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DAVIS WRIGHT TREMAINE

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

STATE OF WASHINGTON

Respondent

v.

PETER R. BARTON,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. CrR 3.2(b)(4) permits the court to require posting a bond and deposit in the registry of the court in cash or other security a sum not to exceed 10 percent of the amount of the bond. Does this court rule violate Washington Constitution art. 1, §20 guarantee of bail by sufficient sureties?

2. Should the defendant's equal protection challenge to the bail order be analyzed under the rational relationship test or the intermediate scrutiny test?

3. Does CrR 3.2(b)(4) violate the equal protection guarantees under the Fourteenth Amendment and Washington Constitution art. I, §12.

4. Should the Court decline to consider public policy grounds as a basis on which to vacate a bail order, where the order was entered pursuant to a court rule?

5. Was bail ordered pursuant to CrR 3.2(b)(4) constitutionally excessive?

II. STATEMENT OF THE CASE

The defendant, Peter Richard Barton, has been charged with one count of rape of a child first degree. 1 CP 61-62. The court initially entered an order requiring the defendant to post \$250,000

either by a bond with sufficient sureties, or cash in registry of the court as a pre-condition to release from confinement. 1 CP 54-55. After initially setting bail the court was provided more information regarding the defendant's likelihood to appear and his potential danger to the community. Specifically the court was advised that this case involved the defendant's second strike, which if convicted meant he would be sentenced to life without the possibility of parole. The defendant had not been compliant while on community custody; he had numerous violation hearing and had failed to complete sex offender treatment and drug treatment. The defendant had other criminal convictions as well, including two convictions for failure to register as a sex offender. In addition to the victim in the charged offense, there were other offenses involving two other victims, which could result in additional charges. 1 CP 56-60.

Upon receipt of additional information the court amended the detention/release order to read:

The defendant shall post bail in the amount of \$500,000 [x] by executing a bond with depositing 10% cash in the registry of the court. . . The defendant shall be detained in the Snohomish County Jail until such bail is posted.

1 CP 50.

The court subsequently amended the order to read:

Defendant's order on release, section 1.1 shall be modified to read: Defendant shall execute a bond in the amount of \$500,000 and deposit in the registry of the court in \$50,000 cash or other security, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition of release. This order is intended to include all of the language of CrR 3.2(b)(4).

1 CP 13.

The defendant sought discretionary review of the court's order which the State did not oppose.

III. ARGUMENT

A. THE BAIL ORDER DOES NOT VIOLATE THE SUFFICIENT SURETIES CLAUSE OF WASHINGTON CONSTITUTION ART. 1 SECTION 20.

The defendant first contends that the bail order in this case violates the "sufficient sureties" clause in Art. I, §20. That provision states:

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.

Washington Constitution, art. 1, §20.

Conditions under which an accused is released pending trial are governed by court rule. Any person who is not charged with a capital offense must be released on his personal recognizance unless the court determines that such recognizance will not reasonably assure the accused's appearance when required or there is shown a danger that the accused will commit a violent crime or will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice. CrR 3.2(a). If the court determines the accused is not likely to appear when required then the court may impose conditions set out in CrR 3.2(b). The court may

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.

CrR 3.2(b)(4).

The trial court's bail order was authorized by CrR 3.2(b)(4). The defendant argues the requirement that he post 10% of the total bail amount in cash or other security deprives him of the right to "sufficient sureties." Because the court's order tracked the court rule, and his challenges apply to any bail order entered pursuant to

the rule, his argument is in fact a constitutional challenge to that rule.

Whether a court rule violates a constitutional provision is a question of law which is reviewed de novo. In re Detention of D.F.F., 172 Wn.2d 37, 41, 256 P.3d 357 (2011). In order to determine whether the rule violates the constitutional provision, the Court must interpret the meaning of “sufficient sureties” within the context of art. 1, §20, permitting bail. This appears to be a question of first impression in this state.

When interpreting a constitutional provision the court will first look to the plain language of the text, and accord it its reasonable interpretation. Bothell v. Barnhart, 172 Wn.2d 223, 229, 257 P.3d 648 (2011). The words in the text of the provision are given their common and ordinary meaning as determined at the time they were drafted. Washington Water Jet v. Yarbrough, 151 Wn.2d 470, 477, 90 P.3d 42 (2004), cert. denied, 543 U.S. 1120 (2005), Westerman v. Cary, 125 Wn.2d 277, 288, 892 P.2d 1067 (1994) (“To understand what the framers intended, we look to the right as it existed at the time of the constitution’s adoption.”) To ascertain the meaning of specific words in constitutional provisions the court may look to the historical context of the constitutional provision for

guidance. Yarbrough, 151 Wn.2d at 477. It may also consult dictionaries published about the time the constitution was adopted. Id at 481. Contemporaneous newspaper articles may also provide guidance when discerning the drafter's intent. Id. at 485. In addition, the court may also consider how other states have interpreted similar constitutional provisions. Id. at 493-500.

The historical context in which the constitutional right to bail was adopted does provide guidance in regard to this provision. Originally bail was a medieval practice designed to serve the interest of the state, the prisoner, and a surety. State v. Briggs, 666 N.W.2d 573, 579 (Iowa 2003). The state avoided the cost of jailing the prisoner, the prisoner enjoyed freedom pending trial, and the surety was granted wide-ranging powers to ensure the prisoner appeared for trial. Id. As time passed though the purpose of bail shifted from protecting the prisoner to protecting the court's interest in assuring the defendant appeared for trial. Bail-The Constitutionality Of Cash Only Bail Orders, State v. Brooks, 604 N.W. 2d 345 (Minn 2000), 32 Rutgers L.J. 1343, 1350 (Schmid 2001). Washington courts have recognized that the court's interest is the main reason for bail in modern times. State v. Paul, 95 Wn. App. 775, 778, 976 P.2d 1272 (1999), State v. Banuelos, 91 Wn

App. 860, 863, 960 P.2d 952 (1998), State v. Kramer, 167 Wn.2d 548, 561, 219 P.3d 700 (2009). The court has also permitted bail to ensure the accused does not commit acts of violence, intimidate witnesses, or otherwise interfere with the administration of justice. CrR 3.2(a)(2), CrR 3.2(d)(6).

