Bail Reform in Kentucky: A Primer for Future Legislative Efforts

October 2020

By Aubrey Vaughan Travis

Texas Public Policy Foundation

RIGHT ON CRIME

October 2020

by Aubrey Vaughan Travis
Texas Public Policy Foundation

Table of Contents

Bail Reform in Kentucky: A Primer for Future Legislative Efforts

by Aubrey Vaughan Travis

Executive Summary

Kentucky has long been a pioneer in pretrial practices, being one of the first states to eliminate commercial bail bonds in 1976 (Kentucky Court of Justice, n.d.-a). Over 40 years later, Kentucky still serves as a model to other states seeking to move away from commercial bail bonds but has been saddled with a different problem: major overcrowding in its jails—a problem that could find a solution in pretrial reform. With the pandemic of 2020 serving as a forced but successful experiment into pretrial reform, Kentucky has a window of opportunity to improve its practices further. Enacting additional reforms to allow more defendants to await their trials from home rather than a jail cell will enhance public safety by more effectively using limited funds to prioritize keeping dangerous defendants behind bars pretrial. Kentucky communities absorb a significant financial and human toll when low-risk, nonviolent defendants are detained pending the resolution of their case simply because they cannot afford to pay bail. Depriving defendants of pretrial release if they cannot afford monetary bail weakens defendants' community ties (through a lost home or time away from school or family) and means to support themselves (through a lost job or inability to pay for a car), increasing the likelihood of future criminal activity. Legislators should consider ways to detain fewer offenders pretrial without jeopardizing public safety through continued use of objective risk assessments, considering alternative options for substance abusers, and ensuring judges have the discretion to keep the most dangerous offenders behind bars pretrial.

Key Points

- Kentucky holds too many nonviolent, low-risk offenders in county jails prior to their trials, often due to their inability to pay their money bail.
- Legislators need to consider cost-saving reforms that will decrease this pretrial population without jeopardizing public safety.
- Any proposals should include solutions for those with substance abuse issues, who make up the bulk of nonviolent, low-risk offenders in pretrial detention.

Background & History

Prison Overcrowding in Kentucky & Detainment During Pretrial Period

In Kentucky, pretrial reform, particularly around the state's bail practice, has received considerable attention in recent years. It is an area ripe for reform as a way to reduce Kentucky's jail overcrowding and other costs associated with detaining individuals prior to their trials. As of 2015, 43% of Kentucky's jail population was composed of individuals being held in jail prior to their trials (Vera Institute, 2019). The length of time a person is detained pretrial is often tied to their ability to pay monetary bail—cash that is forfeited if the defendant does not appear in court. Kentucky Revised Statutes Section 431.525 governs the amount at which monetary bail is set, which provides that "[t]he amount of bail shall be (a) Sufficient to insure compliance with

the conditions of release set by the court; (b) Not oppressive; (c) Commensurate with the nature of the offense charged; (d) Considerate of the past criminal acts and the reasonably anticipated conduct of the defendant if released; and (e) Considerate of the financial ability of the defendant." However, even if the bail is considerate of the defendant's financial ability, it is reasonable to draw the conclusion—based on the large number of offenders awaiting trial behind the bars of county jails—that a significant number of defendants subject to monetary bail still could not come up with the money. A defendant's inability to pay bail does not mean he is a high risk, nor does his ability to pay bail mean he is a low risk. Thus, monetary bail is not inherently the most effective tool to protect public safety. Continuing to spend so much money on detaining such a large pretrial population diverts limited law enforcement and correctional resources away from ensuring that the most dangerous offenders are not a threat to public safety while awaiting trial. Without reform, these costs will also continue putting an ever-greater burden on Kentucky's taxpayers, economy, and safety. Upholding the presumption of pretrial release for nonviolent, nonsexual, low-risk defendants is an important policy priority for legislators to keep in mind.

Kentucky holds the dubious honor of being among the top 10 states for highest incarceration rates (Carson, 2020, table 7). This number is expected to continue growing, with Kentucky CJPAC projecting a 19% prison population growth from January 2017 through January 2027 (Kentucky CJPAC, 2017, p. 7). Kentucky CJPAC found that driving this increase, in 2016, nearly two thirds of new admissions were incarcerated for nonviolent drug or property offenses, and nearly half of these individuals had no prior felony record (Kentucky CJPAC, 2017, p. 7). From 2012 to 2016, the number of new admissions for Class D felonies rose 38%, and the number of people incarcerated for Class D felony drug possession increased 102% (Kentucky CJPAC, 2017, pp. 6, 9). According to a 2018 report by the Administrative Office of the Courts, of the nearly 7,000 defendants eligible for pretrial release on November 1, 2018, 71% were being held on nonviolent Class D felonies,[1] the most common of which was drug possession (26%) followed by theft (13%) (May, 2019, pp. 15, 17, 21). Furthermore, the majority of these Class D felony offenders were scored as low (38%) or moderate (31%) risk for failure to appear and low (26%) or moderate (40%) risk for new criminal activity (May, 2019, pp. 22-25). Without changes to current policy and the projected rise in prison population, incarcerating these offenders pretrial could cost Kentucky taxpayers an additional $600 million in the 10-year period from 2017 to 2027 (Kentucky CJPAC, 2017, p. 6).

