No. SC92532

In The
Supreme Court of Missouri

STATE OF MISSOURI,

Plaintiff,

v.

KIRK JACKSON,

Defendant.

Rule 33.09 Application Regarding
Conditions for Release Pending Trial
from St. Charles County Circuit Court,
Eleventh Judicial Circuit,
(case presently pending before)
The Honorable Nancy Schneider, Circuit Judge

DEFENDANT'S BRIEF

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JURISDICTIONAL STATEMENT

The issue presented for review by way of Rule 33.09 is whether cash-only bail for a pretrial defendant violates article I, section 20 of the Missouri Constitution because of the phrase "sufficient sureties." "That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." Mo. Const. art. I, sec. 20.

This particular issue of law presents a constitutional issue of first impression for Missouri. Moreover, this issue is one of statewide importance where guidance from this Court is necessary. "[C]ash only bail is an important public issue of statewide significance upon which this court should rule. Most pretrial bail issues are, by definition, short-lived and failure to decide this issue could have a continuing adverse impact on those defendants who are unable to post cash-only bail. Indeed, failure to address this issue may create a class of defendants with constitutional claims but no remedy." State v. Brooks, 604 N.W.2d 345, 348 (Minn. 2000); see also State v. Briggs, 666 N.W.2d 573, 576 (Iowa 2003) ("[t]he constitutional implications of this form of bail are of great relevance for members of the public, the bar, and the judiciary.").

"The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death." Mo. Const. art. V, sec. 3.

Nevertheless, "[i]f a court shall fail to set conditions for release, or shall set inadequate or excessive conditions, an application may be filed in a higher court by the accused or by the state, stating the grounds for the application and the relief sought." Mo. Sup. Ct. R. 33.09(a), and Appendix, p. A24.[1] Defendant filed an Application pursuant to Rule 33.09 in the Missouri Court of Appeals, Eastern District on May 3, 2012 (case number ED98383). That Application was denied on May 7, 2012 – the merits of the Application were not reached. On May 11, 2012, defendant filed before this Court the presently pending Application pursuant to Rule 33.09.

Since defendant has been admitted to bail, and is not charged with a capital offense (i.e., he stands charged with all class D felonies), the validity of his cash-only bail as a matter of law raises questions involving the interpretation of article I, section 20 of the Missouri Constitution because of the phrase "sufficient sureties." Therefore, exclusive jurisdiction for this issue lies with the Missouri Supreme Court. Mo. Const. art. V, sec. 3.

Moreover, "[t]he quintessential power of the judiciary is the power to make final determinations of questions of law." Asbury v. Lombardi, 846 S.W.2d 196, 200 (Mo. banc 1993) (citing Marbury v. Madison, 5 U.S. 137 (1803)).

[1] Rule 33.09 contains no condition precedents for a defendant seeking relief under the rule, e.g., there is no requirement that a defendant have had a bond hearing or multiple bond hearings before one or more different judges before seeking relief under the rule.

STATEMENT OF FACTS

On March 29, 2012, a warrant for defendant's arrest was issued. Defendant was admitted to bail and the judge set bail at $75,000 cash only. On April 27, 2012, the State filed an Indictment charging defendant with fourteen felony counts and all are class D felonies.

"If a court shall fail to set conditions for release, or shall set inadequate or excessive conditions, an application may be filed in a higher court by the accused or by the state, stating the grounds for the application and the relief sought." Rule 33.09(a). On May 3, 2012, defendant filed an Application pursuant to Rule 33.09 in the Missouri Court of Appeals, Eastern District (case number ED98383). Said Application claimed as a matter of law that the cash-only condition of his bond, which can be satisfied *only* by posting the full amount of the bond, violated article I, section 20 of the Missouri Constitution because of the phrase "sufficient sureties." That Application was denied on May 7, 2012 – the merits of the Application were not reached. On May 11, 2012, defendant filed before this Court the presently pending Application pursuant to Rule 33.09. On [June 27], 2012, the Court issued an Order setting the briefing schedule and setting the case for argument on September 5, 2012.

POINTS RELIED ON

POINT I

When the initial warrant for arrest was issued on March 29, 2012, the trial court erred in setting defendant's bail at cash-only.[2] The Missouri Constitution states "[t]hat all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great[]"and the applicable Missouri Supreme Court Rule states that "[a]ny person charged with a bailable offense shall be entitled to be released pending trial."[3] Mo. Const. art. I, sec. 20 and Mo. Sup. Ct. R. 33.01(a). Since defendant is not charged with a capital offense (i.e., he is charged with a bailable offense), we submit that as a matter of law cash-only bail, which can be satisfied *only* by posting bond with the full amount of the cash, violates article I, section 20 of the Missouri Constitution because of the phrase "sufficient sureties."[4]

Ex parte Burgess, 274 S.W. 423 (banc 1925).

State ex rel. Corella v. Miles, 262 S.W. 364 (banc 1924).

Mo. Const. art. I, sec. 20 (2011).

Mo. Const. art. XIII, sec. 11 (1820).

Mo. Sup. Ct. R. 33.01 (2011).

Section 544.455, RSMo 2011.

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[2] See Rule 84.04(d)(1)(A).

[3] See Rule 84.04(d)(1)(B).

[4] See Rule 84.04(d)(1)(C).

ARGUMENT

When the initial warrant for arrest was issued on March 29, 2012, the trial court erred in setting defendant's bail at cash-only.

I. STANDARD OF REVIEW

A. Constitutional interpretation is a question of law and is subject to *de novo* review. Akers v. City of Oak Grove, 246 S.W.3d 916, 919 (Mo. banc 2008). However, the "Court avoids deciding a constitutional question if the case can be fully resolved without reaching it." Ross v. State, 335 S.W.3d 479, 480 (Mo. banc 2011).

B. "When construing a constitutional provision, however, words are to be taken in accord with their fair intendment and their natural and ordinary meaning, which can be determined by consulting dictionary definitions." St. Louis Univ. v. Masonic Temple Ass'n of St. Louis, 220 S.W.3d 721, 726 (Mo. banc 2007). The use of the term "or" generally refers to alternative possibilities and is akin to use of the word "either." TAP Pharm. Prods. v. State Bd. of Pharm., 238 S.W.3d 140, 144 (Mo. banc 2007). And, the "interpretation of [a term may be] guided by the statutory maxim of noscitur a sociis – a word is known by the company it keeps." Aquila Foreign Qualifications Corp. v. Dir. of Revenue, 362 S.W.3d 1, 5 (Mo. banc 2012).

