MEMORANDUM OF THE CUYAHOGA COUNTY PUBLIC DEFENDER TO THE OHIO SUPREME COURT BAIL TASK FORCE

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Introduction

The time has come for Ohio to implement comprehensive bail reform. This can be partially accomplished by a series of amendment to the rules of procedure and to relevant statutes. The most significant change is to amend Crim. R. 46 to

- establish that financial conditions of release will relate only to the risk of flight and cannot result in pretrial detention.
- presume, subject to rebuttal, that cash or secured bonds are unnecessary in cases not involving allegations of a violent or sexual nature.

It is our hope that these amendments will assist in changing the mindset of many stakeholders in the criminal justice system as to how the legitimate purposes of bail can be advanced transparently and intelligently.

This memorandum first provides a brief historical perspective on bail and on the initiatives in bail reform that have been ongoing for more than thirty years. Rules changes are then discussed, followed by statutory changes.

It should be noted that the term "release conditions" is oftentimes used in this memorandum, as opposed to the term "bail." More recently, “bail" has been understood to be the combination of financial and nonfinancial conditions of release. But the term "bail" as a reference primarily, if not solely, to monetary conditions is prevalent in constitutional, statutory and rules provisions that were enacted prior to the bail reforms of the 1980s -- as well as in modern parlance. As a result "bail" can be a confusing term and is used herein primarily when referencing older rules of law.

I. Background

A. The Constitutional Right to Bail and the Prohibition on Excessive Bail.

1. Federal Constitution and the Right to Bail

Harkening back to the English Bill of Rights, the right to reasonable bail has been a part of our constitutional framework from the ratification of the Bill of Rights and is embodied in the Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Eighth Amendment does not provide an absolute right to bail, only a guarantee that, if set at all, bail will not be excessive. *United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Nonetheless, *Salerno* recognized that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." In keeping with that belief, the Judiciary Act of 1789 recognized a right to bail in non-capital cases. 1 Stat. 73, 91.

2. Ohio Constitution and the Right to Bail

In Ohio, the right to bail was part of the original Constitution of 1802 that was ratified as part of Ohio's becoming a State. Unlike the federal constitution's simple ban on excessive bail, the Ohio Constitution explicitly guaranteed bail:

> 12. That all persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption is great; and the privilege of the writ of habeas corpus shall not be suspended, unless when the case of rebellion or invasion, the public safety may require it.

Ohio Const. of 1802, Article VIII, Sec. 12.

The Constitution of 1851 included both a right to bail and a prohibition on excessive bail:

> Section 9. All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great.--Excessive bail

> shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Ohio Const. of 1851, Art. I, Sec. 9.

This remained the constitutional guarantee with respect to bail until 1997, when Art. I, Sec. 9 was amended to provide for the denial of bail in non-capital cases – but only when the accused represented a substantial risk of danger and where there is compelling evidence of guilt:

> All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who 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. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.
>
> The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures 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.

Ohio Const. Art. I, Sec. 9 (eff. Jan. 1, 1998).

Thus, unlike the federal system, which does not provide a constitutional right to release and further provides for pretrial detention when a defendant poses either a risk of flight or of danger, *Salerno,* Ohio has always provided a constitutional right to release in all non-capital cases with the recent exception for felony cases where the proof is evident or the presumption great and where the defendant poses *a substantial risk of danger* to any person or to the community. Ohio continues to part ways with the federal system in that the *Ohio Constitution does not provide for pretrial detention based on a risk of flight in noncapital cases*.

B. Pretrial Detention and Bail Reforms: Pre-1980

Until the 1960s, the prevailing practice in trial courts throughout the United States was that, at least theoretically, bail would be set on the basis of the risk that the defendant would not subject him- or herself to the jurisdiction of the trial. Subjecting oneself to the jurisdiction of the trial court meant two things:

1. Be present at all proceedings, through sentencing (if applicable); and
2. Refrain from corrupting the trial process via witness tampering or similar efforts to obstruct justice.

See generally, United States v. Graewe, 689 F.2d 54 (6th Cir. 1982).

While protecting the general safety of the community was not a recognized bail consideration at that time, the practice of many judges was to the contrary. In Cuyahoga County, for example, it was commonplace for judges to set financial bonds in non-capital cases that bore no rational relationship to a defendant's risk of flight and were simply used as a means to "keep the bad guy in jail until the jury can convict him." And Cuyahoga County was hardly unique in this regard.[1]

In the late 1960s, the movement for bail reform became focused on including considerations of the risk of danger to the community posed by the defendant. President Nixon proposed that Congress consider this with respect to the bail provisions of the United States

[1] *See,* Karnow, Curtis, *Setting Bail for Public Safety*, 13 Berkely Journal of Criminal Law 1, 5, 7 n.43 (2008). *See also*, Testimony of Attorney General Robert F. Kennedy on Bail Legislation Before the Subcommittee on Constitutional Rights and Improvements in Judicial Machinery of the Senate Judiciary Committee, August 4, 1964 (hereinafter Testimony of Attorney General Kennedy) ("our bail 'setting process is unrealistic and often arbitrary. Various studies demonstrate that bail is set without regard to a defendant's character, family ties, community roots or financial conditions. Rather, what is often the sole consideration in fixing bail is the nature of the crime.").

