

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

I. STATEMENT OF THE IDENTITY AND INTEREST OF AMICI 4

II. THIS CASE IS OF GREAT PUBLIC INTEREST AND IT IMPACTS THE
CONSTITUTIONAL RIGHTS OF ALL OHIO CITIZENS..... 4

III. ARGUMENT..... 6

 Proposition of Law No. I:..... 6

 The current practice of several trial courts in concert with the clerk of courts requiring
defendants to post cash bonds instead of securing them with a surety is a violation of Article I,
Section 9 of the Ohio Constitution and Ohio Criminal Procedure Rule 46. 6

 A. The basic right of a criminal defendant to be released pending his/her trial is
protected under Article I, Section 9 of the Ohio Constitution..... 6

 B. Requiring a cash only payment as a condition of release pursuant to Ohio Criminal
Rule 46 is a violation of Article I, Section 9 of the Ohio Constitution. 9

 Proposition of Law No. II: 12

 The Wayne County Clerk of Court has a clear duty to act regarding the acceptance of a surety
bond..... 12

IV. CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases

Cincinnati Traction Co. v. Ruthman, 85 Ohio St. 62, 70, 96 N.E. 1019 (1911)..... 13
Locke v. Jenkins, 20 Ohio St.2d 45, 253 N.E.2d 757 (1969)..... 8
State ex rel. Jones v. Hendon, et. al., 1992 Ohio App. LEXIS 2199 (1st Dist. Ct. of App. 1992). 8
Smith v. Leis, 106 Ohio St.3d 309, 2005-Ohio-6090, 835 N.E.2d 5 (2005)..... 5, 6, 8, 9, 10, 12
State ex rel. Baker v. Troutman, 50 Ohio St.3d 270, 553 N.E.2d 1053 (1990)..... 8, 12
State ex rel. Cola v. McFaul, 109 Ohio App.3d 203, 671 N.E.2d (8th Dist.1996)..... 10
State ex rel. Jones v. Hendon, et. al., 66 Ohio St.3d 115, 609 N.E.2d 541 (1993)..... 6, 7, 8, 10, 12
State ex rel. Smith v. Johnson, 12 Ohio App. 2d 87, 231 N.E.2d 81 (7th Dist.1967)..... 12
State ex rel. Wanamaker v. Miller, 164 Ohio St.176, 128 N.E.2d 110 (1955)..... 12
State ex rel. Williams v. Fankhauser, 11th Dist. No. 2006-P-0006, 2006-Ohio-1170 11
State of Ohio ex rel. Woodrow L. Fox and Woody Fox Bail Bonds, LLC v. Gary Walters, et al.,
Case No. 2013-0364..... 5, 11
State v. Briggs (Iowa 2003), 666 N.W.2d 573, 576..... 5
State v. Brooks (Minn. 2000), 604 N.W.2d 345, 348 5
State v. Kearns, 70 Ohio L.Abs. 534, 129 N.E.2d 547 (C.P. 1955) 12
State v. Wilson, 102 Ohio App.3d 467, 472, 657 N.E.2d 518 (1995)..... 13
Yakima v. Mollett, 115 Wash. App. 604, 610, 63 P.3d 177 (2003) 10

Statutes

R.C. 2303.26 12

Other Authorities

Ohio Constitution, Art. I, Sec. 9 6, 7, 9, 10
Ohio Constitution, Art. I, Sec. 9 (1851)..... 7
Ohio Constitution, Art. VIII, Secs. 12-13 (1802). 7

Rules

Rule 46 of Ohio Rules of Criminal Procedure..... 4, 6, 8, 9, 10, 11, 12

Amici respectfully submit this brief for the purpose of expanding upon the reasons that it is unconstitutional for courts in Ohio to require incarcerated individuals who are granted bail to post “cash-only” bonds, and that this Court accordingly should grant the mandamus relief.

I. STATEMENT OF THE IDENTITY AND INTEREST OF AMICI

Amicus curiae, the American Bail Coalition (and the listed members), is an association composed of America’s premier underwriters of criminal court appearance bonds. The Coalition seeks to educate local government on the benefits of commercial bail bonding and to advance the interests of the member companies’ many retail agents. To achieve its purposes, the Coalition disseminates information to the nation’s judiciary and local government leaders regarding publicly-funded bail programs; promotes legislative action to expand the use of the commercial bonding system, to form a more effective public/private sector partnership to develop, and to implement safer and more responsible methods of pre-trial release; and participates as an amicus curiae in appropriate cases, such as this one.

