AMERICAN BAIL COALITION

Ohio Testimony on House Bill 439

March 20, 2018

Dear Mr. Chairman and Members of the Committee:

I am writing to express our opposition to House Bill 439, concerning reforming Ohio's bail system. I represent the American Bail Coalition, which is a national trade association of licensed insurance companies who underwrite criminal bail bonds throughout the country.

First, the entire premise upon which this bill is based has been proven not to have worked.

In a landmark study released in December, Professor Megan Stevenson debunked the Kentucky risk-assessment reforms by showing that despite all of the resources spent over the last five years there was only a trivial decrease in the jail population. At the same time, new crimes and failures to appear in court actually increased.

In a recent news article drafted by a another prominent Professor and outspoken critic of risk assessment algorithms encouraging the City of Philadelphia to reject legislation similar to House Bill 439, she said that of the risk assessments, *"They don't necessarily get more people out of jail, they can't compensate for judges' biases, and they can actually reinforce biases by using inputs that serve as proxies for race."*

In New York, 100 community groups sent a letter to Governor Cuomo demanding that he not proceed forward with legislation that would use computer risk assessments for purposes of bail, saying that they would reinforce rather than correct racial bias and would likely increase pretrial incarceration. Of course, the assessments have also been shown to be non-transparent black-box technologies that enjoy complete waivers of liability on top of trade secret protections.

In addition, it is important to recognize that states have begun rejecting this shift to a computerized justice system. California, Connecticut, and Texas rejected similar legislation last year. The Governor of Nevada, Brian Sandoval, vetoed risk assessment in bail legislation in 2017 because he said the science was just not there. So far in 2018, the Florida and West Virginia legislatures have squarely rejected risk assessments and substantial bail reforms that were very similar to House Bill 439.

Second, the shift away from financial conditions of bail, by eliminating bail bondsmen or other financial conditions of bail, has been failing. The most recent examples that can be given are Lucas County, Ohio,

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which one attorney called a *"culture of non-accountability."* Houston, Texas used Lucas County as a model, and now has a 45% failure to appear rate on misdemeanors for those released on a free bail. The rate of failing to appear is six times lower when a bail bondsman is involved.

In addition, national, peer-reviewed research has shown that financial bail conditions work better to curb long-terms fugitive rates, and bail bondsmen were referred to in that study as *"the true long-arms of the law."* Other studies prove the worth of private surety bail in reducing the financial burden on the state and keeping jail populations down.

Third, this legislation also follows a damaging national trend of delegating legislative policy-making power to the courts. The Courts have shown their hand, however. The Conference of Chief Justices organization is pushing the no money bail system, as is the Conference of State Court Administrators. These systems are simply too expensive to operate, as New Jersey is now finding out. In states where legislatures have given the courts the power or permitted the courts to exercise such legislative power, such as the states of Maryland, New Jersey, and New Mexico, the courts have used such power to eliminate monetary conditions of bail from the system. It is within the legislative purview to set the substantive criminal law within the bounds of the constitution, and not to allow the third branch of government who is interpreting the law to also make the law.

This separation of powers issue becomes an even larger problem when the Supreme Court and the judiciary are going to be tasked with regulating and approving algorithms for use in bail and bail setting. In House Bill 439, the courts are going to design the system of pretrial supervision, making it difficult for individual judges or litigants to question the wisdom or fairness of the results. It will be difficult indeed for litigants in a criminal case, or a judge, to assert that the risk assessment approved by the Supreme Court is faulty or invalid. Of course, the other problem is that the public records laws to which such algorithms would be subject to disclosure would also be controlled by the Supreme Court, giving private proprietors of such algorithms, like the one used in Lucas County, Ohio, another layer of protection from anyone actually getting to audit, inspect, or test their algorithm or expose the process of how it was built or validated to some sunshine and transparency. Of course, this is in addition to the issue of contractual trade secrets and other protections regarding algorithms in criminal justice, which will be another substantive issue the Courts will get to decide.

Fourth, having participated in the Ohio Sentencing Commission's process, and now looking back upon it, one thing is abundantly clear today: we don't know what we are doing on this as a policy issue because there simply is not enough data to support the implementation of a significant bail reform. I do not, however, blame the Sentencing Commission—they tried. They conducted a survey and 54 jurisdictions

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who responded. Of those, only three kept any numbers on failures to appear in court. Only one kept any comparative data based on types of release.

