ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel.* Woodrow L. Fox, *et al.*,	:	
Relators,	:	
	:	Case No. 2013-0364
v.	:	
Gary Walters Clerk of Court for the Court of Common Pleas, Licking County, Ohio, *et al.*,	:	Original Action in Mandamus
Respondents.	:	

MERIT BRIEF OF RELATORS WOODROW L. FOX AND WOODY FOX BAIL BONDS, LLC

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STATEMENT OF FACTS

This is a matter of first impression before the Court. It arises out of Respondents' refusals to accept surety bail bonds from Relators when an order of bail is set pursuant to Criminal Rule 46(A)(2) and instead require a cash-only payment.

Relator Woodrow L. Fox is licensed by the Ohio Department of Insurance to issue surety bail bonds and is the owner of Relator Woody Fox Bail Bonds, LLC (collectively, "Fox"). Complaint for Mandamus, Exhibit C; Stipulation of Evidence, No. 2. Fox is headquartered in Columbus, Ohio, and also maintains a prominent office in Newark, Ohio across from the Licking County courthouse. *Id.* Its business is based upon securing the release of those persons in jail by providing surety bail bonds and assuming liability for the person's appearance in court. *Id.*

Starting in about 2010, Respondent Gary Walters, in his capacity as the Clerk of Court for the Licking County, Ohio Court of Common Pleas ("Clerk"), began to refuse posting of a surety bail bond from Fox in satisfaction of a bail order set under Criminal Rule 46(A)(2) that provides a person must pay ten percent of the bail amount in cash (commonly known as a "10% Bond"). *Id.* Fox was advised that Respondents, the Court of Common Pleas, Licking County, Ohio, and Judges David Branstool and Thomas Marcelain (through their respective capacities as judges in the Common Pleas Court) (collectively, "Common Pleas Court"), forbid the Clerk to accept anything but cash when a 10% Bond had been set. *Id.*

On or about August 28, 2012, Fox, through counsel, advised the Licking County Prosecutor, Kenneth W. Oswalt, that when a 10% Bond was set, Respondents refused to accept a surety bail bond. *Id.* In response, the Prosecutor stated that Respondent

was not obligated to the bond. *Id.*; Complaint for Mandamus, Exhibit B; Stipulation of Evidence, No. 1. Specifically, the Prosecutor advised Relators Fox that, "the Judge who sets [a 10% Bond] will expect the Clerk of Courts to accept only the type(s) of bond(s) specifically approved by the assigned Judge." *Id.*

ARGUMENT

PROPOSITION OF LAW I

IT IS UNCONSTITUTIONAL TO PROHIBIT THE POSTING OF A SURETY BOND WHEN BAIL IS SET UNDER CRIMINAL RULE 46(A)(2).

Understanding Bail, Surety Bail Bonds, and Bail Bonding Companies

"Bail" or "bond" is an amount of money in cash or guaranteed by a surety bond for the purpose of making sure that a particular person attends all required court appearances. R.C. § 2937.22 (A); http://www.insurance.ohio.gov/Agent/Pages/SuretyBailBond.aspx (accessed June 10, 2013). It allows a person to be released from jail until the criminal case is disposed. R.C. § 2937.22(A). It may also be set to secure a witness's appearance in a criminal matter. R.C. §§ 2937.16-18. No matter the type, amount, or conditions of bail, all orders of bail must be related to the sole purpose of securing a person's attendance in court. *State ex rel. Baker v. Troutman,* 50 Ohio St.3d 270, 553 N.E.2d 1053 (1990).

"Cash bond" is the full amount of the bail that is required to be paid in cash before a defendant may be released from jail. Ohio Adm.Code § 3901-1-66(B)(1). A "surety bail bond" is a court accepted bond instrument from a licensed insurance

company that is issued for or on behalf of an incarcerated person, who is held under criminal charges. Ohio Adm.Code § 3901-1-66(B)(3) .

Further, a "surety bail bond agent" is a person who is licensed by the Ohio Department of Insurance to sell surety bonds and authorized to conduct business in the State of Ohio. *See* R.C. § 3905.83, *et seq.;* http://www.insurance.ohio.gov/Agent/Pages/SuretyBailBond.aspx (accessed June 10, 2013). In order to obtain and maintain a license, all agents are required to pass a test and attend a minimum number of continuing education classes and be backed by an insurance company that sells surety bonds. *Id.* A "surety bond" is an agreement made between one or more persons and a bond agent where the surety bail bond agent agrees to post the necessary bail so that a person can be released from jail. *See Dep't of Liquor v. Calvert*, 195 Ohio App.3d 627, 2011 Ohio 4735 (6th Dist. No. S-10-055).

The surety bond agreement is backed by an insurance company contract that is signed by one or more persons and the surety bail bond agent on behalf of the insurance company. R.C. § 3905.83, *et seq.;* http://www.insurance.ohio.gov/Agent/Pages/SuretyBailBond.aspx (accessed June 10, 2013). The agreement is backed by sufficient cash or collateral to cover the full amount of the bail if the person misses his or her court date. *Id.* Only someone who has been licensed by the Ohio Department of Insurance may post a surety bond. *Id.* In practice, the surety bail bond agent will deliver a copy of the surety bond to the clerk of court to procure the person's release – at this stage, the agent does not pay cash to the clerk of court. *See* R.C. § 3905.932 (Prohibited Acts).