Kentucky communities absorb a significant financial and human toll when low-risk, nonviolent defendants are detained pending the resolution of their case simply because they cannot afford to pay bail. Reforming the current bail practice is popular with Kentuckians, too—a Kentucky Chamber of Commerce survey of 625 registered Kentucky voters found that "76 percent supported changing Kentucky's bail system so those charged with nonviolent, nonsexual crimes can be released before trial without making a cash payment" (Wolfson, 2019, para. 27).

Pretrial Risk Assessments

Except in capital cases, Kentucky's Constitution ensures all defendants have a right to bail. Perhaps in part because of this, Kentucky has long been a leader in pretrial reform (often called "bail reform"). It was one of the first states to eliminate commercial bail bonds[2] in 1976 with the passage of the Bail Bond Reform Act, which also created the Kentucky Pretrial Services program. Pretrial Services operates under the premise that "defendants are entitled to the least restrictive release terms possible, depending on whether they are likely to appear in court and whether they present a risk to public safety" (Kentucky Court of Justice, n.d.-b). After Kentucky's elimination of commercial bail bonds and newfound approach to a pretrial process focused on circumstantial risk and promoting public safety, the state began favoring the use of risk assessment tools in determining what conditions to place on a defendant's release. In 2006, Kentucky started using the Kentucky Pretrial Risk Assessment tool and in 2013 transitioned to the Public Safety Assessment-Court tool developed by the Arnold Foundation (Albright, 2019, p. 10).

Pretrial Services carries out these assessments as a tool for administrative release or for the presiding judge to determine a defendant's conditions for release. This process works by a pretrial officer asking the defendant to consent to a voluntary pretrial interview. If the defendant consents, the officer will check the defendant's criminal background and determine his "failure to appear" risk and his "new criminal activity" risk if he were to be released from jail. The risk assessment test is based on nine factors and determines the statistical risk of a defendant committing a new crime if he is released prior to his trial, plus the risk that he will

1 A Class D felony is the lowest felony class in Kentucky, with imprisonment of at minimum 1 year and at maximum 5 years (KRS 532.060). It includes knowing and unlawful possession of a controlled substance (KRS 218A.1415(1)) and theft of property valued between $500 to $10,000 (KRS 514.030(2)(d)).

2 A commercial bail bond is backed by a bail bondsman who agrees to pay the court the full monetary bail if the defendant whose appearance the bondsman is guaranteeing fails to appear at court. KRS 431.510 prohibits bondsmen from engaging in business in Kentucky.

fail to appear for a court hearing (Arnold Ventures, 2019a). These nine factors are:

- The age at current arrest (risk of new criminal activity is weighted higher if the defendant is 22 or younger).
- Current violent offense (risk of new violent criminal activity is weighted higher if the current offense was a violent one).
- Pending charges at the time of the offense (risk of failure to appear, new criminal activity, and new violent criminal activity are all weighted higher if there was a pending charge at the time of the offense).
- Prior misdemeanor conviction (risk of failure to appear and new criminal activity are both weighted higher if there was a prior misdemeanor conviction).
- Prior felony conviction (risk of failure to appear and new criminal activity are both weighted higher if there was a prior felony conviction).
- Prior violent conviction (risk of new criminal activity and new violent criminal activity are both weighted higher if there was a prior violent conviction).
- Prior failure to appear in the past 2 years (risk of failure to appear and new criminal activity are both weighted higher if there was a prior failure to appear in the past 2 years).
- Prior failure to appear older than 2 years (risk of failure to appear is weighted higher if there was a prior failure to appear older than 2 years).
- Prior sentence to incarceration (risk of new criminal activity is weighted higher if there was a prior sentence to incarceration) (Laura and John Arnold Foundation, 2016, pp. 2-3).

The weighted scores from these factors are converted to numerical scores that reflect the likelihood of the defendant's risk of failure to appear and risk of committing new criminal activity (p. 4).

