IN THE

SUPREME COURT OF OHIO

JUSTIN DUBOSE, Hamilton County Justice Center 1000 Sycamore Street Cincinnati, Ohio 45202, Petitioner-Appellee, vs. **CHARMAINE MCGUFFEY,** **HAMILTON COUNTY SHERIFF** 1000 Sycamore Street Cincinnati, Ohio 45202, Respondent-Appellant.	:	**NO. 2021-1403** On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case Number C-210489

MERIT BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF THE CASE

On November 13, 2020, Dubose was indicted on two counts of murder, one count of aggravated robbery, and one count of aggravated burglary. His initial bond was set at $1,500,000 straight. On January 26, 2021, Dubose filed an initial motion to reduce his bond. Following a hearing on that motion, Dubose's bond was reduced to $500,000 straight with EMU on February 24, 2021, but was immediately thereafter increased to the original $1,500,000 bond on February 25, 2021. Following a subsequent hearing held on February 26, 2021, the court overruled Dubose's initial motion.

Dubose filed two additional motions to reduce his bond on June 26 and June 28, 2021. Following a hearing on those motions on August 12, 2021, the trial court overruled them on August 13, 2021.

Dubose filed a petition for writ of habeas corpus as an original action in the First District Court of Appeals on September 22, 2021. On October 27, 2021, the First District granted the writ and reduced the bond to $500,000 straight, no ten percent, with additional conditions. *Dubose v. McGuffey*, 2021-Ohio-3815, -- N.E.3d – (1st Dist.).

STATEMENT OF THE FACTS

In this case, Dubose and his codefendant Shelton are alleged to have entered a residence through the garage, planning to rob someone in the home. Dubose carried a firearm, and once inside, shot the victim once in the head, killing him. Both Dubose and Shelton fled the jurisdiction, and they were ultimately apprehended in Las Vegas, Nevada.

Dubose was only found because Las Vegas police, on routine patrol, stopped someone for "suspicious activity." They determined that person, who was in possession of 56 credit cards that were not in his name, to have a "full extradition warrant for narcotics sales out of Indiana." Dubose was with this person, and Dubose provided a false identification card with the name

"Kevin Polanski," also had possession of multiple credit cards not in his name, and was carrying $2,000 in cash. Shelton was located thereafter at a hotel room in Las Vegas.

At one of the hearings on Dubose's motions, the victim's grandmother informed the court that the family had serious concerns for their safety due to Dubose. The State also displayed a Facebook photograph which depicted Dubose holding a firearm in each hand, with additional firearms at his feet.

Dubose argued that he is a lifelong resident of Cincinnati, where his entire family lives, that he has no prior felony convictions or failures to appear in court, and that he had been working at the same job for approximately one year. He said he was not in Las Vegas avoiding prosecution and that he could not afford a $1.5 million bail.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Any review of a trial court's imposition of bail should be for an abuse of discretion.

In reviewing the bond set in the instant case, the First District Court of Appeals reasoned that "*Mohamed* suggests that our standard of review is de novo." *Dubose* at ¶ 14. Support of this suggestion included a Sixth District Court of Appeals decision, where that court explained, "we glean from *Mohamed* that we must conduct a de novo review in our determination of whether the pretrial bail is excessive." *Id.*, citing *Stevens v. Navarre*, 2021-Ohio-551, 168 N.E.3d 578, ¶ 8 (6th Dist.). The States submits that the trepidation present in the decision of these appellate districts (and likely countless courts throughout the State of Ohio),[1] is due to the language of the Ohio Constitution and Crim.R 46, coupled with the decades of as-yet undisturbed precedent from this Court that has routinely held "[t]he amount of bail is largely

[1] "Until we resolve this contradiction and reconcile our caselaw, this area of law will remain a source of confusion for litigants, lawyers, and jurists alike." *Hartman v. Schilling*, 160 Ohio St.3d 1486, 2020-Ohio-5506, 158 N.E.3d 617, ¶ 1 (Kennedy, J. dissenting).

within the sound discretion of the court." *Bland v. Holden*, 21 Ohio St.2d 238, 239, 257 N.E.2d 397 (1970); see also *Jenkins v. Billy*, 43 Ohio St.3d 84, 85, 538 N.E.2d 1045 (1989); *Davenport v. Tehan*, 24 Ohio St.2d 91, 264 N.E.2d 642 (1970). The plain language and precedent suggest that, regardless of whether a claim of excessive bail is considered in an original action, the appropriate standard of review is to determine whether there was an abuse of discretion on the part of the trial court.

Article I, Section 9 of the Ohio Constitution states:

> 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.

(Emphasis added.)

