Jail Population in America

Over 6 in 10 of jail inmates are awaiting trial.

Impact of Short-term Pretrial Incarceration

Increase in New Criminal Arrest Low-Risk Defendants*

<table>
<thead>
<tr>
<th>Duration</th>
<th>Increase in Arrest</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-3 Days</td>
<td>39%</td>
</tr>
<tr>
<td>4-7 Days</td>
<td>50%</td>
</tr>
<tr>
<td>8-14 Days</td>
<td>56%</td>
</tr>
</tbody>
</table>

Increase in 2-Year Recidivism Low-Risk Defendants*

<table>
<thead>
<tr>
<th>Duration</th>
<th>Increase in Recidivism</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-3 Days</td>
<td>17%</td>
</tr>
<tr>
<td>4-7 Days</td>
<td>35%</td>
</tr>
<tr>
<td>8-14 Days</td>
<td>51%</td>
</tr>
</tbody>
</table>

“...defendants who are high-risk and/or violent are often released... nearly half of the highest-risk defendants were released pending trial.”

-Developing a National Model for Pretrial Risk Assessment, Laura & John Arnold Foundation
Outcomes of Pretrial Incarceration

Compared to defendants released at some point prior to trial, defendants held for the entire pretrial period had:

- 4x greater likelihood of being sentenced to jail
- 3x greater likelihood of being sentenced to prison
- 3x longer jail sentences
- 2x longer prison sentence

Question:
Some have proposed using risk-based screening tools instead of cash bail bonds to determine whether defendants should be released from jail before trial. This risk assessment would take into account such factors as [drug use history, mental health, employment status, residency, and community ties] or [the charge in question, criminal history, any warrants or previous failures to appear for court]. Under this system, high-risk defendants would be held in jail until trial and low-risk defendants would be released with conditions and be monitored and supervised. Would you support or oppose this proposal to use risk assessment instead of cash bail bonds to determine whether defendants should be released from jail before trial, or are you undecided? [IF SUPPORT/OPPOSE] And do you feel that way strongly, or not-so strongly?
Perceived Effectiveness of "Pretrial Risk Assessment"

Question:
I’m going to read you a list of terms used to describe the proposal of using risk-based screening tools to determine whether defendants should be released from jail before trial. For each term, tell me how effective you think it sounds when it comes to protecting public safety and ensuring appearance for trial: VERY effective, SOMEWHAT effective, NOT VERY effective, NOT effective AT ALL. If you don’t know just say so and we’ll move on.

“Pretrial risk assessment.”
Putting the “UMP!” back into the PresUMPtion of Innocence:

Kentucky’s “Wake-Up” Call to Litigate Bail Issues
In the beginning, there was bail...
King Richard III
Richard III’s Legacy

• Court of Requests (1483) – A court to which people too poor to hire a lawyer could apply to have grievances heard.

• Right to Bail (1484) – Introduced to protect suspected felons from imprisonment before trial and to protect their property from seizure during that time.
Presidential Assassination Attempt
Jan. 30, 1835
“Mr. Key seemed, at first, to acquiesce, but having conversed with some of the president's friends who stood round him, he suggested the idea that it was not impossible that others might be concerned who might be disposed to bail him, and let him escape to make another attempt on the life of the president, and therefore thought that a larger sum should be named.”
“The chief judge then said that there was no evidence before him to induce a suspicion that any other person was concerned in the act; that the constitution forbade him to require excessive bail; and that to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law.”
And What Became of Richard Lawrence?
Ky. Const. § 17

“Excessive Bail is prohibited.”

Ky. Const. § 16

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

“Reasonableness in the amount of bail should be the governing principle. The determination of that question must take into consideration the nature of the offense with some regard to the prisoner's pecuniary circumstances. If the amount required is so excessive as to be prohibitory, the result is a denial of bail.” Adkins v. Regan, 233 S.W.2d 402 (Ky. 1950)
Kentucky Does!

“‘The right to bail is a constitutional one, which has been safeguarded. Excessive bail is denounced.’ Kentucky Constitution, Section 17.” *Day v. Caudill*, 300 S.W.2d 45 (Ky. 1957)
“Any attempt to impose excessive bail as a means to deny freedom pending trial of charges amounts to a punishment of the prisoner for charges upon which he has not been convicted and of which he may be entirely innocent. Such a procedure strikes a blow at the liberty of every citizen.”  Long v. Hamilton, 467 S.W.2d 139 (Ky. 1971)
So What Happened?
Was it the Marketplace?
Rise in Crime?

