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September 26, 2018

Jesse Mosser
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Sent Via Email: jesse.mosser@sc.ohio.gov

Re: Comments on Proposed Amendments to Criminal Rule 46, Bail, as Published on August 15, 2018.

Dear Jesse Mosser,

On behalf of the American Civil Liberties Union of Ohio and a number of other organizations and individuals dedicated to criminal justice reform, we submit the enclosed joint comment to the Rules Commission's amendments to Criminal Rule 46.

Thank you for your consideration of our comment, if you have any questions please do not hesitate to reach out to our office.

Sincerely,

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September 26, 2018

Re: Comments on Proposed Amendments to Criminal Rule 46, Bail, as Published on August 15, 2018.

We are writing on behalf of the American Civil Liberties Union of Ohio and a number of other sister organizations and individuals, to request additional and stronger amendments to Criminal Rule 46 beyond those recently proposed by the Commission on the Rules of Practice and Procedure in Ohio Courts (hereinafter, "Rules Commission"). As organizations dedicated to advocating for justice, we oppose the indiscriminant and routine use of money bail to detain individuals pretrial, and other unconstitutional bail setting practices of Ohio judges. Although many of the proposed amendments to Rule 46 offer improvements, they fail to provide for a number of procedures that would ensure the U.S. Constitution's Eighth Amendment guarantee against excessive bail, or the accused's right to Due Process and Equal Protection. If the amended Rule is enacted as proposed, it will not meaningfully change the number of people unlawfully held on financial bonds.

Until the judicial use of money bond is restrained by clear rules that limit when and how it can be used, so that it can only be used in appropriate circumstances (which are very limited), judges will continue to violate the rights of individuals, and the Constitution, by setting financial bonds calculated to detain rather than release.[1] Many of the same unconstitutional practices Ohio judges employ when setting bail have successfully been challenged through state and federal litigation and habeas corpus proceedings. Ohio courts need Criminal Rule 46 to provide clear guidance on constitutionally sound bail practices.

Introduction

Criminal Rule 46 establishes procedures for setting bail. The Rule was significantly revised in 1998 in reaction to an amendment to Article I, Section 9, of the Ohio Constitution that provided for the pretrial detention of certain felony defendants. There are reasons to believe the 1998 changes to the Rule led to an increase in unconstitutional bail setting practices that caused Ohio's pretrial jail population to increase dramatically. Chief among these is the use of money bonds as a means of ensuring detention rather than release. Because of this, the Rules Commission should make changes to Rule 46 that mirror provisions in the pre-1998 amended version of the Rule and provide clear guidance to judges on how to set bail in a manner that satisfies constitutional scrutiny.

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[1] Tim Schnacke, *"Model," Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention,* Center for Legal and Evidence Based Practices, at 30 (Apr. 18, 2017), http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf. ("Leaving money in the system allows a convenient (albeit unlawful) means of efficiently detaining defendants without the bother of a due process hearing."); The ACLU of Ohio and others signing on to this document know firsthand that Ohio's preventive detention process is rarely, if ever used, because money detains more efficiently, *see* https://www.theguardian.com/world/2013/may/09/cleveland-suspect-ariel-castro-arraigned and http://blog.cleveland.com/metro/2009/11/anthony_sowells_bond_5_million.html.

Section I identifies the notable differences between the pre-1998 version of the Rule and the current Rule, and explains how the current Rule eliminated certain important provisions which led to unconstitutional bail setting practices and, in turn, a dramatic increase in Ohio's overall pretrial jail population over the last 20 years.

Section II contains a summary of suggested additions to the Rules Commission's Rule 46 proposals.

Section III provides support for certain amendments that were proposed by the Rules Commission on August 15, 2018.

I. Pre-1998 Rule vs. Current Rule

A. Rule 46 should explicitly recognize the purpose and right to bail and what bail is

The text of the pre-1998 Rule included an explanation of the purpose and the right to bail. It stated at section (A):

> **Purpose of and right to bail**
> The purpose of bail is to ensure that the defendant appears at all stages of the criminal proceedings. All persons are entitled to bail, except in capital cases where the proof is evident or the presumption great.

This section was removed in the 1998 amendment and not restored in subsequent amendments. The Rules Commission should restore to the Rule a statement of the purpose and right to bail. Additionally, it should include a clear definition of "bail."

Bail is the process of conditional release of the accused before trial.[2] The fundamental purpose of this process is twofold: 1) to ensure the accused's liberty interest as an unconvicted person—in other words, releasing a legally innocent person; while 2) assuring public safety and the accused's appearance in court.[3] Defining bail as the process for release, and recognizing that the purpose is to allow for release, is necessary to create a culture change in Ohio courts that moves away from detaining accused individuals on financial bonds.[4]

B. The presumption of release without money bond should be honored

The text of the pre-1998 version of the Rule included a presumption of non-financial bonds and limited use of secured money bonds for both petty and serious offenses (i.e., misdemeanors and felony offenses). It stated:

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[2] Schnacke, *supra* note 1, at 16.
[3] *Id.*
[4] *Id.*; *see also* Harvard Law School Criminal Justice Policy Program, *Moving Beyond Money: A Primer on Bail Reform* (2016), http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf.

> **(C) Preconviction release in serious offense cases**
> Any person who is entitled to release under division (A) of this rule shall be released on personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judge or magistrate, unless the judge or magistrate determines that release will not ensure the appearance of the person as required. Where a judge or magistrate so determines, he or she, either in lieu of or in addition to the preferred methods of release stated above, shall impose any of the following conditions of release that will reasonably ensure the appearance of the person for trial or, if no single condition ensures appearance, any combination of the following conditions.
>
> **(D) Preconviction release in petty offense cases**
> A person arrested for a misdemeanor and not released pursuant to Crim.R. 4(F) shall be released by the clerk of court, or, if the clerk is not available, the officer in charge of the facility to which the person is brought, on the person's personal recognizance, or upon the execution of an unsecured appearance bond in the amount specified in the bail schedule established by the court. If the clerk or officer in charge of the facility determines pursuant to division (F) of this rule that release will not reasonably ensure appearance as required, the person shall be eligible for release by doing any of the following, at the person's option: * * *.

