

89390-0

NO. 69630-1

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

PETER R. BARTON,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

MOTION FOR EXPEDITED DISCRETIONARY REVIEW

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JAN -3 PM 4:00

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I. IDENTITY OF PETITIONER

Peter R. Barton (“Petitioner”) is an indigent criminal defendant charged in the Superior Court of Snohomish County with rape of a child in the first degree. He is in custody in the Snohomish County Jail. Petitioner’s trial date is currently set for January 26, 2012, but this date may be continued by the trial court.

II. DECISION BELOW

Pursuant to RAP 2.3(b), Petitioner seeks discretionary review of an order entered by the trial court on October 18, 2012 (the “October 18 Order”). A copy of the written order is in the Appendix at APP052. Because his liberty interest is at stake and he cannot otherwise obtain meaningful review of the constitutional bail issues in this case, Petitioner also asks this Court to consider his motion for discretionary review on an expedited basis pursuant to RAP 17.4(b), and to accelerate review on the merits pursuant to RAP 18.12.

The October 18 Order denied Petitioner’s motion to strike the requirement that he post \$50,000 (out of a total bail amount of \$500,000) in “cash or other security.” The result of this ruling, unless reversed, is to deny Petitioner his right to bail “by sufficient sureties” under Article I, Section 20 of the Washington State Constitution (“Section 20”), and his right to Equal Protection under the Fourteenth Amendment to the United

States Constitution and Article I, Section 12 of the Washington State Constitution.

III. ISSUES PRESENTED FOR REVIEW

The issues presented for review are as follows:

1. Did the October 18 Order constitute probable error that substantially alters the status quo and substantially limits Mr. Barton's freedom to act on the grounds that the order:
 - a. denied Mr. Barton his right to bail "by sufficient sureties" guaranteed by Article I, Section 20 of the Washington Constitution by specifying that he could secure his pretrial release only by posting \$50,000 in cash or other security with the court;
 - b. created a conflict with Article I, Section 20 of the Washington Constitution by interpreting Superior Court Criminal Rule 3.2(b)(4) as precluding the option of posting bail with a surety; and
 - c. violated the Equal Protection Clauses of the United States and Washington Constitutions by requiring an indigent defendant to post \$50,000 in cash or other security with the court to secure his pre-trial release?
2. Did the October 18 Order so far depart from the accepted and usual course of judicial proceedings as to call for review by this Court, in that the order accepted a novel approach to bail proposed by the Snohomish County Prosecuting Attorney as a remedy for his failure to persuade the legislature to modify the state's bail system.

IV. STATEMENT OF THE CASE

On August 13, 2012, Petitioner pleaded not guilty to the charged crime of Rape of a Child in the First Degree. APP001-03. Initially, bail was set at \$250,000, though the court held over to the following day its decision regarding the prosecutor's request that ten percent of that amount be deposited in cash with the registry of the court. Petitioner objected to the extraordinary "cash-only" aspect of the State's request. APP001-03.

On August 14, 2012, the State amended its proposed bail amount to \$1,000,000, while retaining its request to "require that if the defendant posts bail that ten percent of that be paid in cash to the clerk's office." APP003.

On August 15, 2012, the Court increased the bail amount to \$500,000, and ordered that Petitioner "must post ten percent of the bail in cash." APP004-06.

On August 22, 2012, Petitioner filed a Motion to Strike "Cash Only" Provision on Order on Detention. APP019-26. Following subsequent briefing (APP027-51), the Court entered the October 18 Order. The October 18 Order amended and superseded the August 15 order such that the requirement that Petitioner post ten percent "cash" with the registry of the court was modified to a requirement that he post ten percent "cash or other security." APP052. The State contended that this order

was consistent with Section 20 of the state constitution on the ground that the defendant was free to borrow the \$50,000 in cash or other property from a third party, including family, friends, or a commercial bail bondsman. APP048-49. The trial court denied the motion and declined to allow use of a surety. APP052; APP078-79.

On November 16, 2012, Petitioner timely filed a Notice for Discretionary Review. APP081-84.

Petitioner remains in custody in the Snohomish County Jail.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should grant review pursuant to RAP 2.3(b)(2) and (3) because the October 18 Order issued by the Snohomish County Superior Court and that court's interpretation of CrR 3.2(b)(4) deny Petitioner access to a surety and are directly in conflict with Article I, Section 20 of the Washington State Constitution, this State's system of bail based on that constitutional provision, and the Equal Protection Clauses. For the reasons discussed below, the October 18 Order constitutes probable error that alters the status quo and limits Petitioner's freedom to act, and so far departs from the accepted and usual course of judicial proceedings as to call for review by this Court.

This case involves a criminal defendant's right to bail, one of the essential bulwarks of the presumption of innocence. *See* Wa. Const. art. I,

§ 20; *State v. French*, 88 Wn. App. 586, 593, 945 P.2d 752 (1997) (“The allowance of preconviction bail recognizes the presumption of innocence.”). A chief reason that bail exists is to give meaning to a defendant’s presumption of innocence by limiting the government’s ability to detain him before trial. *State ex rel. Wallen v. Noe*, 78 Wn.2d 484, 487, 475 P.2d 787 (1970); *see also Westerman v. Cary*, 125 Wn.2d 277, 291, 892 P.2d 1067 (1995). “The posting of a secured bond fully protects the court’s interest in having the defendant appear because the third party surety (a family member, friend, or commercial bail bondsman) has both a strong incentive to guarantee the defendant’s appearance, and the ability to ensure appearance.” *State v. Hance*, 910 A.2d 874, 878 (Vt. 2006).

The purpose of the “sufficient sureties” clause is to facilitate a defendant’s efforts to obtain bail in reality, rather than just in theory. *See, e.g., State v. Brooks*, 604 N.W.2d 345, 350 (Minn. 2000) (“The clause is intended to protect the accused rather than the courts.”); *Hance*, 910 A.2d at 880 (“[I]t is apparent that clause is primarily aimed at protecting a defendant’s liberty interest and, concomitantly, serving the court’s interest in having the defendant appear at trial.”).

A. This Case is Appropriate for Discretionary Review Under RAP 2.3(b)(2).

Under RAP 2.3(b)(2), this Court grants discretionary review where the trial court has committed “probable error” that “substantially alters the status quo or substantially limits the freedom of a party to act.”

This Court’s decision in *City of Yakima v. Mollett*, 115 Wn. App. 604, 63 P.3d 177 (2003), demonstrates that discretionary review should be granted here. That case involved review of the question whether CrRLJ 3.2(b)(5)¹ could be interpreted to permit cash-only bail in light of Section 20 of the Washington constitution. This Court granted review because “[t]he proper form of bail is a matter of continuing and substantial public interest. The lack of applicable case law in Washington and the record below illustrate a need to provide judicial guidance on this issue.” *Mollett*, 115 Wn. App. at 607.

The issues in the instant case present an even more compelling case for judicial review. The trial court’s ruling has the potential to affect many criminal defendants, and the proper form of bail remains a matter of substantial public interest. There continues to be a dearth of case law in Washington on this issue. Moreover, the trial court’s interpretation of

¹ The district court in *Mollett* applied CrRLJ 3.2, which is nearly identical to CrR 3.2, applicable in superior court. *See Harris v. Charles*, 171 Wn.2d 455, 467, 256 P.3d 328 (2011) (examining intent behind CrR 3.2 on appeal from district court that applied CrRLJ 3.2, “because CrRLJ 3.2 is the nearly identical rule for district courts”).

CrR 3.2(b)(4)—that requiring a defendant to post ten percent of the total bail amount in cash or other security with the court is the same as the defendant paying a bail bondsman a fee equal to ten percent of the total bail amount—is manifestly inconsistent with the meaning of the term “sureties” in that section.

1. **The October 18 Order Constitutes Probable Error Because it Violates Petitioner’s Right under Article I, Section 20 of the Washington Constitution to Bail by “Sufficient Sureties.”**
 - a. **The Term “Sureties” In the State Constitution Has a Specific Meaning Ignored by the Trial Court.**

The Court’s October 18 Order constitutes probable error because it violates Article I, Section 20 of the Washington Constitution, which provides:

SECTION 20 BAIL, WHEN AUTHORIZED. *All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied 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 or any persons, subject to such limitations as shall be determined by the legislature.*

(emphasis added).² The trial court believed that posting cash or security with the court satisfies Section 20's guarantee of access to "sureties," even though the court's ruling defines the term "security" in CrR 3.2(b)(4) as real or personal property, not a surety bond. This ignores the presence and meaning of the term "sureties" in the text of Section 20. *See* APP078-79.

"When interpreting provisions of the state constitution, [courts] look first to the plain language of the text and . . . accord it its reasonable interpretation." *City of Bothell v. Barnhart*, 156 Wn. App. 531, 535, 234 P.3d 264 (2010) (quoting *Wash. Water Jet Workers Ass'n v. Yarborough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004)). "If a constitutional provision is plain and unambiguous on its face, then no construction or interpretation is necessary or permissible." *Id.* (quoting *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 650, 211 P.3d 406 (2009)).

Here, the constitutional text is plain and unambiguous—when bail is allowed, the accused is entitled to release upon the posting of bail "by sufficient sureties." A "surety" is "a third party who guarantees the accused's appearance in exchange for accepting the substantial financial obligation that will be imposed should the accused fail to appear." *Hance*,

² Petitioner is not being tried for a capital offense. Nor was he denied bail pursuant to Section 20's second sentence. As a consequence, Petitioner is constitutionally entitled to bail "by sufficient sureties."

910 A.2d at 882; *see also Brooks*, 604 N.W.2d at 353; *Smith v. Leis*, 835 N.E.2d 5, 14 (Ohio 2005) (quoting Black's Law Dictionary 1482 (8th ed. 2004)).

Washington courts have ascribed specific, distinguishing definitions to “cash bail,” “bail bond,” and “surety.” *In re Marriage of Bralley v. Cnty. of Snohomish*, 70 Wn. App. 646, 652, 855 P.2d 1174 (1993). The *Bralley* court explained that

[t]he 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. However, 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.
... ***Depositors of cash bail are not sureties.***

Id. at 653 (quoting 8 C.J.S. *Bail* §§ 88, 89 at 109, 111 (1988)) (emphases added). Cash does not constitute a surety. *Smith*, 853 N.E. 2d at 14, n.2. Real or personal property is no different from cash in this context; it also does not constitute a surety. *See Lewis Bail Bond Co. v. Gen. Sessions Ct. of Madison Cnty.*, 1997 WL 711137, at *5 (Tenn. Ct. App. Nov. 12, 1997) (APP094-97).

Petitioner was denied his constitutional right to utilize a surety to post bail when the trial court required that he post “\$50,000 cash or other security” with the registry of the court to secure his pre-trial release.

APP052. The trial court erred because the trial court's definition of "cash or other security," i.e. cash or property, does not allow the posting of bail by "sufficient sureties."

b. Cash-Only Bail is Prohibited

In *City of Yakima v. Mollett*, 115 Wn. App. 604, 63 P.3d 177 (2003), a trial court imposed a \$10,100 "cash-only" bail³ against a defendant pursuant to CrRLJ 3.2(b)(5) and (b)(7). This Court reversed, having been persuaded by the reasoning of *State ex. rel. Jones v. Hendon*, 609 N.E.2d 541 (Ohio 1993):

"Once a judge chooses [the Ohio equivalent of CrR 3.2(b)(5)] and sets the amount of bond, we find no legitimate purpose in further specifying the form of bond which may be posted." *The Hendon court further reasoned that the result of "cash only" bail would be to "restrict the accused's access to a surety" in violation of the Ohio constitution.* Ohio's constitution "provides in part that '[a]ll persons shall beailable by sufficient sureties' in noncapital cases."

Mollett, 115 Wn. App. at 609 (citations omitted) (emphasis added).

Mollett did not reach the question of whether Washington's constitution would permit "cash-only" bail, because the court interpreted CrRLJ 3.2(b)(5) to preclude cash-only bail. But the Ohio Supreme Court, construing a provision identical to Section 20, confronted the constitutional question squarely in *Smith v. Leis*, 835 N.E.2d 5 (Ohio

³ This amount included \$10,000 bail and a \$100 warrant fee, both "cash only." *Mollett*, 115 Wn. App. at 606.

2005). *Smith* upheld the Ohio Supreme Court's previous determinations that "an accused . . . charged with a noncapital offense [had] an absolute constitutional right to bail by sufficient sureties." *Id.* at 12. Consequently, a cash-only requirement for bail was unconstitutional. *Id.* at 16. The same is obviously true for cash equivalents, such as real or personal property-only bail. *See Lewis Bail Bond Co.*, 1997 WL 711137, at *5 (APP090).

Consistent with *Smith*, the majority of cases across the country have prohibited "cash-only" bail, holding that defendants have an absolute right to have a surety post bail on their behalf pursuant to constitutional bail provisions similar to Section 20. *See, e.g., Two Jinn, Inc. v. District Ct. of the Fourth Jud. Dist.*, 249 P.3d 840 (Idaho 2011) ("[T]he Idaho Constitution prevents cash-only bail prior to conviction of noncapital offenses."); *Hance*, 910 A.2d at 881-82 ("Our Constitution provides that 'all persons shall be bailable by sufficient sureties.' Vt. Const. ch. II, § 40. To permit imposition of cash-only bail would impermissibly restrict an accused's ability to negotiate with a surety to avoid pretrial confinement upon a promise of appearance."); *Brooks*, 604 N.W.2d at 352 ("Our next step is to determine whether the phrase 'sufficient sureties' as used in Minnesota's Constitution is ambiguous and whether it prohibits cash only bail. We conclude that this phrase is unambiguous and that it prohibits cash only bail."); *State v. Rodriguez*, 628 P.2d 280, 284-85 (Mont. 1981)

(noting, in moot case, that requiring \$10,000 cash on \$25,000 bail would “effectively undermine the constitutional guarantee of bail by ‘sufficient sureties’”); *Lewis Bail Bond Co.*, 1997 WL 711137, at *5 (APP090); *State v. Golden*, 546 So. 2d 501,502-03 (La. Ct. App. 1989); *see also Sawyer v. Barbour*, 300 P.2d 187, 193 (Cal. App. 1956) (noting that requiring penalty assessment in cash when person is admitted to bail might impair right to bail on sufficient sureties in violation of Article I, § 6 of California Constitution).

**c. There Is No Substantive Difference
Between Ten Percent Cash-Only Bail And
100 Percent Cash-Only Bail.**

In the case at bar, the ten percent cash or property requirement operates identically to impermissible 100 percent cash-only bail requirements. If a \$50,000 bail order with a 100 percent cash (or property) requirement is improper—and it surely is under the case law discussed above—then it must be the case that a \$500,000 bail order with a ten percent cash (or property) requirement is also improper. In both situations the defendant must have \$50,000 cash to secure his pretrial release, and in both situations the defendant is denied access to a surety as guaranteed by the state constitution.

2. The October 18 Order Constitutes Probable Error Because It Interpreted Criminal Court Rule 3.2 in a Manner That Conflicts with Section 20.

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 in conflict with Section 20 of the state constitution. As this Court found in *Mollett*, in connection with CrRLJ 3.2(b)(5), CrR 3.2(b)(4) should be interpreted to avoid a conflict with the state constitution. See *Mollett*, 115 Wn. App. at 179 (citing *State v. Hall*, 95 Wash.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); see also *In re Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993). This court should accept review to confirm that CrR 3.2(b)(4) must be interpreted to allow the use of a surety to post bail.

To ensure consistency with Section 20, the phrase “other security” in CrR 3.2(b)(4) must include a surety bond, as well as property or other collateral provided by the defendant. This interpretation is consistent with the language and structure of CrR 3.2, which contains subsections running from (b)(1) to (b)(7) in order of least to most restrictive bail conditions. This interpretation would also avoid a conflict between CrR 3.2(b)(4) and Section 20. The trial court erred by ignoring this issue and adopting an

interpretation of CrR 3.2(b)(4) that puts the rule directly in conflict with the Washington Constitution.

3. The October 18 Order Also Constituted Probable Error Because it Violated the Equal Protection Clause.

The trial court's imposition of a \$50,000 cash or security requirement also should be rejected as a violation of the Equal Protection Clauses of the state and federal constitutions. Requiring Petitioner to post \$50,000 in cash or security would place a nearly insurmountable obstacle to obtaining bail on indigent defendants. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

"Equal Protection requires that persons similarly situated receive like treatment." *In re Fogle*, 128 Wn.2d 56, 62, 904 P.2d 722 (1995) (citing *In re Mota*, 114 Wn.2d 465, 475, 788 P.2d 538 (1990)); *Westerman*, 125 Wn.2d 465, 294, 892 P.2d 1067 (1995). Courts utilize one of three standards to determine whether an equal protection violation has occurred: (1) strict scrutiny; (2) intermediate scrutiny; or (3) rational basis review. *See, e.g., Westerman*, 125 Wn.2d at 294.

Intermediate scrutiny applies here because the trial court's interpretation of the applicable rule implicates "both an important right (the right to liberty) and a semi-suspect class not accountable for its status

(the poor).” *Id.* at 294 (quoting *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987)); *see also In re Mota*, 114 Wn.2d at 474 (explaining that 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.”), *superseded by statute on other grounds*, RCW 9.94A.150, *as recognized in In re Williams*, 121 Wn.2d 655, 853 P.2d 444 (1993); *State v. Danis*, 64 Wn. App. 814, 818, 826 P.2d 1096 (1992) (“[I]ntermediate scrutiny is applicable to statutory classifications which involve deprivation of liberty **and** what we would term a ‘semi-suspect’ class, such as the poor.”) (emphasis added). The Court should apply intermediate scrutiny here both because Petitioner is indigent, APP085-91, and because he is being deprived of a substantial liberty interest—his freedom pending trial—by virtue of the trial court’s actions.

“Under intermediate scrutiny, the state must prove the law furthers a substantial interest of the state.” *In re Mota*, 114 Wn.2d at 474; *In re Mayner*, 107 Wn.2d 512, 517, 730 P.2d 1321 (1986). Here, the state will not be able to make the required showing. The state does not have a substantial interest in refusing indigent defendants such as Petitioner their constitutional right to pre-trial release by imposing extra-constitutional conditions on that release.

B. This Case is Also Appropriate for Discretionary Review Under RAP 2.3(b)(3).

This Court should also accept review because the trial court's ruling so far departs from the accepted and usual course of judicial proceedings as to call for review by this Court. As discussed above, the October 18 Order is manifestly inconsistent with the state and federal constitutions. *Cf. Folise v. Folise*, 113 Wn. App. 609, 54 P.3d 222 (2002) (court's failure to follow unambiguous language in statutory scheme justifies discretionary review under RAP 2.3(b)(3)).

The October 18 Order is also inconsistent with standard practices for setting bail in Snohomish County. As the trial court noted on the record, requiring ten percent cash be paid into the court is "not something that we normally do around here." APP016 at 6. Indeed, the prosecutor at the arraignment was unaware of the existence of the court rule at issue here. APP009 at 4-7 ("I recognize that there isn't any established court rule for the Court to make this decision."). Despite the multitude of bail decisions handled by the Snohomish County Superior Court, no form even existed to set this unusual form of bail; the court had to delete by hand the language in the standard form that provided for access to a surety. APP005 at ¶ 1.1.

Furthermore, the Snohomish County Prosecuting Attorney has candidly admitted that his approach to bail in this case is a novel one designed to remedy what he perceives as flaws in the state's bail system that the legislature was unwilling to address. *See* Diana Hefley, *Judge Requires Unusual Bail in Child Rape Case*, Everett Herald, Aug. 16, 2012, APP092-93 (quoting Prosecuting Attorney Mark Roe as stating about the instant case that “[t]he legislature has failed two years in a row to address the gaping flaw in our fictional system of bail. We will ask judges to address it one case at a time.”).⁴ “Roe has been harping on the issue since he served on a task force assigned to look at bail practices in the state.” APP092. The Everett Herald rightly described the trial court's ruling and the prosecutor's approach in this case—seeking to impose a standard that the legislature rejected—as “unusual” and “unique.” *Id.* This Court should, therefore, accept review under RAP 2.3(b)(3) as well.

