



THE BUCKEYE INSTITUTE

Public Comments to the Ohio Supreme Court on Proposed Criminal Rule 46

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The proposed changes to Criminal Rule 46 substantially improve the existing rule and address many concerns regarding Ohio’s current system of pretrial detention and release. **The Buckeye Institute** has long advocated pretrial reforms to promote public fairness and safety, and we commend the Commission on the Rules of Practice and Procedure for its great work on this issue. Pursuant to The Supreme Court of Ohio’s request for comments, The Buckeye Institute respectfully suggests the following revisions to further the Commission’s stated goals.

1. Proposed 46(B) should state that there is a presumption of release on personal recognizance.

Because the government is attempting to take a person’s liberty, the burden should be on the government to demonstrate to the court that restricting the person’s liberty is necessary to provide reasonable assurance of appearance or public safety. The proposed new rule rightly states that the court should release a person on the least restrictive conditions. To solidify that policy, the rule should state that release on personal recognizance is the default. The court can use the factors provided in proposed 46(D) to determine whether to deviate from the default.

2. The end of proposed 46(B) should also explicitly state that monetary conditions shall not be used to address public safety concerns. Public safety concerns should be addressed instead through appropriate pretrial detention as authorized by the Ohio Constitution and the Ohio Revised Code.

The final sentence of proposed 46(B) implies that financial conditions are to be used only to address concerns about appearance in court, but this restriction should be stated explicitly in order to remove any ambiguity. As shown in our report, **“Money Bail” Making Ohio a More Dangerous Place to Live**, the amount of money a person deposits with a court or bail agent makes him or her no more or less of a danger to others and the community. At times, courts and prosecutors use high bail amounts—setting bond at \$2 million, for example, for someone who is not wealthy—in order to detain that person without having to go through the formal hearing required by R.C. 2937.222 and referred to in proposed 46(A).

The Ohio Constitution guarantees the right to bail *except* when a person is “charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community.” Currently, the Ohio Revised Code limits those who can be held without bail to those who are “charged with aggravated murder when it is not a capital offense, murder, a felony of the first or second degree, a violation of section 2903.06 of the Revised Code, a violation of section 2903.211 of the Revised Code that is a felony, or a felony OVI offense.” If Ohio policymakers want to give judges and prosecutors the authority to hold dangerous felony three-, four-, and five-offenders, they may do so by revising R.C. 2937.222 to include all felony offenses allowed by the Ohio Constitution.

3. Proposed 46(C)(8) should be changed from “...considered reasonably necessary to ensure appearance or public safety...” to “...considered necessary to provide reasonable assurance of appearance or public safety.”

This grammatical fix would apply the reasonable standard to the proper place in the sentence. The change would also make it consistent with the new (and properly drafted) paragraph in proposed 46(B), which repeatedly uses the phrase “reasonably ensure...”

4. Proposed 46(D) should explicitly require the court to consider the accused’s financial capacity to pay as a factor in setting monetary bail.

A financial capacity to pay provision would help ensure that people are not detained simply because they cannot afford a financial condition. The proposed addition to Rule 10(A) that requires courts to review a defendant’s bail at arraignment also is a welcome change. By requiring courts to consider the defendant’s ability to pay at the first possible instance, courts may spend less time revisiting bail at arraignment. The proposed revisions would also allow defendants to work, spend time with family, and meet other obligations and responsibilities that otherwise may be neglected between the initial appearance and arraignment.

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