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No. 49793-0-II

Pierce County No. 16-1-01469-2

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS CUMMINGS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Frank E. Cuthbertson (trial judge), and
the Honorable Katherine M. Stolz (pretrial)

APPELLANT'S OPENING BRIEF

KATHRYN A. RUSSELL SELK, No. 23879
Appointed Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, #176
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting hearsay as a “statement of identification” and the remaining evidence is insufficient.
2. The superior court violated CrR 3.2, the presumption of innocence, the presumption of pretrial release without conditions and state and federal due process by failing to follow the requirements of CrR 3.2.
3. Article 1, §§ 14 and 20, the Eighth Amendment, state and federal due process and equal protection were violated when appellant, a person cloaked with the presumption of innocence, was kept in physical custody because he was too impoverished to be able to meet wealth-based conditions of release.
4. Appellant was deprived of his Article 1, § 22 and Sixth Amendment rights to counsel.
5. The Court should address the bail issues regardless whether they are technically moot.
6. Appellant assigns error to the “Order Setting Conditions Pending Pursuant to CrR 3.2” as follows:

THE COURT HAVING found probable cause, establishes the following conditions that shall apply pending in this cause number or until entry of a later order; IT IS HEREBY ORDERED:

Release Conditions:

Defendant shall be released upon execution of a surety bond in the amount of \$50,000.00 or posting cash in the amount of \$50,000.00.
* * * NEW BAIL * * *

Bail issue reserved.

CP 116¹ (emphasis in original).

¹For the Court’s convenience, a copy of the document is attached hereto as Appendix A.

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Nicholas Cummings was charged by information in Pierce County superior court with first-degree unlawful possession of a firearm. CP 1; RCW 9.41.010; RCW 9.41.040(1)(a). Pretrial hearings were held before the Honorable Judges Stanley J. Rumbaugh on June 14 and 21, and July 14, 2016, Ronald Culpepper on August 30, 2016, and Michael E. Schwartz on August 9, October 17, October 24, November 14 and 21, 2016.²

Trial was held before the Honorable Judge Frank E. Cuthbertson on November 29 and 30 and December 1, 2016, after which the jury found Mr. Cummings guilty as charged. CP 8. On December 16, 2016, Judge Cuthbertson ordered a standard-range sentence. 8RP 1, 2, 150; CP 86-98. Mr. Cummings appealed and this pleading follows. See CP 105.

2. Testimony at trial

Puyallup Police Department Officer Carl Murrell was on patrol at about one in the afternoon on April 9, 2016, when he got a “call” over his communication radio telling him to respond to a

²The verbatim report of proceedings consists of multiple volumes, only some of which are chronologically paginated. They will be referred to as follows:
April 11, 2016, as “1RP;”
June 14, 2016, as “2RP;”
June 21, 2016, as “3RP;”
July 14, 2016, as “4RP;”
August 30, 2016, as “5RP;”
the volume containing the proceeding of August 9, October 17, November 14 and 21, 2016, as “6RP;”
October 24, 2016, as “7RP;” and
the four chronologically paginated volumes of November 29 and 30, December 1 and 16, 2016, as “8RP.”

disturbance in Puyallup. 8RP 207-208. The dispatch sent him to “the 700 block” of 2nd Avenue Northeast, for what was declared to be a “fight involving a possible gun.” 8RP 207-209.

When Murrell arrived, he spoke with two people who said they were involved, Samantha Blackwell and a person not identified at trial except as “Mr. Heath.” 8RP 210. Officer Murrell talked with Blackwell and Heath for about five or ten minutes about the call. 8RP 224. The officer, however, did not take statements from either alleged witness/claimant, in written or recorded form. 8RP 224.

Meanwhile, Officer Lloyd Leppell had heard the same call and headed towards the area. 8RP 246-47. Along the way, he saw a man he thought matched the description of a person involved in the alleged incident entering a convenience store, about three blocks from the site mentioned in the original call. 8RP 246-47. The officer parked his patrol car at the store and went inside, approaching the man he had seen. 8RP 250.

Officer Leppell told the man he had heard that the man had been involved in an argument nearby. 8RP 251. The man conceded he was involved and the officer then asked the man to step outside the store to talk about the “disturbance.” 8RP 250-51. According to the officer, the man conceded he had been in an argument. 8RP 251.

Officer Leppell and the man walked out of the store. 8RP 251, 262. The officer put the man in handcuffs, then read him his rights. 8RP 258. At some point, Leppell said, the man gave the officer his backpack and said to put him in the back of the patrol car because he

was a “felon with a firearm.” 8RP 259. Counsel’s objection to this evidence was overruled. 8RP 259.

Officer Murrell had by then finished his unrecorded interviews of Heath and Blackwell, and had headed over to where Leppell was holding the man. 8RP 210-13. Officer Leppell had already put the man in the rear of Leppell’s patrol car, so Murrell went to that car to inquire further. 8RP 211. Murrell then interrogated the man who was in the back of the patrol car. 8RP 213-14. According to the officer, the man told him that there was a .25 caliber pistol wrapped in a “beanie” inside a zipper pouch in the backpack. 8RP213-14. The man said there was no round in the chamber but that the gun was loaded with five rounds. 8RP 214.

Officer Murrell took the backpack from where it was sitting on the police car and searched it. 8RP 229. He testified that he found a gun as described. 8RP 215. It was later test-fired and deemed “operable” by a police expert, although it malfunctioned after the third round was shot through the barrel. 8RP 277-78, 293-94.

The man told Officer Murrell that he had gotten the gun from Blackwell and had not had it during the argument that day. 8RP 215-21. Blackwell and Heath had been staying at the home of the man’s cousin about a week earlier and had stolen the gun from that house. 8RP 236. About three or four days after he had leveled those accusations, the man said, he was sitting in a car and the gun was thrown into his lap, wrapped in several bags. 8RP 239. He believed

he was being set up by Blackwell. 8RP 239-40.

The gun was in the backpack underneath a nearby freeway moments before the man retrieved it, which was just before he had gone into the store. 8RP 219-21. He was planning to take it to his cousin's house to return it that day. 8RP 241. He was unwilling, however, to give his cousin's name or information to the police. 8RP 244.

On cross-examination, Officer Murrell conceded that the man had said he "didn't want to get anybody else in trouble and he just wasn't going to give" that information to police. 8RP 245.