The 1998 amendments to Rule 46 deleted the above presumptions against secured money bonds for both serious and petty offenses and instead rewrote the current Rule at sections (A) and (B) to give courts discretion to set any type of bail (including secured financial bond) in any type of case. The staff notes accompanying the 1998 Rule amendment explain this change by stating:

> Rule 46 was reorganized in keeping with the Constitutional Amendment to Article I, Section 9 passed by Ohio's voters on November 4, 1997. This amendment *allows* a court to determine at any time the type, amount, and conditions for bail in all cases where incarceration is a possible punishment. Therefore, Crim. R. 46 now applies the same procedures to all offenses without regard to whether the alleged offense is serious or petty. (Emphasis added.) (available at westlaw.com)

At first reading, it might appear that the revision of the rule was necessary to comply with the 1997 constitutional amendment that provided: "[w]here a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail." Ohio Const., Art. I, §9. However, this deletion was unnecessary. Even though the Ohio Constitution now provides that a court *may* determine the type, amount, and conditions of bail at any time, it does not vest judges with unfettered discretion to set bail. Nor does the Constitution outlaw rules of criminal procedure that provide judges with guidance on how to set bail within the confines of the state and federal constitutions. To the contrary, the Ohio

Constitution requires the Court to provide these procedures. Ohio Const., Art. I, §9 (stating, "[p]rocedures for establishing the amount and conditions of bail *shall* be established pursuant to Article IV, Section 5(b) [mandating the Supreme Court prescribe the rule governing practice and procedure of courts] of the Constitution of the state of Ohio." (emphasis added)).

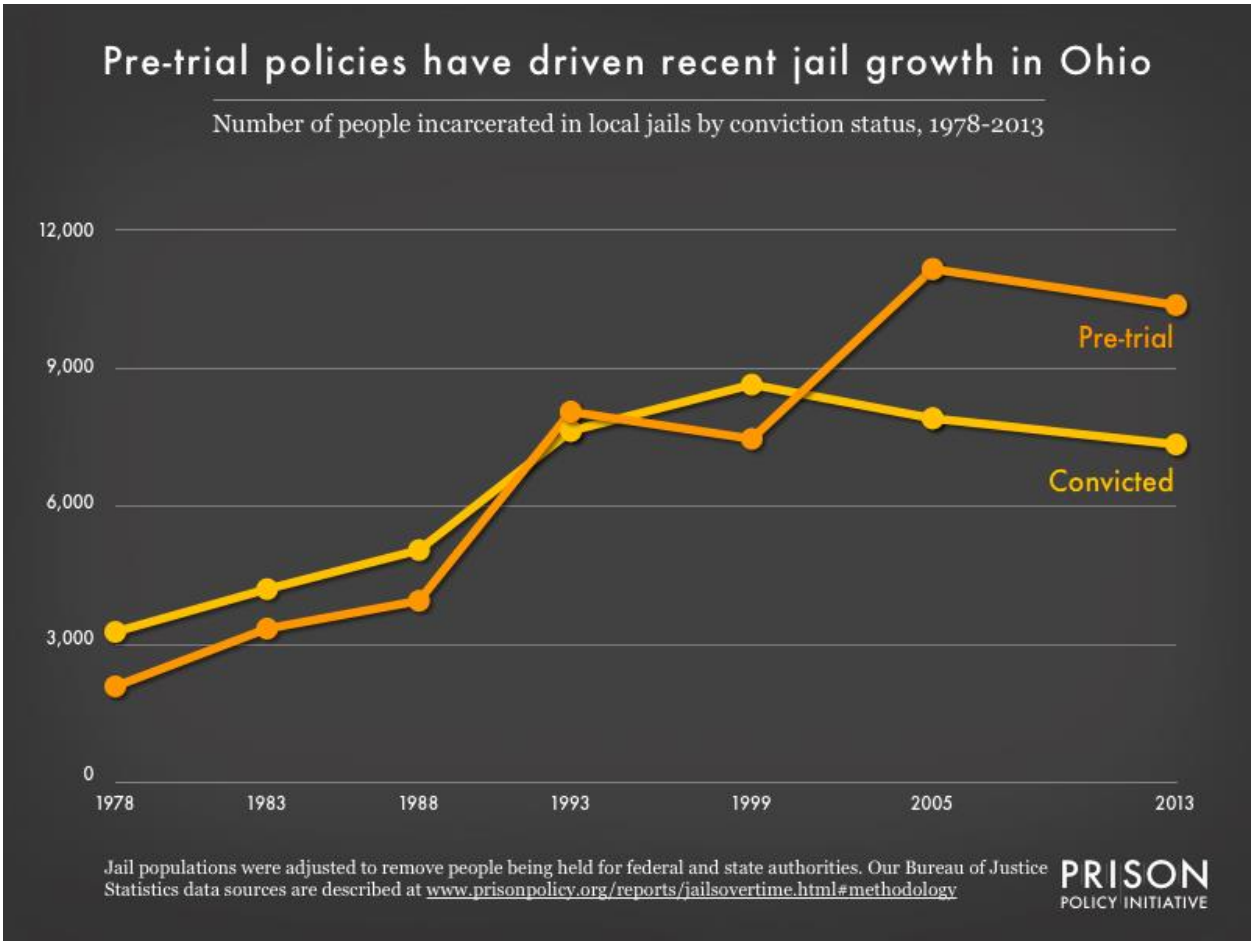
A judge's discretion to set bail is bound by a number of state and federal constitutional protections, as well as state and federal case law. These authorities include the guarantee against excessive bail found in the Eighth Amendment to the United States Constitution and Article I, Section 9, of the Ohio Constitution, Substantive and Procedural Due Process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and the right to Equal Protection under the law guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution. *See Stack v. Boyle*, 342 U.S. 1, 5 (1951) ("Bail set at a figure higher than an amount reasonably calculated[to assure a defendant's appearance at trial] is excessive."); *United States v. Salerno*, 481 U.S. 739 (1987) (allowing pretrial preventative detention only in limited circumstances and after a full adversarial hearing). These cases affirm a number of bedrock principles that courts must follow, including: the requirement to conduct ability-to-pay inquiries before setting a financial bond, *see, e.g.*, *In Re Humphrey*, 19 Cal.App.5th 1006, 534-35 (1st Dist. 2018); the requirement not to set a financial bond higher than the person can afford, because doing so would amount to a de facto order of pretrial detention, *see, e.g.*, *Walker v. Calhoun*, Georgia, No. 4: 15-CV-0170-HLM, 2016 WL 36162,*11 (N.D. Ga. Jan. 28, 2016) (order granting a preliminary injunction and stating "[c]ertainly, keeping individuals in jail because they cannot pay for their release, whether via fines, fees, or a cash bond, is impermissible"); the requirement to avoid unthinking reliance on uniform bail schedules that ignore the defendant's financial circumstances, *see, e.g.*, *ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018); and the requirement to use the least restrictive conditions necessary, given the fundamental interest in pretrial liberty—an interest "second only to life itself" in constitutional importance, *see, e.g.*, *Humphrey* at 536; *see also Salerno* at 750.

