STATEMENT OF THE OFFICE OF THE CUYAHOGA COUNTY PUBLIC DEFENDER

Regarding

HB 607 and HJR 2

OHIO HOUSE CRIMINAL JUSTICE COMMITTEE

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Cullen Sweeney
Chief Public Defender
John T. Martin
Assistant Public Defender
Cuyahoga County
310 Lakeside Avenue, Suite 400
Cleveland, Ohio 44113
(216) 443-8388

Introduction

While the presumption of innocence is a hallmark of our system of criminal justice, most, if not all, Ohioans would agree that individuals accused of serious crimes should be detained until trial if the individual "poses a substantial risk of serious physical harm to any person or to the community." Indeed, twenty-five years ago, Ohioans so valued pre-trial detention to protect public safety that they chose to cement it in Article I, Section 9 of the Ohio Constitution. And consistent with Article I, Section 9, the Ohio legislature has adopted a procedure, R.C. 2937.222, that ensures an individual, merely accused of a serious crime, can be subject to pre-trial detention if necessary to protect public safety.

HB 607 and HJR 2 have been introduced in reaction to the Ohio Supreme Court's decision in *Dubose v. McGuffey* and the suggestion that *Dubose* has somehow made our communities less safe. That is simply not the case. *Dubose* simply recognizes that, as contemplated by the Ohio Constitution and Ohio law, public safety considerations can be addressed by pre-trial detention orders under R.C. 2937.222 or by non-financial conditions of release (such as GPS ankle monitors). Post-*Dubose*, if a trial judge concludes that an individual, accused of a serious crime, cannot be safely released, that individual can be detained.

HB 607 and HJR 2 seek to authorize Ohio's judges to use high monetary bonds that most Ohioans could not afford rather than a pretrial detention order for the purpose of protecting the public. Such a procedure is not only unnecessary given the existing option of pretrial detention but also is less effective at addressing the concern of public safety. Instead of detaining all individuals accused of serious crimes who present a substantial public safety risk, courts using high monetary bonds only detain those with little or moderate financial resources. Moreover, by constitutionalizing the use of high monetary bonds for pretrial detention purposes, HB 607 and

HJR 2 hamstrings future legislatures from examining bail practices of trial courts. If, as several cosponsors of bail reform legislation have recently concluded, there are people *unnecessarily* being detained pretrial, they would be largely powerless to address the issue of high monetary bonds.

Public safety is already a fundamental consideration in the pretrial detention and release decisions made by trial courts. There is no need to constitutionalize the practice of imposing high monetary bonds as a replacement for pretrial detention orders. If a judge concludes that a defendant cannot be safely released to the community during the pendency of his or her case, the judge can simply order the defendant held without bond pursuant to R.C. 2937.222.

HR 607 and HJR 2 have a potential to be misused to the detriment of persons who are low risks of flight. The fortunate portion of this population find themselves spending money they cannot afford to spend for cash bonds or secured bonds in order to be able to continue on with stable family lives and employment. Ironically, it is these factors of stable family life and employment which are the ties to the community that make a large cash or secured bond unnecessary.

The less fortunate portion of this population find themselves sitting in jail despite significant ties to the community that insure against a risk of flight – because they cannot beg or borrow the money needed to make their bond. As a result, their stability in the community is threatened – jobs are lost, child support falls in arrears, family relationships are strained.[1] Without ever having been found guilty of any crime, much less incarcerated after conviction,

[1] *See*, Cuyahoga County Bail Task Force, Report and Recommendations, March 16, 2018, at 7 (hereinafter Cuyahoga County Bail Task Force Report) citing Clark, John and Logvin, Rachel Sottile, *Enhancing Pretrial Justice in Cuyahoga County: Results from a Jail Population Analysis and Judicial Feedback* (Sept. 20, 2017, Pretrial Justice Institute) (hereinafter PJI Report).

these people are punished despite being lifelong residents of their county who have no intention of failing to appear.

Prior to *Dubose* and the 2020 amendment to Crim. R. 46 that links financial conditions of release only to a risk of flight, pretrial detention in Cuyahoga County was a common occurrence. A recent study revealed that twenty-five percent of the felony pretrial population were detained during the entirety of pretrial proceedings and that the average period of detention of the more fortunate seventy-five percent who eventually were released was still seventeen days.[2] **Notably, not one person in that study was detained pursuant to R.C. 2937.222.**

When offenders are charged with fourth and fifth degree non-violent, non-sex felonies and cannot post bond, pretrial detention undermines the goals of sentencing. R.C. 2929.13(B)(1) recognizes that, in the absence of aggravating factors involving offense conduct or criminal history, persons convicted of these offenses – if found guilty -- will be sentenced to community control sanctions. Yet they find themselves incarcerated prior to trial because their poverty precludes them from posting what many in the criminal justice system would consider a modest bond. A recent study in Cuyahoga County revealed that twenty-eight percent of all defendants whose bond was set at $5000.00 or less never posted bond prior to the disposition of their case.[3]

In these and many other low-level cases, the solution for many defendants is to plea bargain in order to get out of jail immediately – even if they believe they are innocent of the charge.[4] One study revealed that felony defendants in pretrial detention were 13% more likely to be convicted and that misdemeanor defendants in pretrial detention were 7% more likely to be

[2] Cuyahoga County Bail Task Force Report at 7, citing PJI Report at 3.

[3] Cuyahoga County Bail Task Force Report at 7, citing PJI Report at 3.

