

69630-1

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NO. 69630-1-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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PETER R. BARTON,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

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PETITIONER'S REPLY BRIEF

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## I. INTRODUCTION

The question on appeal is whether trial courts may require bail-eligible defendants to post cash or property—in whatever amount—to obtain pre-trial release. The answer is no. The Washington Constitution guarantees that “[a]ll persons charged with crime shall be bailable by sufficient sureties.” Wash. Const. art. I, § 20. A bail order requiring a bail-eligible accused defendant to post cash or property is unconstitutional, because the posting of cash is not now, and never has been, a surety transaction.

The State is asking the Court to re-write Section 20 by excising the phrase “by sufficient sureties,” and replacing it with “on bail terms found sufficient by the trial court” or some similar expression. The State’s formulation—that the “sufficient sureties” clause is not violated if the trial court finds that use of a surety would not be sufficient to assure the defendant’s appearance, or that posting cash is a surety transaction—either reads the term “sureties” out of the Constitution altogether or renders the term meaningless, severing it from its historical roots by redefining it to mean the posting of cash bail.

Since the 2009 tragedy involving Maurice Clemmons, Section 20 has been at the center of significant public debate about the proper role of bail. Indeed, the legislative approach to Section 20 and Washington’s bail

statutes following the Clemmons tragedy is a case study in the workings of constitutional democracy: following the Lakewood murders, the press reported that Clemmons had been in jail awaiting trial for felonies that could have resulted in life imprisonment, but that he had been released on bail. Spurred by the public and media outcry, the legislature created a bail practices work group (“Work Group”) to “study bail practices and procedures . . . and make recommendations to the governor, the Supreme Court, and the legislature.” *See* S.B. Rep. 5056 (Wash. 2011).

The Work Group’s efforts were realized: bail legislation was passed and signed by the governor, and a constitutional amendment to Section 20 was put on the ballot and approved by a vote of the people on November 2, 2010. As a result, courts in this state may now deny bail “for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community.”<sup>1</sup> Wash. Const. art. I, Sec. 20.

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<sup>1</sup> The State did not invoke this provision in Mr. Barton’s case. In its brief, the State recites a litany of allegations and catchwords, such as “danger to the community,” “second strike,” and “not . . . compliant while on community custody.” Resp’t Br. 2. But none of these charges bear on whether it was appropriate for the court to order a cash deposit bond, because there is no dispute that Mr. Barton was entitled to bail. The State made no effort to have bail denied based upon a clear and convincing showing that Mr. Barton’s release would create a substantial likelihood of danger to the community under Section 20, as amended.

Not everyone was satisfied with the results of the legislative and constitutional amendment process. In particular, Mark Roe, the elected Snohomish County Prosecuting Attorney (and a member of the Work Group) felt that the legislative and constitutional changes did not go far enough. *See* S.B. 5056 – Bail and Pretrial Release Practices: Hearing Before the Senate Judiciary Committee (Jan. 12, 2011), *available at* [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2011010107](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2011010107) 12:01-16:13 (last visited Sept. 25, 2013). Mr. Roe has stated that there is a “gaping flaw in our fictional system of bail, [that he is] ask[ing] judges to address . . . one case at a time;” by which he apparently means that unless and until bail bond agencies are required to obtain a known percentage of the bond as a premium up front and in cash, he will ask for cash deposit bonds. *See* Diana Hefley, *Judge Requires Unusual Bail in Child Rape Case*, *Everett Herald*, Aug. 16, 2012, *available at* <http://www.heraldnet.com/article/20120816/NEWS01/708169921> (last visited Sept. 23, 2013).

That is to say, Mr. Roe would like to reduce access to sureties—which today means commercial bail bond companies. If Mr. Roe has his way, the effects would be particularly devastating to indigent defendants like Mr. Barton, who are less likely to have, or have access to, cash or property. Politically at least, these efforts appear to be stalled, largely

because of this very concern. See Jonathan Martin, *Higher bails likely in courts despite deadlock in Olympia*, Seattle Times, June 4, 2011, available at [http://seattletimes.com/html/localnews/2015235251\\_bail05m.html](http://seattletimes.com/html/localnews/2015235251_bail05m.html) (last visited Sept. 23, 2013) (legislation died after Senator Adam Kline, chair of the Senate Judiciary Committee, opined that the proposal “floated by the state’s prosecuting attorneys, would have been unfair to poor defendants, who have benefited from competition among bail-bonding agencies”); see also S.B. 5056 – Bail and Pretrial Release Practices: Hearing Before the Senate Judiciary Committee, *supra*, at 19:42-21:00; 27:10-27:48.