Crim.R. 46, titled "Pretrial Release," states:

> Unless the court orders the defendant detained under division (A) of this rule, the court shall release the defendant on the least restrictive conditions that, *in the discretion of the court*, will reasonably assure the defendant's appearance in court, the protection or safety of any person or the community, and that the defendant will not obstruct the criminal justice process. If the court orders financial

> conditions of release, those financial conditions shall be related to the defendant's risk of non-appearance, the seriousness of the offense, and the previous criminal record of the defendant. Any financial conditions shall be in an amount and type which are least costly to the defendant while also sufficient to reasonably assure the defendant's future appearance in court.

(Emphasis added.) Crim.R. 46(B).

Likely due to this clear grant of discretion to the trial courts, precedent from this Court has routinely included a determination whether the trial court had, in fact, abused that discretion. *See Davenport v. Tehan*, 24 Ohio St.2d 91, 264 N.E.2d 642 (1970) ("There are no facts alleged in the instant case which indicate in any way that the bail is excessive, or that the trial judge has abused his discretion."); *In re DeFronzo*, 49 Ohio St.2d 271, 273, 361 N.E.2d 448 (1977) ("It is clear from the judgment that the Court of Appeals did, in fact, find that the bail was excessive and that the trial court abused its discretion even if the Court of Appeals did not so state in the actual words it used in its entry."); *Jenkins v. Billy*, 43 Ohio St.3d 84, 85, 538 N.E.2d 1045 (1989) ("Here, petitioner alleges no facts that indicate an abuse of discretion by the trial court or that appropriate grounds for independent review by this court exist."); *Chari v. Vore*, 91 Ohio St.3d 323, 328, 744 N.E.2d 763 (2001) ("Chari alleged no facts that indicate either an abuse of discretion by the trial court or that appropriate grounds for independent review exist by the court of appeals or this court.").

The *Mohamed* court relied upon *DeFronzo* in applying a de novo standard of review to a claim of excessive bail. "Bail is excessive when it is higher than is reasonably necessary to serve the government's interest in ensuring the accused's appearance at trial." *Mohamed* at ¶ 29 (Kennedy, J., dissenting), citing *United States v. Salerno*, 481 U.S. 739, 753-755, 107 S.Ct.

2095, 95 L.Ed.2d 697 (1987), and *Stack v. Boyle*, 342 U.S. 1, 5, 72 S.Ct. 1, 96 L.Ed. 3 (1951). As explained above, the Ohio Constitution gives broad discretion to the trial court to determine the type, amount, and conditions of bail, while ensuring that it is not excessive. Given this discretion, implicit in every decision by an appellate court finding a bail excessive, even those following a de novo review, is a finding that the trial court abused its discretion; otherwise, why upset the underlying decision? *DeFronzo* acknowledged this reality, but declined to require that any specific language accompany that implicit determination. *DeFronzo* at 273. This, of course, does not change the fact that the determination is nonetheless being made. While this may seem an innocuous question of semantics, its impact is much greater; it allows the reviewing court to usurp the discretion of the trial court without granting it any deference, essentially eliminating it entirely. This cannot be reconciled with the language of the Ohio Constitution and Crim.R. 46. Accordingly, any citation to *DeFronzo* for the proposition that a de novo standard of review is appropriate for claims of excessive bail should not exclude that decision's predicate finding of an abuse of discretion on the part of the trial court. This is the only interpretation of *DeFronzo* that adequately accounts for the clear grant of discretion to the trial court contained in the Ohio Constitution and Crim.R. 46.[2]

Aside from standing contrary to the clear grant of discretion in the trial court, de novo review with no consideration to the original bail would result in a rush of bond modification hearings, which the trial courts of the State are perfectly suited for handling, flooding the Courts

[2] In reviewing the underlying bond de novo in this case, the First District appears to have gone out of its way to avoid making a predicate finding of abuse of discretion on the part of the trial court:

> We finally would like to note that the trial judge below engaged in thoughtful consideration of the bail in this case, convening no less than three separate bail hearings. Determining a bail that satisfies all of the requirements of Crim.R. 46 is not an easy decision to make. But, as explained above, it is unlawful to set a bail so high that it "accomplishes with money what courts could not otherwise achieve without following the due-process requirements in R.C. 2937.222." *Mohamed*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132, at ¶ 25 (Stewart, J., concurring).

Dubose at ¶ 28. Despite this apparent lack of an abuse of discretion, the Court of Appeals nevertheless upset the trial court's thoughtfully considered bail.

of Appeals and this Court.[3] *See Hartman v. Schilling*, 160 Ohio St.3d 1486, 2020-Ohio-5506, 158 N.E.3d 617, ¶ 4 (Kennedy, J. dissenting) ("this court created a new right 'open to all criminal defendants in this state who are dissatisfied with the amount of bail that has been imposed by a trial court' through which this court could exercise its 'sole, unreviewable discretion [and] substitute its judgment for that of the trial court.'"); *DeFronzo* at 275 (Celebrezze, J. dissenting) ("It follows that the amount of bail to secure the presence of the accused is primarily a matter of judgment. In the absence of a finding of abuse in the exercise of that judgment, it should not become the subject of speculation."). Judicial economy would no doubt suffer with duplicative review of the same arguments being conducted in multiple courts, each free to ignore entirely what occurred in the others.

