DocuSign Envelope ID: BB6EF67C-C04C-4B0E-A520-89969E062FAC

AMERICAN BAIL COALITION

877-735-2240 | info@ambailcoalition.org
P.O. Box 352 | Franklinville, NJ 08322
www.AmericanBailCoalition.org

April 29,2024

Clerk of the Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929

RE: **Comment on Proposed Changes to CrR 3.2, Release of the Accused**

I. Summary

On behalf of the American Bail Coalition, we are writing to express opposition to the proposed change to CrR 3.2, Release of Accused. While we support a system of robust pretrial release and efforts to reduce racial discrimination across the criminal justice system, a system of ten percent bonds does not solve those problems. The design of this rule change, in particular and unlike other state programs, creates substantial flaws that counsel against adoption.

II. The Imposition of Two Penal Bond Amounts in this Proposal is Irreconcilable with *Stack v. Boyle*, 342 U.S. 1 (1951)

In *Stack v. Boyle*, one of the most quoted cases on bail of all time, the Supreme Court instructed courts that bail must be set "at *an amount* reasonably calculated" to fulfill the purposes of bail, which is to assure the presence of the accused. 342 U.S. 1, 7 (1951). Fundamentally, courts cannot reconcile under *Stack* the setting of bail in two amounts. In those states that have 10% to the court, defendants secure and thus risk forfeiture of 100% of the bond, with the court acting as surety. Here, to the contrary, this rule change can only be interpreted to allow a defendant to actually have a *bond amount* that is 90% less than set pursuant to *Stack,* by only requiring forfeiture of the amount needed to satisfy the bond amount ("a sum not to exceed 10 percent of the amount of the bond"). This rule change takes all bonds that are set by judges pursuant to the dictates in *Stack* and then reduces them by 90% by operation of law, setting two bond amounts in each case.

III. Surety Bonds Will Be Allowed in Cases of 10% Cash Bonds to Satisfy Bonds in That Amount (And Not the Entire Penal Amount), Which Will Entirely Frustrate and Upend the System

To further complicate matters, offering a mandatory 10% *cash-only* option is contrary to settled interpretation of the sufficient sureties clause of the state constitution. *State v. Barton* stands for the rule that the constitutional right to bail is not the right to post cash but instead the right to a third-party surety to make a financial guarantee to the court on the defendant's behalf.[1] Here, defendants pursuant to *Barton*, as one commentor pointed out, would have the option to post a surety bond on the 10% amount. If a typical premium is agreed in that matter, then we have a situation where a judge had held an amount is necessary pursuant to *Stack*, we then offer a 10% option where 90% is not collectible, and then pursuant to *Barton* a defendant will then post 10% of the 100%, and pay a 10% premium. In other

[1] *State v. Barton*, 331 P.3d 50 (Wash. 2014)(en banc).

DocuSign Envelope ID: BB6EF67C-C04C-4B0E-A520-89969E062FAC

words, for 1% of the total amount of the bond, defendants will be released pursuant to this option, with only 9% of the entire amount at risk upon forfeiture. This automatic rule of 10% in all cases will, in the end, undermine not only *Stack* but the entire system of bonding in Washington. This is why many states that have followed the majority interpretation in *Barton*, which is one of the leading cases on this matter, do not have robust 10% to the court systems because it deprives the defendant of a right to a personal surety.

IV. Imposition of Court Costs Upon Only Those Posting Partially Secured Bonds is Inconsistent with Equal Protection Principles

The imposition of court costs *only* upon those who choose to post 10% to the court includes imposing that requirement only on arguably those who are less advantaged than those who are able to execute a bond with sufficient sureties or a deposit of cash "in lieu thereof." This discrimination needs a basis, and unfortunately, there is none. If anything, those who can afford and choose to post 100% of the bail amount imposed rather than the 10% should be the ones paying $50 in court costs. Thus, lacking any, much less a rational basis, this section should be amended.

V. The Mandatory 10% Option is Likely to Substantially Increase the Penal Amount of Bail Bonds, Harming Historically Oppressed Communities; There is No Evidence that Mandatory 10% to the Court Systems Reduce Racial Disparities in Pretrial Release

Unfortunately, creating a mandatory 10% option will only increase the penal amount of bail bonds, and thus lead to the creation of greater hardship for those already struggling to afford bond.

