



Ohio Prosecuting Attorneys Association

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Senate Joint Resolution 5
Proponent Testimony
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Chairman Manning, Vice-Chair McColley, Ranking Member Thomas and members of the Senate Judiciary Committee, thank you for the opportunity to provide proponent testimony on Senate Joint Resolution 2 to place before Ohio voters a constitutional amendment to Article I, Section 9 of the Ohio Constitution that would require courts, when determining the amount of bail, to consider public safety, including the seriousness of the offense, a person's criminal record, and the likelihood a person will return to court. This restores consideration of public safety and public safety related concerns, along with flight risk, to bail determinations in Ohio. Senate Joint Resolution 5 is critical for two reasons: (1) because Ohioans should be given the opportunity to directly express in their Constitution their desire for community safety in these matters and (2) it makes it crystal clear to future courts that consideration of public safety when setting bail is not something that is subject to change by Court Rule.

In *DuBose v. McGuffey* the Supreme Court of Ohio held that the sole purpose of bail is to ensure an accused person's attendance in court and that under Criminal Rule 46 public safety is not a consideration with respect to the financial conditions of bail.

Public safety is and historically has been an appropriate consideration when setting reasonable bail. This is recognized in the Ohio Supreme Court's own rules, the statutory scheme that has been adopted by the General Assembly, and prior caselaw.

Criminal Rule 46

Criminal Rule 46 establishes procedures for a court when setting both financial and non-financial conditions of bail. The rule was amended in July 2020 in order to, according to the Staff Note for the Rule "improve efficiency in setting bail in an amount that effectively ensures (1) the defendant's continued presence at future proceedings, (2) that future proceedings will not be impeded by any effort to obstruct justice, and (3) the safety of any person as well as the community in general."

When the changes to Criminal Rule 46 were originally published for public comment, the second sentence of Criminal Rule 46(B) provided that "If the court orders financial conditions of release, those financial conditions shall be related solely to the defendant's risk of non-appearance. This second sentence was changed during the public process that the Rule went through so that today, Criminal Rule 46(B) provides that "If the court orders financial conditions of release, those financial conditions shall be related to the defendant's risk of non-appearance, the seriousness of the offense, and the previous criminal record of the defendant." Our Association worked with the Commission on the Rules of Practice and Procedure and with the General Assembly during this public process to have the word "solely" taken out of division (B) and to have "the seriousness of the offense, and

the previous criminal record of the defendant” inserted. We advocated for this change expressly out of concern for victim and public safety if financial conditions were related solely to the defendant’s risk of non-appearance.

In addition, Criminal Rule 46(C), which establishes factors to be considered “in determining the types, amounts, and conditions of bail,” requires courts to “consider all relevant information, including but not limited to...The nature and circumstances of the crime charged, and specifically whether the defendant used or had access to a weapon.” These are also clear public safety related factors that the court is required to consider when determining the types, amounts, and conditions of bail.

Thus the staff note to Criminal Rule 46, the changes that the rule underwent during the public process in 2020, and the language of Criminal Rule 46 itself recognize public safety considerations in determining the amount of bail.

The Statutory Scheme

In addition to our concern for victim and public safety when the first version of Criminal Rule 46 as outlined above, a second concern we had was that limiting the financial conditions of bail “solely” to the risk of non-appearance would conflict with the substantive statutory scheme enacted by the General Assembly. Specifically, we were concerned that it would conflict with Revised Code section 2937.23(A)(3) that provides that “In all cases, the bail shall be fixed with consideration of the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of the defendant appearing at the trial of the case,” Revised Code sections 2919.251, 2903.212, and 2907.41 that establish victim and public safety related considerations when setting bail in domestic violence cases, violation of protection order cases, and subsequent sexual offense cases.

Thus, the statutory scheme enacted by the General Assembly already establishes a variety of ways that public safety should be considered when fixing bail.

Caselaw

It has been asserted in support of other bail reform efforts in the General Assembly and was held in DuBose that the only purpose of bail is to ensure the accused’s appearance at trial. To be sure, the primary purpose of bail is to ensure the appearance of the defendant. But caselaw has recognized that safety considerations are appropriate too. In *United States v. Salerno*, 481 U.S. 739, the Supreme Court of the United States said that “The government’s interest in preventing crime by arrestees is both legitimate and compelling.” *Id.* at 749. It went on to say that “[n]othing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight” and that “[t]he only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil.” *Id.* at 754. Finally, the Court said that “While we agree that a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.” *Id.* at 753. When the government has admitted that it’s only interest is flight, then bail must be set at the sum designed to ensure that goal and no more.

For these reasons and in the name of the safety of Ohio victims, witnesses, communities, we encourage you to adopt Senate Joint Resolution 5 to allow the voters to have a direct say on this issue. Thank you again for the opportunity to provide testimony in support of the Resolution. We encourage the committee’s favorable consideration.