Proposition of Law No. 2: There are legitimate reasons that the State may request a defendant be given a high bail, and all such argument are not tantamount to a request for no bail.

The State disagrees that with the First District's characterization of its request for a high bail as tantamount to a request for no bail. There are legitimate arguments that a high bail, which the defendant meets, more effectively ensures "the defendant's appearance in court, the protection or safety of any person or the community, and that the defendant will not obstruct the criminal justice process." Crim.R. 46(B).

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[3] "Marsy's Law was established on February 5, 2018, when Article I, Section 10a of the Ohio Constitution was amended following an initiative adopted by Ohio voters at the 2017 general election." *State ex rel. Suwalski v. Peeler*, 2021-Ohio-4061, -- N.E.3d --, ¶ 14. "As adopted, Marsy's Law states that its express purpose is to secure justice and due process for victims and provide rights to victims that must be protected with the same vigor as an accused's rights." *Centerville v. Knab*, 162 Ohio St. 3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 16.
Marsy's Law includes ten enumerated victims' rights. These rights include "reasonable protection from the accused" and the right "to be heard in any public proceeding involving release [...] or in any public proceeding in which a right of the victim is implicated." Article I, Section 10a(A), Ohio Constitution.
If, when considering a claim of excessive bail, the Courts of Appeals and this Court are free to ignore the broad discretion vested in the trial courts in setting the amount of bail, Marsy's Law grants victims the right to be heard in each of those cases.
In fact, if the First District arrived at the new bail amount after conducting a de novo review below, it likely violated Marsy's Law by not notifying the victim's family on the right to be heard in this case.

In its decision below, the First District elevated the defendant's ability to pay a certain amount for bail above all other considerations that are provided under Crim.R. 46. "Any financial conditions shall be in an amount and type which are *least* costly to the defendant *while also* sufficient to reasonably assure the defendant's future appearance in court." (Emphasis added.) Crim.R. 46(B). This sentence is written in the conjunctive, and for good reason. It is not difficult to conceive of a situation where the amount of money required to ensure a defendant's appearance at trial exceeds what they can pay in bail; in fact, this circumstance is expressly provided for by the plain language of Crim.R. 46(B). As Justice Kennedy pointed out in her dissent in *Mohamed*, other courts "have rejected the view that bail is excessive merely because the accused cannot afford it." *Mohamed* at ¶ 43 (Kennedy, J. dissenting), citing 4 LaFave, *Criminal Procedure*, Section 12.2(b), 38-44 (4th Ed.2015). The language of Crim.R. 46(B) compels such a result. If the appropriate amount of bail were simply a matter of how much a defendant can afford to pay, the rule presumably would have been written that way. The Court can, of course, make this change via an amendment should it see fit.

The First District used this logic to cast the State's argument below as "an argument for the denial of bail," despite an absence of any such request on the part of the State. *Dubose*, 2021-Ohio-3815 at ¶ 19-22. In fact, the State's arguments cited by the First District all address those considerations present in Crim.R. 46, including assuring the defendant's appearance in court, the protection or safety of any person or the community at large, prohibiting the defendant from obstructing the criminal justice process, and the seriousness of the underlying offense. Crim.R. 46(B). The First District interpreted these arguments to be an attempt to circumvent the due process protections provided in the no bail provision in R.C. 2937.222. The relevant considerations under that section are as follows: 1) the proof is evident or the presumption great

that the accused committed the offense with which the accused is charged; 2) the accused poses a substantial risk of serious physical harm to any person or to the community; and 3) that no release conditions will reasonably assure the safety of that person and the community. R.C. 2937.222. The First District took the State's arguments relative to the safety concerns of the victim's family and looked at them in terms of R.C. 2937.222, but Crim.R. 46 also mandates consideration of the protection or safety of any person or the community at large. The argument regarding Dubose's apprehension in Las Vegas and other flight concerns are not considerations appropriate under R.C. 2937.222; those only apply in selecting an appropriate bail under Crim.R. 46.

Ultimately, the State does not believe it is appropriate to consider every request for a high bail as tantamount to a request for no bail, even in those cases where a defendant claims they are only able to afford a certain amount. Aside from the nearly impossible task of calculating what any person is able to afford (there are obviously myriad ways to pay for a bail), the rules governing these decisions are designed chiefly to ensure the defendant's appearance for trial, and how much a defendant can afford is a fundamentally different question than how much ensures their appearance.

CONCLUSION

The decision of the First District Court of Appeals below was made without regard to the broad discretion granted to the trial court by both the Ohio Constitution and Crim.R. 46. If allowed to stand, trial courts in the First District, and likely elsewhere throughout the State, will no longer be able to rely upon Crim.R. 46 when determining appropriate amounts of bail, and instead are left speculating as to what bond might be deemed appropriate by the Court of Appeals.

