



J. Bennett Guess  
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November 6, 2019

Jesse Mosser  
Policy Counsel  
Supreme Court of Ohio  
65 South Front Street  
7<sup>th</sup> Floor  
Columbus, Ohio 43215-3431  
Sent Via Email: jesse.mosser@sc.ohio.gov

Re: Comment on Proposed Amendments to Criminal Rule 46

Dear Jesse Mosser,

On behalf of the American Civil Liberties Union of Ohio and a number of sister organizations and individuals dedicated to criminal justice reform, we submit the enclosed joint comment to the Rules Commission's proposed 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,

A handwritten signature in black ink, appearing to read "J. Bennett Guess".

J. Bennett Guess  
Executive Director

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ACLU of Ohio

A handwritten signature in black ink, appearing to read "Jocelyn Rosnick".

Jocelyn Rosnick, Esq.  
Advocacy Director

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ACLU of Ohio

A handwritten signature in black ink, appearing to read "Claire Chevrier".

Claire Chevrier, Esq.  
Advocacy Counsel

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ACLU of Ohio

\*Barred in Washington,  
D.C.

November 6, 2019

**Re: Comment on Proposed Amendments to Criminal Rule 46**

We are writing on behalf of the American Civil Liberties Union of Ohio and sister organizations and individuals to request revisions to the amendments to Criminal Rule 46 recently proposed by the Commission on the Rules of Practice and Procedure in Ohio Courts (hereinafter “Rules Commission”). The undersigned organizations and individuals are pleased to see a commitment on behalf of the Supreme Court of Ohio to reexamine problematic bail-setting practices. We remain opposed to the indiscriminate and routine use of financial conditions of bail to detain individuals pretrial. While the proposed amendments include positive changes, without corresponding procedural safeguards, many of these improvements are unlikely to change the unconstitutional bail-setting practices in Ohio.

Ohio has a two-tiered system of justice in which wealthier individuals accused of a crime go home, and those without deep pockets are unnecessarily held behind bars—often forced to endure other significant harms, such as losing one’s job, home, or custody of one’s children. This is wealth-based detention that offends the fundamental right to liberty, and therefore triggers Equal Protection, Substantive and Procedural Due Process, and right to bail claims.

Revisions to Criminal Rule 46 have the opportunity to decrease unnecessary human suffering, increase judicial and jail efficiency, and save taxpayer dollars. However, as currently proposed, Criminal Rule 46 fails to create clear rules that would successfully limit when and how conditions of release can be set. Each of the recommendations provided below is responsive to the goal of ensuring that no individual is detained simply because they cannot afford their conditions of release. The harmful bail-setting practices utilized by judges across Ohio that cause this wealth-based detention have been held unconstitutional by an increasing number of federal courts, and more cases are pending.<sup>1</sup> Criminal Rule 46 is needed to enshrine and require constitutional practices and to realign our pretrial system so it does not continue to subvert the long-held understanding that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>2</sup>

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<sup>1</sup> *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018); *Ross v. Blount*, No. 2:19-cv-11076 (E.D. Mich. filed April 12, 2019); *Booth v. Galveston County*, 352 F.Supp.3d 718 (S.D. Tex. 2019) (denying, in large part, defendants’ motions to dismiss); *Schultz v. State*, 330 F.Supp.3d 1344 (N.D. Ala. 2018) (preliminary injunction granted); *Daves v. Dallas County*, 341 F.Supp. 3d 688 (N.D. Tex. 2018) (preliminary injunction granted).

<sup>2</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

## **I. Suggested Additions and Support for Improvements**

### **A. A clear definition and usages of the word “bail”**

Bail is the process of conditional release of the accused before trial.<sup>3</sup> 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.<sup>4</sup> Unfortunately, the term “bail” is often conflated with financial conditions of release. This is problematic because the right to bail, as enshrined in the Ohio Constitution,<sup>5</sup> promotes release, not financial conditions that lead to continued detention. However, for many Ohioans who have been accused of crimes, continued detention is their lived experience. Defining bail as the process of 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 wrongfully detaining accused individuals on financial bonds.<sup>6</sup>

The proposed language dangerously confuses “financial conditions of release” and bail. In Section (B)(1), the proposed language removes the title “Types and amounts of bail” and replaces it with “Financial conditions of release.” It also removes the word “bail” in the body of the Section and replaces it with “financial conditions.” Doing so drastically changes the right of an accused individual from the right to bail, or conditions—financial or non-financial—of release, to only a right to financial conditions of release. This language causes Criminal Rule 46 to conflict with itself. The same proposed Section (B) states that “*if* the court orders financial conditions of release, those financial conditions shall be related solely to the defendant’s risk of non-appearance” (emphasis added). Yet, the rule also states that “any person who is entitled to release” shall be released on “financial conditions.” This language creates significant confusion, and subverts the purpose of bail, which is release.

In order to provide clarity, the Supreme Court of Ohio should restore to the Rule a statement of the purpose of and the right to bail, and provide a clear definition of bail. The definition of bail should explicitly state that it is the process of conditional release, and can include financial and/or non-financial conditions of release. Criminal Rule 46 should then be reviewed to ensure its language reflects this definition and purpose.