If the defendant is charged with a nonviolent, nonsexual misdemeanor and he scores as low or moderate risk on the new criminal activity and failure to appear scales, he will be administratively released by Pretrial Services on recognizance—in other words, without imposing any conditions other than showing up for court dates (Supreme Court of Kentucky Order 2017-19, Section 3(A)).[3] If he does not meet these criteria, then within 24 hours, the officer gives this assessment to the judge with a release recommendation based on the risk assessment. According to KRS 431.066(2), the court must consider the risk assessment, but the judge makes the final determination on release—in other words, the decision is not made for the judge (Kentucky Court of Justice, n.d.-c). In cases of higher risk or higher class of criminal charges, the judge can place conditions on the release of the defendant. According to Kentucky Rules of Criminal Procedure 4.04, the judge may require an unsecured bond (only paid if court dates are missed), nonfinancial conditions (home incarceration, substance abuse treatment, work release, that the defendant remain in the custody of another, that the defendant may not leave a certain area, or that the defendant not associate with certain others), a surety bond (paid for by someone other than the defendant if the defendant's court dates are missed), or a monetary bail amount to be paid upfront before release (sometimes reduced to 10% of the bond and sometimes paired with a real property lien).

Yet, despite the presumption against money bail, "34 percent of initial bond decisions in 2016 involved monetary bail," with a 9% increase, from 22% to 31%, in its use among low-risk defendants in the 5-year period ending in 2016 (Kentucky CJPAC, 2017, p. 18). Pegasus Institute found that in 2016, 64,123 nonviolent, nonsexual offenders—over 70% of whom (44,997) were assessed as low to moderate risk—were detained for an average of 109 days pretrial because they could not afford bail (Crawford, 2017). The state's cost to house each offender in a county jail is $31.34 per day per inmate (Kentucky Department of Corrections, n.d., p.19). Using the average length of pretrial stay and per diem amount, that means Kentucky potentially spent in excess of $150 million in 2016 to detain these nonviolent, nonsexual offenders assessed as low or moderate risk before their trials. In addition to the high costs, the jails are also overcrowded. As of September 2016, Kentucky's county jails averaged 120% of their capacity (Legislative Research Commission, 2016, p. 14). Thirty jails exceeded the 137.5% limit the United States Supreme Court advised in its 2011 *Brown v. Plata* decision, with some jails, like Bell County's, holding over twice its intended limit (p. 14).

Legislative & Pretrial Reform History

Of course, 2020 brought changes to all of this with the onset of COVID-19. The pandemic forced Kentucky into a sudden bail reform experiment, with local court officials releasing over 6,000 low to moderate risk individuals to

3 If a defendant who is released on his own recognizance does in fact fail to appear at a future court date, he can be charged with bail jumping (even if he is not ultimately found guilty of his underlying offense). In Kentucky, if the underlying offense was a misdemeanor, the defendant who fails to appear can be charged with a new Class A misdemeanor (KRS 520.080(3)), and if the underlying offense was a felony, the defendant can be charged with a new Class D felony (KRS 520.070(3)). Additionally, the court can change the conditions imposed on the defendant, including imposing a bail amount on him (KRS 431.520(9)(c)).

await trial at home rather than in jail, where they would risk infection (Interim Joint Committee on Judiciary, 2020a, 1:02:12; Supreme Court of Kentucky Order 2020-25). The Supreme Court order precipitating this release, issued on April 14, 2020, expanded upon the 2017 pretrial release program described in the previous section by also allowing:

- Monitored release of Class D felony offenders (if their charges are nonviolent and nonsexual, and they have been assessed to have low to moderate risk of new criminal activity).
- Monitored release of offenders assessed as having a high risk of failure to appear.
- Monitored release of offenders arrested for failure to appear.
- Release of offenders arrested for nonpayment of court costs, fees, or fines (or failure to appear on such a violation).
- Release on recognizance of offenders arrested for contempt of court when the underlying case is a civil matter or failure to pay restitution (Supreme Court of Kentucky Order 2020-25).

The Supreme Court amended this order on June 1, 2020, to rescind the failure to appear and contempt of court administrative release provisions (Supreme Court of Kentucky Order 2020-45). The experiment has seemingly proved successful, with the judicial branch reporting that despite doubling the levels of administrative release of pretrial defendants from 2019 to 2020, the rearrest rate has only increased by 2% (Dudgeon et al., 2020, slide 13). Overall, when including judicial releases, the rate at which released defendants were rearrested for new crimes while out on pretrial release was consistent—from April through July 2019, it was 6%, and from April through July 2020, it was 7% (Dudgeon et al., 2020, slide 16). Pretrial Services speculated that the fact that COVID-19 is causing it to take longer to dispose of cases, meaning that defendants are out in the community longer prior to arraignment, may explain this slight uptick (Interim Joint Committee on Judiciary, 2020b, 25:47). The county jail population also decreased by 35% from the beginning of the pandemic in Kentucky to present (Dudgeon et al. 2020, slide 9). This indicates that Kentucky counties can save money by releasing their nonviolent, nonsexual offenders to await their trials from home without jeopardizing public safety.