Mr. Roe’s office then sought to achieve the same result extra-legislatively through a unique—and at the time possibly unprecedented—application of Superior Court Criminal Rule 3.2(b)(4). Specifically, the Snohomish County Prosecuting Attorney prevailed upon the trial court to enter a bail order providing that, to secure his pretrial release, Mr. Barton would have to deposit \$50,000 in cash or other security with the court and could not utilize a surety for that component of his bail requirement. See CP 11-13. This was a novel application of Rule 3.2(b)(4); despite the many bail decisions handled by the Snohomish County Superior Court, the prosecutor had never heard of the rule, see RP (8/15/12) 3:4-5, and the court had to manually cross out the language in the standard form that guaranteed access to a surety, see CP 11 ¶ 1.1.

The resulting October 18 Order is unconstitutional and must be overturned. The Order denied Mr. Barton his constitutionally guaranteed right to bail by sufficient sureties because it required that he post \$50,000 cash or property with the court as the only way to secure pre-trial release. It also violated Mr. Barton's right to equal protection, denying him liberty pending trial due to his indigence. Finally, the State requested a cash deposit bond from Mr. Barton to ensure his continued incarceration until trial, not to ensure his presence. The form of bail is, therefore, improper under the Eighth Amendment to the U.S. Constitution and Article I, Section 14 of the Washington Constitution. For these reasons, the October 18 Order should be reversed.

## **II. ARGUMENT**

### **A. The October 18 Order Violates Mr. Barton's Right to Bail by Sufficient Sureties Guaranteed by Article I, Section 20 of the Washington Constitution**

#### **1. The Language and History of the Sufficient Sureties Clause Support Mr. Barton's Arguments on Appeal**

The text of the Sufficient Sureties Clause is plain and unambiguous—when eligible for bail, the accused is entitled to release upon the posting of bail “by sufficient sureties.” Wash. Const. art. I, § 20. This provision plainly requires courts to grant a defendant access to a surety when needed to post a bail bond. “If a constitutional provision is

plain and unambiguous on its face, then no construction or interpretation is necessary or permissible.” *City of Bothell v. Barnhart*, 156 Wn. App. 531, 535, 234 P.3d 264 (2010) (quoting *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 650, 211 P.3d 406 (2009)).

The Court of Appeals has previously embraced long-standing, authoritative definitions of the terms “surety” and “cash bail,” and the distinction between the two, in *In re Marriage of Bralley (Gibson v. Cnty. Of Snohomish)*, 70 Wn. App. 646, 652-53, 855 P.2d 1174 (1993). “Surety is defined as: One who undertakes to pay money or to do any other act in event that his principal fails therein.” *Id.* at 653 (quoting Black’s Law Dictionary 1293 (5th ed. 1979)). Surety had the same meaning in 1889, when the Washington Constitutional Convention drafted and adopted the Sufficient Sureties Clause. *See, e.g.*, A Dictionary of Am. & English Law 1243 (Steward Rapalje & Robert L. Lawrence eds., 1888) (“A surety is a person who binds himself to satisfy the obligation of another person, if the latter fails to do so.”); Black’s Law Dictionary 1142 (1st ed. 1891) (“Suretyship is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not.”); A New Law Dictionary 351 (Archibald Brown ed., 1874) (Suretyship “denotes the relation in which one person who is not primarily indebted stands towards two other

persons, viz, the primary creditor whom he further assures in his debt, and the primary debtor whom he assists in obtaining credit.”).

Each of these definitions describes a tri-partite relationship between a creditor, debtor, and surety, and specifies that a surety binds himself for a future obligation should the debtor fail in his primary obligation. “In practice the term [surety] is usually restricted to the case of a person who binds himself *by a bond*.” A Dictionary of Am. & English Law 1243 (emphasis added). A bond, in turn, is a promise to pay a designated amount of money at some future time or under particular future circumstances. *See* Black’s Law Dictionary 144 (1st ed. 1891).