Code.[2] While this did not occur, Congress did add a pretrial detention provision to the District of Columbia criminal code in 1970 which enabled judges to deny bail altogether in noncapital cases, either because of an undue risk of flight or because the defendant posed a significant danger to the community at large.[3] Other states followed suit, although pretrial detention continued to be a minority position.

C. Pretrial Detention and Bail Reform in the 1980s to Present: A Review of Federal Bail Reform

1. The Federal Bail Reform Act of 1984

The federal Bail Reform Act of 1984 represented a watershed in bail reform that was intended to be a compromise which would make pretrial release more readily attainable for those who posed lower risks of flight or danger, while allowing prosecutors, in a transparent manner, to deny bail outright to those who posed a risk of flight and/or danger to any person or the community.

To effectuate these goals, 18 U.S.C. 3142 established a procedure whereby prosecutors were entitled to a hearing where they would have the opportunity to prove by clear and convincing evidence (aided by presumptions in certain types of cases) that no conditions of release would adequately insure against a defendant's risk of flight and/or danger to the community. At the same time, when prosecutors did not avail themselves of this pretrial detention avenue, the judicial officer was prohibited from setting a financial condition that "results in the pretrial detention of the person." 18 U.S.C. 3142(c)(2).

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[2] Mitchell, John, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 Va. L. Rev. 1223 (1969).

[3] *United States v. Edwards,* 430 A.2d 1321 (D.C. App. 1981).

The goal of the federal Bail Reform Act was to close the back door of using high monetary bonds to effectively detain persons because they posed a risk of danger to the community which the legislative history acknowledged was an historic *sub rosa* practice.[4]

2. The Federal Experience Since 1984

The Bail Reform Act of 1984 came on the heels of the Pretrial Services Act of 1982, which put into place a nationwide network of federal pretrial service support which has become a significant evidence-based alternative to pretrial detention.[5] As a result of the Pre-Trial Services Act, federal courts have greatly expanded the role of pretrial services offices to (1) provide initial screening of defendants to identify whether conditions of release, particularly non-financial conditions, will allow for the defendant's release as opposed to pretrial detention, and (2) to monitor those released prior to trial to ensure compliance with conditions of release.

II. Ohio's Bail System and Implementation of Reform

A. The Statutory and Rules Framework Prior to the Constitutional Amendment of 1998

Prior to the Ohio constitutional bail amendment of 1998, Crim. R. 46 (pre-July 1, 1998) was different than its current version in several significant respects. The text of the pre-1998 Rule 46 included an explanation of the purpose and the right to bail. It stated:

> "(A) Purpose of and right to bail
>
> "The purpose of bail is to ensure that the defendant appears at all stages of the criminal proceedings. All persons are entitled to bail, except in capital cases where the proof is evident or the presumption great.

[4] S. Rep. No. 225, 98th Cong., 1st Sess., 1983.

[5] 18 U.S.C. 3152.

This section was removed in the 1998 amendment of Crim. R. 46 and not restored in subsequent amendments.

The text of the pre-1998 version of the Rule included a preference for personal recognizance and then unsecured bonds, with secured bonds being a less-favored alternative:

> (C) Preconviction release in serious offense cases
>
> Any person who is entitled to release under division (A) of this rule shall be released on personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judge or magistrate, unless the judge or magistrate determines that release will not ensure the appearance of the person as required. Where a judge or magistrate so determines, he or she, either in lieu of or in addition to the preferred methods of release stated above, shall impose any of the following conditions of release that will reasonably ensure the appearance of the person for trial or, if no single condition ensures appearance, any combination of the following conditions.
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> (D) Preconviction release in petty offense cases
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> A person arrested for a misdemeanor and not released pursuant to Crim.R. 4(F) shall be released by the clerk of court, or, if the clerk is not available, the officer in charge of the facility to which the person is brought, on the person's personal recognizance, or upon the execution of an unsecured appearance bond in the amount specified in the bail schedule established by the court. If the clerk or officer in charge of the facility determines pursuant to division (F) of this rule that release will not reasonably ensure appearance as required, the person shall be eligible for release by doing any of the following, at the person's option: * * *

The 1998 amendments to Rule 46 deleted the above preferences and, instead, rewrote the current Rule at sections (A) and (B) to give courts discretion to set any type of bail (including secured financial bond) in any type of case. The staff note accompanying the 1998 Rule amendment explains this change:

> Rule 46 was reorganized in keeping with the Constitutional Amendment to Article I, Section 9 passed by Ohio's voters on November 4, 1997. This amendment allows a court to determine at any time the type, amount, and conditions for bail in all cases where incarceration is a possible punishment. Therefore, Crim. R. 46 now applies the same procedures to all offenses without regard to whether the alleged offense is serious or petty.

At first reading, it might appear that the revision of the rule was necessary to comply with the 1997 constitutional amendment that provided: "[w]here a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail." Article I Section 9. However, this deletion was unnecessary. Even though the Ohio Constitution now provides that a court may determine the type, amount, and conditions to bail at any time, it does not vest judges with unfettered discretion to set bail. Nor does the Constitution outlaw rules of criminal procedure that provide judges with guidance on (1) how to set bail within the confines of the state and federal constitutions and/or (2) establish presumptions against financial bonds where appropriate.