The method of granting bail has also changed. Originally a prisoner's release was conditioned on delivering him into the hands of a responsible third party known to the sheriff and prisoner, who would then guarantee the prisoner's appearance at trial. Briggs, 666 N.W.2d at 579. This kind of surety stood in the prisoner's place, suffering the same punishment the prisoner would have if the prisoner failed to appear. Id. The surety also faced loss of his own property or money. Bail: An Ancient Practice Reexamined, 70 Yale L.J. 966 (1961). The bail system changed when it was imported into American jurisprudence. As individual's ties to their communities became more attenuated when people pioneered the western frontier, it became more difficult to assess the sufficiency of a personal surety. Thus by the mid-nineteenth century the commercial bond system began to develop, with bondmen charging fees to serve as sureties. Briggs, 666 N.W.2d at 580.

Reference to dictionary definitions in use at the time the constitution was adopted also shed some light on the drafter's intent. The first edition of Black's Law Dictionary, published in 1891 defines a surety as "one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance of the latter of some act in favor of a third person, or hypothecates property as security therefor." Black's Dictionary of Law 1142 (West. 1891). Another dictionary published 8 years later defined surety as "[a] person who binds himself for the payment of a sum of money, or for the performance of something else, for another." Bouvier's Law Dictionary at 1073 (Boston Book Company 1897).

The historical context of bail and contemporary dictionary definitions indicate that at the time the constitution was adopted a "surety" as contemplated by the "sufficient sureties" clause in article 1, §20 was merely a person who would undertake a bail obligation on behalf of "persons charged with a crime." The term "surety" did not inherently suggest a limitation on the character of the obligation undertaken. Certainly it included the payment of a sum of money without limitation as to when that payment should be made. Nor did it suggest who qualified as a surety; a surety could be a private

person, such as a relative or friend, or it could be professional engaged in the for profit business of writing bail bonds. Early cases demonstrate both kinds of sureties posted cash to satisfy a charged person's obligations. . . . State v. Jakshitz, 76 Wash. 253, 136 P. 132 (1913), State v. Bailey, 121 Wash. 413, 209 P. 847 (1922).

Reports of the convention in contemporary newspaper articles and in the Journal of the Washington State Constitutional Convention do not provide much assistance in assessing what the framers meant by "sufficient sureties". Contemporary newspaper articles at the time shed no light on why the members of the constitutional convention modified bailable with "by sufficient sureties." See Seattle Times July 29, 1889, p. 2-86 to 2-88 and Spokane Falls Review, July 30, 1889, 3-53 to 3-54, Washington State Constitutional Convention 1889: Contemporary Newspaper Articles (Hien, 1999). Those sources indicate that the bill of rights was passed with no discussion.

The Journal contains no discussion regarding why the committee recommended adding the sufficient sureties language, or why the delegates favored its inclusion. Because there was no discussion regarding the bill of rights before it was adopted,

changes from original draft through final amendments do not explain what the drafter intended. The original draft of the bill of rights did not include the sufficient sureties language. It stated “[o]ffenses, except murder and treason, shall be bailable...” The Journal of the Washington State Constitutional Convention 1889, 52 (Rosennow 1962). The committee reviewing the bill of rights recommended adoption to an amended provision stating “[a]ll prisoners shall be bailable by sufficient sureties...” Id at 155. Art I, §20 was ultimately adopted with the sufficient sureties language. Id. at 509.

Although the Journal of the Washington State Convention references the Oregon and Indiana constitutional provisions similar to Art. 1, § 20, there were a total of 23 states¹ that had adopted

¹ Del. Const. art I, §12 (admitted Dec 7, 1787), PA. Const. art. I, §14 (admitted Dec 12, 1787), N.J. Const. art. I, §11 (admitted Dec 18, 1787), Conn. Const. art. I §8 (admitted Jan 9, 1788), S.C. Const. art. I, §15 (admitted May 23, 1788), Vt. Const. chap II, §40 (admitted March 4, 1791), Ky, const. §16 (admitted June 1, 1792), Tenn. Const. art. I, §15 (admitted June 1, 1792), Ohio Const. art. I § 9 (admitted March 1, 1803), La. Const. art. 1, § 18 (admitted April 30, 1812), Ind. Const. art. I, § 17 (admitted Dec. 11, 1816), Ala. Const. art. I, § 16 (admitted Dec. 14, 1819), Mo. Const. art. I, § 20 (admitted Aug. 10, 1821), Ark. Const. art. II, §8, (admitted June 15, 1836), Tex. Const. art. I, §11 (admitted Dec. 29, 1845), Iowa Const. art. I, §12 (admitted Dec. 28, 1846), Minn. Const. art. I, §7 (admitted May 11, 1858) Ore. Const. art. I, §14 (admitted Feb. 14, 1859), Kan. Const. Bill of Rights § 9 (admitted Jan 29, 1961), Nev. Const. art, I, §7 (admitted Oct. 31, 1864), N.D. Const. art. I, §11 admitted Nov. 2, 1889), S.D. Const. art. VI, §8 (admitted Nov. 2, 1889), Mont. Const. art II, §21 (admitted Nov 8, 1889), Wash. Const. art. 1, §20 (admitted Nov. 11, 1889). See Bail-Defining Sufficient Sureties: the Constitutionality of Cash-Only Bail, State v. Briggs, 666 N.W.2d 573

constitutional provisions guaranteeing the right to bail by sufficient sureties by the time Washington adopted this language. Two states that adopted the “bailable by sufficient sureties “ before Washington have considered the specific question presented here; whether a deposit with the clerk of the court in cash or security equal to 10% of the total bail amount offends a constitutional provision for bail by “sufficient sureties.”

The Illinois Supreme Court considered the question in People ex. rel. Gendron v. Ingram, 217 N.E.2d 803 (Ill. 1966). There the court discussed two bail statutes in light of former Illinois Constitution Art. II, § 7 (now codified as Illinois Constitution Art. I, § 9). Like Washington, the Illinois constitution provided “all persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great...” Id. Illinois amended its bail statutes to limit release on bail to two methods. One method required a person for whom bail was set to execute a bail bond and deposit with the clerk of the court a sum of money equal to 10% of the bail. Gendron, 217 N.E.2d at 805. The Court held that statute did not violate the sufficient sureties clause.

