17. Section 16 of the Kentucky Constitution provides the right to bail and Section 17 prohibits excessive bill. Section 16, Right to bail, “Habeas corpus. All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it. Text as ratified on: Aug. 3, 1891, and revised Sept. 28, 1891.” Section 17, Excessive bail or fine, or cruel punishment, prohibited. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted. Text as ratified on: Aug. 3, 1891, and revised Sept. 28, 1891.”

<https://legislature.ky.gov/LRC/Publications/Informational%20Bulletins/ib210.pdf>. See also Ky. Rev. Stat. § 431.066 (2012) (providing pre-trial release and bail options of verified and eligible defendant based on assessment of flight risk, likelihood of appearing at trial, and risk of danger).

<sup>17</sup> *After Cash Bail*, The Bail Project at <https://bailproject.org/after-cash-bail/> citing Wendy Sawyer & Peter Wagner, “[Mass Incarceration: The Whole Pie 2019](#),” Prison Policy Initiative, March 2019.

<sup>18</sup> <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>

<sup>19</sup> *After Cash Bail*, The Bail Project at <https://bailproject.org/after-cash-bail/> citing Brian Elderbroom, et al., “[Every Second: The Impact of the Incarceration Crisis on America’s Families](#),” FWD.us, December 2018.



Many states have adopted risk assessment tools based on national data to make pretrial custody decisions with the goal of reducing cash bail while protecting public safety. Kentucky led this effort in the U.S. when, in 2011, the legislature mandated the use of a pretrial risk assessment tool.<sup>20</sup> Kentucky statute requires courts to use a pretrial risk assessment to make determinations whether a defendant is a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released.<sup>21</sup> For those designated as low risk, the statute requires state courts to “order the defendant released on unsecured bond or on the defendant's own recognizance subject to such other conditions as the court may order.”<sup>22</sup>

Risk assessment tools often are a key element in the “smart crime” initiatives adopted by states. The use of national data provides an evidence-based mechanism to determine which individuals should be released without any cash bail while their cases are pending. Kentucky’s tool, the Public Safety Assessment (PSA), was developed by the Laura & John Arnold Foundation and piloted in the state in 2013.<sup>23</sup> It is the most-widely used algorithm for pretrial determinations in the country to predict the risk of failure to appear at a trial.<sup>24</sup> The PSA is used for other decisions in the criminal justice system including sentencing, probation, and parole. Proponents of predictive risk assessment tools highlight the opportunity for consistent and standardized bail release decision-making guidelines. Critics have noted the disproportionate impacts on communities of color and have questioned the predictive reliability of the algorithms used in the risk assessment tools. A recent study found that black people charged with crimes were more than twice as likely to be wrongly classified as high risk using a risk assessment tool.<sup>25</sup>

Kentucky’s PSA has not achieved the intended goal of reduced pretrial detention according to a comprehensive empirical study published in 2018.<sup>26</sup> The study results found “only a trivial increase in pretrial release,” despite early promising assessments.<sup>27</sup> According to the study, the low increase in releases was due, in part, to the discretionary judgments by judges permitted by the law with the result that judges “ignored the presumptive default of non-monetary release in more than two-thirds of cases.”<sup>28</sup> A 2015 Marshall Project report on Kentucky’s bail reform identified a lack of trust by judges in the PSA’s determinations of low risk defendants.<sup>29</sup> This lack of trust in the pretrial release recommendations from the Kentucky PSA leading to unnecessary detentions was confirmed by several witnesses.

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<sup>20</sup> Megan Stevenson, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 303, 308 (2018).

<sup>21</sup> Ky. Rev. Stat. § 431.066.

<sup>22</sup> *Id.*

<sup>23</sup> Stevenson, *supra* note 8, at 309.

<sup>24</sup> *Id.* at 310 (the author used detailed data on more than a million criminal cases to analyze the use of pretrial risk assessment in Kentucky).

<sup>25</sup> *Id.* at 305 (citing a study by ProPublica that found that black defendants who did not reoffend were more than twice as likely to be wrongly classified as high risk than white defendants).

