

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. :  
WOODROW L. FOX, et al., :  
: Relators, : Case No. 2013-0364  
: :  
v. : Original Action in Mandamus  
: :  
GARY WALTERS, CLERK OF THE :  
COURT OF COMMON PLEAS :  
LICKING COUNTY, OHIO, et al., :  
: Respondents. :

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AMICUS CURIAE BRIEF OF OHIO ATTORNEY GENERAL MICHAEL DEWINE  
IN SUPPORT OF RESPONDENTS

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## INTRODUCTION

Relators Woodrow L. Fox, Woodrow, L. Fox, Sr., LLC, and Woody Fox Bail Bonds, LLC, provide commercial bail bonds to criminal defendants awaiting trial. They seek a writ of mandamus ordering Respondents, Gary Walters, the Licking County Clerk of Courts, and two Licking County Court of Common Pleas judges, to accept surety bonds in lieu of cash when a defendant's bail is set under Criminal Rule 46(A)(2). That provision provides for a defendant's pre-trial release upon the posting of "[a] bail bond secured by the deposit of ten percent of the amount of the bond in cash," ninety percent of which is returned when the defendant appears for trial. Relators argue that requiring a cash deposit and not accepting a surety bond violates Article I, Section 9 of the Ohio Constitution, which guarantees (with exceptions not applicable here) that "[a]ll persons shall be bailable by sufficient sureties."

Criminal Rule 46(A)(2) does not conflict with the Ohio Constitution, but instead provides defendants with an accessible way of obtaining pre-trial release. A defendant can post the ten percent cash or have a surety – a bail bondsman, friend, or close family member – post the cash on his behalf. Then, the defendant or his surety will receive back ninety percent of the amount deposited upon the defendant's appearance in court. Far from inhibiting a defendant's constitutional right to bail "by sufficient sureties," the ten-percent bond provides a defendant with pre-trial release and an opportunity to receive back nearly all of the expense of bail upon appearing in court. In that way, a ten-percent bond incentivizes a defendant's return, which a traditional bail bondsman does not, since a defendant does not recoup costs paid to a bondsman when he appears. This ten-percent bond arrangement may well disrupt a bondsman's existing business model or cut into his profit margins, but these concerns are constitutionally irrelevant. The Ohio Constitution guarantees *defendants* a right to bail by sufficient sureties; it does not

guarantee bail bondsmen a right to a profit or a business model of their choosing. No writ of mandamus should issue.

## ARGUMENT

**PROPOSITION OF LAW I: Criminal Rule 46(A) expressly requires that the deposit on a ten-percent bond under Criminal Rule 46(A)(2) be paid in cash; the rule does not permit the posting of a surety bond in lieu of cash.**

The Relators argue that they do not challenge the constitutionality of Crim. R. 46(A)(2), suggesting that “nothing in the rule” requires courts to accept only cash on a “ten-percent bond,” or alternatively, that defendants always have the opportunity to choose among the three subsections of Rule 46. Both arguments fail.

First, Relators’ contention that “nothing in the rule” requires a cash deposit is meritless. Criminal Rule 46(A) specifically and unambiguously states that cash is the only way in which a Crim. R. 46(A)(2) ten-percent bond may be posted. When bail is set under Subsection (A)(2), the rule requires: “a bail bond secured by the deposit of ten percent of the amount of the bond *in cash.*” Crim. R. 46(A)(2) (emphasis added). Thus, the rule expressly requires that the ten-percent deposit be cash.

Second, the subsections of Crim. R. 46(A) cannot be read as options for the defendant to select, as Relators argue. This Court has made clear that it construes “statutes and rules to avoid unreasonable or absurd results.” *State ex rel. Barley v. Ohio Dept of Job & Family Servs*, 132 Ohio St. 3d 505, 2012-Ohio-3329, 974 N.E.2d 1183, ¶ 25 (citing *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, 957 N.E.2d 19, ¶25). Here, the only way the rule makes sense is if the *court* selects the subsection of Crim. R. 46 under which the defendant will be required to post bond.