(Iowa 2003), 35 Rutgers L.J. 1407, n. 32, http://americanhistory.about.com/od/states/a/state_admission.htm

The Court observed that a bond with sufficient sureties was premised on the assumption that an economic loss to the accused, or those close to him, would assure his presence at trial. Since bail was intended to assure the accused would appear for trial, the court reasoned that “sufficient” as used in the constitution, “means sufficient to accomplish the purpose of bail, not just the ability to pay in the event of a ‘skip.’” *Id.* at 806.

Likewise the Oregon court considered an Oregon statute that required a defendant to “execute a release agreement” and deposit with the clerk of the court a sum of money equal to 10% of the security amount, but not less than \$25.00 in order to secure his release from confinement. Burton v. Tomlinson, 527 P.2d 123, 125 (Ore. 1974). The court rejected the defendant’s contention that this statute violated Oregon Constitution Art. I, § 14 which states “[o]ffenses (sic), except murder, and treason, shall be bailable by sufficient sureties.” The Court concluded that the constitutional provision did not say that the lawful release of a defendant may be accomplished only through the medium of sureties. “Were this contention sound, release of a defendant on his own recognizance or by any other means would be constitutionally prohibited – an obvious absurdity.” *Id.* at 126.

Both of these cases are persuasive authority to conclude a bail order entered pursuant to CrR 3.2(b)(4) does not violate the sufficient sureties clause in light of how release pending trial has been treated historically. Throughout history the interest served by bail has always been to ensure the defendant appears for trial or other hearings as required by the court. Thus, a surety that is not sufficient to achieve that goal is not guaranteed by the State constitution. Trial judges have been given discretion to determine what is "sufficient" to satisfy that interest. State v. Reese, 15 Wn App. 619, 620, 550 P.2d 1179 (1976). In some cases a judge may determine a sufficient surety is the defendant's own promise to appear. CrR 3.2(a) (ordering release of an accused unless the court finds recognizance will not reasonably assure the accused's appearance or the accused presents some danger of violent actions or will interfere with the administration of justice.) As the Oregon Court observed, if the phrase "sufficient sureties" limited the court's authority to release the defendant only on the basis that a surety was willing and available to be responsible for the defendant, it would eliminate the possibility of personal recognizance or other modes of release.

The defendant presents several arguments to support his position that the bail order entered in his case violates Washington Constitution Art. 1, §20. His arguments are based on an incorrect statement of facts and incorrect assumptions.

The defendant argues that the purpose of bail is to “protect the accused rather than the court.” BOA at 7 quoting, State v. Brooks, 604 N.W.2d 345, 350 (Minn 2000). But as discussed, bail has historically served many purposes, including protecting the court’s interest in the orderly administration of justice by ensuring the defendant appears when required, and ensuring the defendant does not frustrate the ends of justice while released pending trial.

The defendant also argues that surety as contemplated in Article I, §20 has a specific meaning, inconsistent with the court’s bail order. BOA at 8-13. He cites the definitions for “cash bail,” “bail bond,” and “surety” considered by this Court in Marriage of Bralley, 70 Wn. App. 646, 855 P.2d 1174 (1993). He argues that a surety is not one who posts cash or property with the court because a “surety” as defined in Bralley is one who posts a bond and whose role is to produce the accused. Citing a law review article he states that a constitutionally “sufficient surety” is one who provides adequate security to fulfill its obligations, a role which is filled by

Washington bail bond companies, but is not satisfied when a third person deposits cash bail with the court.

Historically a surety did post money or property to secure the release of the defendant. The surety risked its loss if the accused failed to appear as required. Bail, 70 Yale L.J. at 966. The commercial bail bondsman did not exist at the time that many states with the same constitutional provision adopted the sufficient sureties language, and it was just coming into existence when Washington adopted that language. Briggs, 666 N.W.2d at 580. It is unlikely then that the framers intended to limit that language to the use of professional bail bondsmen.

Bralley is also not helpful in this analysis because it was a civil case involving forfeiture of bail to pay child support. Because the case involved a civil action, Art. 1, §20 did not apply Id. at 654, n. 5. The references to contemporary definitions of terms in that case do not explain what the framers of the constitution would have understood those terms to mean when they adopted the language "bail by sufficient sureties." Id. at 652. It therefore provides little guidance to determine whether CrR 3.2(b)(4) unconstitutionally denies a criminal defendant bail by sufficient sureties. Cf. Yakima v. Mollett, 115 Wn. App. 604, 610, 63 P.3d 177 (2003) (declining to

rely on Bralley and Paul, supra because neither addressed the ultimate issue under consideration, whether the court had authority to order “cash only” bail.).

The defendant also argues that the history of the sufficient sureties clause shows that the drafters of Washington's constitution intended a surety to mean a person or entity that posts a bond, not a cash deposit. BOA at 13. But as discussed, history does not support this claim.

The defendant cites Brooks for the proposition that the purpose of the sufficient sureties clause is to protect the accused rather than the court. BOA at 16. He then concludes that because business practices have evolved to a commercial bail bond system the constitution must guarantee him the access to a commercial bail bondsman. That argument fails because while business practices may change, the meaning of the constitution does not.

The defendant cites a number of cases for the proposition that a majority of states have found cash only bail violates a constitutional provision for bail by sufficient sureties. BOA at 17-21. None of these cases address the specific kind of bail authorized by CrR 3.2(b)(4) requiring 10% of the total bail to be posted in cash or other security. For that reason they are not persuasive authority to

find the bail order entered in this case violates the bail by sufficient sureties clause in Art. 1, §20.