We knew the day would come when we would get to argue our case before you. So, we tried to get the data for you so we could make an educated argument. We sent public records requests to get the data to all 88 clerks of court in Ohio within the last thirty days. Of course, we miserably failed in our attempt. Of the requests, we received no response at all from 68 or 77.2% of the jurisdictions. Of the twenty that responded, they indicated that they either did not have the data or did not compile it. Thus, we had a zero percent success rate in determining the failure to appear rate in Ohio and new crimes while on bail rate in Ohio based on the type of release. It was not for lack of effort.

Fifth, this legislation eliminates the uses of schedules of bail. Scheduled bail, based on the crime alleged to have occurred, allow persons to be released from jail when court is not in session. The goal is to get individualized bail setting hearings in all cases, yet that is expensive and puts a burden on judges, prosecutors, and public defenders. The problem, however, is that the right to bail is then conditioned on the timing of bureaucracy, which denies the right to bail during that time period. In one jurisdiction, widely cited as a success for getting rid of bail schedules and going to a risk assessment process, the opposite occurred—the number of persons spending more than one night in jail increased by 141%. This was due to the bureaucratic delays of running the risk assessment and having to see a judge in every case.

I would also like to correct one central misunderstanding—bail schedules are absolutely constitutional. While there has been a wave of litigation, the U.S. Court of Appeals for the Fifth Circuit recently affirmed the constitutionality of schedules, while at the same time holding Harris County's system unconstitutional. That case is *ODonnell v. Harris County, Texas*. The Fifth Circuit determined that a bail schedule is allowable if there is a meaningful review by a judge of the bail set by the schedule within 48 hours. Harris County could not meet that standard because it was having hearings in only 80% of the cases within 24 hours, but the defendants were not allowed to speak. In other words, that was not a meaningful enough review. In addition, the court made absolutely clear that there is no right to an affordable bail, and that whether or not someone can or cannot afford bail is merely one factor in the basket of factors judges consider in setting bail that it is not excessive. I would point out that this result is consistent with nine state attorneys general who have opined on the question, and is consistent among both the Eric Holder and Jeff Sessions U.S. Departments of Justice. It is not the use of the schedules that *per se* is unconstitutional, it is rather a question of lack of adequate due process from the setting of bail by a schedule that is important.

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Sixth, this legislation creates a legal presumption in favor of correctional technology and other non-financial conditions of bail. This will result in the unnecessary trammeling of civil liberties for those who can post bail or have a bail posted for them. This is something we have seen around the country, which is based on an outdated ABA standard from the 1970s that assumes that financial conditions bail are always the most restrictive. That was true prior to GPS, house arrest, blood chemistry monitoring etc. In fact, the State of New Jersey is being sued by former U.S. Solicitor General Paul Clement, Esq. in the case of *Holland v. Rosen*, where Clement is asserting that creating presumptions against financial conditions of bail runs afoul of the federal constitutional right to bail. Financial conditions of bail, said Clement, cannot be put behind the *"emergency glass"* as a last resort. Yet, this is exactly what House Bill 439 would do.

Seventh, we question why there is a need for a new risk assessment since Ohio already has ORAS, which is a comprehensive risk assessment process from cradle to grave in a criminal case. In fact, in other states considering bail reform, many have pointed to Ohio's ORAS as a good product. Some jurisdictions outside of Ohio are in fact using ORAS. The question for reformers then becomes why do we need this new process wherein we can have any other number of algorithms, all approved by the Supreme Court.

At the end of the day, Ohio's bail system is functional, constitutional, and judges and local jurisdictions in Ohio are left to run their systems largely based on local control. In the medical field, the first step would be to diagnose the problem before we begin treating the problem, otherwise we may just be treating the symptoms. Upon study, reflection, and involvement with stakeholders and policy-makers over the last two years in Ohio, I can say comfortably that we have collectively failed to diagnose the problem and have instead let a few anecdotal cases drive the discussion, which is largely class-war rhetoric about persons who are unable to post bail. As they say in the legal world, bad cases make bad law.

For these reasons, we would encourage modification of House Bill 439 to compile data, and we would also support the legislature conducting its own study once the data is compiled. We would be glad to assist in setting the parameters of such a study, and participate to the extent we can be of assistance.

Respectfully submitted,

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