"The rules applicable to construction of statutes are applicable to the construction of constitutional provisions; the latter are given broader construction due to their more permanent character." Buechner v. Bond, 650 S.W.2d 611, 612 (Mo. banc 1983). Also, "interpretation of the language of the Missouri Supreme Court Rules is guided by

principles similar to those applied in our interpretation of state statutes." State ex rel. USAA Casualty Insurance Co. v. David, 114 S.W.3d 447, 448 (Mo. App. E.D. 2003).

"The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." State ex rel. Young v. Wood, 254 S.W.3d 871, 872-873 (Mo. banc 2008); Buechner v. Bond, 650 S.W.2d 611, 613 (Mo. banc 1983) (stating "[t]he first rule of construction of a constitutional amendment is to give effect to its intent and purpose."). "A court may not add words by implication to a statute that is clear and unambiguous." Asbury v. Lombardi, 846 S.W.2d 196, 202 n.9 (Mo. banc 1993).

II. HISTORICAL ANALYSIS

The historical analysis is broken down as follows:

A. History of Bail, Jails, and Prisons;

B. Missouri's History and Law Existing Prior to Admission to the Union;

C. A "Then and Now" Definitional Look at the Constitutional Provision;

D. The Implementing Law; and

E. The Procedural Context of the Argument.

NOTE: The relevance of foreign jurisdictions' case law and the excessive bail clause are addressed in III. ARGUMENT.

A. History of Bail, Jails, and Prisons

"It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal

thought." Roper v. Simmons, 543 U.S. 551, 626 (2005) (Scalia, J. dissenting). However, when it comes to bail, "the origins of the modern American bail system lie in some uncertainty, caused in not the least part by historical inattention." Ronald Goldfarb, Ransom: A critique of the American Bail System 21 (1965); see also Ronald Goldfarb, Jails: The Ultimate Ghetto 1 (1975) ("[j]ails have been little studied, and widely misunderstood. There is sparse literature on the subject.").

Our system of bail traces its roots to England and the Statute of Westminster in 1275. State v. Brooks, 604 N.W.2d 345, 350 (Minn. 2000); State v. Briggs, 666 N.W.2d 573, 578-579 (Iowa 2003). Prior to 1275, the purpose of bail in Anglo-Saxon times "was to ensure that the debt owed the victim or the victim's family was paid." June Carbone, Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34 Syracuse L. Rev. 517, 521 (1983). Imprisonment as a form of punishment was rare. Id. at 521. Further, the State as a prosecutor did not exist – "the aggrieved 'sued' the accused; the accused was then required to secure a surety, who would provide the pledge or 'borh' and would guarantee both the appearance of the accused at trial *and* payment of the bot upon conviction." Id. at 519-520.

"With the passage of the ordinance called the 'Assize of Clarendon' in 1166, the system of individual institution of prosecutions was replaced [and] [t]he Crown took over the administration of all criminal jurisdiction." Ronald Goldfarb, Ransom: A critique of the American Bail System 25 (1965). "Bail release became more important once the criminal process was institutionalized and made more formal." Id.

The Statute of Westminster in 1275 appears to be the first "law" to recognize a right to bail. State v. Briggs, 666 N.W.2d 573, 579 n.3 (Iowa 2003) (citing Bail: An Ancient Practice Reexamined, 70 Yale L.J. 966, 977 app. (1961). The Statute was a direct response to "widespread corruption in the administration of bail . . . ." Carbone, 34 Syracuse L. Rev. at 523. "Parliament sought not to liberalize bail practice, but to codify existing law in order to ensure greater certainty in its administration and to protect bailable prisoners from the abuses of the sheriffs." Id. at 524. "[L]ocal landowners were preferred as sureties and were given the powers of a jailer to prevent the accused's flight [because] . . . it was in immobile land-oriented society." Bail: An Ancient Practice Reexamined, 70 Yale L.J. 966, 967(1961). "This statute defined who was bailable, but the statute's categories were confusing and complicated." State v. Brooks, 604 N.W.2d 345, 349 (Minn. 2000) (citing June Carbone, Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34 Syracuse L. Rev. 517, 526, 529 (1983)).

"By the time of the American Revolution, English bail law was a tangled morass." Caleb Foote, The Coming Constitutional Crisis in Bail, 113 U. Pa. L. Rev. 959, 973 (1965). "Once the colonies began to liberalize criminal penalties, the liberalization of bail followed." Carbone, 34 Syracuse L. Rev. at 530.

"Jails that did exist in the eighteenth century were run on a household model with the jailer and his family residing on the premises. The inmates were free to dress as they liked, to walk around freely and to provide their own food and other necessities." Ronald Goldfarb, Jails: The Ultimate Ghetto 10 (1975). "The idea of serving time in a prison as

a method of correction was the invention of a later generation." Id. Missouri's first prison did not open its doors until 1836 in Jefferson City. Tour the oldest prison west of the Mississippi, Missouri News Horizon, May 5, 2011 (retrieved from http://missouri-news.org/missouri-living/tour-the-oldest-prison-west-of-the-mississippi/4689) (last visited July 30, 2012). And when the facility closed in 2004 it was the oldest prison west of the Mississippi. Id. Thus, it would seem a logical inference that the concept of posting bond and jails as a place for pretrial detention took on new meaning in 1836, even though the critical language in the constitutional provision at issue has remained unchanged since 1820.

Goldfarb portrays the stark reality that during the Twentieth Century "[p]oor people are in jail because they cannot provide bail or even the bondsmen's premium or because the judge has deliberately set bail so high that in effect preventive detention has been decreed." Ronald Goldfarb, Jails: The Ultimate Ghetto 29 (1975). He further posits that "[b]ail is an economic discrimination: those with the means to afford a bail bond usually go free before trial; those without the required money, property or connections rot in jail." Id. at 36. And according to 2011 information, "about 6 in 10 inmates were not convicted, but were in jail awaiting court action on a current charge – a rate unchanged since 2005." Todd D. Minton, Jail Inmates at Midyear 2011 – Statistical Tables, Bureau of Justice Statistics, April 2012, at 1 (retrieved from http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf) (last visited July 30, 2012). Without comprehensive studies on jails and jail populations vis-à-vis bail, it is difficult to say precisely to what extent cash-only bail affects this statistic. Nevertheless, there is doubtless a societal

consideration related thereto that may be dramatically impacted by how this Court decides to interpret the constitutionality of cash-only bail.