The State of Ohio respectfully submits that the decision below must be reversed.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Merit Brief, by United States mail and email, addressed to Kara C. Blackney and William R. Gallagher, Arenstein and Gallagher , 114 East Eighth Street, Cincinnati, Ohio 45202, counsel of record, this 7th day of December, 2021.

/s/Alex Scott Havlin
Alex Scott Havlin, 0089317P
Assistant Prosecuting Attorney

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JUSTIN DUBOSE,	:	CASE NO. C-210489
Petitioner,	:	
vs.	:	*JUDGMENT ENTRY IN HABEAS CORPUS*
CHARMAINE MCGUFFEY, HAMILTON COUNTY SHERIFF,	:	
Respondent.	:	

This cause was heard upon a verified petition for a writ of habeas corpus, the exhibits attached thereto, and the response of the respondent.

The petition for a writ of habeas corpus is granted for the reasons set forth in the Opinion filed on this date. Petitioner's bail in the case numbered B-2005815B is reduced to $500,000 straight, no ten percent, with the additional conditions of 24-hour lockdown EMU, no direct or indirect contact with the victim's family and petitioner shall surrender his passport if he owns one. All other non-financial conditions of release imposed by the court of common pleas shall also remain in place.

Costs are taxed to the respondent. The clerk of courts is hereby directed to serve upon all parties this judgment and writ.

To The Clerk:

Enter upon the Journal of the Court on 10/27/2021 per Order of the Court.

By: _____
Judge Candace C. Crouse

D133304574

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JUSTIN DUBOSE,	:	CASE NO. C-210489
Petitioner,	:	
vs.	:	*OPINION.*
CHARMAINE MCGUFFEY, HAMILTON COUNTY SHERIFF,	:	
Respondent.	:	

Original Action in Habeas Corpus

Judgment of Court: Petition for Writ Granted

Date of Judgment Entry on Appeal: October 27, 2021

Arenstein and Gallagher, William R. Gallagher and *Kara C. Blackney,* for Petitioner,

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Alex Scott Havlin,* Assistant Prosecuting Attorney, for Respondent.

CROUSE, Judge.

{¶1} Petitioner Justin Dubose is currently being detained in the Hamilton County Justice Center because he contends he is unable to post the $1.5 million bail that has been set in his case. Dubose and codefendant Jamie Shelton were charged with the murder of Shawn Green. The murder is alleged to have occurred on July 18, 2020, during a robbery. Dubose has been indicted for two counts of murder, one count of aggravated robbery, and one count of aggravated burglary in the case numbered B-2005815B. He has filed a petition for a writ of habeas corpus challenging the amount of his pretrial bail as excessive. The court, upon consideration thereof, finds that the petition is well taken and is granted.

The Bail Hearings Below

{¶2} Complaints were filed and warrants were issued against Dubose on October 2, 2020, for murder and aggravated robbery. He was arrested in Las Vegas, Nevada. He waived extradition and was returned to Hamilton County on November 5, 2020, and appeared before the Hamilton County Municipal Court for a bail hearing. At the hearing, the state requested that the court impose a $1.5 million secured bail because a different judge had already set such a bail for his co-defendant, Shelton. In support of the high bail, the state claimed that Dubose and Shelton shot the victim in the head after they entered the garage of a home in order to rob the homeowner of his marijuana. They subsequently fled the scene and Dubose was arrested in Las Vegas.

{¶3} In support of a lower bail, Dubose's attorney represented that he had been retained by Dubose's mother, Dubose is not employed, and he does not have

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the financial means to afford a high bail. He further explained that Dubose is 25 years old and does not have a significant criminal history.

{¶4} After hearing argument, the municipal court judge set a $750,000 secured bail on the murder charge and an additional $750,000 secured bail on the aggravated-robbery charge, totaling $1.5 million.

{¶5} After he was indicted, Dubose filed a motion to reduce bail before the common pleas court judge assigned to the case, arguing that the $1.5 million bail was excessive and the municipal court judge did not consider Dubose's ability to afford the bail. In the motion, Dubose asserted that he is a graduate of Colerain High School, a lifelong resident of Cincinnati, and his entire family lives in Cincinnati. He claimed he had been working full-time for the same company for over a year. He further claimed he had no felony convictions, no history of weapons, and no history of failing to attend court appearances. He claimed that he and his family did not have the financial means to post the current bail. The motion was set for a hearing on February 23, 2021.

{¶6} At the hearing, Dubose's counsel argued that Dubose has strong family ties to the community, no failures to appear, no felony convictions, does not own a passport, and cannot afford the $1.5 million bail.

