



THE BUCKEYE INSTITUTE

The Buckeye Institute Comments on Ohio Criminal Sentencing Commission: *Ad Hoc Committee on Bail and Pretrial Services Final Report*

[Ohio's Criminal Sentencing Commission](#) has proposed rule changes that will help make our communities safer, our criminal justice system more just, and our local jails less crowded.

The Buckeye Institute supports the Commission's proposed changes, but we suggest two amendments to the new rules.

First, the proposed rules unfortunately maintain outdated bail bond schedules that do not make an accurate, individual assessment of each defendant's flight risk or the risk he poses to the community. Instead, the rules should do away with bail bond schedules and require the courts to use vetted risk assessment tools to assess every defendant individually.

Second, bail bonds serve two valid purposes—protecting the community and ensuring that defendants return to court. But new information and technology have made cash bail an antiquated practice with limited utility. Risk assessment tools, like those used in Lucas County, have proven more effective than current cash bail practices by every metric. The proposed rules should recognize that cash deposits do not make defendants less dangerous, and should therefore require that cash bail be used only as a last resort.

Risk Assessment Tools

Knowledge is power, and at the risk of sounding like a pizza commercial: better information, better decision-making. Businesses have long understood this and have gone to great lengths to enhance the data and information at their disposal in order to improve profit margins, create better experiences and products for their customers, and become more effective and efficient at whatever they do. Our favorite sports teams have more recently discovered the not-so-secret benefits of data collection. Teams now routinely use “analytics” to maximize their defense or point-scoring efficiency. Baseball teams employ the infield “shift” on some opposing power hitters who statistically do not hit to the opposite field. Basketball statisticians have shown that taking an uncontested three-point shot has more value and probability of success than shooting a contested layup. Analytics.

But “big data” is not just for “big business.” Ohio can use data and analytics in her criminal justice system in much the same way that the Indians and Reds know when to shift the infield. The shortstop doesn't play behind second base against every batter.

Similarly, vetted risk assessment tools allow courts to collect statistically significant information from defendants in order to better determine whether a particular defendant poses much of a risk to the community or how likely he might be to skip town. These analytical tools do not set the terms or conditions of a defendant's release, but they can provide courts with better information to help them make better decisions. Courts in Lucas County, for example, are successfully using

a risk assessment tool that, according to the Sentencing Commission Report, has already improved court appearance rates, public safety rates, and pretrial success rates—all while awarding more pretrial releases.¹ And more courts are following Lucas County’s lead.

Unfortunately, the Sentencing Commission’s proposed rule still refers to bail bonds schedules, the antithesis of individualized risk assessments.

Bail Schedules, Judicial Discretion, & Public Safety

Mandatory bail schedules undermine judicial discretion without enhancing public safety. Unlike individualized risk assessments, prescribed bails schedules allow some defendants to remain in jail simply because they cannot afford the bail, while also releasing other, potentially more dangerous defendants merely because they can afford the fixed bail. What bail a given defendant might afford, of course, has no reasonable bearing on the danger that he may present to the community—making it an imprudent means of securing our public safety. A dangerous defendant is dangerous regardless of the money he gives to the bail bond agent, and there are far more effective conditions of pre-trial release—such as electronic monitoring, periodic court check-ins, and required appointments with probation officers—that can help make our communities safer while dangerous defendants await trial.

There are limited circumstances when assessing cash bail makes sense. When an out-of-state defendant poses no threat to the community, for instance, but needs a financial inducement to return for his court date, a reasonable cash bond is likely to ensure his return. But ordinarily, cash bail is the least effective way to keep communities safe and should be the exception rather than the rule.

The final rule should abolish and not even refer to bail schedules. The Commission Report asks the legislature to do away with bail schedules, but the Ohio Supreme Court should exercise its constitutional authority to make this change unilaterally. Article I Section 9 of the Ohio Constitution states, in part, that “[p]rocedures 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) gives rule-making authority to the Ohio Supreme Court.

Thus, although state law requires (R.C. 2937.23(A)(2)) our courts to set bail schedules, Article IV, Section 5(b) of the Ohio Constitution makes clear that an Ohio Supreme Court rule would supersede this law if the rule and the statute are inconsistent: “All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” The Supreme Court should use its constitutional authority to establish a new, unilateral rule on bail schedules for all Ohio courts to follow.

Conclusion

To maximize public safety, justice, and local jail facilities, the Sentencing Commission’s proposed rules should:

¹ The Ohio Criminal Sentencing Commission: *Ad Hoc Committee on Bail and Pretrial Services Final Report*, at 9.

1. Prohibit bail bonds schedules; and
2. Acknowledge that cash bail is the least preferred condition of release that should only be used as a last resort to ensure a defendant's appearance in court.