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<sup>3</sup> Tim Schnacke, Center for Legal and Evidence Based Practices, “MODEL” BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION, at 16, [http://www.clebp.org/images/04-18-2017\\_Model\\_Bail\\_Laws\\_CLEPB\\_.pdf](http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf) (Apr. 18, 2017).

<sup>4</sup> *Id.*

<sup>5</sup> OH. CONST. art. 1, § 9.

<sup>6</sup> *Id.*; see also Harvard Law School Criminal Justice Policy Program, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM, <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> (2016).

## **B. Strong presumption of release on personal recognizance and against financial conditions**

Financial conditions of release—secured bonds, surety bonds, property bonds, etc.—are not more effective than other forms of release—unsecured bonds, release on one’s own recognizance—at ensuring speedy release, preventing the failure to appear at future hearings, and protecting public safety.<sup>7</sup> However, the widespread overuse of financial conditions *does* increase unnecessary pretrial detention.<sup>8</sup> *(Please see below for a discussion on why and how this Rule should recategorize some of the conditions it currently lists as “financial.”)* Although just as or less successful as other conditions, and far more harmful than other possible conditions, financial conditions of release continue to be overused across Ohio, and in some jurisdictions, the setting of financial conditions of release is the norm. Criminal Rule 46 should include a strong presumption of release on one’s own recognizance and against the imposition of financial conditions.

Before 1998, this Rule included a presumption of non-financial bonds and limited the use of secured bonds for both misdemeanors and felony offenses. It stated:

### **(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

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<sup>7</sup> Michael R. Jones, Pretrial Justice Institute, UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION, <https://pdfs.semanticscholar.org/5444/7711f036e000af0f177e176584b7aa7532f7.pdf> (2013).

<sup>8</sup> Randy Ludlow, *Momentum grows to reform Ohio bond practices, free more prisoners*, THE COLUMBUS DISPATCH, Aug. 24, 2019, <https://www.dispatch.com/article/20190823/NEWS/190829163>. (“The human cost of pretrial detention is high, [Chief Justice] O’Connor said. ‘Studies show that as little as three days being detained can have a negative ripple effect,’ she said. Prisoners ‘lost a job, they lose a place to stay—that snowballs into maybe losing their support system.’”).

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 this Rule deleted the above presumptions and gave courts the discretion to set any type of bail (including secured bonds) in any type of case. While the staff notes accompanying the 1998 Rule amendment stated the removal of these presumptions was intended to align the Rule with recent amendments to the Ohio Constitution, the removal was not necessary to comply with the 1997 constitutional amendments, and has caused a drastic uptick in pretrial detention.<sup>9</sup>

The 1997 constitutional amendments provided that: "[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."<sup>10</sup> 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 Ohio 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 provide these procedures,<sup>11</sup> and the U.S. Constitution requires, along with state and federal case law, protections with which state courts must comply.

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 provide procedural safeguards for the bail-setting process.<sup>12</sup> Case law further affirms a number of bedrock principles that courts must follow, including: the requirement to conduct ability-to-pay inquiries before setting

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<sup>9</sup> JOSHUA AIKEN, PRISON POLICY INITIATIVE, ERA OF MASS EXPANSION: WHY STATE OFFICIAL SHOULD FIGHT JAIL GROWTH (2017), [https://www.prisonpolicy.org/graphs/OH\\_Convicted\\_Status\\_1978-2013.html](https://www.prisonpolicy.org/graphs/OH_Convicted_Status_1978-2013.html).

<sup>10</sup> OH. CONST. art. 1, §9.

<sup>11</sup> OH. CONST. art. 1, §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.").

<sup>12</sup> See *United States v. Salerno*, 481 U.S. 739 (1987) (allowing pretrial preventative detention only in limited circumstances and after a full adversarial hearing); *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.").

a financial bond<sup>13</sup>; the requirement to avoid unthinking reliance on uniform bail schedules that ignore the defendant's financial circumstances<sup>14</sup>; 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.<sup>15</sup>

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 individuals with a constitutional process. A presumption in favor of release on personal recognizance 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.

Aside from the legal arguments for reinstating the presumptions of release on personal recognizance and against the use of financial conditions of release, there is also a practical reason for doing so. Current Criminal 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 financial conditions of release. In the late 1990s the state's pretrial jail population exploded at the same time that the presumption in favor of non-monetary release was deleted from Criminal Rule 46.<sup>16</sup> Accordingly, the Supreme Court of Ohio should restore Criminal Rule 46's presumption of release on personal recognizance and against the imposition of financial conditions of release for pretrial defendants.

### **C. Ability-to-pay determination**

Across the state of Ohio, legally innocent individuals are behind bars, not because of what they have done, but because of what they do not have. When a judge fails to consider what a defendant is presently able to pay, the result is often wealth-based detention that offends the defendant's constitutional rights.

