

69630-1

69630-1

NO. 69630-1

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

PETER R. BARTON,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

PETITIONER'S OPENING BRIEF

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INTRODUCTION

On October 18, 2012, the Snohomish County Superior Court ordered that, to secure his pretrial release, Petitioner Peter R. Barton would have to deposit \$50,000 in cash or other security with the court and could not utilize a surety (the “October 18 Order”). The court’s bail order violated Article I, Section 20 of the Washington State Constitution, which provides that “[a]ll persons charged with crime shall be bailable by sufficient sureties.” It also violated the Equal Protection Clause of the U.S. Constitution and the Privileges and Immunities Clause of the Washington Constitution, and the prohibitions on excessive bail contained in the Eighth Amendment and Article I, Section 14 of the Washington Constitution.

The trial court’s October 18 Order should be reversed for the following reasons:

First, Section 20 guarantees pre-trial defendants bail by sufficient sureties. “Depositors of cash bail are not sureties.” *In re Marriage of Bralley (Gibson v. Cnty. of Snohomish)*, 70 Wn. App. 646, 653, 855 P.2d 1174 (1993) (quoting 8 C.J.S. *Bail* §§ 88, 89, at 109, 111 (1988)). Sureties post non-cash bonds with the court and guarantee the defendant’s presence at trial. *See id.* The October 18 Order denied Mr. Barton his right of access to a surety who could post bond on his behalf. Indeed, “the

only apparent purpose in requiring a ‘cash only’ bond to the exclusion of the other forms provided in [the rules] is to restrict the accused’s access to a surety and, thus, to detain the accused in violation of [the State constitution].” *City of Yakima v. Mollett*, 115 Wn. App. 604, 610, 63 P.3d 177 (2003) (quoting *State ex rel. Jones v. Hendon*, 609 N.E.2d 541, 544 (Ohio 1993)) (brackets in original).

Second, by interpreting CrR 3.2(b)(4) to allow only a cash deposit bond—and thereby denying Mr. Barton access to a surety—the court created an unnecessary and improper conflict between the court rule and Section 20. *See In re Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993). To avoid this conflict, the Court should read CrR 3.2(b)(4) to include surety bonds among the various forms of “other security” permitted by the rule.

Third, the federal Equal Protection Clause and Washington Privileges and Immunities Clause guarantee that “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). Here, the State’s insistence on cash deposit bail disproportionately impacts the indigent, like Mr. Barton, denying them liberty prior to trial in violation of equal protection. *See In re Mota*, 114 Wn.2d 465, 474, 788 P.2d 538 (1990).

Fourth, the State requested a cash deposit bond from Mr. Barton to ensure his continued incarceration until trial, not to ensure his presence. The form of bail is, therefore, improper under the Eighth Amendment to the U.S. Constitution and Article I, Section 14 of the Washington Constitution, which prohibit excessive bail.

I. ASSIGNMENTS OF ERROR

Mr. Barton assigns error to the October 18 Order as follows:

1. The October 18 Order 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 (defined as property and not a surety bond) with the court;
2. By interpreting CrR 3.2(b)(4) as precluding the option of providing security in the form of a surety bond, the October 18 Order created an unnecessary and improper conflict between that rule and Article I, Section 20 of the Washington Constitution;
3. The October 18 Order violated the Equal Protection Clause of the United States Constitution and the Privileges and Immunities Clause of the Washington Constitution by requiring an indigent defendant to post \$50,000 in cash or other security with the court to secure his pretrial release, but excluding access to a surety; and

4. The October 18 Order violated the Eighth Amendment to the U.S. Constitution and Article I, Section 14 of the Washington Constitution, by requiring an excessive form of bail that fails to assure the defendant's appearance at trial.

II. STATEMENT OF THE CASE

On August 14, 2012, Mr. Barton pleaded not guilty to the charged crime of Rape of a Child in the First Degree. RP (8/14/12) 3:15-4:12. Mr. Barton's bail was set the previous day at \$250,000. CP 54-55. Also on August 14, the State amended its proposed bail request to \$1,000,000, and asked "that if the defendant posts bail that ten percent of that be paid in cash to the clerk's office." CP 53. The court held this unusual request over to the following day to allow Mr. Barton's counsel time to formulate a response. CP 53; RP (8/14/12) 6:12-7:13.

Mr. Barton objected to the increase in bail and, specifically, to the extraordinary "cash-only" aspect of the State's request. RP (8/15/12) 3:15-4:1. But on August 15, 2012, the court increased the bail amount from \$250,000 to \$500,000, and ordered that Mr. Barton "must post ten percent of the bail in cash." CP 50-52.

On August 22, 2012, Mr. Barton filed a Motion to Strike "Cash Only" Provision on Order on Detention. CP 42-49. Following subsequent briefing, CP 15-41, and argument, RP (9/7/12) & (10/18/12), the court

denied the motion and entered the October 18 Order. The October 18 Order amended and superseded the August 15 order such that the requirement that Mr. Barton post ten percent “cash” with the registry of the court was modified to a requirement that he post ten percent “cash or other security.” CP 10. However, the order remained clear that “other security” meant some form of property with at least a value of \$50,000, and could not be a surety bond. CP 13; RP (10/18/12) 26:2-27:14. The State contended the October 18 Order was consistent with Article I, Section 20 of the Washington Constitution because Mr. Barton was free to borrow the \$50,000 in cash or other property from a third party, such as family, friends, or even a commercial bail bondsman. CP 16-17.

The October 18 Order was inconsistent with standard practices for setting bail in Snohomish County. As the trial court noted, requiring ten percent cash be paid into the court is “not something that we normally do around here.” RP (8/15/12) 10:6. Indeed, the prosecutor at the arraignment seemed unaware of the existence of CrR 3.2(b)(4). RP (8/15/12) 3:4-7 (“I recognize that there isn’t any established court rule for the Court to make this decision.”).¹

¹ Further highlighting its unconventionality, despite the multitude of bail decisions handled by the Snohomish County Superior Court, no form existed to set this unusual form of bail; the court had to manually cross out the language in the standard form that guaranteed access to a surety. CP 50 ¶ 1.1.

On November 16, 2012, Mr. Barton timely filed a Notice for Discretionary Review. CP 9-12. The State agreed that this case was appropriate for discretionary review. On January 18, 2013, after full briefing, the Court of Appeals granted discretionary review pursuant to Rule of Appellate Procedure 2.3(b)(4), explaining that the motion raised an important question regarding bail yet to be addressed by any Washington appellate court. The court further ordered that trial proceedings not be stayed pending appeal, and that the appeal go forward even if the underlying criminal case is resolved.

Mr. Barton remains in custody in the Snohomish County Jail awaiting trial, which is currently scheduled for July 26, 2013.

III. ARGUMENT

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

This case involves the right to bail, a right “so fundamental that it is guaranteed in the [Washington] Bill of Rights.” *State v. Kramer*, 167 Wn.2d 548, 553, 219 P.3d 700 (2009). Bail is one of the essential bulwarks of the presumption of innocence. *See State v. French*, 88 Wn. App. 586, 593, 945 P.2d 752 (1997). It gives meaning to a defendant's presumption of innocence by limiting the government's ability to detain the defendant 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).

Article I, Section 20 of the Washington Constitution (“Section 20”) 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.) Mr. Barton is not being tried for a capital offense. CP 61-62; RCW 9.94A.507; 9A.20.021(1)(a); 9A.44.073. And the State did not attempt to have bail denied based upon a clear and convincing showing that his release would create a substantial likelihood of danger to the community. As a consequence, Mr. Barton is constitutionally entitled to bail “by sufficient sureties.” Wa. Const. art. I, § 20.

The Sufficient Sureties Clause, i.e. the first clause of Section 20, facilitates a defendant’s efforts to obtain bail in reality, rather than just in theory. “The clause is intended to protect the accused rather than the courts.” *State v. Brooks*, 604 N.W.2d 345, 350 (Minn. 2000); *see also State v. Hance*, 910 A.2d 874, 880 (Vt. 2006) (“[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.”).

The State contends that a defendant’s access to any third party with cash satisfies the dictates of the Sufficient Sureties Clause. CP 16-17. But this definition is completely at odds with the legal meaning of the word surety, the history of the Sufficient Sureties Clause, and the mechanics of how surety bonds work.

1. The Term “Surety” has a Specific Legal Meaning Under Washington Law Inconsistent with the October 18 Cash Deposit Bail Order.