The fact that the Ohio Constitution requires the Supreme Court of Ohio to dictate the procedures that lower courts must use when setting bail necessarily means that the discretion of the lower courts is not unlimited. The Supreme Court of Ohio *can and should* do much more to ensure that courts are not abusing their discretion to set bail in Ohio and are providing the accused with a constitutional process.

A presumption in favor of personal recognizance release or unsecured bond does not negate a judge's discretion to set bail: rather, it provides much needed guidance to judges on the appropriate parameters of constitutional bail setting practices, and the considerations that the state and federal constitutions demand.

Aside from the legal arguments for reinstating the presumption in favor of non-montary release, there is also a practical reason for doing so. Current Rule 46 has allowed for Ohio's jails to become grossly overpopulated with people who have not been convicted

and who are presumed innocent, but cannot afford their bonds. This graph aptly illustrates this point by showing the dramatic increase in pretrial jail populations following the 1998 rule amendment:



Last accessed Sept. 12, 2018, available at https://www.prisonpolicy.org/profiles/OH.html.

While the ACLU of Ohio and the other organizations and individuals signing on to this document understand that correlation does not necessarily equal causation, the strong correlation illustrated by the above graph—and the heavy toll that this increase has taken on presumptively innocent individuals and their families—cannot be ignored. In the late 1990's the state's pretrial jail population exploded at the same time that the presumption in favor of non-monetary release was deleted with the revision of Rule 46. Accordingly, the Rules Commission should include a presumption in favor of non-monetary release for pretrial defendants, and also implement other concrete reforms that will increase the accountability, uniformity, and constitutional compliance of Ohio courts.

II. Suggested Edits and Additions

A. A clear definition of bail

As mentioned above, Rule 46 should include a clear articulation of what bail is. "Bail" is the process of releasing a bailable person before trial.[5] "No bail" is the process for detaining a person by denying release.[6] Both the current Rule and proposed amendments conflate "monetary or financial conditions" with release itself (for instance, a surety bond is considered a "type" of bail under the current and amended Rule, but it is a condition of bail, not bail itself). Conflating these two distinct concepts promotes the use of money in pretrial release decisions, and encourages the misconception that bail equals money and that a person should not be released without first paying the court.[7]

To improve Ohio's pretrial system and ensure that judges do not violate the accused's right to Equal Protection and Due Process under the law, there needs to be a culture change where judges move away from using money in their release decisions.[8] The current and amended forms of Rule 46 define bail as money and in doing so keep money at the forefront of judges' minds when they make their release decisions. Culture change will be exceedingly slow to happen—if it happens at all—if the Rule remains in its current form. The current proposed amendments will not change this.

One of the Rules Commission's proposed amendments makes the question of what bail is, or is not, even murkier. The proposed amendment reads:

> Unless the court orders the defendant detained under division (A) of this rule, the court shall release the defendant on the least restrictive conditions that, in the judgment of the court, will reasonably ensure the defendant's appearance in court, the protection of the safety of any person or the community, and that the defendant will not obstruct the criminal justice process. If the court orders *monetary conditions of release*, the court shall impose an amount and type which are least costly to the defendant while also sufficient to reasonably ensure the defendant's future appearance in court. (Emphasis added.)

The amendment—although on the right track—mentions "monetary conditions of release." This phrase is not defined, and this is the only place within the Rule that mentions monetary conditions of release. However, the context and the apparent plain

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[5] Schnacke, *supra* note 1, at 16.

[6] *Id*.; Pretrial detention is allowed in Ohio where the prosecution can prove that the accused is a serious danger to the public or a flight risk and that no condition or set of conditions of release will ensure public safety or appearance. *See* R.C. 2937.222.

[7] For example, both the current Rule and proposed amendments keep the heading at section (B) titled "Types and Amounts of Bail." Including "Types" and "Amount" in the same heading leaves the impression that the only task before the judicial officer is to decide whether the "type" of bail will be secured or unsecured when setting the "amount" of bail. It also does not make sense to talk about an "amount" when one of the bail "types" included in this section is personal recognizance release.

[8] *See also A Primer on Bail*, *supra* note 4.

meaning of the phrase allow us to infer that monetary conditions of release are three of the four "bail" types outlined in current subsection (B)(1)-(3).[9] Although we believe that unsecured, ten-percent, and surety bonds *are* more accurately defined as monetary conditions of release—rather than bail itself (i.e., release)—as written, this particular amendment's placement within the current rule could cause confusion.

We recognize the Rules Committee's intentions behind the amendment are good. To avoid confusion we recommend clearly defining bail as the process for release and then defining money bonds as *monetary or financial conditions* of release, rather than bail itself.[10]

B. Strong presumption of release and against financial bonds

As Chief Justice Rehnquist stated in *United States v. Salerno*, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." 481 U.S. 739, 755 (1987). Yet the current system for setting bail allows judges to set financial bonds that keep people detained if they are too poor to afford them. Too often, judges order costly financial bonds without deep consideration for why they might be needed or whether the accused can afford their bond. A strong presumption in favor of release on limited or no conditions places the burden on the prosecution and court to justify why bail conditions that often lead to detention and other restraints on liberty are necessary

More specifically, the Rule should include a strong presumption of release on no conditions other than the promise to appear—in other words personal recognizance release. It should also state that the presumption must be overcome before an order to attach any non-financial conditions of release to the personal recognizance bond can be made. The Rule should also state that the judicial officer must use only the least restrictive non-financial conditions reasonably necessary to assure reappearance and protect the community, and should include a presumption against secured financial bonds—because they are often the *most restrictive condition* that can be placed on a person. If a judicial officer is going to order a secured financial bond (by this we mean 10% or surety), it should come with the requirement that the prosecution prove by clear and convincing evidence that the accused is in fact a flight risk (meaning at risk of *purposefully* avoiding prosecution by leaving the jurisdiction). Also, this determination should come only after a full, adversarial hearing that includes the right to counsel. Given the interests at stake, such a process is the only way to ensure that the accused's Constitutional rights are fully respected.

As explained above, a prior version of Rule 46 contained a presumption of release on recognizance for most offenses. At the time, Ohio jails were mostly filled with convicted misdemeanants, not pretrial detainees as they are now. Since the Rule was changed to

[9] We note that (B)(1) of the amended rule includes personal recognizance as a type of bail, but the rest of the types of bail listed are monetary in nature. They place monetary conditions on release.

[10] Schnacke, *supra* note 1 at 17 (noting that, "* * * although defining bail as money is understandable * * * bail is not money. Quite simply, money is a condition of bail with a different purpose. Defining bail as money causes confusion especially when jurisdictions are confronted with bail's history * * *").

remove the presumption in the late 1990's, Ohio pretrial jail populations have skyrocketed.