These “definitions highlight the fact that a person who posts a *bond*, or a surety, *has a special role in the production and security of the accused*. This person is responsible if the accused does not appear at the required time.” *Bralley*, 70 Wn. App. at 653 (second emphasis added). In contrast, “*in the case of cash bail*, the appearance of the accused is assured by the security of the money itself, and *the person who posted the money has no special role in the process*.” *Id.* (emphases added). A person who posts cash bail has no further responsibility if the accused does not appear, his performance ends when he deposits the cash bail. “[C]ash bail is conclusively presumed to be the property of the accused,” regardless of who actually posts the bail. *Id.* at 655. Because cash bail is

the defendant's property whether the cash comes from his own resources or from borrowed funds, a cash bail system is not a tri-partite relationship involving the defendant, the court, and a surety, and is not, therefore, a surety relationship.

Moreover, "[t]he underlying legal theories behind *bail bonds* and *cash bail* are different; in bail bonds the law looks to the surety to guarantee the defendant's appearance, while in cash bail the law looks to the money already in the hands of the state to insure defendant's appearance." *Id.* at 653 (quoting 8 C.J.S. *Bail* §§ 88, 89 at 109, 111 (1988)). Most importantly here, "[d]epositors of cash bail are not sureties." *Id.* (quoting 8 C.J.S. *Bail* §§ 88, 89 at 109, 111 (1988)). A person who pays cash bail "did not post a *bond*" and "is not a *surety*."<sup>2</sup> *Id.* at 654. This distinction between sureties on the one hand and depositors of cash bail on the other conforms with the understanding of these concepts from the turn of the twentieth century, when the Sufficient Sureties Clause was drafted. As *Bralley* recognized, the 1897 Kentucky Court of Appeals confirmed that a depositor of cash bail (on behalf of

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<sup>2</sup> The State contends that *Bralley* has no relevance here because it dealt with civil rather than criminal bail. Resp't Br. 15. But the *Bralley* court itself specified that bail bond statutes did not apply in that case "not only because we are dealing with civil bail, but also because . . . Gibson did not post a *bond*. She is not a *surety*. She paid civil bail money in this case and got a receipt. A receipt is not the equivalent of a bail bond." 70 Wn. App. at 654. Furthermore, the State presents no reason to believe that the meaning of the term surety differs in civil and criminal proceedings.

another person) was *not a surety* to whom notice must be provided before forfeiture. *Id.* at 654 n.4 (citing *Ansparger v. Norman*, 40 S.W. 574 (Ky. 1897)).

The Washington Constitutional Convention specifically modified the word bailable by the phrase “sufficient sureties,” rather than using the first suggested formulation that simply made all crimes bailable by whatever means the court saw fit. See The Journal of the Washington State Constitutional Convention 1889 52, 155, 268-72, 509 (Beverly Paulik Rosenow ed. 1962). Contrary to the State’s assertion, Resp’t Br. 9-10, the selection of particular language over a competing formulation—even if not accompanied by an explanation on the record—is constitutionally significant. See *Westerman v. Cary*, 125 Wn.2d 277, 287-89, 892 P.2d 1067 (1995) (analyzing a different portion of Section 20 and stating that “[t]he reason for the substituted language was not articulated; however, *it is significant that one was merely substituted for the other*” (emphasis added)). The intentional selection of the sufficient sureties language—chosen instead of simply making all crimes bailable—supports Mr. Barton’s contention that surety, as used in Section 20, refers specifically to a third party with a special role in the production and security of the accused, not simply a depositor of cash bail.

The State's contention that the framers of the Washington constitution would not have limited the term surety to only commercial bail bond companies is beside the point. *See* Resp't Br. 21. In 1889, a wide variety of financially solvent people could act as sureties under Section 20, which does not itself limit who may act as a surety. However, the state legislature has established a system requiring commercial bail companies to be licensed, bonded, and fully capitalized. *See generally* Pet'r Br. 26-27. The existence of these statutes and regulations does not alter the definition of surety generally. These provisions have simply steered surety bonds to commercial bail bond companies that are in compliance with the rules established by the legislature and the courts. These licensed commercial bail bond companies qualify as sufficient sureties, but do not constitute the entire universe of sufficient sureties contemplated by Section 20. This statutory and regulatory scheme simply provides an easier way to determine which sureties are "sufficient" under Section 20, compared to making the individualized assessments that would otherwise be necessary.