This Court reviews questions of constitutional interpretation de novo. *Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007). “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 allowed bail, 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*, 910 A.2d at 882;² *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)). Cash is not, and cannot be, a surety. *Smith*, 835 N.E. 2d at 14, n.2; *see also State v. Paul*, 95 Wn. App. 775, 778, 976 P.2d 1272 (1999) (“When the entire amount of bail is put up in cash, there is no need of a surety.”).

Washington courts have ascribed specific, distinguishing definitions to the terms and phrases “cash bail,” “bail bond,” and “surety.” *Bralley*, 70 Wn. App. at 652; *see also Paul*, 95 Wn. App. at 777-78, 976 (explaining difference between surety bond and cash bail). “Cash bail,” denotes “[a] sum of money . . . posted by a defendant or by another person on his behalf with a court . . . upon condition that such money will be forfeited if the defendant does not comply with the directions of a court requiring his attendance.” *Bralley*, 70 Wn. App. at 652. In contrast, a

² Although Washington courts “generally do not rely on cases from other jurisdictions to interpret our own [law],” they will do so when “it is helpful.” *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 638, 278 P.3d 173 (2012) (citing *Meyer v. Burger King Corp.*, 144 Wn.2d 160, 166-67, 26 P.3d 925 (2001)). Because so many state constitutions have bail provisions substantially identical to Section 20, *see Brooks*, 604 N.W.2d at 346, 350, cases from other jurisdictions are particularly helpful here. *See, e.g., Westerman* 125 Wn.2d at 289-90, 292 (looking to Oregon, Indiana, Rhode Island, and California law in analyzing Section 20).

“bail bond” requires a “written undertaking, executed by the defendant or one or more sureties, that the defendant . . . [will] appear in a designated criminal action or proceeding . . . and that 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.” *Id.* at 653. Finally, a “surety” is “[o]ne who undertakes to pay money or to do any other act in event that his principal fails therein.” *Id.*

The 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. (quoting 8 C.J.S. *Bail* §§ 88, 89 at 109, 111 (1988)) (emphases added); *see also Paul*, 95 Wn. App. at 777-78.

Indeed, in Washington, “cash bail is conclusively presumed to be the property of the accused,” regardless of who actually posts the bail. *Bralley*, 70 Wn. App. at 655. A person who pays cash bail “did not post a *bond*” and “is not a *surety*.” *Id.* at 654 (emphasis in original). And unlike a surety system involving a third party guaranteeing the presence of the defendant at trial, *see id.* at 653 (defining surety), only two parties are

required for a cash bail system: the defendant to pay the money and the court to receive it.

Using a definition of surety that equates the term surety with the concept of depositing cash or posting property with the court is particularly inappropriate “when the term is used in a constitutional provision pertaining strictly to bail.” *Fragoso v. Fell*, 111 P.3d 1027, 1035 (Ariz. 2005) (Florez, P.J. dissenting). First, “[t]he law uses familiar legal expressions in their familiar legal sense.” *Id.* (quoting *Bradley v. United States*, 410 U.S. 605, 609 (1973)). “Second, in determining the meaning of words used in a . . . constitutional provision, we must take into consideration the surrounding circumstances at the time when they were used, and they should be given a definition consonant with ideas then prevailing” *Id.* (quoting *Maricopa Cnty. Mun. Water Conservation Dist. No. 1 v. Sw. Cotton Co.*, 4 P.2d 369, 374 (Ariz. 1931), *modified on rehearing*, 7 P.2d 254 (Ariz. 1932)).

Both principles require this Court to define “surety,” as used in Section 20, as “a person who posts a **bond**, [and] has a special role in the production and security of the accused.” *See Bralley*, 70 Wn. App. at 653.³ First, as discussed above, this is the definition Washington courts

³ This definition corresponds with that used by the U.S. Department of Justice, which defines “surety bond,” as one in which a defendant “[p]ays fee (usually 10% of bail amount) plus collateral if required, to commercial bail agent.” Bureau of Justice

use for surety in the bail context. Second, as discussed in Section IV(A)(2), *infra*, this definition corresponds with the history of the Sufficient Sureties Clause and the language specifically chosen by the delegates at the Washington Constitutional Convention and affirmed by vote of the people of Washington.

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) (comparing cash-only bond to hypothetical real estate-only bond and noting that either type of bond could effectively detain a defendant in contravention of the Tennessee Constitution's sufficient sureties clause) (App. A).

A constitutionally *sufficient* surety provides adequate security to fulfill its obligations. *See Joseph Buro, Bail—Defining Sufficient Sureties: The Constitutionality of Cash Only Bail*, 35 Rutgers L.J. 1407, 1416-19 (2003-04). Washington bail bond companies demonstrate sufficiency by

Statistics, U.S. Dep't of Justice, Pub. No. NCJ 214994, *Pretrial Release of Felony Defendants in State Courts* 3 (Nov. 1997), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=834>. In contrast, a "deposit bond" is one in which a defendant "[p]osts deposit (usually 10% of bail amount) with court, which is usually refunded at successful completion of case," as is required in the present case. *Id.*; *see also* Bureau of Justice Statistics, U.S. Dep't of Justice, Pub. No. NCJ 148818, *Pretrial Release of Felony Defendants*, 1992 3 (Nov. 1994), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=835> ("Deposit, full cash, and property bonds are posted directly with the court, while surety bonds involve the services of a bail bond company.").

being licensed, bonded, and approved by each county court with which they post bonds. *See infra* Section IV(B). Section 20, by making “[a]ll persons charged with crime . . . bailable by sufficient sureties,” therefore, guarantees that defendants like Mr. Barton must be bailable by an authorized and solvent person or entity who posts a bond, not simply by someone making unsupported promises to the court. Allowing third parties to deposit cash bail with the court does not fulfill this constitutional obligation. The October 18 Order denied Mr. Barton his fundamental right to utilize a surety; a right guaranteed by the State Constitution.

2. The History of the Sufficient Sureties Clause Supports Defining Surety as a Person Who Posts a Non-Cash Bond with the Court.

If the Court determines the meaning of sufficient sureties is not plain and unambiguous, “it may examine the historical context of the constitutional provision for guidance.” *Wash. Water Jet Workers Ass’n*, 151 Wn.2d at 477 (citing *Yelle v. Bishop*, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959)). “In determining the meaning of a constitutional provision, the intent of the framers, and the history of events and proceedings contemporaneous with its adoption may properly be considered.” *Id.* (quoting *Yelle*, 55 Wn.2d at 291). The history of the Sufficient Sureties Clause shows that the drafters of the Washington Constitution defined a surety as a person or entity who posts a bond, not a cash deposit.

The Sufficient Sureties Clause dates back to the original adoption of Article I of the Washington Constitution on August 6, 1889. See The Journal of the Washington State Constitutional Convention 1889 268-72 (Beverly Paulik Rosenow ed. 1962). Constitutional delegate Weir first proposed entirely different language for what is now Section 20:

Offenses except murder and treason shall beailable.
Murder and treason shall not beailable when the proof is evident or the presumption strong. Excessive bail shall not be required nor excessive fines imposed. In all criminal cases the jury shall be exclusive judges of the law and the facts under the direction of the court as to the law and the right of new trial in civil cases.

Id. at 52, 509. But on July 25, 1889, the Committee on Preamble and Declaration of Rights (“Committee”) proffered a new version of Article I that contained two separate sections addressing bail: Section 14 prohibiting excessive bail and Section 21—which ultimately became Section 20—making all non-capital crimes “ailable by sufficient sureties.” *Id.* at 155, 509.

On July 29, 1889, the Committee adopted the final language of Section 20: “All persons charged with crime shall beailable by sufficient sureties” *Id.* at 509. This language remained unchanged on August 6, when Article I was adopted by the Constitutional

Convention.⁴ *Id.* at 268-72. The constitutional delegates specifically selected the “bailable by sufficient sureties” language, rather than using the original formulation that simply made all non-capital crimes bailable. Although the delegates failed to record or publicly articulate the reason for the change, the selection of the existing language over the competing formulation is significant. *See Westerman*, 125 Wn.2d at 287-89 (analyzing different portion of Section 20). This intentional selection of the sufficient sureties language—chosen instead of simply making all crimes bailable—supports Mr. Barton’s contention that Section 20 gives a specific, legal meaning to the word “surety.”

The Journal notes the Sufficient Sureties Clause is similar to that found in the Oregon and Indiana constitutions adopted in 1857 and 1851, respectively. *Id.* at 509 n.33. Indeed, approximately two-thirds of state constitutions contain provisions identical or substantially similar to Section 20. *See Brooks*, 604 N.W.2d at 346, 350 (examining history of Article I, Section 7 of the Minnesota Constitution, which provides that “[a]ll persons before conviction shall be bailable by sufficient sureties”).