Several proponents state, without any evidence whatsoever, that defendants from historically oppressed classes fare better in states that have 10% mandatory options.[2] To the contrary, those states cited are the handful nationally that do not have for-profit personal sureties, and thus the state *must act as surety*. It is no surprise then that such states have a mandatory 10% option, which is the fee the state in essence collects as premium. While premium refunds are usually sold as the benefit of this arrangement, most of the money posted as 10% to the court bonds is actually kept for a wide variety of assessments including a combination of court costs, fees, fines, restitution and surcharges.

Further, 10% bonds can distort the market and create upward pressure on bond amounts, which ultimately will harm defendants and create unnecessarily high bonds sizes. In Connecticut, the most recent example of any state moving to a more robust 10% to the court system, it is clear that *bond sizes have more than doubled over the last five years* as a result of the introduction of the mandatory 10% option. Unfortunately, many defendants cannot afford the 10% option (having to choose to make payments to bail agents), so the dramatic doubling in bond sizes *actually hits those who cannot afford it* more *than those who can*.

VI. Prosecutors Will Not Be Able to Prove "Willful" Violations, Thus Defeating the Incentives Created by the 1/10 of the Penal Amount of the Bond that Was Posted; The Forfeiture Discrimination is Not Consistent with Equal Protection Principles

[2] There is certainly no reason to believe such is the case, for example, in Nebraska which has the highest percentage of defendants incarcerated pretrial of any state or Kentucky which generally is in the top three of states with the highest overall incarceration rates in all categories. Nonetheless, no case has been made that defendants in classes that have historically faced discrimination fare better under such systems.

DocuSign Envelope ID: BB6EF67C-C04C-4B0E-A520-89969E062FAC

Regarding forfeitures of bonds, this proposed rule change requires prosecutors to affirmatively prove the violations were "willful" in order for a bond to forfeit. Candidly, that is not particularly likely to ever happen. In essence, this will delete from law the affirmative duty to appear in court for those who choose to post only 10%. Under current law, a defendant has a duty to appear in court, and non-appearance is grounds for automatic forfeiture of bond.

Further, the rule created here that a person's violations must be "willful" when applied to 10% bonds but not willful when applied to surety or 100% cash bonds in order to forfeit will not pass equal protection scrutiny. Those who posted the full amount or used a bail surety would then be surely entitled to the same rule, and in any event there is no basis for this discrimination. If no bonds could forfeit except where proven willful, this would in essence undo the system of incentives within the existing system and render it unworkable.

Finally, prosecutors are not going to have the time or resources to ever prove that some intended not to do something. In other words, if someone simply says they forgot, then how is a prosecutor supposed to disprove that? In practicality, it means none of these 10% bonds are really ever going to be forfeited.

VII. Unsecured Bonds Perform Quite Badly; This Scheme is Likely to Increase Failures to Appear in Court and New Crimes on Pretrial Release by Using Unsecured Bonds Contrasted with Deposit Bonds

Next, "deposit bonds," the 10% mechanism used by judges in other states to allow the state to collect the premium and the defendant secure 100% of the bonds amount, already perform worse than 100% cash, property or surety bonds. Here, however, this 10% bond is actually an unsecured bond. Settled national data shows that unsecured bonds are *substantially* worse than cash, deposit (10% up front, liable for 100%) property, or surety.[3] For example, the predicted rate of misconduct for unsecured bonds is 27.3% higher than surety bonds, the failure to appear rate is 40% higher than surety bonds, and the rate of being charged as a fugitive is 100% higher than surety bonds. Thus, failure to require 100% security then will in essence mean a 90% discount over what judges think was appropriate to ensure appearance in court and protect the safety of the public. A reduction in that amount is to necessarily increase, at some unknown percentage, failures to appear in court and new crimes while on pretrial release.

VIII. The Proposed 10% Bonds May Be Forfeited for Non-Performance, Which Creates Another Equal Protection Issue

Another problem with this mandatory rule change is that 10% bonds may be forfeited for "violation of any condition of release." In *State v. Darwin*, 70 Wn. App. 875 (1993), the Court of Appeals ruled that a surety is only liable for forfeitures occasioned by non-appearance, unless the surety specifically agrees to forfeit due to performance of non-monetary conditions.

Perhaps the drafters of the original rule, allowing 10% to the court, contemplated that the trade in those rare cases would be turning an appearance bond into a performance bond in exchange for releasing

[3] Cohen, Thomas H. & Reaves, Brian A., State Court State Court Processing Statistics, 1990-2004 Pretrial Release of Felony Defendants in State Courts, at 10 (U.S. Bureau of Justice Statistics, Special Report, November, 2007) (https://bjs.ojp.gov/content/pub/pdf/prfdsc.pdf, last accessed April 25, 2024).