The American Bail Coalition believes the decision in this case could materially affect how its members issue bonds and result in a substantial reduction in the number of defendants offered bail by bondsmen. Accordingly, it participates in this action in support of Relator Anthony Sylvester.

II. THIS CASE IS OF GREAT PUBLIC INTEREST AND IT IMPACTS THE CONSTITUTIONAL RIGHTS OF ALL OHIO CITIZENS.

It is the regular practice for Ohio trial courts to set a monetary bail pursuant to Rule 46(A)(2) of the Ohio Rules of Criminal Procedure and to require the defendant to pay in cash (as opposed to collateral or surety) ten percent of the set bail amount. This is commonly referred to as a “10% Bond.”

In this case, the Licking County Clerk of Court in concert with the Licking County Court of Common Pleas is violating the constitutional rights of incarcerated individuals by requiring the posting of cash bonds, named 10% bonds, instead of permitting the individuals to secure the full amount of the bond through a surety. This case, along with another recently filed case seeking similar relief, entitled *State of Ohio ex rel. Anthony Sylvester v. Tim Neal, et al.*, Case No. 2012-1742, must proceed, so that it is made clear to all Ohio Trial Courts and Clerks of Court that when a monetary bond is set, a defendant has the absolute right to post a surety bond and that to otherwise require a cash-only payment is unconstitutional.

This Court has previously recognized that the issue of a “cash only” bail is a “properly debatable constitutional issue” and that such issue presents a “great public or general interest because it affects the types of bail that trial courts are authorized to grant in criminal cases throughout the state.” *Smith v. Leis*, 106 Ohio St.3d 309, ¶14, 2005-Ohio-6090, 835 N.E.2d 5 (2005); *see also State v. Brooks* (Minn. 2000), 604 N.W.2d 345, 348 (“cash only bail is an important public issue of statewide significance upon which this court should rule”); *State v. Briggs* (Iowa 2003), 666 N.W.2d 573, 576 (“Questions resting on the nature and propriety of cash only bail are of a pressing public interest. The imposition of cash only bail is a regular occurrence in our district courts. The constitutional implications of this form of bail are of great relevance for members of the public, the bar, and the judiciary. The need to provide guidance on this issue is manifest”).

The purpose of this amicus brief is to provide a supplemental explanation of the Ohio Constitution, Ohio Rules of Criminal Procedure, the relationship between the Clerk of Court and the Court of Common Pleas and the pertinent case law from which the only reasonable conclusion is that incarcerated individuals, who are not charged with capital crimes and who are

eligible for bond, must be permitted to utilize a surety to post the full amount of the bond.

III. ARGUMENT

Proposition of Law No. I:

The current practice of several trial courts in concert with the clerk of courts requiring defendants to post cash-only bonds instead of securing the bond with a surety is a violation of Article I, Section 9 of the Ohio Constitution and Ohio Criminal Rule 46.

This Court must enforce the Ohio Constitution, Rule 46 of Ohio Rules of Criminal Procedure, as well as its previous holdings in *State ex rel. Jones v. Hendon, et. al.*, 66 Ohio St.3d 115, 609 N.E.2d 541 (1993) and *Smith v. Leis*, 106 Ohio St.3d. 309, 2005-Ohio-5125, 835 N.E.2d 5 (2005), and reject Respondent's proposition that a court has the discretion under Crim. R. 46 **to force a defendant to post a 10% cash only bond** instead of allowing the defendant to post the full amount through a surety.

A. The basic right of a criminal defendant to be released pending his/her trial is protected under Article I, Section 9 of the Ohio Constitution.

The right to bail is basic to the system of justice and individual protections set up by the Ohio Constitution. Ohio Constitution, Art. I, Sec. 9. Bail prevents a person from being held indefinitely. It also serves to prevent the infliction of punishment prior to conviction and permits the unhampered preparation of a defense. Unless this right to bail before trial is preserved, the presumption of innocence -- which every defendant retains until proven guilty -- will lose its meaning.