The State also asserts that the word "sufficient" in the Sufficient Sureties Clause should be read to give trial courts the discretion to order cash deposit bonds—or even cash-only bail—in any case where the judge does not believe that use of a surety should be permitted. This reading

entirely eliminates the term surety, properly defined, from Section 20. “[E]ach word in a constitutional provision must be accorded its own separate meaning, and the court should not embrace a construction causing redundancy or rendering words superfluous . . . .”<sup>3</sup> *Amalgamated Transit Union Local 587 v. Washington*, 142 Wn.2d 183, 260, 11 P.3d 762 (2000); *see also HomeStreet, Inc. v. Wash. Dep’t of Revenue*, 166 Wn.2d 444, 454-55, 210 P.3d 297 (2009) (stating that “all words in a statute must be accorded their meaning” even if the court believes the legislature intended something else, but failed to express it adequately). The Court should resist the State’s invitation to amend the Constitution by reading the word sureties out of the Sufficient Sureties Clause.

**2. A Fundamental Purpose of Bail is to Protect the Liberty Interests of the Accused.**

A fundamental purpose of bail is to protect the presumption of innocence. *See, e.g., State v. French*, 88 Wn. App. 586, 593, 945 P.2d 752 (1997); *State ex rel. Wallen v. Noe*, 78 Wn.2d 484, 487, 475 P.2d 787 (1970) (“[Bail’s] true purpose is to free the defendant from imprisonment and to secure his presence before court at an appointed time.”).

The State is simply incorrect when it asserts that “Washington courts have recognized that the court’s interest is the *main reason* for bail

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<sup>3</sup> The term “sufficient” is given full meaning by requiring the use of responsible and solvent sureties like those approved under statutory and regulatory standards. *See* Pet’r Br. 12-13, 26-27.

in modern times.” Resp’t Br. 6 (emphasis added). The State cites three cases for this proposition, but all arise in the bail forfeiture context. *See State v. Paul*, 95 Wn. App. 775, 779, 976 P.2d 1272 (1999) (holding that trial court “had no power to forfeit bail”); *State v. Banuelos*, 91 Wn. App. 860, 960 P.2d 952 (1998); *State v. Kramer*, 167 Wn.2d 548, 552, 219 P.3d 700 (2009).<sup>4</sup> All are inapposite. In each case the question before the court was whether bail should be forfeited, *not* whether protecting a defendant’s liberty interest remains a purpose of bail. For example, in *Paul*, the defendant duly appeared in court on a theft charge after her parents posted \$2,500 cash bail. 95 Wn. App. at 777. The trial court found that she owed \$5,613.24 in restitution, and ordered the \$2,500 bail applied against the balance. *Id.* The Court of Appeals reversed, finding that “[i]n a criminal case, the sole purpose of bail is to ensure the appearance of the accused. When the accused appears, the conditions of the bail have been fulfilled, and the court must give the money back.” *Id.* at 778. The court’s statement in *Paul* is that the *State’s* only legitimate interest in the bail is to ensure the accused’s appearance. Bail “is not a revenue measure in lieu of fine, or one to punish sureties.” *State v. Heslin*, 63 Wn.2d 957, 960, 389

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<sup>4</sup> Elsewhere in its brief, the State questions Mr. Barton’s reliance on *Bralley*, Resp’t Br. 15, but both *Paul* and Justice Fairhurst’s dissent in *Kramer* analyze and assume the validity of *Bralley* in the criminal context. *See Paul*, 95 Wn. App. at 777-78; *Kramer*, 167 Wn.2d at 561 (Fairhurst, J., dissenting). The State also failed to indicate that its citation was to Justice Fairhurst’s dissent in *Kramer*.

P.2d 892 (1964). Nothing was said or decided about the *accused's* interest in bail.

**3. The Sufficient Sureties Clause Prohibits Bail Orders like the October 18 Order that Allow Only the Deposit of Cash or Property**

The Sufficient Sureties Clause requires Washington courts to allow defendants access to a surety, such as a commercial bond agent, when posting bail. The majority of courts across the country that have addressed the issue have agreed that constitutional provisions like the Sufficient Sureties Clause prohibit cash-only bail, because the clause grants a defendant an absolute right of access to a surety, who may post bond on their behalf. *See* Pet'r Br. 19-21. The cases cited by Mr. Barton analyze constitutional provisions practically identical to Washington's Sufficient Sureties Clause; they are relevant and contain persuasive reasoning supporting Mr. Barton's position. In particular, the cases hold that a defendant may not be denied access to a surety. *See generally* Pet'r Br. 19-21. This rule applies whatever the form of bail.