C. Ability-to-pay determination

The Rule should require an ability to pay hearing if the person is given a financial bond, and require that the judicial officer limit the bond to an amount the individual can afford.

Setting a financial condition of bail can only assure appearance if a person is able to afford it. Otherwise a financial bond that was supposed to guarantee appearance now only guarantees detention. Moreover, the amount necessary to assure appearance will change based on the person: what might induce a very wealthy person to appear is going to be different than what might induce an impoverished person to appear. Given the same bond, a wealthy arrestee will post it, whereas an indigent arrestee will be confined to jail. This hypothetical scenario is played out time and again in Ohio courts and is a violation of both the Due Process and Equal Protection clauses of the U.S. Constitution.[11]

Judicial officers must make meaningful inquiry into a person's ability to pay a bond and then limit the bond amount to what the individual can afford. Anything less will amount to pretrial detention that subverts the constitutionally mandated process for lawful pretrial detention outlined in *United States v. Salerno*[12] and codified in R.C. 2937.222. We recommend that the Rule explicitly require an ability-to-pay inquiry and further establish guidelines so that these inquiries are comprehensive and uniform across the state.

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[11] See similar hypothetical articulated in *ODonnell v. Harris County*, where the Fifth Circuit upheld, in large part, the lower court's injunction against the county's unconstitutional bail practices, and in doing so stated:

> In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way – same charge, same criminal backgrounds, same circumstances, etc., – except that one is wealthy and one is indigent. Applying this County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

892 F.3d 147, 163 (5th Cir. 2018).

[12] *United States v. Salerno*, 481 U.S. 739 (1987) (upholding the constitutionality of preventative detention in the federal Bail Reform Act because it: 1) limited detention to the most serious crimes, 2) included a right to a prompt and adversarial detention hearing, at which 3) the government needs to convince a neutral decision maker by clear and convincing evidence that *no conditions of release can reasonably assure the safety of the community* or any person.) (Emphasis added.)

D. Financial bonds reserved for appearance

In addition to mandating that the use of financial bonds should be extremely limited, the Rule should also mandate that judges may only consider financial bonds when deciding how best to assure appearance at trial, and that they cannot be used to assure public safety.

State judges routinely argue that their use of financial bonds is meant to keep the public safe. We also hear the bail bond industry echo this same sentiment. But financial bonds are ill-suited to the task for a several reasons. First, no rational relationship exists between the amount of money a person has and how likely he or she is to commit an offense during the pretrial period.[13] Second, financial bonds cannot be forfeited in Ohio for anything other than non-appearance.[14] Under the current legislative and rule schemes in Ohio money does not incentivize good behavior. This is not to say that money can or ever should be used in this way; it is simply to suggest that the reason too often given for using money bail, protecting the community, is in no way served. Better systems are available to promote reappearance and reasonably assure community safety.

The only thing financial bonds do well is detain people pretrial because they cannot afford their bond. Every court that uses financial bonds to detain opens itself up to litigation. A rule change is an important way to ensure that judges comply with the constitution and to prevent the kind of legal challenges that have been brought in

[13] Studies show that the more time a person spends in jail pretrial because he or she cannot afford release, the more likely that person is to recidivate once released, thus resulting in the opposite intended effect. *See, e.g.*, Arpit Gupta, Christopher Hansman, Ethan Frenchman, *The Heavy Cost of High Bail: Evidence from Judge Randomization*, at 1, *available at* http://www.columbia.edu/~cjh2182/GfuptaHansmanFrenchman.pdf (stating that "Our estimates suggest that the assignment of money bail causes a 12% rise in the likelihood of conviction, and a 6–9% rise in recidivism."); *see also* American Bar Association's Cri*m*inal Justice Section Report to the House of Delegates, *available at* https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/Adult_Cash_Bail_Resolution.authcheckdam.pdf.

[14] In Ohio, financial bonds cannot be forfeited for anything other than non-appearance. R.C. 2937.35; Crim.R. 46(I). A breach of conditions of bail, including allegedly reoffending while out on bail, can only result in the modification of bail (increase in amount if given a financial condition, revocation, or changes in non-financial conditions—we note that "conditions" under the current Rule are considered to be non-financial). *See also* The Rules Commission's Notes to Crim.R. 46 following the 1998 amendment (stating "[t]he amended rule permits a court to forfeit bail only upon a person's failure to appear. However, the court has the discretion not to forfeit bail and may take action to amend instead. Bail may also be amended for failure to follow any of the conditions contained in the bail order.") (available at westlaw.com). Notably, this was a change from the pre-1998 rule that allowed, at subsection (M), for bond forfeiture following a breach of a condition to bail. Because bond can no longer be forfeited for breach of a condition to bail (generally conditions are employed to ensure public safety) there is no rationale for courts to use financial bonds to assure public safety. Under Ohio's current laws, the only thing a financial bond can incentivize is reappearance—and this only works if the person has the means to afford it in the first place. Otherwise the person sits in jail. Accordingly, non-financial conditions are the only mechanisms suited to assuring public safety, and in rare instances where a person is too much of a risk to the public, courts should use the detention process outlined in R.C. 2937.222.

California,[15] Louisiana,[16] Texas,[17] Alabama,[18] Oklahoma,[19] Illinois,[20] and elsewhere. Ohio is currently vulnerable to such a challenge. Prompt action in amending Rule 46 could reduce this risk.

E. Eliminate cost of conditions and monitoring

The Rule should state that any costs associated with non-financial conditions (supervision, drug testing, monitoring etc.) be borne by the court, not the accused.

Right now, across Ohio, a number of jurisdictions demand that the accused pay for what are technically supposed to be non-financial conditions of release. For instance, Medina County requires the accused to pay for supervision expenses, and other counties require the accused to pay for electronic monitoring. This is a pay-as-you-go system, meaning the accused must pay the money upfront and in advance of the service. In almost all instances where the accused has to pay, the money is not returned to him or her even if the case is dismissed or ends in acquittal. This results in wealth extraction from those individuals who can afford this least. Furthermore, requiring payment for services can lead to pretrial detention if the person is unable to afford the costs, since they are unable to comply with the condition, and can create unsustainable debt burdens that make successful reentry difficult or even impossible.

Placing the cost burden on the court has the benefit of naturally limiting the number of unnecessary conditions placed on the accused because the judicial officer now must consider the court's financial ability to pay for them. But even more importantly, it will ensure that the legally and/or actually innocent are not punished before conviction by having to pay or being detained if they cannot.

(F) Require Explanation for Bail Decisions

Rule 46 should require a recorded explanation for why a financial condition or non-financial condition was considered the least restrictive condition necessary to reasonably assure appearance or public safety.