To the contrary, the Ohio Constitution requires the court to provide these procedures. Article I Section 9 (stating, "[p]rocedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) [mandating the Supreme Court prescribe the rule governing practice and procedure of courts] of the Constitution of the State of Ohio.

B. Post-1998 Reforms

Since 1998, Ohio has passed a pretrial detention statute -- R.C. 2937.222. In addition, Crim. R. 46 has been amended to recognize that a risk of danger to the community is a consideration in establishing release conditions. To this extent, Ohio has parroted the federal reforms.

But what Ohio failed to do was to include a critical aspect of the federal Bail Reform Act -- the provision that ensures that "the judicial officer may not set a financial condition that results in the pretrial detention of the person." As a result, Ohio has permitted the backdoor approach to pretrial detention -- financial conditions that are used to effectuate pretrial detention. Meanwhile, the front-door approach -- detaining defendants pretrial pursuant to R.C. 2937.222

by proving by clear and convincing evidence at a hearing that the likelihood of conviction is strong and the risk of danger is unacceptable -- has, at least in Cuyahoga County, been left unused.

III. Grading Ohio's Current System of Pretrial Release

A. Are We Effectively and Economically Using Financial Conditions?

In our experience financial conditions of release are being misused to the detriment of persons who are low risks of flight. The fortunate portion of this population find themselves spending money they cannot afford to spend for cash bonds or secured bonds in order to be able to continue on with stable family lives and employment. Ironically, it is these factors of stable family life and employment which are the ties to the community that make any type of cash or secured bond unnecessary.

The less fortunate portion of this population find themselves sitting in jail despite significant ties to the community that insure against a risk of flight – because they cannot beg or borrow the money needed to make their bond. As a result, their stability in the community is threatened – jobs are lost, child support falls in arrears, family relationships are strained.[6] Without ever having been found guilty of any crime, much less incarcerated after conviction, these people are punished despite being lifelong residents of their county who have no intention of failing to appear.[7]

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[6] *See*, Cuyahoga County Bail Task Force, Report and Recommendations, March 16, 2018, at 7 (hereinafter Cuyahoga County Bail Task Force Report) citing Clark, John and Logvin, Rachel Sottile, *Enhancing Pretrial Justice in Cuyahoga County: Results from a Jail Population Analysis and Judicial Feedback* (Sept. 20, 2017, Pretrial Justice Institute) (hereinafter PJI Report).

[7] *See*, Testimony of Attorney General Kennedy.

And pretrial detention in Cuyahoga County is not an occasional occurrence. A recent study revealed that twenty-five percent of the felony pretrial population were detained during the entirety of pretrial proceedings and that the average period of detention of the more fortunate seventy-five percent who eventually were released was still seventeen days.[8] Notably, not one person was detained pursuant to R.C. 2937.222.

When offenders are charged with fourth and fifth degree non-violent, non-sex felonies and cannot post bond, pretrial detention undermines the goals of sentencing. R.C. 2929.13(B)(1) recognizes that, in the absence of aggravating factors involving offense conduct or criminal history, persons convicted of these offenses – if found guilty -- will be sentenced to community control sanctions. Yet they find themselves incarcerated prior to trial because their poverty precludes them from posting what many in the criminal justice system would consider a modest bond. A recent study in Cuyahoga County revealed that twenty-eight percent of all defendants whose bond was set at $5000.00 or less never posted bond prior to the disposition of their case.[9]

In these and many other low-level cases, the solution for many defendants is to plea bargain in order to get out of jail immediately – even if they believe they are innocent of the charge.[10] One study revealed that felony defendants in pretrial detention were 13% more likely to be convicted and that misdemeanor defendants in pretrial detention were 7% more likely to be

[8] Cuyahoga County Bail Task Force Report at 7, citing PJI Report at 3.

[9] Cuyahoga County Bail Task Force Report at 7, citing PJI Report at 3.

[10] Cuyahoga County Bail Task Force Report at 7, citing Schnacke, *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial,* pp. 50-51**.**

convicted.[11] And attorneys confronted with these situations are hard-pressed to urge their clients to fight a weak case when the price of victory is months of incarceration prior to trial. Pretrial detainees who go to trial are also, in our experience, hampered in their defense. A client who is released can assist in identifying potential witnesses and in helping counsel prepare a defense. Meeting in a jailhouse conference room (or even worse, through a window by phone) is not optimal trial preparation. Not surprisingly, one study found that pre-trial release decreases the probability of being found guilty by 15.1% -- while much of this disparity was attributable to an 11.8% reduction in the probability of pleading guilty,[12] we believe the remaining difference can be attributed, at least in part, to the ability to effectively present a defense.

Pretrial detainees oftentimes find themselves serving more severe sentences than similarly situated counterparts who were released prior to disposition. One study showed that low-risk defendants detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison than low-risk defendants released at some point prior to case disposition; moderate and high-risk defendants are approximately three times more likely to be incarcerated than similar defendants.[13] And the period of incarceration tends to be longer for the pretrial detainee as compared pretrial release:

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[11] Leslie and Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments* (2016). *Accord,* Justice Policy Institute, *Bail Fail: Why the U.S. should end the practice of using money for bail* (September 2012).