The State's arguments to the contrary suffer from their heavy reliance on *State v. Briggs*, 666 N.W.2d 573 (Iowa 2003), which has been roundly criticized for its confusing and internally inconsistent reasoning. *See, e.g., State v. Hance*, 910 A.2d 874, 881 & n.5 (Vt. 2006); Joseph Buro, *Defining Sufficient Sureties: The Constitutionality of Cash Only*

*Bail*, 35 Rutgers L.J. 1407, 1415-28 (2003-04) (finding that the Iowa Supreme Court misconstrued the historical discretion of officials determining bail, failed to recognize that the sufficient sureties clause was adopted from the Pennsylvania Great Law, and relied on a flawed understanding of the surety relationship). For example, despite spending several pages tracing the history of bail in England and the United States, the *Briggs* court entirely failed to recognize that the language of the sufficient sureties clause comes almost verbatim from the Pennsylvania constitution and had been adopted by a multitude of other states.<sup>5</sup> See 666 N.W.2d at 580-82. The *Briggs* court then failed to examine and reconcile cases analyzing these other clauses, like neighboring Minnesota's *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000). Although *Brooks* and similar cases are mentioned in passing, the Iowa court contends, without explanation, that the "historical emergence of the sufficient sureties clause" was different in Iowa than it was in all other states that adopted the identical clause. See *Briggs*, 666 N.W. 2d at 583 n.7. Most confusingly, *Briggs* allows cash only bail, but also requires courts to ensure access to a surety in some form. 666 N.W.2d at 583 (holding cash only bail

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<sup>5</sup> Pennsylvania's founding Quakers adopted the Great Law, making almost all offenses bailable, due to their aversion to pretrial confinement and the inefficient English bail system. *State v. Brooks*, 604 N.W.2d 345, 350 (Minn. 2000) (citing Paul Lermack, *The Law of Recognizances in Colonial Pa.*, 50 Temp. L.Q. 475, 477 (1977)). The Great Law, which was made a part of the Pennsylvania constitution and adopted by the majority of American states, was "intended to protect the accused rather than the courts." *Id.*

permissible, but “if the accused shows that the bail determination absolutely bars his or her utilization of a surety of some form, a court is constitutionally bound to accommodate the accused’s predicament”). Essentially the *Briggs* court held that Iowans are guaranteed access to a surety, except when they are not. *See id.* at 583 n.7. The court provides no explanation for how an accused required to pay cash bail is still granted access to a surety.

The ten percent cash or property deposit requirement of the October 18 Order operates identically to an impermissible 100 percent all cash bail requirement. First, both illegally restrict a defendant’s access to a surety who can post a bond on the accused’s behalf. Second, if a \$50,000 bail order with a 100 percent cash (or property) requirement is improper—and the State conceded that it is<sup>6</sup>—then it must be the case that a \$500,000 bail order with a ten percent cash (or property) requirement is also improper. In other words, both require a defendant to have \$50,000 cash to secure his pretrial release and both deny a defendant access to the sufficient sureties guaranteed by Section 20. *See e.g.; State v. Rodriguez*, 628 P.2d 280, 284-85 (Mont. 1981) (noting, in moot case, that requiring

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<sup>6</sup> The State now tries to withdraw that concession, arguing that “[t]he State clearly does not concede that cash only . . . violates that constitutional provision.” Resp’t Br. 21 n.2. What is “clear” is trial counsel’s concession that all-cash bail may not be imposed pre-trial. RP (8/15/12) 3:7-9. The State cannot revoke the concession simply because appellate counsel disagrees with trial counsel.

\$10,000 cash on \$25,000 bail would “effectively undermine the [Montana] constitutional guarantee of bail by ‘sufficient sureties’”).

**4. The Court Can and Should Interpret Superior Court Criminal Rule 3.2(b)(4) to Avoid a Conflict with Section 20 of the State Constitution**

The trial court’s interpretation of CrR 3.2(b)(4)—requiring the posting of cash or other security, but denying the use of a surety—puts the rule directly in conflict with Section 20. The criminal rules should be interpreted when possible to avoid a conflict with the state constitution. *See City of Yakima v. Mollett*, 115 Wn. App. 604, 179, 63 P.3d 177 (2003) (citing *State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981)) (noting an appellate court will avoid a constitutional issue if it can find any other basis for its decision). To ensure consistency with Section 20, the phrase “other security” in CrR 3.2(b)(4) should be interpreted to include surety bonds, as well as other forms of security, such as property or other collateral from the defendant or a third party.