At trial, Officer Murrell identified the defendant in court as the same man he had contacted in the back of Leppell's patrol car that day. 8RP 211-12. The officer also testified, "Officer Leppell had identified him as Nicholas Cummings, and through law enforcement databases, I would say." 8RP 211. But Officer Murrell admitted he was not himself involved in - nor did he overhear - any identification procedures done by Officer Lappell with the detained man. 8RP 211-33.

Officer Murrell also testified that he found some mail inside the backpack "addressed to him," which he said meant, "[m]ail addressed to Nicholas Cummings." 8RP 221. The officer did not take the mail into evidence, however, nor did he have any photographs to show the name. 8RP 221-33. The officer speculated that the items would have been put into custody by police for "safekeeping" in the property room and the defendant allowed to take it with him when

he was released. 8RP 233-34.

Although Murrell was not the officer who had identified the detained man, the prosecutor asked Murrell if it was “common” for police to get someone’s date of birth to help identify them in such situations. 8RP 221-22. Officer Murrell said, “[y]es,” and further that this had happened in this case, even though he had not been involved. 8RP 221-23.

Over defense objection, Officer Murrell was allowed to read into the record the date of birth that Officer Murrell said the other officer, Officer Leppell, reported that the man had given, as well as the name. 8RP 222. That date was 12/27/1980. 8RP 222. Exhibits 8 and 9 reflected the 2007 second-degree burglary.

D. ARGUMENT

1. THE CONVICTION FOR FIRST-DEGREE UNLAWFUL POSSESSION OF A FIREARM SHOULD BE REVERSED

Due process requires that the state must prove every element of a crime to a jury, beyond a reasonable doubt, before a person may be found guilty of and punished for a crime. See In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Where the state fails to meet that burden of proof, the conviction must be reversed and dismissed with prejudice. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Wright, 165 Wn.2d 783, 203 P.3d 1027 (2005). Where, however, part of the evidence supporting a conviction was wrongly admitted at trial, if the remaining evidence is insufficient to support

the conviction, reversal and remand for a new trial without the offending evidence is required. See Lockhart v. Nelson, 488 U.S. 33, 40, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988); State v. Stanton, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). In this case, the Court should reverse and remand for a new trial, because the trial court erred in admitting hearsay as a “statement of identification” over defense objection and the remaining evidence was insufficient to support the conviction.

a. Relevant facts

Before and during trial, the defendant declined to stipulate that he had a prior conviction which rendered his possession of the firearm unlawful. See 8RP 3-5, 181-82. The prior conviction was a second-degree burglary from 2007. 8RP 4, 8. The trial judge noted this lack of stipulation, which was unusual, verifying with counsel that he had “explained to Mr. Cummings that what usually happens in these cases are that the defendant will stipulate.” 8RP 181-82; see 8RP 269.

As a result of this decision by the defense, at trial, the prosecutor told the jury that the person on trial was the same person who had a prior conviction for burglary in the second degree, a “serious offense.” 8RP 202. The prosecutor also moved to admit exhibits regarding the prior conviction. 8RP 270-71; see Exhibits 8 and 9 (transmitted to the Court by supplemental designation). Counsel raised no objection “as to them being self-authenticating documents,” just “as to what they prove,” and they were admitted

with a limiting instruction that they were only for the purpose “of determining whether the defendant, Mr. Cummings, had previously been convicted of a serious offense.” 8RP 270-72.

At trial, the prosecution did not call a fingerprint or handwriting expert to verify that the person named on the prior conviction documents was the same Nicholas Cummings that was in court on trial. See 8RP 207-335. The state did not admit known handwriting samples or other documents or ask the jurors to compare them. 8RP 207-335.

Instead, the evidence presented was from the two officers, but primarily from Murrell, who did *not* conduct the identification procedure in this case. At trial, Officer Murrell was asked by the prosecutor whether, in general, it was “common” for police to identify someone as part of an investigation “by obtaining, for instance, a date of birth[.]” 8RP 221. The following exchange occurred:

[PROSECUTOR]: And did that happen in this case?

[OFFICER]: Yes.

[PROSECUTOR]: What was the date of birth that you obtained for the defendant?

[COUNSEL]: Objection. Hearsay. Authentication. I don't know the source of the information.

THE COURT: I'm going to sustain the objection. You can voir dire the witness and establish the foundation.

[PROSECUTOR]: How did you obtain that information, specifically, the date of birth?

[OFFICER]: He had been already identified by Officer Lepell.

[PROSECUTOR]: Okay. Including a date of birth?

[OFFICER]: Correct.

Q: Okay. And did you include that information in your report?

A: Yes.

Q: Your investigative report? What was the date of birth that you obtained?

[COUNSEL]: Objection.

THE COURT: Yeah. I'm going to overrule the objection. Statement of identification.

A: 12/27 of 1980.

8RP 222.

Later, however, when Officer Lepell himself testified, the prosecutor asked, “[a]t some point did you identify this individual?” 8RP 251. The officer responded, “[y]es, I did.” 8RP 251. The prosecutor then asked how and the officer responded, “[h]e gave me his name.” 8RP 251. In follow up, the prosecutor established that the man had given a “full name,” which the officer read from the report was “Nicholas Cummings.” 8RP 252.

Officer Lepell never said anything about the birthdate Murrell claimed Lepell had gotten and then passed on to Murrell. 8RP 246-256.

In closing argument, the prosecutor specifically relied on Murrell’s testimony of the date of birth he said Officer Lepell told him as evidence “it’s the same individual[.]” 8RP 348. In response,

counsel argued the evidence was insufficient, cautioning against assuming the prior conviction documents must be for the same person just because, “[w]ho would possibly put these documents down here if it wasn’t him” and they were both named “Nicholas Cummings,” but not even a middle name had been provided. 8RP 367. In rebuttal, the prosecutor relied on the name identity of “Nicholas Cummings” and the birth date evidence again, speculated that Murrell could not have made up the date of birth, and said the defense argument had not “create[d] reasonable doubt.” 8RP 377-78, 380.

- b. The trial court erred in admitting the hearsay and without that evidence there was insufficient evidence to support the conviction

The conviction for first-degree unlawful possession of a firearm should be reversed, because the trial court erred in admitting evidence as a “statement of identification” and without that evidence there was not sufficient proof to support the conviction. First-degree unlawful possession of a firearm is defined in RCW 9.41.040(1)(a), as follows in relevant part:

A person, whether an adult or juvenile, is guilty of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted. . . in this state or elsewhere of any serious offense as defined in this chapter.