B. Missouri's History and Law Existing Prior to Admission to the Union

Missouri as a possible state began to take form on April 30, 1803 when the Louisiana Purchase Treaty was signed for the cession of Louisiana. Treaty Between the United States of America and the French Republic, April 30, 1803, U.S.-Fr., 8 Stat. 200-7. The land associated with present day Missouri was included in this treaty. Floyd Calvin Shoemaker, Missouri's Struggle for Statehood 1804-1821, 9 (1916). On October 31, 1803, Congress passed an act enabling the President of the United States to take possession of Louisiana. 2 Stat. 245. And on June 4, 1812, Congress passed an Act providing for the government of the territory of Missouri. 2 Stat. 743, and Appendix, p. A2. Section Fourteen of that Act stated, "[a]ll persons shall be bailable unless for capital offences where the proof shall be evident or the presumption great." 2 Stat. 743, 747, and Appendix, p. A6. On March 6, 1820, Congress passed an Act enabling the people of the Missouri Territory to form a constitution and to be admitted to the Union. 3 Stat. 545, and Appendix, p. A7.

The roots of the Missouri constitutional provision at issue actually trace not to England, but to Massachusetts. In 1641, New England's government stated,

> No mans person shall be restrained or imprisoned by any Authority what so ever, before the Law hath sentenced him thereto, If he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behaviour in the

> meane time, unlesse it be in Crimes Capital, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it.

Massachusetts Body of Liberties, p. 264 (1641), and Appendix, p. A16. "Where this major bench mark in American bail history came from appears to be a mystery; there was certainly nothing like it in England." Caleb Foote, The Coming Constitutional Crisis in Bail, 113 U. Pa. L. Rev. 959, 975 (1965).

> The Massachusetts provision influenced article XI of the Pennsylvania Charter of Liberty (1682), which granted a constitutional right to bail in a form that was later adopted by Pennsylvania and North Carolina in their constitutions in 1776, and was widely copied in 19th century state constitutions: 'That all persons shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great.'

United States v. Edwards, 430 A.2d 1321, 1327-1328 (D.C. Ct. App.1981) (internal footnotes omitted). Historically, "a fundamental right to bail was not universal among the colonies or among the early states; several states made the right to bail a statutory rather than a constitutional right." Id. at 1327. And as between having a constitutional right to bail or not having a constitutional right to bail, our Framers chose the former. Mo. Const. art. XIII, sec. 11 (1820), and Appendix, p. A20.

C. A "Then and Now" Definitional Look at the Constitutional Provision

In 1812 – prior to our admission to the Union – the law stated, "All persons shall be bailable unless for capital offences where the proof shall be evident or the presumption great." 2 Stat. 743, 747, and Appendix, p. A6.

In 1820, Missouri's first Constitution stated, "[t]hat all persons shall be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great, and the privilege of the writ of habeas corpus cannot be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." Mo. Const. art. XIII, sec. 11 (1820), and Appendix, p. A20.

Today, the Missouri Constitution states, "[t]hat all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." Mo. Const. art. I., sec. 20, and Appendix, p. A21.

1. Then

Prior to 1820, bail[5] was defined or described as: "[T]he freeing, or setting at liberty, of one arrested, or imprisoned, upon any action, civil or criminal, on surety taken

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[5] In discussing bail one note states, "[b]ut justices must take care, that under pretence of demanding sufficient surety, they do not make so excessive a demand, as in effect amounts to a denial of bail; for this is looked upon as a great grievance . . . by which it is declared, that excessive bail ought not to be required." Giles Jacob & T.E. Tomlins, The Law Dictionary: Explaining the Rise, Progress, and Present State, of the English Law, Vol. 1, 219 (I. Riley, Printer 1811).

for his appearance at a day and place certain, or when demanded." Thomas Potts, A Compendious Law Dictionary, 42-43 (J. Cundee, Printer 1803). "Bail" was also defined as "the freeing or [s]etting at liberty one arre[s]ted or impri[s]oned upon action either civil or criminal, under [s]ecurity taken for his appearance." Samuel Johnson, A Dictionary of the English Language, Vol. I (9th ed. 1806). Yet another definition for "bail" was "a [s]urety for another, relea[s]e from cu[s]tody on giving [s]ecurity, handle, hoop." Noah Webster, Compendious Dictionary of the English Language, 23 (Sidney's Press 1806).

"Bailable" was defined as "[t]hat may be [s]et at liberty by bail or [s]ureties." Samuel Johnson, A Dictionary of the English Language, Vol. I (9th ed. 1806). The word was also defined as "that may be bailed, admitting bail." Noah Webster, Compendious Dictionary of the English Language, 23 (Sidney's Press 1806).

Sufficient meant "[e]qual to any end or purpo[s]e; enough; competent; not deficient." Samuel Johnson, A Dictionary of the English Language, Vol. II (9th ed. 1806).

"Surety" was defined as "a bond[s]man, bail, [s]ecurity again[s]t lo[s]s." Noah Webster, Compendious Dictionary of the English Language, 300 (Sidney's Press 1806). "Surety" was also defined as "[a] bail that undertakes for another man in a criminal case, or action of trespass []. Giles Jacob & T.E. Tomlins, The Law Dictionary: Explaining the Rise, Progress, and Present State, of the English Law, Vol. 6, 146 (I. Riley, Printer 1811). Yet another definition was "[h]o[s]tage; bond[s],man; one that gives [s]ecurity for

another; one that is bound for another." Samuel Johnson, A Dictionary of the English Language, Vol. II (9th ed. 1806).

Security was "[a]ny thing given as a pledge or caution; in[s]urance; a[ss]urance for any thing; the act of giving caution, or being bound." Samuel Johnson, A Dictionary of the English Language, Vol. II (9th ed. 1806).