DocuSign Envelope ID: BB6EF67C-C04C-4B0E-A520-89969E062FAC

the defendant on the liability of the remaining 90% of the bond. In any event, this proposed change allows for 10% bonds in all cases, and thus must be analyzed with that in mind.

First, the existing rule warns defendants as to the consequences for violation of conditions, but, perhaps due to the rare use of the 10% today, does not warn of the possible consequences of declaring a bond forfeited for non-performance of non-monetary conditions. This warning is an essential component to providing adequate procedural due process protections to defendants who may assume, wrongly, that if they appear they will have their 10% bail returned to them.

Second, from an equal protection perspective, we are not sure who suffers the injury—the accused who may violate conditions of bond without financial penalty or the defendants who escape liability on 90% of the bonds imposed pursuant to *Stack v. Boyle*, 342 U.S. 1 (1951). Upon what data or information the court relied to craft the original rule is not known, but here, we are going to have two large distinct classes of persons, some relieved of financial penalty for violating conditions and some relieved of having to secure 90% of the penal amount of the bond. As an initial matter, there is no basis to create these two classes.

Third, imposing performance of conditions is not consistent with the sufficient sureties clause in the Washington State Constitution. Bail is imposed solely to guarantee the appearance of the defendant in court. As Blackstone wrote in his commentaries, the purpose of bail is to "deliver" the accused into the "friendly custody" of "his sureties, upon their giving (together with himself) sufficient security for his appearance."[4] Here, if a defendant selects to post 10% of the penal amount with the promise of a refund, that defendant will neither be warned nor will be aware that failure of a single drug screening test may result in forfeiture of bond leading to re-incarceration, and that a new 10% bond will have to be posted for every violation, whether technical or not. This also creates a direct form of *sub rosa* detention because the law requires defendants to perform the conditions or be re-jailed. This depends solely on the defendant's ability to continue to post bonds—for those that can and may continue to violate, and those that cannot are jailed due to the fact that they cannot afford their future crime committing, which is another form of *sub rosa* preventative detention.

In short, we are aware that this issue exists in existing rule, albeit based on limited use and some consideration for the failure to secure 100% of the bond on a limited basis. If this rule change is going to be widely used and likely to become the most widely used form of bail if the change is made, this issue will then become a problem.

IX. The Negative Revenue Effects Should Be Fully Disclosed to the Legislature

Although perhaps not of primary concern, it must be highlighted that any rule change such as the one proposed would have negative impacts on the state budget. Surety insurers pay premium taxes on the amount of bail premiums collected to post bonds for the accused in Washington State. Shifting to a system of state underwriting will deprive the state of those dollars, in whole or in part, and the degree to which that may be the case should be provided to the legislature in the event that this rule is going to move forward because backfilling those legislative dollars will then become a legislative necessity. In addition, because only 10% of bond amounts are going to be forfeited instead of 100%, that loss of revenue should also be estimated and provided to the legislature.

[4] 4 William Blackstone, *Commentaries* *293-297 (https://press-pubs.uchicago.edu/founders/documents/amendVIIIs4.html, last accessed April 24, 2024).

DocuSign Envelope ID: BB6EF67C-C04C-4B0E-A520-89969E062FAC

We would also note that the City of Philadelphia ran a robust 10% to the court bail program, which was ultimately disbanded over a decade ago. The City was owed in excess of $1 billion in unpaid bail forfeitures. This lack of collections effort sent an economic signal to the accused that they need not appreciate the duty to appear in court and remain crime free while at large. A system lacking real incentives has proven to lead to higher failure to appear rates and massive unpaid debts. Given lack of gains from any metric, the program was thus disbanded.

X. Conclusion

We all share the goal of reducing unnecessary pretrial incarceration and guaranteeing accountability in terms of making sure that defendants appear in court and justice is appropriately served. This proposal, however, will ultimately do nothing to reduce pretrial incarceration, and, likely, over the long term, will dramatically increase the penal amount of criminal bail bonds, and thus likely harm poorer communities. Coupled with the other enumerated issues, we must counsel against the adoption of this rule change.

Respectfully submitted,

DocuSigned by:
Jeffrey Clayton
45CB1FFA6278476...

Jeffrey J. Clayton, M.S., J.D.
Executive Director
American Bail Coalition
jeff@ambailcoalition.org