<sup>26</sup> *Id.* at 308.

<sup>27</sup> *Id.* A major change in court practices and outcomes occurred soon after the law was implemented but these changes eroded over time as judges returned to their previous bail-setting practices, and within a few years the pretrial release rate was lower than it was before the 2011 and lower than the national average.

<sup>28</sup> *Id.*

<sup>29</sup> Alysia Santo, *Kentucky's Protracted Struggle to Get Rid of Bail*, Marshall Project (Nov. 12, 2015), <https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail/> (discussing results from Kentucky's bail reforms); see also, Arthur Rizer & Caleb Watney, *Artificial Intelligence Can Make Our Jail System More Efficient, Equitable, and Just*, 23 Tex. Rev. L. & Pol. 181, 227 (2018).

Pretrial release ensures that people charged with crimes have an opportunity to prepare a defense. Unaffordable cash bail determinations leave innocent Kentuckians in jail because of their inability to pay amounts as low as \$250.00.<sup>30</sup> Higher risk defendants are released from jail pending their trials while people charged with low level, non-violent crimes remain in jail.<sup>31</sup> Significant harms are caused by pretrial detention and other conditions required for pretrial release. Unaffordable bail leads some to accept a guilty plea to get released from jail. The lack of a clear and convincing evidence standard for pretrial release decisions limits the ability of defendants to challenge bail and related decisions. Tech alternatives, such as electronic monitoring, can be equally restrictive as cash bail creating a need for clear standards for these decisions.<sup>32</sup> The reliance on prior criminal charges in these decisions disproportionately affects black and other defendants of color as well as those who are economically disadvantaged, all of whom have increased contacts with the criminal justice system.

Pretrial detention can create or exacerbate poverty.<sup>33</sup> In Kentucky, re-arrests after pretrial release primarily stem from challenges related to homelessness (often caused by an arrest and detention for even short periods of time), mental health, and substance abuse. Children suffer if one of their parents is detained before trial. Seventy percent (70%) of women and fifty-nine (59%) of men incarcerated in Kentucky have children.<sup>34</sup> The percentage of children in Kentucky with a parent in jail is four times the national average.<sup>35</sup>

The incarceration rates in Kentucky provide insight into the low number of pretrial releases. Kentucky continues to have a high proportion of incarcerated people. It ranked tenth in the U.S. for the rate of people incarcerated per capita from 2008-2018.<sup>36</sup> Before the KRS was amended in 2011, Kentucky's prison population was growing at nearly four times the national average.<sup>37</sup> The severe overcrowding of prisons and county jails has prompted calls for reform by legislators and other elected officials.

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<sup>30</sup> Ed Monahan, Executive Director, NAPD Fund for Justice, Inc., testimony, Briefing on Bail Reform before the Kentucky Advisory Committee to the U.S. Commission on Civil Rights, June 30, 2020, transcript p. 15 (hereafter cited as June 30 Briefing Transcript).

<sup>31</sup> Damon Preston, Public Advocate, Office of the Public Advocate, *June 30 Briefing Transcript*, at 17-18.

<sup>32</sup> Megan Stevenson, Assistant Professor of Law, George Mason University, *June 30 Briefing Transcript*, at 6.

<sup>33</sup> Damon Preston, *June 30 Briefing Transcript*, at 18.

<sup>34</sup> Cherise Fanno Burdeen, Executive Partner, Pretrial Justice Institute, *Aug. 20 Briefing Transcript*, at 2.

