



Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony in Support of HB315 Bail Reform Sponsors Representatives Hillyer and Leland

Chair LaRe, Vice Chair Swearingen, Ranking Member Leland and members of the House Criminal Justice Committee. Thank you for the opportunity to testify on behalf of the Office of the Ohio Public Defender (OPD) in support of Substitute House Bill 315 (HB315). I am Niki Clum, Legislative Policy Manager for OPD.

Ohio's monetary bail system disproportionately disadvantages low-income individuals. The inability to pay a bail of \$100 may be hard to imagine for some, but it is the reality for many Ohioans. Financial hardships can force individuals to stay in jail and miss work while their case is pending. If they miss work – they get fired and getting fired is simply not an option for most people. These individuals sometimes feel compelled to plea guilty to crimes they may not have committed in order to get out of jail. While release from incarceration resolves that individual's immediate problem, a criminal conviction can cause severe impediments to obtaining employment, housing, financial aid, professional licenses, and social services later. This same conundrum is not felt by wealthier Ohioans who have the means to simply post bail and return to work while their case is pending. Despite the fact that the wealthy Ohioan and the poor Ohioan might have the exact same charge, criminal record, and presumption of innocence, an individual's ability to post bail can impact the outcome of their case and the rest of their life.

It is worth repeating that these people are presumed innocent, meaning they are legally innocent. In 1987, Chief Justice Rehnquist in *U.S. v Salerno* wrote, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Yet, at present day the pretrial imprisonment rate in the United States is among the highest in the world – more than four times

the world's median pretrial imprisonment rate.¹ Cash bail infringes on the liberty of legally innocent Ohioans and punishes them because they have limited means. Being indigent does not mean someone is a bad or dangerous person. Just as being wealthy does not mean someone is a good person.

As this committee knows, the Ohio Supreme Court found that monetary bail is about one thing – ensuring defendants appear for their hearings.² Despite being constitutionally permissible, monetary bail does not further this goal because there is “no causal nexus between money bail and guaranteed appearance.”³ That is why jurisdictions that have implemented bail reform have experienced improvements in their failure to appear rates. Historically, the failure to appear rate is 40%.⁴ When New Jersey implemented bail reform in 2016, they saw a 20% reduction in their jail population as 95% “of defendants were released pretrial and 89 percent of them appeared at their trial date.”⁵ HB315 requires that individuals receive telephone, text, and electronic message reminders of hearings. This is a better approach to ensuring appearance for court hearings. Text message reminders have been shown in multiple jurisdictions to significantly reduce failures to appear, in some instances by as much as 13%.⁶

In 2020, before the *DuBose v. McGuffey*⁷ decision, in a concurring opinion joined by Justice Donnelly and Chief Justice O'Connor, Justice Stewart reiterated that, “setting a high bail in order to keep someone accused of a crime incarcerated before trial is both statutorily and constitutionally

¹ <https://harvardlawreview.org/2018/02/bail-reform-and-risk-assessment-the-cautionary-taleof-federal-sentencing/> (citing Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, Jail Inmates at Midyear 2014).

² *DuBose v. McGuffey*, Slip Opinion No. 2022-Ohio-8. While the Ohio Supreme Court held that public safety is not a consideration in determining a bail amount, non-financial conditions may be imposed to protect the public. Such conditions were imposed on Mr. Dubose. When considering public safety, courts can impose bond conditions like home detention, GPS monitors, daily reporting requirements, drug testing and other oversight and monitoring that will ensure the public is safe if the person is released.

³ Jennifer Williams, *Stop Assuming Money Bail is an Effective Tool for Criminal Justice*, The American Bar Association, https://www.americanbar.org/groups/judicial/publications/appellate_issues/2020/winter/stop-assuming-money-bail-is-an-effective-tool-for-criminal-justice/.

⁴ Alissa Fishbane, Aurelie Ouss, Anuj K. Shah, *Behavioral nudges reduce failure to appear for court*, American Association for the Advancement of Science, Nov. 6, 2020.

⁵ Lea Hunter, *What You Need To Know About Ending Cash Bail: What's Wrong with Cash Bail and How to Fix It*, Center for American Progress, March 16, 2020, <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/16/481543/ending-cash-bail/#:~:text=The%20cash%20amount%20serves%20as,in%20court%20for%20their%20trial.>

⁶ Josan Tashea, *Text-message reminders are a cheap and effective way to reduce pretrial detention*, American Bar Association Journal, July 17, 2018, https://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail.