At present, there is no requirement that judges make a statement on the record explaining bail decisions. This allows judges to detain people on financial bonds they cannot afford under the pretext that the bond was tailored to their individual circumstances, and this silent record allows appellate courts to rubber stamp lower court decisions even when bail is excessive. The reality is that most bail decisions are not tailored to the individual and the conditions placed on people are hardly ever the

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[15] *In Re Humphrey*, 19 Cal.App.5th 1006, 534-35 (1st Dist. 2018).
[16] *Little v. Frederick*, No. 6:17-cv-00724 (W.D. La.), *available at* https://www.clearinghouse.net/detail.php?id=15872,
[17] *Odonnell v. Harris County*, 227 F.Supp.3d 706 (2016) (injunction largely upheld in 882 F.3d 528 (5th Cir. 2017)).
[18] *Schultz v. Alabama*, No. 5:17-cv-00270 (N.D. Ala.), *available at* https://www.courthousenews.com/wp-content/uploads/2017/02/Alabama.pdf.
[19] *Parga v. Tulsa County*, Case No.18-cv-00298 (N.D. Okla.), *available at* https://cdn.buttercms.com/tYYqGhOET32OHSGXN5wQ.
[20] *Robinson v. Martin*, No. 2016-ch--13587 (Cir.Ct. Cook County), *available at* https://www.clearinghouse.net/detail.php?id=15874.

least restrictive.[21] Judicial bail decisions are made in a matter of seconds upon cursory review of the allegations and the individual's criminal history. In many instances, judges will bypass even this limited review and simply follow the recommendation of the prosecutor or a bail schedule.

Accordingly, requiring an explanation for bail decisions ensures that thought is given to the decisions, and that a record exists upon which the decision may be challenged.

G. Data collection and reporting

The Rule should require the documentation, collection, and reporting of pretrial outcomes, including the documentation, collection and reporting of the type, amount, and conditions to bail, as well as the demographics of the accused (race, gender, age, ethnicity), and any pretrial outcomes that ended in dismissal of the charges, acquittal, or conviction. Rule 46 should also ensure that this information is made available to the public through publication on the Supreme Court of Ohio's website.

Data collection is essential to understanding how the state's pretrial criminal justice system is operating, and whether reforms are having the intended affect. Comprehensive data will help home in on areas where improvements can be made, but can also highlight reforms that are successful and should be expanded. This can help to streamline processes, minimize costs, and reduce unnecessary and expensive pretrial detention.

Accurate and comprehensive data collection of bail practices is a necessary component for good and lasting bail reform. It is hard to measure efficiency, government effectiveness, and compliance with constitutional standards if there is no meaningful way to review what is happening. Without data collection, Ohio will not be able to aptly address the problems that lead to the loss of financial resources and human potential that occurs every time a person is jailed because he or she cannot afford release.

We are concerned that the judiciary's opposition to data collection[22] is borne out of fear that it will lead to scrutiny of the judiciary. However, to ensure fairness, transparency, and efficient processes across Ohio courts, we need to look at what judges and court systems are doing. It also helps to ensure that biases are not the driving force behind pretrial decisions.

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[21] Cynthia Jones, *"Give Us Free:" Addressing Racial Disparities in Bail Determinations*, 930 (2014) *available at* https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1304&context=facsch_lawrev (noting, "In 1952 Justice Jackson observed that, '[f]ixing bail is a serious exercise of judicial discretion that is often done in haste—the defendant may be taken by surprise, his counsel has just been engaged, or for other reasons, the bail is fixed without that full inquiry and consideration which the matter deserves.' More than sixty years later, this description of the bail determination process remains shockingly accurate with regard to state court bail determinations.").

[22] *Judicial Conference Eyes Priorities But Expects Little Action In Remaining Months Of General Assembly*, May 11, 2018, *available at* https://www.gongwer-oh.com/programming/news.cfm?Article_ID=870920203 (Ohio Judicial Conference Executive Director Paul Pfeifer stating, in response to a bill requiring pretrial data collection that, "'There's just no worthy result at the end of the trail once you have the data,' he said, before adding, 'There's a whole bureaucracy of folks who like to play with numbers.'").

The racial disparities in Ohio are stark. As of 2015 reports, Black people represented 35% of the total jail population in Ohio, despite comprising only 12% of Ohio's overall population.[23] And it's worse for Ohio prisons. There, Black people comprise 44% of the total population.[24] Numerous studies have found that controlling for all other factors, people of color receive higher bail amounts than white defendants and also longer stays in pretrial detention—simply because of the color of their skin.[25] Studies show that the longer a person spends in jail pretrial because he or she can't afford bail, the more likely he or she is to lose a job, housing, and custody of children.[26] This reality, coupled with the fact that it is incredibility difficult to meet with an attorney and mount a defense while behind bars, often results in the person taking a plea deal out of financial and emotional desperation, without regard to innocence.[27] This drives the cycle of mass incarceration in Ohio, and contributes greatly to the race and class disparities we see in conviction rates and sentencing outcomes.

System change cannot occur without a mechanism for measuring the effectiveness of reforms. Because of the Ohio Constitution's home rule provisions, uniform data collection is quite difficult. And this has been a problem for years. For instance, lack of data was brought to the attention of the Supreme Court of Ohio ten years ago in the 2008 Report and Recommendations of the Joint Committee to Study Costs and Filing Fees,[28] three years ago in the 2015 Report and Recommendations of the Supreme Court Task Force on the Funding of Ohio Courts,[29] and just last year in the 2017 Criminal Sentencing Commission's Ad Hoc Committee Report on Bail and Pretrial Services.[30] These reports were issued by committees comprised of Ohio legal scholars, practicing attorneys, court personnel, and members of the judiciary—who all agree that the lack of access to good data from Ohio courts is preventing the understanding and amelioration of problems within court systems. The pretrial context is the perfect place to start to fix this problem.

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[23] Vera Institute, Incarceration Trends (2017) http://trends.vera.org/rates/ohio?incarceration=rate&similar=jailpopulation; U.S. Census Bureau, "Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States," 2015 population estimates.

[24] Urban Institute analysis of: U.S. Census Bureau, "Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States," 2016 population estimates; ODRC, Institutional Census 2016 (Jan. 2016) https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-OH.pdf .

[25] *See, e.g.,* Will Dobbie, Jacob Goldin, and Crystal Yang, *Racial Bias in Bail Decisions, available at* https://www.princeton.edu/~wdobbie/files/racialbias.pdf: *see also* Jones, *supra* note 21 at 938.

