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April 28, 2021

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Washington State
Supreme Court

Susan L. Carlson
Clerk of the Washington Supreme Court
415 12th Avenue SW
Olympia, WA 98504-0929

RE: Comment on Proposed Changes to CrR 3.2 and CrRLJ 3.2 – Release of the Accused

Dear Ms. Carlson,

Please find our comment on the proposed changes to CrR 3.2 and CrRLJ 3.2 enclosed. We believe the existing rule represents national best practices and is not in need of any changes at this time.

Respectfully submitted,

DocuSigned by:
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COMMENT ON PROPOSED CHANGES TO CrR 3.2 and CrRLJ 3.2 – RELEASE OF THE ACCUSED

April 28, 2021

I. Discriminating against Defendants for purposes of bail on the basis of whether a charge is "violent" or "non-violent" is not evidence-based, lacks a rational basis, and is unsupported by data

Studies for a generation have concluded that the nature of the charge, including whether it is violent or non-violent or severity of the charge, is not predictive of pretrial misconduct, defined as failing to appear in court as required or committing a new crime while on bond. Thus, to allow defendants who, as will be shown are more risky, to instead be released on a charge that is non-violent when their less risky counterparts remain in jail or have to post a bond lacks any support in the research.

First, a validation study of the Washington, D.C. pretrial risk assessment tool, conducted by the National Association of Pretrial Agencies, found that factors relating to the charge did correlate slightly with risk, but that criminal history was by far the largest factor.[1] For example, criminal history data information in the study accounted for 85% of the predictive weight for a rearrest while it was 75% of the predictive weight for failures to appear in court. The variables relating to the nature of the current arrest were only 5% of the predictive weight for a rearrest, while only 8% of the predictive weight for a failure to appear in court. Further, the predictive weight of the present charge was based on the contributing effect of 14 separate factors, of which a crime of violence was only one, meaning that the predictive power of a violent versus non-violent is a fraction of the 8% and 5% predictive weights.

Other studies have reached similar results. The Institute for Social Research at the University of New Mexico, in a letter to then Chief Justice Charles Daniels of the New Mexico Supreme Court, concluded as follows:

> Variation in the content and application of rebuttable presumptions across jurisdictions notwithstanding, the proposition that a defendant's current charge alone is predictive of his or her subsequent involvement in dangerous crimes is not supported in extant research. In their follow-up of nearly 72,000 felony defendants released pretrial between 1990 and 2006, Baradaran and McIntyre (2012) found that although defendants initially charged with a violent offense were more likely to be rearrested for a violent felony than the average defendant, recidivism rates were low in absolute terms regardless of original offense. For example, for teenage defendants previously convicted of a violent felony with at least four prior arrests and an active criminal justice status—the group of persons most likely to be rearrested in the sample—an initial felony charge of murder was associated with a 19.4% rearrest likelihood,

[1] Spurgeon Kennedy, Laura House, & Michael Williams, *Using Research to Improve Pretrial Justice and Public Safety: Results from PSA's Risk Assessment Validation Project* (June, 2013), https://www.uscourts.gov/sites/default/files/77_1_5_0.pdf (last visited April 20, 2021).

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> followed by 15% for a robbery charge, 13% for a rape charge, and 11% for an assault charge. Regarding the probability of rearrest for violent offenders overall, they concluded that "those charged with violent crimes are *not* necessarily more likely to be rearrested pretrial... [and after breaking] out rearrests for violent crime... no group was composed mostly of people who will be rearrested" (Baradaran & McIntyre, 2012:528, emphasis original).[2]

Another author noted that, "Indeed, many of these factors do not have empirical validity to predict risk or have not been confirmed as valid for the population on which they are being used." (Cooprider, 2009; Lowenkamp & Wetzel, 2009). For example, while the seriousness of current charges is a factor scored in many PTRAs, it has not been found to predict pretrial failure. (Lowenkamp & Wetzel, 2009; Steinhart, 2006)."[3]

Further to this point, there is actually evidence that those charged with violent offenses are less likely to fail to appear or commit a new crime. In the study of the Virginia pretrial risk assessment, researchers concluded the following, based on the data: "It was also found that the type of charge was significant in examining outcomes. **Defendants charged with traffic (driving under the influence) and violent offences were found to be the most successful**, while defendants charged with drug and theft or fraud offences were the least likely to be successful."[4] A study from Minnesota, regarding a juvenile risk assessment reached a similar conclusion: "A validation of this instrument demonstrated that it was somewhat predictive of pretrial failure. Binary logistic regression revealed that current charge and prior pending petitions contribute to FTA; specifically, the more serious the charge, the less likely the youth is to FTA."[5]

In addition, this comment clearly sums up the current state of the research:

> **While there is often great concern about the danger posed by violent offenders, violent offenses were found to either have no relation to pretrial release failure** (Siddiqui, 2006) or a decreased risk of failure (Siddiqui, 2006; VanNostrand & Keebler, 2009).[6]

Also, the nation's oldest think-tank on pretrial justice issues, the Pretrial Justice Institute, noted: "A person's risk level should be used to guide two decisions: 1) the decision to release or detain pretrial, and 2) if released, the assignment of appropriate supervision conditions. While the charge for which

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[2] Letter from Torres, Guerin & Ferguson to Former Chief Justice Charles Daniels of 11/12/19, at 1-2, https://nmcourts-cf.rtscustomer.com/wp-content/uploads/2020/12/PreTrialDetention_Memo_to_Justice_Charles_Daniels_Final_070919v1b__1___1_.pdf (last visited April 20, 2021).

