AMERICAN BAIL COALITION

BRIEFING DOCUMENT
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Ohio Senate Bill 182: Make Bail Changes[1]

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I. The Legislation Will Largely Eliminate Judges Ability to Require Financial Conditions of Release

In general: this legislation will largely if not entirely eliminate secured bail in Ohio (cash, 10%, property and surety). Most defendants will get either an unsecured bond (a worthless promise to pay if they fail to show up, turning Ohio Courts into a vast collection agency) or they will be released on their own recognizance. This is a more significant bail reform than New York, which implemented a rule like this but limited the crimes to which it applied. The standards and rules in this bill apply to *all crimes* in Ohio from murder on down. The only result we can expect as a result of this bill is increased failing to appear in court and an increase in pretrial crime.

II. SB 182 Completely Upends Existing Bail Procedures And Will Mean More Jail For All Until Judges Are Able to Hear Everyone Twice

All cases will have to be heard in 24 hours to see if defendants qualify for a release on their own recognizance. At this hearing, no bail can be imposed. If a defendant gets a release on their own recognizance, only the standard conditions of bail can be ordered, and no other non-monetary conditions are allowed (see lines 4781-4791), and bail cannot be imposed or denied at the 24 hour mark. Under current law, a judge has to discretion to set bail and individualized conditions of release. This will slow the process down because now if they don't get a straight own recognizance bond, they get to sit in jail for another 48 hours to wait for the second hearing.

This section of the legislation also allows for temporary preventative detention if the court does not grant a straight own recognizance release. But there is no finding required whatsoever. There is no standard in deciding when to order a personal recognizance or not. This is a major constitutional issue.

III. Litigation Will Upend This Unconstitutional Scheme Which Will Park Everyone Who Posts Bail or Is Released on Pretrial Services in Jail Longer

Federal courts for the past decade have held that a person needs to have a meaningful opportunity to argue bail within 48 hours of arrest. While there is no outer hard limit on this time frame, it is fair to say the longer courts wait to set a bail they get on thinner constitutional ice.

This legislation is facially unconstitutional because it allows a judge to refuse to set bail or set individualized conditions of release at the first hearing and leave them in jail pending a second hearing, regardless of whether the defendant can afford it or not. Thus, defendants who today would simply have bail set and post it will instead remain in jail. Defendants who would be released to pretrial services will wait longer in jail. In addition, if a defendant is going to get a release on their own

[1] https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA134-SB-182

recognizance but needs to have an ignition interlock device, they get to sit in jail until the conditions of release hearing.

Prosecutors can delay the initial setting of bail for up to three calendar days by simply filing a motion. There is no discretion for the judge to deny the motion, only discretion to hold the hearing in a time frame of less than three calendar days. That will never pass constitutional muster and will create massive delays by requiring judges to have two hearings before a person can be released on bail or a non-monetary condition of release.

IV. This Legislation Unconstitutionally Discriminates Against Those Charged with Domestic Violence

If a defendant is charged with a non-domestic violence misdemeanor, then the court has to have the release hearing within 48 hours of arrest. If charged with a domestic violence misdemeanor, the court has 72 hours. Interestingly, there is no time frame on felonies. We know they violate the due process clause if they don't set a bail within 48-72 hours. There is no requirement to do so under this law. We also know that basing bail and bail procedures on the nature of the charge is not evidence-based and there is no rational basis for making a person charged with domestic violence wait in jail for three days while a person not charged with domestic violence will only have to wait two days. The presumption of innocence applies equally to all charges lodged by a prosecutor.

V. Prosecutors Will Have to Put on A Mini-Trial With Evidence to Get Pretrial Supervision or Additional Conditions of Release to Overcome a New Presumption in Favor of Own Recognizance Release

All defendants are released on their own recognizance unless the prosecutor proves, by clear and convincing evidence, a flight risk or danger to the community (see lines 4844-4851). This is a much, much stronger standard than current law. In fact, it happens to be the federal standard to deny bail altogether and impose preventative detention.

Prosecutors are going to have to go to a hearing and put on evidence every time they want to attempt to have them put on a non-monetary condition, such as ankle monitor, interlock device, etc. They are not going have the time, resources, or ability to do that. The end result is that someone who is going to get pretrial supervision now imposed by a judge will not under this legislation. There is no chance that there will be more pretrial supervision under this bill. Only those that judges today order pretrial will benefit by not getting it.

The law creates a new rebuttable presumption that the prosecutor must overcome in order to request bail (lines 4852-4855). The prosecutor has to overcome the rebuttable presumption by clear and convincing evidence, making it that much more difficult to get to a cash, 10%, property or surety bond. The end result is that defendants who are either held in jail on an unposted bond will be released and those who post bond and thus have a layer of accountability will instead get released without bond.

In addition, there is a further presumption of non-monetary release that the prosecutor has to overcome (lines 4970-71). This will result in more persons being released from jail and more persons not having the incentives of a bond to return to court or be rearrested by a bail agent.

If that is not enough, then a court has to go even further. There has to be clear and convincing evidence that the defendant "will not appear at a future date and time during which the accused is required to appear before the court" (line 4986) or "Why monetary conditions of release will reasonably assure the appearance of the accused at a future date and time during which the accused is required to appear before the court" (line 4989). Then, a court has to find in writing that "the bond amount is the lowest amount necessary to reasonably assure the appearance of the accused at a future date and time during which the accused is required to appear before the court."