The subsections provide for very disparate methods of ensuring the appearance of the accused:

- (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).

Subsection (A)(1) requires the defendant to post nothing at all—under that subsection, the defendant is released on his own recognizance. If defendants were permitted to choose among these three subsections, every defendant would choose Subsection (A)(1), which requires no security whatsoever. Clearly, this Court did not intend that absurd result when drafting the rule.

Moreover, even if defendants could choose only between subsections (A)(2) and (A)(3) (a result for which the rule contains absolutely no support), nearly every defendant would choose Subsection (A)(2), which presents the advantages of having to post only ten percent of the bond amount set by the court *and* permits the defendant to receive ninety percent of the deposited amount back upon appearance. The opportunity to recover ninety percent of the deposited amount is a benefit the accused would not receive if he paid that same ten percent to a commercial bonding company to obtain a surety bond for the full amount under Subsection (A)(3). *See, e.g., Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) (“Actually, under the professional bondsman system the only one who loses money for non-appearance is the professional bondsman, the money paid to obtain the bond being lost to the defendant in any event.”) (Wright, J., concurring).

Simply put, reading the rule to provide that the court merely sets an “amount” and the defendant then has the opportunity to choose which subsection of Crim. R. 46(A) under which he

will post bond—including an option of paying nothing at all and walking free on his own recognizance—is an absurd conclusion that this Court cannot have intended when it wrote the rule. *Barley*, 2012-Ohio-3329, ¶25. The only way to read the rule sensibly is that the court selects the subsection under which a defendant may make bail. *See* Crim. R. 46(A) (“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 . . .”) (emphasis added).

Accordingly, a court may choose to set bail under Crim. R. 46(A)(2), and when it does, the rule *requires* that the ten percent deposit be posted in cash. Given that, the Relators’ claims can only be a direct challenge to the constitutionality of Crim. R. 46(A)(2) itself—not merely to the “practices” of the clerks and judges who are the respondents in this case.

**PROPOSITION OF LAW II: Criminal Rule 46(A)(2) does not violate Article I, Section 9 of the Ohio Constitution’s guarantee that all persons shall be bailable by sufficient sureties.**

A ten-percent bond is not a cash-only bond as this Court has held to be unconstitutional in previous cases. If anything, this Court has already signaled the constitutionality of ten-percent bonds because it has approvingly upheld all of Rule 46 in previous cases. And upon fresh examination today, the ten-percent bond does not violate a defendant’s right to a sufficient surety. A defendant may choose to have a surety pay the ten percent cash on his behalf, and regardless of who pays the cash amount, the court will return ninety percent upon the defendant’s appearance in court. At no time is the bond a one hundred percent cash bond because, at most, a defendant need supply only ten percent in cash, whether a surety posts the money or a defendant does so himself.

To begin, Relators bear a heavy burden in this case. To obtain the writ of mandamus they seek, they must establish that: (1) they have a clear legal right to have their surety bonds accepted in lieu of cash when a court sets a defendant’s bond under Crim. R. 46(A)(2); (2) the

respondents have a clear legal duty to accept surety bonds in lieu of cash under those circumstances; and (3) absent a writ of mandamus, the Relators have no adequate remedy at law. *See Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶53. In meeting this standard, Relators bear a high evidentiary burden: they must show their entitlement to mandamus relief by clear and convincing evidence. *State ex rel. Doner*, 2011-Ohio-6117, ¶ 55. (“[T]he burden of proof on the relator in a mandamus case is to demonstrate that there is plain, clear, and convincing evidence which would require the granting of the writ.”) (Internal quotation omitted). They cannot.