Thus, to prove the crime, the prosecution has to show 1) the accused owns or has in his or her control a “firearm,” and 2) he or she has

“previously been convicted . . . of any serious offense” as defined in Title 9.41. See, e.g., State v. Huber, 129 Wn. App. 499, 504, 119 P.3d 388 (2005).

Put another way, the “identity” of the current defendant as the same person who was convicted of the prior crime is an element of the current offense and thus a question of fact for the jury. See State v. Harkness, 1 Wn.2d 530, 540, 96 P.2d 460 (1939).

In most cases, the prosecution does not have to prove this element. See e.g., Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998). It is well-settled that jurors who hear a defendant has criminal history can be swayed into deciding a case based on passions and prejudice instead of evidence admitted at trial. See State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997); see also, Old Chief, 519 U.S. at 181. As a result, most defendants faced with a crime requiring proof of a prior felony conviction as an element of the current offense make the choice of insulating themselves as much as possible from that potential prejudice by stipulating to having the required prior conviction as unnamed but qualifying felony, i.e., “a prior conviction for a violent offense.” See State v. Roswell, 165 Wn.2d 186, 195, 196 P.3d 705 (2008); Old Chief, 519 U.S. at 181-82. Indeed, it is an abuse of discretion for a trial court to refuse to accept such a stipulation, if offered. See Old Chief, 519 U.S. at 189-90.

Where a defendant declines to make such a stipulation, however, the state is not relieved of its burden of proving, beyond a reasonable doubt, that the person on trial was also the person who had the required prior conviction. See State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). Here, because there was no stipulation, the state was not relieved of its burden of proving that the person who was named in the 2007 burglary conviction documents was the same person as the Nicholas Cummings who was on trial for the current offense.

To meet its burden below, the prosecution relied on two pieces of evidence - 1) the name “Nicholas Cummings” (with no unusual middle name or indeed even a middle initial) and 2) the date of birth that Officer Murrell included in his police report and testified that Officer Leppell told him the detained man had given. See 8RP 348, 377-78. But the latter was admitted in error.

Although in general this Court reviews a trial court’s decision to admit evidence for abuse of discretion, this Court reviews a trial court’s interpretation of proper application of a rule of evidence de novo. See State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Here, the trial judge overruled the defense objection to the hearsay from Officer Murrell on the grounds that the testimony involved a “statement of identification.”

ER 801(d)(1)(iii) provides an exception to the hearsay rule for

such statements if the declarant testifies and is subject to cross-examination and the statement is “one of identification of a person made after perceiving him[.]” The theory behind the rule is that “evidence of pretrial identification has greater probative value than a courtroom identification,” because the “witness’ memory is fresher and the identification occurs before the witness can be influenced to change his mind.” State v. Grover, 55 Wn. App. 923, 931-32, 780 P.2d 901 (1989), review denied, 114 Wn.2d 1008 (1990).

Thus, it was proper for an officer to testify that he had interviewed an alleged victim at the scene and she had identified the defendants as the robbers. Grover, 55 Wn. App. at 931-32. It was not necessary for the alleged victim herself to testify as to her identification, because statements of identification “may be admitted through testimony of another person who heard or saw the identification.” Grover, 55 Wn. App. at 932. Although most cases involve statements of identification made during a photographic montage, lineup or other pretrial investigation procedure, statements made without such a procedure may also be admissible under the rule. See, Grover, 55 Wn. App. at 932 n. 1; see also, State v. Stratton, 139 Wn. App. 511, 517, 161 P.3d 448 (2007), review denied, 163 Wn.2d 1054 (2008) (allowing admission of statements about physical characteristics of a person made by a witness after perceiving that person).

Here, the statements were not “statements of identification” under ER 801(d)(1)(iii). They were not statement made by a witness or a victim who had perceived someone and was providing a description, such as “the man was tall and bald,” or making an identification, such as “it was Joe who had the gun.” Officer Leppell did not “perceive” the birthdate of the man he held; he allegedly questioned the man and received it, according to Officer Murrell (not Leppell, who did not testify about the birthdate at all).

The birthdate was not admissible through Officer Murrell’s testimony as a statement of identification under ER 801(d)(1)(iii). And it was clearly offered for the truth of the matter asserted - that the date given was the birth date of the man the officer was holding and who was on trial - which was absolutely crucial to the prosecution’s case. In fact, the evidence the prosecution sought to admit was hearsay within hearsay within hearsay, because it was 1) an out-of-court statement (the writing in the report) by Murrell (hearsay), 2) which Murrell said Officer Leppell had told him (hearsay), 3) which the defendant supposedly told to Leppell (hearsay).

The trial court erred in admitting this evidence, and the error was prejudicial. An error in admitting evidence is prejudicial if it is reasonably likely that the trial’s outcome would have been different, had the error not occurred. State v. Everybodytalksabout, 145 Wn.2d

456, 468-69, 39 P.3d 294 (2002). That standard is more than met here and reversal and remand for a new trial is required, because without the improperly admitted evidence, there was insufficient evidence to support the conviction first-degree unlawful possession of a firearm.

The weight of the state's burden of proving a prior conviction depends upon whether the state is using the prior conviction as an element of a crime or just for the purposes of sentencing. See State v. Hunter, 29 Wn. App. 218, 221-22, 627 P.2d 1339 (1981). At sentencing, the prosecution need only establish the identity of the person with the prior convictions by a preponderance of the evidence. See State v. Ammons, 105 Wn.2d 175, 188-86, 713 P.3d 719, amended, 718 P.2d 796 (1986).

In stark contrast, where, as here, an essential element of the crime is the defendant's status as the person who had a particular prior conviction, the state must prove it like all other elements - beyond a reasonable doubt. See Harkness, 1 Wn.2d at 542-43. This requires more than just a certified document showing someone with the same name was convicted of a previous crime. 1 Wn.2d at 542. While the "identity of names may be some evidence of the identity of persons," the Supreme Court has held, it is not enough, standing alone. Id, quotations omitted.

Indeed, the Court said, it would "amount to a travesty to say

that a prima facie case” was made by showing that “a man passing under that name had at some time or other been convicted” in other courts. Harkness, 1 Wn.2d at 542. When “criminal liability depends on the accused’s being the person to whom a document pertains . . . the State must do more than authenticate and admit the document. Huber, 129 Wn. App. at 502. It is also recognized that “in many instance men bear identical names,” so that the State cannot meet its burden by showing identity of names alone. Huber, 129 Wn. App. at 502 (citations omitted).

And this is true even when the names are unusual, such as “Mitchell T. Brezilla” or “Dallas E. Hunter.” See State v. Brezilla, 19 Wn. App. 11, 573 P.2d 1343 (1978); Hunter, 29 Wn. App. at 221.