<sup>35</sup> *Id.*

<sup>36</sup> The April 2019 reports by The Vera Institute and the U.S. Department of Justice [Bureau of Justice Statistics](#) both reached the same conclusion about Kentucky's incarceration rates: from 2008-18, most states reduced the number of incarcerated people due to a relatively low crime rate, however Kentucky increased incarcerations. Kentucky saw an 11.2 percent increase in its state inmate population from 2008 to 2018, compared to an 8.5 percent drop on average for the 50 states overall as well as the federal government, which runs its own prison system, according to the Vera Institute [analysis](#). With an incarceration rate of 540 state inmates per 100,000 residents, Kentucky ranked tenth in the nation. John Cheves, *Prison populations are falling in most states, but ballooning in Kentucky. Here's why*. (April 25, 2019) at <https://www.kentucky.com/news/politics-government/article229666564.html#storylink=cpy>.

<sup>37</sup> John Cheves, *Prison populations are falling in most states, but ballooning in Kentucky. Here's why*. (April 25, 2019) at <https://www.kentucky.com/news/politics-government/article229666564.html#storylink=cpy>.

Current calls for reform have come from across the state due to inequities in the administration of the cash bail system in addition to the high incarceration rates in the state.<sup>38</sup> According to a 2019 LEXINGTON HERALD-LEADER analysis of bail data from the Kentucky courts system, “the likelihood of a defendant being ordered to pay cash bail varies widely from county to county, court to court and judge to judge.”<sup>39</sup> In April 2019, Kentucky’s chief justice of the Supreme Court, John Minton Jr., noted in a speech that the current bail system disproportionately affects low-income defendants who aren’t able to pay for release after being charged with low-level, non-violent offenses.<sup>40</sup> In December 2018, the Kentucky Chamber of Commerce and the Kentucky Center for Economic Policy (KCEP) urged the legislature to take action on bail reform.<sup>41</sup> A KCEP analysis of pretrial release found that in 2018 eighty-nine (89%) percent of defendants were *not* charged with new crimes including seventy-six (76%) percent of those identified by the PSA as having a higher risk for re-offense.<sup>42</sup>

As of July 2018, 73 percent of Kentucky jails were at or over capacity and close to 10 jails were at or over 200 percent capacity which is most severe in overcrowded county jails.<sup>43</sup> According to the Administrative Office of the Courts, many of Kentucky’s overcrowded jails are filled with non-violent offenders.<sup>44</sup> In the 2019 legislative session, Rep. John Blanton (R-Slayersville) introduced a bill to address this inequality by eliminating the cash bail system in most circumstances, which he hoped would provide relief to overcrowded jails.<sup>45</sup> A similar bill was introduced in the 2021 legislative session by Sen. Morgan McGarvey (D-District 19), but the bill died in committee.<sup>46</sup>

The inequities and disparities in cash bail determinations made across the state has led to legal action. In January 2020, the Kentucky Department of Public Advocacy filed a petition before the state Supreme Court to set clear constitutional rules to protect defendants’ rights to reasonable bail.<sup>47</sup> The lack of guidelines and standards was demonstrated by six cases in which the same criminal charges were filed against defendants across the state.<sup>48</sup> In these cases, the pretrial release determinations ranged from someone being released on their own recognizance to another individual being required to pay a \$50,000 full cash bond.<sup>49</sup>

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<sup>38</sup> Travis Ragsdale, *Bail reform advocates make push for change in Kentucky* (Jan 22, 2019) at [https://www.wdrb.com/news/bail-reform-advocates-make-push-for-change-in-kentucky/article\\_e3e62912-1e87-11e9-aa00-6310a27c714c.html#comments](https://www.wdrb.com/news/bail-reform-advocates-make-push-for-change-in-kentucky/article_e3e62912-1e87-11e9-aa00-6310a27c714c.html#comments).

<sup>39</sup> Daniel Desrochers and Beth Musgrave, *This lawmaker tried to reform Kentucky’s cash bail system. Here’s why he failed.* (June 14, 2019) at <https://www.kentucky.com/news/local/watchdog/article231477743.html#storylink=cpy>

<sup>40</sup> Lisa Autry, *Chief Justice: Conversation on Bail Reform Just Getting Started* (April 18, 2019) at <https://www.wkyufm.org/post/chief-justice-conversation-bail-reform-just-getting-started>

<sup>41</sup> *The Emerging Consensus Behind Reforming Kentucky’s Bail System* (December 12, 2018) at <http://kentuckytoday.com/stories/the-emerging-consensus-behind-reforming-kentuckys-bail-system,16703>

<sup>42</sup> Ashley Spalding, Research Director, Kentucky Center for Economic Policy, Aug. 20 Briefing Transcript at 12.