[26] Dobbie, W., Goldin, J., Yang, C.S., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* (2018) *American Economic Review, 108*(2), 201-40, *available at* https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20161503. Megan T. Stevenson., *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (July 15, 2018). Journal of Law, Economics & Organization, Forthcoming, a*vailable at* SSRN: https://ssrn.com/abstract=2777615 or http://dx.doi.org/10.2139/ssrn.2777615.

[27] Blume and Helm., *The Unexonerated: Factually Innocent Individuals Who Plead Guilty* (2014), *available at* https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1116&context=clsops_papers; *see also* Stevenson, *supra* note 26.

[28] https://www.supremecourt.ohio.gov/Publications/JtCommCourtCostsReport.pdf

[29] https://www.supremecourt.ohio.gov/Boards/courtFunding/Report.pdf

[30] https://www.supremecourt.ohio.gov/Boards/Sentencing/Materials/2017/March/finalAdHocBailReport.pdf

(H) Right to Counsel

The Rule should recognize the right to defense counsel at initial bail hearings and subsequent bail review hearings, and should state that appointed counsel must be provided free of cost to those who cannot afford an attorney.

An accused's right to counsel "attaches" at his or her first appearance before a court. *See Rothgery v. Gillespie County, Texas,* 554 U.S. 191 (2008). Once the right attaches, the accused has the right to counsel and the appointment of counsel, at all critical stages of proceedings. *Id.*

Although the Supreme Court of the United States has yet to decide the exact issue of whether a first appearance/bail hearing is a critical stage, three states— Maryland, New York, and Connecticut—already recognize a right to counsel at these proceedings. *See DeWolfe v. Richmond*, 434 Md. 444, 464 (Md. Ct. App. 2013) ("[A]n indigent defendant is entitled to state-furnished counsel at an initial hearing."); *Hurrell-Harring v. State*, 930 N.E.2d 217, 223 (N.Y. 2010 ("There is no question that a bail hearing is a critical stage of the State's criminal process."); *Gonzalez v. Comm'r of Correction*, 68 A.3d 624, 63536 (Conn.), cert. denied, 134 S. Ct. 639 (2013).

Given the current bail setting practices of our state courts—where financial bonds more often than not lead to detention rather than release—it is clear that initial and subsequent bail hearings are critical stages for which counsel is required.[31] The Supreme Court of the United States defines critical stages "as proceedings between an individual and agents of the State (whether they be 'formal or informal, in court or out') that take on the form of 'trial like confrontations,' where counsel can assist the accused 'in coping with legal problems or * * * meeting his adversary.'" *Rothgery*, 554 U.S. at 212 n.16. Nearly all pretrial stages that include hearings or meetings with the government or court have been found to be critical. *See Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012) (plea negotiations); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings); *United States v. Wade*, 388 U.S. 218 (1967) (post-indictment lineups); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignments).

At bail hearings, decisions are being made that directly affect whether a person is going to spend time in jail or not. The entire hearing centers on that person's constitutional liberty interest, a right that cannot be arbitrarily restrained by the government. As other courts aptly put it, pretrial liberty is "a fundamental interest second only to life itself in terms of constitutional importance." *In re Humphrey*, 19 Cal.App.5th 1006, 1037, 228 Cal.Rptr.3d 513, 535 (Cal.App.2018) citing *Van Atta v. Scott*, 27 Cal.3d 424, 435, 166 Cal.Rptr. 149, 613 P.2d 210 (1980). Even beyond the immediate potential for detention, a number of studies show that the longer a person spends in pretrial detention the more likely he or she is to plead guilty (despite actual innocence) and the more likely he or she is to receive a harsher sentence.[32] Even a few days in pretrial

[31] It might not be a critical stage if courts, in practice, did follow constitutional mandates when it comes to setting bail. In that case it would mean only a very limited number of people would be detained.

[32]Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, American Bar Association Journal of Criminal Justice, Vol 31 Issue 1, at 26 (2016), *available at*

detention can cause a person's life to unravel, causing them to miss rent, lose their job, have their kids taken away, and so on.[33] Or maybe the person does get out, but only after sitting in jail for weeks waiting for family members to scrape together $200 or $500 to pay a bail bond agent's fee.

At bail hearings counsel can advocate on behalf of their client by encouraging non-financial release and limited non-monetary conditions. Counsel can ensure that all arguments related to the constitutional mandates surrounding bail are made to the court and can speak in their client's defense when a prosecutor asks for high bond or a judge decides to set one. If nothing else, having the right to counsel at bail hearings allows counsel to know, that the point it is happening, whether their client is being detained unlawfully and whether the filing of a habeas petition is warranted.

Those who raise counterarguments to the right to counsel at bail hearings typically object on the grounds that it would be too costly to provide representation at bail proceedings to those who need it, given the amount of people going through the system on a daily basis. Although we are conscious of the fact that courts in Ohio are cash-strapped because of local and state budget cuts, cost savings from housing less individuals pretrial provides a mechanism to ensure access to counsel.[34]

III. Support for Proposed Amendments

Although we believe that many of the proposed amendments to Rule 46 improve the rule to a limited degree, we strongly believe that additional and stronger amendments are needed to ensure the rights of individuals as they go through the bail process. Below we highlight the amendments with an explanation for our support and/or concerns.

A. Amendments to section (A)
(A) Pretrial detention. A prosecutor may file a motion seeking pretrial detention of a defendant pursuant to the standards and procedures set forth in the Revised Code.

> R.C. 2937.222, Ohio's pretrial detention statute, rarely if ever gets used.[35] We agree that judges and prosecutors should be reminded that this statute exists and should be used when warranted. Currently, rather than using the statute—which guarantees the

https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/v31/cjspring2016_BUNIN.authcheckdam.pdf.
[33] *Id.*

[34]Tamara Aparton, *Study: Public Defender's Pilot Program Curtails Pretrial Incarceration, Saves Costs*, San Francisco Public Defender, http://sfpublicdefender.org/news/2018/05/study-public-defenders-pilot-program-curtails-pretrial-incarceration-saves-costs/ (reporting program providing counsel at bail hearings saved the city $808,508 by doubling the likelihood of the defendants release at arraignment).

[35] To highlight this point, Ariel Castro was given a $8 million bond, and Anthony Sowell a $5 million bond. https://www.theguardian.com/world/2013/may/09/cleveland-suspect-ariel-castro-arraigned; http://blog.cleveland.com/metro/2009/11/anthony_sowells_bond_5_million.html.

person a number of due process protections including: an adversarial hearing, the right to counsel, the requirement that the prosecution prove by a high standard proof that the accused must be detained, and the right to an immediate and expedited appeal—Ohio judges routinely set high bonds which many individuals cannot afford. This violates a number of constitutional guarantees and subverts the requirements of R.C. 2937.222.