In 1802, the framers of the first Ohio Constitution assured that Ohio citizens would be afforded the inalienable right to bail:

Sec 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.

Sec 13. Excessive bail shall not be required; excessive fines shall not be imposed, nor cruel and unusual punishment inflicted.

Ohio Constitution, Art. VIII, Secs. 12-13 (1802).

In 1851, Ohio adopted a new Constitution, which condensed Sections 12 and 13:

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 Constitution, Art. I, Sec. 9 (1851).

The current Constitution, instituted in 1912 and amended in 1998, still ensures the right to bail:

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 Constitution, Art. I, Sec. 9 (1998).

The right to bail under the Ohio Constitution was addressed in 1993 by the Court in *State ex rel. Jones v. Hendon, et. al.*, 66 Ohio St.3d 115, 609 N.E.2d 541 (1993) . In *Jones*, the Hamilton County Municipal Court set a \$50,000 cash only bond. The defendant was released from jail after he posted a surety bond with the clerk. See *State ex rel. Jones v. Hendon, et. al.*,

1992 Ohio App. LEXIS 2199 (1st. Dist. Ct. of App. 1992).¹ However, when the municipal court discovered that the defendant posted a surety bond instead of depositing cash, the defendant was re-arrested. *Id.* The *Jones* Court reaffirmed the prior holding in *State ex rel. Baker v. Troutman*, 50 Ohio St.3d 270, 553 N.E.2d 1053 (1990), and found that the municipal court's actions violated the defendant's right to bail under the Ohio Constitution.

The Court found that it had already determined that the Ohio Constitution guaranteed an accused the absolute right to post a surety bond to secure his release. *Jones*, 66 Ohio St.3d 115, 117 citing *Locke v. Jenkins*, 20 Ohio St.2d 45, 253 N.E.2d 757 (1969) and *Baker v. Troutman* 50 Ohio St.3d 270, 553 N.E.2d 1053 (1990). The Court stated:

[T]he only apparent purpose in requiring a "cash only" bond to the exclusion of the other forms provided in [the criminal rule] 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 118.

Again, in 2005, the constitutional right to bail was addressed by the Court in *Smith v. Leis*, 106 Ohio St.3d 309, ¶14, 2005-Ohio-6090, 835 N.E.2d 5 (2005). In *Smith*, the Hamilton County Court of Common Pleas set bail at "\$1 million straight, cash only." The defendant filed a writ of habeas corpus, seeking relief by the issuance of a reasonable bond. *Id.* at ¶13. Though the issue later became moot, the *Smith* Court nevertheless heard the matter, because it presented a debatable constitutional issue as to whether Article I, Section 9 of the Ohio Constitution authorized a cash-only bail. *Id.* at ¶14. In the opinion authored by Justice Lanzinger, the Court explained the history of Crim. R. 46 and discussed the various opinions of Ohio courts. The Court once again concluded that a cash-only bail violates the Ohio Constitution and Crim. R. 46. *Id.* at ¶ 83.

¹ The 1st District Court of Appeals decision discusses the facts of the defendant's incarceration, his habeas corpus and mandamus complaint.

This case involves at least six different criminal cases in Licking County Case No's 2011 CR 00073; 2012 CR 00358; 2012 CR 00396; 2012 CR 00106; 2012 CR 00404 and 2012 CR 00439. In each of the respective cases, the Licking County Court of Common Pleas set bail for each defendant at 10% of an Appearance Bond. Employees of Realtor Fox, attempted to post a surety bond for each case at Respondent's office, but was denied by one of the clerks.

B. Requiring a "cash-only" payment as a condition of release pursuant to Ohio Criminal Rule 46 is a violation of Article I, Section 9 of the Ohio Constitution.

The Licking County and Wayne County courts of common pleas, as well as several other Ohio courts of common pleas, are setting bail utilizing a mistaken understanding of Crim. R. 46 by imposing a requirement that the 10% bond be secured only by the deposit of cash. Thus, when a bondsman attempts to post a surety bond for the full amount, the clerk denies the bond. This is a direct violation of the defendant's constitutional rights and a misapplication of the criminal rule.

Crim. R. 46(A) provides:

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 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.