While the current proposed language states that financial conditions of release must be the “least costly” to the defendant, which is a positive improvement, without the requirement that judges make an on-the-record ability-to-pay determination, this updated language is unlikely to change current, unconstitutional bail-setting practices. In order for a judge to determine what is “least costly” they must determine what a defendant's income and expenses are, and to what funds the defendant presently has access. If the judge does not consider this

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<sup>13</sup> See, e.g., *In Re Humphrey*, 19 Cal.App.5th 1006, 534-35 (1st Dist. 2018).

<sup>14</sup> See, e.g., *ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018).

<sup>15</sup> See, e.g., *Humphrey*, 19 Cal.App.5th at 536; see also *Salerno*, 481 U.S. at 750.

<sup>16</sup> JOSHUA AIKEN, PRISON POLICY INITIATIVE, ERA OF MASS EXPANSION: WHY STATE OFFICIAL SHOULD FIGHT JAIL GROWTH (2017), [https://www.prisonpolicy.org/graphs/OH\\_Convicted\\_Status\\_1978-2013.html](https://www.prisonpolicy.org/graphs/OH_Convicted_Status_1978-2013.html).

information, they will be unable to determine what bond amount will act as an incentive for appearance versus what is likely to lead to unnecessary detention. Bond amounts that seem insignificant to some may mean long-term detention for defendants.

The Ohio Revised Code § 2937.222 (hereinafter “R.C. 2937.222”) provides what is supposed to be the only mechanism of long-term preventative pretrial detention in Ohio. This statute provides extensive procedural safeguards, including an adversarial hearing, the right to counsel, and multiple factors the state has the burden of proving, before a defendant can be preventatively detained.<sup>17</sup> The statute also explicitly limits the types of crimes for which preventative detention is available.<sup>18</sup> However, this statute is rarely used. Instead, because there is no explicit requirement that judges make ability-to-pay determinations when setting financial conditions of release, judges often subvert the requirements of R.C. 2937.222 and use financial conditions of bail as a way to detain individuals who are, according to the Ohio Constitution and R.C. 2937.222, not eligible for pretrial detention, or who are entitled to the protections of R.C. 2937.222 before they can be detained.<sup>19</sup> Not only does this practice disregard R.C. 2937.222 and the Ohio Constitution, it also ignores protections required by the U.S. Constitution.

We urge the Supreme Court of Ohio to require judges to make ability-to-pay determinations before setting financial conditions of release. Doing so would alleviate two major harms currently present in the Ohio pretrial system: it would stop judges from intentionally and unintentionally setting financial conditions of release that lead to the detention of legally innocent individuals.

#### **D. Eliminate the cost of “non-financial” conditions**

Criminal Rule 46 should explicitly state that any costs associated with non-financial conditions of release (supervision, drug testing, electronic monitoring, etc.) may not be borne by the accused.

Currently, across Ohio, many jurisdictions demand that accused individuals pay for what the proposed amendments to Criminal Rule 46 considers “non-financial” conditions of release. For example, the Cuyahoga County Sheriff’s Office charges

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<sup>17</sup> OH. REV. CODE § 2937.222 (2004).

<sup>18</sup> *Id.*

<sup>19</sup> 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](http://blog.cleveland.com/metro/2009/11/anthony_sowells_bond_5_million.html).

accused individuals \$56 per week for their court-ordered GPS monitoring.<sup>20</sup> In almost all instances where the accused has to pay, the money is not returned to them even if the case is dismissed or ends in acquittal. In the case of GPS monitors, this is a forced leasing fee, the alternative to which is detention. For many, the inability to afford the forced leasing fee, which is a condition of release, means the choice between returning to pretrial detention, accruing debt burdens that may make successful reentry difficult or impossible, or even feeling forced to plead guilty. Whether it is intended to be used as such or not, charging accused individuals for their non-financial conditions is a coercive practice that harms individuals, families, and communities.

We urge the Supreme Court of Ohio to add to Criminal Rule 46 an explicit statement that charging accused individuals for their non-financial conditions of release is prohibited. Otherwise, it will continue to sanction the punishment and coercion of legally innocent individuals.

### **E. Right to counsel**

Judges often set financial conditions of bail during first appearances, and in many jurisdictions across Ohio, defense counsel is not present at these initial hearings. Defendants are then locked in jail if they are unable to pay their financial conditions of release. This is an initial detention decision, which cannot be feasibly challenged by an indigent person without the assistance of counsel. The current proposed rule, which denies indigent defendants the right to counsel at their initial bail hearing, but provides one for their second bail hearing, if one is required, does not adequately protect indigent defendants. To the contrary, it reinforces a two-tiered system of justice in which wealthier individuals can hire an attorney, but indigent defendants will have to be denied appropriate conditions of release and continue to be denied their liberty before an attorney is appointed and able to participate in subsequent bail determinations.

The Sixth Amendment to the United States Constitution, which applies to states via the Fourteenth Amendment, guarantees criminal defendants the right to counsel at each critical stage of criminal prosecution. Critical stages include all pretrial hearings that may prejudice the fairness of the criminal proceedings.