The law does not specifically define "sufficient surety." Certainly, the common definition of "sufficient" is simple – it is being "enough to meet the needs of a situation or a proposed end." http://www.merriam-webster.com/dictionary (accessed June 10, 2013). Under the Ohio Code, a "surety" is an insurer that agrees to be responsible for the fulfillment of the principal's obligation upon the principal's failure. R.C. § 3805.83(C) (Surety Bail Bond Agent Definitions). The *Smith* Court also defined "surety" as a "person who is primarily liable for the payment of another's debt or the performance of another's obligations." (Citation omitted.) *Smith v. Leis,* 106 Ohio St.3d 309, 2005 Ohio 5125, ¶ 62. Thus, a "sufficient surety" may be logically defined as a person who is willing and able to assume the liability for a third party should he or she fail to appear at the next scheduled criminal proceeding.

The Right to Bail in Ohio

Since its adoption in 1803, the Ohio Constitution has always guaranteed citizens who are not charged with a capital offense the right to be "bailable by 'sufficient sureties'." This first Constitution provided: "All persons shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great," and that "excessive bail shall not be required." *Smith v. Leis, supra*, at ¶¶ 19-20 2005 Ohio 5125, citing Ohio Constitution, Article VIII, Sections 12, 13, (1803). A new constitution was adopted in 1851, and this provision became Section 9, Article I. It was further amended to prohibit cruel and unusual punishment, consistent with the Eighth Amendment to the United States Constitution (1791).

In 1998, by popular vote, language was added to the bail provision to limit the

right to bail in cases where (1) there is evident proof or a great presumption of guilt that a person has committed a capital offense, or (2) there is evident proof or a great presumption of guilt that a person has committed a felony and poses a substantial risk of serious physical harm to any person or to the community. Ohio Constitution, Article I, Section 9. In addition, language was added to impart discretion to the courts to determine the type, amount, and conditions of bail. *Id.*

In 1973, the Ohio Legislature enacted R.C. § 2937.22, entitled "Form of Bail." Notably, the statute permits a person (*i.e.*, a surety) to assume liability for a third-party's appearance in court as a condition of bail. In pertinent part, the statute states:

> (A) Bail is *security for the appearance* of an accused to appear and answer to a specific criminal or quasi-criminal charge in any court or before any magistrate at a specific time or at any time to which a case may be continued, and not depart without leave. It may take *any* of the following forms:
>
> (1) The deposit of cash by the accused *or by some other person* for the accused;
>
> (2) The deposit by the accused *or by some other person* for the accused in form of bonds of the United States, this state, or any political subdivision thereof in a face amount equal to the sum set by the court or magistrate. In case of bonds not negotiable by delivery such bonds shall be properly endorsed for transfer.
>
> (3) The written undertaking *by one or more persons* to forfeit the sum of money set by the court or magistrate, if the accused is in default for appearance, which shall be known as a recognizance.

R.C. § 2937.22(A) (emphasis added). This section was not affected by the 1998 amendment to the Ohio Constitution. Rather, a separate section, R.C. § 2937.222, was enacted (which is not relevant to the matter at hand).

Also in 1973, the Court adopted Criminal Rule 46 to govern the procedure by which bail is set. In relevant part, this rule provided:

(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.

***

(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:

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

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

(3) Require the execution of an appearance bond in a specified amount, and the deposit with the clerk of the court before which the proceeding is pending of either twenty-five dollars or a sum of money equal to ten percent of the amount of the bond, whichever is greater. Ninety percent of the deposit shall be turned upon the performance of the conditions of the appearance bond;

(4) Require the execution of bail bond with sufficient solvent sureties, the execution of a bond secured by real estate in the county, or the deposit of cash or the securities allowed by law in lieu of a bond."

(5) Impose any other constitutional condition considered reasonably necessary to ensure appearance. Crim.R. 46 (pre-1998 amendment).

Throughout the years, numerous courts across Ohio were using Subsection (C)(4) to impose a cash-only bond to the exclusion of the other options available to the defendant, such as obtaining a surety bail bond, or providing real estate or other legal security as collateral. In addition, when a court ordered a cash-only bail under this

Subsection, the associated clerk of court refused to accept any other form of bail other than cash.

In 1993, a bail bondsman filed a complaint for mandamus with the First District Court of Appeals against the judges in the Hamilton County Court of Common Pleas and Hamilton County Municipal Court, and the Hamilton County Clerk of Courts seeking a writ of mandamus to compel the respondents to accept a surety bond whenever a monetary bond was set under Subsection (C)(4). *State ex rel. Jones v. Hendon,* 66 Ohio St.3d 115, 609 N.E.2d 541 (1993). The First District denied the writ and found that the trial court had the discretion to impose a cash-only bond to the exclusion of the other options in Crim.R. 46(C)(4). *State ex rel. Jones v. Hendon,* 1st Dist. No. C-910729 (April 29, 1992).

Upon appeal, this Court disagreed. The Court referred to its prior holding in *Locke* that found Section 9, Article I of the Ohio Constitution guarantees an absolute right to bail to those accused of a non-capital crime, as well as a right to a surety. *Id.* at 118 citing *Locke v. Jenkins*, 20 Ohio St.2d 45, 253 N.E.2d 757 (1969); *Baker v. Troutman*, 50 Ohio St.3d 270, 553 N.E.2d 1053 (1990) . The Court stated:

> We agree that Section 9, Article I [Pre 1998 Amendment] is silent as to the forms which bail may take and that Crim.R. 46(C) vests discretion in the judge to impose any of the five conditions listed in Crim.R. 46(C)(1) to (5) when not satisfied that the preferred conditions of release will reasonably ensure the accused's appearance. However, Crim.R. 46(C)(4) constitutes but a single condition which the judge may impose -- the condition of a bond. **Once a judge chooses that condition and sets the amount of bond, we find no legitimate purpose in further specifying the form of bond which may be posted.** Indeed, the **only apparent purpose in requiring a "cash-only" bond** to the exclusion of the other forms provided in Crim.R. 46(C)(4) **is to restrict the accused's access to a surety and, thus, to detain the accused in violation of Section 9, Article I**. ***

> Accordingly, we find that where a judge imposes a bond as a condition of release under Crim.R. 46(C)(4), the judge's discretion is limited to setting the amount of the bond. Once that amount is set, and the accused exercises his constitutional right to enlist a surety to post bail on his behalf, that being one of the options set forth in Crim.R. 46(C)(4), the clerk of courts must accept a surety bond to secure the defendant's release, provided the sureties thereon are otherwise sufficient and solvent. *Id.* at 118 (emphasis added).