⁷ *DuBose v. McGuffey*, Slip Opinion No. 2022-Ohio-8.



unlawful.”⁸ Despite the holdings of the U.S. Supreme Court and Ohio Supreme Court, setting bail at a level defendant cannot pay is seen as a mechanism for public safety. This is a fallacy. Cash bail does not make communities safer.⁹ Money is not safety. In fact, cash bail allows the potential for dangerous people to be released just because they have money. Representative Leland provided excellent examples of this during sponsor testimony. It is not as though individuals charged with a serious offense cannot be held pending trial. Courts are permitted to hold a hearing to determine whether individuals charged with some serious offenses should be held without a bail. As you know, HB315 seeks to greatly increase the number of offenses for which preventative detention can be sought. The bill also lowers the burden of proof for the state to a preponderance of the evidence. Furthermore, the Ohio Rules of Evidence and language in HB315 specify the rules of evidence do not apply to the hearing, meaning witnesses and the victim would not need to appear. The state could meet this low burden with testimony and evidence from the investigating officers. Due process is a necessary burden of a fair and free society. Setting a high monetary bail amount to evade these statutory procedural safeguards is an unconstitutional workaround.

The history of cash bail is a history of two Americas – divided by money. Instead of taking the time to set conditions of release that will ensure public safety and appearance at court, Ohio has been placing a monetary bail on defendants hoping it will resolve both issues. As Justice Stewart wrote, “this unconstitutional practice has gone on for so long that it has simply become a comfortable routine.”¹⁰ It is so commonplace that witnesses before this committee have admitted to engaging in this unconstitutional practice. One even admitted he was surprised when a defendant actually paid the bail amount, and that witness saw the defendant out on the street.

Incarcerating people, who are presumed innocent and pose no threat to the public, actually creates a public safety risk. A study by the ACLU found that pretrial detention increases the likelihood

⁸ *Mohamed v. Eckelberry*, 162 Ohio St.3d 583, 2020-Ohio-4585.

⁹ Yvette C. Hammett, *Study: Jailing people on bail does not make communities safer*, The Legal Examiner, Dec. 10, 2020, <https://www.legalexaminer.com/legal/study-jailing-people-on-bail-does-not-make-communities-safer/>.

¹⁰ *Mohamed v. Eckelberry*, 162 Ohio St.3d 583, 2020-Ohio-4585.



the individual will be convicted, sentenced to jail or prison, and receive a longer sentence compared to those charged with the same crime who were not incarcerated pretrial.¹¹ Pretrial detention leads to prison, and prison can create more skilled criminals and more dangerous individuals. Cash bail makes communities less safe.

Both the United States Constitution and the Ohio Constitution prohibit excessive bail.¹² A bail amount that is “higher than an amount reasonably calculated to” ensure the accused’s presence in court is “excessive.”¹³ As this committee knows, HB315 requires that any cash bail cannot exceed 25% of the individual’s net income and sets a minimum amount of \$200. During sponsor testimony, concern was raised that making such a determination would be overly burdensome for courts. The bill sponsors were correct that currently courts process indigency affidavits for more than 70% of defendants requesting appointed counsel. Additionally, the bill sponsors were correct that the ability to pay determination is less burdensome than the indigency determination, because courts should not pursue a monetary bail in every case, or even in most cases. Alternatively, HB315 provides the courts with 17 other pretrial conditions of release it can order. Ohio could also follow in the footsteps of Washington State and develop an automated ability to pay calculator to minimize the burden on courts.¹⁴ That being said, it is not a bad thing if making the ability to pay determination creates slightly more work for courts. It should never be easy for courts to take someone’s liberty while they are presumed innocent. In Washington, D.C., judges are only permitted to set monetary bail if the defendant can afford it.¹⁵ D.C. Superior Court Judge Truman Morrison stated that because of this law there is no one sitting in the Washington, D.C. jail because they do not have the money to post bail.¹⁶ This should be the goal for Ohio as well. Furthermore, The American Bar Association, the Pretrial Justice Institute, and Ohio Criminal Sentencing

¹¹ Ohio Could Save Big by Implementing Bail Reform: A Fiscal Impact Analysis, Addendum: Cash Bail’s Influence on Sentencing Disparities and Case Outcomes, March 2021, https://www.acluohio.org/sites/default/files/fiscalimpactreport-addendum_2021-0312.pdf.