It is well-documented that conditions of release have the power to severely prejudice the fairness of subsequent criminal proceedings.<sup>21</sup> If a defendant is detained pretrial

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<sup>20</sup> CUYAHOGA COUNTY, CRIMINAL JUSTICE SYSTEM ASSESSMENT, 62 (2019), <https://www.acluohio.org/wp-content/uploads/2019/09/FINALSystemAssessmentPresentation.pdf>.

<sup>21</sup> See MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, INC., A DECADE OF BAIL RESEARCH IN NEW YORK CITY, <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf> (2012); CHRISTOPHER



because they are unable to pay for their financial condition of release, they are more likely to feel coerced into taking a plea deal.<sup>22</sup> Defendants who are detained pretrial due to their inability to pay are more likely to be convicted, and their jail and prison sentences are 2-3 times longer than those charged with the same crime who were able to afford their freedom.<sup>23</sup> This makes sense for a number of reasons.

Defendants' who are detained pretrial do not benefit from the same unfettered access to their attorneys from which someone in the community would benefit.<sup>24</sup> Defendants who are detained pretrial also do not have access to provide the same types of mitigation evidence at sentencing. Someone who purchased their freedom by posting their bond may be able to share about their job, volunteer activities, time with children, etc. For someone who was detained pretrial because they were unable to post their financial condition of release, they will not be able to benefit from sharing their stories of being a contributing member of society during the course of their case. Instead, their stories are more likely to—as a result of detention—be about the loss of their job, homes, and even the custody of their children.

We urge the Supreme Court of Ohio to recognize the importance of counsel at all stages during which conditions of release are set, and to not promulgate a Criminal Rule 46 that promotes disparate access to counsel at this critical stage.

## **F. Limiting financial conditions to the risk of non-appearance**

We strongly support this change. Financial conditions of bail never promote public safety; they simply allow wealthier defendants to buy their freedom, while denying freedom to those without adequate means to post their bond.

## **II. Suggested Edits and Changes with Support or Concerns**

The proposed amendments to Criminal Rule 46 include many positive changes that we support. However, we fear that many of these improvements will fall short of actually having an impact, if they do not require corresponding procedural safeguards, and if pre-existing harmful practices are not removed or discouraged. We encourage the Supreme Court of Ohio to adopt the changes described above. Below we have reproduced the proposed amendments for which we have provided

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LOWENKAMP, ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES

<https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=172dd7bf-96cf-aa8d-75d0-399b1a9b17e3&forceDialog=0> (2013).

<sup>22</sup> PHILLIPS, *supra* note 21, at 115.

<sup>23</sup> LOWENKAMP, *supra* note 21, at 3, 10.

<sup>24</sup> SHIMA BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM – INTRODUCTION, <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1109&context=scholarship>, 7 (2017).

suggested specific language changes. For other sections we encourage the adoption of a different approach. We have also provided additional support and explanation for our positions.

## **A. Amendments to Section (A)**

**1. As proposed: (A) Pretrial detention.** A defendant may be detained pretrial, pursuant to a motion by the prosecutor or the court's own motion, in accordance with the standards and procedures set forth in the Revised Code.

**2. Support:** We support this proposed amendment, but urge the Supreme Court of Ohio to adopt a presumption of release on personal recognizance and a presumption against financial conditions in Section (B) of this Rule. Unless the Supreme Court of Ohio adopts the suggested presumptions, judges may continue to disregard the preventative detention statute and maintain the status quo.

Ohio's pretrial detention statute, R.C. 2937.222, to which this amendment refers, provides for extensive procedural safeguards including an adversarial hearing, the right to counsel, and multiple factors the state has the burden of proving.<sup>25</sup> The statute also explicitly limits the types of crimes for which preventative detention is available.<sup>26</sup>

However, as discussed above, this statute is rarely used. Judges circumvent the procedural safeguards to which this statute entitles individuals, and instead set high financial conditions of release as a way to detain.

We support the inclusion of Section (A) in Criminal Rule 46 because the statute to which it refers is supposed to provide the only mechanism for pretrial detention. However, for this Section to be effective, the Supreme Court of Ohio should adopt strong presumptions of release on one's own recognizance and presumption against financial conditions.

## **B. Amendments to Section (B)**

**1. As proposed: (B) Pretrial release.** 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 discretion of the court, will reasonably assure the defendant's appearance in court, the protection or safety of any person or the community, and that the defendant will not obstruct the criminal justice process. If the court orders financial conditions of release, those financial conditions shall be related solely to the

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<sup>25</sup> OH. REV. CODE § 2937.222 (2004).

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

defendant's risk of non-appearance. Any financial conditions shall be in an amount and type which are least costly to the defendant while also sufficient to reasonably assure the defendant's future appearance in court.