2. Now

"Bail" is defined as "[t]o obtain the release (of oneself or another) by providing security for a future appearance in court." Black's Law Dictionary 161 (Bryan A. Garner, 9th ed. 2009). Bail is also defined as "property or money given as a surety that a person released from custody will return at an appointed time." Webster's unabridged dictionary 156 (Random House, 2nd ed. 2001). And The Oxford English Dictionary has several definitions for bail. One is "[t]emporary delivery or release from imprisonment, on finding sureties or security to appear for trial." The Oxford English Dictionary Vol. I, 885 (J.A. Simpson and E.S.C. Weiner, Oxford University Press, 2nd ed. 1989). Another is "[t]o admit to bail, to liberate on bail; to release (a person) from immediate arrest or imprisonment, on security being given by one or more sureties that the person released shall be duly presented for trial." Id. at 886.

"Bailable" is defined as "capable of being set free on bail" and "admitting of bail: a bailable offense." Webster's unabridged dictionary 156 (Random House, 2nd ed. 2001). Another definition is "eligible for bail." Black's Law Dictionary 161 (Bryan A. Garner, 9th ed. 2009). And yet another definition states "[o]f persons: [e]ntitled to be

released on bail." The Oxford English Dictionary Vol. I, 887 (J.A. Simpson and E.S.C. Weiner Oxford University Press, 2nd ed. 1989).

"Sufficient" means "adequate for the purpose; enough." Webster's unabridged dictionary 1901 (Random House, 2nd ed. 2001).

"Surety" means "[a] person who is primarily liable for paying another's debt or performing another's obligation." Black's Law Dictionary 1579 (Bryan A. Garner, 9th ed. 2009).

"Shall" means "[h]as a duty to; more broadly, is required . . . [t]his is the mandatory sense that drafters typically intend and that courts typically uphold." Black's Law Dictionary 1499 (Bryan A. Garner, 9th ed. 2009). This meaning is the only acceptable one "under strict standards of drafting." Id.

D. The Implementing Law

"The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law." Mo. Const. art. V, sec. 5. "Any person charged with a bailable offense shall be entitled to be released pending trial." Mo. Sup. Ct. R. 33.01(a).[6]

> The court shall in all cases release the accused upon his written promise to appear, unless the court determines that such release will not reasonably assure the appearance of the accused. If the court so determines it shall impose one or

[6] Rule 33.01 in its entirety is in the Appendix at p. A22.

> more of the following conditions for his release which will reasonably assure such appearance: . . . (3) Require the execution of a bond in a stated amount with sufficient solvent sureties, or the deposit in the registry of the court of the sum in cash or negotiable bonds of the United States or of the State of Missouri or any political subdivision thereof . . . .

Mo. Sup. Ct. R. 33.01(d)(3). Missouri's statute similarly states that the judge may "impose any or any combination of the following conditions of release which will reasonably assure the appearance of the person for trial: . . . (3) Require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof . . . ." Section 544.455, RSMo 2011.[7] Also note that Rule 33.01(a) uses "shall" whereas section 544.455.1 uses "may" and section 544.455.2 uses "shall." The rule prevails in instances of any conflict. State ex rel. Union Elec. Co. v. Barnes, 893 S.W.2d 804, 805 (Mo. banc 1995).

E. The Procedural Context of the Argument

The procedural context is limited to those cases where a) the initial warrant (not a summons) has been served and defendant has been admitted to bail, but has not posted bond (most commonly the defendant is in jail, but a defendant could also be in prison and waiting to parole out and might not want to parole out to a county jail which would involve that county having to spend the resources to pick up the defendant, but might

[7] Section 544.455, RSMo 2011 in its entirety is in the Appendix at p. A25.

want to post bond from prison on the parole release date); b) a capital offense is not charged; and c) a cash-only bail has been set either before or after a bond hearing (e.g., sometimes a warrant gets issued with no bond and the judge sets bond after the warrant has been served or after a bond hearing).

Also, the amount of the bail is technically not before the Court as there is no excessive bail claim and thus we submit it is irrelevant. Thus, in this limited procedural context wherein the issue presented is strictly a legal question, whether or not there has been a bond hearing is also irrelevant.

Moreover, the context does not extend to instances that a) are post-trial cases; b) are similar to State v. Briggs 666 N.W.2d 573 (Iowa 2003) infra where a defendant is initially allowed to post a surety bond, posts bond, and while out on bond does something to jeopardize his/her liberty, i.e., fails to appear for court thereby causing a failure to appear warrant to be issued – the trial court would be in the best position to assess the situation, e.g., perhaps the defendant has documentation supporting a true medical emergency as the reason for failing to appear; or c) involve probation violations as probation violations are civil matters. State ex rel. Manion v. Elliott, 305 S.W.3d 462, 462 (Mo. banc 2010). For example, suppose an accused is on probation and picks up a new charge. Depending on what the probation case is for (i.e., is it misdemeanor or felony probation and robbery versus peace disturbance, etc.), and assuming defendant is admitted to bail, bail could be set at cash-only and bail on the new charge would, at a minimum, allow for surety. This reflects the necessary respect for the presumption of

innocence[8] while allowing a judge sufficient discretion in deciding questions of the type and amount of bail. Again, it is a defendant's actions either while out on bond or on probation, subject to the discretion of the judge, which bring cash-only bail into the equation. Said issues must wait for another day in court.

III. ARGUMENT

We submit that whether or not cash-only bail is constitutionally prohibited because of the "sufficient sureties" phrase depends on the procedural context (as identified in II. E supra) because the constitutional provision, the implementing law, Missouri case law and, to the extent relevant, case law from foreign jurisdictions seem to indicate an intent wherein cash-only bail is prohibited because of the "sufficient sureties" phrase.

A. The constitutional provision seems to indicate that cash-only bail is prohibited.

In 1812, the intent seems unmistakable because there is no "sufficient sureties" phrase. See II. C above. Again, and excluding the constitutional exception not applicable herein, "[a]ll persons shall be bailable unless" suggests that a defendant is to have his liberty restored, even if jails were run on a household model. Ronald Goldfarb,

[8] "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, 453 (1895).

Jails: The Ultimate Ghetto 10 (1975). Even though this law predates our first Constitution, it is relevant because it goes to the intent at that time in our state's history. Since there have been no substantive changes since Missouri's first constitution in 1820, the key language that was added in 1820 was the phrase "by sufficient sureties." Mo. Const. art. XIII, sec. 11 (1820), and Appendix, p. A20.

Shall be bailable by sufficient sureties

If the framers intended courts to have complete discretion would they not have used the word "may" or, in fact, any word other than "shall." The use of the word "shall" in the constitutional provision seems straightforward.