Article I, Section 9, of the Ohio Constitution guarantees that, with exceptions not applicable here, “all persons shall be bailable by sufficient sureties.” Ohio Constitution, Article I, Section 9. This Court held in *Smith v. Leis* that Article I, Section 9 “obviously does not prescribe *which* of various types of bail or bond may be imposed—but it does mandate that defendants have access to sufficient sureties.” 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 56 (emphasis added); *see also State ex rel. Jones v. Hendon*, 66 Ohio St.3d 115, 118, 609 N.E.2d 541 (1993) (Article I, Section 9 is “silent as to the forms which bail may take . . .”). Accordingly, Criminal Rule 46(A)(2)’s provision for a ten-percent bond posted in cash is constitutional unless it operates to deny a defendant access to sufficient sureties. *See Smith*, 2005-Ohio-5125, ¶ 60 (Article I, Section 9 “does not authorize bail that would violate an accused’s access to a surety”). The Constitution does not define “surety,” but this Court has held that “[a] ‘surety’ is ‘[a] person who is primarily liable for the payment of another’s debt or the performance of another’s obligation.’” *Id.* ¶ 62 (quoting Black’s Law Dictionary (8th Ed. 2004) 1482).

In *Jones*, this Court held that when a court sets an amount of bail, requiring one hundred percent of the bail amount to be paid in cash—a so-called “cash-only” bond—it violates Article I, Section 9 because “the only apparent purpose in requiring a ‘cash only’ bond to the exclusion of the other forms provided in [former] Crim.R. 46(C)(4) is to restrict the accused's access to a surety . . .”. 66 Ohio St.3d at 118. The Court reaffirmed this holding in *Smith*. 2005-Ohio-5125, ¶70 (“cash-only bail . . . infringes upon an accused’s constitutional right to bail by sufficient sureties”). Relators argue that *Smith* and *Jones* govern this case and that the result here should be the same.

Relators are incorrect. Crim. R. 46(A)(2)’s requirement that the deposit on a ten percent bond be paid only in cash is materially distinguishable from the one hundred percent “cash-only” bonds at issue in *Smith* and *Jones*. Those cases do not mandate a finding that Crim. R. 46(A)(2) is unconstitutional. In fact, this Court’s statements in *Smith* indicate that it has already found Crim. R. 46(A)(2) to be constitutional. And, even if that was not the case, unlike the one hundred percent “cash-only” bonds at issue in *Smith* and *Jones*, requiring a ten-percent cash deposit on the full bond amount does not violate the constitution because it does not restrict a defendant’s access to a surety.

**A. A ten-percent bond under Crim. R. 46(A)(2) is not a “cash-only” bond as prohibited by *Smith* and *Jones*.**

Relators’ read *Jones* and *Smith*’s language prohibiting “cash only” bonds as necessarily prohibiting ten-percent bonds under Crim. R. 46(A)(2) because Relators conclude that the two situations are equivalent. This reading glosses over several important details that distinguish the ten-percent bonds authorized by Crim. R. 46(A)(2) from the so-called “cash-only” bonds at issue in *Jones* and *Smith*.

The provisions of Crim. R. 46 at issue in *Jones* and *Smith* each required a defendant to post the *entire amount* of the bond set by the court in order to be released on bail, using one of several methods listed in the provisions. See *Smith*, 2005-Ohio-5125, ¶¶ 26, 48 (quoting former Crim. R. 46(C)(4), which authorized defendants to post the entire bond amount by “bail bond with sufficient solvent sureties . . . a bond secured by real estate . . . or the deposit of cash or securities allowed by law . . .” and Crim. R. 46(A)(3), which authorized courts to order that the full bail amount be posted in the form of “[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*”) (emphasis added). By contrast, Crim. R. 46(A)(2), only requires the defendant to post *ten percent* of the bond amount in cash. See *id.* ¶ 47.