⁴ The Washington Constitution was then ratified by the people of Washington on October 1, 1889, and became effective when President Harrison issued a proclamation admitting Washington to the Union on November 11, 1889. *See* Wa. Const. art. 27, § 16 (Constitution to take effect when President declares Washington a state); Proclamation of Nov. 11, 1889, 26 Stat. 1552.

These provisions can be traced back to the Pennsylvania Constitution, which in turn adopted language from Pennsylvania's Great Law of 1682, providing that "all Prisoners shall beailable by Sufficient Sureties" *Brooks*, 604 N.W.2d at 350 (citing June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 531-32 (1983); Pa. Const. art. I, § 14). The Quakers who founded Pennsylvania adopted the Great Law—making almost all offensesailable—due to their aversion to pretrial confinement and the inefficient English bail system that evolved in England under the Statute of Westminster. *Id.* (citing Paul Lermack, *The Law of Recognizances in Colonial Pa.*, 50 Temp. L.Q. 475, 477 (1977)).

The general purpose of bail—particularly under the English system—was to "ensure an accused's appearance and submission to the court's judgment." *Id.* at 349. But the Great Law and the ensuing guarantees of "sufficient sureties" in many state constitutions carries another purpose, to "limit[] government power to detain an accused prior to trial." *Id.* at 350. "The [sufficient sureties] clause is *intended to protect the accused* rather than the courts." *Id.* (emphasis added).

Under the Pennsylvania bail system adopted by most American states, "American courts—at least until the nineteenth century—utilized the personal surety system." *Id.* But as the country grew and modern

society evolved it became difficult to find “reliable persons known by both the courts and the accused.” *Id.* (citing Wayne H. Thomas, Jr., Bail Reform in America 12 (1976)). “As a result, the personal surety system evolved into the commercial bondsman system that exists today.” *Id.* (citing Thomas, *supra*, at 12). “Money security came to take the place of personal sponsorship.” Ronald Goldfarb, Ransom: A Critique of the American Bail System 94 (1965). Thus, the surety guaranteed by the Great Law of 1682 and by the majority of state constitutions that followed the Great Law has evolved into the commercial bail bond business. And the guarantee of access to that commercial bail bond exists to protect the accused, who would otherwise remain incarcerated prior to trial. The trial court denied Mr. Barton access to a commercial bail bond when it required him to post a cash deposit bond with the court, thus denying him his right to a surety under Section 20 of the State Constitution.⁵

3. The Sufficient Sureties Clause Precludes Bail Orders That Allow Only The Deposit of Cash or Property With The Court.

a. The Majority of Courts Interpreting Similar Constitutional Provisions Preclude Cash Only Bail

The trial court’s bail order requiring the deposit of cash (or security defined only as property) with the court runs afoul of significant

⁵ The difference between posting a ten percent cash deposit with the court and obtaining a surety bond is a meaningful one. *See infra* note 10 and accompanying text.

case law prohibiting cash only bail. Indeed, the Washington Court of Appeals recognized the problems associated with cash-only bail in *City of Yakima v. Mollett*, 115 Wn. App. 604, 63 P.3d 177 (2003).

In *Mollett*, a trial court imposed cash-only bail of \$10,100⁶ pursuant to CrRLJ 3.2(b)(5) and (b)(7).⁷ The Court of Appeals reversed, based on 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). The *Mollett* court further noted that “the only apparent purpose in requiring a ‘cash only’ bond to the exclusion of the other forms provided in [the rules] is to restrict the accused’s access to a surety and, thus, to detain the accused in violation of [the State constitution].” 115 Wn. App. at 610

⁶ This amount included \$10,000 bail and a \$100 warrant fee, both in cash. *Mollett*, 115 Wn. App. at 606.

⁷ 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”).

(quoting *Hendon*, 609 N.E.2d at 544) (brackets in original); *see also id.* (citing *Brooks*, 604 N.W.2d at 353 (noting “cash only bail orders can be used to deny bail to those accused who have other means of providing sufficient surety”))).

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 such a form of bail. But the Ohio Supreme Court, construing a provision functionally identical to Section 20,⁸ confronted the constitutional question squarely in *Smith v. Leis*, 835 N.E.2d 5 (Ohio 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. As in Washington, Ohio defines a surety as one who posts a bond and retains a special relationship with the court and the accused, in contrast with one who simply pays out cash bail. The court Ohio explained that “[a]lthough the state suggested for the first time at oral argument that cash could constitute a surety, we find no support for this novel proposition, which is contrary to the ordinary definition of ‘surety.’” *Id.* at 14 & n.2. Consequently, a cash-only bail requirement was unconstitutional. *Id.* at

⁸ Compare Wa. Const. art. I, § 20 (“All persons charged with crime shall be bailable by sufficient sureties . . .”), with Ohio Const. art. I, § 9 (“All persons shall be bailable by sufficient sureties . . .”).

16. The same is true for cash equivalents, such as real or personal property-only bail. See *Lewis Bail Bond Co.*, 1997 WL 711137, at *5.

Consistent with *Smith*'s reasoning, the majority of courts across the country that have addressed the issue prohibit cash-only bail, finding that defendants have an absolute right of access to a surety—who may post bond 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.”); *Lewis Bail Bond Co.*, 1997 WL 711137, at *5; *Simms v. Oedekoven*, 839 P.2d 381 (Wyo. 1992); *State v. Golden*, 546 So. 2d 501, 502-03 (La. Ct. App. 1989); *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’”); *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).

b. Courts Permitting Cash-Only Bail to the Exclusion of Surety Bonds Fail to Consider the History and Meaning of Surety

A few courts have reached the opposite conclusion—that cash-only bail, to the exclusion of surety bonds, is consistent with their states’ constitutional guarantees of access to sufficient sureties. *See, e.g., State v. Briggs*, 666 N.W.2d 573 (Iowa 2003);⁹ *In re Alabama v. Singleton*, 902 So. 2d 132 (2004) (relying entirely on *Briggs*). But these courts define “surety” differently than Washington courts. Rather than defining surety to incorporate its traditional legal meaning of “a person who posts a *bond*, [and] has a special role in the production and security of the accused,” *see Bralley*, 70 Wn. App. at 653 (emphasis in original), these states simply equate the terms surety and security. *See, e.g., State v. Jackson*, 384

⁹ *Briggs* has been roundly criticized for its confusing and internally inconsistent reasoning. *See, e.g., Hance*, 910 A.2d at 365-66 & n.5; Buro, *supra* p. 12. Indeed, *Briggs* both allows cash only bail and requires access to a surety in some form, with no explanation for how both concepts can coexist in a single case. 666 N.W.2d at 583. Moreover, *Briggs*’ definition of the term “sufficient” in the phrase “sufficient sureties” reads the guarantee of access to a surety out of the constitutional provision entirely.

S.W.3d 208, 213-14 (Mo. 2012) (defining surety as “security against loss”); *Fragoso v. Fell*, 111 P.3d 1027, 1033 & n.5 (Ariz. 2005) (defining surety as any form of security for payment); *State v. Gutierrez*, 140 P.3d 1106, 1110 (N.M. Ct. App. 2006) (same, relying on *Fragoso*). Other courts failed to define surety at all. See *Singleton*, 902 So.2d 132; *Briggs*, 666 N.W.2d 573.

As the dissent in *Briggs* explained, these courts fail to account for the fact that “[a] requirement of cash bail is not a surety transaction . . . [a] surety transaction is a tripartite arrangement between an obligee, a principal obligor, and a secondary obligor who vouches for the performance of the primary obligor.” 666 N.W.2d at 585 (Carter, J. dissenting). “[T]he word ‘surety’ used in the context of bail referred historically to a third person who guaranteed the appearance of the accused and who would be answerable if the accused did not appear, a role that evolved into the professional bail bondsperson.” *Fragoso*, 111 P.3d at 1035 (Florez, P.J. dissenting). These courts “mistakenly assume[] that a surety arrangement may exist by having a third party post the [cash] bail.” *Briggs*, 666 N.W.2d at 585 (Carter, J. dissenting). “That would not involve a surety relationship.” *Id.*

Security and surety are not equivalent terms. Security is a broad concept, encompassing all forms of collateral. Black’s Law Dictionary

1475 (9th ed. 2009) (security is “collateral given or pledged to guarantee the fulfillment of an obligation”). In the bail context, security may be obtained myriad ways, including cash deposit, real or personal property collateral, cash deposit bond, property bond, or surety bond. In contrast, the term surety refers to one distinctive form of collateral or security. A surety “undertakes to pay money or to do any other act in event that his principal fails therein.” *Bralley*, 70 Wn. App. at 653; *see also* Black’s Law Dictionary 1579 (9th ed. 2009) (surety is a “person who is primarily liable for paying another’s debt or performing another’s obligation”). This promise of payment provides security that the principal will fulfill his obligations or the injured party will be compensated for his failure. Surety bonds provide just this type of security, by guaranteeing either the presence of the defendant or payment of the full bail amount. *See* RCW 10.19.090 (requiring surety’s forfeiture of bail amount when defendant fails to appear).