The word "bailable" around 1820 seems to indicate a process whereby a defendant's liberty is restored. Today, the Oxford English Dictionary defines it as "[e]ntitled to be released on bail." The Oxford English Dictionary Vol. I, 887 (J.A. Simpson and E.S.C. Weiner Oxford University Press, 2nd ed. 1989). Again, the intent would seem not to take away one's liberty but rather to restore one's liberty.

The words "by sufficient sureties" constitute a phrase, specifically a prepositional phrase modifying the word "bailable." To unlock the appropriate meaning of a word one may use the maxim of noscitur a sociis – a word is known by the company it keeps. Aquila Foreign Qualifications Corp. v. Dir. of Revenue, 362 S.W.3d 1, 5 (Mo. banc 2012). Applying the above maxim would only further confirm the idea that the total meaning of the provision was not intended to restrict a defendant's rights by allowing cash-only bail.

In addition, in 1820, the constitutional provision appears in the section titled Declaration of Rights. Mo. Const. art. XIII, sec. 11 (1820), and Appendix, p. A19. These Rights were declared based on principles of individual liberty and free government. Id., and Appendix, p. A19. The intent of the Declaration of Rights appears to be for the benefit of the people. Id. It may also be worth noting that the Declaration of Rights came well after the articles regarding the Legislative, Executive, and Judicial Powers. Mo. Const. art. XIII, sec. 11 (1820). As if to further heighten the emphasis on individual rights and liberties, the Bill of Rights containing the same constitutional provision is listed first in *today's* constitution.

According to more than one dictionary, bondsman did exist in 1820. State v. Briggs 666 N.W.2d 573, 583 (Iowa 2003) infra, which is distinguishable based on the procedural context that the issue was presented in, claimed that the commercial bonding process was not one of the traditional methods of surety. To be sure, the commercial bonding process may not have been sufficiently developed to be recognized as a traditional method, but it is not as if bondsman were nonexistent or merely emerging.

Again, based on the language and as limited to the procedural context of this issue, there is only one constitutional exception denying a defendant the right to bail and that exception is not applicable. Therefore, it would seem that a cash-only bail in an amount that defendant does not have frustrates the intent of release by sufficient sureties. In keeping with this intent, it seems more reasonable to interpret sufficient sureties as allowing a surety bond or another bond to be posted…and posted at the defendant's option.

B. The implementing law seems to indicate that cash-only bail is prohibited.

We submit that Rule 33.01(d) and section 544.455.1 address the type or form of bail that the judge shall require and that Rule 33.01(e) and section 544.455.2 primarily address the amount of the bail that the judge shall set. See Ex parte Singleton, 902 So. 2d 132, 133 (Ala. Crim. App. 2004) (indicating that their legislature "provides for four different types of bail: cash bail, judicial public bail, professional surety bail, and property bail, see § 15-13-111, Ala. Code 1975; it defines what constitutes each form of bail."); Smith v. Leis, 835 N.E.2d 5, 16 (Ohio 2005) (indicating "the possible types of bail, including '[a] surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.'"); and State v. Gutierrez, 140 P.3d 1106, 1108 (N.M. Ct. App. 2006) (indicating that "the court shall order the pretrial release of such person subject to the first of the following types of secured bonds which will reasonably assure the appearance of the person as required and the safety of any person and the community . . . .).

We further submit that based on the juxtaposition of types of bail with actual conditions of release in Rule 33.01(d) and section 544.455.1, the actual use of "conditions of release"[9] and "conditions for his release" seems to make the task of

[9] Whether or not a "condition of release" indicates a type of bond or an actual condition of release would seem to depend on the use or omission of "execution of a bond." Rule 33.01(d)(1),(2), (4), and (6) would seem to be "conditions of release" because they do not contain the language "execution of a bond." Whereas, Rule 33.01(d)(3) and (5) contain

ascertaining true intent more, not less, difficult. Therefore, we submit that Rule 33.01(d) is easier to interpret based on a reconstruction stating, "[i]f the court so determines it shall impose one or more of the following [types of bail] which will reasonably assure such appearance" and as to Rule 33.01(e), "[i]n determining [the amount of bail and which type of bail,] the court shall, on the basis of available information, take into . . . ." See also Ex parte Chandler, 297 S.W.2d 616, 617 (Mo. App. S.D. 1957) (indicating factors to consider in determining the amount of bail in an excessive bail case).

The enabling rule states "[i]f a court shall fail to set conditions of release, or shall set inadequate or excessive conditions . . . ." Rule 33.09(a). In this context, we submit that the rule actually means the following: if the court shall fail to set bail, or sets a type of bail that is inadequate or a bail amount that is excessive.

We assume that there are basically four considerations to all bail issues: 1) Is the person entitled to be admitted to bail? 2) What type of bail shall be set? 3) What amount shall bail be set at? and 4) Are there any other conditions of release the court wants to impose? Considerations one and four are not relevant to this issue. However, because of the procedural context of this issue, and to the extent the Court considers the excessive

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the language "execution of a bond." In other words, if Rule 33.01(d)(1),(2), (4), and (6) were meant as types of bonds, it would seem reasonable to expect that the language "execution of a bond" would have been used. Likewise, if Rule 33.01(d)(3) and (5) were meant as conditions of release it would seem that the language "execution of a bond" would not have been used.

bail clause (i.e., the amount of the bail) relevant to resolving the issue, we submit that incorporating case law and/or principles discussing the excessive bail clause are not relevant because our Nation's highest court has yet to define the contours of that clause.

In fact, we respectfully point out that, "[t]he Supreme Court has directly addressed the [Excessive Bail] Clause only three times since its adoption. See United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); Carlson v. Landon, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952); Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951)." Galen v. County of Los Angeles, 477 F.3d 652, 659 (9th Cir. 2007). More importantly, none of the cases dealt directly with whether or not the amount of a defendant's bail was constitutionally excessive. United States v. Salerno, 481 U.S. 739 (1987) determined that pretrial detention on the basis of future dangerousness under the Bail Reform Act was constitutional on its face. Carlson v. Landon, 342 U.S. 524 (1952) was a civil case dealing with deportation which held that "the Eighth Amendment [did] not require that bail be allowed under the circumstances of these cases." Carlson v. Landon, 342 U.S. 524, 546 (1952). Stack v. Boyle 342, U.S. 1 (1951) was a federal case that did not reach the question of excessiveness because it concluded "that bail ha[d] not been fixed by proper methods." Stack v. Boyle, 342 U.S. 1, 7 (1951). Further, this Court indicated in United States v. Salerno that Stack v. Boyle's then arguable holding that, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose '[to ensure the defendant's presence at trial]' is 'excessive' under the Eighth Amendment," is "dictum." Stack v. Boyle, 342 U.S. 1, 5 (1951) and United States v. Salerno, 481 U.S. 739, 752 (1987) (regarding "to ensure the defendant's presence at trial") and United

States v. Salerno, 481 U.S. 739, 753 (1987) ("[t]he above-quoted dictum in Stack v. Boyle . . . .").