In recent years, legislators have proposed reforming Kentucky's bail practice. In 2019, Representative John Blanton introduced House Bill 94, which would have instructed judges to set a monetary bail solely for ensuring a defendant's court appearance and amended Kentucky's pretrial system to require a detention hearing within 5 days of arrest for any defendant for whom monetary bail was used (HB 94). In 2020, Representative Deanna Frazier proposed House Bill 410, which would have imposed cash bail if a preponderance of evidence reflected the defendant would likely fail to appear or be a danger to others (HB 410). The effort to draft and introduce the bills has been a great starting point for moving forward the pretrial reform conversation, but each bill also contained provisions that could have unintentionally created setbacks in Kentucky's pretrial system.

HB 94 had a discussion-only hearing in the House Judiciary Committee but never had a legislative hearing to vote on the bill. As reported in the *Lexington Herald-Leader*, at that hearing, a group of Circuit Court judges opposed the bill, arguing it would "impede judicial discretion and cit[ed] a lack of trust among judges for the Administrative Office of the Court's pre-trial assessments of risk" (Desrochers & Musgrave, 2019, para. 33). Specifically, Judge Patricia Summe of Kenton County raised concerns with the reliance on the risk assessment tool, noting that "[i]t's a good tool, but it's not a complete tool…[t]he algorithm is automatically deemed to be more trustworthy than a judge who reviews the algorithm as well as the citation and the entire criminal history of the defendant" (paras. 34-35). Public defenders were concerned that the new detention hearing requirement would overburden their already stretched-thin offices (para. 29). Others were concerned that 5 days would be too long to wait before setting cash bail (para. 29). Additionally, HB 94 could have presented constitutional issues in its ability to deny bail to certain offenders, since the Kentucky Constitution provides the right to bail (paras. 30-31). Stakeholder groups, including ACLU, were skeptical the bill would have actually reduced the size of the pretrial jail population (paras. 13-14), which remains an overarching goal of any pretrial reform effort.

HB 410 did not have any type of hearing. However, stakeholder groups regularly met with legislators to offer feedback to improve the bill prior to the Capitol being shut down to the public due to the COVID-19 pandemic. While concerns with the bill therefore were not formally heard, some anticipated concerns echoed those voiced about HB 94. One concern was that HB 410 could have actually increased pretrial populations (for example, it included a provision that required a defendant's juvenile record to be provided to the judge if the defendant was 23 or younger, potentially expanding the number of defendants courts would decide to detain pretrial). Additionally, it overbroadly defined "danger to others" (basing it on prior criminal "acts"

rather than prior criminal "convictions" or "charges") and "failure to appear" (basing it on a "*material* risk of failing to appear" rather than something more precise like a "*substantial* risk of *willfully* failing to appear"). Similarly, the bill used a "preponderance of evidence" standard, a much lower bar than the "clear and convincing" standard generally used in criminal law. Another concern was that violation-only offenses (i.e., less than a misdemeanor) could have been saddled with financial conditions on their release. Finally, the bill made reforms to bail credits, which stakeholders agreed would be better addressed separately from a pretrial reform bill.

Ultimately, neither of these bills were voted on in committee.

Pretrial Reform in Other States

Efforts to reform bail systems across the country have been met with successes and failures.

Probably the highest-profile failure is the bail reform law that went into effect in New York at the beginning of 2020. New York abolished monetary bail for most misdemeanors and nonviolent crimes. By eliminating the ability of judges to "consider a criminal defendant's threat to public safety when imposing conditions of release or detention"—the only state to do so—violent, repeat offenders were being released from jail and immediately reoffending (Trainor, 2020, para. 7). For example, one offender was arrested for misdemeanor assault against three Orthodox Jewish women (she slapped them and used anti-Semitic insults). She was released because of the bail reform law and arrested again 2 days later for punching a woman. She was again released and arrested a third time 2 days later for assaulting her social worker (para. 6). New York's reform demonstrates the importance of ensuring judges always have some level of discretion in the bail process, which Kentucky must strive to balance with its risk assessment tool.

Next door in New Jersey is one of the most successful implementations of pretrial reform. The state replaced its monetary bail system with a risk-based bail system, which went into effect in 2017. The pretrial population declined by 43.9% from the end of 2015 to the end of 2018, with court appearances remaining high (89.4% in 2017, only a slight decrease from 92.7% in 2014) and the rate of new criminal activity when released pretrial remaining low (26.9% in 2017, only a slight increase from 24.2% in 2014) (Arnold Ventures, 2019b). Similar to Kentucky's, New Jersey's system uses the nine-factor public safety assessment. New Jersey also essentially eliminated cash bail, only allowed detention if there was a proven risk, and permitted denial of bail to the most dangerous offenders. Kentucky should continue to consider the idea of denial of bail to dangerous offenders even if they are not charged with capital offenses, but it does remain a concern that doing so could require changes to Kentucky's constitutional right to bail.

