



BUCKEYE POLICY BRIEF

REFORMING BAIL REFORM

BY ANDREW J. GEISLER
APRIL 28, 2020

Introduction

A last-minute change to Ohio's new proposed bail rule (Criminal Rule 46) threatens to undermine the pro-liberty and pro-safety reforms by expanding judicial authority to impose cash bail based on factors that should be used to consider whether potentially dangerous individuals should be detained without bail. The amended rule likely will lead to detaining more defendants who cannot pay, while releasing dangerous individuals with access to money or bail bonds back on the street. The Ohio Supreme Court's Committee on Practice and Procedure should rescind this last-minute change and the General Assembly should fix the current law that prevents judges from ordering pretrial detention without bail when justified.

Ohio's over-reliance on cash bail fails to keep our communities safe and perpetuates injustice in our criminal justice system. Good news came in the Ohio Supreme Court's Committee on Practice and Procedure's January version of Criminal Rule 46, which shifted the law's presumption away from cash bail and asked courts to release defendants on the least restrictive conditions that would reasonably ensure the defendant's appearance in court and protect public safety. This important reform promotes public safety and protects the rights of the accused.

Unfortunately, an amended version of the rule released March 12 allows courts to also consider the seriousness of the defendant's alleged offense and previous criminal record when imposing cash bail. Although this may seem to promote public safety, it actually will permit dangerous individuals to be released if they procure sufficient bail or bond. Fortunately, there is a better way to ensure public safety and protect the rights of the accused.

The Problem

Under a unique provision in Ohio’s Constitution, individuals charged with misdemeanors cannot be held before trial without access to bail.¹ This provision means that certain domestic violence offenses are ineligible for a no-bail hearing and must be granted bail, regardless of the risk the accused poses to the community or their alleged victim. This provision also allows the General Assembly to set standards for no-bail hearings for individuals charged with felonies “where the proof is evident or the presumption great,” that the accused “poses a substantial risk of serious physical harm to any person or to the community.”² Pursuant to this authority, the General Assembly has further limited the class of offenses eligible for no-bail hearings to a circumscribed list of serious offenses, including all first and second-degree felonies.³ This means that certain serious third, fourth, and fifth degree felonies are ineligible for no-bail hearings as well.

A feature, not a glitch, of Ohio’s cash bail system is that dangerous individuals who have the resources to post bond may still walk free even under the current amended rule. This feature demonstrates why cash bail is an ineffective tool that fails to keep communities safe.

The Solution

Fixing this problem does not require expanding the availability of cash bail. Instead, the General Assembly should amend the Revised Code section limiting no-bail hearings to make some serious third, fourth, and fifth-degree felonies, including certain aggravated assaults, certain drug-trafficking offenses, commercial sexual exploitation of a minor, and aggravated menacing eligible for no-bail hearings. The General Assembly should amend Ohio’s domestic violence offenses so that accused offenders posing a threat to the public or a person may be charged with at least a fifth-degree felony. This offense should also then be eligible for a no-bail hearing.

These simple legislative fixes would help keep Ohio safer, rather than expanding and perpetuating a less-effective means of detaining dangerous offenders before trial.

Ohio Should Not Expand Cash Bail

Cash bail creates a two-tiered system of justice in which the poor, who cannot afford nominal bail, sit in jail until trial despite their presumed innocence, and the wealthy, who can afford bail, walk free—regardless of the risk they pose to the community.⁴ This two-tiered system is especially hard on Ohio’s working poor. Even a short, pre-trial stay in jail can cost the accused their employment,

¹ **Ohio Const. § 1.09.**

² *Ibid.*

³ **R.C. 2937.222.**

⁴ Daniel J. Dew, *“Money Bail”: Making Ohio a More Dangerous Place to Live*, The Buckeye Institute, December 11, 2017.

which can then yield other devastating financial impacts.⁵ In this time of staggering unemployment, policymakers should not make it harder for working people to keep their jobs.