In short, New Hampshire Representative Samuel Livermore's 1789 question, "What is meant by the terms excessive bail?" remains unanswered. 1 Annals of Cong. 754 (1789) (J. Gales ed. 1834) (statement of Rep. Livermore). That fundamental question is of particular importance to those defendants who lay claim to only the most meager of resources and consequently create an entire class of defendants who languish locked in their cells as a result of income inequality. Surely it was not the Founding Father's wish that only the wealthy shall be presumed innocent. Nor was it their wish that only the wealthy shall remain free while they await trial.

Either way, the intent of Rule 33.01 seems unambiguous: to release the accused. At no point does the rule authorize a court under Rule 33.01(e) – and even assuming a worst case scenario in terms of each of the factors to be considered (a lengthy criminal history, no assets, no ties to the community, etc.) – to deny bail or to set bail at cash-only. To the extent that sequence is indicative of priority or preference, a surety bond appears before a ten percent bond. Rule 33.01(d). Assuming that cash-only bail is a type of bail, it is not one of the options in Rule 33.01 (or for that matter in section 544.455) because of the way the rule is written and by the use of the word "or" in the rule and statute. The use of the term "or" generally refers to alternative possibilities and is akin to use of the word "either." TAP Pharm. Prods. v. State Bd. of Pharm., 238 S.W.3d 140, 144 (Mo. banc 2007). Again, if an accused's promise to appear is insufficient, then the two types of bail

available are surety (a professional bondsman) and a bond that can be posted with ten percent cash. Rule 33.01(d)(3) and (5).

If cash-only bail was to be allowed the drafters could have specifically made it a type and released it from its location in Rule 33.01(d)(3). For instance, there could have been three types of bail: 1) require the execution of a bond in a stated amount with sufficient solvent sureties, 2) require the execution of a bond in a stated amount and the deposit in the registry of the court of ten percent, or such lesser sum as the court directs, of such sum in cash or negotiable bonds of the United States or the State of Missouri or any political subdivision thereof, and 3) require the execution of a bond with deposit in the registry of the court in the sum of cash. Because the "deposit . . . in the sum of cash" is not freestanding but a) is anchored to the type of bail that requires sufficient sureties and b) is connected by the word "or," the combination of these two factors suggests that it is the defendant's option whether or not to post bond with surety or with cash because if an accused did not have the option, then cash-only bail denies the defendant access to a surety.

If cash-only is deemed to be allowed under the "or the deposit . . . of the sum in cash" language, then the amount of the cash-only bail would have to be an amount that the defendant has so that the defendant can be released under the rule. Or rather, if the defendant cannot post bond by furnishing the cash-only bail, then the defendant has not been released when the rule specifically says "[a]ny person charged with a bailable offense shall be entitled to be released pending trial." Rule 33.01

C. Missouri's case law appears to indicate that cash-only bail is prohibited.

"Since the only purpose of bond is to secure the appearance of the defendant at the trial . . . . The bail bond must be fixed with a view to giving the prisoner his liberty, not for the purpose of keeping him in jail." State ex rel. Corella v. Miles, 262 S.W. 364, 365 (banc 1924); see also State v. Canania, 537 S.W.2d 203, 204-205 (Mo. App. E.D. 1976) and Ex parte Chandler, 297 S.W.2d 616, 616-617 (Mo. App. S.D. 1957).

Within four years of our first Constitution, this Court stated, "[i]f, in order to keep him in custody, the bond is ordered at a sum so large that the prisoner cannot furnish it the order violates [Article I, Section 20] of the Constitution [because] that is saying the offense is not bailable when the Constitution says it is." State ex rel. Corella v. Miles, 262 S.W. 364, 365 (banc 1924).

Generally, "one accused of crime is entitled to bail as an absolute right, subject to the limitation that it should be denied in capital cases where the proof is evident or the presumption great. This limitation, founded upon justice and reason, has nothing mystic in its meaning." Ex parte Burgess, 274 S.W. 423, 426 (banc 1925).

"Upon admission to bail the custody of the defendant is transferred to his sureties." State v. Canania, 537 S.W.2d 203, 205 (Mo. App. E.D. 1976) (citing State v. Wynne, 204 S.W.2d 927 (Mo. 1947)).

"While bail is favored and is granted in the ordinary course of events, an accused by his actions can forfeit his right to bail and the court is under a duty to protect its processes and to protect prospective witnesses." State v. Dodson, 556 S.W.2d 938, 945 (Mo. App. E.D. 1977). This holding would seem to be more applicable in a case that is

procedurally similar to Iowa's State v. Briggs infra where defendant's actions while out on bond caused the court to set cash-only bail.

And in Ex parte Welsh, 162 S.W.2d 358 (Mo. App. W.D. 1942), that court answered in the affirmative that the defendant charged with murder in the first degree was "entitled to be released on bail pending a preliminary hearing . . . ." Bail was fixed at $10,000. Id. at 360. The opinion is silent as to whether the bail was cash-only. Id. The reasonable inference would be that the bail was not cash-only because a surety bond was posted. Id. at 360-361 ("[b]ond being offered instanter, the bondsmen are duly qualified by us and bond is herewith executed . . . petitioner discharged from custody under said bail."). Further, the amount of bail was fixed at $10,000 because of the excessive bail clause. Id. at 361.

D. To the extent the Court deems relevant, case law from foreign jurisdictions seem to indicate that cash-only bail is prohibited.[10]

The state of Louisiana was the first state to address the question of the constitutionality of cash-only bail. State v. Golden, 546 S0. 2d 501 (La. App. 1989). The law in Louisiana provided for an in lieu of a surety alternative that could be posted with a cash deposit equal to the amount of bail. Id. at 502. The court held that "[t]his statutory in-lieu-of-a-surety-alternative to the constitutional pre-trial bail 'by sufficient surety' is granted, not to the court that sets the 'amount' of the bail (Arts. 315-317) and the

[10] All cases deal with constitutional provisions similar to Missouri's constitutional provision.