U.S. Violent Crime rate

[Graph showing the trend of U.S. Violent Crime rate from 1960 to 2005]
Where we were....

It was a time of Dark Shadows...
We had lost our sense of Moral Repugnance of unmakable bonds...
We litigated outliers from “the standard” bail, not the standard...

$5,000  $5,000  $25,000
75% of our clients in jail pretrial...
No (or very few) appeals...
Then, three years ago, a celestial alignment...

Participants In All 3 Branches of Government Came Together...
HB 463
passed.

Kentucky’s AOC Pretrial Division Chief Operating Officer got Kentucky’s pretrial risk assessment tool statistically validated.
Kentucky Pretrial

Risk Assessment Instrument Validation

Prepared by
James Austin
Roger Ocker
Avi Bhati

The JFA Institute

October 29, 2010

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Dr. James Austin
JFA Institute
Pretrial Justice’s Tim Murray to Kentucky Public Advocate Ed Monahan:

“You Defenders dropped the ball. Clients are being hurt. You need to do better....”
KENTUCKY DPA’s Strategic Plan Developed:
Culture Change: 10 Steps from Dark Shadows to Enlightenment
1. The Public Advocate Created a Point Person for Bail Advocacy
2. **Used HB 463 as a Catalyst**

-Introduced “evidence-based practices”;
-Made mandatory (“shall” language) O.R. or unsecured bond for defendants “low” and “moderate” risk of “failing to appear” or a “danger to the community”;
-Created “presumptive probation” for certain drug offenses, and presumptive O.R. or unsecured bonds for persons charged with those offenses;
-Created a bail credit of $100/day for low/moderate risk defendants;
-Made some offenses non-arrestable, subject to criminal summons.
3. **Education and Training**

- Started with developing a bond advocacy curriculum
- Created a team of dedicated persons
- Brought it first to supervisors, then to field attorneys
- Had sessions at Annual Defender Conference, KBA Conv.
- New Attorney Training
- Long Distance Communications
Pretrial Release Manual

Published in June, 2013 and now available online at dpa.ky.gov
4. Directive:

Some people need to be told flat out to do something.

"My job is to get men to do what they don't want to do to achieve what they've always wanted to achieve."  

Tom Landry
5. Performance Evaluations

- Clear
- Specific
- Measurable
- Obtainable
- Honest
6. **Hiring**

- First Chance to set expectations and get buy-in
- Reinforces for Supervisors what is expected of them!
7. Promotion of Values and Ideas

- *The Advocate*
- Speaking engagements
- Talking it up
- Tying it to $
Looking for a Great Liberal Thinker to Equate Presumption of Innocence with Right to Pretrial Release
“The presumption of innocence only means you don’t go right to jail!”
8. **Collaboration**

- DPA/AOC-PTD
- County Judges
- Local Jailers
- Legislators
- Other Stakeholders
9. **Litigation**

- Written bond motions
- Calling Witnesses
- Putting pretrial risk assessments into evidence
10. **Appeals**

Up to 80+ appeals and counting...

- Won 1/3
- Lost 1/3
- Moot 1/3
After Implementation of HB 463, Pretrial Release Rates Increase 3% Statewide

Year before 463: 65%
July 1, 2013 - March 31, 2014: 68%
Kentucky’s Counties Save Jail Costs between $4 - $5 million per percent increased release.
Federalizing the Right to Bail

See Kentucky Pretrial Release Manual, p. 50
"Stack v. Boyle, 342 U.S. 1 (1951)"

- Eighth Amendment “Excessive Bail” case

- “Petitioners' motion to reduce bail did not merely invoke the discretion of the District Court setting bail within a zone of reasonableness, but challenged the bail as violating statutory and constitutional standards.”
“As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a ‘final decision’ of the District Court...”

8th Amendment has been applied to the states through 14th Amendment. (McDonald v. City of Chicago, 130 S.Ct. 3020 (2010), fn. 12, citing Schilb v. Keubel, 404 U.S. 357 (1971).

• Holds that the 5th Amendment mandates that a “clear and convincing evidence” standard applies when denying bail for reasons of being a danger to community.

• The 5th Amendment Due Process Clause has been incorporated to the states via the 14th Amendment.
Thank you for having me!