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September 26, 2018

Jesse Mosser
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65 South Front Street
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Columbus, Ohio 43215-3431

Re: Comments on Proposed Amendments to Criminal Rule 46, Bail, as Published on August 15, 2018.

Dear Jesse Mosser,

On behalf of Civil Rights Corps, I am submitting this comment to Criminal Rule 46, as published on August 15, 2018.

Thank you very much for your consideration, and please be in touch if we can answer any questions or provide further assistance.

Sincerely,
Thea L. Sebastian

September 26, 2018

Re: Comments on Proposed Amendments to Criminal Rule 46, Bail, as Published on August 15, 2018.

Dear Jesse Mosser,

I am writing on behalf of Civil Rights Corps to request that the Court expand, strengthen and clarify the proposed amendments to Criminal Rule 46. This Rule change creates a valuable opportunity to end an unconscionable and unconstitutional practice—the detention of individuals simply because they cannot pay a fixed sum of money. Without a number of specific changes, we believe that the amendments to Rule 46 will not curb or eliminate the unconstitutional practices within the Ohio bail system.

In the following pages, we outline nine changes that could expand, strengthen or clarify the proposed amendments. These changes are not the only amendments that can or would improve the Ohio system, but represent a core set of issues that are necessary for constitutional compliance and effective policy. Please contact us if you have any questions about a particular suggestion or want further information.

PROPOSED CHANGES:

1. **Require Ability-to-Pay Inquiry and End Wealth-Based Detention.**

As of now, proposed amendment B says that if a court orders monetary conditions of release, the court must impose "an amount and type which are *least costly* (emphasis added) to the defendant" while also sufficient to ensure court appearance. This revision is helpful, but omits the express requirement of an ability-to-pay inquiry. If the court does not do this inquiry, it cannot determine what monetary amount is precisely calibrated to achieve this balance. As our cases across the country have shown, a comprehensive ability-to-pay inquiry is required to prevent the wealth-based detention that our Constitution prohibits.[1]

When setting this requirement, we further urge the Court to adopt a comprehensive, uniform ability-to-pay framework that creates consistency across jurisdictions. This framework should involve clear presumptions of indigence, including receipt of means-tested benefits and income below 200% of the Federal Poverty Guidelines, and should avoid any processes that invite bias or are unnecessarily intrusive. If of interest, we are very happy to discuss this issue further and provide specific recommendations.

2. **Create Clear Presumptions for Liberty and against Money Bonds.**

[1] See e.g., *In Re Humphrey*, 19 Cal.App.5th 1006, 534-35 (1st Dist. 2018); *Little v. Frederick*, No. 6:17-cv-00724 (W.D. La.), *available at* https://www.clearinghouse.net/detail.php?id=15872; *Odonnell v. Harris County*, 227 F.Supp.3d 706 (2016) (injunction largely upheld in 882 F.3d 528 (5th Cir. 2017)); *Schultz v. Alabama*, No. 5:17-cv-00270 (N.D. Ala.), *available at* https://www.courthousenews.com/wp-content/uploads/2017/02/Alabama.pdf.

Even if the proposed Rule 46 is expanded to include mandatory ability-to-pay inquiries, proposed amendment B should add a strong presumption *for* liberty and *against* monetary conditions. The current lack of a clear hierarchy and liberty-enhancing presumptions sends insufficient guidance to Ohio courts.

To achieve this end, the proposed Rule 46 should include a strong presumption that release on recognizance is always appropriate. The court may only attach non-financial conditions of release when this presumption is overcome. Moreover, in all circumstances, the court must use the least restrictive condition(s) necessary to reasonably ensure reappearance and protect the community. Whenever setting a condition more restrictive than release on recognizance, the court must justify its decision in writing and on the record. This justification should serve to ensure that courts are disciplined in evaluating what "least restrictive" means in any circumstance, as well as creating a record that the individual can appeal.