VI. EXPEDITED REVIEW IS APPROPRIATE IN THIS CASE

This Court is empowered by RAP 18.12 to “set any review proceeding for accelerated disposition.” And RAP 18.8(a) authorizes this Court to shorten the time within which an act must be done in a particular

⁴ Petitioner requests that the Court take judicial notice of the Snohomish County Prosecutor's statements as quoted in the attached article from the Everett Herald. *See* ER 201 (stating court may take judicial notice of facts “not subject to reasonable dispute” that are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”).

case to serve the ends of justice. Following grant of Petitioner's motion for discretionary review, accelerated review (specifically including an accelerated briefing schedule) will be necessary and appropriate due to Petitioner's substantial interest in securing release prior to trial.

Petitioner also requests expedited consideration of this motion pursuant to RAP 17.4(b). Petitioner is *not* asking to shorten the time to answer and reply under RAP 17.4(e). However, Petitioner does respectfully request that a hearing be set—and a decision on the motion for discretionary review be entered—at the earliest possible time.

Expedited review is warranted because Petitioner's liberty interest is at stake. Unless and until Petitioner's right to utilize a surety to post bond is confirmed, Petitioner has no way to obtain pre-trial release. Under these circumstances, review should be accelerated. *See, e.g., State v. Taplin*, 55 Wn. App. 668, 669, 779 P.2d 1151 (1989) (accelerated review granted under RAP 18.12 where defendant appealed from sentence modification imposing a 240-day jail term); *State v. Marshall*, 83 Wn. App. 741, 748, 923 P.2d 709 (1996) (order jailing defendants stayed and accelerated review granted under RAP 18.12 in contempt proceeding); *State v. Fritzke*, 521 N.W.2d 859, 860 (Minn. App. 1994) (expediting appeal from order denying sentence reduction); *Green v. Superior Ct.*, 647 P.2d 166, 168-69 (Ariz. 1982) (granting petition for special action when

petitioner's probation order was modified to require him to spend additional time in jail because "no matter how much the appeal might be expedited, petitioner would have served at least a substantial part of the 175 days of jail time before disposition."). *See also, e.g.*, 18 U.S.C. § 3145(c) and Fed. R. App. P. 9 (requiring that appeals of release or detention orders be determined promptly).

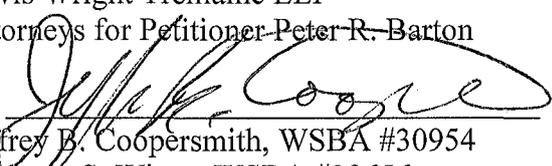
Given Petitioner's liberty interest in the establishment of valid pre-trial conditions of release, it is no answer to say that the appeal need not be accelerated because it will not be mooted by an intervening adjudication of the underlying charges against Petitioner. *See Mollett*, 115 Wn. App. at 606-07 (reviewing moot case because "[t]he proper form of bail is a matter of continuing and substantial public interest" that "is likely to recur"). The only way to remedy the deprivation of Petitioner's rights is to expedite review—and consequently allow him the opportunity to bail by sufficient sureties, as the constitution requires.

VII. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court accept expedited discretionary review of the October 18 Order.

RESPECTFULLY SUBMITTED this 3rd day of January, 2013.

Davis Wright Tremaine LLP
Attorneys for ~~Petitioner Peter R. Barton~~

By 

Jeffrey B. Coopersmith, WSBA #30954

Anthony S. Wisen, WSBA #39656

Davis Wright Tremaine LLP

1201 Third Avenue, Suite 2200

Seattle, WA 98101-3045

Telephone: (206) 622-8020

Facsimile: (206) 757-7700

Email: jeffcoopersmith@dwt.com

Email: anthonywisen@dwt.com

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.

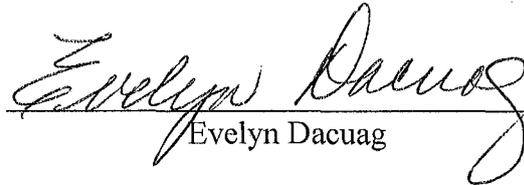
On January 3, 2013, I caused to be served in the manner noted below, true and correct copies of the foregoing on the following:

Seth Aaron Fine, WSBA #10937 **Via Hand Delivery**
Deputy Prosecuting Attorney
Snohomish County Prosecutor's Office, Criminal Division
3000 Rockefeller Avenue, M/S 504
Everett, WA 98201-4046
Telephone: 425-388-3333
Facsimile: 425-388-3572

Adam W. Cornell, WSBA #32206 **Via Hand Delivery**
(acornell@co.snohomish.wa.us)
Deputy Prosecuting Attorney
Snohomish County Prosecutor's Office, Criminal Division
3000 Rockefeller Avenue, M/S 504
Everett, WA 98201-4046

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

Executed this 3rd day of January, 2013, in Seattle, Washington.


Evelyn Dacuag

NO. 69630-1

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

PETER R. BARTON,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

APPENDIX TO
MOTION FOR EXPEDITED DISCRETIONARY REVIEW

Jeffrey B. Coopersmith, WSBA #30954
Anthony S. Wisen, WSBA #39656
Davis Wright Tremaine LLP
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Email: anthonywisen@dwt.com

Attorneys for Appellant Peter R. Barton

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JAN -3 PM 4:00

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FILED
2012 AUG 13 PM 2:37
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO WASH

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v

BARTON, PETER RICHARD

Defendant

No 12-1-01772-1

ORDER ON RELEASE/DETENTION
OF DEFENDANT

[] (Clerk's Action Required)

Sex M Race Black DOB 11/15/1980
Ht 508 Wt 240 Hair Black Eyes Brown

The above-named defendant having come before the court for preliminary appearance or reappearance, and it appearing to the Court that probable cause exists for the offense(s) charged in the Information filed herein based upon the Affidavit of Probable Cause,

IT IS HEREBY ORDERED that

- 1 1 [] The defendant is hereby released on his/her personal recognizance [] without further conditions [] with the conditions set forth in paragraph 2 1 and/or 3 1 below based upon the findings set forth in paragraph 2 1 If the defendant is held in the Snohomish County Jail in this matter, he/she is hereby released only as to this Cause No
- [X] The defendant shall post bail in an amount of \$ 250,000 [X] by executing a bond with sufficient sureties or depositing cash in the registry of the court in lieu thereof [] cash only (*post conviction only*), based upon the court having made the findings set forth in paragraph 2 1 below The defendant shall be detained in the Snohomish County Jail until such bail is posted [] Bail has been previously posted in this Cause No
- [] The defendant having previously posted a bond in the amount of \$ _____ shall post a rider for such bond and file a copy of it with the Clerk's Office within 2 business days of the date of this order If no rider is posted and filed with the Clerk's Office, the defendant shall immediately report to the Snohomish County Jail
- 2 1 [X] The court having found that [X] pursuant to CrR 3 2(a)(1), release without further conditions will not reasonably assure the defendant's presence when required, the defendant shall post bail as set forth above and/or comply with the conditions set forth below, and/or [X] pursuant to CrR 3 2(a)(2), there is a substantial danger that the defendant will commit a violent crime, seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the defendant shall post bail as set forth above and/or comply with the conditions set forth below and/or in paragraph 3 1

ORIGINAL

APP001

6

- Shall be placed in the custody of _____ who has agreed to supervise the defendant,
- Travel, association, and/or abode are restricted as follows State of Washington;
- If bed space is available and the defendant is eligible, shall be housed in the minimum security facility and shall participate in work crew,
- Shall be placed on electronic home detention/monitoring, and
- Other _____

3 1 The defendant shall also comply with the following conditions set forth below based upon the court having made the findings pursuant to CrR 3 2(a)(2) as set forth in paragraph 2 1

- No contact with G R DOB 03/18/2005 and with the State's witnesses, except through counsel,
- Not go to the following areas or premises. Areas where children tend to congregate such as schools, playgrounds
- Not possess any dangerous weapon or firearm,
- Not possess or consume intoxicating liquor or drugs without a valid prescription,
- Shall report regularly to and remain under the supervision of the Department of Corrections.
- Not commit any crimes, and
- Not reside at all with children under the age of 18, and no contact, direct or indirect, with children under the age of 18, except with the supervision of a responsible adult who is aware of these charges

The defendant shall appear for trial and all scheduled court hearings and comply with the conditions indicated above. Violation of any of these conditions may result in revocation of release, forfeiture of bail, and/or additional charges. A warrant for the arrest of the defendant may be issued upon a showing of probable cause that the defendant has failed to comply with any of the above conditions of release.

DATED this 13 day of August, 2012.

 Judge

Presented by

 ADAM W CORNELL, 32206
 Deputy Prosecuting Attorney

FILED



CL15791496

SUPERIOR COURT OF
WASHINGTON
FOR SNOHOMISH COUNTY

2012 AUG 14 PM 4: 15

SUNYA KRASKI
COUNTY CLERK

SNOHOMISH CO. WASH

STATE OF WASHINGTON

CAUSE NO. 12-1-01772-1

vs.

JUDGE: ERIC Z. LUCAS

PETER R. BARTON
(DEFENDANT)

REPORTER: JOANN BOWEN

CLERK: JASON GREENFIELD

DATE: 08-14-2012 @ 1:00 PM

THIS MATTER CAME ON FOR: ARRAIGNMENT

CONTINUED/CODE:

DEPARTMENT/TIME:

STATE REPRESENTED BY: ADAM CORNELL

DEFENDANT APPEARED: YES IN CUSTODY: YES REPRESENTED BY: LAURA MARTIN

FAILED TO APPEAR: WARRANT AUTHORIZED: ISSUED: BAIL AMOUNT: \$250,000.00

REQUESTED COUNSEL: REFERRED TO OFFICE OF PUBLIC DEFENSE:

DEFENDANT ANSWERS TO TRUE NAME AS CHARGED: YES

SERVED WITH TRUE COPY OF INFORMATION: YES READ IN OPEN COURT: NO READING WAIVED: YES

MOTION FOR RELEASE: RELEASED ON PERSONAL RECOGNIZANCE:

ADVISED OF BASIC CIVIL AND CONSTITUTIONAL RIGHTS:

DEFENDANT ADVISED OF LOSS OF RIGHT TO BEAR FIREARMS:

HEARINGS SET/TRIAL CONTINUANCE:	SENTENCING DATE:
OMNIBUS HEARING (10:30): 09-06-2012	SENTENCING DATE:
TRIAL DATE (1:00): 09-28-2012	DEPT. NO./JUDGE:
SPEEDY TRIAL DATE: 10-15-2012	PRESENTENCE REPORT REQUESTED:
OMNIBUS/PLEA CALENDAR:	RETURN DATE:
PLEA (3:00):	DOSA RISK ASSESSMENT/CHEMICAL DEPENDENCY
3.5 HEARING:	SCREENING REPORT REQUESTED:
ARRAIGNMENT ON AMENDED INFO:	RETURN DATE:
MOTION HEARING:	40 DAY RULE WAIVED:
BAIL HEARING: 08-15-2012 @ 1:00 PM	

OTHER: STATE'S MOTION TO INCREASE BAIL TO \$1,000,000.00: DENIED, THE COURT WILL CONTINUE THAT MATTER TO TOMORROW TO ALLOW THE DEFENDANT TIME TO REVIEW THE MOTION.

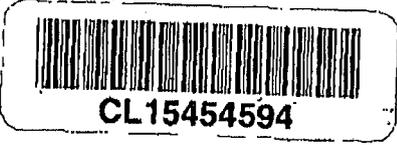
STATE'S MOTION TO REQUIRE THAT IF THE DEFENDANT POSTS BAIL THAT TEN PERCENT OF THAT BE PAID IN CASH TO THE CLERK'S OFFICE: DENIED, THE COURT WILL CONTINUE THAT MATTER TO TOMORROW TO ALLOW THE DEFENDANT TIME TO REVIEW THE MOTION.

DEFENDANT RESERVES ARGUMENT ON BAIL. BAIL MAINTAINED.

OPD/PTS INTERVIEW WORKSHEET; AND RISK ASSESSMENT REPORT FILED.

NOT GUILTY PLEA. SEXUAL ASSAULT PROTECTION ORDER; AND ORDER SETTING TRIAL DATE ENTERED.

FILED



SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

2012 AUG 15 PM 3:26

SONYA KRASKI COUNTY CLERK SNOHOMISH CO. WA

STATE OF WASHINGTON

CAUSE NO. 12-1-01772-1

vs.

JUDGE: ERIC Z. LUCAS

PETER BARTON (DEFENDANT)

REPORTER: JOANN BOWEN

CLERK: KAREN RICHARDSON

DATE: 08-15-2012 @ 1:00 PM

THIS MATTER CAME ON FOR: BAIL HEARING

CONTINUED/CODE:

DEPARTMENT/TIME:

HEARING STRICKEN/CODE:

STATE REPRESENTED BY: ADAM CORNELL

DEFENDANT APPEARED: YES IN CUSTODY: YES REPRESENTED BY: LINDA COBURN

FAILED TO APPEAR: WARRANT AUTHORIZED: ISSUED: BAIL AMOUNT: \$500,000.00

REQUESTED COUNSEL: REFERRED TO OFFICE OF PUBLIC DEFENSE:

DEFENDANT ANSWERS TO TRUE NAME AS CHARGED:

SERVED WITH TRUE COPY OF INFORMATION: READ IN OPEN COURT: READING WAIVED:

MOTION FOR RELEASE: RELEASED ON PERSONAL RECOGNIZANCE:

ADVISED OF BASIC CIVIL AND CONSTITUTIONAL RIGHTS:

DEFENDANT ADVISED OF LOSS OF RIGHT TO BEAR FIREARMS:

Table with 2 columns: HEARINGS SET/TRIAL CONTINUANCE and SENTENCING DATE. Includes rows for omnibus hearing, trial date, speedy trial date, omnibus/plea calendar, plea, 3.5 hearing, arraignment on amended info, motion hearing, violation hearing, sentencing date, dept. no./judge, presentence report requested, return date, dosa risk assessment/chemical dependency screening report requested, return date, and 40 day rule waived.

OTHER: THE COURT INCREASES BAIL TO \$500,000.00. DEFENDANT MUST POST TEN PERCENT OF THE BAIL IN CASH. ORDER ON RELEASE/DETENTION OF DEFENDANT ENTERED.

FILED

2012 AUG 15 PM 3:27

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL15454593

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

No. 12-1-01772-1

v.

BARTON, PETER RICHARD

ORDER ON RELEASE/DETENTION
OF DEFENDANT

Defendant.

[] (Clerk's Action Required)

Sex: M Race: Black DOB: 11/15/1980
Ht: 508 Wt: 240 Hair: Black Eyes: Brown

The above-named defendant having come before the court for preliminary appearance or reappearance, and it appearing to the Court that probable cause exists for the offense(s) charged in the Information filed herein based upon the Affidavit of Probable Cause;

IT IS HEREBY ORDERED that:

- 1.1 [] The defendant is hereby released on his/her personal recognizance [] without further conditions [] with the conditions set forth in paragraph 2.1 and/or 3.1 below based upon the findings set forth in paragraph 2.1. If the defendant is held in the Snohomish County Jail in this matter, he/she is hereby released only as to this Cause No.
- [X] The defendant shall post bail in an amount of \$ 500,000 [X] by executing a bond with sufficient sureties or depositing cash in the registry of the court in full thereof [] cash only (post conviction only), based upon the court having made the findings set forth in paragraph 2.1 below. The defendant shall be detained in the Snohomish County Jail until such bail is posted. [] Bail has been previously posted in this Cause No.
- [] The defendant having previously posted a bond in the amount of \$ _____ shall post a rider for such bond and file a copy of it with the Clerk's Office within 2 business days of the date of this order. If no rider is posted and filed with the Clerk's Office, the defendant shall immediately report to the Snohomish County Jail.
- 2.1 [X] The court having found that:
 - [X] pursuant to CrR 3.2(a)(1), release without further conditions will not reasonably assure the defendant's presence when required, the defendant shall post bail as set forth above and/or comply with the conditions set forth below; and/or
 - [X] pursuant to CrR 3.2(a)(2), there is a substantial danger that the defendant will commit a violent crime, seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the defendant shall post bail as set forth above and/or comply with the conditions set forth below and/or in paragraph 3.1.

Order on Release/Detention of Defendant Page 1 of 2
St. v. BARTON, PETER RICHARD
PA #12F03363

Snohomish County Prosecuting Attorney
S:\Felony\Forms\Special Assault\Charging\deadline package_mrg.dot
SAL\AWC\mp

FROM 12

- Shall be placed in the custody of _____ who has agreed to supervise the defendant;
- Travel, association, and/or abode are restricted as follows: State of Washington
- If bed space is available and the defendant is eligible, shall be housed in the minimum security facility and shall participate in work crew;
- Shall be placed on electronic home detention/monitoring; and
- Other: _____

3.1 The defendant shall also comply with the following conditions set forth below based upon the court having made the findings pursuant to CrR 3.2(a)(2) as set forth in paragraph 2.1:

- No contact with G.R. DOB: 03/18/2005 and with the State's witnesses, except through counsel;
- Not go to the following areas or premises: Areas where children tend to congregate such as schools, playgrounds
- Not possess any dangerous weapon or firearm;
- Not possess or consume intoxicating liquor or drugs without a valid prescription;
- Shall report regularly to and remain under the supervision of Department of Corrections;
- Not commit any crimes; and
- Not reside at all with children under the age of 18; and no contact, direct or indirect, with children under the age of 18, except with the supervision of a responsible adult who is aware of these charges.

The defendant shall appear for trial and all scheduled court hearings and comply with the conditions indicated above. Violation of any of these conditions may result in revocation of release, forfeiture of bail, and/or additional charges. A warrant for the arrest of the defendant may be issued upon a showing of probable cause that the defendant has failed to comply with any of the above conditions of release.

DONE IN OPEN COURT this 15 day of Aug, 2012.



 Judge

Presented by


 ADAM W. CORNELL, 32208
 Deputy Prosecuting Attorney

Approved for entry; copy received:


 WILLIAM A. JAQUETTE, 9461
 Attorney for Defendant 36802
Colum



 PETER RICHARD BARTON
 Defendant
 Defendant's Address: _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.) No. 12-1-01772-1
)
 PETER BARTON,)
)
 Defendant.)

VERBATIM REPORT OF PROCEEDINGS

Heard before the Honorable Eric Z. Lucas
 Snohomish County Courthouse
 3000 Rockefeller Avenue, C304
 Everett, Washington

APPEARANCES:

ADAM CORNELL, representing the State;
LINDA WY COBURN, representing the Defendant.

DATE REPORTED: AUGUST 15, 2012
REPORTED BY: JOANN BOWEN, RPR, CRR, CCP, CCR# 2695

1 EVERETT, WASHINGTON; WEDNESDAY, AUGUST 15, 2012

2 1:06 P.M.

3 -o0o-

4 THE COURT: Thank you. Please be seated.

5 MR. CORNELL: Good afternoon, Your Honor.

6 Adam Cornell on behalf of the State of Washington. I'm
7 back on the Barton matter. It's number three on the
8 calendar if the Court is willing to take it out of
9 order. Ms. Coburn has to be in Court at 1:30.

10 THE COURT: Sure.

11 MR. CORNELL: The defendant is present. He
12 is in custody. Counsel of record, Linda Coburn, is with
13 him. This matter is before Your Honor today for two
14 matters. One is to consider the State's request to have
15 bail increased from its currently set amount of
16 \$250,000, and, two, to consider the Court's request to
17 have the defendant post 10 percent of any bail amount in
18 cash before bonding out.

19 I understand Ms. Coburn has received the declaration
20 that was filed by the State as well as the affidavit of
21 probable cause. With respect to the State's increase
22 for bail, Your Honor, I made my record yesterday. I
23 don't think Your Honor needs me to resuscitate --
24 recitate -- or resuscitate perhaps is even a better word
25 -- my earlier argument. So I won't do that. But I will

1 ask the Court to impose a requirement that the defendant
2 does post 10 percent of any bail that the Court sets in
3 a cash amount.

4 I recognize that there isn't any established court
5 rule for the Court to make this decision. But in the
6 same regard, there isn't anything that says that the
7 Court can't do this. Of course, as the Court and
8 counsel well knows, the Court can't impose that bail be
9 in cash only pretrial, but the Court can certainly
10 require the defendant to post some amount of bail in
11 cash. So I would ask the Court to do that. And I would
12 ask the Court to increase bail in this matter in the
13 amount of \$1 million.