Challenges in Kentucky's Current Bail System

Kentucky's current pretrial system is a great starting point because it has already been a laboratory for innovation for decades. However, large jail populations, failing to maintain a presumption of release, and widescale substance abuse issues all present areas for improvement in the current system.

Vast Differences in How Bail Decisions Are Made Across the State

Transitioning to a system that focuses on a defendant's risk is paramount to any pretrial reform, and Kentucky has made successful inroads on this front. Perhaps surprisingly, though, decisions to use monetary bail vary widely across the state, meaning that *where* a defendant is charged with

Table 1

How Location Affects Pretrial Release Decisions

	High rates of pretrial release without monetary bail	Low rates of pretrial release without monetary bail
Eastern Kentucky	Martin County (68% of defendants are released pretrial on a nonfinancial bond), Lawrence County (65%), Letcher County (51%), Carter County (49%), Greenup County (42%)	Pike County (24% of defendants are released pretrial on a nonfinancial bond), Boyd County (17%)
Central Kentucky	Jefferson County (53%)	Fayette County (18%)
Western Kentucky	Christian County (57%), Daviess County (52%), Marshall County (51%)	Todd County (18%), Henderson County (11%), McCracken County (5% [the lowest level in the state])

Note. From *Disparate Justice: Where Kentuckians Live Determines Whether They Stay in Jail Because They Can't Afford Cash Bail* by Ashley Spalding, Kentucky Center for Economic Policy, "Share of criminal district and circuit court cases with nonfinancial bonds by county" section (https://kypolicy.org/disparate-justice-where-kentuckians-live-determines-whether-they-stay-in-jail/).

a crime plays a major role in determining whether or not they await their trial from jail or are released, as illustrated in **Table 1** by a sampling of various neighboring counties in different parts of the state:

Looking at these disparate levels of financial conditions on release between neighboring counties should give policymakers pause, especially because the judges in these communities are relying on the same pretrial risk assessments as their neighbors.

Failing to Maintain the Presumption of Pretrial Release & Ensuring Public Safety by Accurately Assessing Risks of Danger & Failure to Appear

As former Chief Justice William Rehnquist aptly noted in *United States v. Salerno* (1987), "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." For the most part, policymakers should be focusing on keeping the small number of dangerous defendants behind bars pretrial, while maintaining the presumption of pretrial release for most others. If held for just 2 to 3 days, "low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours" (Lowenkamp, 2013, p. 3). To solve this, judges must maintain the presumption of pretrial release and rely on objective risk assessments.

As of January 1, 2017, the Administrative Release Program became mandatory in Kentucky. Its purpose is "to expedite pretrial release of low to moderate risk defendants charged with nonviolent, nonsexual misdemeanors and to increase efficiency by reserving resources for higher-risk defendants ordered to pretrial supervision" (Supreme Court of Kentucky, 2017, p. 1). As outlined in depth earlier in this paper, the program generally operates as follows (disregarding the temporary expansion of the program due to COVID-19, as previously explained): Using the risk assessment tool, Pretrial Services assesses the risk level of eligible defendants.[4] The tool generates two scores: the first between 0 through 7 for the risk of failure to appear and the second between 0 through 13 for the risk of new criminal activity. The scores correspond to risk levels of low, moderate, and high risk. In general, if a defendant is charged with nonviolent or nonsexual misdemeanor(s) and has been assessed to have a low or moderate risk for new criminal activity and failure to appear, then Pretrial Services will administratively release him on recognizance (*see* "Pretrial Risk Assessments" subsection above for further details; exceptions to this are outlined in the remainder of Supreme Court Order 2017-19, Part II, Section 3). If the defendant does not qualify for administrative release, the local judge makes a release decision using the risk assessment provided by Pretrial Services to determine what conditions of release the defendant will have (e.g., requiring a monetary bail to be paid prior to release).

Kentucky law strongly favors pretrial release with a presumption against financial conditions (Kentucky Revised Statutes 431.520). If these statutory instructions were followed directly by judges, the expectation is that "90% of defendants would be granted immediate non-financial release" (Stevenson, 2018, p. 311). However, in practice, "only 29% are released on non-monetary bond at the first bail setting" (Stevenson, 2018, p. 311). Upholding judicial discretion is paramount, but this number reflects a judicial failure to uphold the presumption of pretrial release.