The Rule should explicitly add a strong presumption against secured financial conditions. These conditions are often the *most restrictive condition* that the court can place on a person. Thus, to set a monetary bond (either 10% or surety), the prosecution must first prove by clear and convincing evidence that the individual is a flight risk. In setting this presumption, the Rule would address another constitutional infirmity in the current Ohio system and improve outcomes. As judges have stated in previous Civil Rights Corps cases, money bail is ineffective both at securing court appearance and keeping the community safe.[2] In fact, money bail may increase the chances of nonappearance and future crime. The more that Ohio can eliminate money bail and create a system that maximizes pretrial liberty, the more that its communities—those moving through the system and those not—will benefit.

3. Eliminate Bond Schedule, but Create Tool for Expedited Release.

Proposed amendment H makes some changes to bond schedules, but does not go far enough to correct the constitutional problems with these tools. Even under the proposed amendments, subsection (3) makes it clear that some individuals will be detained solely because they could not pay a preset sum of money. Specifically, subsection (3) specifies that these individuals may be detained for 48 hours before they receive a bail hearing. This means that the proposed rule contemplates and entrenches 48 hours of wealth-based detention.

Given the foregoing issue and the litigation risk that this situation creates, we recommend that the Rule urge courts *not* to use bond schedules. We do, however, firmly support the goal in section (1) of expediting "prompt"—i.e., pre-arraignment—release before initial appearance. To achieve this goal, while adhering to our Constitutional obligations, we recommend creating a list

[2] See e.g., *ODonnell v. Harris County*,

> Recent studies of bail systems in the United States have concluded that even brief pretrial detention because of inability to pay a financial condition of release increases the likelihood that misdemeanor defendants will commit future crimes or fail to appear at future court hearings.

251 F. Supp. 3d 1052, 1121 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), and *aff'd as modified sub nom. ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018).

of charges that are subject to immediate release. Unlike a traditional schedule of bond, individuals charged with these offenses would be released immediately *without* paying any money. Since bond schedules are currently used only for misdemeanor offenses, we would suggest that essentially all charges on current bond schedules be included.

Having created a list for expedited release, we support the mandate in (5) that this list be reviewed annually and expanded to include new charges.

4. Create Additional Safeguards for Risk-Assessment Tools.

Proposed amendment (D)(6) allows courts to use "objective" risk-assessment tools when setting bail conditions. Indeed, the proposed rule effectively requires these tools, provided that their use will not cause "unreasonable" delay.

We have significant concerns about using algorithmic risk-assessment tools that purport objective evaluations, but in fact instantiate racial bias, are often inaccurate in their predictions and mask value judgments. For a longer discussion, please see our Statement on Risk Assessment.[3] For these purposes, we would just note that from a constitutional perspective, "unthinking reliance" on an algorithm does not constitute the individualized determination that our Constitution requires. If used at all, these tools should only expand the category of individuals who are released immediately. Wherever these tools do not recommend immediate release, there must be an individualized determination to assess what conditions of release, if any, are appropriate.

Even with this circumscribed use, risk-assessment tools must be subject to local validation, revalidation, reporting and evaluation requirements. There should be community input into the design of the tools, especially on the appropriate inputs and the risk threshold that should trigger immediate release. The court should require regular collection of data, as well as a feedback process that allows for modifications reflecting community needs and new data.

5. Add a Right to Counsel.

The proposed Rule should add a section that requires a right to counsel, including appointed counsel—free of cost—whenever the individual is unable to pay. This right should apply to initial and subsequent bail-related hearings, including appeal of conditions or ability-to-pay inquiries.

The Supreme Court has held that the accused's right to counsel "attaches" at his or her first appearance.[4] And, once this right has attached, the right applies at all "critical stages" of proceedings. In Ohio and beyond, where monetary conditions so often serve to detain, counsel is necessary to safeguard the liberty interest that is "second only to life itself" in constitutional importance.[5]

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[3] http://www.civilrightscorps.org/resources/7B7FS7wRTSKnWMXSqR9Y
[4] *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, (2008).
[5] *In re Humphrey*, 19 Cal. App. 5th 1006, 1037, 228 Cal. Rptr. 3d 513, 535 (Ct. App. 2018).