14 THE COURT: Ms. Coburn.

15 MS. COBURN: Your Honor, I would ask that the
16 Court maintain the bail that has already been set. I
17 believe that's \$250,000. Nothing has changed in
18 circumstances from the time that that bail had been set.
19 The Court certainly has taken into consideration the
20 accused's financial resources for the purposes of
21 setting a bond that will reasonably assure his
22 appearance. I think \$250,000 for my client who is
23 indigent is certainly enough to assure his appearance in
24 court. I don't think there's any basis to change that
25 or any requirement that he needs to post 10 percent in

1 cash to the court.

2 MR. CORNELL: Your Honor, I would --

3 THE COURT: Wait. So, Ms. Coburn, yesterday
4 Mr. Cornell argued to me what he described as additional
5 facts. If I'm paraphrasing him correctly, he recited
6 the fear of the victims upon the release of the
7 defendant. Do you want to respond to that at all? I
8 wasn't sure that -- I only ask because I wasn't sure
9 that you were aware of that argument.

10 MS. COBURN: Mr. Cornell did provide a copy
11 of his affidavit to me, so I was able to review that,
12 Your Honor. So, I have received that. Although I think
13 almost in any criminal charge, the alleged victims are
14 always fearful. I don't think that's new. However, I
15 don't think that changes the circumstances of what to
16 consider regarding the amount of bail and the form of
17 bail that needs to be set to reasonably assure his
18 appearance in court. I think that that's a factor that
19 the Court can consider, and I think that it's a factor
20 that the Court has considered in setting this amount
21 already.

22 THE COURT: One thing that I was -- I will
23 let Mr. Cornell respond before I inquire further. You
24 said you had a response.

25 MR. CORNELL: I was only going to add that

1 which Your Honor has already pointed out. I wanted
2 Ms. Coburn to be aware of the new circumstance, which
3 was the input of the victims, which Your Honor has
4 correctly shared with counsel. So I don't have anything
5 else to add.

6 THE COURT: One of the things I was concerned
7 about when I initially reviewed this was whether the
8 State had taken into consideration the defendant's
9 financial ability, and I note that Ms. Coburn brought
10 that up this afternoon; what his financial resources
11 are. Because the whole point of bail is to ensure --
12 and the phrase is that it will be reasonably necessary
13 to ensure the defendant's presence at trial. So I was
14 wondering if you had given that any thought,
15 Mr. Cornell.

16 MR. CORNELL: Your Honor, I did to the extent
17 that it's my understanding that Mr. Barton has been a
18 longstanding member of the community and has family and
19 friends who have similarly been in the community for a
20 long period of time. This was information that was
21 shared to me by the assigned case detective.

22 So, while I recognize that Mr. Barton may indeed be
23 indigent, he may have other resources in the community,
24 particularly by way of what I understand is a fairly
25 large family and a network of other friends who may be

1 able to support him. So, I can't say that I thought
2 specifically does Mr. Barton have the means necessary to
3 post bail, but knowing that he was part of a large
4 family in the community, and I'm getting this
5 information from the detective, that was certainly
6 something that I thought about I guess ancillary, for
7 back of a better term.

8 THE COURT: So, I know that we are taking a
9 little extra time on this, but I think it's sort of
10 required. Things like, does the defendant own a home?
11 Do the relatives you are thinking about own homes? Do
12 they have cars? Do they rent? Things like that. Is he
13 homeless? Have you considered those things?

14 MR. CORNELL: I didn't have the detective do
15 a financial analysis of his associates or friends. I
16 mean, Your Honor makes -- I think Your Honor's concern
17 about his financial status is certainly worth
18 considering. Frankly, what I am more concerned about
19 are the kinds of things that I've specified more
20 particularly in my declaration which doesn't bear
21 repeating.

22 THE COURT: Any response to any of that,
23 Ms. Coburn, before I rule?

24 MS. COBURN: Mr. Barton has no financial
25 means to even post the amount of bail of \$250,000. As

1 far as I understand, he is not aware of any family
2 members who have the money in the interest of custody
3 bail for him as well.

4 MR. CORNELL: May I be heard briefly, Your
5 Honor?

6 THE COURT: Yes.

7 MR. CORNELL: I would only say, I don't doubt
8 Ms. Coburn's representation or her client's
9 representation. The problem that I think my office is
10 concerned about is the fact that it is possible that
11 Mr. Barton is -- the way that the rules currently are,
12 Mr. Barton could post bond without having any money put
13 up at all. That's the concern for the State.

14 Indeed, Mr. Barton may well be indigent. But as I
15 said yesterday, just yesterday when I was driving around
16 the county campus, there was somebody who was waving a
17 sign that said something like "you sign, you walk" with
18 respect to bail. So the requirement of cash is really a
19 fiction because there isn't cash that's required. I
20 mean, we know this from the -- just from our common
21 experience.

22 So, I think that bail has to mean something to the
23 victims. I think that the victims -- the victim and the
24 victim's mother -- need to know that when Your Honor
25 sets bail that they have a certainty that Mr. Barton is

1 going to have to either post a certain amount of money
2 to get out, which if he can and he certainly has every
3 right to do, or alternatively they know, okay, so it's
4 \$250,000, what does that mean, because it doesn't
5 actually mean that Mr. Barton has to put any money
6 forward. That's really the rub. From my perspective as
7 a prosecutor, the victims need to have some assurance of
8 what it's going to take for Mr. Barton to get released.

9 If he can post the bond, he's free to be released
10 into the community. But it just has to mean something.
11 And just because Mr. Barton is indigent doesn't mean
12 that he can't find somebody walking around the -- or his
13 family can't find somebody walking around the courthouse
14 waving a sign and just waiting for them to sign on the
15 dotted line so he can get out of custody. It's got to
16 mean something. That's where I'm coming from.

17 THE COURT: Ms. Coburn, I will give you the
18 last word.

19 MS. COBURN: Well, Your Honor, I think
20 there's plenty of people here in jail that if they know
21 of a bond company that says they don't have to put up
22 anything in order to get out, then everybody would be
23 out. Regardless of the amount of bail that's set, I
24 disagree with Mr. Cornell's assertion saying that
25 \$250,000 bail means nothing, that he doesn't have to do

1 anything in order to get out. If that's the case, he
2 would be out right now.

3 THE COURT: Okay. I want to address a couple
4 of things. I agree with the State that bail has to mean
5 something, and that is one of the primary concerns I've
6 had for a long time. One of the things I think the
7 Court has to be concerned about is what we would refer
8 to as excessive bail. On the flip side, bail has to
9 mean something. I, too, share the concerns that there's
10 a sort of wide variance out there in terms of what's
11 required.

12 Historically I think everyone's thought that at
13 least 10 percent of the value of the bond had to be
14 posted. But that has eroded over time. There's some
15 very interesting high-profile cases where 10 percent was
16 not required, and the results were not happy for the
17 community.

18 The other thing that I wanted to address is the
19 comment that there's no rule that applies. I kind of
20 disagree with that. Criminal Rule 3.2(b)(4) reads as
21 follows: Require the execution of a bond in a specified
22 amount and the deposit in the registry of the court in
23 cash or other security as directed, of a sum not to
24 exceed 10 percent of the amount of the bond, such
25 deposit to be returned upon the performance of the

1 conditions of release or forfeited for violation of any
2 condition of release.

3 So there is a rule, counsel, that governs this.
4 That's another thing that I wanted both sides to
5 consider yesterday when that argument was made to me.
6 It's not something that we normally do around here. But
7 it's something -- it's one of the tools that is
8 available to the Court.

9 Based on the additional information that I received
10 yesterday with regard to the concerns of the victims,
11 based on the information that I received today about
12 possible support from relatives and/or friends -- let's
13 put that in there -- what I'm going to do is I'm going
14 to increase the amount of bail to \$500,000, and I'm
15 going to require that 10 percent be posted in cash. I
16 think that means something.

17 MR. CORNELL: Thanks for considering that,
18 Your Honor.

19 THE COURT: I think that adequately protects
20 the victims and the community.

21 MR. CORNELL: Your Honor, I would just ask
22 the jail staff to make sure that that language is
23 included in the order. I think it was faxed over to the
24 jail this morning by my office. Is that right,
25 Ms. Coburn? Do you have the order?

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MS. COBURN: I have it. I will write it in.

THE COURT: Thank you, Ms. Coburn. I think
that concludes this matter.

MR. CORNELL: Thank you, Your Honor.

1 REPORTER'S CERTIFICATE

2

3 STATE OF WASHINGTON)
 4 COUNTY OF SNOHOMISH) §:

5

6 I, JOANN BOWEN, RPR, CRR, CCP, CCR #2695, an
 7 official court reporter of the State of Washington, do
 8 hereby certify that the foregoing proceedings were
 9 reported by me in stenotype at the time and place herein
 10 set forth and were thereafter transcribed by
 11 computer-aided transcription under my supervision and
 12 that the same is a true and correct transcription of my
 13 stenotype notes so taken.

14 I further certify that I am not employed by,
 15 related to, nor of counsel for any of the parties named
 16 herein, nor otherwise interested in the outcome of this
 17 action.

18

19 JoAnn Bowen

20 OFFICIAL COURT REPORTER

21

22

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RECEIVED

AUG 22 2012

PROSECUTING ATTORNEY
FOR SNOHOMISH COUNTY
BY _____
FOR _____

FILED
2012 AUG 22 PM 3:21
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON,
Plaintiff,

vs.

PETER R. BARTON,
Defendant.

NO. 12-1-01772-1

MOTION TO STRIKE "CASH ONLY"
PROVISION ON ORDER ON
DETENTION

MOTION

COMES NOW the defendant, by and through his undersigned attorney, LINDA W.Y. COBURN of the Snohomish County Public Defender Association, and moves this Court to strike the 10 percent cash-only bail provision on Mr. Barton's detention order. This motion is brought pursuant to CrR 3.2 and CrR 7.8 on the grounds that the "cash only" provision of the detention order violates Article I, sections 12, 14, and 20 of the Washington State Constitution.

DATED this 22nd day of August, 2012.

Respectfully submitted,

LINDA W.Y. COBURN WSBA #36902
Attorney for Defendant

MOTION TO STRIKE CASH ONLY BAIL

SNOHOMISH COUNTY PUBLIC DEFENDERS
1721 HEWITT AVENUE - SUITE 200
EVERETT WASHINGTON 98201

14

APP019

PROCEDURAL HISTORY

This case was initially filed in Everett District Court as a probable cause hold on July 31, 2012 and then as a district court felony detention on August 2, 2012. The State filed this case in Superior Court and the case was set for arraignment on August 13, 2012. The State requested this Court set bail at \$250,000 and asked the Court to require that the defendant put down 10 percent cash only bail to the registry of the court prior to his release. The State failed to provide notice to the defense of its intent to seek this bail provision prior to the hearing. Bail was set at the requested amount and the cash only provision was continued one day based on the defense's objection. On August 14, 2012, the State asked to increase bail to \$1,000,000 and required 10 percent cash only of the bail amount be posted with the Court. The Defense objected on the record. The Court raised bail to \$500,000 and granted the State's request to require 10 percent be posted in cash with the court.

The objectionable provision of Order on Detention reads:

The defendant shall post bail in an amount of \$500,000 by executing a bond with depositing 10% cash in the registry of the court.

See Order of Detention dated August 14, 2012.

REQUESTED RELIEF

The Defense moves the Court to strike the cash only provision based on the Washington State Constitution and the Washington Court Rules. "Cash only" bail to the exclusion of bond violates the defendant's rights to not have excessive bail and to have access to release when bail is posted with sufficient sureties. The "cash only" bail also violates the Washington Constitution Equal Protection Clause.

MOTION TO STRIKE CASH ONLY BAIL

SNOHOMISH COUNTY PUBLIC DEFENDERS
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APP020

MEMORANDUM

The Washington Constitution provides:

SECTION 14 EXCESSIVE BAIL, FINES AND PUNISHMENTS. Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

SECTION 20 BAIL, WHEN AUTHORIZED. All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied 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 or any persons, subject to such limitations as shall be determined by the legislature.

SECTION 12 SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

The purpose of bail under the U.S. Constitution is to ensure the accused's appearance and submission to the court's judgment. See *Reynolds v. United States*, --- U.S. ----, 80 S.Ct. 30, 32, 4 L.Ed.2d 46 (1959). The Washington State Constitution also provides a right to bail to an accused person and that bail amount "shall be bailable by sufficient sureties." Const. art I, § 20. This constitutional provision offers protection to the accused from pre-trial detention and guarantees a right to a bailable amount by sufficient sureties except in very limited circumstances.

Minnesota has similar state constitutional bail provisions to the Washington State Constitution.¹ The Minnesota Supreme Court analyzed these provisions in the case of *Minnesota v. Brooks*, 604 N.W.2d 345 (2000). In the *Brooks* case, the Minnesota Supreme Court held that

¹ Minnesota's Constitution addresses bail in two different clauses. Article I, section 5 provides that "excessive bail shall not be required" and article 1, section 7 guarantees that "[a]ll persons before conviction shall be bailable by sufficient sureties * * *." Minn. Const. art. 1, §§ 5, 7.

the Minnesota Constitution provided for greater protection than the federal constitution based on the provision that “guarantees that all persons before conviction shall be bailable by sufficient sureties.” Minn. Const. art. 1, § 7. That court held that the right to bail by sufficient sureties limited the government power to detain an accused prior to trial. The clause is intended to protect the accused rather than the courts. It is this broader purpose that makes the Minnesota Constitutional provisions broader than the U.S. Constitution. Minnesota held that “cash only” bail violated this constitutional provision. Similarly, “cash only” bail, even if just 10% cash only, violates the Washington Constitution.

The Criminal Court Rules do not authorize cash bail to the exclusion of a bond.

The State argued in its oral presentation that CrR 3.2(b)(4) authorized the Court to order up to 10% cash only as provision of pre-trial bail. Criminal Court Rule 3.2 governs Release of the Accused and section (b)(4) authorizes the court to:

Require the execution of a bond in a specified amount and the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition of release;

Another section of this rule also refers to a “deposit of cash”:

CrR 3.2(b)(5) Require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof;

The last section of the same rule reads:

CrR 3.2 (b)(7) Impose any condition other than detention deemed reasonably necessary to assure appearance as required.

While CrR 3.2 subsections (4) and (5) discuss cash bail and subsection (7) discusses “any condition...reasonably necessary”, these provisions do not authorize “cash only” bail for pre-trial detainees to exclusion of bail unless specific conditions are met.

In *State v. Mollett*, 115 Wn.2d 604 (2003), the Washington Court of Appeals discussed similar provisions of CrRLJ 3.2. The case cited with approval to *State ex rel. Jones v. Hendon*, 66 Ohio St.3d 115, 609 N.E.2d 251 (1993). The Ohio case was instructive as it interpreted the Ohio Court rule which is very similar to the Washington Court Rule cited above. The Ohio Court reasoned that the result of "cash only" bail would restrict the accused's access to surety in violation of the Ohio Constitutional.

In *Mollett*, the City of Yakima charged the defendant with violating the city code's telephone harassment statute. The City asked for and the Municipal Court approved \$10,000 cash only bail. The defendant was later arrested and held on the cash only bail. He sought relief by means of a writ of habeau corpus (dismissed as moot because at the time of the hearing the cash bail was posted), an appeal to Yakima County Superior Court (denied), and then sought discretionary review from the Court of Appeals. The Court of Appeals ultimately ruled that the Municipal Court erred when interpreting CrRLJ 3.2(a)(5) and (7) to authorize "cash only" bail. The Court reasoned that the provisions of the Washington Court Rules may offer the trial court options when setting bail. "The 'deposit of cash' clause in an option for the trial court may order, but not to the exclusion of the bond." *State v. Mollett*, 115 Wn. App. 604, 609 (2003) (emphasis added). The same is true in this circumstance: the court may have an option to require a cash deposit for release of the accused, but the court cannot order that option to the exclusion of a bond.

Cash only bail violates the Equal Protection Clause.

It has long been established that classifications based on wealth in the context of criminal protections is protected. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois*, 351 U.S. 12, 17, 76 S.Ct.

585, 590, 100 L.Ed. 891, 898 (1956).

The Washington Constitution provides a guarantee of "bail by sufficient sureties" in almost all pre-trial detentions. Const. Art. I, § 20. The State cannot discriminate in administering that right that has already been conferred by requiring cash bail to the exclusion of bond. To require cash bail discriminates based on wealth of the individual. Poor pre-trial detainees will not be afforded equal access to bail as the wealthy.

An equal protection issue regarding bail was addressed in *Pugh v. Rainwater*, 557 F.2d 1189 (5th Cir. 1977) which discussed the Florida bail scheme. The traditional test is that a "statutory classification based on suspect criteria or affecting 'fundamental rights' will encounter equal protection difficulties unless justified by a 'compelling government interest.'" *Id.* at 1195. (internal cites omitted.) Wealth was determined to be suspect criteria for the purposes of pre-trial bail. The court held that "whenever a judge sets monetary bail he creates a *de facto* classification based on the defendant's ability to pay." *Id.* at 1196. The court also recognized that the fundamental rights impacted by bail issues include the fundamental right to be presumed innocent and the fundamental right to prepare an adequate defense. *Id.* at 1197. Applying the strict scrutiny test, the court held that the Florida bail system violated equal protection. The Fifth Circuit held that "equal protection standards require a presumption against money bail and in favor of those forms of release which do not condition pretrial freedom on an ability to pay."² *Id.* at 1202.

In this case, the State is arguing that CrR 3.2(b)(4) grants the Court the authority to require up to 10 percent cash deposit to the court registry. The Defense disagrees. The Washington

² The Fifth Circuit did not hold "that money bail may never be imposed on an indigent defendant." *Id.* at 1202. The Court was specifically addressing the bail scheme in Florida. The case is cited for the proposition that bail laws related to wealth classifications will be reviewed by the strict scrutiny standard under the equal protection clause.

Constitution and CrR 3.2 are clearly meant to benefit the accused, not the government accusing the person of a crime. The Washington Constitution confers greater protections than the federal constitution with the right to bail "bailable by sufficient sureties." CrR 3.2(a) provides a presumption of pretrial release in most cases unless the court makes specific findings. CrR 3.2(b) provides that "the court shall impose the least restrictive of the following conditions that will reasonably assure that the accused will be present for later hearings..." (emphasis added.) These provisions protect the accused's fundamental rights to the presumption of innocence and prepare the defense. Pretrial release permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction.

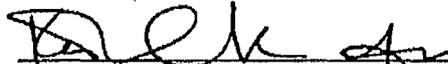
The bail provisions protect the accused, who is presumed innocent. To the degree that CrR 3.2(b)(4) permits the Court to structure bail to permit a cash deposit of up to 10 percent that will be returned to the defendant upon performance of the conditions of release, this option should be to benefit of promoting the defendant's release while protecting the court's interest in securing the accused presence. A wealthy defendant may ask to post 10 percent cash with the court instead of paying for a bonding service. To a wealthy defendant, the cash deposit with the court can be returned at the conclusion of the case instead of paying a bonding company and that fee is not recoverable to the accused even at the conclusion of the case. CrR 3.2(b)(4) would permit this option if the option was presented as an alternative to posting a bond. However, to read CrR 3.2(b)(4) to empower the Court to require cash bail for indigent defendants to the exclusion of bond would violate equal protection standards. The bail laws cannot be read or used to discriminate against the indigent.

CONCLUSION

Based on the Washington Constitution and Court Rules, the Court should strike the cash bail provision on Mr. Barton's order on detention.

DATED this 21st day of August, 2012.

Respectfully submitted,



LINDA W.Y. COBURN - WSBA #36902
Attorney for Defendant

FILED
2012 SEP -5 PM 4: 23
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

vs.

PETER R. BARTON,

Defendant.

NO: 12-1-01772-1

STATE'S MEMORADUM
IN RESPONSE TO
DEFENDANT'S MOTION TO
STRIKE CASH ONLY BAIL
PROVISION

I. INTRODUCTION

The State of Washington, by and through Mark K. Roe, Prosecuting Attorney for Snohomish County, Washington, and Adam W. Cornell, Deputy Prosecuting Attorney for said County, submits this response to the Defendant's Motion to Strike Cash Only Bail Provision (hereinafter Motion). By his Motion, Defendant seeks reconsideration of the Court's requirement that ten percent of his \$500,000 bail be deposited in cash with the Clerk's Office prior to a bond being executed.