[3] John-Etienne Myburgh, Carolyn Camman & J. Stephen Wormith, *Review of Pretrial Risk Assessment and Factors Predicting Pretrial Release Failure* (University of Saskatchewan, *Final Report*, November, 2015) at 32, https://cfbsjs.usask.ca/documents/research/research_papers/ReviewOfPTRAandRiskFactorsPredictingPretrialReleaseFailure.pdf, (last visited April 20, 2021).

[4] *Id.* at 34.

[5] *Id.* at 47.

[6] *Id.* at 55.

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someone was arrested is important in these decisions, the charge alone does not inform you of someone's likelihood to make all court appearances or his or her risk to public safety."[7]

The touchstone of evolving best practices over the last decade of bail reform has been a journey of being less route on the issue of detention, bail and conditions of release from jail in favor of being more engaged and less formulaic in favor of more bon fide individual consideration. The recent multi-year process to revise Court Rule 3.2 was an example of just that, and for that reason we believe it represents best practices.

The proponent of the rule change offers no explanation as to what problem the proposed change is purporting to solve. Certainly, there has not been presented any data, evidence or other considerations that warrant this distinction in the rule other than perhaps pure intuition. That there are later exceptions does not cure the front-end problem: that this arbitrary distinction in the rule will furnish a basis for the absolute release of some defendants immediately on their own recognizance, while others, who are provably lower-risk, will remain in jail on bails they cannot post, will be required to make bail to be released, and/or will have imposed additional non-monetary conditions of release.

If indeed this move is evidence-based, we would call on the proponents to furnish such evidence. Instead, we think the weight of the research if replicated in Washington State Courts, would be equally as dispositive on the issue that whether the charge is violent or non-violent is not predictive, alone, of pretrial misconduct.

II. Discriminating against Defendants for purposes of bail on the basis of whether a charge is "violent" or "non-violent" may run afoul of the Equal Protection Clause.

As detailed in the previous section, to base the automatic right to a personal recognizance bond solely on whether a charge is violent or not will discriminate against persons who are lower-risk by any reasonable measure based on the academic literature. It is questionable whether this distinction would survive an as-applied challenge under the Equal Protection Clause of the Fourteenth Amendment.

As the United States Supreme Court notably stated long ago, "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 15 S.Ct. 394 (1895)*; see also Nelson v. Colorado,* 137 S.Ct. 1249 (2017) 1255-1256 *(*reaffirming the principle that presumption of innocence lies at the foundation of our criminal law and holding that Colorado's Exoneration Act does not comport with the Fourteenth Amendment's guarantee of due process). The presumption of innocence and the requirement that a criminal defendant be convicted by proof beyond a reasonable doubt are closely intertwined. These two elements flow from

[7] Pretrial Justice Institute, *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants* (2010) (Issue Brief, Grant No. 2010-DB-BX-K034 of U.S. Bureau of Justice Statistics) at 2, https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PJI_PretrialRiskAssessment101.pdf, (last visited April 20, 2021).

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the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution, and these elements are "essential [to] a civilized system of criminal procedure." *Taylor v. Kentucky*, 436 U.S. 478, 483–86 (1978).

The Equal Protection Clause of the Fourteenth Amendment forbids the states to "deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. 14th Amend.* Where a plaintiff in an equal protection claim does not allege that distinctions were made on the basis of a suspect classification such as race, nationality, gender or religion, the claim arises under the "class of one" theory. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). To prevail on such a claim, the plaintiff must demonstrate: 1) the defendant treated him or her differently than others similarly situated, 2) the defendant did so intentionally, and 3) there was no rational basis for the difference in treatment. *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d. Cir. 2006) *citing Olech* at 564. The rational basis test is forgiving, but not without limits in its deference. Distinctions cannot be arbitrary or irrational and pass scrutiny. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

An as-applied challenge to the proposed rule could satisfy all three prongs of the *Olech* test. The first two element of the *Olech* test are satisfied because the proposed rule intentionally discriminates between defendants, who are all presumed innocent, solely based on the charged offense with no consideration for whether offenses are felonies or misdemeanors, a defendant's criminal history or history of showing up for court appearances, the underlying facts, the number of victims, flight risk considerations, the ongoing threat of harm to the public, or any other consideration. Solely based on having been charged with a violent offense, defendants are subject to a much more onerous pretrial process and in some cases deprived of their liberty if they cannot post bail. "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095 (1987).