{¶7} In response, the state countered that this was a planned aggravated robbery inside of a residence by Dubose and Shelton. The state alleged that Dubose was the "hands-on killer" who shot and killed the victim, who was left for dead when Dubose and Shelton fled the scene. Dubose and Shelton were later arrested in Las Vegas. The state argued that Dubose posed a danger to the community and was an

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"extremely violent person" and a flight risk. The state asked the judge to keep the bail as is.

{¶8} The trial court stated that it must consider several factors, including ties to the community, ability to pay, the serious nature of the offense and the risk of flight. The court found that although this was a very serious case and Dubose was "a significant risk of flight," he was innocent until proven guilty and the $1.5 million bail was excessive. The court reduced the bail to $500,000 straight with an electronic monitoring unit ("EMU").

{¶9} After the court entered its order reducing the bail, it was informed by the prosecution that there was a failure to comply with Marsy's Law, in that the victim's family had not been notified of the bail hearing. The court immediately reinstated the original $1.5 million bail and set the matter for a hearing on February 23, 2021, with the victim's family present.

{¶10} At the hearing, the victim's grandmother informed the court that she is terrified of Dubose and feels that she and her family would be in extreme danger if he were released, even on electronic monitoring. The court kept the bail at $1.5 million.

{¶11} Dubose filed a second motion to reduce bail, which was heard on August 12, 2021. After hearing argument, the court denied the motion. The court stated that it would give Dubose the benefit of the doubt that he did not travel to Las Vegas to avoid prosecution. However, the court noted the seriousness of the charges, that they included gun specifications and carried mandatory prison time. The court stated that it placed a lot of weight on the fear of the family members.

{¶12} In this habeas petition, Dubose argues that the $1.5 million bail ordered by the common pleas court judge is excessive and unreasonable, and the

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judge did not properly consider his financial resources as required by Crim.R. 46(C) and the Ohio Supreme Court. Dubose requests that this court reduce his bail to $500,000 with EMU, which was the bail originally set by the common pleas court.

The Standard of Review

{¶13} "[I]n an original action, an appellate court may permit a habeas petitioner to introduce evidence to prove his claim and then exercise its own discretion in imposing an appropriate bail amount." *Mohamed v. Eckelberry*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132, ¶ 5.

{¶14} Thus, *Mohamed* suggests that our standard of review is de novo.[1] *See Hartman v. Schilling*, 160 Ohio St.3d 1486, 2020-Ohio-5506, 158 N.E.3d 617, ¶ 2 (Kennedy, J. dissenting) (stating that the court applied a de novo standard of review in *Mohamed*); *see also Stevens v. Navarre*, 2021-Ohio-551, 168 N.E.3d 578, ¶ 8 (6th Dist.) ("[W]e glean from *Mohamed* that we must conduct a de novo review in our determination of whether the pretrial bail is excessive.").

{¶15} Our record consists of the verified habeas petition, the exhibits attached thereto, and the response of the respondent. Neither party requested an opportunity to submit additional evidence.

The $1.5 million Bail is Excessive

{¶16} While the nature and circumstances of the crime charged are certainly relevant to any bail determination, Crim.R. 46(C) also requires the court to "consider many other factors that are specific to the accused, such as the weight of the evidence and the defendant's financial resources." *Mohamed* at ¶ 7. "Any financial conditions [of release] shall be in an amount and type which are least costly to the defendant

[1] As a result, this de novo standard supplants the prior "hybrid" standard of review that this court historically applied. *Drew v. State ex. rel. Neil*, 2020-Ohio-4366, 158 N.E.3d 684, ¶ 3 (1st Dist.).

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while also sufficient to reasonably assure the defendant's future appearance in court." Crim.R. 46(B). Imposing an unreasonably high bail that everyone knows the defendant cannot afford is tantamount to a denial of bail, but it is done in a manner that avoids compliance with the due-process requirements for the statutory denial of bail.

{¶17} We must remember that "[t]he sole purpose of bail is to ensure a person's attendance in court." *State ex rel. Sylvester v. Neal*, 140 Ohio St.3d 47, 2014-Ohio-2926, 14 N.E.3d 1024, ¶ 16; R.C. 2937.22 (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."). "Bail is excessive when it is higher than is reasonably necessary to serve the government's interest in ensuring the accused's appearance at trial." *Mohamed*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132, at ¶ 29 (Kennedy, J., dissenting), citing *United States v. Salerno*, 481 U.S. 739, 753-755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), and *Stack v. Boyle*, 342 U.S. 1, 5, 72 S.Ct. 1, 96 L.Ed. 3 (1951).