Many of those cases do not support the defendant's position for other reasons as well. As the defendant acknowledges Mollett did not reach the constitutional question presented. Mollett, 115 Wn. App. at 605, BOA at 19. Reference to the Ohio Court's reasoning in State ex. rel. Jones v. Hendon, 609 N.E.2d 541 (1993) was merely dicta. Id. at 609. Other cases cited addressed completely unrelated issues. In Two Jinn, Inc. v. District Court of the Fourth Judicial District, 249 P.3d 840 (Idaho 2011) the court decided whether an administrative district judge had authority to issue regulations governing bail bond agents. The defendant's reference to cash only bail in that case was dicta, unsupported by any citation to authority or significant analysis. In Simms v. Oedeoven, 839 P.2d 381 (Wyo. 1992) the court considered the constitutionality of a court rule that allowed a trial court to impose a pre-trial no bail order. In State v. Golden, 546 So.2d 501, 503, writ denied, 547 So.2d 365. (La. 1989) the court found the existing authority in Louisiana did not permit a trial judge to set cash only bail, but left open the question whether the legislature could constitutionally enact such a statute. in State v. Rodriguez, 628

P.2d 280, 284 (Mont. 1981) the court specifically refused to decide whether cash only bail violated Montana's sufficient sureties clause, only speculating that it "may undermine" that provision.

The defendant acknowledges that other states have found cash only bail does not run afoul of similar sufficient sureties provisions. He distinguishes those cases by arguing that those states define sureties differently from Washington. He again references the dictionary definition set out in Bralley as well as a more recent legal definition of surety. BOA at 23. But those definitions are from modern legal dictionaries and say little about what the framers of the constitution would have understood those terms to mean.

To the extent that cases addressing the constitutionality of cash only bail may be helpful in analyzing bail orders entered pursuant to CrR 3.2(b)(4), those that have found they are constitutionally permissible support the conclusion the order entered here did not preclude the defendant from bail by sufficient sureties. The Iowa Supreme Court did a thoughtful and thorough analysis of the meaning of surety when determining whether a cash only bail violated that state's sufficient sureties clause in Briggs, supra. The court carefully set out how bail had been historically

developed. Briggs, 666 N.W.2d at 578-80. It concluded that the framers of that state's constitution did not intend to favor the commercial bondsman as the sole surety when it included the sufficient sureties clause. Id. at 583. The court reasoned that since commercial bonding only began to emerge about the time Iowa adopted its constitution, the traditional surety methods of personal, monetary, or property surety were not eclipsed by adoption of the states' sufficient sureties clause. Id. The framers of Washington's constitution would have had a similar frame of reference to those in Iowa, since Washington's constitution was drafted after Iowa's. See f.n. 1.

Alabama adopted the reasoning of the Court in Briggs to hold that cash only bail was not precluded by that state's sufficient sureties clause. Ex parte Singleton, 902 So.2d 132, 134-135 (Ala. 2004). Arizona relied on the kinds of sureties available in that State at the time it adopted its constitution in 1910, and that the purpose of bail was to ensure the defendant appeared for trial, to conclude that cash could constitute a "sufficient surety" under its constitution. Fragoso v. Fell, 111 P.3d 1027, 1032-34 (Ariz. 2005).

Recently the Missouri Supreme Court also addressed the issue in State v. Jackson, 384 S.W.3d 208 (Mo. 2012). There the

court surveyed cases from various states which had considered cash only bail in light of sufficient sureties clauses and found they fell in to two different camps. Courts which found cash only bail violated that provision relied on modern and contemporary dictionary definitions of surety. Those cases include State v Brooks, 604 N.W.2d 345 (Minn. 2000) and Smith v. Lies, 835 N.E.2d 5 (Ohio 2005) which the defendant relies on here. Jackson, 384 S.W.3d at 213. But other definitions, both modern and contemporary did not defined "surety" as narrowly as those relied on by the courts in Brooks and Smith. Id. Other cases, such as Briggs and State v. Guiterrez, 140 P.3d 1106, cert. denied, 143 P.3d 184 (N.M. 2006) looked to the historical use of the term surety to come to the opposite conclusion. Id. at 212-13. The Jackson court concluded that the combination of the minor role commercial bonding companies played at the time Missouri adopted its constitution, and the recognition by Missouri and other states that cash and other property had been used as bail supported the reading of sufficient sureties adopted by cases such as Briggs and Gutierrez. Id. at 215.

Like these authorities, this Court should consider the historical context in which bail arose to determine whether the 10%

cash or other security provision in CrR 3.2(b)(4) violates the State Constitution. From a historical perspective the framers of Washington's constitution would have understood that a surety was not necessarily a commercial bail bondsman, but could be a third person who put up cash or property to ensure the defendant appeared for trial once released from custody. Contrary to the defendant's position, the order in itself does not deny him access to a surety, because it does not limit who may post bail, including the 10% portion posted with the clerk of the court.²

The defendant's claim that the bail order prohibited him from employing a surety also misstates the court's order. There is nothing in the order that would prohibit the defendant from obtaining the services of a third party, either a professional bondsman or a private party, to post the bail amount ordered by the court. The cash or other security portion of the bail is not an additional bail, but rather it is part of the total bail ordered. The order in itself does not preclude the use of a professional bonding

² The defendant argues that the State concedes that a pre-trial cash only order is impermissible to then argue that an order posting 10% of the total bail in cash or other property is also impermissible. BOA at 23-24. Although the prosecutor at trial did not state the basis for that concession, clearly under Mollett it was based on the provisions of CrR 3.2(b)(5) and (7), not on the basis of the sufficient sureties clause of Art. 1, §20. The State clearly does not concede that cash only, or more pertinent here, a 10% cash or other security violates that constitutional provision.

company. A professional bonding company could take the premium collected when writing the bail bond and post it with the court to satisfy the 10% obligation. It would be entirely refundable upon the defendant's completion of his obligation to the court. Whether a professional bonding company chooses to do so or not as part of its normal business practice does not determine the constitutionality of a court rule or court order entered pursuant to that rule.

The defendant's arguments in favor of finding the 10% cash or security order unconstitutional are based on the mischaracterization of the order as a "cash only" bail order. It clearly is not a cash only order; not in the sense that the entire amount of bail ordered must be posted in cash or in the sense that cash is the only kind of property that could secure his release. The order contemplates three kinds of surety; (1) a bond of which a portion is either (2) cash or (3) *other security*. Thus reliance on cases finding "cash only" bail violates those State's "sufficient sureties" clauses, are not dispositive.

B. THE BAIL ORDER ENTERED PURSUANT TO CRR 3.2(b)(4) DID NOT VIOLATE EQUAL PROTECTION UNDER EITHER THE STATE OR FEDERAL CONSTITUTIONS.

1. The Court Should Use the Rational Relationship Test to Analyze Whether The Bail Order Violates Constitutional Guarantees of Equal Protection.