[12] Dobbie, W., Goldin, J., Yang, C.S., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*. American Economic Review, 108(2), 201-40 (2018) (hereinafter, Dobbie).

[13] Arnold Foundation, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (November 2013).

Jail sentences are 2 to 3.5 times longer for those detained until trial or disposition (depending on the risk level of the defendant) and prison sentences are 2 to 2.84 times longer.[14]

Nor does disparity stop when the pretrial detainee has completed his incarceration. Pre-trial release decreases the likelihood of rearrest following case disposition by fifteen percent, which is a 46.9 percent change; and pre-trial release increases the probability of employment in the formal labor market three to four years after the bail hearing by 10.8 percentage points, a 28.6 percentage increase.[15]

These statistics are in accord with our experience. A client who is detained is hampered in showing a court at sentencing that steps toward rehabilitation have already been undertaken, that the client has steady employment and will enjoy familial support. As a result, more severe sentences are far more likely. In turn, serving a longer sentence makes the client's transition into the job market that much higher. Unfortunately, this also increased the risk of recidivism.

From a purely economic standpoint, the present over-utilization of cash/secured bonds is equally nonsensical. Everyone pays when a defendant is locked up instead of being released prior to trial. It costs far more to jail a defendant than to release the same person under supervision, even if that supervision includes electronic monitoring.[16] Persons who are released prior to trial and working are more likely to fulfill their familial support responsibilities. Persons

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[14] *Id.*

[15] Dobbie, 201-40.

[16] In 2018, Cuyahoga County charged the City of Cleveland a per diem of approximately $99 per inmate. Bamforth, Emily, *How Cuyahoga County Is Balancing Its 2018-2019 Budget*, cleveland.com (Oct. 11, 2017). In contrast, in 2015, *per diem* GPS-monitoring charges were $7 per supervisee. National Center for State Courts, Booking Process and Pretrial Services, Cuyahoga County, Final Report (Dec. 17, 2015) at 7.

who are released prior to trial are more likely to retain counsel, thus saving the system the cost of appointed counsel.

Conversely, persons who are pleading guilty to crimes they have not committed as an escape from pretrial detention then tax probation offices with needless supervision as part of a sentence to community control sanctions. Long-range, these individuals are oftentimes destined to a lifetime of unemployment/underemployment because of a criminal record that they never deserved.

B. Why Are High Bonds Set and What Can Be Done About It?

No prosecutor or judge wants to be responsible for the release of a person who then turns around and commits a nefarious offense. The safest way to prevent this is to make sure the defendant does not get released. As discussed above, this is unconstitutional, unjust and expensive. But it insulates prosecutors and judges from public blame – by perpetuating the same abuse of financial conditions that historically plagued the pretrial release system and was the impetus for the reforms discussed above.

Moreover, there is evidence that secured bonds are no more effective than unsecured bonds in protecting against a risk of flight or a risk of harm to the community (which, as discussed above, is an improper consideration for any financial condition of release). One comparison of unsecured and secured bonds revealed that persons released on unsecured bonds had higher court appearance rates and lower rates of arrests for crimes while on pretrial release.[17]

As a practical matter, in Cuyahoga County, a judge's bail determination is rarely challenged on appeal. Challenging an excessive bail determination requires filing a writ of

[17] Pretrial Justice Institute, *Unsecured Bonds: The As effective and most efficient pretrial release option* (October 2013).

habeas corpus in the court of appeals, which most court-appointed attorneys believe is beyond the scope of their appointment, in addition to being a procedural morass. Recently our Office successfully challenged an excessive bond amount via a writ of habeas corpus. *Palmer-Tesema v. Pinkney,* 8th Dist. No. 107025, 2018-Ohio-1852, 2018 WL 21492092018. But this Office, unlike many smaller public defender offices and most private firms, has the benefit of a separate appellate division with attorneys who, on the average, have more than 20 years of experience.

What is needed is a legal remedy to allow for an immediate appeal when a defendant is unable to meet the financial conditions of release – just as there is already a legal remedy for an immediate appeal when a defendant is ordered detained prior to trial. Such cases must be given a fast track that is even more expedited than an appellate court's accelerated calendar. And trial courts must be required to appoint counsel for an expedited bail appeal whenever a defendant is being held because of a failure to meet conditions of release. A statutory change is proposed in Appendix B of this memorandum.

C. Jailhouse Bonds in Misdemeanor Cases

The practice of having a bond schedule by which defendants can be released prior to ever appearing in court is, in our opinion, a useful form of triage to promptly release persons accused of low-level offenses. We suggest three changes in this regard. First, the Rules of Superintendence should mandate that these bond schedules be reviewed every two years by the individual courts to ensure that they remain reasonable.

Second, and more importantly, Crim. R. 46 needs to explicitly state that the bond schedules are not to be used as a factor in determining pretrial release conditions once a defendant is before the court. Pretrial release should be the product of the court's individual determination of a defendant's risk of flight and danger. The "one size fits all" bond schedules

are the antithesis of individual discretion and should only be used before a judicial officer becomes involved.