Upon the 1998 amendment to the Ohio Constitution, Rule 46 was also amended. Section A that defined the purpose of bail was eliminated. Subsections (C)(1), (2), and (5) were moved to Section B and retitled, "Conditions of bail;" and the provision for a recognizance bond in Section C, along with subsections (C)(3) and (4) were moved to an entirely revamped Section A and retitled as a "type" of bail:

> (A) **Types and amounts of bail.** Any person who is entitled to release shall be released upon one or more of the following types of bail in the amount set by the court:
>
> (1) The personal recognizance of the accused or an unsecured bail bond;
>
> (2) A bail bond secured by the deposit of ten percent of the amount of the bond in cash. Ninety percent of the deposit shall be returned upon compliance with all conditions of the bond;
>
> (3) 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. Crim.R. 46(A) (amended 1998).

Other than relabeling subsections (C)(1) and (2) from conditions of bail to types of bail, the substance of Rule 46 saw few changes and had little impact upon certain Ohio courts. So again, in 2005, the issue of cash-only bail was addressed by this Court upon appeal of another denial by the First District, this time of a petition for a writ of habeas corpus filed by a criminal defendant. *Smith v. Leis*, 106 Ohio St.3d. 309, 2005

Ohio 5125, (2005).[1] In this case, the trial judge purposefully prevented the defendant's release from jail by setting bail at "$1,000,000 straight, cash-only."

One of the issues before the Court was whether the 1998 amendment to Article 9, Section I of the Ohio Constitution authorized a cash-only bail. The Court analyzed the history of the Ohio Constitution, the Revised Code, Crim.R. 46, as well as its own decisions in *Baker* and *Jones*. The Court concluded that the Constitution still prevented a cash-only bail and proffered five reasons why. *Id.* at ¶ 58. First, it addressed the new sentence in the 1998 amendment that states "[courts may] determine at any time the type, amount and conditions or bail." *Id.* at ¶ 59. Recognizing the duty to "give a construction to the Constitution as will make it consistent with itself," the Court found that the new language did not "authorize bail that would violate an accused's access to a surety." *Id.* at ¶¶ 59-60.

Second, the Court found that Section 9, Article I "unambiguously provides that all persons charged with an offense "shall be bailable by sufficient sureties [with two exceptions]." *Id.* at ¶ 62. The Court focused on two words: "shall" and "surety." It stated that "'shall' denotes that compliance with the commands of that statute is *mandatory.*'" (citation omitted.) *Id.* Further, the Court defined "surety" as a "person who is primarily liable for the payment of another's debt or the performance of another's obligation." *Id.*

Third, the Court presumed that the Ohio Legislature intended for its decisions in *Jones* and *Baker* to remain "viable precedent" when it proposed the 1998 amendment to Section 9, Article I. *Id.* at ¶ 63.

---

[1] By the time the *Smith* came before the Court, the defendant had been convicted and his writ of habeas corpus was rendered moot. However, the Court decided to consider the matter because it presented a properly debatable constitutional issue.

Fourth, the Court referred back to the second reason and stated, "even if the meaning of Section 9, Article I [was] ambiguous, the stated purpose of the amendment indicates that the General Assembly did not intend to overrule precedent by permitting a cash-only bail." *Id.* at ¶ 64. The Court reasoned that the purpose of the 1998 amendment was only to "expand the types of offenses and circumstances under which bail could be *denied, not to limit an accused's access to a surety once bail is granted.*" *Id.* .

Finally, the Court found that other jurisdictions throughout the nation had determined that cash-only bail orders violate the constitutional rights of certain accused persons to be "bailable by sufficient sureties." *Id.* at ¶ 65. For purposes of the case at bar, the most notable finding was issued by a Tennessee appellate court, which held:

> If the judge were to have discretion to require a cash-only bond, he would also arguably have the power, for instance, to demand that a defendant put up qualifying real estate in order to secure his release. If a particular defendant had no quailing real estate, such a requirement could effectively detain the accused [in violation of the guarantee that all defendants shall be bailable by sufficient sureties]. *Id.* citing *Lewis Bail Bond Co., v. Madison Cty. Gen. Sessions Court* (Nov. 12, 1997), 1997 Tenn. Appl. LEXIS 784, at *12, Tenn.App. No. C-97-62, 1997 WL 711137, *5.

Next, the *Smith* Court affirmatively stated that a cash-only bail also violates Rule 46 as amended in 1998. *Id.* at ¶ 73. The Court explained that that Rule 46 was amended and reorganized in 1998 in accordance with the constitutional amendment. *Id.* at ¶ 70. The amendment simply provided a court with the ability to impose conditions that relate to both appearance and public safety. *Id.* It referred back to its holding in *Jones:*

> The only apparent purpose in requiring a 'cash-only' bond to the exclusion of the other forms provided in Crim. R. 46, is to restrict the

> accused's access to a surety and, thus to detain the accused in violation of Section 9, Article I. *Id.* at 71 citing *Jones, supra, at 118*, 609 N.E.2d 541.