The defendant next contends that the bail order entered pursuant to CrR 3.2(b)(4) violated his right to equal protection under both the Fourteenth Amendment to the United States Constitution and Art. 1, §12 of the Washington Constitution. Equal protection under both constitutions requires that "persons similarly situated with respect to the legitimate purpose of the law receive like treatment." State v. Phelan, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983), quoting, Harmon v. McNutt, 91 Wn.2d 126, 130, 587 P.2d 537 (1978).

The Court applies one of three tests to analyze whether a violation of these provisions has occurred. Westerman v. Cary, 125 Wn.2d 277, 294-95, 892 P.2d 1067 (1994). Strict scrutiny applies when a suspect class or fundamental right is affected. Id. Under that test a law is upheld if it is necessary to accomplish a compelling state interest. Id. This test is applied when the class at issue is based on race, alienage, or national origin. State v. Schaaf, 109 Wn.2d 1, 18, 743 P.2d 240 (1987). Intermediate

scrutiny applies to classifications that affect an important right and a semi-suspect class not accountable for its status. Westerman, 125 Wn.2d at 295. Under this second test the challenged law must “fairly be viewed as furthering a substantial interest of the State.” Id. quoting, Phelan, 100 Wn.2d at 512. Thirdly, under the rational relationship test a law will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective. Id.

The defendant notes that courts have generally treated the two constitutional provisions as co-extensive. BOA at 29, n. 11. He cites two exceptions: Grant County Fire Protection District No. 5 v. City of Moses Lake, 145 Wn.2d 702, 42 P.3d 394 (2002) and Madison v. State, 161 Wn.2d 85, 163 P.3d 757 (2007).

The Court will decline to consider whether the state constitutional provision should be independently analyzed, and if so whether the State provision is more protective than its federal counter part, in the absence of an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). In re Mota, 114 Wn.2d 465, 472, 788 P.2d 538 (1990). In Grant County the parties performed that analysis. Grant County, 145 Wn.2d at 725. After considering those factors the court determined art, 1, §12 provided greater

protection when the challenged law provides undue favoritism to a minority class. Grant County, 145 Wn.2d at 731. The court reaffirmed that an independent state analysis under Art. 1, §12 was not appropriate unless the challenged law is a grant of positive favoritism to a minority class in Anderson v. King County, 158 Wn.2d 1, 16, 138 P.3d 963 (2006). One year later the court issued a plurality decision in Madison where no clear majority of the court agreed on when independent state analysis under Art. 1, §12 was appropriate. A plurality decision has little precedential value and is not binding on the courts. In re Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).

The challenged order here does not involve favoritism to a minority class. The defendant has not performed a Gunwall analysis. Nor has he explained why the class at issue is similar to those traditionally treated as suspect so as to justify strict scrutiny. Thus consistent with prior authorities this Court should decline the defendant's invitation to analyze this issue independently under article I, §12 and find that provision is more protective than its federal counterpart by applying strict scrutiny to the challenged bail order entered pursuant to a lawfully enacted court rule.

Alternatively, the defendant urges the Court to employ intermediate scrutiny. He argues the bail order affects a fundamental right to liberty and a semi-suspect class not accountable for its status, the poor. BOA at 31.

Intermediate scrutiny is only appropriate when the denial of a liberty interest is due to a semi-suspect classification. In re Fogle, 128 Wn.2d 56, 62, 904 P.2d 722 (1995). The defendant argues that the relevant liberty interest is his ability to be released on bail, relying on an incomplete quote from Mota, 114 Wn.2d at 474. The liberty interest in Mota involved the application of good time credit by the Department of Corrections to pre-sentence incarceration time served in the county jail once offenders were sent to prison. Under prior RCW 9.94A.150 DOC awarded credit for time served but not good time credit for pre-sentence incarceration. Id. at 468-69. In Mota the Court assumed a prisoner did not bail out because he lacked the financial resources to do so. Id. at 474. Thus intermediate scrutiny was appropriate because the failure to award good time credit was specifically a result of his indigent status.

Later the Court observed that failure to pay bail may not represent a classification based on wealth. Setting bail depends on many factors aside from wealth including the defendant's perceived

dangerousness, and likelihood of flight. Fogle, 128 Wn.2d at 36. Also the defendant may choose not to pay bail for reasons unrelated to his financial condition. Id.

Here the liberty interest is "bail by sufficient sureties." Bail was ordered in this case, and as discussed the defendant was not precluded from using a third party to post that bail for him. Because he has not been deprived of a liberty interest, the defendant cannot argue that his equal protection rights have been violated.

If the Court finds the liberty interest is not only the setting of bail but also release on bail then payment of that bail amount does not necessarily require intermediate scrutiny as the defendant argues. The Court applied the rational basis test to a challenge to the Illinois bail system in Schilb v. Kuebel, 404 U.S. 357, 92 S.Ct. 479, 30 L.Ed.2d 502 (1971). There the court considered an equal protection challenge to two alternative means of posting bail. One way allowed a prisoner to post the entire amount with the court clerk, and upon performing the conditions of the bond the bail would be refunded in whole. A second method allowed the prisoner to post 10% of the bail in cash with the clerk. Upon performance the entire amount less 10%, or 1% of the entire bail

ordered, was returned. The retained amount served as an administrative cost. Id. at 360-61. The court applied the rational basis test to a challenge to the second method because the question presented did not relate to the right to bail, but how that right was administered. Id. at 485. Here the question relates not to whether the defendant was entitled to bail, but what form that bail should have taken, either fully bondable, or partially bondable with 10% posted in cash or other security.

In Washington the Court applied intermediate scrutiny where the challenged law and the deprivation of liberty were clearly linked. In Phelan the Court applied intermediate scrutiny where the question involved whether an offender was entitled to credit against his minimum prison term for jail time served presentence. Phelan, 100 Wn.2d at 513-14. If it was not granted the defendant would have been deprived of actual physical liberty for the period of time served pre-sentence. But where the link between the challenged law and liberty was less clear the court employed the rational relation test. Schaaf, 109 Wn.2d at 21. There the Court revisited whether juveniles were constitutionally entitled to jury trials. Whether a juvenile would have been found guilty at a bench trial where he would have been acquitted by a jury could not be

determined in the abstract. Id. For that reason the Court found it unwise to apply the heightened scrutiny test where the statute in question did not directly implicate a physical liberty. Id.