Third, in keeping with the change to Crim. R. 46, R.C. 2937.23(A)(2) needs to be amended to remove the provision that allows a judicial officer to rely upon a bond schedule in setting conditions of release.

D. Measuring Risk: Risk Assessment Tools

In Cuyahoga County, and particularly in the Cleveland Municipal Court (where we represent virtually all indigent defendants in both misdemeanor cases and in preliminary matters in felony cases), the courts have been employing validated risk assessment tools, most notably the Arnold Foundation's Public Safety Assessment (PSA). The PSA measures risk of offending while on release on a six-point scale with the lowest possible score being "1." A similar six-point scale is used to measure risk of flight. The defendant is then assigned a coordinate of between (1,1) and (6,6).

Our experience has been that judges have voiced criticism of the PSA's failure to adequately consider the nature of the offense charged in evaluating the risks of flight and danger. Perhaps as a result of this criticism, we have not seen a strong correlation between the PSA's score and the financial conditions imposed by the trial court. Our review of approximately 1400 felony cases (which did not include charges of murder or aggravated murder) where the Cleveland Municipal Court determined release conditions at the initial appearance after employing the PSA revealed little correlation between the PSA score and the financial conditions of release that were imposed on those individuals for whom cash or surety bonds were ordered. We observed that:

- Those defendants whose risk scores were (1,1), (1,2) or (2,1) were released on personal recognizance or unsecured bonds 30 percent of the time with an average cash/surety bond in the remaining cases of approximately $19,500.00.
- Those defendants whose risk scores were (3,3) were released on personal recognizance or unsecured bonds 18 percent of the time and the average cash/surety bond was approximately $22,000.00.
- Those defendants whose risk scores were (5,6), (6,5) or (6,6) were released on personal recognizance 3 percent of the time and the average cash/surety bond was approximately $28,000.00.

We are also mindful of the criticism that these tools can be racially biased and tend to overstate the risk of dangerousness among African Americans because the risk assessment is tethered to a criminal justice system which is already biased in this regard.[18]

In the end, we recommend that validated risk assessment tools be available as one consideration in assessing conditions of release under Crim. R. 46 but that the Rule should not assign any particular weight to the tool. The validation of any particular risk assessment tool should be left to the sound discretion of the trial court in the absence of a statutory recognition that a particular assessment tool has been validated.

E. Evidence-Based Non-Financial Conditions

In our experience, when Cuyahoga County judges order a defendant be subjected to Court Supervised Release, those defendants abide by the conditions of release. Summit County

[18] The ACLU and NAACP were among a large number of organizations that have criticized risk assessment tools in a recent statement. With respect to racial bias in the criminal justice system as a general matter, see Balko, Radley, *There's overwhelming evidence that the criminal justice-system is racist. Here' the proof.* Washington Post (September 18, 2018) (reviewing multiple studies).

has found that its use of pretrial services has "saved money while improving pretrial processes and reducing unnecessary pretrial detention."[19]

While non-financial conditions that work can include more sophisticated undertakings such as GPS monitoring, there are simple tasks that are also effective. For example, in our Office, felony defendants who are on pretrial release receive a text message the day before court appearances; clients have commented to us about the value of this reminder. While we take this on as part of our client representation, there are pretrial services offices that employ the same practice.[20]

Our single greatest concern with non-financial conditions is that the costs of conditions such as GPS monitoring are passed on to the defendant in the form of court costs. As a result, a defendant who is charged with a serious felony and is found guilty of a misdemeanor, either via a plea or after trial, can incur unnecessary and burdensome expenses.

To that end, in that defendants do not pay for the cost of incarceration when detained prior to trial, the costs of non-financial conditions of release (which are significantly less than incarceration) should also not be included as court costs.

IV. Proposed Rules Changes

Based on the foregoing, we have proposed an amended Crim. R. 46 with an accompanying proposed Staff Note; a proposed new Sup. R. 36.020 to provide for biennial review of bond schedules; and an amended Sup. R. 37.02 to address bail bond schedule review. These are included in Appendix A.

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[19] Cuyahoga County Task Force Report at 5.

[20] Tashea, Jason, "*Text-message reminders are a cheap and effective way to reduce pretrial detention,"* ABA Journal -- Law Scribbler (July 17, 2018).

V. Proposed Statutory Changes

We are also proposing two statutory changes to R.C. 2937.23: An amendment to subsection (A)(2) to remove reference to bail bonds in a judge's determination of financial conditions and an additional subsection to provide for an immediate appeal when a person is detained because of an inability to meet a financial condition of release. The amendments to R.C. 2937.23 are set forth in Appendix B.

Conclusion

The Office of the Cuyahoga County Public Defender appreciates the Task Force's consideration of this memorandum and is available to assist in the important work of the Task Force in any way possible.

APPENDIX A: RULES AMENDMENTS

PROPOSED AMENDMENT TO CRIMINAL RULES

Rule 46. ~~Bail~~ Pretrial Release and Detention

(A) Pretrial Release.

