Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony in Opposition of SJR5
Bail Constitutional Amendment
Sponsors Senator Gavarone

Chair Manning, Vice Chair McColley, Ranking Member Thomas and members of the Senate Judiciary Committee. I am State Public Defender Tim Young. Thank you for the opportunity to testify on behalf of the Office of the Ohio Public Defender (OPD) in opposition of Senate Joint Resolution 5 (SJR5).

Conversation around this joint resolution has been somewhat misleading.[1] To be clear, in *Dubose v. McGuffey*, the Ohio Supreme Court held that the sole purpose of monetary bail is to ensure an accused person's attendance in court, and that under Crim.R. 46,[2] public safety is not a consideration with respect to the financial conditions of bail.[3] While the 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. The Ohio Supreme Court did not eliminate public safety as a concern when considering pretrial detention. It clarified long standing law.[4] And it directed courts to take real steps to ensure public safety through

[1] The joint resolution to modify Article I, Section 9 of the state constitution does two things. First, it adds "When determining the amount of bail, the court shall consider public safety, a person's criminal record, the likelihood a person will return to court, and the seriousness of a person's offense." Second, it removes "Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(B) of the Constitution of the State of Ohio." Article IV, Section 5(B) vests the supreme court with the power to promulgate rules of court.

[2] Presumably the SJR5 is meant to strip the court of its ability to regulate bail through Crim.R 46. That deletion is unnecessary, as the proposed addition would meet the intent of the amendment, and the court could not promulgate a rule that violates the amendment. Finally, the court, through its ability to promulgate rules of court, is in the best position to incorporate the amendment, should it be made, into court procedures throughout Ohio.

[3] *DuBose v. McGuffey*, Slip Opinion No. 2022-Ohio-8.

[4] *State ex rel. Sylvester v. Neal*, 140 Ohio St.3d 47, 2014-Ohio-2926, 14 N.E.3d 1024, ¶ 16; *State ex rel. Baker v. Troutman*, 50 Ohio St.3d 270, 272, 553 N.E.2d 1053 (1990).

oversight and monitoring and not by simply substituting an unreachable monetary amount in the name of public safety.

Both the United States Constitution and the Ohio Constitution prohibit excessive bail.[5] A bail amount that is "higher than an amount reasonably calculated to" ensure the accused's presence in court is "excessive."[6] Amending our state constitution to allow courts to consider public safety when setting bail amounts does not insulate a bail amount from being challenged as excessive. In other words, a reviewing court can still find a bail amount to be constitutionally excessive in light of the expressed public safety concerns. DuBose is a good example, as the supreme court was critical of the trial court's thin support for its public safety concerns: "Moreover, we note that the trial court did not determine that DuBose actually posed a threat to the victim's grandmother or her daughter. There was no suggestion, for example, that DuBose had made threats against them or that they will be witnesses against DuBose at trial. Instead, the trial court credited the unsworn statement without making any inquiry into the basis for her fear of DuBose."[7]

The fallacy that setting bail at a level defendants cannot pay is a means to protect the public is pervasive. "This unconstitutional practice has gone on for so long that it has simply become a comfortable routine."[8] It is so commonplace that witnesses before this committee have admitted to engaging in this unconstitutional practice. However, 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. We have heard examples of this from the Buckeye Institute and Representative Leland during sponsor testimony of House Bill 315 (HB315). It is not as though individuals charged with a serious offense cannot be held pending trial. Courts are permitted to hold a

[5] Eighth Amendment to the U.S. Constitution and Article I, Section 9 of the Ohio Constitution.
[6] *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).
[7] *Dubose* at ¶ 31.
[8] *Mohamed v. Eckelberry*, 162 Ohio St.3d 583, 2020-Ohio-4585 (Stewart, J. concurring).
[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/.

hearing to determine whether individuals charged with some serious felonies should be held without bail. Substitute HB315 and SB182 expand current preventative detention law. Setting a high monetary bail amount to evade these procedural safeguards is an unconstitutional workaround.

The U.S. Supreme Court recognized that public safety concerns *could* lead the government to seek pretrial detention and that such pretrial detention would not necessarily violate the excessive bail clause of the Eighth Amendment.[10] However, the *Salerno* court cautioned that this was justifiable only because there were significant procedural protections afforded to defendants who faced pretrial detention. In other words, if the state feels a defendant poses a risk to public safety, they are permitted to seek to have that person held pretrial. In fact, that is the question that was at play in *Salerno* – the case was not about how much bail should be set, it was about whether bail should be set at all. However, pretrial detention requires due process. It requires a hearing and findings made by the trial court. Proponents of cash bail want to skip due process all together and simply ask for a cash bail (they hope) the defendant cannot afford.