What happens when so many defendants are held on monetary bail pretrial? In 2013, the Laura and John Arnold Foundation (Arnold Foundation, 2013) funded a study of defendants in Kentucky incarcerated pretrial due to bail conditions. They found two important points regarding pretrial detention of low- and high-risk defendants:

> Low-risk defendants who were detained pretrial for more than 24 hours were more likely to commit new crimes not only while their cases were pending, but also years later. In addition, they were more likely to miss their day in court. … Conversely, for high-risk defendants, there was no relationship between pretrial incarceration and increased crime. This suggests that high-risk defendants can be detained before trial without compromising, and in fact enhancing, public safety and the fair administration of justice. (p. 4)

Nevertheless, research has previously shown that no matter the level of risk defendants pose, there is an equal likelihood that bail amounts will be set at the same levels in Kentucky (Spalding, 2019, Figure 12). The current temporary expansion of the Administrative Release Program to include low to moderate risk Class D felony offenders, for example, demonstrates that Kentucky has room to improve upon which low-risk offenders can be released pretrial.

Substance Abuse Disorder Is Unlikely to Be Resolved by Incarceration

Most low-risk defendants in pretrial detention are charged with drug possession, and many of them presumably suffer from substance abuse disorder (Musgrave, 2019, para. 3). Some judges worried—unfortunately, often

4 An eligible defendant is one who is "charged with non-violent/non-sexual misdemeanor(s) whose risk scores have been assessed as Low Risk or Moderate Risk on the [Failure to Appear ("FTA")] scale and Low Risk or Moderate Risk on the [New Criminal Activity ("NCA")] scale" (Supreme Court of Kentucky, 2017, p. 3).

correctly—about releasing defendants with addiction issues pretrial, fearing the defendants would get out, overdose, and die (Musgrave, 2019). Similarly, frustrated relatives of these defendants may refuse to post bail for their loved ones, especially because they may have exhausted their resources trying to help them receive treatment or they do not want to enable them further.

Housing these individuals in jails without drug treatment and rehabilitation programs, however, is ineffective, especially when there are open beds in treatment facilities around the state (Musgrave, 2019). Kentucky's Pretrial Services Division acknowledged room for improving treatment for pretrial populations, which are generally overlooked when it comes to rehabilitation programs. Currently, most of the treatment programs focus solely on the convicted population.

To improve this situation, Kentucky prosecutors have proposed reforms implemented in other states, such as offering treatment in lieu of conviction or allowing police officers to send people to drug treatment rather than charging offenders with a drug offense (Musgrave, 2019). In Ohio, a recent law change allows eligible offenders to plead guilty to a drug crime and enter treatment without ever being convicted of that crime. While data on its success is not yet available, proponents believe this change will ease jail overcrowding and have better long-term benefits for the offenders, such as sealing the charge, better access to community treatment and education programs, and an intensive supervision structure to provide support to those suffering from addictions (Oldfield, 2018). In Seattle, Washington, the Law Enforcement Assisted Diversion program "allows law enforcement to send individuals arrested for low-level drug offenses to treatment and support services rather than booking and charging them" (Law Enforcement Leaders, n.d., para. 4). The program has been remarkably successful, with participants being "58 percent less likely to be arrested again than those processed through the [criminal court] system" (para. 4). At the end of 2018, Louisville launched an 18-month pilot version of Seattle's program, which will be evaluated by the Commonwealth Institute at the University of Louisville (University of Louisville, n.d.).

Legislative Priorities

While the challenges around pretrial reform abound, there are solutions. Moreover, Kentucky can adopt many of these solutions piecemeal if legislators do not perceive comprehensive bail reform as a viable option. Lawmakers should specifically consider the following reforms:

- ***Kentucky should focus its pretrial release policy on risk to public safety.*** *Criminal justice reform generally focuses on targeting limited resources on the most dangerous offenders. The same holds true for pretrial reform. This means finding alternative solutions for low-risk, nonviolent offenders who are only remaining incarcerated pretrial because of their inability to afford their bail, and, based on data from 2020, considering a permanent expansion of administrative release of low-risk, nonviolent Class D felons.*
- ***Ensure the Pretrial Risk Assessment Informs Judicial Discretion on Release.*** *Judges must uphold Kentucky's presumption of nonfinancial conditions for release for low-risk, nonviolent offenders, but the high variance in the use of monetary bail in neighboring Kentucky counties shows this is not always happening. Instances where monetary conditions are imposed should be tied to the risk of flight or their threat to public safety. In other words, there must be a direct connection between the imposition of bail, the bail amounts assigned (if any), and the risks of those defendants failing to appear for their court dates or reoffending.*
- ***Find solutions for those with substance abuse disorders.*** *The majority of individuals in the detained pretrial population are low-risk, nonviolent offenders, most commonly being detained for drug possession. Establish pretrial options for offenders in need of substance abuse treatment, such as treatment in lieu of conviction, law enforcement-assisted diversion, and better utilizing open beds in treatment facilities. Families of substance abusers should not feel that pretrial detention is their only solution, especially when alternatives may allow them to remain a part of their community and keep their jobs while obeying their release conditions.*
- ***Consider legislation on topics on the periphery of the issue of bail, especially concerning substance abuse.*** *Low-risk drug offenders may not need to be incarcerated, but current law makes simple drug possession a felony. Work on legislative proposals like lowering simple possession to a misdemeanor, at least for first- or second-time offenders, to decrease the population size and costs of drug offenders being held in county jails pretrial, and instead focus on addiction treatment and using probation to encourage people to find gainful employment.*