II. PROCEDURAL SUMMARY

Defendant, Peter R. Barton, was charged in Snohomish County Superior Court on August 13, 2012, in a one count Information alleging Rape of a Child in the First

STATE'S RESPONSE TO
DEFENDANT'S MOTION TO STRIKE
CASH ONLY BAIL PROVISION / St. v. Barton (12-1-01772-1)
Page 1 of 6

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., MS 504
Everett, WA 98201-4046
(425) 388-3333 Fax: (425) 388-3572

ORIGINAL

15

1 Degree. On August 14, 2012, Defendant appeared before the Court for a bail hearing.
2 At the hearing, bail was set at \$500,000 under the condition that for Defendant to post
3 bond, ten percent of the bail, (or \$50,000), had to be deposited in cash with the Clerk's
4 Office. (Dkt. #12). The Court's order provided for the other 90 percent of the bail
5 amount to be posted by sufficient surety.

6 **III. ARGUMENT**

7 The Motion should be denied. Defendant misunderstands the ruling of the Court
8 and the status of the law by implying that a ten percent cash deposit requirement
9 coupled with a bond at 90 percent of bail is the same as requiring Defendant to post
10 \$500,000 cash to secure his release. The difference is significant. An order that
11 literally required Defendant to post \$500,000 "cash only" to the exclusion of any bond,
12 would be violative of *CrR* 3.2, but that is not what the Court required for Defendant to
13 be released in this case. The Court's order is consonant with *CrR* 3.2 and prevailing
14 case law—that is, that Defendant post ". . . in cash or other security as directed, of a
15 sum not to exceed 10 percent of the amount of the bond. . . ." *CrR* 3.2(b)(4).

16 To Defendant, the ten percent cash requirement is more onerous than an
17 unsecured bond in a specific amount, but it does not deny him the right to a surety.
18 To the public and Defendant's victim, the requirement assures certainty in knowing
19 precisely the amount of money it will take for Defendant to walk out of the jailhouse
20 doors and precisely the amount of money that he and his family will lose if he eludes
21 justice or fails to comply with the conditions of release.

1 The proper form of bail is a matter of continuing and substantial public interest.
2 *City of Yakima v. Mollett*, 115 Wash.App. 604, 607 (2003). In *Mollett*, the Court of
3 Appeals considered the defendant's constitutional and court rule challenge to the
4 Municipal Court's imposition of \$10,000 "cash only" bail.¹ Unequivocally finding that
5 "Cash only bail is not authorized under [the applicable court rule]," the Court of
6 Appeals reasoned that a combination of a requirement of cash and a surety was
7 permissible.² Saliently, *Mollett* reads:

8 But when CrRLJ 3.2(a) is read in its entirety, it is more reasonable to interpret
9 the "deposit of cash" clause as an option the trial court may order along with the
10 primary condition of a bond. If the rule drafters intended to authorize "cash only"
11 bail, they could have easily set it out as a discrete condition of release.
12 Accordingly, we conclude CrRLJ 3.2(a)(5) does not authorize "cash only" bail to
13 the exclusion of a bond.

14 In this case, the Court properly considered the least restrictive conditions as
15 enumerated in CrR 3.2(b). Among those conditions relating to bail, the Court had
16 many options. Among them, was the execution of an unsecured bond in a specified
17 amount. CrR 3.2(b)(3). Next, as in this case, require the execution of a bond in a
18 specified amount and the deposit in the registry of the court in cash or other security
19 as directed, of a sum not to exceed 10 percent of the amount of the bond. CrR
20 3.2(b)(4). Finally, require the execution of a bond with sufficient solvent sureties, or

21 ¹ The subject of the Court of Appeals' analysis was the Court of Limited Jurisdiction court rule analog to
22 CrR 3.2(b).

23 ² The Court of Appeals did not reach the constitutional issue addressed by Appellant, asserting in
pertinent part that, "We first address the court rule argument to decide if we can resolve the matter
without addressing the constitutional issue. See *State v. Hall*, 95 Wash.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)."
Mollett, 115 Wash.App. at 607.

1 the deposit of cash in lieu thereof. CrR 3.2(b)(5). The Court's ten percent
2 requirement in this case was not the imposition of "cash only" bail like that imposed on
3 the Appellant in *Mollett*. Instead, it was the Court exercising its discretion after
4 considering a menu of options available to it to ensure Defendant's appearance at
5 court and the safety of the victim and the community.

6 The Minnesota Supreme Court's decision in *Minnesota v. Brooks*, 604 N.W. 2d
7 345 (2000), a case cited by Defendant, similarly involved a lower court's imposition of
8 "cash only" bail, to the exclusion of any surety. Like the court in *Mollett*, the *Brooks*
9 court found "cash only" bail impermissible, but favored the imposition of the
10 requirement of the payment of some cash in addition to the possibility of bond. The
11 *Brooks* court reasoned:

12 The concept of surety, from its inception in early England to its use in the
13 modern bail system, has involved the concept of a third party assuming
14 responsibility for an accused's appearance. Accordingly, the guarantee of
"sufficient sureties" must, at the very least, protect an accused's access to
helpful third parties.

15 *Id.* at 353.

16 Finally, Defendant addresses the constitutional implications of the Court's ruling in
17 his Motion. A plain reading of the holding in *Pugh v. Rainwater*, 557 F.2d 1189 (5th
18 Cir. 1977)—the primary case cited by Defendant in support of his constitutional
19 argument—asserts that "cash only" bail raises Equal Protection concerns only in the
20 absence of bond. As the court in *Pugh* concluded, "money bail is not necessary to
21 promote [a compelling state interest] because the bail bondsman system eliminates
22

1 the basic premise behind such [cash only] bail." *Id.* at 1202. In deciding Pugh, the
2 court offered the following final conclusion:

3 Our holding is not that money bail may never be imposed on an indigent
4 defendant. The record before us does not justify our telling the State of Florida
5 that in no case will money bail be necessary to assure a defendant's
6 appearance. We hold only that equal protection standards require a
7 presumption against money bail and in favor of those forms of release which do
8 not condition pretrial freedom on an ability to pay.

9 *Id.* In this case, *CrR* 3.2 requires the court to consider the least restrictive alternatives
10 and the financial resources of the accused when setting bail. *CrR* 3.2(b)(7). Thus,
11 Equal Protection considerations are embedded in the court rule and are not offensive
12 to constitutional considerations.

13 IV. CONCLUSION

14 Defendant's Motion should be denied. There are substantial, compelling, and
15 legally justifiable reasons for the Court to require ten percent of Defendant's bond to
16 be in cash. This requirement does violate the prohibition against cash only bail,
17 because it is not cash only bail. The Court's ruling merely adheres to what judges,
18 prosecutors, victims, law enforcement, defense attorneys and the public were all led to
19 believe was the industry standard of charging ten percent down payment to post a
20 bond for the full amount.

21 //

22 //

23 //

1 When criminal defendants are charged much less—and sometimes nothing at all—
2 for their release than the public expects or deserves and where the bail imposed is the
3 least restrictive alternative, the rights' of the accused have not been violated. Simply
4 put, there must be truth and certainty in our system of bail. Everyone must leave the
5 courtroom knowing exactly how much it is going to take to get the defendant released.
6 The Court's order should be affirmed because it injected that certainty where the
7 legislature has failed to, and that the bonding industry itself has so far refused to.

8 DATED this 5th day of September, 2012.

9 Respectfully Submitted,

10 

11 ADAM W. CORNELL
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23 STATE'S RESPONSE TO
DEFENDANT'S MOTION TO STRIKE
CASH ONLY BAIL PROVISION / St. v. Barton (12-1-01772-1)
Page 6 of 6

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APP032

Filed in Open Court

September 20 12

SONYA KRASKI
COUNTY CLERK

By Alma Ombra
Deputy Clerk



CL15352151

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 PETER R. BARTON,)
)
 Defendant.)

NO. 12-1-01772-1

DEFENSE RESPONSE TO STATE'S
BRIEF ON TERMS OF BAIL

ANY CASH-ONLY BAIL, WHETHER IT IS PART OF OR THE FULL AMOUNT OF
BAIL, IS UNCONSTITUTIONAL.

The State does not cite a single case, in Washington or in a state with similar constitutional protections, that condones the pretrial condition of a percentage of bail required to be posted in cash. The State asks the Court to distinguish the cases cited in the defense brief with the argument that the State did not ask for the total amount of bail to be posted in cash, just ten percent of the bail. However, the State fails to address the underlying constitutional analysis in *State v. Mollett*, 115 Wn.2d 604 (2003). Based on the "bail by sufficient sureties" language of

DEFENSE RESPONSE BRIEF ON BAIL

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19

APP033

WA Const. Art. I, § 14, “[t]he ‘deposit of cash’ clause is an option for the trial court may order, but not to the exclusion of the bond.” *State v. Mollett*, 115 Wn. App. 604, 609 (2003) (emphasis added). Whether the court orders the entire bail amount to be posted in cash or ten percent to be posted in cash, either condition of bail is to the exclusion of a bond and violates the plain language of the Washington Constitution, “bail by sufficient sureties.”

Bail is a two-fold contract. There is a contract between the bail agent or agency and the court, guaranteeing that an individual will comply with conditions of release and will appear in court. There is also a contract between the bail agency or agency and the bailee over how much will be paid for having provided bail and how it will be paid. The court’s interest is in its contract with the bail agent or agency, not in the contract between the bailee and bail agent or agency. The State’s request for ten percent cash bail unconstitutionally interferes with the contract between the bailee and the bail agent or agency.

“Sureties” are promises – in this instance by the bonding company – that they will pay the court if the accused does not show up as promised. Sureties are not cash. While the question at issue here is not all-cash bail, the effect is nonetheless the same: poor people will be denied bail because they cannot produce cash or its equivalent before release.

THE POLICY ARGUMENTS OFFERED IN THE STATE’S BRIEFING FAILS TO PROVIDE THE CONTEXT OF THE RELATED LEGISLATIVE HISTORY.

The State argues that the requirement of ten percent cash bail “merely adheres to what judges, prosecutors, victims, law enforcement, defense attorneys and the public were all led to believe was the industry standard of charging ten percent down payment to post a bond for the full amount.” This statement is simply not true. The citizens of Washington State have always been constitutionally guaranteed the right to bail by sufficient sureties except in the most serious cases

under particular conditions.

The State's request for a specific bail minimum has been recently addressed and declined to be adopted by the Washington State Legislature. The issue was carefully considered. In 2010, SSB 6673 created the Bail Practices Work Group to study bail practices and procedures in a comprehensive manner and make recommendations to the Governor, the Supreme Court, and the Legislature.¹ In the 2011-12 legislative session, House Bill 2668 (SHB 2668) was proposed to add a new section to RCW 10.19 and amend the definition of bail:

Bail is defined to require that five percent of the bond amount shall be collected by the bail bond agent or agency before the person's release. The court may waive this requirement upon written justification from the bail bond agency at the time of recognizance.

The new proposed definition of bail inserted a 5% cash bail minimum. The policy argument forwarded by proponents of SHB 2668 was that the new definition of bail was necessary because the existing rules did not allow for a specific bail minimum. The proponents of SHB 2668 made similar arguments to the State's policy argument that "[e]veryone must leave the courtroom knowing exactly how much it is going to take to get the defendant released" in a public hearing before the House Public Safety and Emergency Preparedness Committee on January 25, 2012² and a public hearing in front of the Senate Judiciary Committee on February 22, 2012.³

¹ The report to the Legislature from the Bail Practices Work Group was published in December 2010 and available at the following link:

http://www.leg.wa.gov/documents/legislature/ReportsToTheLegislature/Bail%20Practices%20Work%20Group%20Report%20Final_1472b58e-d0be-45a2-8a38-6270206fb7e0.pdf

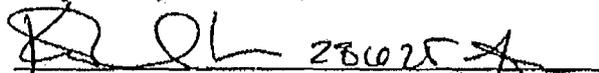
² The House Public Safety and Emergency Preparedness Committee public hearing discussing SHB 2668 can be watched at the following link: http://tvw.org/index.php?option=com_tvwplayer&eventID=2012011210#start=1475&stop=4216.

³ The Senate Judiciary Committee public hearing discussing SHB 2668 can be viewed at the following links: http://tvw.org/index.php?option=com_tvwplayer&eventID=2012020166#start=53&stop=321 and http://tvw.org/index.php?option=com_tvwplayer&eventID=2012020166#start=1989&stop=3492

There were also persuasive policy arguments against SB 2668, including the impact on the poor, concerns over shifting the burden of failures to appear from a privately funded system (bonding companies) to the public, and constitutional challenges to cash bail premiums. SHB 2668 was not enacted and a cash bail premium was not legislatively authorized. To make the same argument to this Court is tantamount to an end run around the Legislature's decision not to enact a cash bail premium. A cash bail, whether in total or a percentage premium, violates Washington constitutional protections. The practice has not been approved by the Washington Legislature and should not be condition imposed by this Court.

DATED this 6th day of September, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Linda W.Y. Coburn', with a date '28025' and a star symbol written to the right of the signature.

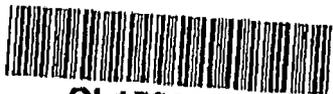
LINDA W.Y. COBURN - WSBA #36902
Attorney for Defendant

RECEIVED

SEP 28 2012

PROSECUTING ATTORNEY
FOR SNOHOMISH COUNTY

BY _____
FOR _____



CL15806613

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

2012 SEP 28 AM 9:28

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON,)	
	)	NO. 12-1-01772-1
Plaintiff,)	
)	
vs.	)	SUPPLEMENTAL BRIEFING
	)	REGARDING HARMONIZING
PETER R. BARTON,	)	CONSTITUTIONAL PROTECTIONS AND
	)	THE COURT RULE ON CONDITIONS OF
Defendant.	)	BAIL

The Washington Constitution provides:

SECTION 20 BAIL, WHEN AUTHORIZED. All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied 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 or any persons, subject to such limitations as shall be determined by the legislature.

The Washington Court Rules For Superior Court, CrR 3.2(b) further provides:

(b) Showing of Likely Failure to Appear-Least Restrictive Conditions of Release. If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive of the following conditions that will reasonably assure

MOTION TO STRIKE CASH ONLY BAIL

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APP037

that the accused will be present for late hearings, or, if no single condition gives that assurance, any combination of the following conditions:

- (1) Place the accused in the custody of a designated person or organization agreeing to supervise the accused;
- (2) Place restrictions on the travel, association, or place of abode of the accused during the period of release;
- (3) Require the execution of an unsecured bond in a specified amount;
- (4) Require the execution of a bond in a specified amount and the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition of release;
- (5) Require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof;
- (6) Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or
- (7) Impose any condition other than detention deemed reasonably necessary to assure appearance as required.

If the court determines that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the accused's appearance.

CrR 3.2(b) (emphasis added.)

This Court announced at the last hearing that the Court's intent was to impose the condition listed in CrR 3.2(b)(4) verbatim. The current bail order reads:

The defendant shall post bail in an amount of \$500,000 by executing a bond with depositing 10% cash in the registry of the court.

This Court clarified that the bail order should read identical to CrR 3.2(b) augmenting the language to read "cash or other security." Based on solely reviewing the court rule, this condition of bail

MOTION TO STRIKE CASH ONLY BAIL
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may appear to be authorized. However, based on language in the Washington State Constitution, even an order with verbatim language of CrR 3.2(4) would be unconstitutional.

CrR 3.2 has to be read in its entirety and in light of the Washington State constitutional protections regarding bail and other court rules. WA Const. Art. 1, section 20 guarantees a right to "bail by sufficient sureties." This Court does not have the authority to order bail to the exclusion of bond, despite the plain language of CrR 3.2(4).

"It is a general rule that statutes are construed to avoid constitutional difficulties when such construction is consistent with the purposes of the statute." *Matter of Williams*, 121 Wn.2d 655, 853 (1993). This general rule of statutory construction is incorporated in the court rules in CrR 1.1:

These rules govern the procedure in the courts of general jurisdiction of the State of Washington in all criminal proceedings and supersede all procedural statutes and rules that may be in conflict and shall be interpreted and supplemented in light of the common law and the decisional law of this state. These rules shall not be construed to affect or derogate from the constitutional rights of any defendant.

(Emphasis added.)

As discussed during oral argument, there is no case directly on point interpreting the constitutional limitations of CrR 3.2(b)(4). However, there are many other examples in the case law where courts have limited the application of a particular rule or statute to avoid constitutional challenges.

In *State v. Kilburn*, 151 Wn.2d 36 (2004), the court held that the felony harassment statute only prohibited true threats to avoid unconstitutional infringement of protected speech. The felony harassment statute, RCW 9A.46.020, plainly states that "a person is guilty of harassment if: (a) without lawful authority, the person knowingly threatens: (i) to cause bodily injury immediately or in the future to ather person threatened or to any other person, or (ii) to cause

MOTION TO STRIKE CASH ONLY BAIL
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physical damage to property of a person other than the actor; (iii) to subject the person threatened or any other person to physical confinement or restraint, or (iv) maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety, and (b) the person by words or conduct places the person threatened in reasonable fear that the threat would be carried out.” As the Washington Supreme Court stated, “The statute criminalizes pure speech. Therefore, it “ ‘must be interpreted with the commands of the First Amendment clearly in mind.’” *Kilburn*, 151 Wn.2d at 41. “True threats” are not protected speech under the First Amendment. *Id.* at 43. To keep RCW 9A.46.020 in line with First Amendment protections, “[a]n alleged threat to kill under RCW 9A.46.020 must be a “true threat” in the First Amendment sense.” *Kilburn* at 53.

In *State v. Johnston*, 156 Wn.2d 355 (2006), the court rejected an overbreadth challenge to the bomb threat statute by limiting the statute to true threats, and not threats made in jest. RCW 9A.46.020 states that is “unlawful for any person to threaten to bomb or injure” any building.¹ On appeal, the parties agreed that the bomb statute “must be construed to limit its application to true threats in order to avoid facial invalidation of the statute on overbreadth grounds under the first amendment of the United States Constitution and article I, section 5 of the Washington Constitution.” *Johnston*, 156 Wn.2d at 359.

In regards to the application of any conditions of CrR 3.2(b), conditions of bail must be imposed in light of the constitution protections. CrR 3.2(b) permits that the court may use any combination of the listed conditions. This Court may order a condition of bail listed in CrR 3.2(4) if the condition is an option and bond is also an alternative option. The Court cannot impose bail verbatim to CrR 3.2(b)(4) as the sole condition of bail. To do so would violate the state

¹ The statute lists a number of public and private buildings, structures, and other places of human occupancy.

constitution. As the bail order in the Barton case stands now, it violates the constitutional right to bail "by sufficient sureties."

Based on the discussion of the intersection of the court rules and the Washington Constitution, the court may question when or how CrR 3.2(b)(4) may be used in light of the purpose of the rule and the Constitutional protections. CrR 3.2(b)(4) provides the Court an option to allow a pre-trial defendant the choice between depositing a certain sum of money with the registry of the Court or bond with a bonding company. A wealthier defendant may choose to deposit the sum of money with the Court so that the entire amount would be returned at the end of the case so long as the defendant abided by the court's conditions of release and save the money that otherwise would be paid to a bail bondsman for their professional service of providing the bond. CrR 3.2(b)(4) could also be used to set bail for post-conviction cases: cases pending sentencing or a probation issue. The Washington Constitution is not offended by cash bail when the defendant has pled or been proven guilty.

However, for pre-trial defendants, defendants who are afforded the presumption of innocence, CrR 3.2 favors release and favors the least restrictive combination of conditions to ensure the defendant will appear for court. CrR 3.2(b)(4) may be used as an option, but it should be in favor of release of the defendant, not to set a specific sum of money or wealth to gain pre-trial freedom to the detriment of indigent accused persons.

The plain language of the Washington Constitution prohibits a cash bail bond, whether the cash bail bond is a partial or total amount of the bond.

This Court theorized at the last hearing that adding language to the existing bail order in the Barton case would bring the written order into alignment with the Court's intent and immunize the bail order from constitutional challenge. The defendant maintains his objection to the "cash bail"

MOTION TO STRIKE CASH ONLY BAIL

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language in the current bail order, but broadens his objection to language that would require 10 percent cash or other security to be deposited to the registry of the court prior to being eligible to post a bond. Cash is a sum of money. Security is also a sum of money. In this case, the cash or other security was set by the Court at a sum of \$50,000.