The State ignores this fundamental argument and instead responds throughout the Respondent’s brief as though Mr. Barton is presenting, as the only option, that CrR 3.2(b)(4) should be declared unconstitutional. That is simply not the case.<sup>7</sup> As an alternative to holding that

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<sup>7</sup> *Cf. e.g.*, Pet’r Br. 3 (assigning error to trial court’s *interpretation* of CrR 3.2(b)(4), and explaining that “the October 18 Order created an unnecessary and improper conflict between that rule and Article I, Section 20”); Resp’t Br. 4-5 (asserting that Mr. Barton’s

CrR 3.2(b)(4) is unconstitutional on its face, the Court can simply interpret the term “or other security” in this rule to permit the accused to choose between depositing ten percent of the bail amount in cash with the court, or providing “other security,” including in the form of a surety bond for ten percent of the bail amount and an unsecured bond for the remaining ninety percent.

Reading the phrase “other security” in CrR 3.2(b)(4) to include surety bonds allows the accused to select one of three methods of payment: (1) pay ten percent of the total bail into the court registry in cash; (2) provide property or other collateral worth ten percent of the total bail to the court registry; or (3) obtain a surety bond for ten percent of the total bail amount. This interpretation ensures consistency with the language and structure of CrR 3.2, which contains subsections running from least to most restrictive bail conditions—(b)(1) to (b)(7). Each of Mr. Barton’s proposed alternatives is less restrictive than a surety bond for the full amount of bail authorized by CrR 3.2(b)(5), and more restrictive than the unsecured bond allowed by CrR 3.2(b)(3). In contrast, the State’s requirement of a cash deposit bond will often be more restrictive than a secured surety bond under CrR 3.2(b)(5). *See* Pet’r Br. 25-26 & n.10.

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argument is a constitutional challenge to CrR 3.2(b)(4), and analyzing and applying the standard for determining “[w]hether a court rule violates a constitutional provision”).

## **B. The October 18 Order Violates Equal Protection**

The trial court's imposition of a \$50,000 cash or security requirement violates the Equal Protection Clause of the U.S. Constitution and the Privileges & Immunities Clause of the Washington Constitution. U.S. Const. amend. XIV, § 1, cl. 4; Wash. Const. art. I, § 12. Fifty thousand dollar cash or security deposits, like that required in this case, create a nearly insurmountable obstacle to making bail on indigent defendants like Mr. Barton.

### **1. The Court Should Apply Intermediate Scrutiny**

The State argues for rational basis review, contending that Mr. Barton's only liberty interest was in obtaining bail by sufficient sureties, (which the State contends was provided). But Mr. Barton has a liberty interest in freedom pending trial—particularly because he is presumed innocent until proven guilty beyond a reasonable doubt. The State's method of assigning bail is the element to be assessed under intermediate scrutiny, not the liberty interest at stake. The State's argument collapses the equal protection analysis, requiring the Court to assume that the bail order is legitimate for the purposes of the liberty interest before even analyzing the validity of the order.

As explained in *In re Mota*, when a defendant's "inability to obtain pretrial release was due to indigency . . . the denial of a liberty

interest due to a classification based on wealth is subject to intermediate scrutiny.” 114 Wn.2d 465, 474, 788 P.2d 538 (1990), *superceded by* RCW 9.94A.150 *on other grounds, as recognized in In re Williams*, 121 Wn.2d 655, 853 P.2d 444 (1993). Mr. Barton is an indigent defendant. Requiring a cash deposit bond disproportionately affects the indigent, who must remain in jail while the wealthy may post cash and retain their freedom pending trial. In contrast, allowing a surety bond provides even indigent defendants with the possibility of pre-trial release because the commercial bail bond company may be more flexible than the court regarding payment plans or types of collateral. *See* RP (8/15/12) 7:9-21. Intermediate scrutiny applies here because Mr. Barton’s inability to obtain pretrial release relates directly to his indigency.

**2. The State Failed to Establish that Cash Deposit Bonds Further a Substantial State Interest**

The State argues that bail supports the orderly and fair administration of justice, which provides the required substantial state interest supporting the October 18 Order. But the State has again misidentified Mr. Barton’s legal argument so that it can dismiss his claims as frivolous and unworthy of the Court’s time and attention. Mr. Barton does not argue that *bail* violates equal protection. Instead, he contends that the State’s selection of a cash deposit bond over a surety bond violates

equal protection. Thus, the State bears the burden of setting forth a substantial state interest favoring cash deposit bonds over the more common and clearly constitutional surety bonds.