6. Eliminate Pretrial Fees.

Individuals awaiting adjudication should not be forced to finance their release or detention. These pretrial fees, which include supervision, drug testing and monitoring, extract wealth from poor communities. Because pretrial fees are never returned, the process can cost individuals thousands even if their case is ultimately dismissed. For these reasons, the Court should unequivocally end the practice of charging pretrial fees. Any costs associated with nonfinancial conditions must be borne by the court.

7. Create Procedural Safeguards before Ordering Treatment and Diversion.

Proposed amendments (C)(6) and (C)(7) allow, as a release condition, the completion of a drug / alcohol assessment and treatment recommendations ((C)(6)) and compliance with "alternatives to pretrial detention" that include diversion ((C)(7)).

As written, these provisions raise significant legal concerns. First, in both cases, the Rule should require an individualized assessment before any conditions are ordered. Given the liberty interest of individuals who have not been convicted, they should have access to counsel whenever considering a program offer. Second, any conditions must be free of charge. When assessments, treatment or diversion programs cost money, especially when no ability-to-pay inquiry is mandated, treatment and diversion become "pay-to-play" luxuries for those who can pay—or, for those who cannot pay, a coercive influence toward inhumane sacrifices. One plaintiff in our Maricopa County lawsuit was forced to sell blood plasma simply as a way to finance drug tests that were required for her diversion program. The Court should prevent these abuses upfront by stipulating that treatment and diversion programming be free of charge. If not, the Rule must require an ability-to-pay determination and fee waivers for those who cannot pay.

At a broader level, we have concerns that diversion is even mentioned in this section. In Ohio, diversion is an alternative to conviction rather than an alternative to pretrial detention. It requires admission of guilt; if the program is completed successfully, the charge is dismissed. Thus, while diversion programs certainly require the fee waivers and procedural protections noted above, they should *not* be included on a list of alternatives to pretrial detention.

8. Mandate Delay Before Bench Warrants Are Issued.

Section (I) currently says that if a person does not appear in court, bail is forfeited and the individual is subject to punishment as "provided by the law." We recommend modifying this section to reflect and accommodate the reasons that people most often do not appear in court.

The vast majority of individuals miss court simply because they forget, they misunderstand, or they otherwise have an emergency. Indeed, this is why simple interventions—including the

provision of text message-based reminders—can significantly improve appearance rates.[6] To accommodate this reality, we urge the court to adopt a 48-hour moratorium on taking any legal action, including the forfeiture of bail or issuance of a bench warrant. During that 48-hour period, the court must attempt contact with the individual using mechanisms that are reasonably calculated to reach this individual. These mechanisms should include, at minimum, text message and voice call. Having courts ask individuals upfront for their mobile numbers can help facilitate this process.

9. Add Data Reporting Requirements.

As of now, Ohio has minimal requirements for data reporting. This Rule should address this issue by requiring the documentation, collection and reporting of pretrial outcomes. This must include the type, amount and conditions to bail, as well demographic data of the individuals involved and the pretrial outcomes. Rule 46 should further ensure publication of this data, including through the Supreme Court of Ohio's website.

CONCLUSION:

We are pleased that the Supreme Court of Ohio is considering much-needed changes to Ohio bail practices, including changes that can address the constitutional infirmities plaguing the system today. The courts can and must have a process to quickly release all individuals who are charged with low-level crimes, including essentially all misdemeanors, and must have strong presumptions of release everywhere else. Secured financial conditions—"money bail"—must be vanishingly rare and used, if ever, as a last resort. In no instance can judges use these conditions to create an "end-run" around the pretrial detention net that R.C. 2937.222 provides. Furthermore, fees are inappropriate in the pretrial context, whether these fees are related to supervision or treatment.

The proposed amendments do not do enough to address current constitutional infirmities and advance these goals, but we are eager to assist the Court as it considers ways to strengthen Rule 46 and, generally, the Ohio pretrial system. We urge the Supreme Court of Ohio both to accept our suggestions and to contact us if we can ever assist in any way.

Respectfully,

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[6] See e.g., Brice Cooke et al., *Using Behavioral Science to Improve Criminal Justice Outcomes Preventing Failures to Appear in Court*, Ideas41 and The University of Chicago Crime Lab (2018), 4; also see 29 http://www.uptrust.co/what-we-do#our-results-section.