(1) Purpose of pretrial release. The court shall release the defendant on the least restrictive conditions that, in the discretion of the court, will reasonably assure that the defendant will appear in court, that the defendant will not pose a substantial risk of safety to any person or the community, and that the defendant will not obstruct the orderly prosecution of any charge pending against him.

(~~1~~ 2) ~~Types and amounts of bail.~~ **Personal recognizance.** When consistent with the purposes of pretrial release, ~~A~~any person who is entitled to release shall be released upon ~~one or more of the following types of bail in an amount set by the~~ court ~~:1)~~ the personal recognizance of the accused.

(3) Financial conditions of release. In the event the court finds that release on personal recognizance will not reasonably assure that the defendant will appear in court, the court may impose ~~or upon~~ one or more ~~of the following types~~ of ~~bail~~ financial conditions in the amount set by the court. ~~:~~ Financial conditions of release shall be of an amount and type that are the least costly to the defendant and still in keeping with the purposes of pretrial release. The court may not impose a financial condition that results in the pretrial detention of the person. Financial conditions shall take the following forms:

(1 a) ~~The personal recognizance of the accused or~~ ~~a~~An unsecured bail bond;

(~~2~~ b) A bail bond secured by the deposit of ten percent of the amount of the bond in cash. ~~Ninety percent of~~ ~~t~~The deposit shall be returned upon compliance with all conditions of the bond;

(~~3~~c) A surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.

A court shall presume, subject to rebuttal, that a secured financial condition of release is not necessary if the defendant either:

(i) Is charged with a crime other than a crime of violence or a registerable sex offense; or

(ii) Has appeared in court pursuant to a summons.

(~~B~~4) Non-financial ~~C~~conditions of release ~~bail~~. The court may impose any of the following conditions of ~~bail~~ release to the extent necessary to ensure the purposes of pre-trial release:

(~~1~~a) Place the person in the custody of a designated person or organization agreeing to supervise the person;

(~~2~~b) Place restrictions on the travel, association, or place of abode of the person during the period of release;

(~~3~~c) Place the person under a house arrest, electronic monitoring, or work release program;

(4d) Regulate or prohibit the person's contact with the victim;

(~~5~~e) Regulate the person's contact with witnesses or others associated with the case upon proof of the likelihood that the person will threaten, harass, cause injury, or seek to intimidate those persons;

(~~6~~f) Require ~~a person who is charged with an offense that is alcohol or drug related, and who appears to need treatment, to attend treatment while on bail;~~ assessment for drug and/or alcohol treatment and compliance with treatment recommendation for any person who is either:

(i) charged with an alcohol or drug-related offense;

(ii) or for whom there is clear and convincing evidence that the alleged criminal conduct is related to drug or alcohol use and the accused is in need of such treatment.

(g) Require compliance with alternatives to pretrial detention, including but not limited to diversion programs, reporting, or comparable alternatives.

(~~7~~h) Any other constitutional condition considered reasonably necessary to ensure ~~appearance or public safety~~ the purposes of pretrial release.

(~~C~~ B) Factors. In determining the types, amounts, and conditions of ~~bail~~ pretrial release, the court shall consider all relevant information, including but not limited to:

(1) The nature and circumstances of the crime charged, and specifically whether the defendant used or had access to a weapon;

(2) The weight of the evidence against the defendant;

(3) The confirmation of the defendant's identity;

(4) The defendant's family ties, employment, financial resources, character, mental condition, length of residence in the community, jurisdiction of residence, record of convictions, record of appearance at court proceedings or of flight to avoid prosecution;

(5) Whether the defendant is on probation, a community control sanction, parole, post-release control, bail, or under a court protection order.

(6) When available from either party or upon the court's own initiative, and without causing unreasonable delay in the court's pre-trial release determination, the results of a validated risk-assessment tool recognized as reliable by statute or by the court.

~~**(D) Appearance pursuant to summons.** When summons has been issued and the defendant has appeared pursuant to the summons, absent good cause, a recognizance bond shall be the preferred type of bail.~~

(~~E~~ C) Amendments. Consistent with the purpose of pretrial release, a court, at any time, either on the court's own motion or by motion of a party, may order the

addition, elimination or amendment of any previously imposed condition. ~~additional or different types, amounts, or conditions of bail~~.

(~~F~~ D) Information need not be admissible. Information stated in or offered in connection with any order entered pursuant to this rule need not conform to the rules pertaining to the admissibility of evidence in a court of law. Statements or admissions of the defendant made at a bail proceeding or in the course of compliance with a condition of release shall not be received as substantive evidence in the trial of the case.

(~~G~~ E) Bond schedule.

(1) In order to expedite the prompt release of a defendant prior to initial appearance, ~~E~~each court shall establish a bail bond schedule covering all misdemeanors including traffic offenses, either specifically, by type, by potential penalty, or by some other reasonable method of classification. The court also may include requirements for release in consideration of divisions (B) and (C)(5) of this rule. The sole purpose of a bail bond schedule is to allow for the consideration of release prior to the defendant's initial appearance.

(2) A bail bond schedule shall not be considered as "relevant information" under division (C) of this rule.