These differences mean that a ten-percent bond is not a “cash-only” bond as that term was used in *Jones* and *Smith*; it could more accurately be described as a “ninety percent recognizance” bond. Cf. *Williams*, 2006-Ohio-1170, ¶ 24 (noting that under Crim. R. 46(A)(2), the defendant “is given the benefit of not having to cover ninety percent of the full amount set by the trial court” and holding that, “[t]o this extent . . . the bond requirement of Crim. R. 46(A)(2) cannot be characterized as a ‘cash only’ bond in the same respect as the bonds in the *Smith* and *Jones* cases”). In addition, unlike the *Smith* and *Jones* “cash-only” bonds, Crim. R. 46 itself requires the ten-percent cash deposit, rather than the cash requirement being a gloss on the rule created by lower courts to eliminate choices this Court gave to defendants in former Crim. R. 46(C)(4) and Crim. R. 46(A)(3). Contrary to Relators’ argument, this Court has *never* held that the ten-percent cash bonds at issue here are unconstitutional; in fact, quite the opposite.

**B. This Court stated in *Smith* that Crim. R. 46(A)(2) is constitutional.**

In ruling that one hundred percent “cash-only” bonds were unconstitutional, this Court in *Smith* noted that if it had intended Rule 46 to authorize such “cash-only” bonds, it “would have

so provided with appropriate language.” *Id.* ¶ 70. Further, the Court noted that if “Crim.R. 46 [had] expressly permitted cash-only bail, it would have violated the sufficient-sureties clause” of the Ohio Constitution. *Id.* ¶ 72.

Not only does this further demonstrate that Crim. R. 46(A)(2) bonds are not “cash-only” bonds as the Court used that term in *Smith*, but it also demonstrates their constitutionality. The Court added Subsection (A)(2) to Crim. R. 46 as part of its 1998 revision of the rule. *Smith*, 2005-Ohio-5125, ¶¶ 21-26, 43-51. In *Smith*, the Court held that “the purpose of the 1998 amendment to Crim. R. 46 was to reorganize the rule *in accordance with the constitutional amendment* to Section 9, Article I”—which guaranteed the right to bail “by sufficient sureties” both before and after its 1998 amendment. *Id.* ¶¶ 18, 20, 39-40, 70 (citing the Staff Notes to the 1998 Amendment to Crim. R. 46) (emphasis added). Surely this Court was aware of Crim. R. 46(A)(2)’s requirements when it held that the 1998 revision was constitutional. *Cf. State ex rel. Williams v. Fankhauser*, 2006-Ohio-1170, 2006 Ohio App. LEXIS 1054, at ¶ 25 (“this court cannot envision that 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”). Accordingly, Relators’ argument that cash-only deposits on ten-percent bonds violate the Constitution has *Smith* exactly backward: this Court has already spoken on the issue, and its holding in *Smith* forecloses Relators’ claim.

**C. Requiring a bond payment in cash does not violate the constitution because it does not deprive the accused of “sufficient sureties.”**

Even in the absence of the Court’s declaration that it specifically drafted Crim. R. 46(A)(2) to comply with the Constitution, Relators have not established that requiring cash deposits on ten-percent bonds deprives defendants of the right to be bailed by “sufficient sureties.” This Court has defined “surety” as “[a] person who is primarily liable for the

payment of another's debt or the performance of another's obligation.” *Smith*, 2005-Ohio-5125, ¶ 62 (quoting Black’s Law Dictionary (8th Ed. 2004) 1482).<sup>1</sup> This—and no more—is what the Constitution guarantees. Article I, Section 9 does *not* guarantee access to any particular *type* of surety. There is no constitutional right to a “commercial” surety or to the use of a “surety bond.”<sup>2</sup> There is no constitutional guarantee that bail bonding companies’ preferred business models must be honored. A constitutionally sufficient surety may include any person who can deposit cash or post a sufficiently reliable bond on the defendant’s behalf.

The Court in *Jones* apparently based its finding (which the Court reaffirmed in *Smith*) on the presumption that sureties—any sureties—would be unwilling to post the entire bail amount in cash. *See Jones*, 66 Ohio St.3d at 118. Here, there is no reason for the Court to make the same presumption with respect to ten-percent bonds as the Court did in *Jones* with respect to one hundred percent cash-only bonds. At least two reasons exist for distinguishing the two.