Further – and simply put – the Court said, "If we had intended to authorize cash-only bail when we amended Crim.R. 46, we would have so provided with appropriate language." *Id.* at ¶ 71. Regardless, as the Court aptly found: "[M]ost important, even had Crim.R. 46 expressly permitted cash-only bail, it would have violated the sufficient sureties clause...." *Id.* at ¶ 72.

Cash-Only Bail Orders in Licking County and the Refusal to Accept Surety Bail Bonds

The case at hand is about the cash-only provision of Crim.R. 46(A)(2) that is commonly referred to as a "10% Bond." It is a matter of first impression before this Court, as all of the preceding cases involved a cash-only bail set under Crim.R. 46(A)(3) (f/k/a Crim.R. 46(C)(4) prior to the 1998 amendment).

Under Subsection A(2), the Common Pleas Court has been setting the amount of bail (*e.g.*, $50,000) and requiring the person to pay a ten percent bond (*i.e.* $5,000) in cash only, to the exclusion of posting a surety bail bond. Certainly, the plain language of (A)(2) permits the Common Pleas Court to set the amount of bail and to require the defendant to pay ten percent of the amount in cash. But when the Common Pleas Court and the Clerk refuse to accept a surety bail bond and condition a person's release from jail upon the payment of cash only, they trample upon the rights afforded to Ohio citizens in Section 9, Article I, of the Ohio Constitution and R.C. § 2937.22(A), because

it is well established that cash-only bail is unconstitutional. *See Smith, supra,* in accord with *Baker, supra, and Jones*, supra.

There is absolutely no legitimate reason for a court to require a 10% Bond be satisfied only in cash to the exclusion of a surety bond, because the requirement to satisfy bail with cash only is wholly unrelated to the appearance of the accused at the next court proceeding. After all, the sole purpose of bail *is to* secure the appearance of a person in court. Therefore, a court need only concern itself with setting a sufficient amount of bail that ensures the person's attendance at the next criminal proceeding. To hold otherwise would offend the right to a sufficient surety under the Ohio Constitution and cause a certain class of persons to be unlawfully detained.

So then, the standing question is – why do the Common Pleas Court and the Clerk refuse to accept a surety bail bond in satisfaction of bail set under Crim.R.46(A)? The most logical reason -- revenue. Respondents do not make any money when a surety bail bond is posted. The bond is simply a document that the bonding company files with the Clerk that guarantees the payment of the full amount of bail – no actual money is paid unless the person fails to appear in court. Yet, when a person is forced to make the deposit only in cash pursuant to a 10% Bond, this is a win-win situation for the Common Pleas Court and the Clerk, because they get paid whether or not the person attends the next court proceeding. If the person does not appear, they are entitled to the full amount of the bond; if the person appears, then they keep ten percent of the cash deposit.

Concededly, whether it is the Relators or the Respondents, with a 10% Bond someone is making money. But, that is not the issue. This is about the rights of Ohio

citizens to be bailable by sufficient sureties, and to not endure excessive bail as prohibited by the Ohio Constitution and by the Eighth Amendment to the United States Constitution. Bail bonding companies (such as Woody Fox Bail Bonds, LLC) play a quintessential role in guaranteeing these rights, because they provide options to those in need of bail that the Respondents do not offer. For example, Relator accepts credit cards; Respondents do not.[2] Relator will accept collateral; Respondents do not. Relator accepts payment plans; Respondents do not. The list goes on and on.

Moreover, under Ohio law, a bail bonding agent is a "sufficient surety," *per se*. The same cannot be said for an unlicensed surety. Although Rule 46(J) requires a court to have an unlicensed surety justify why he or she is sufficient, it is evident from its own form that this is not happening in Licking County. Exhibit A (excerpt from the Stipulation of Evidence, No. 5 and merely one example). The court form merely requires the unlicensed surety to acknowledge that he or she could be liable to the State of Ohio for the full amount of the bail. Nowhere on the form does the person justify or otherwise affirm that he or she has the financial means to be a sufficient surety.

Furthermore, to stray beyond the principle purpose of bail and further prohibit the posting of a surety bail bond amounts to excessive bail and unlawful detainment. This could work in at least one of two ways. First, similar to the $1 million cash only bail in *Smith*, a trial judge, who did not want a person to be released from jail, could set a 10% Bond at an amount that it was certain the person or any unlicensed surety could not afford. And, unlike *Smith,* the face of the order may not necessarily appear to be an

[2] See Crim.R. 46(G) (Each municipal or county court shall, by rule, establish a method whereby a person may make bail by use of a credit card).

excessive amount, because "excessive" is a relative term. Essentially, it is an amount that the person cannot afford.

Second, "excessive" is also relative with respect to the amount that an unlicensed surety is not willing to risk. So that if a jailed person is limited to paying only in cash when a 10% Bond is set and cannot otherwise afford the cash payment, he may be unable to find someone to assume the liability for his appearance in court. The same is true with a 10% Bond to assure the appearance of a witness at a criminal proceeding under R.C. §§ 2937.16-18. Yet, it is not only an inconceivable, but also a ghastly notion that the Ohio House or the voters intended that the 1998 amendments would work to deny a witness -- who could be a victim of crime or a minor -- the ability to post a surety bail bond and keep that person in county jail because that person does not have the financial means to pay in cash (many times the case in domestic violence) and cannot find a willing unlicensed surety to post a bond. But as is the practice in Licking County, this is definitely in the realm of possibilities. This is why it absolutely makes sense that when a 10% Bond is issued, a surety bail bond agent has the right to post a surety bail bond to secure a person's release from jail.

PROPOSITION OF LAW II

IT IS UNCONSTITUTIONAL TO REQUIRE A CASH ONLY PAYMENT WHEN BAIL IS SET UNDER CRIM.R. 46(A)(2).