We agree that this amendment should be in the rule and urge the Supreme Court of Ohio to adopt it. However, we also urge the Rules Commission and Supreme Court of Ohio to amend the rule to provide a strong presumption in favor of personal recognizance release on most offenses and to require that judges justify, on record, their reasons for setting a financial bond, if they choose to do it. Otherwise, judges will continue to use money to detain without regard to the Due Process rights that the accused would otherwise receive from R.C. 2937.222.

We also suggest that the amendment be revised to reflect that under R.C. 2937.222 judges may, sua sponte, also call for a detention hearing.

B. Amendments to section (B)

Unless the court orders the defendant detained under division (A) of this rule, the court shall release the defendant on the least restrictive conditions that, in the judgment of the court, will reasonably ensure the defendant's appearance in court, the protection of the safety of any person or the community, and that the defendant will not obstruct the criminal justice process. If the court orders monetary conditions of release, the court shall impose an amount and type which are least costly to the defendant while also sufficient to reasonably ensure the defendant's future appearance in court.

We are pleased to see an express articulation of the concept of least restrictive conditions in the Rule. This requirement goes to all government actions if the act will infringe on a liberty interest of the individual. In such cases the government is always required to use the least restrictive means of achieving its goal, and then justify more restrictive means as needed. It is an improvement to place this language in the Rule, but a more substantial amendment would explicitly state that money is presumed to be the *most restrictive condition*, so its use must be justified by clear and convincing evidence that it is needed and by making a written record for why it was considered the least restrictive condition reasonably necessary.

With this in mind, and aside from the concerns raised in Section II, subsection A, we support this amendment but also suggest

rewording to comply with constitutional mandates. This section should be rewritten to:

Unless the court orders the defendant detained under division (A) of this rule, the court shall release the defendant on the least restrictive conditions necessary to reasonably ~~ensure~~ assure the defendant's appearance in court, the protection of the safety of any person or the community~~, and that the defendant will not obstruct the criminal justice process~~.

We would delete of the clause in the amendment related to obstruction of the criminal justice process. This addition to the Rule is new and is largely unnecessary because any attempt to intimidate a witness or juror is also a crime a can also be viewed as a threat to any person or the community.[36] Moreover, courts may use the criminal contempt statute to prevent such behavior.[37] Accordingly, we suggest the removal of this language in case it causes confusion and leads to unnecessary detention.

C. Amendments to section (B) relabeled as (C)

(C)(6) Require ~~a person who is charged with an offense that is alcohol or drug related, and who appears to need treatment, to attend treatment while on bail~~ completion of a drug and/or alcohol assessment and compliance with treatment recommendations, for any person charged with an offense that is alcohol or drug related, or where alcohol or drug influence or addiction appears to be a contributing factor in the offense, and who appears based upon an evaluation, prior treatment history, or recent alcohol or drug use, to be in need of treatment;

If the Rule is going to list a variety of different conditions that a court may place on an individual if necessary and found to be the least restrictive, then the Rules Commission should amend this section to require a drug or alcohol assessment before a person may be ordered to comply with a condition that monitors their drug intake. Any condition that a court places on a person must be the least restrictive necessary to ensure appearance or public safety. Any blanket condition requiring drug treatment or testing without first assessing that person's need is automatically overly restrictive. Accordingly, we support the amendment to the extent that it does not lead to increased time in pretrial detention while the accused waits to be assessed or waits for the results to come in. To avoid this, the Rules Commission and Supreme Court of Ohio should place clear and definitive time restrictions on how long a person may be jailed while waiting for the completed assessment.

[36] Schnacke, *supra* note 1 at n.466.

[37] *Id.*; *see* R.C. 2945.04 (Orders to Prevent Intimidation of Attorney, Victim, or Witness in a Criminal Trial)

We recommend completion and rehearing within 12 hours of the initial bail hearing, if the person is not released sooner.

We are also concerned about the use of the word "conditions" in this section. All conditions in Section (C) amount to non-monetary conditions of release. As explained in Section II, Subsection A, conditions can be both financial and non-financial. The current and amended Rule conflate financial conditions with bail itself. This should be fixed for consistency and clarity.

(C)(7) Require compliance with alternatives to pretrial detention, including but not limited to diversion programs, day reporting, or comparable alternatives, to ensure the person's appearance at future court proceedings;

This amendment causes concern. Diversion programs are not alternatives to pretrial detention as the proposed amendment suggests, nor is their purpose to assure reappearance at court proceedings. Rather, diversion programs generally require the person to admit to the allegations before the person may enter the program, on the promise that successful completion of the program will result in dismissal of the charges. Accordingly, diversion programs are better labeled as alternatives to conviction, rather than alternatives to pretrial detention. Although a court may order compliance with a diversion program as a condition of release, failure to comply with the program should not automatically result in the pretrial detention of the accused until trial or plea. Indeed, one can imagine a scenario where a person might fail to comply with a technical requirement of a diversion program and yet still make every single court appearance.

Moreover, this amendment implies that "pretrial detention" is the norm and that pretrial release is the exception to that rule. United States Supreme Court case law clearly states that this is an incorrect way to view the bail process.[38] Accordingly, this section should be rewritten to state that the court may order compliance with any programs or conditions meant to assure a person's appearance at future court proceedings, as long as they are least restrictive means.

(C)(8) Any other constitutional condition considered reasonably necessary to ensure appearance or public safety.

[38] *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

Although the Rules Commission did not offer amendments to this particular subsection, it should be rewritten, as follows, to comply with the constitution:
(8) Any other constitutional condition considered ~~reasonably~~ necessary to provide reasonable ~~ensure~~ assurance of appearance or public safety.

D. Amendments to section (C) relabeled as (D)
In general, we are concerned about amendments to section (D), and section (D) as a whole. Although this section provides factors that judges should consider when determining bail, there is no evidence that these factors are predictive of appearance or public safety, and if they are, what weight should be given to each of them. The proposed language also fails to provide guidance for judges on how to use these factors. We suggest that the Rule provide more guidance on how the factors should be used, and that the Supreme Court of Ohio ensure that the factors are weighted based on predictability. Nevertheless, below we give our responses to the suggested amendments.

(D)(6) An evaluation of the defendant's likelihood of appearance and risk to public safety, as determined by an objective risk-assessment tool recognized as reliable by statute or by the court, when reasonably available to the court. As soon as possible without causing unreasonable delay to the court's bail determination, this risk-assessment tool shall be employed by the court on its own initiative for any defendant not yet released on bail, either before or after the defendant's initial appearance.