**2. Suggested change: (B) Pretrial release.** Unless the court orders the defendant detained under division (A) of this rule, the court shall release the defendant on their own recognizance. The court may only set condition(s) of release if there is clear and convincing evidence that the conditions are the least restrictive necessary to reasonably assure the defendant's appearance in court, the defendant will not obstruct the criminal justice process, and the safety of a specific person, persons, or organization. There shall be a presumption against the use of financial conditions of release. If the court orders financial conditions of release, those financial conditions shall be related solely to the defendant's risk of non-appearance. Any financial conditions shall be in an amount and type which are least costly to the defendant while also sufficient to reasonably assure the defendant's future appearance in court. If the court sets conditions of release in addition to the defendant's own recognizance, it shall make written findings on the record stating why the condition is necessary and least restrictive. If the court sets any financial conditions, it shall make a written finding regarding how the defendant is presently able to pay for the condition.

**3. Support and Concerns:** We strongly support the limiting language which requires financial conditions to only be set if there is a risk of non-appearance. Our suggested language adds a number of procedural safeguards that we believe are necessary to implement the positive changes that are currently proposed.

**a. Presumptions of release on personal recognizance and against financial conditions:** In many jurisdictions in Ohio, financial conditions are the norm, regardless of whether their effect is detention. Adding these presumptions would require judges to consider whether there is actually a need to set conditions, and would limit the harmful practice of automatically setting unnecessarily burdensome conditions.

**b. Written findings on the record:** We support the express articulation of the concept of conditions being "least restrictive." This language is aligned with the constitutional requirement that the government not infringe upon a liberty interest without using the least restrictive means of achieving its goal. However, without a requirement that judges make written findings on the record which explain why, by clear and convincing evidence, a condition is necessary

and least restrictive, this language may be an improvement in theory and not in practice.

**c. Ability-to-pay determination:** As discussed, at length, above, if a judge does not make an ability-to-pay determination, they cannot be sure whether a financial condition of release will successfully encourage appearance versus lead to detention. Because there is no current, explicit requirement that judges undergo an ability-to-pay hearing, across Ohio, judges intentionally and unintentionally set financial conditions in amounts that lead to detention. Further, it is necessary that this determination be focused on what a defendant is presently able to pay. If a judge sets a financial condition in an amount that a defendant would need to fundraise, the result is continued, unnecessary pretrial detention.

**d. Defining public safety:** Our suggested language also changes the scope of the “protection of the safety of any person or the community.” As currently proposed, the language is amorphous and lacks guidance. Because it is not clear what constitutes safety of the community, a judge could use this vague language as cover to set restrictive conditions of release. Requiring the court to make findings regarding the safety of a specific person, persons, or organizations provides guidance for how to determine if someone is a threat to public safety.

We strongly urge the Supreme Court of Ohio to add a presumption of release on personal recognizance, a presumption against financial conditions of release, a requirement that judges make written findings on the record with regard to how a condition is least restrictive and necessary and, if setting a financial condition, how a defendant is presently able to pay for financial condition. Further, we encourage the court to specify the meaning of public safety in order to provide necessary guidance.

### **C. Amendments to Sections (B)(1) and (B)(2)**

**1. As proposed: (B)(1) ~~Types and amounts of bail~~ Financial conditions of release.** Any person who is entitled to release shall be released upon one or more of the following types of ~~bail~~ financial conditions in the amount set by the court:

(~~1a~~) The personal recognizance of the accused or an unsecured bail bond;

(~~2b~~) A bail bond secured by the deposit of ten percent of the amount of the bond in cash. Ninety percent of the deposit shall be returned upon compliance with all conditions of the bond;

- (3c) A surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.
- ~~(B)(C)(2) Non-financial Conditions~~ conditions of release bail.** The court may impose any of the following conditions of ~~bail~~ release:
- (a) Place the person in the custody of a designated person or organization agreeing to supervise the person;
  - (b) Place restrictions on the travel, association, or place of abode of the person during the period of release;
  - (c) Place the person under a house arrest, electronic monitoring, or work release program;
  - (d) Regulate or prohibit the person's contact with the victim;
  - (e) Regulate the person's contact with witnesses or others associated with the case upon proof of the likelihood that the person will threaten, harass, cause injury, or seek to intimidate those persons;
  - (f) ~~Require a person who is charged with an offense that 1168 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;
  - (g) 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;
  - (h) Any other constitutional condition considered reasonably necessary to reasonably assure ~~ensure~~ appearance or public safety.

**2. Suggested change: (B)(1) Types of bail.** Any person who is entitled to release shall be released upon one or more of the following conditions set by the court, in accordance with the standards and procedures set forth in Section (B):

- (a) The personal recognizance of the accused;
- (b) An unsecured bail bond;
- (c) A bail bond secured by the deposit of ten percent of the amount of the bond in cash. Ninety percent of the deposit shall be returned upon compliance with all conditions of the bond;
- (d) A surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.
- (e) Regulate the person's contact with witnesses or others associated with the case upon proof of the likelihood that the person will threaten, harass, cause injury, or seek to intimidate those persons;

(f) Require 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;  
(g) 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;  
(h) Any other constitutional condition considered reasonably necessary to reasonably assure appearance or public safety.  
**(B)(2) Costs.** The financial cost of any condition(s) of release, with the exception of a financial bond, shall not be borne by the defendant.