¹² Eighth Amendment to the U.S. Constitution and Article I, Section 9 of the Ohio Constitution.

¹³ *DuBose v. McGuffey*, Slip Opinion No. 2022-Ohio-8, at ¶ 12 citing *Stack v. Boyle*, 342 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951).

¹⁴ <https://focalculator.org/>

¹⁵ *Bail*, Last Week Tonight with John Oliver (HBO), June 7, 2015

¹⁶ *Id.*



Commission among other organizations all agree that pretrial services are less expensive than keeping individuals incarcerated.

Cash bail creates a two-tiered criminal justice system. Releasing some Ohioans, but not others, when they are charged with the same offense and have the same presumption of innocence simply because one can afford to pay bail and the other cannot does not promote public safety. Further, it is a violation of a defendant's right to Equal Protection and Due Process under the law. Wealthier Ohioans will buy their release while indigent Ohioans will be forced to wait for their trial behind bars. Despite this fact, this committee will hear testimony from bail bond persons, insurance companies, and others that cash bail is a necessary component of our criminal justice system. As Upton Sinclair said, "It is difficult to get a man to understand something, when his salary depends on his not understanding it." Eliminating or minimizing the use of cash bail is how we move away from a two-tiered criminal justice system. Bondspersons are not ensuring that indigent defendants are getting released pretrial. Forty percent of Americans do not have enough money in the bank to pay a surprise \$400 bill.¹⁷ Therefore, almost half of a Americans could not pay a \$400 cash bail, and a bail bondsperson is not going to bond these individuals out for a \$40 payoff, or 10% of a \$400 bond. Furthermore, most people who have a warrant for a failure to appear are picked up on traffic stops, not by bondspersons.

The COVID-19 pandemic became a lesson on mass incarceration. Due to the safety concerns for inmates, jails and courts were forced to release more defendants pretrial. This was a successful experiment. We do not need to incarcerate most individuals to keep the public safe and ensure appearance for court. As of July 2020, in its first year working in Cleveland, The Bail Project posted bail for 237 clients. Those individuals had 95% appearance rate, "and of cases closed to date, 30% had all of their charges dismissed outright and another 61% had the charges resolved with no additional jail

¹⁷ Soo Youn, 40% of Americans don't have \$400 in the bank for emergency expenses: Federal Reserve, May 24, 2019, <https://abcnews.go.com/US/10-americans-struggle-cover-400-emergency-expense-federal/story?id=63253846>.



time.”¹⁸ As you have heard, bail reform could save Ohio as much as \$264 million.¹⁹ OPD believes this could be conservative estimate. Imagine the positive impact for Ohio communities if that money was invested in community-based treatment centers. Ohio could use this money to prevent crime before it happens and actually help people who suffer from addiction or mental illness. If that is done, the actual positive impact on Ohioans will be immeasurable.

While cash bail is constitutionally permitted to assure a defendant’s appearance in court, cash bail is not an effective tool for reducing failures to appear or protecting public safety. HB315 is a fantastic first step towards moving to a fair and balanced judicial system where an individual’s economic status does not dictate their treatment and potentially the outcome of their case. OPD believes the positive results seen in other jurisdictions that have implemented bail reform can be repeated across Ohio. Thank you for the opportunity to speak today before your committee. I am happy to answer questions at this time.

¹⁸ Friends of The Bail Project – Cleveland launches operations fund at Cleveland Foundation, Cleveland Found, Aug. 27, 2020, https://www.clevelandfoundation.org/news_items/bail_project/#:~:text=In%20its%20first%20year%20in,with%20no%20additional%20jail%20time.

¹⁹ Ohio Could Save Big By Implementing Bail Reform: A Fiscal Impact Analysis, ACLU Ohio, Sept. 13, 2020, <https://www.acluohio.org/en/publications/ohio-could-save-big-implementing-bail-reform-fiscal-impact-analysis>.