While the approach to reform varies greatly across the country, Right on Crime views pretrial reform as an opportunity to improve public safety, provide courts with additional tools to inform pretrial release determinations, and more efficiently use taxpayer dollars. Kentucky has a

proven pretrial release success rate—"88 percent of both felony and misdemeanor defendants released pretrial in 2015 had no new arrest during their pretrial period"—and 2020 has demonstrated that even with more defendants being released pretrial, the rearrest rate for new offenses does not seem to increase. (Kentucky CJPAC, 2017, p. 16). Yet the state continues to drain its resources to detain large populations of low to moderate risk, nonviolent, nonsexual pretrial defendants, with financial conditions seemingly haphazardly applied depending on where the offense was committed. Substance abuse continues to be a top issue facing Kentucky communities, and innovative approaches to treat substance abuse problems must continue to be prioritized. Most importantly, Kentucky must uphold the presumption of pretrial release, and detention before trial must be the limited exception. Protecting judicial discretion is just as important as protecting the due process rights and liberty interests of a defendant without a conviction, and the judicial system should reflect greater consistency in non-monetary pretrial release across the state. There are legitimate policy reasons to detain some defendants pretrial, but low to moderate risk, nonviolent defendants should not be stuck behind bars solely because they cannot come up with the money to pay their bail. As Marc Levin, chief of policy & innovation at Right on Crime, has stated, "justice for only those who can afford it is really not justice at all" (Messenger, 2019).

References

Albright, A. (2019). *If you give a judge a risk score: Evidence from Kentucky bail decisions* [Discussion paper]. Harvard John M. Olin Center for Law, Economics, and Business. http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Albright_85.pdf

Arnold Ventures. (2019a). *Public safety assessment FAQs ("PSA 101")*. https://craftmediabucket.s3.amazonaws.com/uploads/Public-Safety-Assessment-101_190319_140124.pdf

Arnold Ventures. (2019b). *New Jersey set out to reform its cash bail system. Now, the results are in.* https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/

Carson, E. A. (2020). *Prisoners in 2018*. Bureau of Justice Statistics. https://www.bjs.gov/content/pub/pdf/p18.pdf

Crawford, J. (2017). *Reform opportunities in Kentucky's bail system*. Pegasus Institute. https://docs.wixstatic.com/ugd/7b8e16_86d7300130a74451a48ab1686d4594f7.pdf

Desrochers, D., & Musgrave, B. (2019, June 14). This lawmaker tried to reform Kentucky's cash bail system. Here's why he failed. *Lexington Herald-Leader*. https://www.kentucky.com/news/local/watchdog/article231477743.html

Dudgeon, L., Blair, T., & Darcy, A. (2020, August 20). *Kentucky Court of Justice response to COVID 19*. https://apps.legislature.ky.gov/CommitteeDocuments/8/12824/Aug%2020%202020%20Pretrial%20COVID%20Rearrest%20Data%20AOC.pdf

HB 94. Kentucky Legislature. (2019). https://apps.legislature.ky.gov/recorddocuments/bill/19RS/hb94/orig_bill.pdf

HB 410. Kentucky Legislature. (2020). https://apps.legislature.ky.gov/recorddocuments/bill/20RS/hb410/orig_bill.pdf

Interim Joint Committee on Judiciary. (2020a). June 4, 2020, committee hearing. KET. https://tinyurl.com/y2emolqr

Interim Joint Committee on Judiciary. (2020b). August 20, 2020, committee hearing. KET. https://tinyurl.com/yyyo4qd3

Kentucky CJPAC Justice Reinvestment Work Group. (2017). *Final report*. Retrieved October 8, 2020, from Internet Archive website: https://web.archive.org/web/20200424232457/https:/justice.ky.gov/Documents/KY%20Work%20Group%20Final%20Report%2012.18.pdf

Kentucky Court of Justice. (n.d.-a). *Virtual tour of Kentucky pretrial services*. https://kycourts.gov/courtprograms/pretrial-services/Pages/virtualtour.aspx

Kentucky Court of Justice. (n.d.-b). *Pretrial services*. https://kycourts.gov/courtprograms/pretrialservices/Pages/default.aspx