The trial court erred in admitting the testimony from Officer Murrell about what Murrell had written in his report, which Murrell said Officer Leppell had told him that Leppell had gotten from the detained man. Without that evidence, the only evidence to support the conviction was the identity of names, “Nicholas Cummings,” which was insufficient. Because the remaining evidence did not support the conviction, reversal and remand is required.

2. THE PRETRIAL RELEASE PROCEEDINGS WERE IN VIOLATION OF COURT RULE AND CONSTITUTIONAL RIGHTS AND THIS COURT SHOULD ADDRESS THESE ISSUES

Before trial, every person accused of a crime is cloaked with the presumption of innocence. See, State ex rel Wallen v. Judges

Noe, Towne, Johnson, 78 Wn.2d 484, 487, 475 P.2d 787 (1970); Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed 481 (1895).

As a result, it is a fundamental principle that the state may not simply keep someone in custody pretrial based solely on an unproven accusation. Hudson v. Parker, 156 U.S. 277, 285, 15 S. Ct. 450, 39 L. Ed. 424 (1895); State v. Barton, 181 Wn.2d 148, 331 P.3d 50 (2014). Indeed, pretrial release and liberty is supposed to be “the norm” - not an exceptional or unusual situation. United States v. Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095, 96 L. Ed. 2d 697 (1987); see Barton, 181 Wn.2d at 152. In contrast, “detention prior to trial or without trial” is supposed to be “the carefully limited exception.” Salerno, 481 U.S. at 742.

In our state, CrR 3.2 governs pretrial release and, in theory, honors the mandate that pretrial detention is to be the exception, not the rule. Under the rule, unless a person is charged with a crime for which they could face the death penalty, there is a presumption they will be released without any conditions pretrial. Butler v. Kato, 137 Wn. App. 515, 522-23, 154 P.3d 259 (2007). Neither this presumption nor the presumption of innocence were honored below, as the superior court utterly failed to follow the requirements of CrR 3.2 - itself a violation of due process. Further, the lower court set wealth-based conditions of pretrial liberty which were in violation of the excessive bail provisions of the state and federal constitutions, as

well as equal protection and due process rights.

a. Relevant facts

The information was filed April 11, 2016 and, that same day, the defendant appeared in front of Judge Katherine Stolz. 1RP 1; CP 1. Judge Stolz confirmed that the charges had been read to the defendant and he was asking “that a plea of not guilty be entered on his behalf.” 1RP 3. The judge also said it appeared that Mr. Cummings had “refused to provide any information,” so “we’ll need to schedule a return with attorney date.” 1RP 3. The prosecutor asked the court to “inquire again,” because “sometimes when dockets are large,” the pretrial screeners did not “take time to question everybody.” 1RP 3-4.

At that point, the judge established with the accused that he had just started work the previous week doing demolition and flooring work by the job. 1RP 3-4. When he was working, Mr. Cummings said, he made \$15 an hour. 1RP 3-4. Cummings admitted, however, that he was homeless. 1RP 3-4.

Judge Stolz asked for the “State’s request regarding conditions of release,” and the prosecutor responded:

State is asking for \$50,000 bail. The defendant does have seven adult felonies and one juvenile felony case. He also has 12 cases with bench warrant activity; so he presents a flight risk and a risk to community safety.

1RP 4. An attorney apparently from the public defender’s office said, “at this time I’m going to reserve the bail argument for Mr.

Cummings' attorney," and the judge then said, "I'll reserve bail argument [sic], I'll set it at 50,000." 1RP 4. Judge Stolz also said, "if you bail out, you'll need to make certain that you take your scheduling order with you." 1RP 4-5. The later written order also said, "[b]ail issue reserved." CP 116.

Appointed counsel filed a notice of appearance the next day. CP 4.

About two months later, on June 14, 2016, the parties appeared in court and told the judge that the defendant wanted to fire his current appointed counsel, although counsel was not citing a "legal reason." 2RP 1-3. The court inquired and Mr. Cummings explained that he was unhappy with his attorney's failure to bring a motion to reduce the bail and get information to verify employment which would support that request. 2RP 3. He was frustrated that his attorney was claiming not to be able to find information which a unit officer in the jail had found. 2RP 3-4. Mr. Cummings wanted to try to get a bail reduction hearing so he could "get out on bail and save up money" before going to prison. 2RP 4.

After being told that bail had been "reserved" at arraignment, Judge Rumbaugh told counsel, "[i]f you want to set a bail, hearing, you can set a bail hearing." 2RP 4. Mr. Cummings objected that he had asked his counsel for a bail reduction hearing "[o]ver a month ago" and counsel had not done anything, but the judge thought the

defendant could “work that out” with counsel. 2RP 5.

Appellant wrote the superior court a few days later, again asking for new counsel. CP 9-10. About a month later, at a hearing, there was some mention of a scheduled bail hearing set for July 21, 2016. 3RP 3. But that bail hearing apparently did not occur, and on August 30th the court granted a continuance based on the prosecutor’s trial and vacation schedule. 5RP 1-3; see 6RP 2-4.

After a further continuance, a bail review hearing was held on October 24, 2016. 7RP 2. The assigned prosecutor was not present for the hearing, however. 7RP 2. Counsel asked the judge to lower the amount of bail from \$50,000 to \$10,000, so that Mr. Cummings might have a chance of securing his release pending trial. 7RP 2. While Cummings had been homeless when arrested, there was now a family friend who had agreed to let him live with her, so there was a “confirmed residence” to which he could go, if released. 7RP 3.

Counsel did not dispute that Mr. Cummings had a high offender score but noted again that there was a “confirmed” address available. 7RP 3. He told the court that Mr. Cummings had no funds in a bank or even a car to his name. 7RP 3. While \$10,000 was still “a fortune” for Mr. Cummings, counsel thought Cummings might be able to raise it, with help. 7RP 3-4.

The stand-in prosecutor opposed the motion, stating:

We show 12 cases with warrant activity. Counsel is correct, he has a number of felonies including a 1999 forgery; 2004 UPOF

2; 2005 UPCS; 2005 Escape, 2005 Theft in the First Degree; 2006 Unlawful Possession of a Firearm; 2007 Burglary in the Second Degree, and 2011 Unlawful Possession of a Firearm in the Second Degree.

7RP 4. The stand-in also opined that the initial bail amount had been specifically set because of “FTA history and the number of times that he has committed felonies.” 7RP 4.