Similarly, whether a defendant would be more likely to bail out on an order allowing for a secured bond than an order requiring 10% of the bond posted with the clerk is not certain. The defendant's case demonstrates that even when the court allows bond on the entire bail amount, the defendant may still not be able to obtain release. Counsel informed the court that even at the lower bail amount, neither the defendant nor any family or friend was able to post a bail bond. 8-15-12 RP 6-7. Because the question presented here relates to the administration of bail, and because the link between the defendant's release from jail and the order entered is not certain, the Court should employ the rational relation test.

2. The Order Does Not Violate Equal Protection Guarantees Under Either The Rational Relationship Or Intermediate Scrutiny Tests.

Under the rational relationship test the state has a legitimate State interest is the orderly and fair administration of justice. To that end the State's interest is not in holding those when there is reason to believe they would appear in court when directed to do so

and otherwise comply with court orders. Thus CrR 3.2(a) presumes release on personal recognizance pending trial unless the court finds that release will not reasonably assure the accused's presence when required, or there is a danger the accused will commit a violent crime or "will seek to intimate witnesses, or otherwise unlawfully interfere with the administration of justice."

If, when considering the factors set out in CrR 3.2(c) and (e) the court finds release on recognizance will not reasonably assure the orderly administration of justice it may condition release on one or more conditions set out in CrR 3.2(b) and (d). Several of those conditions include posting of bond or other security in various forms. CrR 3.2(b)(3), (4), (5), CrR 3.2(d)(6). The analysis in each case is necessarily fact specific, because no two defendants present the exact same background and circumstances. When bail is set the court must take into consideration the accused's financial resources "that will reasonably assure the accused's appearance." CrR 3.2(b).

Courts have routinely acknowledged that the purpose of bail is to provide the defendant incentive to appear in court when ordered to do so. Bralley, 70 Wn. App. at 657, n. 7 (noting the purpose of bail in the criminal context is to assure the appearance

of the accused, where in the civil context it also served to secure a valid judgment), Paul, 95 Wn. App. at 778, In re Williams, 121 Wn.2d 655, 665, 853 P.2d 444 (1993), Stack v. Boyle, 342 U.S. 1, 5, 72 S.Ct. 1, 96 L.Ed.3d 3 (1951). The Court has also implicitly indicated that bail may be imposed to ensure the defendant does not commit a violent act or intimidate or harass witnesses while released pending trial when it adopted CrR 3.2.

Bail provides an incentive for either the defendant, the surety, or both to ensure the defendant appear and comply with other court orders while released. Gendron, 217 N.E.2d at 805. When faced with potential economic loss in the event of failure to appear or other disobedience of court orders the incentive to comply is greater than without that coercive element of conditions of release. Similarly, the incentive to comply with court orders increases when money or other property will be return upon compliance with court orders. Thus requiring a portion of the bail ordered to be posted with the clerk of the court pending trial in a matter is relevant to assuring the defendant's presence at trial and compliance with other court orders.

Even if the Court accepts the defendant's position that intermediate scrutiny is appropriate, the bail order entered pursuant

to CrR 3.2(b)(4) is valid. Under this test, the court looks to whether the challenged law can be "fairly be viewed as furthering a substantial interest of the State." Westerman, 125 Wn.2d at 295.

As the bail system has developed commercial bail bondmen acting as sureties have typically required a fee in payment along with collateral for posting a bond with the court. Bail: 70 Yale L.J. at 968-70 (1961), Briggs, 666 N.W.2d at 580. If the defendant failed to appear the bail could be forfeited. RCW 10.19.090. Thus the bondsman had incentive to insure the defendant appeared in order to avoid forfeiture, and the defendant had incentive to appear in order to avoid the bondsman keeping the collateral taken to secure the bond that had been posted.

While a commercial bail bondsman is expected to ensure the defendant appear for trial, he or she has no role in ensuring other orders of the court are complied with. Thus, a court that imposes conditions pursuant to CrR 3.2(d) does not have a guarantee from the bondsman that the defendant will comply with those conditions. An order pursuant to CrR 3.2(b)(4) does provide that guarantee. 10% of the bond collected by the clerk may be "forfeited for violation of any condition of release." CrR 3.2(b)(4) (emphasis added.) An order entered pursuant to CrR 3.2(b)(4)

does provide economic incentive for the defendant, either directly or through a surety, to comply with no contact orders and other conditions designed to ensure the defendant does not commit violent acts, or interfere with the administration of justice while on release pending trial.

The defendant states that the State's only interest in this case was to ensure the defendant was not released on bail. BOA at 31. He argues the State's only justification for the 10% bail was to provide certainty to the victim' of the offense, who he claims have no legitimate interest in the outcome of the bail hearing. BOA at 35.³ The State's interest as outlined above is ensuring the defendant has a known economic incentive to appear before the court when required to do so and otherwise follow court orders.

The defendant's citations to the record do not support his position. The deputy prosecutor at oral argument did state that "bail had to mean something." 8-14-12 RP 5, 8-15-12 RP 7-8. But

³ The defendant incorrectly states the court made no findings under CrR 3.2(d) and entered a bail order under the CrR 3.2(b)(4) relating solely to appearance. While the condition that the defendant post 10% of the total bail in cash or other securities does relate to the findings regarding the defendant's likelihood of appearing, the court also found that pursuant to CrR 3.2(a)(2) there was a substantial likelihood the defendant would commit a violent crime, seek to intimate witnesses, or otherwise unlawfully interfere with the administration of justice. 1 CP 50. The court therefore ordered additional conditions pursuant to CrR 3.2(a)(2).

bail meaning something is not the same as keeping the defendant locked up pending trial. In his affidavit in support of bail the deputy prosecutor set out the nature of the allegations, the defendant's criminal history, his history of non-compliance while on community custody, and potential other charges. 1 CP 56-60. The prosecutor concluded by stating that the bail requested by the State "can assure the safety of the community and assure Defendant's appearance." 1 CP 60. The State did not seek the bail amount for the purpose of ensuring the defendant did not get released; the requested bail was sought to further legitimate State interest as outlined in CrR 3.2(a).