The law is clear – a cash-only bail is unconstitutional. And here, the facts are clear – it is Respondents' policy to not accept a surety bail bond when only a 10% Bail is set. According to their counsel, it does not have any intention on changing this policy:

> I am in receipt of your letter dated August 28, 2012, regarding your concerns with respect to the Licking County Common Pleas Court setting "10% bonds" and thereafter, the Clerk of Court's Office declining to accept a surety bond in their place. In response to your letter, I contacted the Judges of the Court. Please be advised that the Court is not inclined to change its current practice.

Complaint for Mandamus, Exhibit B; Stipulation of Evidence, No. 2.

In defense, Respondents claim that a 10% Bail is not a cash-only bail, because the defendant is not required to pay the full amount of the bail in cash, just a portion. This is absurd. No matter the amount, cash is cash – it does not somehow escape the confines of the Ohio Constitution or this Court's prior rulings that a lesser amount of cash does not constitute a cash-only bail.

PROPOSITION OF LAW III

RELATOR IS ENTITLED TO DAMAGES CAUSED BY RESPONDENTS' UNLAWFUL CONDUCT.

Relator Woody Fox Bail Bonds, LLC is a well-known bonding company, particularly in Central Ohio. While it is headquartered in Columbus, Ohio, it also has a very prominent location across from the Licking County courthouse. The company derives income from the issuance of surety bail bonds; its fees are based upon ten percent of the amount of the bail. Exhibit B, Affidavit of Nevin P. Keim.

In numerous criminal cases, Respondents have prevented Fox from posting a surety bail bond when a 10% Bond has been set. No documents exist to reflect this, because it is not an established practice to create a document under these circumstances. However, for purposes of efficiency, Fox has identified ten cases where he was barred from posting a surety bail bond due to Respondents' unlawful policy. *Id.*

Though damages may continue to accrue, should this Court issue a Writ of Mandamus, Relator is entitled to damages pursuant to R.C. § 2731.11, of no less than $11,450. In addition, under R.C. § 2731.12, Relator would also be entitled to costs.

CONCLUSION

In Ohio, it is unconstitutional to condition a person's release from jail upon the payment of cash only or otherwise deny a person the right to post a surety bail bond that is issued by a licensed bail agent before he or she will be released from jail. Accordingly, the Court should issue a Writ of Mandamus against all Respondents ordering them to accept a surety bail bond whenever bail is set pursuant to Criminal Rule 46(A)(2).

Respectfully submitted,

Sprankle Carpenter, LLC

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Voice + Fax: 614.310.4135
KCarpenter@SprankleCarpenter.com
Attorney for Relators
Woodrow L. Fox and
Woodrow L. Fox, Sr., LLC

CERTIFICATE OF SERVICE

I certify that on June 24, 2013, I sent Relators' Merit Brief to Amy Brown Thompson, Designated Counsel of Record for Respondents, via email.

Kendra L. Carpenter (0074219)

APPENDIX

IN THE COURT OF COMMON PLEAS

LICKING COUNTY, OHIO

CLERK COMMON PLEAS COURT
2012 OCT 24 P 4:27
FILED
GARY R. WALTERS
CLERK

STATE OF OHIO

CASE NO. 2012 CR 00404
OFFENSE: AGGRAVATED TRAFFICKING IN DRUGS (F4)

VS.

JENNY L MARKLE

THE STATE OF OHIO, LICKING COUNTY, SS

ON October 24, 2012 THE DEFENDANT JENNY L MARKLE AND STEVE W. BURGE JR. PERSONALLY
APPEARED BEFORE ME AND INDIVIDUALLY/JOINTLY AND ACKNOWLEDGED THAT JENNY L MARKLE WOULD BE RESPONSIBLE TO OWE TO THE STATE OF OHIO THE SUM OF $10,000 TO BE LEVIED ON PERSONAL PROPERTY AND REAL PROPERTY, IF HE/SHE SHOULD DEFAULT ON THE CONDITIONS OF THE BAIL AS SET FORTH BELOW:

1. THAT THE DEFENDANT SHALL PERSONALLY APPEAR BEFORE THE COMMON PLEAS COURT WHEN REQUIRED TO DO SO ON THE CHARGES FILED HEREIN.
2. REPORT TO ADULT COURT SERVICES Immediately upon Release
3. NO DRUGS OR ALCOHOL
4. URINALYSIS AND BREATH TESTING

X

- ☐ OTHER CONDITIONS
- ☑ LAPP EVALUATION
- ☐ NO CONTACT WITH ALLEDGED VICTIM
- ☐ NO OPERATING A MOTOR VEHICLE
- ☐ NO WEAPONS
- ☐ OTHER

Steve Burge Jr
INDIVIDUAL POSTING BOND

5911 Reform Rd
ADDRESS

Newark OH 43055
CITY STATE ZIP CODE

740-755-8965
PHONE NUMBER

DEFENDANT'S SIGNATURE

5911 Reform Rd
ADDRESS

Nawark Oh 43055
CITY STATE ZIP CODE

740-763-2186
PHONE NUMBER

2012 OCT 25 A 8:30

TAKEN AND ACKNOWLEDGED BEFORE ME UPON THE DATE ABOVE STATED.

GARY R. WALTERS
BY M Markham
DEPUTY CLERK

THIS IS A TRUE and CERTIFIED COPY OF ORIGINAL ON FILE
COMMON PLEAS COURT
LICKING COUNTY, OHIO

BY _____ JUN 5 2013
DEPUTY
Deputy

Clerk of Courts

2012-Oct-24 05:[illegible] Licking County Justice Center 740-670-5584

1/1

Exhibit A

AFFIDAVIT OF NEVIN P. KEIM

STATE OF OHIO :
: ss
COUNTY OF FRANKLIN :

Nevin P. Keim, being first duly cautioned and sworn, states as follows:

1. I make this Affidavit pursuant to my personal knowledge.

2. I am licensed by the Ohio Department of Insurance to issue surety bail bonds, and I work with Woody Fox Bail Bonds, LLC.

