



THE BUCKEYE INSTITUTE

Public Comments on Proposed Criminal Rule 46

Submitted to The Ohio Supreme Court

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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.

Clarify the apparent contradiction between Proposed 46(B) and Proposed (46)(B)(1), and state that personal recognizance is the presumptive method of release.

Proposed Criminal Rule 46(B) makes clear that financial conditions "shall be related solely to the defendant's risk of non-appearance." This language should be retained. As we demonstrated in **"Money Bail": Making Ohio a More Dangerous Place to Live**, the amount of money that a defendant deposits with a court or bail agent makes him or her no more or less dangerous to the community.

Proposed Rule 46(B) also states: "If the court orders financial conditions," which suggests that financial conditions are optional and not required. Unfortunately, proposed Rule 46(B)(1) makes that optionality and discretion unclear by stating: "Any person who is entitled to release *shall* be released upon one or more of the following types of financial conditions in the amount set by the court..." (emphasis added). Thus, the discretion created by proposed Rule 46(B)'s use of "if the court orders" is contradicted by the "shall" in proposed Rule 46(B)(1) that requires the court to set financial conditions.

The language of proposed Rule 46(B) indicates that personal recognizance is not a financial condition, but proposed Rule 46(B)(1) then categorizes personal recognizance as a financial condition. That apparent contradiction should be clarified.

In addition, proposed Rule 46(B) should also explicitly state that personal recognizance is the default method of release. With personal liberty at stake, the government should have the burden to demonstrate that a financial condition is necessary to provide reasonable assurance of appearance. The proposed rule rightly states that the court should release a person on the least restrictive conditions. To solidify that policy, the rule should state expressly that release on personal recognizance is the presumptive release method. The court may then use the factors provided in proposed Rule 46(C) to determine whether to deviate from the default.

Both concerns can be remedied by deleting proposed rule 46(B)(1)(a) and amending proposed 46(B)(1) to read:

Financial conditions of release. The personal recognizance of the accused or an unsecured bond is the presumed method of release. If the court finds that financial conditions are necessary to reasonably assure the appearance of the defendant, it shall release the defendant on one or more of the following types of financial conditions in the amount set by the court:...

The end of proposed Rule 46(B)(2) should state that a person will not be required to pay for any non-financial condition of release. If a person is required to pay for non-financial conditions of release, like drug testing or electronic monitoring, the person may be detained for not having access to cash.

Proposed Rule 46(B) states that financial conditions may be used only to address concerns about appearance in court. But if a defendant must pay for non-financial conditions, then they effectively become financial conditions that may financially harm defendants or their families, or needlessly keep people in jail.

Proposed Rule 46(C) should require the court to consider the accused's financial capacity to pay as a factor in setting monetary bail.

A financial condition gives defendants an incentive to appear for their court dates. A financial-capacity-to-pay provision would help ensure that defendants are not detained simply because they cannot afford a financial condition. Without a required capacity-to-pay hearing, financial conditions may go beyond their limited, intended purpose and become unintentionally punitive.

Proposed Rule 46(G) should be amended to state that recognizance bonds are the default under any bond schedule.

Bond schedules only apply to misdemeanors and, as such, the bond schedule default should be personal recognizance unless the defendant has previously failed to appear in that case. Bail schedules in which personal recognizance is not the default release method may create the untenable situation in which felonies enjoy a presumption of recognizance, but misdemeanors do not.



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