Kentucky Court of Justice. (n.d.-c). *Interview process & release alternatives*. https://kycourts.gov/courtprograms/pretrials-ervices/Pages/interviewrelease.aspx

Kentucky Department of Corrections. (n.d.). *2018 annual report*. https://corrections.ky.gov/About/researchandstats/Documents/Annual%20Reports/2018%20Annual%20Report.pdf

Laura and John Arnold Foundation. (2013). *Pretrial criminal justice research*. https://www.ils.ny.gov/files/Hurrell-Harring/Counsel%20At%20Arraignment/Pretrial%20Criminal%20Justice%20Research.pdf

Laura and John Arnold Foundation. (2016). *Public safety assessment: Risk factors and formula*. https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/PSA-Risk-Factors-and-Formula.pdf

Legislative Research Commission. (2016). *State inmates housed in county jails in Kentucky*. Research Report No. 430. https://apps.legislature.ky.gov/lrc/publications/ResearchReports/RR430.pdf

Lowenkamp, C., VanNostrand, M., & Holsinger, A. (2013). *The hidden costs of pretrial detention*. https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf

May, C. (2019). *Kentucky pretrial population*. Kentucky Pretrial Services.

Messenger, T. (2019, October 3). Unconstitutional use of cash bail makes cities less safe: Conservative group. *The Crime Report*. https://thecrimereport.org/2019/10/03/unconstitutional-use-of-cash-bail-makes-cities-less-safe-conservative-group/

Musgrave, B. (2019, September 27). Report: Most KY jail inmates awaiting trial are nonviolent and pose little risk. *Lexington Herald-Leader*. https://www.kentucky.com/news/local/crime/article234761942.html

Oldfield, J. (2018, September 27). Law you can use: Ohio law allows conviction alternative for eligible offenders. *The News-Herald*. https://www.news-herald.com/news/ohio/law-you-can-use-ohio-law-allows-conviction-alternative-for-eligible-offenders/article_18ac0f69-a31b-5a56-864c-a464c07dd13a.html

Release on personal recognizance or unsecured bail bond - Conditions of release, Ky. Rev. Stat. § 431.520, https://apps.legislature.ky.gov/law/statutes/statute.aspx?id=43540

Spalding, A. (2019, June 11). Disparate justice: Where Kentuckians live determines whether they stay in jail because they can't afford cash bail. Kentucky Center for Economic Policy. https://kypolicy.org/disparate-justice-where-kentuckians-live-determines-whether-they-stay-in-jail/

Stevenson, M. (2018). Assessing risk assessment in action. *Minnesota Law Review*, 103(1), 303-384. https://www.minnesotalawreview.org/wp-content/uploads/2019/01/13Stevenson_MLR.pdf

Supreme Court of Kentucky Amended Order 2017-19. (2017). https://kycourts.gov/courts/supreme/Rules_Procedures/201719.pdf

Supreme Court of Kentucky Order 2020-25. (2020). https://kycourts.gov/courts/supreme/Rules_Procedures/202025.pdf

Supreme Court of Kentucky Amended Order 2020-45. (2020). https://kycourts.gov/courts/supreme/Rules_Procedures/202045.pdf

United States v. Salerno, 481 U.S. 739 (1987). https://supreme.justia.com/cases/federal/us/481/739/

University of Louisville. (n.d.). Commonwealth Institute to evaluate city's LEAD program. https://louisville.edu/sphis/news/commonwealth-institute-to-evaluate-citys-lead-program

Vera Institute of Justice (2019). *Incarceration trends in Kentucky*. https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-kentucky.pdf

Vera Institute of Justice. (2020). *Kentucky*. https://www.vera.org/covid-19/criminal-justice-city-and-state-spotlights/kentucky

Wolfson, A. (2019, March 29). Is it fair? A Louisville judge is releasing defendants on low bail and police aren't happy. *Courier-Journal*. https://www.courier-journal.com/story/news/crime/2019/03/29/lmpd-objects-to-louisville-kentucky-judge-releasing-domestic-violence-defendants-low-bail/3291959002/

ABOUT THE AUTHOR

Aubrey Vaughan Travis

Aubrey Vaughan Travis is the Kentucky state director of Right on Crime. She was an executive advisor in Governor Matt Bevin's administration until his term ended.

Following graduation from law school, Travis worked in a senior fundraising role on Sen. Rand Paul's presidential campaign and then worked in his Senate office as his general counsel in the 114th and 115th Congresses.

While in law school, Travis was the president of the Federalist Society and clerked for now-Congressman James Comer, current Acting Deputy Secretary of Homeland Security Ken Cuccinelli, and RANDPAC.

Travis is a graduate of Wake Forest University and the University of Kentucky College of Law.

About Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation promotes and defends liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

901 Congress Avenue | Austin, Texas 78701 | 512.472.2700 | www.TexasPolicy.com