The Washington Constitution provides for bail "by sufficient surety" which means bail is not conditioned on a sum of money. Reviewing the definitions of the terms 'cash bail bond', 'bail bond', and 'surety' support the argument that the Washington Constitution's bail "by sufficient sureties" language protects an indigent defendant from being compelled to post 10 percent cash or other security premium prior to pre-trial release.

In the case of *In the Matter of Marriage of Candice Bralley*, 70 Wn. App. 646 (1993), the Court of Appeals adopted the Black's Law Dictionary definitions of cash bail bond, bail bond, and surety with approval.

Cash bail bond is defined as:

A sum of money, in the amount designed in an order fixing bail, posting by a defendant or by another person on his behalf with a court or other authorized public officer upon condition that such money will be forfeited if the defendant does not comply with directions of the court requiring his attendance at the...proceeding involved and does not otherwise render himself amendable to the orders and processes of the court.

Bralley, 70 Wn. App at 652, citing Black's at 128.

Bail bond is defined as:

A written undertaking, executed by the defendant or one or more sureties, that the defendant designated in such instrument will, while at liberty as the result of an order fixing bail and of the execution of bail bond in satisfaction thereof, appear in a designated criminal action or proceeding when his attendance is required and otherwise render himself amenable to the orders and processes of the court, and in the event he fails to do so, the signers of the bond will pay to the court the amount of money specified in the order fixing bail.

Bralley, 70 Wn. App at 643, citing Black's at 1293.

MOTION TO STRIKE CASH ONLY BAIL
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Surety is defined as:

One who undertakes to pay money or to do any other act in event that his principal fails therein. One bound with his principal for the payment of a sum of money or for the performance of some duty or promise and who is entitled to be indemnified by some one who ought to have paid or performed if payment or performance be enforced against him. Everyone who incurs a liability in person or estate, for the benefit of another, without sharing in the consideration, stands in the position of a "surety," whatever may be the form of his obligation.

Bralley, 70 Wn. App at 653, citing Black's at 1293.

Sureties provide the court and society a service. This is reflected in the *Bralley* case; the Court of Appeals explained that the different definitions of cash bail bond, bail bond, and surety:

highlight the fact that a person who posts a bond, or a surety, has a special role in the production or security of the accused. This person is responsible if the accused does not appear at the required time. However, 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.

Bralley, 70 Wn.App at 653. The modern practice of professional and commercial bondsman system balances the indigency of the accused with the accused's risk to fail to appear. A high risk may demand a higher bail premium up to a maximum of 10 percent of the bond. A lower risk may merit a lower premium. Bail by sufficient surety is a bond on promise, not a bond solely conditioned on wealth. If an accused does fail to appear, the professional bondsman has powerful incentive to make sure that the accused for whom he is surety appears at court. It is the accused who pays the bondsman to perform a police function of apprehension of a person who has jumped bail.

CrR 3.2(b)(4) and the Court's current bail condition requiring 10 percent cash or other security to the registry of the court fits into the cash bail bond definition. CrR 3.2 mirrors the

MOTION TO STRIKE CASH ONLY BAIL

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language of the definition of a cash bail bond. The following compares CrR 3.2(b)(4) to Black's definition of cash bail bond:

CrR 3.2(b)(4): Require the execution of a bond in a specified amount and the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition of release...(Empasis added.)

Cash bail bond: A sum of money, in the amount designated in an order fixing bail, posted by a defendant or by another person on his behalf with the court...upon condition that such money will be forfeited if the defendant does not comply with directions of the court requiring is attendance at the...proceeding involved and does not otherwise render himself amendable to the orders and processes of the court.

See definition of cash bail bond, supra, emphasis added. Both 10 percent cash or other security equaling \$50,000 is a sum of money to be posted with the registry of the court.

By definition, this condition requires a cash bail bond.

As discussed in the previous defense brief, the Court of Appeals analysis in *City of Yakima v. Mollett*, 115 Wn. App. 604 (2003), is applicable in this case. The court cannot order cash bail to the exclusion of a bond. The \$50,000 cash or other security to the registry of the court is a form of cash bail bond. In the Court's current order, the \$50,000 cash or other security is to the exclusion of bond. The defendant cannot otherwise post bond unless he has also posted a sum or \$50,000 either in cash or other security to the registry of the court to gain release.

The Washington Constitution guarantees a right to post bail by sufficient sureties. By definition, bail by sufficient sureties cannot require a specific sum of money to be posted with the registry of the court prior to release. This reflects Washington's long history of protecting individuals, including the poor, against pre-trial confinement. The Washington Constitution is

MOTION TO STRIKE CASH ONLY BAIL
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more protective than the federal Constitution. As previously discussed in the first section, this Court must read the available conditions in CrR 3.2 to align with the guarantees of the Washington Constitution.

It is clear from CrR 3.2 itself that the rule is designed to protect the accused. CrR 3.2(a) starts with a presumption for release of the accused in noncapital cases. CrR 3.2(b) states that "the court shall impose the least restrictive of the following conditions that will reasonably assure that the accused will be present for later hearings." CrR 3.2(b) offers a variety of options for the court: (b)(1) can require specific supervision of the defendant, (b)(2) imposes travel restrictions, (b)(3) provides for unsecured bond, (b)(4) requires a sum of money deposited with registry of Court to be returned at completion of case, (b)(5) requires bond by sufficient solvent sureties, (b)(6) provides for reporting and/or electronic home monitoring, and (b)(7) is the catch all for other conditions deemed necessary by the Court.

In cases involving wealthy defendants, a defendant may benefit from posting a specific sum with the registry of the Court so that the money will be returned to the defendant at the end of the case. In those cases, the Court should still set bail to offer the option of allowing the wealthy defendant to post a certain sum of money or post bond through a surety. The court would still be precluded from requiring any defendant, wealthy or poor, to post a specific sum to the exclusion of bond because cash bail to the exclusion of bond would run afoul of the constitution protection to access to bail by sufficient sureties. *See Mollett, supra.*

In cases involving indigent defendants, the Constitution requires access to bail by sufficient sureties and CrR 3.2(b)(5) authorizes the court to set bail by sufficient surety. The surety, the commercial bail bondsman, provides a service for the accused to post the bond to gain pre-trial release. The surety also provides a service to the Court, monitoring the defendant in the

community to monitor and detaining/surrendering the defendant to the local jail should the bondsman determine the defendant has not abided by conditions of the bail bond contract or should the defendant jump bail. CrR 3.2 should not be used to condition access to pre-trial release solely on the wealth of the accused. CrR 3.2 may permit the Court to set additional or alternative bail options. However, the Court cannot set bail pursuant to CrR 3.2(b)(4) to the exclusion of access to a bond.

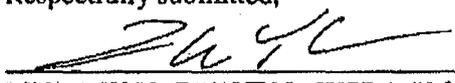
This Court should strike the 10 percent cash or other security provision from the bail order. The condition is unconstitutional as applied in this case. The bail provision violates equal protection as it requires an indigent defendant to post cash or other security equal to a specified sum prior to pre-trial release, instead of allowing that indigent defendant access to bail bond or surety.²

CONCLUSION

Based on the Washington Constitution and Court Rules, the Court should strike the cash bail provision on Mr. Barton's order on detention.

DATED this 27 day of September, 2012.

Respectfully submitted,


LINDA W.Y. COBURN - WSBA #36902
Attorney for Defendant

² The Court's order is even more restrictive than contemplated by the court rule. CrR 3.2(b)(4) states that the accused can be released once a specific sum is deposited with the registry of the court. The accused faces forfeiture of the amount in the event of a failure to appear. Under the bail order in this case, if the defendant posted 10 percent cash with the registry of the Court, he would not get released. This Court's order essentially doubles the amount of the bail because the order requires that the defendant post 10 percent with the registry of the court and also secure a bond on the total amount, \$100,000, prior to release.

FILED

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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

vs.

PETER R. BARTON,

Defendant.

NO: 12-1-01772-1

STATE'S SUPPLEMENTAL
MEMORADUM IN RESPONSE
TO DEFENDANT'S MOTION TO
STRIKE CASH ONLY BAIL
PROVISION

I. INTRODUCTION

The State of Washington, by and through Mark K. Roe, Prosecuting Attorney for Snohomish County, Washington, and Adam W. Cornell, Deputy Prosecuting Attorney for said County, submits this supplemental response to the Defendant's Motion to Strike Cash Only Bail Provision (hereinafter Motion). By his Motion, Defendant seeks reconsideration of the Court's requirement that ten percent of his \$500,000 bail be deposited in cash with the Clerk's Office prior to a bond being executed.

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STATE'S SUPPLEMENTAL MEMORANDUM
IN RESPONSE TO
DEFENDANT'S MOTION TO STRIKE
CASH ONLY BAIL PROVISION / Sl. v. Barton (12-1-01772-1)
Page 1 of 5

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., M/S 504
Everett, WA 98201-4048
(425) 388-3333 Fax: (425) 388-3572

ORIGINAL

26

1 **II. PROCEDURAL SUMMARY**

2 On September 6, 2012, the Court heard oral argument concerning the Motion.
3 Based upon the arguments of counsel and the questions of the Court, oral argument
4 was set over to October 18, 2012, at 9:00 a.m. to accommodate further briefing and
5 argument by the parties.

6 **III. ARGUMENT**

7 Defendant objects to any condition that requires the posting of cash as a condition
8 of release, whether it be in the current form or modified to be more consonant with the
9 language of CrR 3.2(b)(4) (as previously suggested by the Court during the
10 September 6, 2012, hearing). Defendant argues that the cash bail ordered by the
11 Court on August 15, 2012, violated the Washington State Constitution's guarantee that
12 he has a right to bail by "sufficient sureties." Defendant also argues that the Court's
13 order violates his right to Equal Protection under the United States Constitution.

14 The Motion should be denied because CrR 3.2(b)(4) does not preclude Defendant
15 from access to helpful third parties—including, but not limited to bail bondsmen—when
16 a ten percent cash requirement is imposed. Defendant adopts a very restrictive
17 interpretation of the Constitutional guarantee of bail by "sufficient sureties," by
18 suggesting that the ten percent cash bail required of him in this case would have to
19 come from his own pockets. The surety guaranteed by the Constitution, more broadly
20 and appropriately applied, allows Defendant access to others, including bondsmen,
21 banks, family, friends, and other individuals who might be responsible for helping him

22 STATE'S SUPPLEMENTAL MEMORANDUM
23 IN RESPONSE TO
DEFENDANT'S MOTION TO STRIKE
CASH ONLY BAIL PROVISION / St. v. Barton (12-1-01772-1)
Page 2 of 5

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., MS 504
Everett, WA 98201-4048
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1 post cash on his behalf for the fulfillment of his obligation to secure his release.¹
2 Defendant's own supplemental briefing supports the State's position by defining cash
3 bail bond in pertinent part: "A sum of money. . . posted by a defendant or another
4 person on his behalf with the court. . . upon the condition that such money will be
5 forfeited if the defendant does not comply with directions of the court. . . ."
6 (Defendant's Supplemental Briefing, Dkt. #22, Pg. 8). In sum, the Court's ten percent
7 cash requirement pursuant to CrR 3.2(b)(4) does not hinder Defendant's access to
8 others who might post cash on his behalf, it simply requires that a fixed amount be
9 deposited in the registry of the court. In so doing, this requirement insures certainty
10 that when bail is imposed the community knows just how much will be required of
11 Defendant to secure his release.

12
13
14 ¹ sure·ty noun \shūr(-ə)-tē\
plural sure·ties
15 Definition of SURETY
16 1: the state of being sure: as a : sure knowledge : certainty b : confidence in manner or behavior
: assurance
17 2a : a formal engagement (as a pledge) given for the fulfillment of an undertaking : guarantee b :
a basis of confidence or security
18 3: one who has become legally liable for the debt, default, or failure in duty of another
— sure·ty·ship \ship\ noun
19 Examples of SURETY
As sureties, they will be liable in his place.
20 <gave his surety that he would pay back the loan if his sister was unable to for any reason>
Origin of SURETY
21 Middle English seürte, from Anglo-French seürté, from Latin securitat-, securitas security, from
securus
22 First Known Use: 14th century
<http://www.merriam-webster.com/dictionary/surety>

1 The Motion should also be denied because the Equal Protection argument
2 asserted by Defendant lacks merit because a bond remains available to him and there
3 is no controlling case authority to support Defendant's argument. The State's
4 response to Defendant's Equal Protection argument was previously reasoned in a
5 past pleading and will not be repeated here. (Dkt.#22, States Response to
6 Defendant's Motion to Strike Cash Only Bail). Nevertheless, it bears repeating that
7 while Defendant has a right to bail, he does not have a right to bail out.

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STATE'S SUPPLEMENTAL MEMORANDUM
IN RESPONSE TO
DEFENDANT'S MOTION TO STRIKE
CASH ONLY BAIL PROVISION / St. v. Barton (12-1-01772-1)
Page 4 of 5

Snohomish County
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IV. CONCLUSION

Defendant's Motion should be denied.² There are substantial, compelling, and legally justifiable reasons for the Court to require ten percent of Defendant's bond to be in cash. This requirement does not violate the prohibition against cash only bail, because it is not cash only bail and because Defendant has access to helpful third parties—including bail bondsmen who could write a bond to include the \$50,000 cash required—who could make themselves responsible for all of Defendant's bail as guaranteed by the Washington State Constitution.

DATED this 5th day of October, 2012.

Respectfully Submitted,



ADAM W. CORNELL
Deputy Prosecuting Attorney
WSBA# 32206

² Should the Court wish to modify the Order setting bail to be more consonant with CrR 3.2(b)(4) the State proposes the following language: *The defendant shall post bail in an amount of \$500,000 by executing a bond with sufficient sureties and depositing 10% cash in the registry of the court, based upon the court having made the findings set forth in paragraph 2.1 below.*

FILED

2012 OCT 18 PM 4:42

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL15352269

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

State
PLAINTIFF/PETITIONER

and

DEFENDANT/RESPONDENT

Peter R. Barton

NO. 12-1-01772-1

ORDER

IT IS HEREBY ORDERED: Defendant's Order on release,
Section 1.1 shall be modified to read:
Defendant shall execute a bond in the amount
of \$500,000 and deposit in the registry of the court
in \$50,000 cash or other security, such
deposit to be returned upon the performance of
the conditions of release or forfeited for
violation of any condition of release

DONE IN OPEN COURT this date: Oct. 18, 2012

This order is intended

*to include all of the language
of CR 3.2(b)(4)*

Presented By:

#32206

JUDGE / COURT COMMISSIONER

Copy Received:

601 page 1 of 2

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APP052

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON,	) NO. 12-1-01772-1
)
)
Plaintiff,)
	) October 18, 2012
v.	) 9:00 a.m.
)
PETER BARTON,)
)
Defendant.)
)

VERBATIM REPORT OF PROCEEDINGS
DEFENSE MOTION TO STRIKE TEN PERCENT CASH BAIL REQUIREMENT

BE IT REMEMBERED that the foregoing proceedings were taken from the motion hearing in the above-referenced matter heard on October 18, 2012 before The Honorable Judge Eric Z. Lucas.

Adam Cornell, Esq., Snohomish County Prosecutor's Office, 3000 Rockefeller Avenue, Everett, Washington 98201 appearing on behalf of the Plaintiff.

Kathleen Kyle, Esq. Snohomish County PDA, 1721 Hewitt Avenue, Suite 200, Everett, Washington 98201, appearing on behalf of the Defendant.

PROCEEDINGS REPORTED and TRANSCRIBED BY:

DONNA HUNTER, CCR#3065, RPR#046393

1 (Defendant present.)

2 WHEREUPON, the following proceedings were had and done, to
3 wit:

4 THE CLERK: All rise. Snohomish County Superior Court
5 is now in session, the Honorable Eric Z. Lucas presiding.

6 THE COURT: Thank you. Please be seated. Good
7 morning.

8 MR. CORNELL: Good morning, Your Honor, Adam Cornell
9 on behalf of the State. We're here on the matter of the State
10 of Washington v. Peter Barton. Mr. Barton is here. He's in
11 custody. He's represented by Ms. Kyle and we're here before
12 Your Honor for the Court to consider the defense's motion in
13 this matter to strike the ten percent cash bail requirement that
14 the Court had previously imposed. Has the Court had an
15 opportunity to review the subsequent pleadings that were filed
16 since the last hearing?

17 THE COURT: Yes, thank you.

18 MR. CORNELL: Then I think the parties are prepared to
19 proceed and as this is Ms. Kyle's motion, I will defer to her.

20 MS. KYLE: Thank you, Your Honor. I do want to direct
21 my comments to any questions the Court might have, so I
22 encourage the Court to interrupt and ask questions if my
23 argument is not targeting the Court's concerns. Similar to the
24 analysis in the Fifth Circuit federal case analyzing the bail
25 scheme in Florida, this is the Pugh v. Rainwater suit case, the

1 question as I would pose it is can an -- can an indigent
2 defendant be denied freedom where a wealthy man would not
3 because he does not happen to have a specific sum of money to
4 pledge for his freedom. And the answer to that question in the
5 state of Washington is, no, that the Washington Constitution
6 guarantees a bail by sufficient sureties.

7 The State's sought to frame this as an issue that the
8 Defendant does not have a constitutional right to post bail, and
9 I think that is looking at the issue not in the right light.
10 The Constitution is clear that pretrial defendants, presumed
11 innocent, do have a right to post bail by sufficient sureties
12 and not post bail by cash bail. The City of Yakima v. Mollett,
13 the analysis in that case is on point. It is analyzing very
14 similar provision and a very similar court rule, although maybe
15 different provisions of that court rule, and the ultimate ruling
16 in the City of Yakima v. Mollett is that the Court cannot order
17 cash bail to the exclusion of bond. The State argues that the
18 current bail scheme in Mr. Barton's case does not require cash
19 bail, but that is not true, and the current scheme requires Mr.
20 Barton to post \$50,000 cash or other security as the Court has
21 amended with the registry of the Court prior to being able to
22 post the remainder of the amount on bond.

23 If we look at the definition of cash bail, and then as
24 defined by Black's Law dictionary but adopted in Washington
25 State as a correct definition, cash bail bond is defined as a

1 sum of money in an amount designated by an order fixing bail to
2 be posted by a defendant or another person on behalf with the
3 court or another authorized public officer upon condition that
4 such bail be forfeited if the defendant does not comply with the
5 directions of the Court requiring attendance.

6 Then if we look at the def -- or the verbatim language in
7 CrR 3.2(b)(4), which is the requirement of the execution of a
8 bond and in a specified amount and the deposit in the registry
9 of the Court in cash or other security as directed, a sum not to
10 exceed 10 percent of the amount bond. Those two definitions are
11 essentially the same but using different words. The -- it is
12 they both require a sum of money.

13 Criminal Rule 3.2 defines -- further defines a sum of money
14 as cash or other security, but those are all -- a sum of money
15 is the equivalent of cash is the equivalent of security, which
16 is the equivalent of property. And the Court cannot require
17 under Washington State Constitution a person to have a requisite
18 amount of property or wealth or sum of money to gain his
19 freedom. That is a specifically what the Washington
20 Constitution provides is a right to bail by sufficient surety,
21 which is a promise, and that is also defined in the case law.
22 Again, it's the Black's definition of surety, but it's one who
23 undertakes to pay money or do another act in the event that his
24 principal fails therein, so that -- that is the kind of modern
25 development of the commercial bailbondsman. The commercial

1 bailbondsman makes a promise to the Court that they will ensure
2 the promise of the defendant or a sum of money from the
3 bailbondsman will be forfeited.

4 There are many policy reasons that this is a good scheme,
5 the first is that in Washington they recognize that a person is
6 presumed innocent pretrial and that an indigent defendant is no
7 less important than a wealthy defendant. Having access to
8 freedom pretrial allows a defendant to fully participate in the
9 preparation of their defense. Also any form of incarceration
10 pretrial, although is not intended to be punishment, it is
11 intended to secure their presence at the trial cannot be talked
12 about as something other than punishment other than in words in
13 a sense of we send people to jail as punishment and those people
14 are housed in the same facility under the same conditions as
15 somebody who is held on pretrial bail.

16 The other policy decisions that support all of this are
17 that in this instance it is the defendants who then pay for the
18 -- the commercial bailbondsman, so when they do fail to appear,
19 it is a private system, not taxed to the community, to the local
20 government, to the federal government to bring absconding
21 defendants back before the Court. It is the commercial
22 bailbondsman who has a very large incentive for that otherwise
23 police mechanism to bring absconding defendants before the
24 Court.