<sup>43</sup> *Id.* In August 2018, then Kentucky Justice and Public Safety Secretary John Tilley reported that people were sleeping “on the floors in 76 jails and 12 prisons” throughout the state.

<sup>44</sup> Kyeland Jackson, *Louisville Officials To Advocate For Cash Bail Reform In Next Legislative Session* (Oct 31, 2019) at <https://wfpl.org/louisville-officials-to-advocate-for-cash-bail-reform-in-next-legislative-session/>

<sup>45</sup> H.B. 94, {leg no}, 2019 Reg. Sess., (Ky. 2019).

<sup>46</sup> S.B. 286, {leg no} 2021 Reg. Sess., (Ky. 2021). <https://apps.legislature.ky.gov/record/21RS/sb286.html>

<sup>47</sup> Petition to Exercise Original Jurisdiction Under Ky Const. § 110(2)(a), Ky. Sup. Ct. (Jan. 17, 2020) at <https://dpa.ky.gov/News-and-Public-Information/Documents/DPA%20Bail%20Writ.pdf>

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Local efforts to address the inequities created by the cash bail system have emerged. There is a Louisville chapter of The Bail Project, a national nonprofit organization that pays bail for people in need to reunite families and communities, and to reshape America's pretrial system.<sup>50</sup>

## Current Federal Law

The Eighth Amendment to the Constitution provides that “excessive bail shall not be required.”<sup>51</sup> Individuals also have a right to bail in a federal context.<sup>52</sup> Congress passed the 1966 Bail Reform Act to address concerns about disparities in pretrial release due to inability to pay bail. This Act amended federal law to require the pretrial release of an individual charged with a noncapital federal offense upon personal recognizance or an unsecured appearance bond unless the court determined the individual was unlikely to appear at trial.<sup>53</sup> The 1966 Act assessed the risk of failure to appear by considering the nature and circumstances of the offense charged, the weight of the evidence against the individual, family ties, employment, financial resources, character and mental condition, length of residence in the community, record of convictions, and the individual’s record of appearance at court proceedings.<sup>54</sup> If the individual was determined to be a flight risk under these factors, they would be given a variety of options, including an option of third-party custody, then travel and associational limitations, then cash or unsecured bail, and finally nighttime restrictions.<sup>55</sup> The accused had a right to appeal these conditions.<sup>56</sup> Release for a capital offense was also required under the 1966 Act unless the flight risk or danger to the community were too great.<sup>57</sup>

The Bail Reform Act of 1984<sup>58</sup> amended federal bail law to allow the use of preventative detention in limited circumstances where the accused posed a danger to the public or particular members of the public.<sup>59</sup> Under these circumstances, it is presumed that the accused is such a danger that they are not eligible for pre-trial release if the offense is a capital offense, if they committed the crime while on pre-trial release for a different federal crime, or if it has been less than five years since their conviction or release based on a different crime.<sup>60</sup> The accused is also presumed to be a flight risk if the offense qualifies under a proscribed list.<sup>61</sup> These presumptions may be challenged.

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<sup>50</sup> The Bail Project Louisville Page, <https://bailproject.org/louisville/> (Last visited Nov. 18, 2020).

<sup>51</sup> U.S. Const. amend. VIII.

<sup>52</sup> 18 U.S.C. § 3141.

<sup>53</sup> Congressional Research Service, *Bail: An Overview of Federal Criminal Law* (July 31, 2017).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 18 U.S.C. §§ 3141-3150.

<sup>59</sup> *Id.*

<sup>60</sup> 18 U.S.C. §3142(e)(2).

<sup>61</sup> *Id.* at (e)(3).