'conditions of release' (Art. 336.1), but to the defendant." Id. Regarding the discretion granted to "impose any other conditions deemed reasonably necessary[,]" the court also held that such a condition does not allow for cash-only bail because such a construction would be "to supersede the constitutional mandate." Id. at 503. There was only "one constitutional exception to the guarantee of pre-trial bail by sufficient surety . . . . [and] there [was] also no legislative provision authorizing a judge to deny bail or a type of bail." Id. Therefore, bail could not be limited to cash-only. Id. at 504.

In 2000, the state of Minnesota addressed the issue. State v. Brooks, 604 N.W.2d 345 (Minn. 2000). Minnesota's counterpart to our Rule 33.01(d)(3) and section 544.455.1(3) similarly stated a court could "[r]equire the execution of an appearance bond in an amount set by the court with sufficient solvent sureties, or the deposit of cash or other sufficient security in lieu thereof . . . ." Id. at 351. However, the court did not address whether cash-only bail was allowed under the rule. The court echoed the intent of the federal Bail Reform Act of 1966 "to de-emphasize monetary bail." Id. The court instead reached the constitutional question and held that the sufficient sureties "phrase is unambiguous and that it prohibits cash-only bail." Id. at 352. "We base our conclusion on the plain meaning of the word 'surety.' Our conclusion is supported by the definition of surety, its historical usage, our decision in Pett, and the holdings of other courts." Id. at 352. The meaning of the word "surety" has a broad meaning and cannot be limited to cash-only bail. Id. at 353. "[A]t the very least it must protect an accused's access to helpful third parties." Id. From a historical point of view, "[t]he clause is intended to protect the accused rather than the courts." Id. at 350. In support, the court gave as an

example a property only bond. Id. The court stated that if the individual did not have any property, "he is in essence being denied bail when he may be able to provide adequate assurance by some other means." Id.

In 2003, two opinions were published: Yakima v. Mollett, 63 P.3d 177 (Wash. Ct. App. 2003) and State v. Briggs, 666 N.W.2d 573 (Iowa 2003).

Yakima v. Mollett, 63 P.3d 177 (Wash. Ct. App. 2003)

The court in Yakima did not reach the constitutional issue. Yakima, 63 P.3d at 181. The applicable counterpart to our Rule 33.01(d)(3) and section 544.455.1(3) similarly stated a court could "[r]equire the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof . . . ." Id. at 180. The context of the rule speaks in term of release. Id. at 179. In holding that cash-only bail is not authorized under the rule, the court stated, "[i]f the rule drafters intended to authorize 'cash only' bail, they could have easily set it out as a discrete condition of release." Id.

State v. Briggs, 666 N.W.2d 573 (Iowa 2003)

The court in Briggs reached the constitutional issue and held cash-only bail "is permissible under the sufficient sureties clause of the Iowa Constitution so long as the accused is permitted access to a surety in some form." Briggs, 666 N.W.2d at 583. "[T]he core purpose of the clause was to guarantee a bailable individual access to a surety of some form. . . . [but] the framers did not intend that such access be unfettered or tied specifically to a commercial bonding process." Id. at 581-582. Since the commercial bonding process was not one of the traditional methods of surety, the sufficient sureties phrase does not extend "an unfettered right to a commercial bail bondsman." Id. at 583.

In using the word "sufficient," the court found that "the framers carved out a measure of discretion for the person overseeing the bailing process." Id. at 582.

Iowa's counterpart to our Rule 33.01(d)(3) and section 544.455.1(3) similarly stated a court could "[r]equire the execution of a bail bond with sufficient surety, or the deposit of cash in lieu of bond." The court found cash-only bail acceptable under this section in combination with a section allowing for any other conditions. Id. at 583.

The holding has two problems for purposes of deciding the issue presented. One, the issue of cash-only bail arose in the following procedural context: the defendant was initially granted a surety bond and posted. Id. at 574. The defendant failed to appear for court and the warrant set bond at cash-only. Id. In justifying cash-only bail, "[t]he district court at first permitted her to be bailed by commercial bond, but Briggs abused that opportunity by 'skipping' bail and failing to appear for her arraignment." Id. at 584.

The other problem is that the holding has an exception which actually undermines the intended holding. The sentence immediately following the holding states "if the accused shows that the bail determination absolutely bars his or her utilization of a surety of some form, a court is constitutionally bound to accommodate the accused's predicament." Id. This would seem to suggest that defendants shall be released if their financial situation will not allow them to furnish the total amount of the cash bail. Vermont noted the confusion in the legal reasoning. See infra State v. Hance, 910 A.2d 874, 881 n.5 (Vt. 2006) ("The decision is internally confusing as well. At one point, the court states 'if the accused shows that the bail determination absolutely bars his or her utilization of a surety of some form, a court is constitutionally bound to accommodate the

accused's predicament.' Briggs, 666 N.W.2d at 583. It is difficult to reconcile this statement with the court's ultimate holding.").

In essence, the holding is that cash-only bail is permissible when an individual who is not charged with a capital offense is admitted to bail, and at a minimum is able to post bond with a surety, posts the bond, and then fails to appear for the arraignment. Again, such is not the procedural context here – defendant has never posted bond and done something to abuse his freedom while his case is pending.

In 2004, the state of Alabama addressed the issue. Ex parte Singleton, 902 So. 2d 132 (Ala. Crim. App. 2004). The applicable statute allowed for four types of bail were allowed: "cash bail, judicial public bail, professional surety bail, and property bail." Id. at 133. Their Supreme Court Rule stated the judge "may order the 'execution of an appearance bond in an amount specified by the court, either with or without requiring that the defendant deposit with the clerk security in an amount as required by the court.'" Id. at 133. Their Supreme Court Rule also had a provision allowing for any other conditions. Id. The court interpreted this rule as placing "great discretion in the judge setting the amount of bail and the terms of a release order." Id.