It was also said in this committee that courts could not possibly have pretrial detention hearings because the witnesses that testify will end dead before the trial. OPD shares the concern for the safety of victims and witnesses, however this statement is legally inaccurate, and factually hyperbolic. The Ohio Rules of Evidence do not apply to the hearing,[11] meaning witnesses and the victim would not need to appear. The state could meet its burden with testimony and evidence from the investigating officers. Due process is a necessary burden of a fair and free society.

It is worth repeating that people pending trial are presumed innocent, meaning they are legally innocent. That is why in *Salerno,* Chief Justice Rehnquist went on to say, “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

[10] *United States v. Salerno,* 481 U.S. 739 (1987).
[11] Ohio Evid.R. 101(C).

times the world's median pretrial imprisonment rate.[12] Cash bail infringes on the liberty of legally innocent Ohioans and punishes them because they have limited means. Last week, it was suggested that the constitutionally required presumption of innocence does not actually mean courts should proceed as if defendants are innocent. It is concerning that Ohio's elected officials do not believe the constitution should be enforced. The presumption of innocence is a necessary protection against a tyrannical government. If we start saying this mass shooter or this rapist is not presumed innocent, the whole system falls apart. The next person could be a political dissenter, you, or me.

Being indigent does not mean someone is a bad or dangerous person. Just as being wealthy does not mean someone is a good person. Throughout this debate on cash bail, it has been suggested in committee and in the media that wealthy people do not committee serious crimes. This classist bigotry is sickening and wrong. Money is not morality. This point – that the *amount* of money bail is unrelated to a public safety interest – was made succinctly by the Seventh Circuit Court of Appeals in *Williams v. Dart,* 967 F.3d 625 (7th Cir. 2020): "In September 2017, with the support of the other branches of government, the Cook County Circuit Court implemented new pretrial release policies aimed at reducing the use of cash bail. This was done for the sake of fairness (poor people cannot afford it) and public safety (the most successful robbers and drug dealers can)."

I want to spend some time correcting the misinformation this committee has heard in testimony. First, I want to address the argument that no defendant languishes in jail. It has been argued that every defendant is promptly brought to trial in 90 days if they are incarcerated. This is not accurate. First, many things toll the speedy trial clock. For example, a defendant's motion for discovery tolls the speedy trial clock. Therefore, if a defendant does not want a trial by ambush, the speedy trial clock will be tolled. Even a defendant's motion for speedy trial tolls the speedy trial clock. Furthermore, a motion from the

[12] 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).

defendant, state or court can toll speedy trial for good cause. Additionally, speedy trial can be tolled by period of continuance necessitated by temporary absence of key state's witness.[13]

Second, it has been argued that an individual that pays a cash bond to be released from jail will think twice before committing a new offense. This is wrong for a few reasons. First, an individual that commits a new offense, such as intimidating a witness, does so because they do not think they will get caught. They hope the witness will not tell law enforcement and will not testify against them in the underlying case. I would venture to guess no person has ever thought to themselves, "I would have committed that burglary, theft, assault, murder, etc.; but I didn't want my bond to be forfeited." Second, and most importantly, cash bond is **not forfeited** because someone commits a new offense or because someone violates a condition of bond. It is only forfeited when a person fails to appear. If Ohio did start forfeiting bonds for new offenses or bond condition violations, bondspersons would have to babysit every defendant for fear they lose the bond they posted.

Simply passing SJR5 does not alleviate all the constitutional problems with cash bail or make excessive bail constitutional. 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. Cash bail can violate a defendant's right to Equal Protection and Due Process under the law.[14] Wealthier Ohioans will buy their release while indigent Ohioans will be forced to wait for their trial behind bars.

It is appropriate, and constitutional under current law, for courts to consider public safety concerns in the context of whether or not to set bail. It is also appropriate for courts to consider public safety concerns in the context of *conditions* on bail. But, if public safety concerns lead to a higher monetary bail being set, then we live in a world where access to wealth, and not dangerousness, set

[13] *State v. Smith*, (1981) *3 Ohio App. 3d 115.*
[14] See *In re Humphrey,* 482 P.3d 1008 (Cal. 2021), citing *Bearden v. Georgia*, 461 U.S. 660 (1983).

the terms of release. That is not constitutional, and it is not just. Thank you for the opportunity to speak today before your committee. I am happy to answer questions at this time.