**3. Concerns:** We strongly encourage the Supreme Court of Ohio to overhaul the proposed changes to this section.

**a. Incorrect categorization of “personal recognizance”:** As currently proposed, the language incorrectly categorizes personal recognizance as a financial condition of release. Black’s Law Dictionary defines “personal recognizance” as:

“The release of a defendant in a criminal case in which the court takes the defendant’s word that he or she will appear for a scheduled matter or when told to appear. This type of release dispenses with the necessity of the person’s posting money or having a surety sign a bond with the court.”<sup>27</sup>

Categorizing personal recognizance as a financial condition of release confuses the very purpose of personal recognizance.

**b. Confusion regarding financial conditions requirements:** As written, this section requires defendants who are entitled to release to be released on financial conditions. Even with personal recognizance wrongfully categorized as a financial condition, this section, as is described above, conflicts with other sections of the proposed Rule. (Compare Section (B) “*If the court orders financial conditions of release, those financial conditions shall be related solely to the defendant’s risk of non-appearance*” (emphasis added), with Section (B)(1) “Any person who is entitled to release shall be released upon one or more of the following types of financial conditions ....”)

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<sup>27</sup> *Personal Recognizance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

We strongly urge the Supreme Court of Ohio to explicitly define and provide a purpose for “bail.” This Section as currently written demonstrates the severe need for such clarification. We also urge the Supreme Court of Ohio to recategorize “personal recognizance” so it is not listed as a financial condition of release, or to alleviate the need for categorization by removing the bifurcated types of conditions. The Supreme Court of Ohio should also make it explicitly clear: courts are **not** required to set financial conditions of release before releasing a legally innocent individual.

#### **D. Amendments to Section (D)**

**1. As proposed: (D) Appearance pursuant to summons.** When summons has been issued and the defendant has appeared pursuant to the summons, absent good cause, there is a presumption of release on personal recognizance ~~a recognizance bond shall be the preferred type of bail.~~

**2. Support:** We strongly support the change to a presumption of release on personal recognizance for individuals who appear pursuant to a summons.

#### **E. Amendments to Section (E)**

**1. As proposed: (E) ~~Amendments~~ Continuation of Bail.** ~~A court, at any time, may order additional or different types, amounts, or conditions of bail.~~ Unless modified by the judicial officer, or if application is made by a surety for discharge from a bond pursuant to R.C. 2937.40, conditions of release 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. When a judicial officer, either on motion of a party or on the court's own motion, determines that the considerations set forth in subsections (B) and (C) require a modification of the conditions of release, the judicial officer may order additional or different types, amounts or conditions of bail, or may eliminate or lessen conditions of bail determined to be no longer necessary.

**2. Suggested change:** We suggest adding the following to the end of the Section: “If a judicial officer orders additional or more restrictive conditions of bail, the judicial officer shall make written findings on the record which state why the least restrictive conditions necessary, pursuant to Section (B), have changed.”

**3. Concerns:** The proposed language does not explicitly require the same procedural safeguards that we hope will be required by subsections (B) and (C), it only requires the same “considerations.” We urge the Supreme Court of Ohio to require written findings on the record for conditions of release, and

for the same procedural safeguards to be provided if more restrictive conditions are ordered at a later date.

## **F. Amendments to Section (G)**

**1. Concerns:** We remain staunchly opposed to bond schedules. We have attached our comment to proposed Rule of Superintendence 5.02 in Appendix A. We strongly encourage the Supreme Court of Ohio to remove this section.

## **G. Amendments to Section (H)**

**1. As proposed: ~~(H) Continuation of bonds.~~** ~~Unless otherwise ordered by the court pursuant to division (E) of this rule, or if application is made by the surety for discharge, the same bond shall continue until the return of a verdict or the acceptance of a guilty plea. In the discretion of the court, the same bond may also continue pending sentence or disposition of the case on review. Any provision of a bond or similar instrument that is contrary to this rule is void.~~

**(H) Review of Release Conditions.** A person who has been arrested, either pursuant to a warrant or without a warrant, and who has not been released on bail, shall be brought before a judicial officer for an initial bail hearing no later than the second court day following the arrest. That bail hearing may be combined with the initial appearance provided for in Crim. R. 5(A).

If, at the initial bail hearing before a judicial officer, the defendant was not represented by counsel, and if the defendant has not yet been released on bail, a second bail hearing shall be held on the second court day following the initial bail hearing. An indigent defendant shall be afforded representation by appointed counsel at State's expense at this second bail hearing.

## **2. Suggested changes:**

We believe the currently proposed two bail hearings procedure is unnecessary and confusing. Further, the right to counsel is only triggered once an unconstitutional deprivation of liberty has occurred; it therefore both creates and relies on continued, unnecessary suffering. We have provided suggestions for how to streamline this procedure in a way that would provide for speedy release and less confusion and suffering. We urge the Supreme Court of Ohio to adopt the following suggestions.