Under intermediate scrutiny the State must show that the challenged law, “fairly be viewed as furthering a **substantial** interest of the State.” *Westerman*, 125 Wn.2d at 294 (quoting *State v. Phelan*, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983)) (emphasis added). But even under rational basis review the State’s argument fails to meet constitutional standards.<sup>8</sup> To determine whether a challenged law, rule, or action meets intermediate scrutiny, courts examine (1) whether the state has identified a **substantial** interest; (2) whether the stated interest is, in fact, the **actual** purpose of the rule; and (3) whether the rule **actually** achieves the stated interest. *See* Pet’r Br. 32-34.

The State has not met its burden. Indeed, the State argued only that it has an interest in setting bail generally; it failed to identify a substantial interest in favoring cash-deposit bonds over surety bonds; it failed to dispute Mr. Barton’s contention that the actual purpose of the cash-deposit bond is to ensure indigent defendants remain in jail pending

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<sup>8</sup> “Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation.” *Westerman*, 125 Wn.2d at 295 (quoting *State v. Smith*, 117 Wn.2d 263, 279, 814 P.2d 652 (1991)). The State presents no rational reason to treat the indigent differently than other classes.

trial; and it failed to identify any state interests met by cash-deposit bonds that are not already achieved by surety bonds.

*No substantial state interests.* Before the trial court, the only interest identified by the State was the alleged victim's supposed interest in knowing that Mr. Barton was required to post a particular dollar amount prior to his release on bail. RP (8/15/12) 7:22-8:6; CP 17:9-11, 36:18-21, 41:4-5. As argued in Mr. Barton's opening brief, this cannot qualify as a substantial interest. *See* Pet'r Br. 35-36.

The State's responsive brief adds only one additional interest: that a cash deposit bond may be forfeited even if a defendant appears, if he violates some other condition of release. *See* Resp't Br. 32-33. But any bail order may be revoked if a defendant violates a condition of release. For example, Mr. Barton's bail order states, "Violation of any of these conditions may result in revocation of release, forfeiture of bail, and/or additional charges." CP 12. The State has not shown that an interest in the return of cash creates a greater incentive to behave than the fear of having bail entirely revoked and being sent to jail to await trial (never mind the antecedent fear of being forcibly retrieved at the hands of a bond recovery agent).

*No furtherance of recognized state interests.* Requiring a cash deposit bond to the exclusion of bail by surety bond does not further the

interests already recognized by courts and court rules as substantial: protecting the presumption of innocence, securing the appearance of the defendant at court hearings and trial, and limiting a defendant's potential danger to the public. *See* Pet'r Br. 36-37. As the Washington Supreme Court has recognized:

“[Bail’s] *true purpose* is to free the defendant from imprisonment and to secure his presence before court at an appointed time. It serves to recognize and honor the presumption under law that an accused is innocent until proven guilty. ***It is a constitutional right available to an accused at the option of the accused.*** It is not, and cannot be, a weapon within the arsenal of the government . . . .”

*Wallen*, 78 Wn.2d at 487 (emphases added).

Requiring a cash deposit bond in lieu of a surety bond does not protect the presumption of innocence; indeed the State’s purpose in requiring the cash deposit was to reduce Mr. Barton’s chance of being released on bail. *See* RP (8/14/12) 5:6-16; RP (8/15/12) 7:9-8:8. The State’s goal acts in direct opposition to the presumption of innocence and hampers an indigent defendant’s ability to prepare his defense.

Nor does requiring a cash deposit bond instead of a surety bond better ensure the appearance of the accused at trial. Indeed, studies show that a surety bond best achieves this critical purpose of bail.<sup>9</sup> Bureau of

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<sup>9</sup> The State cites the same Department of Justice study for the entirely unsurprising proposition that a secured bond (whether secured by a surety, by cash, or by property) is more effective than an unsecured bond or release on recognizance in ensuring the

Justice Statistics, U.S. Dep't of Justice, Pub. No. NCJ 214994, *State Court Processing Statistics, 1990-2004, Pretrial Release of Felony Defendants in State Courts* 8-11 (Nov. 2007), available at

<http://www.bjs.gov/index.cfm?ty=pbdetail&iid=834>; see also Pet'r Br. 37-

39. The State's contention that a defendant's incentive to appear increases when money will ultimately be returned, see Resp't Br. 31, applies only if the defendant himself must pay the money, which the State concedes is not the case. If a friend, family member, or bail bond company posts the cash instead, the defendant has no more significant motivation to appear than he would with a surety bond, which itself would presumably be guaranteed by a friend or family member.