4. All Cash Bail and Cash Deposit Bonds both Unconstitutionally Deny the Accused Access to Sufficient Sureties.

The October 18 Order did not set all cash bail, but instead required Mr. Barton to deposit ten percent of the bail amount, in cash or other security (defined as property and excluding a surety bond), with the court. CP 13. Before the trial court, the State argued that this made the October

18 Order somehow different than traditional cash only bail, which the State conceded would be improper. RP (8/15/12) 3:7-9. But the ten percent cash or property deposit requirement operates identically to an impermissible 100 percent all cash bail requirement. If a \$50,000 bail order with a 100 percent cash (or property) requirement is improper—and the State conceded that it is—then it must be the case that a \$500,000 bail order with a ten percent cash (or property) requirement is also improper. Both require a defendant to have \$50,000 cash to secure his pretrial release and both deny a defendant access to the sufficient sureties guaranteed by Section 20. *See e.g., Rodriguez*, 628 P.2d at 284-85 (noting, in moot case, that requiring \$10,000 cash on \$25,000 bail would “effectively undermine the [Montana] constitutional guarantee of bail by ‘sufficient sureties’”).

B. The Court Should Interpret Superior Court Criminal Rule 3.2(b)(4) in a Manner that Avoids Conflict with Article I, Section 20 of the Washington Constitution.

The trial court’s interpretation of CrR 3.2(b)(4)—requiring the posting of cash or other security, but denying the use of a surety—puts the rule directly in conflict with Section 20. As this Court found in *Mollett*, the criminal rules should be interpreted to avoid a conflict with the state constitution. *See Mollett*, 115 Wn. App. at 179 (citing *State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981)) (noting an appellate court will

avoid a constitutional issue if it can find any other basis for its decision); *see also In re Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993). To ensure consistency with Section 20, the phrase “other security” in CrR 3.2(b)(4) should be interpreted to include surety bonds, as well as other forms of security, such as property or other collateral from the defendant or a third party. This interpretation also ensures consistency with the language and structure of CrR 3.2, which contains subsections running from least to most restrictive bail conditions—(b)(1) to (b)(7).

The trial court’s interpretation of CrR 3.2(b)(4), allows only cash or property to be deposited with the court to satisfy the bail requirement. This interpretation ignores the structure of CrR 3.2. Requiring ten percent of the bail amount in cash or property acceptable to the court under CrR 3.2(b)(4), is generally *more restrictive* than providing a surety bond for the full bail amount as allowed under CrR 3.2(b)(5), because it requires the defendant to have or get the cash (or property) with no flexibility at all.¹⁰ For example, as a matter of private contract, a commercial bail bond company may accept less than 10 percent of the bail amount in cash to

¹⁰ Indeed, the prosecutor’s reason for favoring CrR 3.2(b)(4) bonds over (b)(5) bonds was the state’s ability to control the cost of the bond and ensure it was at least 10 percent of the total bail amount because commercial bail bond companies may provide discounts, payment plans, or other alternatives to a straight 10 percent fee. *See* RP (8/15/12) 7:9-21; *see also* Diana Hefley, *Judge Requires Unusual Bail in Child Rape Case*, Everett Herald, Aug. 16, 2012, *available at* <http://www.heraldnet.com/article/20120816/NEWS01/708169921> (last visited June 2, 2013).

provide the surety bond, or may allow a defendant and his family to put up collateral that might not be acceptable to a court. The trial court erred by adopting an interpretation of CrR 3.2(b)(4) that ignores the structure of the rule and needlessly puts it in conflict with the State Constitution.

Indeed, interpreting the word “security” to permit a defendant to secure his or her release with a surety bond as an alternative to posting cash or property with the court is consistent with the manner in which surety bonds operate and are regulated by the court. The State strictly regulates commercial bail bond agencies. *See* RCW 18.185.010 *et seq.*, WAC 308-19-010 *et seq.* Agencies must be licensed, RCW 48.17.060, and must contract with an approved surety company that carries a certificate of authority under RCW 48.05.030. To obtain a certificate of authority, a surety company must have “capital funds,” i.e. assets in excess of its liabilities. RCW 48.05.040, .060. Thus, all commercial bail bonds issued by a licensed agency in Washington are secured by the assets of a properly capitalized surety company. In addition, each Superior Court keeps its own list of approved bail bond agencies. *See, e.g.*, Snohomish Cnty. Sup. Ct. Admin. Order 07-09, Justification of Bail Bond Cos. & Sureties, *available at* http://www.co.snohomish.wa.us/documents/Departments/Superior_Court/07_09.pdf (last visited May 25, 2013); 2011 King Cnty. Sup. Ct. Judges’

Resolution re Justification of Bail Bond Cos., *available at* <http://www.kingcounty.gov/courts/scforms/bailbonds.aspx> (click on PDF link to access Resolution) (last visited May 25, 2013). If a defendant fails to appear, the bail bond company must forfeit the full bail amount. *See* RCW 10.19.090 (requiring surety's forfeiture of bail amount when defendant fails to appear); *see also* Snohomish Cnty. Bail Bond Forfeiture Procedures, *available at* http://www.co.snohomish.wa.us/documents/Departments/Superior_Court/12_06.pdf (last visited May 25, 2013). In fact, this system more effectively secures the bail amount compared to posting property in many or even most cases, because converting such things as real estate, jewelry, or other property to cash upon a defendant's failure to appear is much more difficult than calling upon the surety for payment.

City of Yakima v. Mollett also supports this interpretation. *Mollett* held that once a judge imposes bail conditions under 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." 115 Wn. App. at 609 (quoting *Hendon*, 609 N.E.2d at 544). In other words, once a judge orders a secure bond under CrR 3.2(b)(5), the defendant gets to choose whether to obtain a surety bond or to deposit cash or other collateral with the court. The Court should treat CrR 3.2(b)(4) the same way. Reading the term

“security” in CrR 3.2(b)(4) to include surety bonds allows defendants to select one of three methods of payment: (1) pay 10% of the total bail into the court registry in cash; (2) provide property or other collateral worth 10% of the total bail to the court registry; or (3) obtain a surety bond for 10% of the total bail amount from a commercial bond agency. Each of these alternatives is less restrictive than a surety bond for the full amount of bail authorized by CrR 3.2(b)(5), and more restrictive than the unsecured bond allowed by CrR 3.2(b)(3).

C. The October 18 Order Violates the U.S. and Washington Constitutions’ Guarantees of Equal Protection under the Law.

The trial court’s imposition of a \$50,000 cash or security requirement violates the Equal Protection Clause of the U.S. Constitution and the Privileges & Immunities Clause of the Washington Constitution. U.S. Const. amend. XIV, § 1, cl. 4; Wash. Const. art. I, § 12. Requiring defendants to post a cash deposit bond with the court, like the \$50,000 in cash or security required in Mr. Barton’s case, places a nearly insurmountable obstacle to making 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 under the law is required by both the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution.”¹¹ *Am. Legion Post #149 v. Wash. State Dep’t of Health*, 164 Wn.2d 570, 608, 192 P.3d 306 (2008) (citing *O’Hartigan v. Dep’t of Pers.*, 118 Wn.2d 111, 121, 821 P.2d 44 (1991)).

¹¹ Washington courts for many years considered Article I, Section 12 to be substantially equivalent to the federal Equal Protection Clause because both provisions require that laws apply equally to all. *See, e.g., State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996) (“This court has consistently construed the federal and state equal protection clauses identically and considered claims arising under their scope as one issue.”). But in 2002, the Washington Supreme Court applied the *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), criteria and determined that Article I, Section 12 warranted analysis independent of the Equal Protection Clause. *See Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 725-31, 42 P.3d 394 (2002) (*Grant County I*), *vacated in part*, 150 Wn.2d 791, 83 P.3d 419 (2004) (*Grant County II*). Several years later, the Supreme Court divided at least three ways on when, how, and under what circumstances Article I, Section 12 should be analyzed independently. *See P. Andrew Rorholm Zellers, Independence for Washington State’s Privileges and Immunities Clause*, 87 Wash. L. Rev. 331, 332, 353-59 (2012) (citing *Madison v. State*, 161 Wn.2d 85, 92-98, 111-20, 127-28, 163 P.3d 757 (2007); *Andersen v. King Cnty.*, 158 Wn.2d 1, 13-19, 58-64, 120-28, 138 P.3d 963 (2006)).