25 All of these things are talked about in that Fifth Circuit

1 case, Pugh v. Rainwater, so why does CrR 3.24(b)(4) exist?

2 Well, it is an option, but it is not an option to the exclusion
3 of bond. It is not an option to the exclusion of bail by
4 sufficient surety. It is also -- 3.2 is for the trial court or
5 for the Superior Court in all cases, and bail by sufficient
6 surety only applies to pretrial cases, and so, in cases
7 involving probation violations or after a finding of guilt
8 either through a plea or a trial, or just to structure a bail
9 bond, which is what the -- or a bond -- a bail amount that is
10 favorable toward release, which is what the rule requires the
11 Court to do, a wealthy defendant again may choose or ask the
12 Court to set an option of either posting an amount with the
13 Court or going through a commercial bailbondsman.

14 The whole scheme of posting property with the Court or a
15 sum of money with the Court would only work assuming that
16 everybody has property, but unfortunately even in today's modern
17 society we have not made sufficient increases to the land of
18 plenty for all. It is a land of plenty for a few and a land of
19 scant resources for still very many of our citizens.

20 We'd ask the Court to strike the provision from the bond
21 and, you know, I'd also note for the Court that the Court's
22 current, or that the State's request that the Court granted of
23 the current bail structure actually makes it doubly difficult
24 for any defendant, because not only do they have to post
25 10 percent cash or other sum of money with the Court registry,

1 but then they have to turn around and post some amount with the
2 commercial bailbondsman, and that essentially doubles the amount
3 that a defendant would have to put up to gain their release.

4 CrR 3.2(b)(4) contemplates posting up to 10 percent in the
5 registry and then being released, not then also having to turn
6 around, although I don't think it is necessarily prescribed if
7 this were not a pretrial case, if this were a case where there
8 was already a finding of guilt, then the Court may I guess be
9 able to do that, but it does double what the rule -- verbatim
10 rule actually contemplates. Your Honor, our position is that
11 the \$500,000 bail that the Court set is a sufficient bail in
12 light of all the circumstances in this case. Court have any
13 questions?

14 THE COURT: I might have some questions when you come
15 back. Mr. Cornell?

16 MR. CORNELL: Thank you, Your Honor. The Defendant's
17 motion should be denied, and I will make not argument over the
18 top of what I've already submitted in my pleadings, but I do
19 think there are a couple of important points to make that
20 address Ms. Kyle's argument. I think it's -- it's the State's
21 position that sufficient surety is this idea of a surety means
22 -- provides that the defendant has a right to access third
23 parties. There is nowhere in the Constitution that says that
24 the defendant -- that the third party has to be a bondsman. I
25 addressed that perhaps tangentially in my response in pleading,

1 but Mr. Barton has access to third parties for the purposes of
2 posting cash. He has access to third parties with respect to a
3 bond.

4 When the Court made the decision to set the conditions that
5 are -- that are currently in place, the Court considered the
6 financial well-being of not only the Defendant but others in the
7 community, and the Court is required to do that for a reason,
8 because access to third parties is something that -- that the
9 Defendant has an opportunity to access to post the bond or the
10 bail that Your Honor has required of him.

11 So my point is this that the Constitution should and does
12 guarantee Mr. Barton access to third parties. There is no
13 constitutional guarantee to a bondsman per say. With respect to
14 rule itself, I think it's important for the Court to understand
15 that the plain meaning of 3.2(b)(4), which is the section of the
16 Court rule that, Your Honor -- that applies in this case, is --
17 is clear. It is a rule that was promulgated by our Supreme
18 Court in consideration of constitu -- in making constitutional
19 considerations.

20 The Court wouldn't have promulgated a rule that was
21 meaningless, and I would refer the Court to actually CrR 1.2
22 that relates to the purpose -- purpose and construction of the
23 court rules promulgated by the Supreme Court. It says, "These
24 rules are intended to provide for the just determination of
25 every criminal proceeding. They shall be construed to secure

1 simplicity in procedure, fairness in administration, effective
2 justice and elimination of unjustifiable expense and delay."
3 The plain meaning of 3.2(b)(4) provides that the Court has the
4 authority to order 10 percent -- up to 10 percent cash in
5 addition to a bond. The Mollett decision, while the Mollett
6 decision talks about a different section of the 3.2 analog,
7 Mollett does acknowledge the significance of the plain meaning
8 of the court rule in saying that if the court drafters intended
9 to authorize cash only bail, they could have easily set it out
10 as a discreet condition of release. So Mollett acknowledges
11 that the Court could or the Supreme Court had they decided could
12 have ordered cash only bail as a condition of release, but they
13 didn't. And, so, I think that Mollett is instructive insofar as
14 the rule drafters intended to provide the Court the option of
15 ordering a bond plus 10 percent cash, because that's exactly
16 what the rule said.

17 With respect to Ms. Kyle's equal protection argument, I am
18 not going to go back and make argument that I previously made,
19 but I do think it is worth repeating, that while I -- I
20 recognize that there are social and economic inequities in our
21 society, no court has ever in the context of cash only bail made
22 wealth a protected class, so there is no court in the land that
23 has adopted the argument that counsel is making in support of
24 the equal protection argument. Mr. Barton does not have a right
25 to bail out, he has a right to bail, but he doesn't have a right

1 to bail out and he does have access to third parties, and Your
2 Honor considered that when you made -- when you imposed the
3 condition. So I am happy to answer any further questions that
4 the Court may have. I am asking the Court to adopt the plain
5 meaning of the court rule.

6 I will say in conclusion that (b)(4) does contemplate cash
7 or other security as directed. I would -- if the Court is
8 considering and I am not sure if Your Honor is, but I -- I think
9 for the Court to order that the -- that the 10 percent be in
10 \$50,000 or other security would cause a plethora of problems for
11 the Clerk's Office if, for instance, it would put the Clerk's
12 Office in a position of having to appraise gold rings and
13 vehicles and stock certificates and other security, and I don't
14 think that that is manageable and I think the public expense in
15 the Clerk's Office having to determine a cash equivalent as the
16 security per the court rule would cause unfathomable problems
17 administratively for the Clerk's Office, so I think the Court
18 can order 10 percent cash. The Court could also order that that
19 10 percent be other security, but the State is not asking the
20 Court to order in other security and would never ask the Court
21 to do that because of the complications and the trouble that
22 that could cause the Clerk's Office, putting them essentially in
23 a position of being a property appraiser, so we're not asking
24 the Court to do that.

25 THE COURT: Well I guess, Mr. Cornell, that last

1 argument that you made, isn't that in violation of the rule,
2 that restriction?

3 MR. CORNELL: I don't believe so, Your Honor. I think
4 Your Honor can -- can take the cash or other securities. I
5 think those two are wholly independent from each other, so I do
6 believe the Court has the authority to order 10 percent cash or
7 10 percent cash with a security equivalent, so I think they can
8 be read wholly independent from each other. If Your Honor
9 disagrees, again, I think the -- that it's important to
10 contemplate just what would that mean in practical terms for the
11 Clerk's Office. I mean, you would have -- would have people
12 bringing in livestock for instance as a security equivalent if
13 that's all they had to post 10 percent, and I can't imagine --

14 THE COURT: Are you seriously proposing that someone
15 bring in, like, cows?

16 MR. CORNELL: Your Honor, when someone's liberty is at
17 stake and all they have is livestock, their freedom is more
18 important than the convenience of the Clerk's Office, and if the
19 plain meaning of (b) (4) is other security, then we have to be
20 prepared for Sonya Kraski to find a corral potentially for a
21 bunch of livestock, because the criminal defendant isn't going
22 to care. They're going to come up with whatever they have, and
23 if it's a farmer out in Arlington and all their family has is
24 livestock, that's the only thing of value, then the Clerk's
25 Office is going to be in the position of having to determine the

1 -- the cost or value of that livestock. They're going to have
2 to keep it somewhere so that it -- because it has to be -- it
3 will be kept until the defendant or the Court releases the --
4 the bond, so to speak, so absolutely.

5 I mean, if -- if you spin this out, that's the practical
6 effect is that we could have a Clerk's Office full of livestock
7 and the Court -- and the Clerk's Office would have to accept
8 that consistent with the court rule, and again, criminal
9 defendant shouldn't and doesn't have to care about the
10 inconvenience it would be to the Clerk's Office. So the State's
11 position is that the cash or other security is wholly -- those
12 clauses are wholly independent from each other.

13 THE COURT: Well, what I am concerned about with that
14 argument, and you might want to address this, is that that
15 proposes an interpretation, which I believe Ms. Kyle is going to
16 say is a cash only bail, and I think the rules have to be
17 interpreted in accordance with the Constitution. Tell me how
18 that hasn't happened with your interpretation.

19 MR. CORNELL: The interpretation that Ms. Kyle is
20 adopting is the Court's interpretation in Mollett where it was a
21 different section of essentially the analog of --

22 THE COURT: No, I'm talking about the interpretation
23 that you gave me, that cows are going to be required -- that if
24 I had the phrase -- that if I adhere to the phrase in the rule,
25 "cash or other security," that would create some kind of absurd

1 condition where the clerk would have to have cows and hold them,
2 so don't do that, Judge, just say cash, that's your argument.

3 So what I am asking you is how is that argument constitutional?

4 MR. CORNELL: Because in the court -- the -- the case
5 law has interpreted this. It's -- it is not cash only bail.
6 The State in this case I am not asking the Court to order cash
7 only bail. It is cash not to the exclusion of a bond, so in 3.2
8 require the execution of a bond, so there is the opportunity to
9 access a bond in addition to a sum of cash not to exceed
10 10 percent. So I do not believe that it is violative of 3.2,
11 and the Court in Mollett and I believe in the Rainwater case, it
12 was the same -- that was specifically just cash. This is not
13 just cash, this is cash and the opportunity for a bond.

14 I will say as I said in my pleading, I think this is
15 important, that with respect to that cash, not to the exclusion
16 of a bond, Mr. Barton still has access to third parties. It
17 doesn't violate the constitution, the constitutional guarantee
18 of bail by sufficient sureties, because the definition of
19 sureties is set forth in my pleading means that Mr. Barton can
20 -- does not have to have \$50,000 in his own pocket, that he has
21 access to third parties. And, again, that is why the Court is
22 required to consider not just Mr. Barton's wealth or means but
23 the means and wealth of others associated with him who might be
24 able to post bond. I mean, it -- I think that's -- I think that
25 is significant. I mean, the Court wouldn't require Your Honor

1 to consider his -- his -- others around him who could post bond
2 for him if -- I'm sorry, I lost my train of thought.

3 The point is that the court rule requires the Court to
4 contemplate access to third parties because Mr. Barton has
5 access -- because Mr. Barton could access third parties with
6 respect to 3.2(b)(4). That's more what I wanted to say.

7 The example that I used about livestock, Your Honor, I --
8 it's not going -- should the Court order 10 percent cash or
9 other security, maybe what you get is somebody bringing in a
10 diamond ring or something that is easily storable, but we can't
11 guarantee that, because again, all a criminal defendant may have
12 is something that is so cumbersome for the Clerk's Office but is
13 nevertheless to them a security, that it would -- it would cause
14 all sorts of upheaval. So, I mean, when it comes to the
15 constitutional interpretation if Your Honor is inclined to order
16 cash and other security, then I think that the Clerk's Office --
17 there has to be some procedures in place so that the Clerk's
18 Office can manage whatever security may come in the door. And
19 the Court may well find that that is a reasonable -- a
20 reasonable constitutional interpretation of the rule, but
21 logistically there just has to be considerations in the event
22 that that happened, because I think if you spin out the
23 interpretation of the rule, that's exactly what could happen.

24 THE COURT: Anything else?

25 MR. CORNELL: No, Your Honor.

1 THE COURT: Ms. Kyle?

2 MS. KYLE: The State seems to define surety as access
3 to a third party, and that is not the right definition of a
4 surety. The definition of a surety is access to a third party
5 promise. The third party only has to pay money if the
6 principal, the Defendant, fails to do what he is required to do,
7 appear in court. So the State is wrong in its definition of
8 surety and in its argument that Mr. Barton has equal access to
9 the third party. That's not what the Constitution guarantees.
10 The Constitution guarantees a right to bail by sufficient surety
11 which is bail by promise by a third party.

12 The Court's current order and the State's proposed order
13 require a specific sum of money, cash, other security prior to
14 Mr. Barton being able to gain his release, and that's exactly
15 what the Constitution forbids for pretrial cases. The State
16 says, well, they wouldn't -- the Supreme Court wouldn't have
17 promulgated CrR 3.2(b)(4) unless it wanted the Court to follow
18 it, and the Court can further chop it up and just ignore the
19 other security and just impose this cash requirement. But I
20 think that does ignore other issues, including the Supreme
21 Court's rule adopted in 1.1. The last line is, "These rules
22 shall not be construed to effect or derogate the constitutional
23 rights of any defendant."

24 So all these rules have to be read in light of one another
25 and read in light of the Constitution. The State is just wrong

1 in its analysis of the equal protection claim, that if the Court
2 did impose cash, 50,000 cash only or 50,000 cash or other
3 security prior to accessing bond that that would make that bail
4 amount unconstitutional as applied. The statutory
5 interpretation, which a court rule is similar to a statute is
6 that the rule must be read to make it be constitutional, and so,
7 it must be applied in light of the constitutional guarantees.

8 The idea that Mr. Barton has access to bond if he first
9 posts \$50,000 cash doesn't make it not a cash only bail
10 provision. He is required to post a specific sum of money prior
11 to gaining his release, and whether that is a whole or a part
12 doesn't make it not a cash bail according to the definition of a
13 cash bail bond. The State is also wrong in the sense that
14 wealth has never been defined as a protected class in this
15 context. Pugh v. Rainwater, the Fifth Circuit struck down the
16 Florida bail scheme finding that wealth in the criminal context
17 was a protected class. The Court went through analysis of other
18 places in the law where wealth was deemed to be a protected
19 class. It's primarily in the criminal defense arena, one is
20 access to counsel. "There can be no equal justice where the
21 kind of trial of a man depends on the amount of money he has."
22 The other is wealth in terms of sentence, that the Constitution
23 prohibits a state from imposing a fine as a sentence and then
24 converting it to a jail term solely because the defendant is
25 indigent and cannot afford to pay the fine in full. And then

1 the Court goes on to apply that same protected class to bail and
2 said that any bail scheme has to be considered with strict
3 scrutiny so that these fundamental rights of an indigent
4 defendant are protected, and that includes the presumption of
5 innocence and the access to freedom to fully prepare your
6 defense.

7 Wealth has been considered in the City of Yakima v. Mollett
8 case, and although they ruled primarily on kind of aligning the
9 court rules with the State constitution and finding that in that
10 case that cash bail provision violated the State Constitution,
11 what the Court did was read those rules to align with the
12 Constitution. They did not read them so narrowly and say, just
13 because we said it in one provision means you can violate the
14 Constitution, which is what the State at the end of the day is
15 arguing.

16 So, again, Mr. Barton, just so the record is clear, is
17 arguing that the \$50,000 cash or other security condition is
18 unconstitutional as applied. It may be that verbatim words of
19 Criminal Rule 3.24, but 3.2(b)(4) has to be read in light of the
20 constitutional protection of right to bail by sufficient surety,
21 and 50,000 cash or other security is a cash bail not a surety.

22 THE COURT: Well, let me ask you this question: Have
23 you contemplated the distinction of secure versus an unsecure
24 bond?

25 MS. KYLE: Your Honor, I believe those definitions are

1 -- actually I am not sure off the top of my head, if those
2 definitions are discussed in the matter of marriage of Candace
3 Brailey (ph), which is where I am getting those definitions of
4 bail. I believe from the CrR 3.2 --

5 THE COURT: If you look at 3, which is -- go to page 2
6 of your brief -- of your supplemental brief, right above it it
7 says, "Require the execution of an unsecured bond in a specified
8 amount." Now, that is basically what you are arguing for, isn't
9 it?

10 MS. KYLE: No, Your Honor, I am -- I guess I am --

11 THE COURT: Well, you said that -- you said that
12 surety means -- let me see if I got this right. You said,
13 "surety equals a promise so that all that has to be done is he
14 has to meet a promise," and that's I think the definition of an
15 unsecured bond, isn't it?

16 MS. KYLE: No, Your Honor. I think the difference
17 between subsection 3 of 3.2, which is the unsecured bond and the
18 specified amount or subsection 5, which requires execution of a
19 bond with sufficient solvent sureties or a deposit of cash in
20 lieu thereof. I think the typical bail amount that the Court
21 sets where indigent defendants go through commercial bail bond
22 is subsection 5. Bailbondsman are regulated by the State of
23 Washington, they're not -- grandma can't become your
24 bailbondsman and say, I promise to pay. That would be I think
25 if grandma came in and said --

1 THE COURT: No, I am not talking about the actual
2 reality. I'm talking about your argument. I think you argued
3 that surety means a promise. Isn't that what you argued? I
4 wrote that down.

5 MS. KYLE: I would go back and cite the Court that the
6 -- that -- the definition from Black's Law dictionary as the
7 basis for my argument. Yes, I do kind of nutshell that down to
8 a surety is a promise. But a surety is defined by Black's Law
9 dictionary, which is then adopted with approval in the State of
10 Washington, which is probably better set my argument in this
11 definition. But a surety is one who undertakes to pay money or
12 to do any other act in the event that his principal fails
13 therein. One bound with his principal for a payment of a sum or
14 money or performance of some duty or promise and who is entitled
15 to be indemnified by someone who ought to have paid or performed
16 if payment of performance be enforced against him. Everyone who
17 incurs a liability in person or a state for the benefit of
18 another without sharing in the consideration stands for the
19 position of a surety, whatever form of his obligation. And the
20 point of that definition is that, and this is where I am
21 differing from the State, the State is arguing that a surety is
22 access to a third person and it doesn't matter whether access to
23 a third person is to promise on a commercial bailbondsman to pay
24 in the event the defendant fails to appear, or paying a cash
25 bail up front. I think that's in a nutshell the State's

1 argument.

2 This definition of surety, which is adopted in Washington,
3 the surety only pays money if the principal fails to do the
4 prescribes act, i.e., appear in court. So when a bailbondsman
5 bails out a defendant, they're not putting up cash money.
6 They're not putting up another security. They're not putting up
7 property. They're putting up an indem -- like an insurance
8 policy essentially. It's a piece of paper and it says, we
9 promise to pay the full amount of the bond in the event the
10 defendant fails to appear.

11 THE COURT: So sometimes that bond is secured and
12 sometimes it's unsecured; isn't that right?

13 MS. KYLE: I believe unsecured -- I think to be a
14 licensed bailbondsman, I may be getting outside my area of
15 expertise, it has to be secured bond.

16 THE COURT: Tell me how that happens. Let me give you
17 a scheme that I have heard and I think happens out there and
18 tell me how it is secured. Okay. So I heard an advertisement
19 on the radio where it was -- actually I think it was on the
20 internet and someone said that it was some kind of all 24-hour
21 bail bonds and it said, no cash or anything up front. We take
22 payment plans. Now -- okay. So isn't that a -- isn't that an
23 unsecured bond?

24 MS. KYLE: No, Your Honor, because those bailbondsmen
25 are required by law to keep their license to pay in the event

1 the defendant fails to appear regardless of whether that
2 defendant ever made a payment toward that payment plan. So that
3 is still a secured bond because it is the bondsman who is
4 secure. They are the one who have either the cash or insurance
5 policy to pay in the event that that defendant fails to appear.
6 An unsecured bond means that if that defendant didn't appear,
7 they -- you -- the Court may or may not get paid. When the
8 Court forfeits the bail on a failure to appear on an unsecured
9 bond, the Court may or may not get the money. In a secure bond,
10 the Court is going to get the money, and that's what a
11 bailbondsman, a licensed bailbondsman promises, so the
12 distinction I think --

13 THE COURT: I don't think so. I think an unsecured
14 bond means that the surety, the bailbondsman is taking the risk
15 and a secured bond means that he is not taking a risk. He has
16 some fund that he -- he's required the defendant to post, and I
17 think that is really the issue.