## Current Kentucky Law

In Kentucky, there are several ways to obtain a pre-trial release.<sup>62</sup> All offenses, except certain capital offenses, have a right to bail,<sup>63</sup> which is guaranteed by section 16 of the Kentucky Constitution.<sup>64</sup> Judges may deny bail if they doubt that the individual will appear for court proceedings or if they determine the defendant is a danger to society.<sup>65</sup> The amount of bail is not to be oppressive and should be proportional to the crime committed, although it should also insure compliance with court orders.<sup>66</sup> When determining the amount of bail, the judge considers the individual's past criminal acts, what they will do upon being released, and their ability to give bail.<sup>67</sup> The court may also use a uniform schedule of bail to determine the appropriate amount.<sup>68</sup>

Kentucky abolished commercial bail in 1976,<sup>69</sup> which led to the formation of a pre-trial services agency. This agency is authorized by the Administrative Offices of the Courts to interview the accused and make recommendations to the court as to what form of pre-trial release the accused should be released on.<sup>70</sup>

In 2013, Kentucky implemented the Public Safety Assessment (PSA) tool that determines which individuals should be released without any cash bail while their cases are pending.<sup>71</sup> The PSA evaluates risk in three ways: risk of failure to appear, risk of new arrest, and risk of new arrest for a violent crime.<sup>72</sup> In 2014, the PSA was modified to include age at arrest as a factor to the new criminal activity score.<sup>73</sup> Studies show that the PSA has not led to a decrease in pretrial detention, due in part to judges ignoring the risk assessment and continuing to assess monetary bail for low- to moderate-risk detainees.<sup>74</sup> Judicial discretion notwithstanding, critics have long questioned the predictive reliability of such risk assessment tools, arguing that they lead to discriminatory outcomes. For example, a recent study found black people who did not reoffend prior to trial were twice as likely as white defendants to be classified as high risk by the PSA.<sup>75</sup>

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<sup>62</sup> Ky. R. Crim. P. 4.04 (The forms of release in Kentucky are: personal recognizance, unsecured bond, nonfinancial conditions such as home incarceration or an electronic monitor, surety bond, cash, ten percent of the cash bond, or to put property up for bond).

<sup>63</sup> Ky. R. Crim.P. 4.02.

<sup>64</sup> Ky. Const. § 16.

<sup>65</sup> John Blanton, Representative, Kentucky House of Representatives, *June 30 Briefing Transcript*, at 2.

<sup>66</sup> Ky. R. Crim. P. 4.16.

<sup>67</sup> *Id.*

<sup>68</sup> *See generally* Ky. R. Crim. P. Appendix A.

<sup>69</sup> Ky. Rev. Stat. § 431.510.

<sup>70</sup> Ky. R. Crim. P. 4.06.

<sup>71</sup> Kathy Testimony, *June 30 Briefing Transcript*, at 8.

<sup>72</sup> Megan Stevenson, *Assessing Risk Assessment in Action*, 103 *Minn. L. Rev.* 303, 304–07 (2018).

<sup>73</sup> *Id.* at 345.

<sup>74</sup> *Id.* at 309.

<sup>75</sup> *Id.* at 305 (citing a study by ProPublica that found that black defendants who did not reoffend were more than twice as likely to be wrongly classified as high risk than white defendants).

### **III. FINDINGS AND RECOMMENDATIONS**

In keeping with their duty to inform the Commission of (1) matters related to discrimination or a denial of equal protection of the laws; and (2) matters of mutual concern in the preparation of reports of the Commission to the President and the Congress, the Kentucky Advisory Committee submits the findings and recommendations set forth below.

This report highlights the themes that emerged in testimony during the Committee's examination of bail reform in Kentucky. Primarily, the Committee heard testimony reflecting the failure of the Kentucky cash bail and pretrial detention system to enhance public safety, as well as the extraordinary consequences of unnecessary pretrial detention on detainees, their families, and the community. In addition to suggested reform efforts, the Committee recommends that the consequences of Kentucky's pretrial release and cash bail system be studied further to better understand the discriminatory and unequal outcomes it has caused, and to identify alternative options to pretrial detention. The Committee's findings result directly from the testimony received and reflect the views of the cited panelists. The complete meeting transcripts and witness testimony is included in the Appendix for further reference.