**a. Timing of initial hearing.** Depending on when someone is arrested, a court day may not take place for over three calendar days. Three days in jail is enough to cause people to lose their housing and



job, and create long-term strains on family connections.<sup>28</sup> As currently written, if someone is eligible for a second bail hearing, it may not take place for four court dates after arrest. This could realistically mean they are detained and not provided a bail hearing at which they are represented for over a week. We strongly encourage the Supreme Court of Ohio to change the timing of the initial bail hearing from “the second court day” to “the second calendar day,” and to make the changes suggested below to the second bail hearing proposal.

**b. Access to counsel:** The goals of this Section may be better served not be allowing defendants to be unrepresented at their initial bail hearings, but by allowing for initial release decisions before a formal bail hearing. For example, if a judicial officer could make the decision to release the accused individual on their own recognizance within the first 24 hours that they are detained without a formal hearing, then the defendant would benefit from release and the court could issue a summons and not be required to hold the hearing within two court or calendar days. If the judicial officer makes the decision that conditions of release may be warranted and that a bail hearing is therefore necessary, then the accused individual should have the right to counsel at that hearing and it should take place within 48 hours of their initial detention. As currently written, indigent individuals would be forced to represent themselves at their initial hearing, spend unnecessary time detained, and deplete court resources by requiring multiple hearings on the same subject. We strongly encourage the Supreme Court of Ohio to adopt language that provides a release valve within 24 hours and that provides for counsel at the initial bail hearing, if one is determined to be necessary, within two calendar days.

## H. Amendments to Section (I)

**1. As proposed: (I) Failure to appear; breach of conditions.** Any person who fails to appear before any court as required is subject to the punishment provided by the law, and any bond~~bail~~ given for the person’s release may be forfeited. If there is a breach of condition of release bail, the court may amend the bail.

**2. Suggested changes:** As it currently stands, if an individual has an emergency on their way to court and is late for their hearing, their bond *may* be forfeited. This Section leaves the decision entirely up to judge discretion. It does not acknowledge real-life obstacles that may thwart good-faith efforts to comply with conditions of release. We strongly encourage the Supreme Court

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<sup>28</sup> 3 Days Counts, WWW.PRETRIAL.ORG, <https://www.pretrial.org/what-we-do/plan-and-implement/3dayscount-for-state-level-change/> (last visited Oct. 22, 2019).

of Ohio to create a mechanism by which an individual may appeal their bond forfeiture.

## **I. Amendments to Section (J)**

**1. As proposed: (J) Justification of sureties.** Every surety, except a corporate surety licensed as provided by law, shall justify by affidavit, and may be required to describe in the affidavit, the property that the surety proposes as security and the encumbrances on it, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged, and all of the surety's other liabilities. The surety shall provide other evidence of financial responsibility as the court or clerk may require. No bail bond shall be approved unless the surety or sureties appear, in the opinion of the court or clerk, to be financially responsible in at least the amount of the bond. No licensed attorney at law shall be a surety.

**2. Suggested language: (J) Justification of sureties.** Every surety, except a corporate surety licensed as provided by law, shall justify by affidavit, and may be required to describe in the affidavit, the property that the surety proposes as security and the encumbrances on it, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged, and all of the surety's other liabilities. The surety shall provide other evidence of financial responsibility as the court ~~or clerk~~ may require. No bail bond shall be approved unless the surety or sureties appear, in the opinion of the court ~~or clerk~~, to be financially responsible in at least the amount of the bond. No licensed attorney at law shall be a surety.

**3. Concerns:** As written, this empowers a clerk to deny a surety. Such a denial could lead to the continued detention of a legally innocent individual. This level of discretion should not be left to court personnel, and should be reserved only for a judge or magistrate. We urge the Supreme Court of Ohio to remove a clerk's ability to deny sureties.

## **III. Conclusion**

We remain encouraged that the Supreme Court of Ohio and its Rules Commission recognize that Criminal Rule 46 must be improved. However, the current proposed changes do not provide the presumptions and procedural safeguards necessary to curtail the use of financial conditions as a way to intentionally or unintentionally detain individuals simply because they cannot afford to buy their freedom.

The recommendations we offer the Rules Commission and the Supreme Court of Ohio are, principally: 1) a definition and purpose of bail that promote release; 2) a

presumption of release on personal recognizance and against the imposition of financial conditions of release; 3) the requirement that judges make an ability-to-pay determination; 4) the requirement that conditions of release be made with written findings on the record; 5) the requirement that the costs of conditions of release not be borne by defendants; 6) the creation of a pretrial release valve that allows courts to release defendants on personal recognizance before an initial hearing; and 7) the right to counsel at initial bail hearings.

Thank you for taking the time to thoughtfully consider our comment. We urge the Rules Commission and the Supreme Court of Ohio to strengthen and provide additional procedural safeguards to Criminal Rule 46 so it ensures a fair and constitutional process for all individuals.

Respectfully submitted,

/s/ J. Bennett Guess

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Executive Director  
ACLU of Ohio

/s/ Heather Hall

Heather Hall  
Director of Advocacy  
Advocates for Basic Equality, Inc.