As for the third element, discriminating between defendants solely based on whether a charge is violent or nonviolent offense is arbitrary and irrational. As explained at length in Section I, numerous studies have demonstrated that the nature of the charge is not predictive of pretrial misconduct even when combined with other factors much less by itself. As the California Court of Appeals stated a "thoughtful San Francisco Superior Court judge who has studied the subject points out, 'the evidence does not support the proposition that the severity of the crime has *any relationship* either to the tendency to flee or the likelihood of re-offending.'" *In re Humphrey*, 19 Cal.App.5th 1006, 1043 fn. 21, 228 Cal. Rptr. 3d 513, 540 fn. 21 (Cal. Ct. App. 2018) *citing* (Curtis E. A. Karnow, *Setting Bail for Public Safety* (2008) 13 Berkeley J. of Crim. L. 1, 14.).

Moreover, using a blunt tool like whether the offense charged is violent or non-violent is a convenient but ultimately irrational basis because "violent offense" is defined in the *sentencing* chapter of the Revised Code of Washington. *See* Sentencing Reform Act of 1981 RCW 9.94A. The primary purpose of the sentencing code is to punish convicted offenders. In RCW 9.94A.010, entitled "Purpose," the first three stated purposes of sentencing are to *punish* convicted offenders. The primary purpose of bail is to make sure that the accused show up for court appearances. The purpose of bail is not to punish

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defendants. Using a statute enacted to *punish* convicted offenders as the basis for discriminating between defendants, who have merely been charged and are presumed innocent, is a blunt, ineffective, and constitutionally suspect method of discriminating between defendants.

The arbitrary nature of this method of sorting defendants is evident from the irrational outcomes it will produce. A defendant who is facing numerous, serious felonies for financial fraud with potentially hundreds of victims can be automatically released on their own recognizance while a person facing a single misdemeanor charge for a violent crime with one victim will face onerous pretrial consequences and, in some cases, end up in jail on a bail that they cannot afford to post. A defendant who finds himself or herself in this situation might ask "Why am I being treated so differently?" It would be a fair question.

In law as in life, intuition is frequently wrong. Although intuitively it might seem like a valid way to classify defendants, the evidence demonstrates that this crude method of using classifications of crimes contained in the sentencing code as a proxy for dangerousness or likelihood of failing to appear for court appearances accomplishes neither asserted goal. Once again, "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). In short, the proposed rule is bad public policy and constitutionally suspect under the Equal Protection Clause of the Fourteenth Amendment. The proposed rule should not be adopted.

III. The Rule Should Be Rejected Because It Allows Two Bond Amounts to Be Set, Which May Run Afoul of Constitutional Provisions

The proposed change would allow courts to set two bail amounts, one if the defendant chooses to use a surety and a different amount if the defendant posts cash to the court. The example given is that a court would be permitted to set a $20,000 surety bond and $1,000 cash bond in the same case.

There are significant constitutional problems with so-called split bonding. The U.S. Supreme Court in *Stack v. Boyle*, 342 U.S. 1 (1951), said, "Bail set before trial at *a figure* higher than an amount reasonably calculated to fulfill the purpose of assuring the presence of the defendant is 'excessive' under the Eighth Amendment." (emphasis added). Two amounts cannot by definition be reasonably calculated to guarantee the appearance of the defendant in court. The higher amount must be excessive bail under this proposed rule if the lesser amount would guarantee the appearance of the defendant in court as required.

Further, in *State v. Barton*, the Washington Supreme Court held that a defendant shall have access to a third-party personal surety, of which a commercial surety is one, and that when a bail was set that "disallowed use of a surety" it "violates the constitutional mandate of article I, section 20." *State v. Barton*, No. 89390–0 (July, 2014), ¶ 36. The current rule allows 10% to the court to be imposed, but allows the defendant a choice—post 10% in cash or security or the court must then also authorize a surety bond under subsection (b)(5). Thus, the defendant may choose how to post the 10% under current law, cash, security or surety. This proposed change deletes the language requiring the court to also authorize a surety bond, eliminates 10% bonds altogether, and allows judges to set any partially

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secured percentage *satisified by cash-only* they choose, which by operation of law then eliminates the option of a surety. This may run both afoul of the Court's decision in *Barton* and the Supreme Court's decision in *Stack.*

In addition, the sponsor of the amendment calls for the repeal of "CrR/CrRLJ 3.2(b)(4), often called the 10% appearance bond." The Bureau of Justice Statistics, U.S. Department of Justice has found that 10% depsit bonds are no more effective at guaranteeing appearances as a personal recognizance bond.[8] For this reason, we agree, there is no little basis for 10% to the court bonds other than for purposes unrelated to protecting public safety or guaranteeing appearance (i.e., payment of costs, fees, fines, restitution and surcharges). That said, we are aware that after a lengthy rule-making and study process 10% bonds were retained.

Sincerely,

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[8] Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, *Special Report: State Court Processing Statistics, 1990-2004 Pretrial Release of Felony Defendants in State Courts* (November, 2007) at 18 (finding that failure to appear rates on personal recognizance bonds in the data set was 30%, while failure to appear rates on deposit bonds (10% to the court) was 31%), (https://static.prisonpolicy.org/scans/bjs/prfdsc.pdf, (last visited April 20, 2021).