The State's methods bear little or no relation to the essential purposes of bail. And absent such a connection, the State cannot show that its requirement that Mr. Barton bail out with a cash deposit bond, rather than a traditional surety bond, furthers a *substantial* state interest.

### **C. Public Policy Favors Mr. Barton's Constitutional Arguments**

Once again the State chooses to misinterpret Mr. Barton's opening brief so as to set up and defeat a straw man argument. Mr. Barton does not believe the October 18 Order was "entered pursuant to lawful

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appearance of a defendant. Resp't Br. 35. But as Mr. Barton explained in his opening brief, the study confirms that surety bonds best ensure the appearance of the accused. Pet'r Br. 38.

authority.” *See* Resp’t Br. 37. Indeed, this entire appeal contends that the October 18 Order violates both the Washington and U.S. Constitutions. The court’s inherent authority to adopt rules governing its own procedures cannot trump the state and federal constitutions.

To be clear, Mr. Barton contends the trial court’s *interpretation* and *application* of CrR 3.2(b)(4) violates the Sufficient Sureties Clause, equal protection, and the excessive bail clauses. He further argues that this Court can and should interpret the phrase “other security” in CrR 3.2(b)(4) to allow the use of a surety bond. *See supra* Section II(A)(4); *see also* Pet’r Br. Section III(B). This would not require amendment or change to the current rule, Resp’t Br. 37-39, or eliminate use of the rule, *id.* at 39. Within this framework, Mr. Barton contends that public policy favors his constitutional arguments. *See* Pet’r Br. Section III(D).

**D. The October 18 Order Set Excessive Bail in Violation of the Eighth Amendment and Article I, Section 14**

The State again appears to misunderstand Mr. Barton’s legal arguments. Mr. Barton does not contend that \$500,000 bail is necessarily excessive, under the circumstances of this case. He argues that the State imposed the cash deposit bail requirement for an improper purpose—to keep Mr. Barton in jail—rather than to ensure his presence at trial.

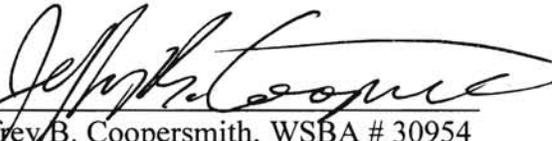
Bail must be fixed for each defendant based only on standards relevant to the recognized purposes of bail: protecting the presumption of innocence, securing a defendant's appearance at trial, and limiting the potential danger a defendant may pose to the public. *See Stack v. Boyle*, 342 U.S. 1, 5 (1951). The October 18 Order imposed a cash deposit bond form of bail, which fails to achieve any of the functions of bail. *See Pet'r Br.* 36-41. Because the State cannot show that a cash deposit bond is more likely to ensure Mr. Barton's appearance at trial than a surety bond, the October 18 Order violates the Eighth Amendment and Article I, Section 14, irrespective of the dollar amount of bail required.

### **III. CONCLUSION**

For the foregoing reasons, Mr. Barton respectfully requests that the Court hold that the October 18 Order violates Article I, Section 12; Article I, Section 14; and Article I, Section 20 of the Washington Constitution and the Equal Protection Clause of and Eighth Amendment to the U.S. Constitution, and require trial courts setting bail under CrR 3.2(b)(4) to allow defendants to post bond by sufficient sureties.

RESPECTFULLY SUBMITTED this 25th day of September,  
2013.

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By   
Jeffrey B. Coopersmith, WSBA # 30954  
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**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On September 25, 2013, I caused to be served in the manner noted below, true and correct copies of the foregoing on the following:

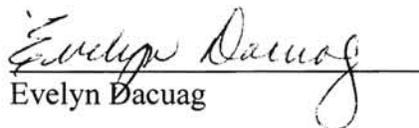
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SNOHOMISH COUNTY PROSECUTOR'S OFFICE

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 25th day of September, 2013, in Seattle, Washington.

  
Evelyn Dacuag