VI. Criminal History is Excluded as A Factor to Consider for Purposes of Imposing Additional Conditions of Release

Courts under this legislation can only consider nature of charge, danger of the person, and recommendations of pretrial services when considering additional conditions (lines 4856-4873). **Prior criminal history is not included**. Prior criminal history is the number one predictor of pretrial failure according to the science, and it is not allowed be considered. Nor are prior failures to appear in court, the #2 predictor of failure, included as a consideration. In short, the #1 and #2 factors that predict pretrial failures are not allowed to be considered.

Current law on this point is deleted, starting on line 5270.[2]

VII. Public Safety is Removed as a Consideration for Setting A Monetary Bond

Ohio will join less than a handful of states that disallow considerations of public safety for purposes of setting a bail (line 4972-4975). New York is the most notable example where public safety cannot be considered.

VIII. Defendants Cannot Be Charged for Electronic Monitoring or Treatment, Even if They Can Afford It; County Pretrial Services Will Not Be Allowed to Ever Charge Defendants Except Post-Conviction

Electronic monitoring costs and treatment costs pretrial will now be entirely borne by local governments since defendants, under this legislation, can no longer be charged (lines 4938 and 4948). This is a massive unfunded mandate to the counties.

In addition, a pretrial agency has to agree to supervise someone, but there is no statutory authority for charges. It is not clear whether local governments can charge at all for pretrial services or if they are agreeing to supervise the defendant for free.

[2] Current law, which is deleted, reads as follows: "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.

Further, on line 5018, we note that a defendant cannot be charged for pretrial services at all until post-conviction. Which means local governments will have to attempt to collect from defedants who are typically judgment-proof. In addition, all other collections are likely to be first in line, e.g., victim restitution, fines, surcharges, etc. In addition, local governments have no standing to enforce the orders. This is massive unfunded mandate on local governments in Ohio.

IX. This Legislation Creates a Right to An Affordable Bail in Ohio, Which Means Everyone Currently Held in Jail on an Unposted Bond Will be Released—Only Those For Whom Bail May be Entirely Denied Will be Held Pending Trial

This legislation on lines 4978-79 creates a right to an affordable bail in Ohio. What this means is if bond is $5000 and I cannot afford it, I do not stay in jail. The court must give me something I can afford, even if it is zero. This means everyone is going to be released in Ohio except when preventative detention (denial of bail) is used. As we have seen in Ohio, Ohio's preventative detention is quite limited, so you are going to see everyone arrested under this bill getting out.

There are no exceptions here either—example, commits a new crime while on an own recognizance bond, then a judge can do a bond, or they fail to appear on the own recognizance bond and then a judge can do a bond, or say aggravated violent acts or sex offenses—not on the list.

ALL CRIMES in Ohio will get an affordable bail. No one will be held in jail on an unposted bond in Ohio. The language in this bill specifically appears in the Washington, D.C. statute, the federal statute, and the New Jersey law, all of who have implemented the no-money bail system. In such a system, either bail is denied or the person is released on their own recognizance with or without non-monetary conditions. In such systems, robust supervision attempts to replace the incentives of a bail bond. In Ohio, not only is there is going to be no investment in pretrial services, to the contrary we are restricting local governments' ability to operate by collecting some of the revenue necessary to operate pretrial services from defendants.

This right to an affordable bail is reaffirmed on lines 5050-51 ("The court may only set a secured bond amount based on the amount the accused is able to pay."),

We have had this debate in numerous states, we have a legal memo absolutely supporting our position on this language, and this language is always put forward as harmless language. In reality, this language will create a right to an affordable bail in Ohio and wreak havoc on the system.

X. A New Bond Fee is Created to Fund Indigent Defense

Despite concerns that people cannot afford bail, now the state via this legislation is going to impose a $25 fee on all bonds to raise revenue. The end result will be that more people will remain in jail who cannot post the $25 fee.

XI. A Court Who Is Able to Jump Through All the Hoops Necessary to Impose Bond Then Has to Go Through An Elaborate Ability to Pay Inquiry Prior to Imposing Bond

This ability to pay inquiry begins on line 5023. The legislation caps the maximum bail at 25% of the persons monthly income less expenses. Example, defendant charged with aggravated robbery makes $2000 a month, but has $2000 in expenses. Maximum bail is zero. Example, defendant makes $2000 a month, has $1600 in expenses, maximum bail is $100. Further, assets are not taken into account, only monthly wages, which discriminates heavily against wage earners.

Further, the court bases affordability on an amount the defendant "is able to pay" within 24 hours. Real property and securities typically cannot be converted that quickly, which means if a person has a $10,000,000 house they inherited that cannot be converted to cash within 24 hours, has a trust fund that covers the living expenses of the person and the house, and then has $2000 a month left over, the maximum bond is $500. Anyone living paycheck to paycheck who gets arrested on a Friday could say, your honor, I don't get paid until next Friday, so free bail today.

Finally, the same rules apply to 10% to the court bonds.

XII. Conclusion

This legislation will entirely upend the bail system in Ohio, making it much, much more likely that defendants will be released and that when they are released they will have less conditions of release on them and will not have a third-party and bail agent watching them or being accountable to the court for their return. By creating a right to an affordable bail, no one will be held pending trial. All bonds will be posted. Period. Or they cannot be imposed. Under this scheme we can expect that New York's failed bail reform experiment will be replicated in Ohio, but on a much larger scale involving more serious offenders. New York's original law enumerated specific crimes at the top end where bail would be allowed, which was later adjusted to allow for more crimes. In Ohio, this bail reform legislation applies to *all crimes*.

The only people who will benefit from this legislation will be the people that judges currently assign bail or non-monetary conditions within their discretion, which will be over-ruled by this legislation.

This legislation is the most radical bail reform legislation that has been proposed in any state in a very long time.

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