{¶18} "[S]etting a high bail in order to keep someone accused of a crime incarcerated pretrial is both statutorily and constitutionally unlawful." *Mohamed* at ¶ 24 (Stewart, J., concurring), citing R.C. 2937.222, *State v. Bevacqua*, 147 Ohio St. 20, 22, 67 N.E.2d 786 (1946), and *Stack* at 4. "Boiled down to its essence, setting high bail amounts accomplishes with money what courts could not otherwise achieve without following the due-process requirements in R.C. 2937.222." *Id.*

{¶19} That is exactly what occurred here. Dubose's counsel repeatedly proffered that neither Dubose nor his family can afford the $1.5 million bail, a point

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reiterated in the verified habeas filing before us. The state has never contested this point or introduced contrary evidence, and, indeed, the thrust of its arguments at the bail hearings is that the bail must be so high that Dubose cannot get out.

{¶20} The state made this point in various ways. At the February 23, 2021, bail hearing, the prosecutor told the court, "So not only for the safety of the community, but I don't think he would come back if he got out. I would ask the court to keep the bond as it was [$1.5 million]." A few days later, the state reiterated, "And I know the Court set a bond and also put on an EMD provision on that bond: but the feeling is that that's just an ankle bracelet and you can either cut that off or violate it, and it doesn't really protect somebody if the person wants to violate it. Certainly there'd be notice to probation or EMD that there's a violation, but in that time period after he goes off his range, then that person could do whatever they want." And at the final bail hearing, the prosecutor warned, "if the defendant were released, [the victim's family] would feel they were in danger from Mr. Dubose."

{¶21} The state's point is not that the court should set a bail at a level to "ensure a person's attendance in court." *Neal*, 140 Ohio St.3d 47, 2014-Ohio-2926, 14 N.E.3d 1024, at ¶ 16. Rather, it is that the bail must be sufficiently high that Dubose can never get out.

{¶22} At the end of the day, this is an argument for the denial of bail. But it is unconstitutional to achieve a de facto denial of bail without satisfying the rules for a true denial of bail. *See Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 64 ("Thus, the amendment to Section 9, Article I was designed 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."). (Emphasis omitted.)

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> 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.

Ohio Constitution, Article I, Section 9.

{¶23} If the state believes that Dubose represents such a danger to the community that he must be held without bail, then it must make a motion pursuant to R.C. 2937.222, at which point "the judge shall hold a hearing to determine whether an accused person charged with aggravated murder when it is not a capital offense, murder, a felony of the first or second degree, a violation of section 2903.06 of the Revised Code, a violation of section 2903.211 of the Revised Code that is a felony, or a felony OVI offense shall be denied bail." R.C. 2937.222(A).

{¶24} The statute places the burden on the state to prove "that the proof is evident or the presumption great that the accused committed the offense with which the accused is charged, of proving that the accused poses a substantial risk of serious physical harm to any person or to the community, and of proving that no release conditions will reasonably assure the safety of that person and the community." *Id.* That provision further provides:

> No accused person shall be denied bail pursuant to this section unless the judge finds by clear and convincing evidence that the proof is evident or the presumption great that the accused committed the offense described in division (A) of this section with which the accused is charged, finds by clear and convincing evidence that the accused poses a substantial risk of serious physical harm to any person or to the community, and finds by clear and convincing evidence that no release conditions will reasonably assure the safety of that person and the community.

R.C. 2937.222(B).

{¶25} In other words, this statute exists to address the exact concerns raised by the state below and in response to Dubose's habeas petition. The court's decision in *Mohamed v. Eckelberry*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132, the Ohio Constitution, Crim. R. 46, and R.C. 2937.222 all reinforce the point that if the state elects not to pursue that statutory path, the focus of the monetary bail amount must be on assuring the defendant's appearance and not simply artificially inflating the amount so that no one can satisfy it.[2]

{¶26} In this case, Dubose's high bail was effectively a denial of bail, without the trial judge making any of the required statutory findings. This is improper. Underscoring the point, despite the fact that the trial court found Dubose to be a

[2] While we acknowledge that Crim.R. 46(B) also requires the court to consider "the protection or safety of any person or the community" when determining an appropriate bail, the rule lists numerous nonfinancial conditions that can be imposed to address this factor. These conditions include, but are not limited to, restrictions on travel, association, or place of abode, regulation of the person's contact with witnesses or others associated with the case, completion of drug and/or alcohol assessment and compliance with treatment regulations, and "[a]ny other constitutional condition considered reasonably necessary to reasonably assure appearance or public safety." The rule states that financial conditions of release "shall be related to the defendant's risk of non-appearance, the seriousness of the offense, and the previous criminal record of the defendant" and must be in "an amount and type which are least costly to the defendant while also sufficient to reasonably assure the defendant's future appearance in court."

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flight risk, it originally found the $1.5 million bail to be excessive. It lowered the bail to $500,000, but, in order to ensure his appearance in court and for the safety of the community, also required an EMU. If the state wishes to have Dubose detained without bail because it believes he poses a substantial risk of serious physical harm to any person or to the community and no release conditions will reasonably assure the safety of that person and the community, then it must comply with R.C. 2937.222.