Expanding cash bail during the COVID-19 pandemic also presents an unwise health risk. Overusing cash bail will likely result in more of Ohio's poor, who cannot afford bail, sitting in jail where it is difficult to practice proper social distancing.⁶ Thus, individuals who pose little to no flight or public safety risk will be at greater risk of contracting the virus.

Defendants posing a danger to the community should be detained regardless of their financial resources. But defendants who are not dangerous and are not flight risks should not be detained or have to post even nominal bail. The court's chief concern with non-dangerous defendants is that they appear for trial. And that concern may be addressed with simple administrative reminders rather than crippling financial burdens and obligations.⁷

The United States Supreme Court has recognized that in our system of justice "liberty is the norm" and detention "without a trial is the carefully limited exception."⁸ Smart bail reform likewise should recognize the fundamental importance of the accused's innocence until proven guilty, and ensure that courts do not predicate pre-trial detention on the accused's financial resources. Alternatives to bail such as supervised release, and pre-trial detention for serial trial-skippers and repeat violent offenders, keep our communities safer and cost taxpayers less money.⁹

The Ohio Supreme Court's deadline for filing additional amendments is May 1. Absent action from the General Assembly after May 1, Criminal Rule 46 will take effect on July 1, 2020.¹⁰ But before May 1, the court should rescind the last-minute change to proposed Criminal Rule 46 and make it clear that bail use should focus on promoting a defendant's appearance in court. And the General Assembly should address those cases in which detention without bail is appropriate but the law withholds that option from judges.

⁵ *Ibid.* One Ohioan was held in jail for four days on a jaywalking and public intoxication charge, causing him to lose "the first steady job he'd had in months." Sara Dorn, **Lyndhurst Man Who Can't Afford Bail Waits 4 Days to Answer Drunken Jaywalking Charge: Impact 2016: Justice For All**, Cleveland.com, October 25, 2016.

⁶ Aleks Kajstura and Jenny Landon, **Since you asked: Is social distancing possible behind bars?**, The Prison Policy Initiative, April 3, 2020.

⁷ Jennifer Elek, Sara Sapia, and Susan Keilitz, **Use of Court Date Reminder Notices to Improve Court Appearance Rates**, Pretrial Justice Center for Courts, September 2017.

⁸ *U.S. v. Salerno*, 481 U.S. 739, 748 (1987).

⁹ Daniel J. Dew, **The Ohio Model for Bail Reform: Retaining Local Flexibility and Saving Money**, The Buckeye Institute, May 2, 2018; and Bernadette Rabuy, **Pretrial detention costs \$13.6 billion each year**, Prison Policy Initiative, February 7, 2017.

¹⁰ **Commission on the Rules of Practice & Procedure**, SupremeCourt.ohio.gov (Last visited April 27, 2020).

About the Author

Andrew Geisler is the visiting legal fellow at The Buckeye Institute's Legal Center. In this capacity, Geisler works on criminal justice policies that focus on how to make Ohio's communities safer, reduce spending, and help people become contributing members of society.

Prior to joining The Buckeye Institute, Geisler earned his law degree from the Case Western Reserve University School of Law, as well as his master's degree in political science and his undergraduate degree in political science and journalism from Miami University. During his graduate studies, Geisler focused on the intersection of political theory and public policy, culminating in his final project, *Why the Family Assistance Plan Failed: Daniel Patrick Moynihan and the Problem of Social Policy*.

Geisler also spent a year as the program coordinator for the Janus Forum and Thomas W. Smith Project on Liberty, Democracy and Citizenship at Miami University, where he planned and executed events on American politics and government. He previously spent a summer at The Buckeye Institute as the Seasongood Fellow focusing on Ohio criminal justice policy.



THE BUCKEYE INSTITUTE

88 East Broad Street, Suite 1300

Columbus, Ohio 43215

(614) 224-4422

BuckeyeInstitute.org

Reforming Bail Reform

Copyright © 2020 The Buckeye Institute. All rights reserved.

Portions of this work may be reproduced and/or translated for non-commercial purposes provided The Buckeye Institute is acknowledged as the source of the material.