18 MS. KYLE: I don't think it is.

19 THE COURT: Think about that for a second.

20 MS. KYLE: I appreciate the Court's invitation to
21 think about that more. I have a feeling it's going to take more
22 than this oral argument to fully process the Court's analysis,
23 but what I would -- what I would tell the Court is we have to
24 look at the plain language of the Constitution. Bail buys
25 sufficient surety. There is not currently any other I guess

1 commercial system in place other than licensed through the State
2 bailbondsman, and I would argue those are secure bonds because
3 those bonding companies will pay the forfeited bond if the
4 defendant fails to appear. It is secure, otherwise they
5 wouldn't be licensed or they would lose their license if they
6 failed to meet the security on the bond.

7 I understand the Court's point and this is -- goes to some
8 of the lobbying efforts that have -- that are being done down in
9 Olympia, and that is to require X percentage, a premium of bail
10 before a bailbondsman can essentially write the bond, because
11 right now it can be 0 as the Court said in some kind of payment
12 plan. There is a maximum premium, I believe 10 percent under
13 the law, that a bailbondsman cannot charge 15 or 20 percent, but
14 I am not totally sure on that. But the Legislature has not
15 adopted a scheme that would require commercial licensed
16 bailbondsmen to have some preset premium, whether it would be I
17 think five percent was the last amount proposed. That law was
18 not adopted.

19 The State seems to be instead of taking that argument to
20 the Legislature or in addition I guess to taking that argument
21 to the legislature, they're coming before the Court, and that's
22 what they're -- they're kind of nutshell argument to the Court
23 is, is that everybody should know how much money the defendant
24 has to post before he can walk out of the courtroom. But that's
25 not the way the Washington Constitution or that's not what the

1 Washington Constitution requires. The Washington Constitution
2 requires bail by sufficient sureties. That may not be a
3 predetermined amount in advance. It is sufficient surety. What
4 surety is is someone who undertakes to pay money or to do
5 another act in the event that is a principal fails therein.
6 That's a surety. And it is not a surety to require a third
7 person to post a specific sum of cash money or other security or
8 wealth or property to gain release. That's what violates the
9 Constitution.

10 THE COURT: Here is another scenario for you to
11 consider. Doesn't the rule allow the defendant to post
12 unsecured bond, in other words, a bond that is just made on a
13 promise, a payment plan or whatever where he has to post nothing
14 with the surety and then post a certain percentage with the
15 Court; isn't that what the rule allows?

16 MS. KYLE: The rule would allow that if it was not a
17 pretrial detainee. I understand that the 3.2 appears to allow
18 that, but I would argue that that would again require a specific
19 sum of money posted to the Court, which is a cash bail. It --
20 it would be forfeited upon the --

21 THE COURT: How would it be different than the surety
22 requiring 10 percent in terms of securing the bond? How would
23 it be any different? Wouldn't it be exactly the same?

24 MS. KYLE: You mean to the bondsman?

25 THE COURT: Well, the effect on the defendant would be

1 the exactly same, wouldn't it?

2 MS. KYLE: No, Your Honor.

3 THE COURT: How would it not?

4 MS. KYLE: Precisely because of the things that the
5 State argued, that you could -- maybe the -- the bondsman would
6 take your cattle or take a payment plan on the cattle if you
7 have a pregnant heifer that is going to have a little calf
8 later, where as the State is saying the Clerk's Offices is in no
9 position to do this. I mean, there are lots of people in
10 private practice, not just bondsmen, lawyers, other people in
11 trade who take payment in trade, so it is services, not
12 necessarily cash or wealth or property and, you know, there is
13 -- it does require -- I guess bail requires probably some amount
14 of services or money to exchange hands.

15 THE COURT: Well, I think the assumption has been
16 historically when courts have set bail that bailbondsman,
17 commercial bailbondsmen were requiring security, and what I
18 think has developed over time is that that issue has become
19 fluid. Some people require ten percent, some people require
20 four percent, some people don't require anything, they allow you
21 to sign a promissory note and make payments. So, you know, in a
22 certain sense a person could have bail set at a certain sum and
23 no one knows whether that will be met with a secured or
24 unsecured bond; isn't that the problem?

25 MS. KYLE: No, Your Honor, because the difference is

1 if they go through a bailbondsman, the bondsman is securing the
2 bond. If the defendant fails to appear, the bondsman will pay
3 the forfeited amount and they will go get that defendant. In an
4 unsecured bond, there is no way to promise the Court that
5 anything will be forfeited if the defendant fails to appear an a
6 forfeiture occurs, so under a commercial bailbondsman, it's not
7 an unsecured bond, because the bondsman is -- has it secured.
8 That's how they do their business, so that is the difference I
9 think.

10 I understand the Court's point. We don't really know what
11 commercial bailbondsman, it's a commercial market. It's a
12 competitive market, so to compete with one another as the
13 economy tanked and the -- several years ago and as national
14 bailbondsmen opened their businesses in Everett, sure, there was
15 a competitive edge to be a commercial bailbondsman, and they may
16 offer some teaser rates or some payment plans to get the
17 business coming through their door and not their competitors'
18 door, but that doesn't make it an unsecured bond. All of those
19 licensed bonding companies will pay that full amount if the
20 defendant fails to appear, and they all tell the Court and the
21 State when they are licensed that we will -- we promise that the
22 defendant will appear. So if the defendant fails to appear,
23 we're going to go get them and bring them back before the Court,
24 and that's not an unsecured bond.

25 THE COURT: Anything else?

1 MS. KYLE: No, that's it, Your Honor.

2 THE COURT: Okay. So I am prepared to rule in this
3 matter, and I am not going to grant the defense's motion as
4 formulated. I do believe that the provision of the order should
5 be amended to reflect the exact language of the rule. That was
6 my intent. We don't have a form. I think it is a form problem
7 in some part. We don't have a form for the entire rule where we
8 can just check off different provisions, but if we did have a
9 form, we would be able to incorporate the entire language that
10 was replied upon into the order, so that is what I am going to
11 require the State do in terms of the order in this matter.

12 What I think is happening here, and this is something that
13 I think was alluded to in my questioning is that there is a
14 problem that needs to be addressed, and I think the problem is a
15 secure versus an unsecured bond. I think that's the problem. I
16 think what is happening out there is in terms of the reality and
17 the practicalities is something different than what Courts
18 contemplate. Courts contemplate that when bail is set, that
19 that defendant will have to go to a surety and post some
20 security in order to get the bond, but that is not the case. I
21 think everyone sort of assumes it will be 10 percent no matter
22 what the sum is, but that is not the case anymore. That -- that
23 percentage slides and we have historical evidence now on what it
24 can be.

25 And as I indicated, I have now seen advertisements that

1 basically require zero, no commitment on the part of the
2 defendant. So what this provision does, this rule, what this
3 rule does is it requires the security to be posted with the
4 Court. It takes that choice away and that's why the language is
5 of the rule is important. The rule says require the execution
6 of a bond in a specified amount and the deposit in the registry
7 of the Court in cash or other security as directed of a sum not
8 to exceed 10 percent of the amount of a bond. So that allows
9 the defendant to go out and secure an unsecured bond where he
10 can make a promissory note or some kind of promise to pay or a
11 payment plan and that -- this provision ensures that the Court
12 will have security for that posted, and that I think is the
13 rationale for that provision, and I think that that makes it
14 constitutional.

15 MR. CORNELL: Thank you, Your Honor.

16 THE COURT: I think that that is exactly the same
17 position if he could go out and get an unsecured bond and post
18 10 percent with the Court, that's the same as if he went out to
19 a private commercial and they required him to post the
20 10 percent, no difference. Anything else?

21 MR. CORNELL: Nothing from the State. I will prepare
22 an order.

23 THE COURT: Thank you, all. Good argument. Court is
24 at recess.

25 (Recess taken 10:01 a.m.)

1 STATE OF WASHINGTON)

2) SS: C E R T I F I C A T E

3 COUNTY OF KING)

4 I, Donna Hunter, a duly authorized Registered Professional
5 Reporter and Notary Public in and for the State of Washington,
6 residing in Seattle, authorized to administer oaths and
7 affirmations pursuant to RCW 5.28.010 do hereby certify:

8 That the foregoing proceedings were taken before me and
9 thereafter transcribed by me by means of computer-aided
10 transcription; that the transcript is a full, true and complete
11 transcript of said proceedings;

12 That I am not a relative, employee, attorney or counsel of
13 any party to this action, or relative or employee of any such
14 attorney, counsel, and I am not financially interested in the
15 action or the outcome thereof;

16 That upon completion of signature, if required, the
17 original transcript will be securely sealed and the same served
18 upon the appropriate party.

19 IN WITNESS WHEREOF, I have hereunto set my hand this 31st
20 day of December, 2012.

21

22

23

24

/S/Donna Hunter

25

Donna Hunter, CCR#3065, RPR#46393



FILED

2012 NOV 16 PM 4:28

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

STATE OF WASHINGTON,
Plaintiff,

v.

PETER R. BARTON,
Defendant.

)
) No. 12-1-01772-1
)

) NOTICE FOR DISCRETIONARY
) REVIEW TO THE COURT OF
) APPEALS DIVISION ONE
)

Defendant seeks discretionary review by the Court of Appeals of the State of Washington, Division One, of the denial of Defendant's motion to strike the portion of the Order on Release/Detention of Defendant requiring \$50,000 cash or other security to be deposited in the registry of the court as a condition for release. This motion was denied on the 18th day of October, 2012, in Snohomish County Superior Court. A copy of the order denying the motion is attached. A copy of the original Order on Release/Detention, entered on the 15th day of August, 2012, is also attached.

DATED this 11th day of Nov, 2012.

Respectfully submitted,


Kathleen Kyle - WSBA # 25065
Attorney at Law

Attorney for Plaintiff:
Snohomish County Prosecuting Attorney
3000 Rockefeller, M/S 504
Everett, WA 98201

Name and Address of Defendant:
Peter R. Barton, CIN# 132448
3025 Oakes Ave.,
Everett, WA 98201

Notice of Appeal

Snohomish County Public Defender Association
1721 Hewitt Avenue, Ste. 200
Everett, WA 98201
(425) 339-6300

SB

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FILED

2012 OCT 18 PM 4:42

SONYA KRASKI
COUNTY CLERK
SHOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

State
PLAINTIFF/PETITIONER

and

DEFENDANT/RESPONDENT

Peter R. Barton

NO. 12-1-01772-1

ORDER

IT IS HEREBY ORDERED: Defendant's Order on release,
Section 1.1 shall be modified to read:
Defendant shall execute a bond in the amount
of \$500,000 and deposit in the registry of the court
in \$50,000 cash or other security, such
deposit to be returned upon the performance of
the conditions of release or forfeited for
violation of any condition of release.

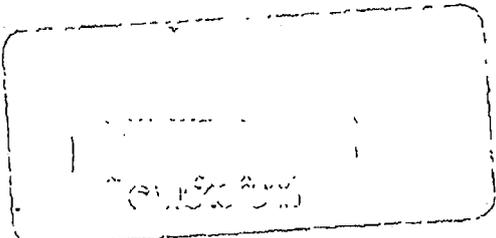
DONE IN OPEN COURT this date: Oct. 18, 2012

Presented By: [Signature]
#32206

This order is intended
to include all of the language
of CR 3.2(b)(4)
[Signature]
JUDGE / COURT COMMISSIONER

Copy Received:
[Signature]
2012 page 1 of 2

28



FILED

2012 AUG 15 PM 3:27

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

BARTON, PETER RICHARD

Defendant.

No. 12-1-01772-1

ORDER ON RELEASE/DETENTION
OF DEFENDANT

[] (Clerk's Action Required)

Sex: M Race: Black DOB: 11/15/1980
Ht: 509 Wt: 240 Hair: Black Eyes: Brown

The above-named defendant having come before the court for preliminary appearance or reappearance, and it appearing to the Court that probable cause exists for the offense(s) charged in the information filed herein based upon the Affidavit of Probable Cause;

IT IS HEREBY ORDERED that:

- 1.1 [] The defendant is hereby released on his/her personal recognizance [] without further conditions [] with the conditions set forth in paragraph 2.1 and/or 3.1 below based upon the findings set forth in paragraph 2.1. If the defendant is held in the Snohomish County Jail in this matter, he/she is hereby released only as to this Cause No.
- PK [X] The defendant shall post bail in an amount of \$ 500,000 ^{10%} [X] by executing a bond with sufficient sureties or depositing cash in the registry of the court in full thereof [] cash only (post conviction only), based upon the court having made the findings set forth in paragraph 2.1 below. The defendant shall be detained in the Snohomish County Jail until such bail is posted. [] Bail has been previously posted in this Cause No.
- [] The defendant having previously posted a bond in the amount of \$ _____ shall post a rider for such bond and file a copy of it with the Clerk's Office within 2 business days of the date of this order. If no rider is posted and filed with the Clerk's Office, the defendant shall immediately report to the Snohomish County Jail.
- 2.1 [X] The court having found that:
 - [X] pursuant to CrR 3.2(a)(1), release without further conditions will not reasonably assure the defendant's presence when required, the defendant shall post bail as set forth above and/or comply with the conditions set forth below; and/or
 - [] pursuant to CrR 3.2(a)(2), there is a substantial danger that the defendant will commit a violent crime, seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the defendant shall post bail as set forth above and/or comply with the conditions set forth below and/or in paragraph 3.1.

Order on Release/Detention of Defendant Page 1 of 2
Sl. v. BARTON, PETER RICHARD
PA #12F03363

Snohomish County Prosecuting Attorney
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SAL/KVC/mg

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FROM 12

- Shall be placed in the custody of _____ who has agreed to supervise the defendant;
- Travel, association, and/or abode are restricted as follows: State of Washington;
- If bed space is available and the defendant is eligible, shall be housed in the minimum security facility and shall participate in work crew;
- Shall be placed on electronic home detention/monitoring; and
- Other: _____

3.1 The defendant shall also comply with the following conditions set forth below based upon the court having made the findings pursuant to CrR 3.2(e)(2) as set forth in paragraph 2.1:

- No contact with G.R. DOB: 03/18/2005 and with the State's witnesses, except through counsel;
- Not go to the following areas or premises: Areas where children tend to congregate such as schools, playgrounds
- Not possess any dangerous weapon or firearm;
- Not possess or consume intoxicating liquor or drugs without a valid prescription;
- Shall report regularly to and remain under the supervision of Department of Corrections;
- Not commit any crimes; and
- Not reside at all with children under the age of 18; and no contact, direct or indirect, with children under the age of 18, except with the supervision of a responsible adult who is aware of these charges.

The defendant shall appear for trial and all scheduled court hearings and comply with the conditions indicated above. Violation of any of these conditions may result in revocation of release, forfeiture of bail, and/or additional charges. A warrant for the arrest of the defendant may be issued upon a showing of probable cause that the defendant has failed to comply with any of the above conditions of release.

DONE IN OPEN COURT this 15 day of Aug 2012.

[Signature]
Judge

Presented by

[Signature]
ADAM W. CORNELL, 32208
Deputy Prosecuting Attorney

Approved for entry, copy received:

[Signature]
WILLIAM A. JACQUETTE, 84407
Attorney for Defendant

[Signature]
PETER RICHARD BARTON
Defendant

Defendant's Address: _____

Order on Release/Detention of Defendant Page 2 of 2
SL v. BARTON, PETER RICHARD
PA #12700383

Eschscholtz County Prosecuting Attorney
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SAA\AWC/mp

FILED

2012 NOV 19 PM 4: 02

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PETER R. BARTON.,

Defendant.

) No. 12-1-01772-1

)
) MOTION AND DECLARATION
) FOR ORDER AUTHORIZING THE
) DEFENDANT TO SEEK REVIEW
) AT PUBLIC EXPENSE AND
) APPOINTING AN ATTORNEY
) ON DISCRETIONARY REVIEW

A. MOTION

COMES NOW the defendant and moves the Court for an order allowing the defendant to seek review at public expense and providing for appointment of attorney on appeal. This motion is based on RAP 2.2(a)(1) and is supported by the following declaration.

DATED this 19th day of November, 2012.

BRADEN PENCE - WSBA #43495
Attorney for Defendant

Motion and Declaration for
Order Authorizing the Defendant to
Seek Review at Public Expense and
Appointing an Attorney on Appeal

Snohomish County Public Defender Association
1721 Hewitt Avenue, Ste. 100
Everett, WA 98201
(425) 339-6300

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B. DECLARATION

I am held in Snohomish County jail pending trial. To obtain my release, the Court requires \$500,000 bail and a 10% cash deposit (\$50,000). On October 18, 2012, the Court denied my motion to strike the 10% cash deposit requirement. I desire discretionary review of the Court's ruling. I believe that the review has merit and is not frivolous and make the following assignments of error

- 1) The Court's ruling violates Article I, sections 12, 14, and 20 of the Washington Constitution.
- 2) The Court's ruling violates the Equal Protection Clause of the United States Constitution.

I have previously been found to be indigent. The following declaration provides information as to my current financial status:

- 1.) That I am the defendant in the above-captioned cause;
- 2.) That I ~~do~~/do not own any real estate (if so, appraised value is approximately \$_____ and rental income is \$_____);
- 3.) That I ~~do~~/do not own any stocks, bonds, or notes (if so, value is approximately \$_____);
- 4.) That I ~~am~~/am not the beneficiary of a trust account or accounts (if so, income therefrom is approximately \$_____);
- 5.) That I own the following motor vehicles or other substantial items of personal property:

ITEM	VALUE/AMOUNT OWED ON ITEM
_____	_____
_____	_____
_____	_____

- 6.) That I ~~do~~/do not have income from interest or dividends (if so, amount is approximately \$_____);
- 7.) That I have approximately \$ 0 in checking account(s), \$ 0 in savings account(s), and \$ 0 in cash.);

Motion and Declaration for
Order Authorizing the Defendant to
Seek Review at Public Expense and
Appointing an Attorney on Appeal

Snohomish County Public Defender Association
1721 Hewitt Avenue, Ste. 100
Everett, WA 98201
(425) 339-6300

8.) That I ~~am~~ am not married (if so, my spouse's name and address is:

____.); 9.) That the following persons are dependent on me for their support:

NAME	RELATIONSHIP	AGE
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

10.) That I have the following substantial debts or expenses:

NAME	AMOUNT OWED	MONTHLY PAYMENT
- <u>Child support</u>	<u>\$20K appx</u>	<u>\$130/mo</u>
- <u>DOC - fines, resht</u>	<u>\$25K appx</u>	<u>\$ -</u>
- <u>T-Mobile</u>	<u>\$3K appx</u>	<u>-</u>
_____	_____	_____

11.) That I am personally receiving public assistance from the following sources (or was until I was incarcerated):

AGENCY OR PROGRAM	AMOUNT OF ASSISTANCE
- <u>Food stamps</u>	<u>\$225⁰⁰</u>
_____	_____
_____	_____

12.) That I ~~am~~ am not employed (if so, take-home pay is approximately \$_____ per month.);

13.) That I have no substantial income other than what is set forth above;

14.) Other circumstances affecting my financial position include:

15.) I authorize the court to obtain verification information regarding my financial status from banks, employers, or other individuals or institutions, if appropriate.

16.) That I will immediately report to the Court any change in my financial status

Motion and Declaration for
Order Authorizing the Defendant to
Seek Review at Public Expense and
Appointing an Attorney on Appeal

Snohomish County Public Defender Association
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(425) 339-6300

which materially affects the Court's finding of indigency.

17.) I certify that review is being sought in good faith. I designate the following parts of the record which are necessary for review:

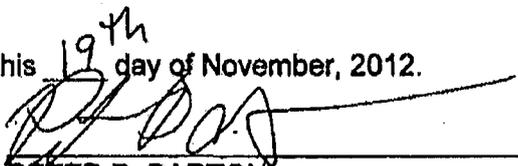
(X)	Pre-Trial Hearings	Date(s)	<u>September 6, 2012</u>
		Judge	<u>The Honorable Eric C. Lucas</u>
		Date(s)	<u>October 18, 2012</u>
		Judge	<u>The Honorable Eric C. Lucas</u>
()	Trial (all proceedings except voir dire and opening statements)	Date(s)	_____
		Judge	_____
()	Hearing on Post-Trial Motions	Date(s)	_____
		Judge	_____
()	Sentencing Hearing	Date(s)	_____
		Judge	_____
()	Other	Date(s)	_____
		Judge	_____

18.) That the foregoing is a true and correct statement of my financial position to the best of my knowledge and belief.

For the foregoing reasons, I request the Court to authorize me to seek review at public expense, including, but not limited to, all filing fees, attorney's fees, preparation of briefs, and preparation of verbatim report of proceedings as set forth in the accompanying order of indigency, and the preparation of necessary clerk's papers.