#### **Findings**

1. Cash bail is regularly required for pretrial release and results in many low-risk defendants being detained pretrial, which can have long-term impacts since defendants are more likely to plead guilty, often without legal counsel representation. The unaffordability of cash bail disproportionately impacts black, Hispanics/Latinxs, and low-income defendants, resulting in higher levels of pretrial detention.
2. Individuals with substance use disorders, behavior health issues, and mental illness often are unable to afford cash bail, resulting in their pretrial detention.
3. Pretrial detention traumatizes defendants, their families, and communities. It often results in the loss of employment and housing. Fifteen (15 ) percent of Kentucky children have had a parent in prison, which is four times higher than the national average.
4. In Kentucky, the high level of judicial discretion in pretrial detention decisions and the lack of review structure allows greater potential for discriminatory decision-making.
5. The pretrial risk assessment is not working to achieve the goal of presumptive pretrial release. The ability of judges and prosecutors to decide when to utilize the pretrial risk assessment tool and how to interpret the results can create disparate impacts in pretrial release.
6. Pretrial administrative release based on defendants' criminal history and current charges allows for discriminatory and unequal release practices.
7. Non-financial pretrial release varies widely by judicial district, which can include released on recognizance, supervision, electronic monitoring, and drug testing.

8. Electronic monitoring is a covert mechanism of pretrial detention that significantly limits the freedom of defendants and has negative impacts, such as stigma and inconvenience. It is effectively imposing cash bail and the expense prohibits some defendants from using electronic monitoring.

## **Recommendations**

1. The legislature should eliminate cash bail except in cases of a clear and identified danger to community, or an established flight risk. The legal standard should be changed to clear and convincing evidence.
2. More emphasis and resources need to be placed on alternatives to pretrial detention such as treatment for substance abuse disorders and mental health challenges. Other no-cost options to pretrial detention are needed.
3. There should be clear standards for all alternative options to pretrial detention.
4. Reforms and resources are needed to ensure that pretrial detention does not influence a defendant's decision to enter a guilty plea.
5. There should be clear standards established for requiring electronic monitoring as a condition of pretrial release.
6. There should be clear standards for a determination that a defendant has violated pretrial release conditions.
7. More research on discrimination in pretrial release and related decisions is needed to:
  - a. Further evaluate Kentucky's risk assessment tool to determine its overall impact in terms of justice and equity and whether it results in disparities and outcomes based on race, gender, income, educational status, etc.
  - b. Determine if there is evidence of discrimination based on race, gender, economic status, educational status, etc. in the administration of pretrial services in Kentucky's Court of Justice. This research should include in-depth, peer-reviewed research studies and be conducted in cooperation with the Office of Pretrial Services of the Administrative Office of the Courts with emphasis on the Kentucky counties of Jefferson, Fayette, Christian, and Hardin.
  - c. Review charging decisions and case processing, and determine how they impact pretrial release and jail populations.
  - d. Determine if there are patterns of disparities based on race, gender, educational status, income, etc. and if there are differences in rates of pretrial release among the counties and judicial districts in Kentucky.
  - e. Determine the extent to which higher bail levels may be set for blacks and Hispanics/Latinxs.
  - f. Determine the extent of racial and ethnic differences in how first-time defendants are treated in terms of bail and overall pretrial release.

- g. Determine whether there is any evidence of discrimination based on race, gender, economic status, educational status, etc. in pretrial release orders and conditions, particularly for electronic monitoring.
  - h. Identify the long-term physical, psychological, relational, and economic impacts that pretrial detention has on defendants' immediate/closest loved ones, especially after they are released.
8. The committee further recommends that a particular effort be given to ensuring that legal representation is available to criminal defendants at all court appearances to protect pretrial rights.