First and foremost, Relators in this mandamus case have presented no evidence that requiring only ten percent of the bond to be posted in cash restricts access to sureties. In fact, the stipulated evidence is to the contrary. In the Licking County example cases, eight out of ten of the defendants found someone else to post ten percent of their bonds in cash. (Stipulated Evidence, documents filed on: Oct. 18, 2012 (Hunt); Oct. 24, 2012 (Markle); Aug. 15, 2012

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<sup>1</sup> The Wayne County Respondents advance a cogent argument that the original meaning of the word “surety” in Ohio’s 1802 Constitution was the “security” that is provided to the court by the defendant or someone on his behalf (whether it be cash, real estate, or a bond), not the person who provides that security. I.e., that “bailable by sufficient sureties” meant “bailable by providing sufficient security to the court to ensure that the person will return for trial.” *See* Brief of Respondent Tim Neal, Wayne County Clerk of Courts, p. 5 (citing contemporaneous dictionaries defining “surety” as “security against loss or damage”).

<sup>2</sup> While the Court in *Jones* held that the clerk “must accept a surety bond to secure the defendant’s release,” it clearly did so because the rule at issue in *Jones*, former Crim. R. 46(C)(4), provided a surety bond as one of the choices available to defendants, along with cash. *See Jones*, 66 Ohio St.3d at 118 (“that being one of the options set forth in Crim. R. 46(C)(4), the Clerk of Courts must accept . . .”). Read in context, the statement clearly constitutes a specific remedy dictated by the text of the rule at issue, not a broad guarantee that is otherwise unfounded in the Constitution.

(Canterbury); Aug. 28, 2012 (Hill); Sep. 30, 2011 (Flanagan); June 21, 2011 (Esposito); May 2, 2011 (Anglada); Nov. 18, 2011 (Lancaster)). (The other two defendants (Caw and Miller) pled guilty and may have chosen to remain in custody to receive credit for time served.) In the Wayne County case, a representative of the commercial bail bond company paid the \$500 cash required for the defendant to bond out of jail. Case No. 2012-1742, Presentation of Evidence, Affidavit of Chris Nickolas, ¶ 8.<sup>3</sup> This evidence cannot support a finding that Crim. R. 46(A)(2) restricts access to sureties, properly defined.

Second, the amount of cash that a defendant or surety is required to post under Crim. R. 46(A)(2) is much lower than on a one hundred percent cash-only bond, being only ten percent of the full bond amount. Because the amounts are so much lower (most of the bonds cited in the example cases were below \$10,000 for the *full* bond amount), access to a surety is not restricted as it is in the case of one hundred percent cash-only bonds.

Relators appear to argue that this is not necessarily the case and that a judge could use Crim. R. 46(A)(2) to circumvent this Court's holding in *Smith* by simply multiplying the impermissible "cash-only" bond she would have set under Crim. R. 46(A)(3) by a factor of ten and setting that enlarged amount as bail under Crim. R. 46(A)(2). This would require the defendant to post the same amount in cash as *Smith* prevents a court from requiring under Crim. R. 46(A)(3). This argument fails because it unjustifiably relies on the assumption that judges will seek to "outsmart" the constitutional pronouncements of this Court. Even if judges did engage in this kind of gamesmanship (which no evidence suggests would occur), they would quickly run afoul of the rule prohibiting excessive bail. *See* Ohio Constitution, Article I, Section

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<sup>3</sup> Relator Fox's allegation that commercial sureties are forbidden from posting ten percent cash bonds appears to be incorrect. *See* R.C. 3905.932(G)(2) (permitting surety bond agents to post "ten percent assignments" without using a bail instrument).

9. For example, a judge who wanted a defendant to pay \$50,000 in cash would have to set bail at \$500,000. Both amounts—the cash bond amount and the total bail amount that would be forfeited if the defendant failed to appear—would be subject to review for excessiveness, and likely would be found excessive. Crim. R. 46(A)(2) is not a viable means of escaping the Court’s holding in *Smith*.