[4] Cuyahoga County Bail Task Force Report at 7, citing Schnacke, *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial,* pp. 50-51**.**

convicted.[5] And attorneys confronted with these situations are hard-pressed to urge their clients to fight a weak case when the price of victory is months of incarceration prior to trial.

Pretrial detainees who go to trial are also, in our experience, hampered in their defense. A client who is released can assist in identifying potential witnesses and in helping counsel prepare a defense. Meeting in a jailhouse conference room (or even worse, through a window by phone) is not optimal trial preparation. Not surprisingly, one study found that pre-trial release decreases the probability of being found guilty by 15.1% -- while much of this disparity was attributable to an 11.8% reduction in the probability of pleading guilty,[6] we believe the remaining difference can be attributed, at least in part, to the ability to effectively present a defense.

Pretrial detainees oftentimes find themselves serving more severe sentences than similarly situated counterparts who were released prior to disposition. One study showed that low-risk defendants detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison than low-risk defendants released at some point prior to case disposition; moderate and high-risk defendants are approximately three times more likely to be incarcerated than similar defendants.[7] And the period of incarceration tends to be longer for the pretrial detainee as compared pretrial release:

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[5] Leslie and Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments* (2016). *Accord,* Justice Policy Institute, *Bail Fail: Why the U.S. should end the practice of using money for bail* (September 2012).

[6] Dobbie, W., Goldin, J., Yang, C.S., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*. American Economic Review, 108(2), 201-40 (2018) (hereinafter, Dobbie).

[7] Arnold Foundation, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (November 2013).

Jail sentences are 2 to 3.5 times longer for those detained until trial or disposition (depending on the risk level of the defendant) and prison sentences are 2 to 2.84 times longer.[8]

Nor does disparity stop when the pretrial detainee has completed their incarceration. Pre-trial release decreases the likelihood of rearrest following case disposition by fifteen percent, which is a 46.9 percent change; and pre-trial release increases the probability of employment in the formal labor market three to four years after the bail hearing by 10.8 percentage points, a 28.6 percentage increase.[9]

These statistics are in accord with our experience. A client who is detained is hampered in showing a court at sentencing that steps toward rehabilitation have already been undertaken, that the client has steady employment and will enjoy familial support. As a result, more severe sentences are far more likely. In turn, serving a longer sentence makes the client's transition into the job market that much higher. Unfortunately, this also increased the risk of recidivism.

From a purely economic standpoint, over-utilization of cash/secured bonds is equally nonsensical. Everyone pays when a defendant is locked up instead of being released prior to trial. It costs far more to jail a defendant than to release the same person under supervision, even if that supervision includes electronic monitoring.[10] Persons who are released prior to trial and working are more likely to fulfill their familial support responsibilities. Persons who are released prior to trial are more likely to retain counsel, thus saving the system the cost of appointed counsel.

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[8] *Id.*

[9] Dobbie, 201-40.

[10] In 2018, Cuyahoga County charged the City of Cleveland a per diem of approximately $99 per inmate. Bamforth, Emily, *How Cuyahoga County Is Balancing Its 2018-2019 Budget*, cleveland.com (Oct. 11, 2017). In contrast, in 2015, *per diem* GPS-monitoring charges were $7 per supervisee. National Center for State Courts, Booking Process and Pretrial Services, Cuyahoga County, Final Report (Dec. 17, 2015) at 7.

Conversely, persons who are pleading guilty to crimes they have not committed as an escape from pretrial detention then tax probation offices with needless supervision as part of a sentence to community control sanctions. Long-range, these individuals are oftentimes destined to a lifetime of unemployment/underemployment because of a criminal record that they never deserved.

Perhaps the most ironic and unintended consequence of setting high bonds instead of going forward with a detention hearing under R.C. 2937.222 is the situation where the bond set by the judge as a substitute for denying bond altogether is not set high enough and the defendant who should have been detained manages to secure their release, either through their own resources or those of a family member. Now, the dangerous offender is back on the street. Why? Because the prosecution did not avail itself of the ability to have detained the defendant via R.C. 2937.222.

And R.C. 2937.222 is not the only means of protecting public safety in the bail context. In Cuyahoga County, and particularly in the Cleveland Municipal Court (where we represent virtually all indigent defendants in both misdemeanor cases and in preliminary matters in felony cases), the courts have been employing validated risk assessment tools, most notably the Arnold Foundation's Public Safety Assessment (PSA). The PSA measures risk of offending while on release on a six-point scale with the lowest possible score being "1." A similar six-point scale is used to measure risk of flight. The defendant is then assigned a coordinate of between (1,1) and (6,6).

In our experience, when judges, sometimes based on risk assessment tools, order a defendant be subjected to Court Supervised Release (CSR), those defendants abide by the conditions of release. Summit County has found that its use of pretrial services has "saved

money while improving pretrial processes and reducing unnecessary pretrial detention."[11] CSR can include GPS monitoring (usually via an ankle monitor), home confinement and curfews.

In the end, there are a number of tools already available to judges to ensure the safety of the community when determining what, if any, conditions of release to set. These tools -- GPS monitoring, CSR reporting and even detention -- have a common characteristic. They are transparent. But HR 607 and HJR 2 lack transparency and allow judges to use a dollar figure to evaluate something the individual risk posed by a defendant, that cannot be measured in dollars and cents.

CONCLUSION

Thank you for the opportunity to address the Committee. We welcome any questions you may have.

[11] Cuyahoga County Task Force Report at 5.