{¶27} After reviewing the record presented to this court, we find that the $1.5 million bail is excessive because it does not take into consideration Dubose's financial resources as required by Crim.R. 46(C)(4). Dubose represented below and reiterated in the verified filing before us that he does not have the resources to post such a high bail, and the state has not presented any argument or evidence to the contrary. By requesting in his habeas petition that this court lower his bail to $500,000 straight with EMU, Dubose is effectively agreeing that this bail amount is attainable yet high enough to compel him to appear in court when required. The additional condition of EMU also addresses concerns regarding the safety of the victim's family and the community.

{¶28} We finally would like to note that the trial judge below engaged in thoughtful consideration of the bail in this case, convening no less than three separate bail hearings. Determining a bail that satisfies all of the requirements of Crim.R. 46 is not an easy decision to make. But, as explained above, it is unlawful to set a bail so high that it "accomplishes with money what courts could not otherwise achieve without following the due-process requirements in R.C. 2937.222." *Mohamed*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132, at ¶ 25 (Stewart, J., concurring).

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{¶29} Accordingly, Dubose's petition for a writ of habeas corpus is hereby granted and his bail in the case numbered B-2005815B is reduced to $500,000 straight, no ten percent, with the additional conditions of 24-hour lockdown EMU, no direct or indirect contact with the victim's family and petitioner shall surrender his passport if he owns one. All other non-financial conditions of release imposed by the court of common pleas shall also remain in place.

Petition for writ granted.

BERGERON, P.J., concurs,
WINKLER, J., dissents.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

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Section 2937.222 | Hearing on bail - grounds for denying.

(A) On the motion of the prosecuting attorney or on the judge's own motion, the judge shall hold a hearing to determine whether an accused person charged with aggravated murder when it is not a capital offense, murder, a felony of the first or second degree, a violation of section 2903.06 of the Revised Code, a violation of section 2903.211 of the Revised Code that is a felony, or a felony OVI offense shall be denied bail. The judge shall order that the accused be detained until the conclusion of the hearing. Except for good cause, a continuance on the motion of the state shall not exceed three court days. Except for good cause, a continuance on the motion of the accused shall not exceed five court days unless the motion of the accused waives in writing the five-day limit and states in writing a specific period for which the accused requests a continuance. A continuance granted upon a motion of the accused that waives in writing the five-day limit shall not exceed five court days after the period of continuance requested in the motion. At the hearing, the accused has the right to be represented by counsel and, if the accused is indigent, to have counsel appointed. The judge shall afford the accused an opportunity to testify, to present witnesses and other information, and to cross-examine witnesses who appear at the hearing. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. Regardless of whether the hearing is being held on the motion of the prosecuting attorney or on the court's own motion, the state has the burden of proving that the proof is evident or the presumption great that the accused committed the offense with which the accused is charged, of proving that the accused poses a substantial risk of serious physical harm to any person or to the community, and of proving that no release conditions will reasonably assure the safety of that person and the community.

The judge may reopen the hearing at any time before trial if the judge finds that information exists that was not known to the movant at the time of the hearing and that that information has a material bearing on whether bail should be denied. If a municipal court or county court enters an order denying bail, a judge of the court of common pleas having jurisdiction over the case may continue that order or may hold a hearing pursuant to this section to determine whether to continue that order.

(B) No accused person shall be denied bail pursuant to this section unless the judge finds by clear and convincing evidence that the proof is evident or the presumption great that the accused committed the offense described in division (A) of this section with which the accused is charged, finds by clear and convincing evidence that the accused poses a substantial risk of serious physical harm to any person or to the community, and finds by clear and convincing evidence that no release conditions will reasonably assure the safety of that person and the community.

(C) The judge, in determining whether the accused person described in division (A) of this section poses a substantial risk of serious physical harm to any person or to the community and whether there are conditions of release that will reasonably assure the safety of that person and the community, shall consider all available information regarding all of the following:

(1) The nature and circumstances of the offense charged, including whether the offense is an offense of violence or involves alcohol or a drug of abuse;

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

(3) The history and characteristics of the accused, including, but not limited to, both of the following:

(a) The character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, and criminal history of the accused;

(b) Whether, at the time of the current alleged offense or at the time of the arrest of the accused, the accused was on probation, parole, post-release control, or other release pending trial, sentencing, appeal, or completion of sentence for the commission of an offense under the laws of this state, another state, or the United States or under a municipal ordinance.

(4) The nature and seriousness of the danger to any person or the community that would be posed by the person's release.

(D)(1) An order of the court of common pleas denying bail pursuant to this section is a final appealable order. In an appeal pursuant to division (D) of this section, the court of appeals shall do all of the following:

(a) Give the appeal priority on its calendar;

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

(c) Decide the appeal expeditiously;

(d) Promptly enter its judgment affirming or reversing the order denying bail.