The judge admitted that he thought “bail should be somewhat lower.” 7RP 4-5. But the judge but also demurred, setting the matter aside for the current time and telling counsel to talk to the assigned prosecutor to give her a chance to “check out the release plan.” 7RP 4-5. The case was subsequently set over two more times because the assigned prosecutor was in other trials. 6RP 7-9. Trial did not start until November 29, and Mr. Cummings remained in custody throughout.

- b. The trial court abused its discretion in failing to follow the mandatory provisions of CrR 3.2 and constitutional rights were violated

Judge Stolz failed to follow the mandatory provisions of CrR 3.2, in violation not only of that rule but also the presumption of innocence and state and federal due process. First, the decision below violated CrR 3.2 in multiple ways. Under that rule, there is a presumption that every person accused of a non-capital (death penalty) crime will be released pretrial without *any* conditions imposed as a condition of that release. See Butler, 137 Wn. App. at 520-21. CrR3.2(1)(a) provides:

Presumption of Release in Noncapital Cases. Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance . . . be ordered released on the accused’s personal recognizance pending trial unless

- (1) the court determines that such recognizance will not reasonably assure the accused’s appearance, when required, or
- (2) there is shown a likely danger that the accused:
 - (a) will commit a violent crime, or
 - (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

Release on “personal recognizance” means release “the court takes the defendant’s word he or she will appear for a scheduled matter” or the arrested person promises, “without supplying a surety or posting bond, to appear.” BLACKS LAW DICTIONARY (10th ed. 2014).

Thus, under CrR 3.2, the presumption in this state is that a person who is charged with a non-capital crime will be released based upon the promise to return, without any conditions placed on that person’s release. State v. Rose, 146 Wn. App. 439, 450-51, 191 P.3d 83 (2008). Any other result requires the superior court to first find the presumption was rebutted, by making the specific findings under CrR 3.2(a)(1) (the “appearance” exception) or (2) (the “likely danger” exception). Rose, 146 Wn. App. at 450-51.

The trial court made no findings that the presumption of pretrial release without conditions had been rebutted here. See CP

116-17. Further, it made no findings to support keeping Mr. Cummings in custody pretrial at all. CP 116-17. The court's preprinted "Order Establishing Conditions of Release Pending Pursuant to CrR 3.2" does not contain any finding other than one of probable cause. Id. There was no finding entered that the presumption had been rebutted, or that Mr. Cummings was not likely to return if released without conditions, or that Mr. Cummings somehow presented a substantial risk of intimidating a witness or anything similar. Id.

Instead, it appears the lower court did not consider the provisions of the rule at all. CrR 3.2 sets forth the required factors a court must consider in each case. See CrR 3.2(b) (the court "shall, on the available information, consider all the relevant facts including, but not limited to," specific factors); see Randy Reynolds & Associates, Inc. v. Harmon, 1 Wn. App. 2d 239, 404 P.3d 602 (2017) ("shall" usually denotes a command). The state appears to have been relying on both exceptions to CrR 3.2, requesting \$50,000 bail and noting Cummings had "seven adult felonies and one juvenile felony case" and "12 cases with bench warrant activity," without providing any information on even what year that warrant activity might have occurred. 1RP 4. The prosecution asked for the bail because, it said, "he presents a flight risk and a risk to community safety," apparently because of his

criminal history and bench warrant activity in the past. 1RP 4.

But the lower court did not consider the relevant factors required to determine whether it is justified to keep a person accused but not yet convicted of a crime in custody pretrial, despite the presumption of release without conditions. For the “future appearance” exception to the presumption, CrR 3.2(c) provides the following mandatory factors the court is to consider in determining whether the risk of non-appearance in the future is significant enough that pretrial release should be denied. The court deciding the risk must consider as follows:

- (1) The accused’s history of response to legal process, particularly court orders to personally appear;
- (2) The accused’s employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;
- (3) The accused’s family ties and relationships;
- (4) The accused’s reputation, character and mental condition;
- (5) The length of the accused’s residence in the community;
- (6) The accused’s criminal record;
- (7) The willingness of responsible members of the community to vouch for the accused’s reliability and

assist the accused in complying with conditions of release;

- (8) The nature of the charge, if relevant to the risk of nonappearance;
- (9) Any other factors indicating the accused's ties to the community.

CrR 3.2(c). For the "likely danger" exception to the presumption, CrR 3.2(e) provides the relevant factors:

- (1) The accused's criminal record;
- (2) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
- (3) The nature of the charge;
- (4) The accused's reputation, character and mental condition;
- (5) The accused's past record of threats to victims or witnesses or interference with witnesses or the administration of justice;
- (6) Whether or not there is evidence of present threats or intimidation directed to witnesses;
- (7) The accused's past record of committing offenses while on pretrial release, probation or parole; and
- (8) The accused's past record of use of or threatened use of deadly weapons or firearms, especially to victim's [sic] or witnesses.

Thus, CrR 3.2 does not require proof of just any degree of "danger" that the person who stands accused but not convicted of a

crime presents if released - the danger in the particular case must be more than just general and must be “substantial.” Rose, 146 Wn. App. at 452; CrR 3.2(d) (conditions of release to be used upon a “[s]howing of substantial danger,” if there is proof “there exists a substantial danger that the accused will commit a violent crime” or seek to intimidate a witness or unlawfully interfere with the administration of justice; CrR 3.2(e).

As a result, for the “danger to others” theory of the prosecution to support imposing a condition of pretrial release, the evidence must show that the risk of a violent crime or witness intimidation or unlawful interference with the administration of justice is not just the normal risk but instead is “**substantial**.” See Rose, 146 Wn. App. at 452 (emphasis added). The prosecution presented nothing to support such a finding below, and, again, no such finding was made. 1RP 4; CP 116-17. Similarly, the risk of non-appearance has to be “reasonable” in light of the circumstances, rather than just the general concern that someone accused of a crime might have a lack of incentive to return to court, and the state presented no proof of a specific risk of likelihood not to return for court below. See CrR 3.2; 1RP 3-4. And again, no such finding was made. 1RP 4; CP 116-17.

The trial court abused its discretion in this case by violating

the rule's mandates in multiple ways. The court made no factual findings that the presumption of release without conditions had been rebutted, or that either of the two exceptions of CrR 3.2 applied. CP 116. It made no oral or written findings that there was a "substantial danger" if the accused was released. CP 116; 1RP 4. It made no oral or written findings of a reasonable likelihood the accused would not appear for trial if released without conditions. CP 116; 1RP 4. It did not consider the relevant, required factors under CrR 3.2 for either of the exceptions to the presumption. CP 116; 1RP 4.