Under the rule, the court has the discretion to set the amount of bail. *See Jones, supra* at 118. (overruling the First District's holding that requiring the payment of cash is to the discretion of the court). However, the Court ruled that when a judge imposed a bond as a condition of release under [the former] Crim. R. 46(C)(4), the discretion was limited to setting the amount of bond. (emphasis added) *Id.*; *State ex rel. Cola v. McFaul*, 109 Ohio App.3d 203, 671 N.E.2d (8th

Dist.1996). Rather, it is the defendant's choice as to the manner in which he or she is going to post the bail. *Smith, supra* at ¶ 68.

Although both the Ohio Constitution and Crim. R. 46 were amended in 1998, the *Smith* Court upheld the spirit of the *Jones* decision. The Court discussed the amendment to the rule and explained that a cash-only bail is a type of bail, not a condition or factor of bail. *Id.* at ¶69. It further stated that the amendment merely imparted greater discretion to the trial court as to the factors that it could consider in determining bail and the conditions the trial court may impose, but not greater discretion as to the type of bail. *Id.*

Furthermore, the *Smith* Court also stated that the purpose of the amendment to Crim. R. 46 was to reorganize the rule in accordance with the amended Section 9 of Article I. *Id.* at ¶70. The Court asserted that had it intended to authorize a cash-only bail under the rule, it could have stated so. *Id.* at ¶71; referring to *Yakima v. Mollett*, 115 Wash. App. 604, 610, 63 P.3d 177 (2003) (Washington rule of criminal procedure held not to authorize cash-only bail to the exclusion of a bond because "if the rule drafters intended to authorize 'cash only' bail, they could have easily set it out as a discrete condition of release"). Moreover, the *Smith* Court recognized that had it expressly permitted such a cash-only bail, it would have violated the sufficient sureties provision of Section 9, Article I. *Id.* at ¶72. Thus, the Court determined that the amended Crim. R. 46 "did not empower the trial court to order a cash-only bond for Smith." *Id.* at ¶73. This is precisely the current practice in Wayne and Licking County trial courts.

Based upon the filings in the *instant* case and in the recently filed case of *State ex rel. Fox, et al. v. Walters, et al.*, Case No. 2013-0364,² Relators are relying upon the Eleventh

² The Licking County Prosecutor, Kenneth Oswalt, has not answered the Mandamus Complaint. However, Exhibit B attached to the complaint is a letter from Mr. Oswalt stating that the Licking County Court of Common Pleas is acting in accord with the holding in *State ex rel. Williams v. Fankhauser*.

District Court of Appeals decision in *State ex rel. Williams v. Fankhauser*, 11th Dist. No. 2006-P-0006, 2006-Ohio-1170. In *Williams*, the trial court set the individual's bond at "\$25,000 Ten Percent." *Id.* at ¶3. However, the clerk of courts refused to accept a surety in the full amount of \$25,000.00. *Id.* at ¶5. The appellate court determined that this was consistent with Criminal Rule 46(A)(2) and that it was a permissible "cash-only" bond, because the defendant is given the "benefit" of not having to cover the entire bond – just a mere 10%. *Id.* at ¶24.

The *Williams* court attempts to distinguish the facts in that case from the facts in *Smith* and *Jones* because those bonds were set under Crim. R. 46(A)(3) (full cash) and not 46(A)(2) (10% cash). *Id.* at ¶23. The *Williams* court states "even though Crim R. 46(A)(2) does not provide the defendant with any options, it requires him to deposit with the clerk only ten percent of the entire bond in cash." *Id.* at ¶24. The *Williams* court's own holding clearly demonstrates an imposition of a cash-only bond.

Furthermore, the *Williams* court continues to incorrectly interpret the Court's holdings in *Smith* and *Jones* when it states "[d]espite the fact that the general legality of Crim. R. 46(A)(2) was not technically before the *Smith* court at the time, this court cannot envision that the Supreme Court would state such a broad holding if there was any doubt as to the constitutionality of the 'ten percent cash' requirement." *Id.* at ¶25. *Williams* misses the point that an accused has an absolute right to be bailable by sufficient sureties and, thus, the options provided in Criminal Rule 46(A). The 10% cash requirement is unconstitutional if it is a requirement and does not work in concert with the other options provided under Crim. R. 46(A). The cash-only requirement, whether its 10% on a \$25,000.00 bail or a \$1.00 bail, violates the accused's rights enumerated under Article I, Section 9 and controverts the precedent in *Jones* and *Smith*.

