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II. ARGUMENT

The briefs filed by Respondents and Amicus Curiae Ohio Attorney General attempt to distinguish the “cash-only” bonds 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) as 100% cash bonds v. 10% cash bond in the case at bar. Whether it’s 10%, 20%, or 50%, the trial courts applying this interpretation of the rule still require the defendant to pay a cash-only “down payment” and a 90% cash payment should the defendant fail to appear. It’s simple: 10% cash is still a “cash-only” bond.

The Respondents also attempt to make the argument that the 10% model may interrupt a bonding company business model; the same argument can be made about a trial court’s motivation. If a court issues a \$50,000 10% bond, a defendant must deposit \$5,000 with the Clerk of Court, and upon the conclusion of his/her case, he/she will be returned 90% or \$4,500 with the court retaining the \$500. The motivation is clear that by issuing 10% bonds the courts will have revenue from those bonds. The issue, however, is not about who may profit from a bond, but rather whether accepting only a 10% cash deposit violates the defendant’s right to use a sufficient surety.

The Relators’ and Amici’s position is consistent with previous holdings of this Court that “cash-only” bonds are unconstitutional because they prohibit the accused from exercising his or her constitutional right to enlist a surety to post bail on his or her behalf. This Court has previously held that “the only apparent purpose in requiring a ‘cash only’ bond to the exclusion of the other forms provided in Crim.R. 46(C)(4) is to restrict the accused’s access to a surety and, thus, to detain the accused in violation of Section 9,

Article I. We found such a practice inappropriate in *State ex rel. Baker v. Troutman*, supra, and reaffirm that finding here.” *State ex rel. Jones v. Hendon, et. al.*, 66 Ohio St.3d 115, 609 N.E.2d 541 (1993); see also *State ex rel. Baker v. Troutman*, 50 Ohio St. 3d 270, 272 (Ohio 1990) (Under Section 9, Article I, a criminal defendant, except a defendant in a capital case, has a right to non-excessive bail on approval of sufficient sureties.); *Smith v. Leis*, 106 Ohio St.3d 309 (2005) (this Court held that “cash-only” bail violates both Section 9, Article I of the Ohio Constitution and Crim.R. 46, as amended).

The Respondents and Ohio Attorney General put a lot of emphasis on the fact that a defendant would satisfy the 90% of the bond when they appear at trial and that this protects the defendant’s constitutional rights. However, this logic wholly ignores one of the most important purposes of bail, which is to protect a defendant prior to trial, when all are assumed innocent until proven guilty. The sufficient sureties clause prevents an individual from being held indefinitely, prevents infliction of punishment prior to conviction, and permits the unhampered preparation of a defense. If the right to bail, and thus sufficient sureties prior to trial, is not preserved, the presumption of innocence loses its meaning.

A. This Court does not have to decide that Crim.R. 46 (A)(2) violates the Ohio Constitution.

Relators and Amici are not making the argument that Crim. R. 46(A)(2) violates Section 9, Article I of the Constitution. The American Bail Coalition believes that the question posed by Respondents does not accurately reflect the argument put forth by the Relators. The question should read as follows:

Is forcing a defendant to post a 10% cash-only bond under Crim.R. 46 (A)(2), instead of allowing the defendant to post the full amount through a surety, a violation of the defendant’s constitutional right?

The trial courts in Licking and Wayne County are failing to follow this Court's holding in *Jones v. Hendon* and *Smith v. Leis* by not permitting an accused to post a surety for the full amount of bond after it is set by the court. The holding in *Smith* is plain and unambiguous "[a]ccordingly, we find that where a judge imposes a bond as a condition of release under Crim.R. 46(C)(4), the judge's discretion is limited to setting the amount of the bond. *Once that amount is set, and the accused exercises his constitutional right to enlist a surety to post bail on his behalf, that being one of the options set forth in Crim.R. 46(C)(4), the clerk of courts must accept a surety bond to secure the defendant's release, provided the sureties thereon are otherwise sufficient and solvent.*" (Emphasis added) *Smith* at ¶36, quoting *Jones v. Hendon*, at 118.