(3) Each municipal or county court shall, by rule, establish a method whereby a person may make bail by use of a credit card. ~~No credit card transaction shall be permitted when a service charge is made against the court or clerk unless allowed by law.~~

(~~H~~ F) Continuation of ~~bonds~~ release conditions. Unless otherwise ordered by the court pursuant to division (E) of this rule, or ~~if application is made by the surety for discharge~~ as required by statute, the same conditions of pretrial release ~~bond~~ shall continue until the return of a verdict or the acceptance of a guilty plea. In the discretion of the court, the same conditions of pretrial release ~~bond~~ may also continue pending sentence or disposition of the case on review. Any provision of a bond or similar instrument that is contrary to this rule is void.

(~~I~~ G) Review of Release Conditions.

(1) Initial hearing. A person who has been arrested, either pursuant to a warrant or without a warrant, and who has not been released under this Rule, shall be brought before the court for an initial bail hearing no later than the second court day following the arrest. A hearing under this Rule may be combined with an initial appearance pursuant to Crim. R. 5(A).

(2) Second hearing. If, at the initial bail hearing before the court, the defendant was not represented by counsel, and if the defendant has not yet been released, a second hearing shall be held no later than the second court day following the initial bail hearing. An indigent defendant shall be afforded representation by appointed counsel at State's expense at this second hearing.

(~~I~~ H) Failure to appear; breach of conditions. Any person who fails to appear before any court as required is subject to the punishment provided by the law, and any bail given for the person's release may be forfeited. If there is a breach of condition of bail, the court may amend the bail.

(~~J~~ I) Justification of sureties. Every surety, except a corporate surety licensed as provided by law, shall justify by affidavit, and may be required to describe in the affidavit, the property that the surety proposes as security and the encumbrances on it, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged, and all of the surety's other liabilities. The surety shall provide other evidence of financial responsibility as the court or clerk may require. No bail bond shall be approved unless the surety or sureties appear, in the opinion of the court or clerk, to be financially responsible in at least the amount of the bond. No licensed attorney at law shall be a surety.

(**J) Pretrial Detention.** A defendant may be detained pretrial, pursuant to a motion by the prosecutor or the court's own motion, in accordance with the standards and procedures set forth in the Revised Code.

Staff Note to Amendments

Crim. R. 46 has been amended to improve efficiency in setting bail in an amount that effectively ensures (1) the defendant's continued presence at future proceedings, (2) that future proceedings will not be impeded by any effort to obstruct justice, and (3) the safety of any person

as well as the community in general. Crim. R. 46 continues to entrust to the judicial officer's sound discretion the setting of particular conditions of release that will be imposed on a particular defendant in a particular case. At the same time, the amendments seek to ensure that excessive monetary bonds are not used as a means of simply denying a defendant bail without benefit of a detention hearing prescribed by statute. See R.C. 2937.222.

The title of Crim. R. 46 has been changed to recognize that "pretrial release" is more than simply the assignment of financial conditions of release which the term "bail" connotes to many. The reference to pretrial detention recognizes that denial of conditions of release is available under the Revised Code in those cases where no conditions of release are reasonably available. Subsection (J) has been added to make clear that the procedures set forth in R.C. 2937.221, pertaining to pretrial detention hearings are recognized as those that should be followed in detention hearing (thus precluding any concerns that the statutory procedures are in conflict with the Rule).

Subsection (A) recognizes that conditions of release include both financial and non-financial conditions, either or both of which may be employed by the judicial officer in the exercise of the judicial officer's discretion. Financial conditions should be the least costly to reasonably ensure the defendant's presence at future proceedings; limiting financial conditions to ensuring against risk of flight is consistent with subsection (H), which provides that bond can only be forfeited when a defendant fails to appear at a future proceeding. The subsection's list of non-financial conditions is not exclusive, but identifies a number of non-financial conditions already employed by courts in Ohio and elsewhere.

Subsection (A) also provides that, in cases where a defendant is charged with a non-violent and non-sex offense, there should be a presumption that cash or secured bonds are unnecessary. Other non-financial conditions may nonetheless be applicable. In that a significant number of these defendants first appear in court pursuant to summons, as opposed to arrest, subsection (A)(3)(ii) also recognizes a recognizance bond as the presumptive type of financial condition for many of these defendants. Finally, it should be noted that this presumption is a rebuttable one and thus the ultimate decision still lies in the exercise of sound discretion by the judicial officer.

Subsection (B) (formerly subsection (C)) has been amended to provide for the use of validated risk-assessment tools, which are already being employed by courts in Ohio and elsewhere. Individual courts are not required to adopt risk assessment tools institutionally and initial bail hearings should not be unreasonably delayed in order to employ such tools. However, when a validated risk assessment tool is available to the judicial officer, including when brought to the judicial officer's attention by either or both of the parties at a bail hearing, the subsection ensures that the validated risk assessment tool will be part of the totality of factors considered by the judicial officer in exercising discretion to set conditions of release. In the absence of a statutory prescription that a particular tool is valid, judicial officers have the discretion to determine the validity of any particular risk assessment tool. Even when a risk assessment tool has been validated, the weight to be given to that tool in any particular case rests within the

judicial officer's discretion and the Rule expresses no view as to what, if any, value should be given to validated risk assessment.