The *Williams* holding, is a tortured, and frankly, incorrect interpretation of the Supreme

Court's decision in *Smith v. Leis*. This Court was clear in *Smith* that a cash only bond is unconstitutional. When a court or clerk requires bond to be posted in accordance with Crim R. 46(A)(2) and prohibits posting by the means provided in Crim. R. 46(A)(3), a court is simply requiring the posting of a cash only bond and prohibiting the use of sureties.

Proposition of Law No. II:

The Wayne County Clerk of Court has a clear duty to act regarding the acceptance of a surety bond.

A public officer is bound to perform the duties of his or her office faithfully, to use reasonable skill and diligence, and to act primarily for the benefit of the public. *See State ex rel. Smith v. Johnson*, 12 Ohio App.2d 87, 231 N.E.2d 81 (7th Dist.1967); *State v. Kearns*, 70 Ohio L.Abs. 534, 129 N.E.2d 547 (C.P. 1955); *State v. Kearns*, 70 Ohio L. Abs. 83, 1955 WL 9034 (1955). This Court has also held that county judges, clerks of court, and sheriffs owe a clear duty not to limit an accused's access to a surety bond. *State ex rel. Baker v. Troutman*, 50 Ohio St.3d 270,272; 553 N.E.2d 1053 (1990).

The General Assembly has vested various statutory powers and duties in a clerk of court and has expressly provided that "[t]he clerk of the court of common pleas shall exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law; and in the performance of his duties he shall be under the direction of his court." R.C. 2303.26; *See also, e.g., State ex rel. Wanamaker v. Miller*, 164 Ohio St.176, 177, 128 N.E.2d 110 (1955) ("[i]t is the duty of the clerk of this court, in the absence of instructions from the court to the contrary, to accept for filing any paper presented to him, provided such paper is not scurrilous or obscene, is properly prepared and is accompanied by the requisite filing fee. The power to make any decision as to the propriety of any paper submitted or as to the right of a person to file such paper is vested in the court, not the clerk".) The clerk's main function is that his or her office is

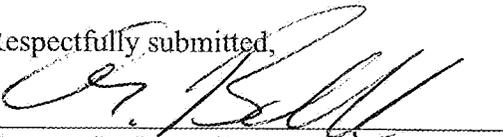
the custodian of the court's records and has "the power to certify the correctness of transcripts from those records, and files the court's papers, enters its judgments, and issues writs and process in the court's name". *State v. Wilson*, 102 Ohio App.3d 467, 472, 657 N.E.2d 518 (1995).

The Respondent argues that the Licking County Clerk of Court is under no clear duty to act because the clerk takes direction from the judge of the Licking County Court of Common Pleas. Even though the clerk of court is an arm of the court and its duties are ministerial and non-judicial, the clerk must certify the correctness of all filings including those from the judge. Because "where a party in the prosecution of a right does everything which the law requires him to do, and fails to attain his right wholly by the neglect or misconduct of an officer charged with a public duty with respect thereto, the law will not permit the diligent party to suffer detriment by reason of such neglect..." *Cincinnati Traction Co. v. Ruthman*, 85 Ohio St. 62, 70, 96 N.E. 1019 (1911). In the underlying case and the Licking County case, the clerks' refusal to accept a surety bond, when a judge sets a 10% bond, violates an accused's right to be bailable by sufficient sureties. Therefore, the clerk of court must not limit an accused constitutional right to be bailable by sufficient sureties, which includes not imposing a cash-only bond.

IV. CONCLUSION

Requiring an individual to post any amount of cash in lieu of release is still a "cash-only" bond, regardless of whether it is a percentage of the total bond. For the reasons set forth above, amici respectfully urge the Court to prohibit all trial courts from setting a "cash-only" bond without permitting the individual to utilize a surety to post the full amount, and to grant a writ of mandamus.

Respectfully submitted,


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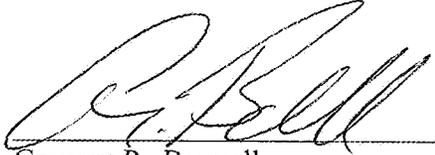
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