We support this amendment to the extent that risk assessments are used to ensure that individuals are released rather than detained pretrial. Objective risk assessments are a tool courts can use but under no circumstances should the tool be used to recommend detention under R.C. 2937.222, or otherwise. If a risk assessment tool does not recommend immediate release, the individual must promptly receive an individualized determination. The Rule should explicitly state this, and should also include a requirement that whatever risk assessment is used, that it must be both race neutral on its face and as applied.

E. Amendments to section (E) relabeled as (F)
~~(E)~~ (F) ~~Amendments~~ **Continuation of Bail.** ~~A court, at any time, may order additional or different types, amounts, or conditions of bail.~~ Unless otherwise ordered by the court pursuant to this subsection, bail shall continue until the return of a verdict or the entry of a guilty plea, and may continue thereafter pending sentence or disposition of the case on review. At any time, a court may eliminate or lessen any condition of bail that the court believes is no longer necessary to reasonably ensure the defendant's appearance in court, the protection of the safety of any person or the community, and that the defendant will not obstruct the criminal justice process.

We support this amendment. Judges should not amend bail decisions without reason, unless it's a downward departure intended to promote release of the individual. Under the current rule, there is nothing stopping judges who might abuse their power to revoke bond. For instance, this tactic has been used to force pleas and retention of counsel.[39]

Again, we note our concern with the final clause of the amendment related to obstruction of the criminal justice process.[40] We suggest deleting it.

F. Amendments to Section (F) relabeled as (G)

~~(F)~~ (G) Information need not be admissible. Information stated in or offered in connection with any order entered pursuant to this rule need not conform to the rules pertaining to the admissibility of evidence in a court of law. Statements or admissions of the defendant made at a bail proceeding or in the course of compliance with a condition of bail shall not be received as substantive evidence in the trial of the case.

We support this amendment but urge the Supreme Court of Ohio to insert language to guarantee defense attorneys access to the same evidence presented to the judge at bail hearings. This includes the police report or other evidence, potentially exculpatory or otherwise. This is crucial in order for the individual, or his or her attorney, to be able to adequately argue against high bonds or unreasonable conditions.

G. Amendments to section (G) relabeled as (H)

(H)(1) In order to expedite the prompt release of a defendant prior to initial appearance, ~~Each~~ each court shall establish a bail bond schedule covering all misdemeanors including traffic offenses, either specifically, by type, by potential penalty, or by some other reasonable method of classification. The court also may include requirements for release in consideration of divisions ~~(B)~~ (C) and ~~(C)(5)~~ (D)(5) of this rule. The sole purpose of a bail schedule is to allow for the consideration of release prior to the defendant's initial appearance.

We believe that bond schedules are unnecessary and that most individuals should be released immediately. Once you have a system where one person gets out because they can afford the bond on the schedule, but another person stays in jail because he or she cannot afford that same bond, it triggers Equal Protection, Substantive and Procedural Due Process, right to bail, and excessive bail claims. We recommend getting rid of bond schedules

[39] *See State v. Campbell*, 8th Dist. Cuyahoga, 2016-Ohio-5510, ¶¶4,6, n.2 (showing how trial judge revokes defendant's bond and remands him to jail because he requested a new attorney and did not want to plead guilty at the hearing).

[40] *See* discussion *supra* at p.16 and n.35, 36.

altogether in favor of a citation in lieu of arrest scheme. Or, if the state is going to continue to arrest people on allegations of having committed very low-level crimes (bond schedules apply only to misdemeanors), we recommend that bond schedules be used for the limited amount of time between arrest and first appearance, and that they be set so people are almost always released on their own personal recognizance.

(H)(2) A bond schedule shall not be considered as "relevant information" under division (D) of this rule.

If Ohio continues using bond schedules, then we support this amendment. Bond schedules based on offense type alone are not indicative of whether a person is unlikely to appear or be a public safety risk.[41]

(H)(3) When a person fails to post a bond established by a bail bond schedule, a judicial officer shall conduct a bail hearing no later than the second court day after that person has been arrested.

We support this amendment, or any move to institute an even shorter timeline. After 48 hours a person's life begins to unravel if detained. However, it should be made clear that the 48 hour rule applies to both those accused of misdemeanors *and felonies*. As written, with the reference to misdemeanor bond schedules, it seems as if the 48 hour rule would not apply to felonies. This should be fixed.

(H)(5) Each court shall review its bail bond schedule bi-annually by January 31 of each even numbered year, to ensure an appropriate bail bond schedule that does not result in the unnecessary detention of defendants due to inability to pay.

Bond schedules will always result in unnecessary detention of defendants due to inability to pay. However, it is worth reviewing the bail bond schedule bi-annually so that courts have an opportunity to adjust, or do away with schedules, and release defendants without money earlier in the process. Accordingly we support this amendment and urge the court to adopt it.

Conclusion

We are encouraged that the Rules Commission recognizes that Rule 46 must be improved, and we hope the Supreme Court of Ohio takes this opportunity to do just

[41] Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 Berkeley J. Crim. L. 1, 15 (2008) (concluding that the "seriousness of criminal charges was not a predictor of flight or crime by defendants who gained pretrial release").

that. However, the current proposed amendments fail to ensure that individuals will not be detained because they are too poor to pay an essentially arbitrary amount of money that has no impact on public safety.

Ohio has a constitutional preventative detention provision that has been codified in R.C. 2937.222. It allows for the detention of those accused of capital crimes or *any felony* where the proof is evident or the presumption is great that the accused poses a substantial risk of serious harm to a person or the community. By enacting these, both the people of Ohio through constitutional amendment, and the Ohio legislature through statute, have determined the criteria for pretrial detention. Criminal Rule 46 should provide for the quick release, under appropriate conditions, of arrestees who do not meet this criteria. The recommendations we offer the Rules Commission and Supreme Court of Ohio—principally: 1) a definition of bail that promotes release, 2) a presumption of release and against financial bonds, 3) ability to pay determinations, 4) the requirement that financial bonds may only be ordered in consideration of appearance only, 5) free conditional release, 6) the requirement of recorded explanations for bail decisions, 7) data collection and reporting, and 8) the right to counsel at bail hearings—are consistently hailed as the best practices that lead to the release of those who are accused of crimes but who are legally ineligible for pretrial preventive detention.[42] The Rules Commission's proposed amendments only touch the surface of much needed greater reforms. We urge the Rules Commission and the Supreme Court of Ohio to strengthen and make additional amendments to the Rule to ensure a fair and constitutional process for all individuals.

Respectfully submitted,

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[42] *A Primer on Bail*, *supra* note 4; American Bar Association Criminal Justice Section Report to the House of Delegates, *available at* https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/Adult_Cash_Bail_Resolution.authcheckdam.pdf; Schnacke, *supra* note 1.

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