Rather, the rule allows courts to choose an intermediate level of commitment by an accused in an effort to hit the mark by setting bail that is not excessive but that is sufficient to induce the defendant’s appearance at trial. The choice of the “ten percent” amount in this regard is surely no accident: ten percent of the full bail amount is traditionally what commercial bonding companies charge an accused when they post a surety bond. This Court was likely aware of that fact and drafted Crim. R. 46(A)(2) with it in mind. And while it is true that commercial sureties (which, again, are only one kind of potentially “sufficient” surety) take credit cards and offer payment plans, there is another important distinction between paying ten percent to a bonding company and paying ten percent to the Court: if the defendant appears, the Court refunds ninety percent of his (or his surety’s) money; whereas even if the defendant appears, the bonding company retains his entire payment. *See Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) (“Actually, under the professional bondsman system the only one who loses money for non-appearance is the professional bondsman, the money paid to obtain the bond being lost to the defendant in any event.”) (Wright, J., concurring); Jonathan Drimmer, “When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System,” 33 *Hous. L. Rev.* 731, 742 (Fall 1996) (“Unfortunately, hiring a commercial bondsman removes the incentive for the defendant to appear at trial. The defendant’s failure to appear results in the bondsman, not the defendant, forfeiting bail.”).

In a landscape where defendants who are not released solely on their own recognizance are paying no less than ten percent of the bail amount to *somebody*, it is reasonable to assume that a defendant will be more strongly incentivized to appear if he (or his surety, which may be a close friend or family member) stands to receive part of the posted money back than if he will not. This dynamic sets the ten-percent bond apart from the one hundred percent cash bond by providing a reason for requiring a cash payment that is related to the appearance of the accused: given that the accused will be paying ten percent to someone, it is reasonable—and constitutionally permissible—to provide a mechanism for the return of ninety percent of the money as an incentive to appear. *See id.*

Boiled down, Relators' argument appears to be based on the premise that they would prefer to post surety bonds in lieu of cash. Presumably, bonds present a more profitable business model. While there are ways a commercial surety could make money posting ten percent bonds in cash (for example, by charging interest), the salient point is that the discretion of the courts to set bail and the constitutionality of Crim. R. 46(A)(2) cannot be determined by the preferences of commercial bail bonding companies regarding what types of transactions they want to enter into, or what business models they wish to adopt. The Constitution does not guarantee maximum profit to commercial bail bonding companies.

Rather, Article I, Section 9 of the Ohio Constitution guarantees to *criminal defendants* the right to be bailed out of jail by “sufficient sureties.” Where the defendant is released on his own recognizance, no surety is needed. Crim. R. 46(A)(2) provides for release on ninety percent recognizance and ten percent cash—meaning most defendants will have far less need for a surety than they would if bail was set under Crim. R. 46(A)(3), requiring one hundred percent of the amount to be pledged up front. The Relators have not shown by clear and convincing evidence

that requiring the ten percent bond (ninety percent of which is returned upon appearance) to be paid in cash (meaning the defendant really pays ten percent in cash) restricts defendants' access to sufficient sureties.

### CONCLUSION

As Relators have not shown that requiring a cash deposit under Crim. R. 46(A)(2) deprives defendants of access to a surety, they have not shown that the rule as written or the Respondents' actions in conformity with it violate Article I, Section 9, of the Ohio Constitution. Relators have not established a clear legal right to post a surety bond in lieu of a cash deposit on a ten-percent bond, or a clear legal duty on the part of the Respondents to accept one. Relators have failed to meet their burden to obtain a writ of mandamus. The Court should dismiss their complaint.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the *foregoing Amicus Curiae Brief of Ohio Attorney General Michael DeWine in Support of Respondents* was served by regular U.S. mail, postage prepaid, on July 30, 2013 upon the following:

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