Victims as members of the community have the same interest the State has in ensuring bail amounts that will provide adequate incentive for the defendant to appear at trial and to not engage in conduct that will impede the administration of justice. When a defendant fails to appear the trial is delayed. Victims are left in limbo until the defendant reappears or is forcibly brought before the court by arrest on a bench warrant. Victims are then forced to re-live the crime, sometimes long after it occurred. In turn victims can experience increased anxiety that could have been avoided had the defendant appeared for trial when order to do so

originally. Victims also have an interest in defendant's having incentive to comply with no contact orders. A defendant who has no incentive to comply with such orders may cause undue harm to a victim if the defendant harasses the victim or attempts to get the victim to alter his or her testimony.

The defendant's reference to the report from the United States Department of Justice on the efficacy of surety bonds ensuring the defendant's appearance does not alter the analysis. BOA at 37. First the existence of surety bonds do not take away the financial incentive to comply with court orders provided by an order pursuant to CrR 3.2(b)(4). Second, a more recent report from the Department of Justice states that there are many factors that bear on whether a defendant will fail to appear for trial, including age, race, prior criminal history and prior failure to appear history. U.S. Department of Justice, Bureau Of Justice Statistics, Special Report, State Court Processing Statistics, 1990-2004, Pretrial Release of Felony Defendants in State Courts, 8-10. (2007).⁴ Defendants who were released on either secured, cash, or property bond were less likely to fail to appear than those who were

⁴ <http://www.bjs.gov/content/pub/pdf/prfdsc.pdf>

released on an unsecured bond. Id. Thus the report actually supports the conclusion that the potential for economic loss will more likely result in a defendant making his court appearances, than one who has little or nothing to lose financially.

Contrary to the defendant's position the incentive to appear is similar regardless of whether the defendant posts the 10% deposit himself or has a surety in the form of a bondsman, family member, or friend post that amount. If he posts the 10% deposit himself his incentive is of course to get the deposit back once he performs the conditions of release. If a family or friend posts for him the incentive to perform is the same incentive if the defendant had taken a loan from the family or friend. Because the defendant has a personal relationship with the person that presumably the defendant would like to keep, the defendant's incentive to perform is based on the desire to see that the deposit is returned to that person. If the 10% deposit is posted by a bondsman, the defendant has an incentive to comply with the contractual obligations to the bail bondsman. If the defendant fails to appear, causing forfeiture of the deposit, the defendant may default on the other contractual obligations to the bail bondsman, thereby exposing himself to additional loss.

Under either test, rational relationship or intermediate scrutiny, the bail order entered pursuant to CrR 3.2(b)(4) does not violate equal protection guarantees. Assuring the orderly administration of justice, by ensuring defendants appear in court when ordered to do so is a legitimate State interest. A 10% deposit in cash or other security that is refundable in whole once the conditions of release are performed provide an economic incentive to do so. Thus bail orders entered pursuant to CrR 3.2(b)(4) are related to and further that interest.

C. PUBLIC POLICY CONSIDERATIONS SHOULD BE ADDRESSED TO THE SUPREME COURT THROUGH THE RULE MAKING PROCESS.

The trial court's order is based on a court rule. To ensure the order was authorized by law the trial court specifically stated "this order is intended to include all of the language of CrR 3.2(b)(4)." 1 CP 13. The defendant argues this Court should vacate that order for public policy reasons even though the order was entered pursuant to lawful authority.

The Supreme Court has enacted a specific procedure for adopting rules and amending existing rules. GR 9. The purpose of that procedure includes ensuring adoption and amendment of rules proceeds in an orderly and uniform manner, ensuring adequate

notice to all interested persons, and to ensure that the proposed rules are necessary statewide. GR 9(a). There is a specific procedure for proposing a new rule or amendment to a current rule. GR 9 (d)-(j). That procedure allows interested persons who may have different perspectives the opportunity to comment on the pros and cons of a proposed rule. GR 9(g), (i)(3). Those comments can provide the Court with an opportunity to make an informed and balanced decision regarding adoption or amendment of a rule.

If this Court accepts the public policy arguments proffered by the defendant as a ground on which to vacate the trial court's bail order, it would in effect amend CrR 3.2 to delete CrR 3.2(b)(4) from the rule. The defendant's public policy reasons are not specific to his case. They would apply equally to all defendants who have been charged with a crime, and for whom a trial court considers conditions of release pending trial. The defendant cites no authority for the proposition that public policy reasons may be used to circumvent procedure set out in GR 9 to eliminate the application of a portion of a court rule in any given case. Given the purposes of GR 9 this Court should not rely on public policy reasons to vacate the bail order in this case. The defendant or any other interested party may submit a proposed amendment to CrR 3.2 to

eliminate CrR 3.2(b)(4) for the reasons set out in his brief. GR 9(d). The defendant, or other interested parties, should be required to follow the procedures adopted by the Supreme Court, rather than attacking bail orders one at a time on the basis of public policy.

In addition, the defendant's public policy arguments do not necessarily support eliminating CrR 3.2(b)(4) as an available means for a trial court to ensure a defendant's appearance when ordered to do so. The defendant relies on three main grounds on which to argue that public policy favors vacating his bail order.

First he argues trial courts should not circumvent the Legislature's implicit rejection of a statute that would place a floor on the premium charged by a bail bondsman for writing a bail bond by imposing what amounts to that same requirement when the court requires a 10% deposit with the clerk. He argues that doing so is tantamount to the court making a law, which invades the province of the legislature. BOA at 41-44.

The legislature's failure to enact a statute says nothing about the legislative intent in regard to proposed legislation. Proposed legislation may not be enacted for many reasons. There may be more pressing legislation that needs the legislatures' attention in that session. There may be an agreement in theory as to the

legislation proposed but insufficient agreement by the majority on the details of the proposed legislation in order to enact the proposed legislations. Or there may be lobbying efforts by special interest groups placing pressure on legislators so that proposed legislation does not come out of committee for a vote, or there are insufficient votes to enact it into law.