These conflicting approaches have not been resolved. The Supreme Court failed to even mention the debate in a recent equal protection case, *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010), which analyzed the two provisions together. And the Courts of Appeal continue to hold that “[o]ur courts construe the federal and state equal protection clauses identically.” *State v. Scherner*, 153 Wn. App. 621, 648, 225 P.3d 248 (2009) (Division 1); *see also State v. Jagger*, 149 Wn. App. 525, 532, 204 P.3d 267 (2009) (Division 2); *State v. King*, 149 Wn. App. 96, 102, 202 P.3d 351 (2009) (Division 3). Mr. Barton, therefore, treats Article I, Section 12 and the Equal Protection Clause as coextensive in this case.

Should the Court choose to analyze Article I, Section 12 separately, Mr. Barton contends that the Washington Constitution would be more protective of his rights than the Equal Protection Clause under the circumstances presented here. First, the right to bail by sufficient sureties is a fundamental right guaranteed by the Washington Constitution. *See* Section IV(A), *supra*. This right, therefore, qualifies as a “privilege” of state citizenship under Article I, Section 12. *See generally Madison*, 161 Wn.2d at 95 (stating that privileges under Article I, Section 12 include “those fundamental rights which belong to the citizens of the state by reason of [their state] citizenship”) (citation omitted). In contrast, the federal Constitution does not guarantee access to bail or sureties. The Washington Constitution is, therefore, significantly more protective of a defendant’s right to bail by sufficient sureties than the federal Constitution. The Court could, therefore, analyze Mr. Barton’s equal protection argument under the most restrictive level of review: strict scrutiny.

“Equal Protection requires that persons similarly situated receive like treatment.” *Fogle v. MacFarlane (In re Fogle)*, 128 Wn.2d 56, 62, 904 P.2d 722 (1995) (citing *In re Mota*, 114 Wn.2d at 475); *Westerman*, 125 Wn.2d at 294.

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 in limited circumstances, for example when laws distinguish between classes based on gender, *id.*, or when classifications “involve deprivation of liberty **and** what we would term a ‘semi-suspect’ class, such as the poor.” *State v. Danis*, 64 Wn. App. 814, 818, 826 P.2d 1096 (1992) (emphasis added). This test requires that the challenged law, “fairly be viewed as furthering a substantial interest of the State.” *Westerman*, 125 Wn.2d at 294 (quoting *State v. Phelan*, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983)). In other words, the State must show that “the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

Intermediate scrutiny should be applied here. The trial court’s interpretation of CrR 3.2(b)(4) implicates “both an important right (the right to liberty) and a semi-suspect class not accountable for its status (the poor).” *Westerman*, 125 Wn.2d at 294 (quoting *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987)). When a defendant’s “inability to obtain pretrial release was due to indigency . . . the denial of a liberty interest due to a classification based on wealth is subject to intermediate scrutiny.” *In re Mota*, 114 Wn.2d at 474, *superseded by* RCW 9.94A.150 *on other grounds, as recognized in In re Williams*, 121 Wn.2d 655. Mr. Barton and similarly situated defendants are deprived of a substantial liberty interest—freedom pending trial—by bail orders like the one in this case. This deprivation stems from Mr. Barton’s indigence and his resulting inability to provide cash deposit bail. *See* CP 2-8. “Of course, the very fact of bail and presentence incarceration raises the possibility of disparate treatment based upon wealth.” *In re Williams*, 121 Wn.2d at 665. The need to assure the presence of defendants at trial generally validates this system, but the courts “should endeavor to minimize this disparate treatment when possible.” *Id.* at 665-66.

Here, however, the State’s purpose in requesting a cash deposit bond was to limit (or entirely remove) Mr. Barton’s ability to obtain pretrial release on bail. *See, e.g.*, RP (8/15/12) 7:9-21. A basic principle

of equal protection is that “a law nondiscriminatory on its face may be grossly discriminatory in its operation.” *Williams v. Illinois*, 399 U.S. 235, 242 (1970). Requiring a cash deposit bond disproportionately affects the indigent, who must remain in jail while the wealthy may post the cash and retain their freedom pending trial. In contrast, allowing a surety bond provides even indigent defendants with the possibility of posting a bond because the commercial bail bond company may be more flexible than the court regarding payment plans or types of collateral. *See* RP (8/15/12) 7:9-21.

“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). To determine whether a challenged law, rule, or action meets intermediate scrutiny, courts examine (1) whether the state has identified a **substantial** interest; (2) whether the stated interest is, in fact, the **actual** purpose of the rule; and (3) whether the rule **actually** achieves the stated interest.

First, not all state interests qualify as substantial. For example, reduction of court workloads and administrative convenience are not substantial state interests that can support discriminatory rules. *In re Mota*, 114 Wn.2d at 477; *see also Craig v. Boren*, 429 U.S. 190, 197-98 (1976). Courts must carefully examine the state’s actual and asserted

interest in the challenged rule to determine whether it rises to the level of a substantial and important interest.

Second, a state's asserted interest must be examined to ascertain whether it diverges from the *actual* purpose underlying the state's action. Courts "must inquire into the primacy of objectives to determine whether the state's proffered interest is substantial." *In re Mota*, 114 Wn.2d at 475. For example, in *Mississippi University for Women v. Hogan*, the Supreme Court held that Mississippi could not rely on its stated interest in compensating for historic discrimination against women to maintain a women-only School of Nursing, because it failed to show that women actually lacked opportunities to obtain training in the field of nursing. 458 U.S. at 729-30. "Thus, [the Court concluded] that, although the State recited a benign, compensatory purpose, it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification." *Id.* at 730 (internal quotation omitted). The Washington Supreme Court reached a similar conclusion in *In re Mota*, when the state attempted to justify a failure to award "good time" credit for time spent in county jail because prison time better served the state policy of rehabilitation. *See* 114 Wn.2d at 475-76. The Court determined that under the Sentencing Reform Act, "punishment [was] the paramount purpose" of a prison sentence, not rehabilitation. *Id.* at 476. Because

rehabilitation was no longer a substantial state purpose, the alleged rehabilitation distinction between jail and prison time could not justify treating the two populations differently and the policy violated equal protection. *Id.* at 475-77.

Finally, the challenged rule must *actually achieve* the state's substantial interest. The Supreme Court struck down the single-sex policy at issue in *Mississippi University for Women* because it failed to "substantially and directly" support the stated objective of compensating for historic discrimination against women; evidence showed that women obtained the same education and had the same opportunities when men were present (in fact, men were allowed to audit classes without credit). *Id.* at 730-31. Similarly, in *Craig v. Boren*, the Supreme Court found "the relationship between gender and traffic safety [an admittedly important government objective] far too tenuous" to support a gender-based difference in drinking ages for a particular type of beer. 429 U.S. 190, 204 (1976). In contrast, Washington's system allowing county jails to establish their own method of calculating good time credits survived intermediate scrutiny because it advanced the state's interest in punishment and discipline in county jails. *In re Fogle*, 128 Wn.2d at 64-65.

In the present case, the State can establish neither the existence of an important state interest nor a substantial relationship between the primary purposes of pre-trial bail and requiring a cash deposit bond.

1. The State's Asserted Interest Is Insubstantial.

The only interest expressed by the State before the Superior Court was the alleged victim's supposed interest in knowing that Mr. Barton was required to post a particular dollar amount prior to his release on bail. RP (8/15/12) 7:22-8:6; CP 17:9-11, 36:18-21, 41:4-5. The State failed to explain why a victim (or the public) needs to know the dollar amount the defendant pays as a fee for a surety bond in addition to the bail amount, stating only that "bail has to mean something to the victims." RP (8/15/12) 7:22-23. Mr. Barton cannot even speculate as to the meaning a victim or the public might ascribe to the financial cost of being released on bail. Realistically, crime victims probably have very little interest in the cost of a bond; instead, they likely just want defendants to remain incarcerated until trial. But this goal runs contrary to Section 20, which makes all non-capital offenses bailable, and CrR 3.2, which presumes release in noncapital cases absent evidence of a likelihood of flight or danger to the community. *See* Crim. R. 3.2(a) ("Any person, other than a person charged with a capital offense, shall . . . be ordered released on the accused's personal recognizance pending trial unless . . .").