3. To issue a surety bond, Woody Fox Bail Bonds, LLC charges a fee of ten percent of the amount of bail set by a court.

4. Respondents in case number 2013-0364 caused Woody Fox Bail Bonds, LLC to lose income in the amount of $11,450, because I was denied the ability to issue a surety bond on behalf of the following defendants:

a. *State of Ohio v. Abigail S. Hunt*, 2012 CR 00396, bail set at $2,500;

b. *State of Ohio v. Sara L. Caw,* 2012 CR 00106, bail set at $10,000;

c. *State of Ohio v. Jenny L. Markle*, 2012 CR 00404, bail set at $10,000;

d. *State of Ohio v. Melissa C. Canterbury*, 2011 CR 00073, bail set at $50,000;

e. *State of Ohio v. Brittani B. Hill*, 2012 CR 00439, bail set at $10,000;

f. *State of Ohio v. Carl G. Flanagan*, 2011 CR 00166, bail set at $10,000;

g. *State of Ohio v. Andrew C. Miller,* 2012 CR 00316, bail set at $10,000;

h. *State of Ohio v. Xavier A. Esposito*, 2011 CR 00185, bail set at $2,000;

i. *State of Ohio v. Errol L. Anglada*, 2011 CR 00100, bail set at $5,000;

j. *State of Ohio v. Chedale J. Lancaster*, 2011 CR 00106, bail set at $5,000.

Exhibit B

FURTHER AFFIANT SAYETH NAUGHT.

Nevin P. Keim

Sworn to before me and subscribed in my presence this 22nd day of June, 2013.

Notary Public, State of Ohio

NOTARIAL SEAL STATE OF OHIO

KAREN HELD PHIPPS
Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03 R.C.

Exhibit B

Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 18
*** Annotations current through April 22, 2013 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Go to the Ohio Code Archive Directory

Oh. Const. Art. I, § 9 (2013)

§ 9. Bail; cruel and unusual punishments

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.

HISTORY:

(As amended January 1, 1998.)

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

Appeal to Supreme Court, release upon, RC §§ 2953.09, 2953.10.

Bail generally, RC § 2937.22 et seq.

Domestic violence; considerations for bail, RC § 2919.25.1.

Misdemeanor, violation of ordinance, RC §§ 2935.10, 2935.15.

Ohio Constitution

Bills of attainder, Ohio Const. art I, § 12.

2731.11 Recovery of damages.

If judgment in a proceeding for a writ of mandamus is rendered for the plaintiff, the relator may recover the damages which he has sustained, to be ascertained by the court or a jury, or by a referee or master, as in a civil action, and costs. A peremptory mandamus shall also be granted to him without delay.

Such recovery of damages against a defendant is a bar to any other action upon such cause of action.

Effective Date: 10-01-1953

2731.12 Costs against relator.

If judgment in a proceeding for a writ of mandamus is rendered for the defendant, all costs shall be adjudged against the relator.

Effective Date: 10-01-1953

2937.16 When witnesses shall be recognized to appear.

When an accused enters into a recognizance or is committed in default thereof, the judge or magistrate shall require such witnesses against the prisoner as he finds necessary, to enter into a recognizance to appear and testify before the proper court at a proper time, and not depart from such court without leave. If the judge or magistrate finds it necessary he may require such witnesses to give sufficient surety to appear at such court.

Effective Date: 10-01-1953

2937.17 Recognizance for minor.

A person may be liable in a recognizance for a minor to appear as a witness, or the judge or magistrate may take the minor's recognizance, in a sufficient sum, which is valid notwithstanding the disability of minority.

Effective Date: 10-01-1953

2937.18 Commitment of witness refusing to give recognizance.

If a witness ordered to give recognizance fails to comply with such order, the judge or magistrate shall commit him to such custody or open or close detention as may be appropriate under the circumstances, until he complies with the order or is discharged. Commitment of the witness may be to the custody of any suitable person or public or private agency, or to an appropriate detention facility other than a jail, or to a jail, but the witness shall not be confined in association with prisoners charged with or convicted of crime. The witness, in lieu of the fee ordinarily allowed witnesses, shall be allowed twenty-five dollars for each day of custody or detention under such order, and shall be allowed mileage as provided for other witnesses, calculated on the distance from his home to the place of giving testimony and return. All proceedings in the case or cases in which the witness is held to appear shall be given priority over other cases and had with all due speed.

Effective Date: 03-23-1973

2937.22 Form of bail.

(A) Bail is security for the appearance of an accused to appear and answer to a specific criminal or quasi-criminal charge in any court or before any magistrate at a specific time or at any time to which a case may be continued, and not depart without leave. It may take any of the following forms:

(1) The deposit of cash by the accused or by some other person for the accused;

(2) The deposit by the accused or by some other person for the accused in form of bonds of the United States, this state, or any political subdivision thereof in a face amount equal to the sum set by the court or magistrate. In case of bonds not negotiable by delivery such bonds shall be properly endorsed for transfer.

(3) The written undertaking by one or more persons to forfeit the sum of money set by the court or magistrate, if the accused is in default for appearance, which shall be known as a recognizance.

(B) Whenever a person is charged with any offense other than a traffic offense that is not a moving violation and posts bail, the person shall pay a surcharge of twenty-five dollars. The clerk of the court shall retain the twenty-five dollars until the person is convicted, pleads guilty, forfeits bail, is found not guilty, or has the charges dismissed. If the person is convicted, pleads guilty, or forfeits bail, the clerk shall transmit the twenty-five dollars on or before the twentieth day of the month following the month in which the person was convicted, pleaded guilty, or forfeited bail to the treasurer of state, and the treasurer of state shall deposit it into the indigent defense support fund created under section 120.08 of the Revised Code. If the person is found not guilty or the charges are dismissed, the clerk shall return the twenty-five dollars to the person.