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

SIGNED in Everett, Washington, this 19th day of November, 2012.

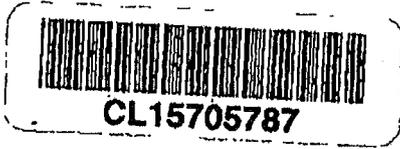


PETER R. BARTON

Motion and Declaration for
Order Authorizing the Defendant to
Seek Review at Public Expense and
Appointing an Attorney on Appeal

Snohomish County Public Defender Association
1721 Hewitt Avenue, Ste. 100
Everett, WA 98201
(425) 339-6300

APP088



FILED
2012 NOV 19 PM 4:02
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

STATE OF WASHINGTON,	)	No. 12-1-01772-1
)	
Plaintiff,	)	ORDER AUTHORIZING THE
v.	)	DEFENDANT TO SEEK REVIEW
	)	AT PUBLIC EXPENSE AND
PETER R. BARTON.,	)	APPOINTING AN ATTORNEY
	)	ON DISCRETIONARY REVIEW
Defendant.)	

THIS MATTER having come on regularly before the undersigned judge upon the motion of the defendant for an order authorizing the defendant to seek review at public expense and the Court having considered the records and files herein, now therefore,

IT IS HEREBY ORDERED that the defendant shall be allowed

(x) To seek discretionary review from the order, entered on the 18th day of October, 2012, at public expense -- to include the following:

- 1.) All filing fees;
- 2.) Attorney fees and the cost of preparation of briefs (including copying costs);
- 3.) Costs of preparation of the statement of facts which shall contain the verbatim report of the following proceedings, all of which are necessary for review:

Order Authorizing the Defendant
to Seek Review at Public Expense
and Appointing an Attorney on
Discretionary Review

Snohomish County Public Defender Association
1721 Hewitt Avenue, Ste. 100
Everett, WA 98201
425-339-6300

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(X)	Pre-Trial Hearings	Date(s) Judge	<u>September 6, 2012</u> <u>The Honorable Eric C. Lucas</u>
		Date(s) Judge	<u>October 18, 2012</u> <u>The Honorable Eric C. Lucas</u>
()	Trial (all proceedings except voir dire and opening statements)	Date(s) Judge	_____ _____
()	Hearing on Post-Trial Motions	Date(s) Judge	_____ _____
()	Sentencing Hearing	Date(s) Judge	_____ _____
()	Other	Date(s) Judge	_____ _____

- 4.) Cost of a copy of the above record for the joint use of defendant's counsel and the prosecuting attorney; and
- 5.) Costs of the preparation of necessary clerk's papers.

IT IS FURTHER ORDERED that counsel on appeal, or his/her representative, is authorized to remove the clerk's file from the Clerk's Office for the purpose of reproducing clerk's papers and designating the record for review.

AND IT IS FURTHER ORDERED that trial counsel is allowed to withdraw and that counsel on appeal be appointed by the Court of Appeals pursuant to RAP 15.2. Payment for expenses of this appointment is authorized under contract with the Office of Public Defense.

Co-defendants, if any, are listed below:

Case Name	Cause Number
_____	_____
_____	_____

Order Authorizing the Defendant
to Seek Review at Public Expense
and Appointing an Attorney on
Discretionary Review

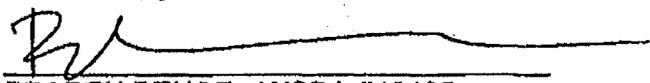
Snohomish County Public Defender Association
1721 Hewitt Avenue, Ste. 100
Everett, WA 98201
425-339-6300

DONE IN OPEN COURT this 11 day of November, 2012.



JUDGE

Presented by:



BRADEN PENCE - WSBA #43495
Attorney for Defendant

Order Authorizing the Defendant
to Seek Review at Public Expense
and Appointing an Attorney on
Discretionary Review

Snohomish County Public Defender Association
1721 Hewitt Avenue, Ste. 100
Everett, WA 98201
425-339-6300

APP091

HeraldNet

Everett, Washington

Tweet 0

Recommend 13

Judge requires unusual bail in child rape case

By Diana Hefley, Herald Writer

EVERETT -- In a unique ruling, a Snohomish County Superior Court judge told a defendant that he'll need to come up with \$50,000 cash if he wants to get out of jail until his trial.

Judge Eric Lucas said Wednesday that while he is concerned about imposing excessive bail, he agreed with prosecutors that "bail must mean something."

Prosecutors had argued that they didn't want convicted rapist Peter Barton's freedom decided by a bail bondsman. Without the judge's order, a bail-bonding company could have agreed to post Barton's bond with little or no money down.

Instead, prosecutors wanted assurance that Barton or someone close to him -- not just the bonding company -- would be on the hook for a significant amount of money if he didn't show up for his court hearings.

Barton, 31, is accused of raping a 7-year-old girl last month. A registered sex offender, Barton faces a mandatory life sentence under the state's persistent offender law if convicted of the new charge.

At the time of the incident, Barton had a warrant for his arrest for failing to report to his community corrections supervisor. He also is a suspect in two other sexual assault cases, according to court papers.

Snohomish County deputy prosecutor Adam Cornell called Barton an untreated sex offender who is a clear danger to the community. Cornell also added on Wednesday that the girl and her mother are afraid of him.

Lucas on Wednesday declined to increase Barton's bail to \$1 million. Instead, he doubled the amount he set on Monday, effectively ordering Barton to be jailed on \$500,000 bail. The judge then granted the prosecutor's request that Barton be required to post 10 percent in cash with the county clerk's office before he can be released. He also must secure a bond for the full amount, Cornell said.

Prosecutors may be making more of these requests in the future.

"The legislature has failed two years in a row to address the gaping flaw in our fictional system of bail. We will ask judges to address it one case at a time," Prosecuting Attorney Mark Roe said. "It is as simple as this: Everyone needs to know, before they walk out of court, exactly how much it is going to take for the defendant to be released, and a judge, not a bonding company, should be making that important public safety decision."

Roe has been harping on the issue since he served on a task force assigned to look at bail practices in the state. The analysis was ordered after four Lakewood police officers were shot to death in 2009. The shooter, Maurice Clemmons, paid a bonding company about \$3,000 on his \$190,000 bail and was

APP092

released from jail about a week before the slayings.

Until then many judges and prosecutors were operating under the assumption that bail-bonding companies required their clients to pay 10 percent of the bail amount before the company would post bond.

That practice "eroded over time," Lucas pointed out on Wednesday. The judge alluded to the Clemmons case, saying some results were "not happy for the community."

Since the task force was formed, voters approved a state constitutional amendment that allows judges to deny bail to some defendants facing a life sentence for a violent offense. Until then, judges could only deny pre-trial bail for someone accused of aggravated murder.

Last year Roe and other county prosecutors proposed other changes, including legislation that would have set a minimum payment rate for people looking to bail out of jail.

Opponents, including the task force's chairman Sen. Adam Kline, D-Seattle, successfully defeated the measure. They argued in part that it would discriminate against the poor. Not surprisingly, those in the bail-bonding industry also balked at the idea.

Mike Rocha, the manager at All City Bail Bonds in Everett, worries similar legislation would be the first step in eliminating commercial bonding companies altogether. He said he's not opposed to requiring a minimum payment rate, but the money shouldn't directly be deposited in government coffers.

He pointed to Oregon, where private bonding companies are outlawed. That eliminates an extra layer of oversight offered by bonding agents, and relies solely on law enforcement to apprehend people who fail to appear for court, Rocha said.

He said private industry is more efficient and effective than the government would be in assuring criminal defendants show up for court hearings. Bonding companies are on the hook for the full amount of the bond, so naturally they have a vested interest in their clients following the rules, Rocha said.

People have a right to be out on bail pending trial, he said.

Everyone is assumed innocent until proven guilty, and bail allows them to "go to work, pay their bills, take care of their family and conduct their lives," Rocha said.

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APP093

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Not Reported in S.W.2d, 1997 WL 711137 (Tenn.Ct.App.)
(Cite as: 1997 WL 711137 (Tenn.Ct.App.))

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
LEWIS BAIL BOND COMPANY, Appellant,
v.
GENERAL SESSIONS COURT OF MADISON
COUNTY, Appellee.

No. C-97-62.
Nov. 12, 1997.

FROM THE CIRCUIT COURT OF MADISON
COUNTY THE HONORABLE FRANKLIN
MURCHISON, JUDGE.

James D. Gass of Jackson For Appellant.

Chris Schultz, Assistant District Attorney General For
Appellee.

REVERSED AND REMANDED
CRAWFORD, Presiding Judge.

*1 This case involves a complaint seeking a Writ of Mandamus ordering judges of the Madison County General Sessions Court to accept bail by other than cash deposit in all cases in which bail is set. Ralph S. Lewis, d/b/a Lewis Bail Bond Company, appeals the order of the trial court dismissing his complaint on the ground that Mandamus is not the proper remedy.

Mr. Lewis is a qualified bail bondsman in Madison County, Tennessee, and has been in that business for thirty-seven years. Mr. Lewis filed a Petition for Writ of Mandamus in the Circuit Court of Madison County which states in part as follows:

For a number of months, The General Sessions Court, Division I, for Madison County, Tennessee, has been setting bond in nearly all cases, and requiring the bond be met by a cash deposit only.

The setting of bonds, which can be met only by a deposit of cash in the Court, severely interferes with Petitioner's business of making bail bonds, by not

allowing prisoners to make bail using Lewis Bail Bonds as their bondsman. Petitioner has suffered, and continues to suffer, severe financial losses as a result of the cash deposit only policy being pursued in the Court. Petitioner has no remedy other than mandamus.

* * *

Petitioner has requested that Respondent allow him to make bail bond in the amount of \$250.00, in the case of Johnny Ray Arnold on February 7, 1997, pursuant to Tennessee Code Annotated, Section 40-11-118. Respondent refused. This refusal is consistent with the policy which has been in effect the past several months.

WHEREFORE, Petitioner requests that there may be issued against Respondent, an alternative Writ of Mandamus, returnable within ten days, compelling Respondent to allow Petitioner, pursuant to T.C.A. § 40-11-122(3), to make a bail bond for any prisoner for whom bail has been set, and who has not been released from jail, and for any prisoner for whom bail may be set in the future, so long as Petitioner is a qualified bail bondsman under Tennessee law.

Mr. Lewis asserts that the practice of requiring cash bonds violates not only the applicable statutes on bail, but also Article I, § 15 of the Tennessee Constitution which provides in pertinent part: "That all prisoners shall be bailable *by sufficient sureties*, unless for capital offenses, when the proof is evident, or the presumption great." (emphasis added).

During the hearing on the matter, the trial judge questioned whether Mr. Lewis had standing to request such relief, but declined to answer that question. The trial court dismissed the petition holding that under the circumstances Mandamus was not an appropriate remedy. In explanation the court stated:

A Mandamus is a special, extraordinary writ that's usually issued when a court or judge is engaging in some reckless abuse of authority that's causing some form of irreparable damage. It's an emergency thing. A thing that you file for urgent, emergency, quick relief, because the damage that's being done and will continue to be done is irreparable.

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*2 It's not present here. There is no irreparable damage. Even if you accept the position of Mr. Lewis, he's not suffering any irreparable damage. He is losing some money, if you take his testimony at face value. He's losing some money on his bond writing. I assume that to be true.

But that is something that can be remedied by money damages down the road in an ordinary, regular lawsuit as opposed to going for a Mandamus. A Mandamus is usually ordered to issue a judge to perform his duty; order a judge to issue an opinion when a judge refuses to act.

Mr. Lewis appeals the dismissal of his petition and present three issues for review: (1) Whether a bail bondsman, whose business suffers because the General Sessions Judge requires bail to be made with a cash deposit only, has standing to bring an action for a Writ of Mandamus; (2) Whether a Writ of Mandamus is the proper remedy for a bail bondsman who has been so injured; and (3) Whether the practice of setting bail which can be met only by a cash deposit violates the Constitution of the State of Tennessee and the applicable state statutes granting a defendant options to select the means by which bail will be made. As we believe that the questions presented can be adequately answered by interpreting the applicable statutory provisions concerning bail, there is no need for this Court to address the Constitutional question raised by the petitioner and it will not be considered further.

Mandamus is an extraordinary remedy and issuance of such a writ is within the broad discretion of the trial judge. Neas v. Tennessee Burley tobacco Growers' Ass'n, 204 Tenn. 405, 321 S.W.2d 802 (Tenn.1959).

We agree with the trial court that this is not an appropriate case for mandamus, however, we believe that a suit for money damages would not be appropriate either. Nevertheless, in the interests of justice and judicial economy, we can construe plaintiff-appellant's complaint as one for declaratory judgment. Tenn.R.Civ.P. 8.06. See also Norton v. Everhart, 895 S.W.2d 317, 319 (Tenn.1995); Fallin v. Knox County Board of Commissioners, 656 S.W.2d 358 (Tenn.1983) (stating that a trial court is not bound by the title of the pleading, but has the discretion to

treat the pleading according to the relief sought). The declaratory judgment statutes provide that:

Any person ... whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any questions of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

T.C.A. § 29-14-103 (1980). Although the bail statutes at issue were not enacted by the legislature with the intention of protecting the livelihood of bail bondsmen, we believe that bail bondsmen are sufficiently affected by the cash only policy complained of to warrant finding that a licensed bondsman has standing to seek relief.

*3 In addition, we believe that this is precisely the type of case that should evade any argument of mootness. This Court has held that an appellate court may entertain an appeal if it involves a question of public interest, even though the issue has become moot as far as the particular parties are concerned. Dockery v. Dockery, 559 S.W.2d 952 (Tenn.App.1977); In re Helvenston, 658 S.W.2d 99 (Tenn.App.1983). "The types of issues the courts are likely to resolve despite their mootness [include]: (1) questions that are likely to arise frequently; (2) questions involving the validity or construction of statutes; ... and (7) questions which must necessarily become moot before the appeal can be heard." Dockery, 559 S.W.2d at 955. The Madison County General Sessions Court's policy of setting cash only bonds involves cases that arise frequently; involve the construction of the statutes on bail; and are likely to be moot before an appeal could be heard. We find, therefore, that this controversy is justiciable.

T.C.A. § 40-4-117(a) provides:

40-4-117. Bail-Forfeiture.--(a) In all misdemeanor cases where bond is made for appearance before the court of general sessions, the judge is authorized and empowered to prescribe the amount of bail, either cash or otherwise, within the same discretionary powers as are granted to judges of the circuit and criminal courts by § 40-11-204.

The statute explicitly and unambiguously au-

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thorizes the general sessions judge to set the *amount* of the bail regardless of the form of the bail. The general sessions judge is also authorized in the statute to exercise the same discretionary powers as circuit and criminal court judges. Section 40-11-204 referenced in this statute deals with relief on forfeited recognizances, not with the discretionary powers granted the judges in setting bail. It appears that this is a typographical error, and that the statute actually referred to is T.C.A. § 40-11-104 which provides:

40-11-104. Authority to release defendants.-Any magistrate may release the defendant on the defendant's own recognizance pursuant to § 40-11-115 or § 40-11-116 or admit the defendant to bail pursuant to § 40-11-117 or § 40-11-122 at any time prior to or at the time the defendant is bound over to the grand jury. The trial court may release the defendant on the defendant's own recognizance pursuant to § 40-11-115, admit the defendant to bail under § 40-11-116, § 40-11-117 or § 40-11-122, or alter bail or other conditions of release pursuant to § 40-11-144 at any time prior to conviction or thereafter, except where contrary to law.

This statute authorizes a general sessions judge to either release a defendant on defendant's own recognizance pursuant to the provisions of T.C.A. § 40-11-115 or 116, or to admit defendant to bail pursuant to T.C.A. § 40-11-117 or § 40-11-122. We find nothing in the statutes that authorizes the general sessions judge to specify the form of the bail that has been set. To the contrary, the provisions of T.C.A. § 40-11-118 (1997) and T.C.A. § 40-11-122 (1997) belie any such authority. T.C.A. § 40-11-118 provides:

4 40-11-118. Execution and deposit-Bail set no higher than necessary-Factors considered-Bonds and sureties.-(a)* Any defendant for whom bail has been set may execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money in cash equal to the amount of the bail. Upon depositing this sum the defendant shall be released from custody subject to the conditions of the bail bond. Such bail shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required.

(b) In determining the amount of bail necessary to reasonably assure the appearance of the defendant

while at the same time protecting the safety of the public, the magistrate shall consider the following:

- (1) The defendant's length of residence in the community;
- (2) The defendant's employment status and history and the defendant's financial condition;
- (3) The defendant's family ties and relationships;
- (4) The defendant's reputation, character and mental condition;
- (5) The defendant's prior criminal record and record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings;
- (6) The nature of the offense and the apparent probability of conviction and the likely sentence;
- (7) The defendant's prior criminal record and the likelihood that because of such record the defendant will pose a risk of danger to the community;
- (8) The identity of responsible members of the community who will vouch for the defendant's reliability; however, no such member of the community may vouch for more than two (2) defendants at any time while charges are still pending or a forfeiture outstanding; and
- (9) Any other factors indicating the defendant's ties to the community or bearing on the risk of the defendant's willful failure to appear.

This statute sets out the various factors that a court is to consider in making a determination as to the amount of the bail bond. Nothing indicates any authority for the judge to order the form of the bond. This is made even more clear by the option allowed the defendant to post with the clerk "a sum of money in cash equal to the amount of the bail."

T.C.A. § 40-11-122 provides other methods for securing the bail bond and provides as follows:

40-11-122. Bail bond secured by real estate or

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sureties.-In lieu of the bail deposit provided for in § 40-11-118, any defendant for whom bail has been set may execute a bail bond which may be secured as provided in this section. The bail bond may be secured by:

(1) Real estate situated in this state with nonexempt unencumbered equity owned by the defendant or the defendant's surety worth one and one-half times the amount of the bail set. If the bail bond is secured by real estate, the defendant or the defendant's surety shall execute a deed of trust conveying the real estate in trust to the clerk who shall immediately file the deed of trust in the office of the register of the county in which the real estate is situated. The cost of preparation of the deed of trust and recordation shall be paid by the defendant;

*5 (2) A written undertaking signed by the defendant and at least two (2) sufficient sureties, and approved by the magistrate or officer. Such sureties under this section shall not be professional bondsmen or attorneys; or

(3) A solvent corporate surety or sureties or a professional bail bondsman as approved, qualified or regulated by §§ 40-11-101-40-11-144 and part 3 of this chapter. No bond shall be approved unless the surety thereon appears to be qualified.

Here again, the legislature has manifested its intent that once the amount of the bail is set, the bailable defendant has an option as to how he will provide the security required.

The appellee asserts that in addition to setting the *amount* of the bail, the trial judge also has discretion to prescribe the *form* that the bail shall take. In our opinion this position is contrary to the plain language of the statutes. We read the statutes to mean that once the trial judge has set the amount of bail "as low as the court determines is necessary to reasonably assure the appearance of the defendant," T.C.A. § 40-11-18(a), the defendant then has the option to meet this amount by either a cash deposit or any of the methods enumerated in T.C.A. § 40-11-122 (1997). It would strain any method of statutory construction to hold that this language gives the judge discretion to require a particular form of bail. If the judge were held to have discretion to require a cash-only bond, he would also arguably have the power, for instance, to demand that

a defendant put up qualifying real estate in order to secure his release. If a particular defendant had no qualifying real estate, such a requirement could effectively detain the accused in violation of Article I, § 15 of the Tennessee Constitution and T.C.A. § 40-11-102 which provide that "all defendants shall be bailable by sufficient sureties." The same result could arise if a cash-only deposit was required of a defendant who had real estate or other sufficient surety, but no cash.

Accordingly, we hold that where a judge determines that imposing bail is an appropriate condition of release, the judge's discretion is limited to setting the amount of the bond in accordance with the factors listed in T.C.A. § 40-11-118. Once the amount of the bond is set, the defendant may exercise his right under the Tennessee Constitution and T.C.A. § 40-11-102 and enlist the services of a professional bail bondsman or other surety to post bail on his behalf. The judgment of the trial court is reversed, and the case is remanded for such further proceedings as may be necessary. Costs of the appeal are assessed against the appellee.

FARMER and LILLARD, JJ., concur.

Tenn.App., 1997.
Lewis Bail Bond Co. v. General Sessions Court of Madison Cty.
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