It is apparent that the trial courts in Wayne and Licking County rely on the tortured interpretation of the Supreme Court's decision in *Smith v. Leis* by the Eleventh District Court of Appeals in *State ex rel. Williams v. Fankhauser*, 11th Dist. No. 2006-P-0006, 2006-Ohio-1170. The discretion of the trial court is to set an amount of bond and then it is up to the accused to determine whether they would like to deposit that amount in cash, use a surety or if the court provides - 10% of the bond. The trial court unequivocally cannot require an individual to deposit any sum of cash without allowing the individual to use a surety otherwise. Therefore, Crim.R. 46(A)(2) does not violate Ohio's constitution if it works in concert with the other options provided in Crim.R. 46(A) and the sufficient sureties clause of the Constitution.

1. ***State ex Rel. Jones v. Hendon and State ex rel. Baker v. Troutman***

Respondents distinguish *Jones* from the case at bar because *Jones* was decided under the old rule which included Crim. R. 46(C)(4), which provided a defendant with

options as to how to satisfy his or her bond and the court's discretion was limited to setting the amount of the bond. The Rule *Jones* was operating under, as Respondents argue, permitted different methods to satisfy the bond and, therefore, there was no reason to limit a defendant. (Respondent brief p. 9) Respondents further argue that Crim. R. 46(A)(2) does not provide a choice and requires a 10% cash deposit with the remaining 90% to be satisfied upon appearance at trial. Respondents assert that the *Jones* Court did not intend to include a bond set under 46(C)(3), what Respondents term as a predecessor to (A)(2), as a cash-only bond. (Respondent Brief p. 9) Regardless of the Criminal Rule 46 in place at the time of *Jones* or the current Rule 46, the spirit of the Court's decision still applies today where the Court stated "the only apparent purpose in requiring a 'cash-only' bond to the *exclusion of the other forms provided* in Crim. R. 46(C)(4) is to restrict the accused's access to a surety and, thus, to detain the accused in violation of Section 9, Article I." *Jones* at 118. Requiring a defendant to post a 10% appearance bond, which *requires a cash deposit*, to the exclusion of allowing the defendant to secure a surety for the full amount does exactly what the *Jones* Court warned against – detains the accused in violation of Section 9, Article I. In other words, the only way a defendant could satisfy a bond would be by providing cash, thus a "cash-only" bond. The Ohio Attorney General argues that Crim. R. 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." (Amicus Ohio Attorney General Brief p. 2). This is precisely what Relators and Amici are arguing. If a court is requiring a defendant to post a bond only by making a cash deposit, whether its by 10% or 100%, then they are "specifically and unambiguously" requiring a cash-only bond.

2. *Smith v. Leis*

Respondents correctly state that the Court in *Smith v. Leis* held that its prior rulings and the Constitution did not permit “cash-only” bonds as it would violate the sufficient sureties clause of Section 9, Article I of the Constitution. However, Respondents mischaracterize the Court’s opinion in *Smith* when Respondents state that the court “ruled that to require a defendant to post a *full* bond amount in cash would effectively bar that defendant access from a surety in contravention of Section 9, Article I.” (Respondent Brief p. 13). The *Smith* Court does not use the language “full bond” – although that would certainly violate the sufficient sureties clause. Rather, the Court speaks only to the unconstitutionality of a requiring a defendant to post cash only in order to be free from detainment.

Respondents point specifically to Iowa Supreme Court’s decision in *State v. Briggs*, 666 N.W. 2d 573 (Iowa 2003) to support its conclusion that “sufficient sureties” does not require a surety by a third party. Respondents’ analysis of this case incorrectly interprets the holding of the Supreme Court of Ohio in *Smith v. Leis*. Furthermore, Respondents fail to acknowledge that the *Smith v. Leis* decision occurred after *Briggs* and this Court considered that decision and several others throughout the country when reaching its decision that a cash-only bail would violate the Ohio constitution and Criminal R. 46.