And that is not the end of its errors. Under CrR 3.2, even if a court makes the required finding that the presumption of release without conditions was rebutted, the court is not authorized to simply impose any condition of pretrial release it desires. Butler, 137 Wn. App. at 524. Instead, the rule and constitutional rights underlying pretrial release issues mandate that the least restrictive means of accomplishing the governmental end are employed. See Butler, 137 Wn. App. at 524. As a result, a court "may not impose onerous or unconstitutional provisions where lesser conditions are available to ensure the public" purpose involved, i.e., protecting the public against potential violent acts by the pretrial detainee, or ensuring the future court presence of the accused. See id.

CrR 3.2(d) specifically provides that, even if there is sufficient proof of a showing of “substantial danger” of risk of violence shown, a court *still* may not impose a financial condition as if a default. The rule provides that a financial condition “may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community.” CrR 3.2(d)(6). Further, the court must consider the defendant’s financial resources in making its decision. Id.

Similarly, under CrR 3.2(b), if there is a showing of likely failure to appear if released without conditions, “the court shall impose the least restrictive” of the listed conditions “that will reasonably assure that the accused will be present for later hearings.” A financial condition must therefore be linked in some way to that future appearance. See, Rose, 146 Wn. App. at 457-58. Thus, for example, in Rose, where the government sought weekly urinalysis testing as a pretrial condition for release when charged with even drug crimes, this Court rejected the condition because the state presented no evidence that drug use was a good indicator of a future failure to appear (and thus the test would serve the required purpose of ensuring future appearance), nor did the lower court “make an individualized determination that [the defendant’s] drug use, if any,

would lead to his none appearance.” Rose, 146 Wn. App. at 458. “[W]ithout a showing that drug use leads to higher likelihood of absconding or an individual determination” that drug use in this particular case would somehow have an effect, the condition of pretrial release requiring the weekly urine tests was improper. Id.

Here, the superior court did not make any findings that a financial condition of pretrial release was required because “no less restrictive condition or combination of conditions would reasonably assure the safety of the community.” 1RP 4; CP 116-17. There was no discussion of less restrictive alternatives, just like there was no discussion of the presumption of release on personal recognizance or the relevant factors and requirements of CrR 3.2. 1RP 4; CP 116-17.

It is an abuse of discretion to fail to follow the mandates of CrR 3.2. Butler, 137 Wn. App. at 524. It is further a violation of state and federal due process and the guarantee of the presumption of innocence. It is an essential part of pretrial due process - even “implicit in the concept of ordered liberty” - that every person is presumed innocent unless and until proven guilty by the state, beyond a reasonable doubt. See Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 368 (1970). A pretrial detainee, cloaked with the presumption of innocence, thus enjoys far different due

process protection than those enjoyed by someone being detained *after* conviction. See Bell v. Wolfish, 441 U.S. 520, 535 n. 16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1997); State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981). The contours of CrR 3.2 were designed to balance the right to pretrial release in light of the presumption of innocence with the government’s occasional real need to keep someone in custody pretrial, when required for specific, enumerated reasons. Failing to follow the rule is not just a violation of the rule, it is an offense to the constitutional principles and rights involved.

More, however, the failure to follow the rule and the haste to impose such a significant financial condition for pretrial release was a violation of due process, equal protection, and prohibitions on excessive bail. Taking the latter first, Article 1, § 20, of the Washington Constitution provides a right to bail in all but the most extreme case³, while Article 1, § 14 and the Eighth Amendment

³Before 2010, a Washington trial court had **no** authority at all to deny bail in any case other than one in which the crime alleged was a capital (i.e. death penalty) crime. Barton, 181 Wn.2d at 152-53. After Maurice Clemmons shot and killed several police officers while on pretrial release, however, the constitution was amended. Barton, 181 Wn.2d at 153. Article 1, § 20, now provides, in relevant part, “[a]ll persons charged with crime shall beailable by sufficient sureties, except for capital offenses when the proof is evidence or the presumption great,” and that bail may be denied for offenses punishable with possible life without parole, “upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any person.” See, Barton, 181 Wn.2d at 153; see ESHJ Res. 4220, 61st Leg., Reg. Sess. (Wash. 2010) (amending Article 1, § 20).

prohibit “excessive bail.” State v. Heslin, 63 Wn.2d 957, 959-60, 389 P.3d 892 (1964); Barton, 181 Wn.2d at 152-53. Bail is “excessive” when it is set “at a figure higher than an amount reasonably calculated” to ensure the presence of the accused in court. See Barton, 181 Wn.2d at 153.

Put another way, the function of bail is “limited” so that fixing of it for “any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant” or protection, if that is the reason for the bail. Id. This is, in effect, a requirement of proportionality, because the court setting bail must consider the specific situation of the individual involved and set bail only at the amount required for the relevant purpose, in light of the situation of the accused. See Salerno, supra, 481 U.S. at 744-47.

Thus, Mr. Cummings had a right to have bail set only at the amount required for the state purpose. But there was no evidence presented that \$50,000 was necessary to ensure any state purpose below as required to avoid being constitutionally excessive. Instead, the amount set as a financial condition of release appears to have been set for the purpose of ensuring that Mr. Cummings could not afford to bail out, thus allowing the state to keep a person in custody pretrial, despite the presumption of innocence and clear provisions of

CrR 3.2, because of poverty.

Discrimination of the basis of wealth also violates due process. See Reanier v. Smith, 83 Wn.2d 342, 517 P.2d 949 (1974). Allowing wealthy defendants to secure release while indigent defendants may not violates those principles. 83 Wn.2d at 349. Put bluntly, in such situations, the wealthy “are able to remain out of prison until conviction and sentencing; the poor stay behind bars.” 83 Wn.2d at 349.

Indeed, it was concern about such unconstitutional, unfair disparities between the pretrial treatment of those with resources and those without which led to amendments to CrR 3.2 in 2002 which apply in this case. See In the Matter of the Adoption of the Amendments to CrR 3.2, CrR 3.2.1, CrRLJ 3.2 and CrRLJ 3.2.1, Order No. 25700-A-721 (WSR 02-01-025) (Dec. 6, 2001).⁴ A blue-ribbon commission studied the matter and “concluded the criteria established by court rule for pretrial release may discriminate against persons who are economically disadvantaged” in this state, so it proposed the current requirements for limiting financial bail unless other, less restrictive means will not work and requiring consideration of the defendant’s financial resources in setting any such bail. Id; see,

⁴Available at <http://apps.leg.wa.gov/documents/laws/wsr/2002/02/02-01-025.htm>.