(C) All bail shall be received by the clerk of the court, deputy clerk of court, or by the magistrate, or by a special referee appointed by the supreme court pursuant to section 2937.46 of the Revised Code, and, except in cases of recognizances, receipt shall be given therefor .

(D) As used in this section, "moving violation" has the same meaning as in section 2743.70 of the Revised Code.

Amended by 128th General AssemblyFile No.9,HB 1, §101.01, eff. 10/16/2009.

Effective Date: 01-01-1960

3905.932 Prohibited acts.

A surety bail bond agent or insurer shall not do any of the following:

(A) Suggest or advise the employment of, or name for employment, any particular attorney to represent its principal;

(B) Solicit business in, or on the property or grounds of, a detention facility, as defined in section 2921.01 of the Revised Code, or in, or on the property or grounds of, any court. For purposes of this division, "solicit" includes, but is not limited to, the distribution of business cards, print advertising, or any other written information directed to prisoners or potential indemnitors, unless a request is initiated by the prisoner or potential indemnitor. Permissible print advertising in a detention facility is strictly limited to a listing in a telephone directory and the posting of the surety bail bond agent's name, address, and telephone number in a designated location within the detention facility.

(C) Wear or otherwise display any identification, other than the wallet identification card required under division (G) of section 3905.85 of the Revised Code, in or on the property or grounds of a detention facility, as defined in section 2921.01 of the Revised Code, or in or on the property or grounds of any court;

(D) Pay a fee or rebate or give or promise anything of value to a jailer, law enforcement officer, committing magistrate, or other person who has power to arrest or to hold in custody, or to any public official or public employee, in order to secure a settlement, compromise, remission, or reduction of the amount of any bail bond or estreatment of bail;

(E) Pay a fee or rebate or give or promise anything of value to an attorney in a bail bond matter, except in defense of any action on a bond;

(F) Pay a fee or rebate or give or promise anything of value to the principal or to anyone in the principal's behalf;

(G) Post anything without using a bail instrument representing an insurer, to have a defendant released on bail on all types of set court bail, except for the following:

(1) Cash court fees or cash reparation fees;

(2) Ten per cent assignments;

(3) Other nonsurety court bonds, if the agent provides full written disclosure and receipts and retains copies of all documents and receipts for not less than three years.

(H) Participate in the capacity of an attorney at a trial or hearing of a principal;

(I) Accept anything of value from a principal for providing a bail bond, other than the premium filed with and approved by the superintendent of insurance and an expense fee, except that the surety bail bond agent may, in accordance with section 3905.92 of the Revised Code, accept collateral security or other indemnity from a principal or other person together with documentary stamp taxes if applicable. No fees, expenses, or charges of any kind shall be deducted from the collateral held or any return premium due, except as authorized by sections 3905.83 to 3905.95 of the Revised Code or by rule of the superintendent. A surety bail bond agent, upon written agreement with another party, may receive a fee or other compensation for returning to custody an individual who has fled the

jurisdiction of the court or caused the forfeiture of a bond.

(J) Execute a bond in this state on the person's own behalf;

(K) Execute a bond in this state if a judgment has been entered on a bond executed by the surety bail bond agent, which judgment has remained unpaid for at least sixty days after all appeals have been exhausted, unless the full amount of the judgment is deposited with the clerk of the court.

As used in this section, "instrument" means a fiduciary form showing a dollar amount for a surety bail bond.

Amended by 128th General AssemblyFile No.18,HB 300, §1, eff. 5/26/2010.

Effective Date: 10-09-2001

Related Legislative Provision: *See 128th General AssemblyFile No.18,HB 300, §6*

See 128th General AssemblyFile No.18,HB 300, §3

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3901-1-66 Surety bail bond agent conduct.

(A) Purpose. The purpose of this rule is to establish criteria for surety bail bond agent conduct.

(B) Authority. This rule is promulgated pursuant to the authority vested in the superintendent under sections 3901.041 and 3905.95 of the Revised Code.

(C) Definitions. As used in this rule:

(1) "Cash bond" means the full amount of the bail required to be paid in cash to release a defendant from jail.

(2) "Power of attorney" means a legal instrument that is used by a authorized surety company to delegate authority to a licensed general agent or surety bail bond agent for the posting of surety bail bonds with a court of law up to a specified monetary amount.

(3) "Surety bail bond" means a court accepted bond instrument from a licensed insurance company issued for or on behalf of an incarcerated person held under criminal charges in any Ohio mayor, municipal, county, or federal court.

(4) "Immigration bond" means a federally accepted bond instrument from a surety company approved by the United States department of treasury issued for and on behalf of alien detainees held by United States immigration and customs enforcement, within the department of homeland security pending a hearing or court appearance; or to guarantee that an alien will be financially independent during a lawful visit or prolonged stay to the United States.

(D) Stacking bonds prohibited.

A surety bail bond agent shall not submit more than one power of attorney for any single bond, charge or charges, as is assigned a number by a court of proper jurisdiction.

(E) Submitting powers and bonds

(1) All surety bail bonds submitted to the court or the custodian of an arrested person must be accompanied by a current, non-expired, legal power of attorney.

(2) Only one power of attorney shall be submitted per bond. The face value of the power shall be equal to or greater than the amount of the bond set by the court in the single charge or charges for which the bond and power are being submitted.

(3) No power of attorney that has been altered or erased shall be submitted to a court or insurance company.