Subsection (E) recognizes that a bond schedule is to be used for the sole purpose of securing a release before an initial appearance, and is not to be considered by a judicial officer during a bond hearing.

Subsection (F) (formerly (H)) has been amended in a non-substantive manner. The Rule permits a surety to apply to the court for amendment of conditions of release, which is consistent with R.C. 2937.40(A), which uses the term "surety on the recognizance or the depositor." By using the term "as provided by statute," the amended Rule tethers the modification of release conditions in this regard to the Revised Code, thus clarifying that the Rule is not creating a substantive right for the surety or depositor to be heard.

Subsection (G) has been amended to ensure that a person arrested who has not already been released pursuant to posting a bond specified in a bond schedule or prescribed in an arrest warrant, will appear before a judicial officer no later than the second court day after arrest. If the defendant's appearance at that time is without counsel, and if the defendant has not yet been released, then a second hearing, with the opportunity for the defendant to be represented by counsel, must take place within two court days after the initial court appearance.

PROPOSED AMENDMENTS TO RULES OF SUPERINTENDENCE

Sup. R. 36.020 [NEW RULE]

Review of Bail Bond Schedule. Each court shall review, no less than once every two years, its bail bond schedule established pursuant to Crim. R. 46 to ensure that the schedule fairly advances the principles of pretrial release set forth in Crim. R. 46 in a manner consistent with judicial economy and not unnecessarily burdensome upon persons arrested.

Sup. R. 37.02

[The following new subsection shall be added]

(C) Report of Administrative Judge Regarding Pretrial Release and Detention.

Each administrative judge of a court of common pleas shall submit a semi-annual report of the cases where pretrial release has been denied pursuant to R.C. 2937.222, or where the defendant was detained for more than ten days awaiting indictment or trial in a case pending in the court of common pleas (including detention of ten or more days following bindover). The report shall indicate the nature of the charges, the conditions of release imposed and the length of detention prior to verdict (whether verdict after trial or via plea).

APPENDIX B: STATUTORY AMENDMENTS

R.C. 2937.23 Bail amount

(A)

(1) In a case involving a felony or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code when the victim of the offense is a peace officer, the judge or magistrate shall fix the amount of bail.

(2) In a case involving a misdemeanor or a violation of a municipal ordinance and not involving a felony or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code when the victim of the offense is a peace officer, the judge, magistrate, or clerk of the court may fix the amount of bail ~~and may do so in accordance with a schedule previously fixed by the judge or magistrate~~. If the judge, magistrate, or clerk of the court is not readily available, the sheriff, deputy sheriff, marshal, deputy marshal, police officer, or jailer having custody of the person charged may fix the amount of bail in accordance with a schedule previously fixed by the judge or magistrate and shall take the bail only in the county courthouse, the municipal or township building, or the county or municipal jail.

(3) In all cases, the bail shall be fixed with consideration of the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of the defendant appearing at the trial of the case.

(B) In any case involving an alleged violation of section 2903.211 of the Revised Code or of a municipal ordinance that is substantially similar to that section, the court shall determine whether it will order an evaluation of the mental condition of the defendant pursuant to section 2919.271 of the Revised Code and, if it decides to so order, shall issue the order requiring the evaluation before it sets bail for the person charged with the violation. In any case involving an alleged violation of section 2919.27 of the Revised Code or of a municipal ordinance that is substantially similar to that section and in which the court finds that either of the following criteria applies, the court shall determine whether it will order an evaluation of the mental condition of the defendant pursuant to section 2919.271 of the Revised Code and, if it decides to so order, shall issue the order requiring that evaluation before it sets bail for the person charged with the violation:

(1) Regarding an alleged violation of a protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code, that the violation allegedly involves conduct by the defendant that caused physical

harm to the person or property of a family or household member covered by the order or agreement or conduct by that defendant that caused a family or household member to believe that the defendant would cause physical harm to that member or that member's property;

(2) Regarding an alleged violation of a protection order issued pursuant to section 2903.213 or 2903.214 of the Revised Code, or a protection order issued by a court of another state, as defined in section 2919.27 of the Revised Code, that the violation allegedly involves conduct by the defendant that caused physical harm to the person or property of the person covered by the order or conduct by that defendant that caused the person covered by the order to believe that the defendant would cause physical harm to that person or that person's property.

(C) As used in this section, "peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(D) (1) An order imposing financial conditions of pretrial release that requires the posting of cash or a secured bond or property is a final appealable order and, if indigent, the defendant shall be appointed counsel for the appeal. In an appeal pursuant to this division, the court of appeals shall do all of the following:

(a) Give the appeal priority on its calendar;

(b) Liberally modify or dispense with formal requirements in the interest of a speedy and just resolution of the appeal;

(c) Decide the appeal expeditiously;

(d) Promptly enter its judgment affirming, modifying or reversing the order of the trial court.

(2) The pendency of an appeal under this section does not deprive the trial court of jurisdiction to conduct further proceedings in the case or to further consider the order imposing conditions of pre-trial release. In the event the defendant is released during the pendency of the appeal the appeal shall be deemed moot and the court of appeals shall dismiss the appeal.