George Bridges, *A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-Trial Detention Practices in Washington*, Washington State Minority and Justice Commission (Oct. 1997).⁵ Here, with bail set at \$50,000, Mr. Cummings was kept in custody solely because he was unable to financially afford to pay for his liberty, while a person who presented exactly the same level of risk to the community as Mr. Cummings but had money would be walking free. That amounts to improper discrimination on the basis of wealth. See, e.g., Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (violation of due process and equal protection to deny access to court based on inability to pay for transcript because “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has”).

Further, it is a violation of equal protection to incarcerate someone because they are too poor to pay to be freed. See, e.g., Tate v. Short, 401 U.S. 395, 398, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971); Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S. Ct. 2016, 76 L. Ed. 2d 221 (1983). Equal protection requires that similarly situated individuals receive similar treatment under the law. State v. Simmons, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). Even applying the most deferential, “rational

⁵Available at http://www.courts.wa.gov/committee/pdf/1997_ResearchStudy.pdf.

basis” analysis, the court’s ruling here does not withstand review. Governmental action will not violate equal protection under the “rational basis” standard if the governmental action bears a rational basis to the legitimate governmental purpose it seeks to serve. See Campbell v. State, Dept of Soc. & Health Servs., 150 Wn.2d 881, 900, 83 P.3d 999 (2004). This means it must apply to all in the designated class alike, there are reasonable grounds to distinguish between those within and without the class, and the classification itself bears a rational relationship to the legitimate government purpose. Id.

Even that forgiving standard is not met here. Mr. Cummings is part of the class of people who accused of crimes and awaiting trial in this state. He is also part of a subset of that class - those without money. But that classification difference is not based on a rational relationship to the legitimate governmental purposes of either 1) ensuring the integrity of the court system by keeping custody of those few people who present a clear risk of not reappearing for court or 2) ensuring the safety of the community or a particular witness by keeping custody of a specific person pretrial when there is sufficient evidence that the risk is real and substantial. There is no legitimate or rational difference between a person in Mr. Cummings’ situation who is indigent and the same person with money. They both present

exactly the same risk. Yet Cummings was required to remain in custody pretrial, despite the presumption of innocence, despite the principles of CrR 3.2, based on imposition of a \$50,000 condition of pretrial bail, simply because he was too poor to pay for his own liberty.

In fact, wealth-based disparities in treatment of the accused pretrial and the serious inequities and constitutional concerns it raises have been the subject of concern for more than years. See, e.g., John S. Goldkamp, *Two Classes of the Accused: A Study of Bail and Detention in American Justice* (Ballinger Publishing Co., 1979) (Cambridge, Ma); see also, Ram Subramanian et al, *Incarceration's Front Door: The Misuse of Jails in America*, Vera Institute of Justice) (Feb. 2015).⁶ And over that time, the average length of pretrial stay nationally increased from 14 to 23 days- while today, in Washington state it is usually far, far longer. See, e.g., Caseloads of the Courts, Superior Courts, Criminal Case Management (2016).⁷

Also over this same time, there has been a stark increase in the use of “financial” conditions imposed upon people presumed

⁶Available at <https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america>

⁷Available at <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=trend&fileID=Crimcm>

innocent, awaiting trial. From 1990 to 1998, “non-financial” release in state courts dropped from 40% of all those released to 28% - meaning that nearly three quarters of all of those released pretrial in our country were order to pay some kind of financial condition to secure their liberty. See Thomas H. Cohen and Brian A. Reaves, Bureau of Justice Statistics, Special Report, *Pretrial Release of Felony Defendants in State Courts* (Nov. 2007).⁸ See Brian A. Reaves, Bureau of Justice Statistics, State Court Processing Statistics, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables* (Dec. 2013)⁹ (pretrial release involving financial conditions an estimated 61 percent of all felonies in large urban counties in 2009).

One reason this is such a troubling trend is the clear evidence that pretrial detention has a significant negative impact on people who are kept in custody - “warehoused” despite not having been convicted of the crime. The U.S. Supreme Court has noted that:

[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.

Barker v. Wingo, 407 U.S. 514, 532-33, 33 L. Ed. 2d 101, 92 S. Ct. 2182

⁸Available at <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

⁹Available at <https://www.bjs.gov/content/pub/pdf/fdluco9.pdf>.

(1972). Further, there is strong evidence that pretrial detention correlates to increased likelihood of conviction and higher sentence. See Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1165 (2005); Christopher T. Lowenkamp et. al, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation (Nov. 2013).¹⁰

And the costs are not just to the accused, his family, his defense and his rights, but to society itself. Just a few years ago, then-U.S. Attorney General Eric Holder acknowledged that the cost of increased pretrial detention of the accused was an estimated 9 billion taxpayer dollars. Eric Holder, Attorney General of the United States, *Speech at the National Symposium on Pretrial Justice* (June 1, 2011).¹¹ Closer to home, the Honorable Theresa Doyle of King County Superior Court in our state has noted, “[s]ociety bears the non-economic costs of lost employment, housing, family support, public benefits, and financial and emotional security for the children of the incarcerated person.” Hon. Theresa Doyle, *Fixing the Money Bail System*, KING COUNTY BAR BULL. (KCBA, Seattle, WA) (April 2016).

¹⁰Available at <https://csgjusticecenter.org/courts/publications/investigating-the-impact-of-pretrial-detention-on-sentencing-outcomes/>

¹¹Available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice>.

Today, it is estimated that, like Mr. Cummings, pretrial, upwards of 60 percent of the people in local jails are there pretrial, legally presumed innocent, awaiting trial or plea resolution, because they are too poor to pay a financial condition to secure their release. See Timothy R. Schnacke, *Fundamentals of Bail: a Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. Dept. Of Justice, Nat'l Inst. of Corrections (2014)¹²; see also, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, Justice Policy Institute (Sept. 2012).¹³

In this state, CrR 3.2, if followed, would eliminate many of the issues surrounding pretrial release. The rule applies a presumption of release on personal recognizance, without no conditions. The rule requires specific findings to rebut that presumption. It gives very clear mandatory requirements for considering the least restrictive means of ensuring governmental ends pretrial.

Here, it was not followed. And the resulting order, imposing \$50,000 as the price for pretrial freedom, does not withstand constitutional review.

