STATEMENT OF THE OFFICE OF THE CUYAHOGA COUNTY PUBLIC DEFENDER

Regarding

S.J.R. 5

OHIO SENATE JUDICIARY COMMITTEE

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Introduction

At this point, this Committee has heard and read the testimony of multiple parties regarding not only S.J.R. 5 but other bail reform efforts now pending in the General Assembly. Our testimony today is not intended to be repetitive of that testimony. We share the sentiment of those proponents who already have explained why SB 182 (and, for that matter, HB 315) appropriately delineates a distinction between financial conditions of release, which can relate solely to the risk of flight, and non-financial conditions, which can relate to both the risk of flight and the risk of danger posed by a defendant to individuals and the public at large. We also share the sentiment of those proponents who believe that expansion of pretrial detention via R.C. 2937.222 needs to be expanded to more offenses.

We mention these legislative efforts toward bail reform because amending the Revised Code, and not amending the Constitution via S.J.R. 5 (nor, for that matter, H.J.R. 2), is the vehicle by which bail can meaningfully be reformed in Ohio. The ongoing debate over bail reform in both the Senate (and the House) has resulted in several incorrect notions regarding the bail system, not only in Ohio but within the parameters of the Eighth Amendment to the United States Constitution. The purpose of this statement is to clarify several points on which there is confusion and, in some cases, an incorrect perception, about what bail is and what it is not.

Clarification No. 1: The meaning of "bail."

Part of that confusion arises from the term "bail," itself. In its legal sense, the term "bail" includes the panoply of conditions, financial and non-financial, employed in a particular case to ensure the defendant's presence at trial and to ensure that the defendant will not harm anyone, including victims, witnesses and the public at large, during the time while the case is pending. To accomplish this goal, bail can include financial conditions, such as a bail bond, as well as

non-financial conditions, such as GPS monitoring or regular reporting to a pretrial services officer. In those cases in Ohio where the risk of danger is so great that that no set of conditions can reasonably guard against that risk, bail can be denied outright and the defendant can be detained. This takes place following a detention hearing pursuant to R.C. 2937.22.

But, in popular and lay vernacular, the term "bail" is oftentimes used to describe only the financial conditions of release. This creates confusion because, under the Eighth Amendment's "excessive bail" clause (which applies to Ohio and is supreme to the Ohio Constitution), only the financial conditions of bail are the portion of bail that can relate to flight. Under the Eighth Amendment, the risk of danger can be addressed via non-financial conditions or via the outright denial of release.

Clarification #2: The Eighth Amendment's excessive bail prohibition limits financial conditions to the risk of flight, and cannot be used to address the risk of danger.

The Eighth Amendment prohibits "excessive bail." In 1951, the United States Supreme Court, in *Stack v. Boyle*, 342 U.S. 1, 1951, held that using high bail as a response to a defendant's suspected risk of danger is "excessive." In this regard, *Stack* is unequivocal:

> Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of **the presence of an accused**. Bail set at a figure higher than an amount reasonably calculated to fulfill **this purpose** is "excessive" under the Eighth Amendment.

(emphasis added).

It has been suggested by some that the United States Supreme Court, in *United States v. Salerno*, 481 U.S. 739 (1987), has changed this interpretation of the Eighth Amendment. It has not. What *Salerno* did was to hold that there is no right to be released in every case under the

Eighth Amendment, and thus *Salerno* upheld the constitutionality of a federal bail statute akin to R.C. 2937.222 whereby bail can be denied after a detention hearing.

Thus, after *Salerno*, release can be denied outright. But, short of detention, financial conditions can only relate to the risk of flight, not danger. At the same time, the risk of danger can also be addressed via non-financial conditions such as GPS monitoring or regular reporting to a pretrial services officer.

This same distinction between prohibiting financial conditions beyond what is necessary to address flight while still countenancing the outright denial of release is made by the Oho Supreme Court in the recent case of *Dubose v. McGuffey*, 2022-Ohio-8. *Dubose* is also consistent with a sentence in Crim. R. 46 that *Dubose* critics have failed to adequately appreciate: " 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."

While Crim. R. 46 also mentions taking the seriousness of the offense and the defendant's criminal record into account when setting financial conditions, the only constitutional interpretation of this language is to recognize that the seriousness of the offense and defendant's criminal record not only relate to danger -- they also relate to the risk of flight. The more serious the offense and the worse your record, the more likely you will receive a more severe punishment if convicted and thus the greater your flight risk.

Clarification #3: The practice of using financial conditions of release to address public safety is unconstitutional.

In light of *Stack*, the decades-long practice of prosecutors and courts in virtually every county in Ohio of using high financial conditions of release as a means of addressing the risk of danger has been unconstitutional. At the same time, in light of *Salerno*, the refusal of

prosecutors and courts to employ the pretrial detention procedures via R.C. 2937.222 has been inexplicable.

Clarification #4: Public safety can effectively be addressed via nonfinancial conditions and detention.

Under Crim. R. 46, as well as under SB 182, judges have a number of nonfinancial tools at their disposal to protect public safety. These include:

- Requiring the defendant to report regularly to a supervising pretrial services officer.
- Placing the defendant in the third-party custody of a person or organization that the court finds responsible and capable of performing this task.
- GPS monitoring of the defendant to ensure compliance with an accompanying order to stay away from certain persons or locations.
- House arrest, again with GPS verification.
- Pretrial detention.

These types of non-financial conditions effectively and constitutionally address the safety of victims, witnesses and the public at large. In contrast, in 2018, the Cuyahoga County Bail Task Force concluded that "[a] defendant's danger to the community is not reduced by the amount of money bail required." https://napco4courtleaders.org/wp-content/uploads/2018/04/Cuyahoga-County-Bail-Task-Force-Report-Mar-2018.pdf (last viewed May 23, 2022).

Ironically, the use of high bond amounts as a subterfuge for detention places victims in the position of having to hope that a truly dangerous defendant will not be able to post the high bond -- as opposed to the certainty that comes with taking the small amount of time necessary to conduct a pretrial detention hearing and, when appropriate, having a judge order that the defendant be detained without bail. Proponents of high bonds respond to this concern with the specious argument that pretrial detention hearings unfairly require victims and/or witnesses to

come to court soon after the alleged crime. The falsity of this concern is addressed in Clarification #5.

Clarification #5: Witnesses and victims need not testify at a detention hearing.

Proponents of an Ohio constitutional amendment maintain that detention hearings will require witnesses and victims to testify at detention hearings. This is not true. Ohio Rule of Evidence 101 (C)(3) explicitly states that the evidence rules do not apply to bail proceedings. R.C. 2937.222 provides to the same effect.

A judge is within their discretion to limit who can testify. While, theoretically, the defense can subpoena witnesses to come to court for the hearing, the judge can quash that subpoena and allow the defense to get the same information it seeks to admit via out of court statements or even via an attorney's proffer (a practice used in federal court where detention hearings have been routinely held since 1984).

We are aware of no case where a victim or witness was required to testify at a detention hearing. This is not surprising because we are only aware of a handful of cases where a detention hearing has ever been held during the past 20 years -- instead, the unconstitutional shortcut of setting high bails has been used as a means of detention. While some prosecutors have begun asking more often for detention after *Dubose*, we are aware of only a few detention hearings that have actually been held. The prevailing practice is still to set high bonds as part of bail, which continues to leave the victim to hope that the defendant will not make bond as opposed to giving the victim the assurance that the defendant cannot be released at all.

Conclusion

Thank you for the opportunity to present this testimony. I am happy to answer any questions the Committee has.