The defendant's argument also conflates the roles of the legislature and the court. While it is true the legislature is charged with making laws, the court is granted the power to govern court procedures pursuant to Washington Constitution Art. IV. City of Fircrest v. Jensen, 158 Wn.2d 384, 894, 143 P.3d 776 (2006), cert. denied, 549 U.S. 1254 (2007). The Legislature has delegated the power to adopt rules of procedure to the court in RCW 2.04.190. Id. Where procedural rules and statutes irreconcilably conflict in matters related to the court's inherent power the court rule prevails. Id. Rules concerning the manner in which an accused is released from custody pending trial undeniably relate to the court's procedure. State v. Smith, 84 Wn. 2d 498, 501, 527 P.2d 674 (1974). The suggestion that the Legislature signaled an intent to disallow a court from requiring a deposit of cash or security as a

condition of release would irreconcilably conflict with CrR 3.2(b)(4). Thus the rule prevails over the suggestion.

The second policy basis offered by the defendant is that the existing statutes, other court rules, and administrative rules governing bail bond practices are sufficient to ensure the defendant's appearance under a traditional bail bond. Thus, the option to require a deposit with the court in cash or other security is unnecessary. The defendant's claim that all commercial bonds are secured within the meaning of the court rules is inaccurate. CrR 3.2(b)(3) and CrR 3.2(d)(6) allow for posting an unsecured bond. As to other laws and administrative rules, sources relied on by the defendant show that there are loopholes in those laws that do not address what trial courts traditionally believed occurred when a bail amount was set. The Court's inherent authority to adopt rules governing its procedures is not trumped by flawed legislation.

Finally the defendant relies on the "economic incentives and practical realities of the modern commercial bail bond system." BOA at 45. It is those "practical realities" that led the Legislature to form a committee to study bail practices throughout the State. What that committee and news reports covering the issue reported was that those "practical realities" include the existence of some

bail bond companies whose business practices are at odds with what courts thought was happening, and with what courts believed were necessary to ensure adequate incentive for the defendant to appear when required to do so. Those "practical realities" provide scant reason to believe that in all cases where a commercial bail bondsman's services are acquired that the assurances intended by setting bail will result in the defendant's compliance with court orders.

The defendant notes that the motivation for a defendant to comply with a bail order when a commercial bail bondsman has written the bond is a negative one, i.e. to avoid further punishment. That punishment may take the form of bond surrender or additional charges for bail jumping. But a defendant who is released pursuant to CrR 3.2(b)(4) has the same incentive. He may be charged with bail jumping for failure to appear. Or he may have additional conditions placed upon him, such as increased bail, by the court.

D. THE BAIL ORDER WAS NOT EXCESSIVE.

Finally the defendant contends that the bail order violated the state and federal constitutional proscription against excessive bail pursuant to the Eighth Amendment and Washington Constitution art. I, §14. He argues those provisions were violated

because the bail order requiring a cash deposit did no more than an order permitting a surety bond for the full amount of bail would have done to ensure his presence at trial. BOA at 49.

The trial court has discretion when setting bail. Reese, 15 Wn. App. at 620. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. In re Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." Id.

Bail is not excessive as long as it is "reasonably calculated" to assure the defendant's presence at trial. Stack, 342 U.S. at 5, United States ex. rel Fitzgerald v. Jordan, 747 F.2d 1120, 1133 (7th Cir. 1984), cert. denied, 471 U.S. 1056 (1985). A defendant's inability to post bail ordered does not automatically render the bail order excessive. White v. United States, 330 F.2d 811, 814 (8th Cir. 1964), cert. denied, 379 U.S. 855 (1964).

When setting bail the court can consider the nature of the crime and potential punishment. Ex Parte Rainey, 59 Wash. 529, 110 P. 7 (1910). The court may also consider the defendant's history in complying with court orders, his ties to the community, his employment status or enrollment in school, participation in treatment or counseling, his criminal history, the length of his residence in the community, and past record of threats to the victim or witnesses. CrR 3.2(c),(e).

The Court considered a challenge to a bail order that was similar to that ordered here in Fitzgerald. The defendant challenged the order requiring that he post 10% of the \$40,000 bail ordered in cash with the court on the basis that it constituted excessive bail under the Eighth Amendment. The appellate court found the trial court did not abuse its discretion given the seriousness of the charge and the strength of the government's case against the defendant. The defendant's ability to post that amount was a consideration, "but it is neither the only nor controlling factor to be considered by the trial court judge in setting bail." Fitzgerald, 747 F.2d at 1134.

The defendant presents no authority to support the claim that one bail order is excessive simply because another bail order

imposing different conditions could satisfy the same objectives. Given the test outlined by the Supreme Court to gage whether a bail order constitutes excessive bail, the order entered here passes muster.

Here the trial court considered the nature of the charges, potential life imprisonment if convicted, his previous criminal history, and history of compliance while on community custody. 1 CP 50-56, 61-62; 2 CP ___ (Sub 2, Affidavit of Probable Cause) Those sources showed the defendant was charged with Rape of a Child First Degree, a class A felony. Based on his criminal history, if convicted his sentence would be life without the possibility of parole. The defendant had not complied with conditions of earlier sentences, including sex offender treatment. He had numerous violation hearings while on community custody. There was reason to believe that the defendant had sexually victimized at least two other people, which may result in the defendant facing additional charges. Under the circumstances the trial court had tenable reasons for ordering bail and requiring that 10% of the total be posted in cash or other security with the clerk of the court. Given the standard articulated for determining whether bail is unconstitutionally excessive, this order was valid.

IV. CONCLUSION

The trial court lawfully entered an order pursuant to CrR 3.2(b)(4) when it set bail in the defendant's case. CrR 3.2(b)(4) does not deny the defendant bail by sufficient sureties as guaranteed by Washington Constitution art. I, §20. Nor does it violate guarantees of equal protection under either the Fourteenth Amendment to the United States Constitution or Washington Constitution Art. 1, §12. The Court should decline to consider whether policy consideration justify vacating the bail order, where the order was authorized by court rule, and there is a procedure for amending court rules. Finally, when viewed in light of the test articulated by the Supreme Court for assessing when bail is excessive, the bail ordered here is not excessive. For the foregoing reasons the Court should deny the defendant's request to hold the bail order is unconstitutional, and his request to require the trial court to permit the defendant to post the entire bail amount through

a bail bondsman as surety.

Respectfully submitted on August 23, 2013.

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