This Court recognized and discussed that other courts reached similar conclusions that cash-only bail violates a constitutional right to be bailable by sufficient sureties. *Smith* at ¶65 (discussing *State v. Brooks*, 604 N.W.2d 345, 354 (Minn. 2000); *State v. Rodriguez*, 192 Mont. 411, 418-419 (Mont 1981); *Lewis Bail Bond Co v. Madison Cty*

Gen. Sessions Court 1997 Tenn. App. LEXIS 784, at 12 (Tenn 1997); *State v. Golden*, 546 So.2d 501, 503 (La. App. 1989)). Like the Respondents, this Court noted Iowa's decision in *Briggs* and the Alabama case that follows *Briggs*, yet this Court still held that cash-only bonds violate the Ohio Constitution. *Id.* The Court found that despite the holding in *Briggs*, the language of Section 9, Article I, the explicit purpose of the 1998 amendment, the persuasive precedent in the other line of Ohio and foreign cases, and the lack of "contrary unambiguous intent by the General Assembly" ensured the Court that its prior precedent in *Baker* and *Jones* remained good law. *Id.* at ¶66. The Court continued to confirm that Section 9, Article I prohibits a cash-only bail because it infringes upon a defendant's constitutional right to bail by sufficient sureties. *Id.*

3. *Smith v. Leis* and *State ex rel. Williams v. Fankhauser* and Bonds under Crim. R. 46(A)(2)

Respondents argue that if the Court considered an appearance bond under Crim. R. 46(A)(2) as a "cash-only" bond, then it would not have adopted the rule per its reasoning under *Smith*. (Respondent Brief p. 15) However, the argument is not that R. 46(A)(2) is unconstitutional, but rather that all of the portions of Rule 46 must work in concert with each other in order not to violate the sufficient sureties clause.

Respondents next turn to *Williams v. Fankhauser*, 2006-Ohio-1170 (11th Dist Ct of App), in an attempt to support their argument. The *Williams* court attempts to distinguish the facts in that case from the facts in *Smith* and *Jones* because those bonds were set under 46(A)(3) (full cash) and not 46(A)(2) (10% cash). *Id.* 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.*

The *Williams* court's own holding clearly demonstrates an imposition of a cash-only bond.

Furthermore, the *Williams* court continues to incorrectly interpret the Supreme Court's holdings in *Smith* and *Jones* when it states "despite 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 Crim. R. 46(A). The ten percent 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 it's ten percent on a \$25,000.00 bail or a \$1.00 bail, violates the accused's rights enumerated under Section 9, Article I and controverts the precedent laid out in *Jones* and *Smith*.

The *Williams* holding is a tortured 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 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.

B. A ten percent only bond violates the sufficient sureties clause regardless of the amount.

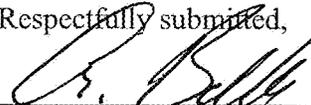
Regardless of whether the listed defendants were able to modify their bonds, a bond that requires cash only is unconstitutional, every single time. Respondents argue that appearance bonds are a good alternative to cash/surety bonds and allow the

defendant access to sufficient sureties as the defendants have the means to satisfy their bonds and secure their release. (Respondents brief p. 18). Respondents make the assumption here that a defendant has the means to satisfy the 10% cash deposit. An appearance bond is a good *option* along with the other options listed in Crim R. 46 (A). It is not, however, a good alternative to providing a defendant options to ensure access to sufficient sureties. Every time a trial court orders a bond that requires a defendant to deposit cash, and only cash, it is in violation of the sufficient sureties clause. As long as Licking County continues this activity, Licking County defendants' rights are being violated.

III. CONCLUSION

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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IV. CERTIFICATE OF SERVICE

I certify that on August 6, 2013, I sent the foregoing to the below counsel of record, via E-Mail.

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