The State’s interest in publicizing the financial cost of bail fails to meet the threshold required by intermediate scrutiny to justify a rule that disproportionately affects the indigent. A substantial or important state interest must achieve something more than providing ambiguous “meaning” to the bail system.

2. The Use of Cash Deposit Bonds Fails to Achieve the Recognized Purposes Underlying the Bail System.

The State’s asserted interest in this case bears little or no relationship to the recognized goals of bail. Three primary purposes of bail have been identified by courts and court rules: bail (1) protects the presumption of innocence, *State v. French*, 88 Wn. App. 586, 593, 945 P.2d 752 (1997); *State ex rel. Wallen v. Noe*, 78 Wn.2d 484, 487, 475 P.2d 787 (1970); (2) secures the appearance of the defendant at court hearings and trial, *State v. Kramer*, 167 Wn.2d 548, 561, 219 P.3d 700 (2009); *see also State v. Paul*, 95 Wn. App. 775, 778, 976 P.2d 1272 (1999) (“In a criminal case, the *sole purpose* of bail is to ensure the appearance of the accused.”) (emphasis added); Crim. R. 3.2(b)-(c); and (3) limits the potential danger a defendant might pose to the public, Crim R. 3.2(d)-(e). As the Washington Supreme Court stated in *Wallen*:

“[Bail’s] true purpose is to free the defendant from imprisonment and to secure his presence before court at an appointed time. It serves to recognize and honor the

presumption under law that an accused is innocent until proven guilty. It is a constitutional right available to an accused *at the option of the accused*. It is not, and cannot be, a weapon within the arsenal of the government”

78 Wn.2d at 487 (emphasis added).

Requiring a cash deposit bond to the exclusion of bail by surety bond does not further these interests. First, release on bail protects the presumption of innocence by permitting “the unhampered preparation of a defense, and serv[ing] to prevent the infliction of punishment prior to conviction.” *Kinney v. Lenon*, 447 F.2d 596, 598 (9th Cir. 1971) (quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951)). In contrast, the State’s clear purpose in requesting a cash deposit bond in lieu of the more common surety bond was to reduce Mr. Barton’s chance of being released on bail. *See* RP (8/14/12) 5:6-16; RP (8/15/12) 7:9-8:8. The State’s goal acts in direct opposition to the presumption of innocence and hampers an indigent defendant’s ability to prepare his defense.

Second, requiring a cash deposit bond rather than a surety bond fails to better ensure the appearance of the accused at trial. Indeed, studies show that a surety bond best achieves this paramount purpose of bail. Bureau of Justice Statistics, U.S. Dep’t of Justice, Pub. No. NCJ 214994, *Pretrial Release of Felony Defendants in State Courts* 8-11 (Nov. 1997), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=834>. As

explained in Section IV(D), *infra*, commercial bail bond companies employ bond recovery agents to ensure the appearance of defendants released on surety bonds. *See, e.g.*, Jerry W. Watson & L. Jay Labe, *Bail Bonds*, in The Law of Miscellaneous & Commercial Surety 127, 139-40 (Todd C. Kazlow & Brice C. King eds., 2001) (explaining that bondsman has a common law, contractual, and statutory authority to take the defendant into custody to exonerate liability on a bail bond). These recovery agents provide defendants with a strong incentive to appear at trial. *See Pugh v. Rainwater*, 557 F.2d 1189, 1200 n.25 (5th Cir. 1977), *overturned*, 572 F.2d 1053 (5th Cir. 1978) (en banc); Goldfarb, *supra* page 17, at 118. And the system remains quite successful; only 18 percent of defendants released on surety bond fail to appear and only three percent are still fugitives after one year; in contrast, 22 percent of defendants released on a deposit bond like that at issue in this case fail to appear, and seven percent remain fugitives after one year. *Pretrial Release of Felony Defendants in State Courts*, *supra*, at 8-10. Courts recognize the utility of surety bonds in this respect: “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.” *Hance*, 910 A.2d at 878.

In contrast, the incentive to appear for trial after posting a cash deposit bond relies on the accused's wish to see the money returned. If the money belongs to a third party—the ability to borrow from whom the State conceded is required by the Washington Constitution, RP (10/18/12) 14:3-6—this incentive is obviously not particularly strong. In addition, law enforcement must return defendants who abscond after posting a cash deposit bond, shifting costs from the private to the public sector. And a public understanding of the cost of a bail bond has no effect on the defendant's incentive to appear at trial.

Finally, Mr. Barton knows of no connection between requiring a cash deposit bond and a reduction in an accused's alleged dangerousness. Again, the State's interest here appears to be avoiding Mr. Barton's release entirely. Bail may be denied if the State presents clear and convincing proof of a defendant's "propensity for violence that creates a substantial likelihood of danger to the community or any persons" when the defendant is charged with a crime punishable by the possibility of life in prison (i.e. a class A felony). *See* Wash. Const. art I, § 20; RCW 10.21.010 *et seq.* (implementing amendment to Section 20). Mr. Barton is charged with a class A felony punishable by up to life in prison. *See* RCW 9.94A.507; 9A.20.021(1)(a); 9A.44.073. But the State chose not to pursue a finding of dangerousness in this case. And although the court expressed

some general concerns regarding the dangerousness of releasing defendants prior to trial, *see* RP (8/15/12) 9:14-17 (obliquely referencing Maurice Clemmons' release on bail), the court did not make any findings that Mr. Barton presented a significant danger to the community. Nor did the court impose conditions on Mr. Barton's release under CrR 3.2(d), which allows the court to consider a defendant's alleged danger to the community. Instead, the court entered its bail order under CrR 3.2(b)(4), which relates solely to appearance, not dangerousness.

The State elected to pursue a bail order solely under CrR 3.2(b), rather than providing evidence of dangerousness. But it then requested a form of bail it knew Mr. Barton, an indigent defendant, could not pay without borrowing funds,¹² which runs directly contrary to the Washington Constitution's guarantee of bail and the Criminal Rules' instruction that the "court shall impose the least restrictive" condition that will ensure the accused's appearance. *See* Wash. Const. art. I, § 20; Crim. R. 3.2(b). The State used the requirement of a cash deposit bond to keep an indigent defendant in jail pending trial without making the showing of future dangerousness required by the Washington Constitution.

¹² Even if a criminal defendant in Mr. Barton's position could borrow funds (the unlikelihood of which is one of the reasons for a surety system), the State's concession that such borrowed funds could be used to satisfy the cash deposit amount completely undermines the State's position. As noted above, compared to a surety bond, a defendant who secures his release with funds borrowed from a third party would have far less incentive to appear as required, because only the third party would lose the funds.

The State's stated goal of informing the public about the money required to bail out of jail merely provides a shortcut to the State's ultimate goal of keeping indigent defendants in jail pending trial. *See* Hefley, *supra* note 10. Dissatisfied with the Legislature's failure to require a minimum payment rate for surety bonds, Snohomish County Prosecutor Mark Roe now seeks to impose this minimum payment rate one defendant at a time. *See id.* But his methods bear little or no relation to the essential purposes of bail. And absent such a connection, the State cannot show that its requirement that Mr. Barton bail out with a cash deposit bond, rather than a traditional surety bond, furthers a *substantial* state interest.

D. Public Policy Favors Reversal of the Trial Court's Imposition of a Cash Deposit Bond.

The judiciary must not invade the province of the legislature. Courts "cannot make laws. [They] can only apply the laws which the legislature makes to the facts of a particular case." *Fix v. Fix*, 33 Wn.2d 229, 231, 204 P.2d 1066 (1949); *see also Soter v. Cowles Publ'n Co.*, 162 Wn.2d 716, 758, 174 P.3d 60 (2007) (Madsen, J., concurring) ("[I]t is the legislature's province to amend a statute, not this court's."). But that is exactly what the trial court did when it accepted the State's interpretation of CrR 3.2(b)(4) and mandated a cash deposit bond.

It appears that the State's efforts to restrict access to sureties arose out of the 2009 tragedy involving Maurice Clemmons. Clemmons murdered four police officers in Lakewood, Washington in 2009. *See* Jonathan Martin, *Higher bails likely in courts despite deadlock in Olympia*, Seattle Times, June 4, 2011, available at http://seattletimes.com/html/localnews/2015235251_bail05m.html (last visited June 3, 2013). The public soon learned that Clemmons had been jailed on felony charges that could have resulted in life imprisonment, but had been released on bail days before the killings. *See id.*; *see also* H.R. B. Rep. ESHJR 4220, at 4 (Wash. 2010), available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/House/4220-S.E%20HBR%20APH%2010.pdf> (last visited June 3, 2013). Clemmons' family secured his release with a commercial surety bond. *See* Martin, *supra*.