¹²Available at <http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf>.

¹³Available at <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>.

There is an additional constitutional concern about what happened below. Both the state and federal constitutions guarantee the right to assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The right to the assistance of counsel involves more than just a warm body next to you. See Javor v. United States, 724 F.2d 831 (2nd Cir. 1984). As the proceedings here illustrate, once a decision has been made to impose a condition of release, it is an uphill battle to convince a court to reconsider or amend the conditions - even if, as here, they were improperly imposed. Where, as here, the defendant is facing the power of the government to control his most fundamental right of physical liberty absent proof of guilt for a crime, the state deprives the accused of counsel at a critical stage at which advocacy is crucial to ensure a balanced result. Had counsel been provided prior to the conditions of pretrial release being set, counsel could have raised the plain language of CrR 3.2 and the lower court would have abused its discretion if it had failed to comply with the mandates of the rule. Instead, Mr. Cummings was left to fend for himself.

This Court should address these important, significant issues regarding the constitutionality of our pretrial procedures but also the

serious failure of the trial court to follow the established rule. In response, the prosecution may urge the Court to decline to do so by arguing that the case is “moot,” because the case is no longer “pretrial” and conviction has occurred.

This Court should reject any such effort, however, because this is exactly the kind of case which this Court is empowered to address despite the passage of the pretrial term.. A case is moot if the court can no longer provide the appellant “effective relief.” In re Det. of M.W., 185 Wn.2d 633, 648, 374 P.3d 1123 (2016). While in general the Court does not consider a case which is moot, this Court also retains discretion to consider such a case where the question is of “continuing and substantial public interest.” See State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

The superior court’s refusal to apply the presumption of personal recognizance and the other provisions and limits of CrR 3.2, and the constitutional implications of those failures, are issues of continuing and substantial interest, likely to arise again but evade review. See, e.g., Federated Publ’ns, Inc. v. Swedberg, 96 Wn.2d 13, 16, 633 P.2d 74 (1981), cert. denied, 456 U.S. 984 (1982). To determine if a case meets this standard, the Court considers 1) the public or private nature of the question presented, 2) the desirability of an

authoritative determination on the issue for “the future guidance of public officers,” and “the likelihood of future recurrence of the question.” Hunley, 175 Wn.2d at 907.

Matters involving interpretation and proper application of a rule or statute tends to be more public in nature, more likely to arise again and the more likely it is that a ruling would be desirable in order to provide future guidance. See Hart v. Dep’t of Soc. & Health Serv., 111 Wn.2d 445, 449, 759 P.2d 1206 (1988). In addition the Court considers “the likelihood that the issue will escape review because the facts of the controversy are short-lived.” In re the Marriage of Horner, 151 Wn.2d 884, 892, 93 P.3d 124 (2004) (quotations omitted).

This case meets all of those requirements. Decisions on pretrial release occur all the time and the failure to properly apply the relevant court rule is an issue of serious public importance. It is desirable for this Court to provide guidance as there are a limited number of cases on the issue but appears to be a lack of understanding and application of the rule.

This Court should address the issue, should roundly decry the lower court’s violations of CrR 3.2 and should hold that the procedures here used violated due process, the right to the presumption of innocence, the state and federal prohibitions against

excessive bail, and equal protection. Further, the Court should hold that having the pretrial hearing on the crucial issue of pretrial release without first appointing counsel is a violation of the state and federal constitutional rights to effective assistance of counsel.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial. Further, the Court should address the bail issue and should soundly condemn the trial court's failure to follow the mandates of CrR 3.2 and honor the presumption of pretrial release without conditions. This Court should further hold that the procedure used here violated fundamental constitutional rights.

DATED this 2nd day of March, 2018.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, Box 176
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, at pcpatcecf@co.pierce.wa.us, and to appellant Nicholas Cummings, DOC 798748, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 2nd day of March, 2018,

/S/Kathryn A. Russell Selk
KATHRYN RUSSELL SELK, No. 23879
1037 Northeast 65th St., Box 176
Seattle, WA. 98115
(206) 782-3353

April 11 2016 2:44 PM

Pierce County Clerk

**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE**

STATE OF WASHINGTON,

Plaintiff

No. 16-1-01469-2

vs.

NICHOLAS JEROME CUMMINGS

Defendant

**ORDER ESTABLISHING CONDITIONS OF
RELEASE PENDING PURSUANT TO CrR 3.2
(orecrp)**

Arresting Agency : PUYALLUP POLICE DEPARTMENT

Incident Number : 16002638

Charges

- UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE

THE COURT HAVING found probable cause, establishes the following conditions that shall apply pending in this cause number or until entry of a later order; IT IS HEREBY ORDERED

Release Conditions:

- Defendant shall be released upon execution of a surety bond in the amount of \$50,000.00 or posting cash in the amount of \$50,000.00.
*****NEW BAIL*****
- Bail issue reserved.

Conditions that take effect upon release from custody:

- Travel is restricted to the following counties **Pierce, King, Thurston, and Kitsap Counties.**
- The defendant is not to drive a motor vehicle without a valid license and insurance.

Conditions that take effect immediately:

- Defendant is to have no violations of the criminal laws of this state, any other state, any political subdivision of this state or any other state, or the United States, during the period of his/her release.
- Remain in contact with the defense attorney.

Dated : April 11, 2016.

Electronically Signed By
/s/KATHERINE M. STOLZ
JUDGE/COMMISSIONER

I agree and promise to appear before this court or any other place as this court may order upon notice delivered to me at my address stated below. I agree to appear for any court date set by my attorney and I give my attorney full authority to set such dates. I understand that my failure to appear for any type of court appearance will be a breach of these conditions of release and a bench warrant may be issued for my arrest. I further agree and promise to keep my attorney and the office of Prosecuting Attorney informed of any change of either my address or my telephone number.

I have read the above conditions of release and any other conditions of release that may be attached. I agree to follow said conditions and understand that a violation will lead to my arrest. FAILURE TO APPEAR AFTER HAVING BEEN RELEASED ON PERSONAL RECOGNIZANCE OR BAIL IS AN INDEPENDENT CRIME, PUNISHABLE BY 5 YEARS IMPRISONMENT OR \$10,000 OR BOTH (RCW 10.19).

Address: **9920 192ND AVE E PUYALLUP, WA 98374 USA**

Phone: **(253) 335-8397**



NICHOLAS JEROME CUMMINGS

Defendant

RUSSELL SELK LAW OFFICE

March 02, 2018 - 3:01 AM

Transmittal Information

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