/s/ Brandon Buskey &  
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Hamilton County Chapter

/s/ Kareem Henton &  
Latonya Goldsby

Kareem Henton and Latonya Goldsby  
Presidents  
Black Lives Matter – Cleveland

/s/ Kareem Henton

Kareem Henton  
Bail Disruptor  
The Bail Project – Cleveland

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Alfred Porter  
President  
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Alana Garret-Ferguson  
Organizer  
New Voices for Reproductive Justice

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Avery Martens  
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Prentiss Haney  
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Evan O'Reilly  
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/s/ Steve Holecko

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Political Director  
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The Very Reverend Bernard J. Owens  
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/s/ Reverend Dave Long-Higgins

Reverend Dave Long-Higgins  
Heartland Conference  
United Church of Christ

Jewish Federation of Cleveland  
Community Relations Board

The Social Justice Institute  
Case Western Reserve University

Puncture the Silence – Stop Mass  
Incarceration

Carl Stokes Brigade  
General Body

Ohio Fair Courts Alliance

Ohio Voter Rights Coalitions

# Appendix: A



Ohio

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October 24, 2019

Tasha Ruth  
Supreme Court of Ohio  
65 South Front Street  
6<sup>th</sup> Floor  
Columbus, OH 43215  
Sent Via Email: tasha.ruth@sc.ohio.gov

Re: Comments on Proposed Rule of Superintendence 5.02

Dear Ms. Tasha Ruth,

Thank you for the opportunity to comment on proposed Rule of Superintendence 5.02 and its accompanying "Supreme Court of Ohio Model Bail Bond Schedule." We submit the enclosed comment on behalf of the American Civil Liberties Union of Ohio and sister departments at the national American Civil Liberties Union.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Jocelyn Rosnick".

Jocelyn Rosnick, Esq.  
Advocacy Director

[Redacted]  
[Redacted]

ACLU of Ohio

A handwritten signature in black ink, appearing to read "Claire Chevrier".

Claire Chevrier, Esq.  
Advocacy Counsel  
\*Barred in Washington, D.C.

[Redacted]  
[Redacted]

ACLU of Ohio

## Re: Comments on Proposed Rule of Superintendence 5.02

Bond schedules are unconstitutional.

Bond schedules allow individuals to be released if they can afford the bond amount listed on the schedule, while they force others to remain detained, not because of what they have done, but because of what they do not have.

Bond schedules that mandate secured bonds, instead of unsecured bonds or nonfinancial conditions of release, are less effective at ensuring speedy release, preventing the failure to appear at future hearings, and protecting public safety.<sup>1</sup> Bond schedules do not provide individualized assessment; they do not consider the weight of the evidence against an individual, nor do they determine the amount an individual is able to pay. For some, the required bond amount will provide no incentive to return to court; for others it will mean unnecessary, continued detention that could lead to other significant harms, such as losing one's job, home, or custody of one's children. This creates wealth-based detention that offends the fundamental right to liberty, and therefore triggers Equal Protection, Substantive and Procedural Due Process, and right to bail claims. Federal courts around the country agree, and more cases are pending.<sup>2</sup>

Bond schedules allow for the early release of *some* individuals; however, justice and freedom from unnecessary detention should not be reserved for *some*; it must be accessible to *all*.

This proposed Rule of Superintendence strengthens the two-tiered system of justice in which wealthier individuals accused of a crime go home, and those without adequate means are unnecessarily held behind bars. Referring to the practices in Harris County, Texas, the United States Court of Appeals for the Fifth Circuit stated that bail practices are—but should not be—used as an “instrument of oppression,” and held that “the incarceration of those who cannot pay money bail, without consideration of other possible alternatives, infringes on both due process and equal protection requirements.”<sup>3</sup>

Perfecting an unconstitutional practice is not progress. The ACLU of Ohio urges the Supreme Court of Ohio to abandon Rule of Superintendence 5.02. The promulgation of this rule would leave the Supreme Court of Ohio, and the counties and municipalities of Ohio, vulnerable to litigation.

We look forward to continuing to work together to create a more just Ohio for everyone.

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<sup>1</sup> Michael R. Jones, Pretrial Justice Institute, UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION, <https://pdfs.semanticscholar.org/5444/7711f036e000af0f177e176584b7aa7532f7.pdf> (2013).

<sup>2</sup> *Booth v. Galveston County*, 352 F.Supp.3d 718 (S.D. Tex. 2019)(Denying, in large part, defendants' motions to dismiss); *Schultz v. State*, 330 F.Supp.3d 1344 (N.D. Ala. 2018)(Preliminary injunction granted); *Daves v. Dallas County*, 341 F.Supp. 3d 688 (N.D. Tex. 2018)(Preliminary injunction granted); *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018).

<sup>3</sup> *ODonnell v. Harris County*, 892 F.3d 147, 157-59 (5th Cir. 2018)(Citing *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978).



Respectfully submitted,

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