(4) No expired power of attorney shall be submitted to a court or insurance company.

(5) No power of attorney shall be used or submitted to a court or insurance company more than once.

(F) Immigration bonds

Immigration bonds may be solicited, sold, or negotiated only by:

(1) A person holding an Ohio insurance license with a casualty line of authority conferred pursuant to Title 39 of the Revised Code.

(2) A person holding an Ohio surety bail bond line of authority conferred pursuant to Title 39 of the Revised Code, who has been given a bond power that expressly allows for the writing of an immigration bond.

(G) Bond money from loan companies

No surety bail bond agent shall be employed by, contracted with, or act as an agent for, or own an ownership interest in any person or business entity that loans money for, or takes collateral for the loan of money for, the purpose of posting a cash bond or surety bail bond on behalf of a defendant.

(H) Real property as collateral

When accepting real property as collateral for a bond,

(1) A surety bail bond agent shall not require the transfer of title of any real property as a condition of issuing the bail bond.

(2) A surety bail bond agent may require a defendant, or anyone agreeing to provide real property as collateral on a defendants behalf, to establish title and unencumbered value, at the defendants expense, together with mortgage security or other documents necessary to establish the surety bail bond agent's lien interest in the real property by the bail agent.

(3) A surety bail bond agent shall not provide title, notary, or lien filing services directly or indirectly to the client or defendant for a fee. A surety bail bond agent shall not receive any valuable consideration for referring a person for title, notary, or lien filing services.

(4) Return of security document collateral:

(a) If the security document has not been filed with the state or a division of the state to perfect the lien, and the bond has not been called or otherwise needed or used, the original mortgage or other security document must be stamped cancelled and returned to the client or defendant within twenty-one days from the end of the bond.

(b) If the security document has been filed with the state or a division of the state to perfect the lien, and the bond has not been called or otherwise needed or used, a release of the mortgage or release of the other security document must be completed within twenty-one days after the end of the bond. A copy of the release containing an official date/time stamp must be provided to the client within twenty-six days after the end of the bond.

(I) Solicitation

(1) The following activities shall constitute prohibited solicitation by a surety bail bond agent on the grounds of a courthouse or detention facility:

(a) Approaching a person not currently a client and in any way initiating communication concerning bail bond services.

(b) Writing bonds for an individual without their direct knowledge and consent.

(c) Communicating as, or holding oneself out to be, a court appointed surety bail bond agent or suggesting in any manner that one has been appointed by a court or other public agency to write a bond for a particular defendant, or on a particular case.

(d) Wearing clothing that indicates a person is in the bail bond industry unless otherwise directed by the court or detention facility, except the wearing of the issued department of insurance ID card.

(e) Conducting business in a loud and conspicuous manner.

(f) Distributing a business card, pen, or any other item, that identifies an individual or business entity as providing surety bail bond services.

(g) Physically impeding, blocking, or hindering the public from viewing or obtaining the docket or other information needed to ascertain the status or procedure of any court process including all court bonding processes.

(h) Engaging or hiring any person, directly or indirectly, to perform any acts listed in paragraphs (I)(1)(a) to (I)(1)(g) of this rule.

(i) Any other activity that may be construed as the sale or solicitation of surety bail bonds.

(2) The following activities shall not constitute prohibited solicitation by a surety bail bond agent on the grounds of a courthouse or detention facility subject to the limitations of paragraph (I)(1) of this rule:

(a) Having personal business matters before a court or detention facility;

(b) Attending a scheduled hearing or meeting with any person(s) regarding surety bail bonds as long as the meeting is arranged with the person(s) prior to the arrival at the courthouse or detention facility;

(c) Being retained by a person to write and post a surety bail bond;

(d) Gathering court and docket information for business purposes;

(e) Writing a bond and posting a bond with the court;

(f) Returning a fugitive from justice pursuant to section 2927.27 of the Revised Code;

(g) Notifying a court, or detention facility of professional activities being conducted by the surety bail bond agent, other than solicitation; or

(h) Filing required paperwork with the court or detention facility regarding bonds, prisoners, bail bond license status, or fugitives.

(J) Severability

If any section, term or provision of this rule is adjudged invalid for any reason, such judgment shall not affect, impair or invalidate any other section, term or provision of this rule, but the remaining sections, terms and provisions shall be and continue in full force and effect.

R.C. 119.032 review dates: 11/30/2012 and 08/31/2017
Promulgated Under: 119.03
Statutory Authority: 3901.041, 3905.95
Rule Amplifies: 3901.83 to 3901.99
Prior Effective Dates: 12/14/2008

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of summons under Rule 4 and Rule 5.

RULE 46. BAIL

(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.

(B) Pretrial Release Where Summons Issued. Where summons has issued and the defendant has appeared, the judge or magistrate shall release the defendant on personal recognizance or upon the execution of an unsecured appearance bond.

(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:

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

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

(3) Require the execution of an appearance bond in a specified amount, and the deposit with the clerk of the court before which the proceeding is pending of

greater. Ninety percent of the deposit shall be returned upon the performance of the conditions of the appearance bond;

(4) Require the execution of bail bond with sufficient solvent sureties, the execution of a bond secured by real estate in the county, or the deposit of cash or the securities allowed by law in lieu of a bond;

(5) Impose any other constitutional condition considered reasonably necessary to ensure appearance.

(D) Preconviction Release in Petty Offense Cases. 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:

(1) Executing an appearance bond in the amount specified in the court's bail schedule, with a deposit of either twenty-five dollars or a sum of money equal to ten percent of the amount of the bond, whichever is greater. Ninety percent of the deposit shall be returned upon the performance of the conditions of the appearance bond;

(2) Executing a bond in the amount specified in the