In response to the Lakewood tragedy, the legislature created a bail practices work group ("Work Group")¹³ "to study bail practices and procedures in a comprehensive manner, and make recommendations to the governor, the Supreme Court, and the legislature." *See* S.B. Rep. 5056

¹³ Mark Roe, the Snohomish County Prosecuting Attorney, was a member of the Work Group, and has been particularly vociferous in his support of changing the bail system to require bail-eligible defendants to have more "skin in the game." *See* Bail Practices Work Group Report, Dec. 1, 2010, available at <http://www.leg.wa.gov/JointCommittees/BPWG/Documents/BailPracticesWorkGroupReport.pdf> (last visited June 2, 2013); *see also* Hefley, *supra* note 10; Martin, *supra* p. 42.

(Wash. 2011), *available at* <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/Senate/5056%20SBA%20JUD%2011.pdf> (last visited May 25, 2013); *see also* 2010 Wash. Legis. Serv. Ch. 256. The Work Group’s efforts ultimately resulted in an amendment to Section 20: courts may now deny bail “for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community.” Wash. Const. art. I, § 20; *see also* 2010 Wash. Legis. Serv. 1st Sp. Sess. Ch. 4220.

Some members of the Work Group felt that the constitutional amendment did not go far enough, and continued to press for legislation that required bail bond agencies to charge a fee equal to or greater than a certain percentage of the overall bond amount. *See* Martin, *supra* page 42. But these legislative efforts failed.

The amendment to Section 20 solved the problem brought to light by the Lakewood tragedy—Clemmons could have been detained without bail under RCW 10.21.010 *et seq.*, which implement the amendments to Section 20. And as discussed above in Section IV(C)(2), the State could have asked the trial court to detain Mr. Barton without bail, because the charged offense is punishable by a maximum of life in prison. RCW

9.94A.507; 9A.20.021(1)(a); 9A.44.073. But the State declined to pursue this path. Notwithstanding this, the State is now attempting to achieve judicially what it did not achieve legislatively—the creation of a system where trial courts may regulate the amount of *cash* a defendant needs to secure pretrial release.

Before the trial court, the State argued that the public has a right to know the amount of cash defendants must pay out of pocket to obtain a bond, which is not always possible when defendants negotiate private bond contracts with commercial bail bond companies. RP (8/15/12) 7:22-8:6; CP 17:9-11, 36:18-21, 41:4-5. This contention appears to be related to the prosecutors' complaint that when defendants obtain bonds for less than ten percent cash down, they do not "have enough skin in the game," allegedly making them less likely to appear for trial. *See, e.g.,* Martin, *supra* page 42.

The Superior Court's October 18 Order also appears to be the result of serious misconceptions about the commercial bond process. First, during the October 18 hearing, the court expressed a belief that a defendant could obtain a \$500,000 bond without any payment, collateral, or other security. RP (10/18/12) 20:18-23; 26:18-27:2. This idea probably came from the prosecutor, who made the same argument in previous hearings. RP (8/14/12) 5:6-11; RP (8/15/12) 7:9-21. Regardless

of the advertisements the court and prosecutor apparently saw outside the Snohomish County courthouse, bail bond companies would not be in business long if they regularly took \$500,000 risks on indigent defendants (particularly on those indigent defendants whose appearance at a trial could result in lifetime imprisonment) without requiring any fee or collateral.

Second, the court believed these allegedly “free” commercial bail bonds to be “unsecured” under CrR 3.2(b). RP (10/18/12) 20:16-23; 21:13-17; 26:12-27:14. But all commercial bail bonds are secured within the meaning of the court rules. The State strictly regulates commercial bail bond agencies and each Superior Court individually justifies particular agencies to do business with that court. *See supra* Section IV(B).

The October 18 Order is based on a fundamental misunderstanding of the economic incentives and practical realities of the modern commercial bail bond system. Commercial bail bond companies operate like insurance companies; they require money up front to provide bonds—usually about ten percent of the total bail amount—and use the cash earned from providing bonds to many defendants to insure against the risk of paying out the full amount of bail if any single defendant flees. *See Pretrial Release of Felony Defendants in State Courts, supra* page 38, at

4; *see also* Watson & Labe, *supra* page 38, at 130 (“Commercial bail is regulated in most states as a form of insurance.”). Bail bond companies may also require further collateral to protect against the risk of loss. *See Pretrial Release of Felony Defendants in State Court, supra* page 38, at 4; Todd C. Barsumian, *Bail Bondsmen & Bounty Hunters: Re-Examining the Right to Recapture*, 47 Drake L. Rev. 877, 883 (1998-99) (citing Goldfarb, *supra* page 17, at 95).

Money paid for a commercial bail bond—the premium—is a sunk cost to the defendant. That payment—whether \$10 or \$10,000—will never be returned to the defendant, even if he appears promptly at all required court appearances.¹⁴ *Pugh*, 557 F.2d at 1199-1200. The motivation to appear in court comes not from the hope of reward, i.e., regaining the money spent (either personally or by a third party), *but from the fear of punishment*, i.e., sanctions from the court and having a bail bondsman forcibly return the defendant to jail. *Id.* at 1200; *see also* RCW 9A.76.170 (making bail jumping a felony when the defendant was held for, charged with, or convicted of a felony). “Because the bondsman does not want to lose money, he has a powerful incentive to make sure that the defendant for whom he is surety appears at trial.” *Pugh*, 557 F.2d at 1200; *see also* Watson & Labe, *supra* page 38, at 139-40 (explaining that

¹⁴ Alternative forms of collateral provided in addition to the basic cost of a bond may be recoverable upon exoneration of the bond.

bondsman has common law, contractual, and statutory authority to take the defendant into custody to exonerate liability on a bail bond); *Taylor v. Taintor*, 83 U.S. 366, 371 (1892) (recognizing common law right of bail bondsmen and their agents to arrest persons for whom they have undertaken bail). “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.” *Hance*, 910 A.2d at 878; *see also* RCW 10.19.090.

The commercial bondsman and potential court sanctions—not the money paid—provides the incentive to the defendant not to flee. *Pugh*, 557 F.2d at 1200 n.25 (“The principle deterrent against flight is the danger of being caught and suffering added detriment as a result.” (quoting Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 1125, 1163 (1965))); *see also* Ronald Goldfarb, Ransom: A Critique of the American Bail System 118 (1965). The total bail amount provides an economic incentive to the commercial bondsman to set appropriate prices for bonds, balancing the defendant’s risk of flight—and the subsequent cost of apprehending the defendant or paying the full bond amount—against commercial interests in providing lower cost bonds. The bail amount does not, therefore, affect the amount of “skin” the defendant has in the

“game”; it sets the proper incentives for a bondsman to set bond prices.

The bondsman then ensures the appearance of the defendant.

Studies demonstrate that this commercial bond approach remains more effective than alternate forms of bail, including cash deposits with the court, in guaranteeing the appearance of the defendant. Watson & Labe, *supra* page 38, at 133 (citing Bureau of Justice Statistics, U.S. Dep’t of Justice, Pub. No. NCJ 148818, *Pretrial Release of Felony Defendants*, 1992 10 (Nov. 1994), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=835>); see also *Pretrial Release of Felony Defendants in State Courts*, *supra* page 38, at 8-11 (for example, only 18% of defendants released on surety bond fail to appear and only 3% are still fugitives after one year; in contrast, 22% of defendants released on a deposit bond like that at issue in this case fail to appear, and 7% remain fugitives after one year).

E. Cash Deposit Bonds Constitute Unconstitutionally Excessive Bail in Violation of the Eighth Amendment and Article I, Section 14

The October 18 Order imposed excessive bail on Mr. Barton, because the cash deposit bond was imposed to keep Mr. Barton in jail pending trial, rather than to assure his presence at future court proceedings. Both the federal and state constitutions guarantee that “[e]xcessive bail shall not be required.” U.S. Const. amend. VIII; Wash.

Const. art. I, § 14. “Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.” *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

Bail serves limited functions, protecting the presumption of innocence, securing a defendant’s appearance at trial, and limiting the potential danger a defendant may pose to the public. *See supra* Section IV(C)(2). Bail must be fixed for each defendant based only on standards relevant to these purposes. *Stack*, 342 U.S. at 5. The October 18 Order imposed a cash deposit bond form of bail, which fails to achieve any of the functions of bail. *See supra* Section IV(C)(2). Because the October 18 Order did nothing more to ensure Mr. Barton’s appearance than a surety bond would have done, the order directly violated the federal and state constitutions. In this case, the very structure of the October 18 Order—i.e. requiring a cash deposit bond—violated the Eighth Amendment and Article I, Section 14, irrespective of the amount of bail required.