(2) The pendency of an appeal under this section does not deprive the court of common pleas of jurisdiction to conduct further proceedings in the case or to further consider the order denying bail in accordance with this section. If, during the pendency of an appeal under division (D) of this section, the court of common pleas sets aside or terminates the order denying bail, the court of appeals shall dismiss the appeal.

(E) As used in this section:

(1) "Court day" has the same meaning as in section 5122.01 of the Revised Code.
(2) "Felony OVI offense" means a third degree felony OVI offense and a fourth degree felony OVI offense.

(3) "Fourth degree felony OVI offense" and "third degree felony OVI offense" have the same meanings as in section 2929.01 of the Revised Code.

CRIMINAL RULE 46. Pretrial Release and Detention

(A) Pretrial detention. A defendant may be detained pretrial, pursuant to a motion by the prosecutor or the court's own motion, in accordance with the standards and procedures set forth
in the Revised Code.
(B) Pretrial release. Unless the court orders the defendant detained under division (A) of this rule, the court shall release the defendant on the least restrictive conditions that, in the discretion of the court, will reasonably assure the defendant's appearance in court, the protection or safety of any person or the community, and that the defendant will not obstruct the criminal justice process. If the court orders financial conditions of release, those financial conditions shall be related to the defendant's risk of non-appearance, the seriousness of the offense, and the previous criminal record of the defendant. Any financial conditions shall be in an amount and type
which are least costly to the defendant while also sufficient to reasonably assure the defendant's future appearance in court.
(1) Financial conditions of release. 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:
(a) An unsecured bail bond;
(b) 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;
(c) A surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.
(2) Non-financial conditions of release. The court may impose any of the following conditions of release:
(a) The personal recognizance of the accused;
(b) Place the person in the custody of a designated person or organization agreeing to supervise the person;
(c) Place restrictions on the travel, association, or place of abode of the person during the period of release;
(d) Place the person under a house arrest, electronic monitoring, or work release program;
(e) Regulate or prohibit the person's contact with the victim;
(f) Regulate the person's contact with witnesses or others associated with the case upon proof of the likelihood that the person will threaten, harass, cause injury, or seek to intimidate those persons;
(g) Require completion of a drug and/or alcohol assessment and compliance with treatment recommendations, for any person charged with an offense that is alcohol or drug related, or where alcohol or drug influence or addiction appears to be a contributing factor in the offense, and who appears based upon an evaluation, prior treatment history, or recent alcohol or drug use, to be in need of treatment;
(h) Require compliance with alternatives to pretrial detention, including but not limited to diversion programs, day reporting, or comparable alternatives, to ensure the person's appearance at future court proceedings;

(i) Any other constitutional condition considered reasonably necessary to reasonable assure appearance or public safety.

(C) Factors. Subject to subsection (G)(2) of this rule, in determining the types, amounts, and conditions of bail, the court shall consider all relevant information, including but not limited to:

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

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

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

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

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

(D) Appearance pursuant to summons. When summons has been issued and the defendant has appeared pursuant to the summons, absent good cause, there is a presumption of release on personal recognizance.

(E) Continuation of Bail. When a judicial officer, either on motion of a party or on the court's own motion, determines that the considerations set forth in subsections (B) and (C) require a modification of the conditions of release, the judicial officer may order additional or different types, amounts or conditions of bail, or may eliminate or lessen conditions of bail determined to be no longer necessary. Unless a modification is agreed to by the parties, the court shall hold a hearing on the modification of bond as promptly as possible. Unless modified by the judicial officer, or if application is made by a surety for discharge from a bond pursuant to R.C. 2937.40, conditions of release shall continue until the return of a verdict or the entry of a guilty plea, or a no-contest plea, and may continue thereafter pending sentence or disposition of the case on review.

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

(G) Bond schedule.

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

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

(3) Each municipal or county court shall, by rule, establish a method whereby a person may make bail by use of a credit card.

(4) Each court shall review its bail bond schedule biennially by January 31 of each even numbered year, to ensure an appropriate bail bond schedule that does not result in the unnecessary detention of defendants due to inability to pay.

(H) Review of Release Conditions. A person who has been arrested, either pursuant to a warrant or without a warrant, and who has not been released on bail, shall be brought before a judicial officer for an initial bail hearing no later than the second court day following the arrest. That bail hearing may be combined with the initial appearance provided for in Crim. R. 5(A). If, at the initial bail hearing before a judicial officer, the defendant was not represented by counsel, and if the defendant has not yet been released on bail, a second bail hearing shall be held on the second court day following the initial bail hearing. An indigent defendant shall be afforded representation by appointed counsel at State's expense at this second bail hearing.

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

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

[Effective: July 1, 1973; amended effective July 1, 1990; July 1, 1994; July 1, 1998; July 1, 2006; July 1, 2020.]

Ohio Constitution, Article I, Section 9 | 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.