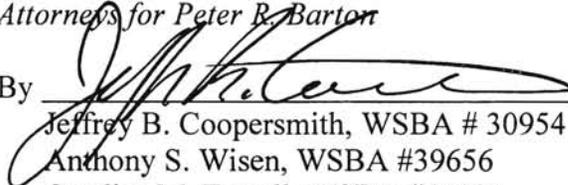
IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 6th day of June, 2013.

Davis Wright Tremaine LLP
Attorneys for Peter R. Barton

By



Jeffrey B. Coopersmith, WSBA # 30954
Anthony S. Wisen, WSBA #39656
Candice M. Tewell, WSBA #41131

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.

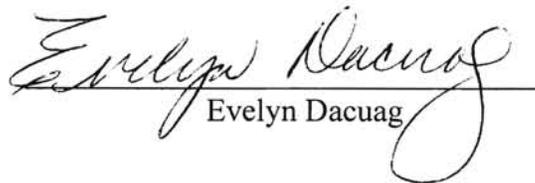
On June 6, 2013, I caused to be served in the manner noted below, true and correct copies of the foregoing on the following:

Seth Aaron Fine, WSBA #10937 **Via Hand Delivery**
Deputy Prosecuting Attorney
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3000 Rockefeller Avenue, M/S 504
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Kathleen Webber, WSBA #16040 **Via Hand Delivery**
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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 6th day of June, 2013, in Seattle, Washington.


Evelyn Dacuag

APPENDIX A

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

▷ Only the Westlaw citation is currently available.

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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APPENDIX B

C

West's Revised Code of Washington Annotated Currentness

Title 10 Appendix. Criminal Procedure

⌘ Superior Court Criminal Rules (Crr) (Refs & Annos)

⌘ 3. Rights of Defendants

→ → **RULE 3.2 RELEASE OF ACCUSED**

If the court does not find, or a court has not previously found, probable cause, the accused shall be released without conditions.

(a) Presumption of Release in Noncapital Cases. Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance pursuant to rule 3.2.1 or CrRLJ 3. 2.1 be ordered released on the accused's personal recognizance pending trial unless:

(1) the court determines that such recognizance will not reasonably assure the accused's appearance, when required, or

(2) there is shown a likely danger that the accused:

(a) will commit a violent crime, or

(b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

For the purpose of this rule, "violent crimes" are not limited to crimes defined as violent offenses in RCW 9.94A.030.

In making the determination herein, the court shall, on the available information, consider the relevant facts including, but not limited to, those in subsections (c) and (e) of this rule.

(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 that the accused will be present for later 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.

(c) Relevant Factors--Future Appearance. In determining which conditions of release will reasonably assure the accused's appearance, the court shall, on the available information, consider the relevant facts including but not limited to:

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

the accused in complying with conditions of release;

(8) The nature of the charge, if relevant to the risk of nonappearance;

(9) Any other factors indicating the accused's ties to the community.

(d) Showing of Substantial Danger--Conditions of Release. Upon a showing that there exists a substantial danger that the accused will commit a violent crime or that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the court may impose one or more of the following nonexclusive conditions:

(1) Prohibit the accused from approaching or communicating in any manner with particular persons or classes of persons;

(2) Prohibit the accused from going to certain geographical areas or premises;

(3) Prohibit the accused from possessing any dangerous weapons or firearms, or engaging in certain described activities or possessing or consuming any intoxicating liquors or drugs not prescribed to the accused;

(4) Require the accused to report regularly to and remain under the supervision of an officer of the court or other person or agency;

(5) Prohibit the accused from committing any violations of criminal law;

(6) Require the accused to post a secured or unsecured bond or deposit cash in lieu thereof, conditioned on compliance with all conditions of release. This condition may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community. If the court determines under this section 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 safety of the community and prevent the defendant from intimidating witnesses or otherwise unlawfully interfering with the administration of justice.

(7) Place the accused in the custody of a designated person or organization agreeing to supervise the accused;

(8) Place restrictions on the travel, association, or place of abode of the accused during the period of release;

(9) Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or

(10) Impose any condition other than detention to assure noninterference with the administration of justice and reduce danger to others or the community.

(e) Relevant Factors--Showing of Substantial Danger. In determining which conditions of release will reasonably assure the accused's noninterference with the administration of justice, and reduce danger to others or the community, the court shall, on the available information, consider the relevant facts including but not limited to:

(1) The accused's criminal record;

(2) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;

(3) The nature of the charge;

(4) The accused's reputation, character and mental condition;

(5) The accused's past record of threats to victims or witnesses or interference with witnesses or the administration of justice;

(6) Whether or not there is evidence of present threats or intimidation directed to witnesses;

(7) The accused's past record of committing offenses while on pretrial release, probation or parole; and

(8) The accused's past record of use of or threatened use of deadly weapons or firearms, especially to victim's or witnesses.

(f) Delay of Release. The court may delay release of a person in the following circumstances:

(1) If the person is intoxicated and release will jeopardize the person's safety or that of others, the court may delay release of the person or have the person transferred to the custody and care of a treatment center.

(2) If the person's mental condition is such that the court believes the person should be interviewed by a mental health professional for possible commitment to a mental treatment facility pursuant to RCW 71.05, the court may delay release of the person.

(3) Unless other grounds exist for continued detention, a person detained pursuant to this section must be released from detention not later than 24 hours after the preliminary appearance.

(g) Release in Capital Cases. Any person charged with a capital offense shall not be released in accordance with this rule unless the court finds that release on conditions will reasonably assure that the accused will appear for later hearings, will not significantly interfere with the administration of justice and will not pose a substantial danger to another or the community. If a risk of flight, interference or danger is believed to exist, the person may be ordered detained without bail.

(h) Release After Finding or Plea of Guilty. After a person has been found or pleaded guilty, and subject to RCW 9.95.062, 9.95.064, 10.64.025, and 10.64.027, the court may revoke, modify, or suspend the terms of release and/or bail previously ordered.

(i) Order for Release. A court authorizing the release of the accused under this rule shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform the accused of the penalties applicable to violations of the conditions imposed, if any, shall inform the accused of the penalties applicable to violations of the conditions of the accused's release and shall advise the accused that a warrant for the accused's arrest may be issued upon any such violation.

(j) Review of Conditions.

(1) At any time after the preliminary appearance, an accused who is being detained due to failure to post bail may move for reconsideration of bail. In connection with this motion, both parties may present information by proffer or otherwise. If deemed necessary for a fair determination of the issue, the court may direct the taking of additional testimony.

(2) A hearing on the motion shall be held within a reasonable time. An electronic or stenographic record of the hearing shall be made. Following the hearing, the court shall promptly enter an order setting out the conditions of release in accordance with section (i). If a bail requirement is imposed or maintained, the court shall set out its reasons on the record or in writing.

(k) Amendment or Revocation of Order.

(1) The court ordering the release of an accused on any condition specified in this rule may at any time on change of circumstances, new information or showing of good cause amend its order to impose additional or different conditions for release.

(2) Upon a showing that the accused has willfully violated a condition of release, the court may revoke release and may order forfeiture of any bond. Before entering an order revoking release or forfeiting bail, the court shall hold a hearing in accordance with section (j). Release may be revoked only if the violation is proved by clear and convincing evidence.

(l) Arrest for Violation of Conditions.

(1) *Arrest With Warrant.* Upon the court's own motion or a verified application by the prosecuting attorney al-

leging with specificity that an accused has willfully violated a condition of the accused's release, a court shall order the accused to appear for immediate hearing or issue a warrant directing the arrest of the accused for immediate hearing for reconsideration of conditions of release pursuant to section (k).

(2) *Arrest Without Warrant.* A law enforcement officer having probable cause to believe that an accused released pending trial for a felony is about to leave the state or has violated a condition of such release under circumstances rendering the securing of a warrant impracticable may arrest the accused and take him forthwith before the court for reconsideration of conditions of release pursuant to section (k).

(m) Evidence. Information stated in, or offered in connection with, any order entered pursuant to this rule need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(n) Forfeiture. Nothing contained in this rule shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.

(o) Accused Released on Recognizance or Bail--Absence--Forfeiture. If the accused has been released on the accused's own recognizance, on bail, or has deposited money instead thereof, and does not appear when the accused's personal appearance is necessary or violated conditions of release, the court, in addition to the forfeiture of the recognizance, or of the money deposited, may direct the clerk to issue a bench warrant for the accused's arrest.

CREDIT(S)

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