The court also adopted "the rationale of the Surpeme Court of Iowa" in State v. Briggs, 666 N.W.2d 573 (Iowa 2003). Id. at 134. In reality, the court did more than adopt the rationale of Briggs, it actually extended the holding of Briggs because it left out the Briggs' exception "if the accused shows that the bail determination absolutely bars his or her utilization of a surety of some form, a court is constitutionally bound to accommodate

the accused's predicament." See Briggs, 666 N.W.2d at 583. In short, the court held there was no law that "prohibits a judge from setting a 'cash only' pretrial bail."

In 2005, two opinions were published: Fragoso v. Fell, 111 P.3d 1027 (Ariz. Ct. App. 2005) and Smith v. Leis, 835 N.E.2d 5, 17 (Ohio 2005).

Fragoso v. Fell, 111 P.3d 1027 (Ariz. Ct. App. 2005)

Fragoso held "only that cash-only bail is not prohibited by, but rather, in appropriate circumstances is permissible under, article II, § 22 of the Arizona Constitution, § 13-3967, and Rule 7." Id. at 1034. The relevant statute stated,

> [A] judicial officer may impose any of the following conditions on a person who is released . . . on bail: . . . . 3. Require the deposit with the clerk of the court of cash or other security, such deposit to be returned upon the performance of the conditions of release. . . . . 6. Impose any other conditions deemed reasonably necessary to assure appearance as required . . . .

Id. at 1030. "Security" was defined as "cash, a surety's undertaking, or any property of value deposited with the clerk to secure an appearance bond." Id. at 1031. That court held that the "language at issue is not ambiguous [and] neither the applicable statute nor the procedural rules expressly prohibit cash-only bail." Id. The court went on to add that if the intent of drafters had been to prohibit such a condition, the drafters would have said so. Id. In addressing the constitutional issue, the court noted the possibility that…

> bail by cash (or personal property of value such as a horse or a firearm) might have been the only practical form of bail in Arizona when our constitution was adopted in 1910, particularly because of the transient nature of the population and the vast rural areas where a secured bond or a traditional, formal, third-party surety arrangement would not have been feasible.

Id. at 1033. The court adopted Briggs' interpretation of the word "sufficient" (i.e., that "sufficient" provides the necessary discretion for a judge to set cash-only bail). Id. The court also adopted Briggs' interpretation of the phrase "sufficient sureties" (i.e., the purpose is to guarantee access to a surety of some form). Id. More importantly, Arizona had actually amended its Constitution in 2003. Id. at 1033-1034. The amendment changed bail's purpose as follows: "the primary, if not paramount, purpose of bail under the Arizona Constitution is to guarantee a defendant's appearance in court while protecting victims, witnesses, and the public[.]" Id. at 1034. Therefore, "[a]ccording a judicial officer the discretion to impose a cash-only condition of release as one such tool is not only statutorily authorized but also entirely consistent with article II, § 22 of our state constitution." Id. at 1034. Somewhat similar to Briggs', the court added a disclaimer: "nothing in this decision should be interpreted as blanket authority for cash-only bail." Id.

Smith v. Leis, 835 N.E.2d 5, 17 (Ohio 2005)

Smith held "that cash-only bail is unconstitutional under Section 9, Article I of the Ohio Constitution and is not authorized by either Crim.R. 46 or R.C. 2937.222." Id. at 7. This is because cash-only bail "infringes upon an accused's constitutional right to bail by sufficient sureties." Id. at 16. The court reached this result notwithstanding the fact that the question arose after "defendant was convicted of ten counts including murder and two counts of attempted murder." Id. His case was reversed on appeal for reasons unrelated to bond, and pending re-trial defendant brought his question challenging the constitutionality of cash-only bail. Id. Ohio's constitution was amended to provide two exceptions.

> All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail.

Id. at 12. The court interpreted the provision to indicate the "types of offenses and circumstances under which bail could be *denied, not to limit an accused's access to a surety once bail is granted*." Id. at 15.

Regarding the issue of whether or not to address the constitutional issue, the court stated that the "constitutional issue is the preeminent reason why this case, while moot as to Smith, may be heard on its merits." Id. at 13. The applicable rule stated the types of allowable bonds were: "'[a] surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.'" Id at 17. The court interpreted this rule to mean that "[i]t is the choice of the defendant to post cash as a deposit to secure the bond posted under Crim.R. 46(A)(3)." Id. at 17. In discussing the applicable rule, the court stated that "a []cash-only bond is a type of bail -- not a condition or factor of bail" Id. at 16. In interpreting the rule, the court also referred to the reasoning used in Yakima v. Mollett that if cash-only bail was desired the drafters could have easily said so. Id. at 16-17. Therefore, cash-only bail was not one of the listed types of bail, i.e., it did not fall within the language of "or the deposit of cash, at the option of the defendant." The rule "did not empower the trial court to order a cash-only bond for Smith." Id. at 17.

In 2006, two more opinions were published: State v. Gutierrez, 140 P.3d 1106 (N.M. Ct. App. 2006) and State v. Hance, 910 A.2d 874 (Vt. 2006).

State v. Gutierrez, 140 P.3d 1106 (N.M. Ct. App. 2006)

The court concluded "that Rule 5-401 expressly provides for cash-only bail, that this does not violate the New Mexico Constitution, and that a cash-only bond is

permissible in appropriate circumstances." Id. at 1111. Defendant was charged, in the alternative, with murder first degree. Id. at 1107. New Mexico's applicable rule initially stated,

> If the court makes a written finding that release on personal recognizance or upon execution of an unsecured appearance bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, in addition to any release conditions imposed pursuant to Paragraph C of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds which will reasonably assure the appearance of the person as required and the safety of any person and the community:

Id. at 1108. One of the types of bonds is, "the execution of a bail bond with licensed sureties as provided in Rule 5-401(B) NMRA or execution by the person of an appearance bond and deposit with the clerk of the court, in cash, of one-hundred percent (100%) of the amount of the bail set . . . ." Id. at 1108. "The rule is not written in terms of what the defendant's options are for posting a secured bond." Id. at 1109.

The court agreed "with the Iowa Supreme Court that by including the qualifying term 'sufficient' in the sufficient sureties clause, the framers must have intended to confer 'a measure of discretion for the person overseeing the bailing process.'" Id. at 1111.

State v. Hance, 910 A.2d 874 (Vt. 2006)

The court held that "[t]o the extent 13 V.S.A. § 7554(a)(1)(F) permits imposition of a cash-only bond, it is unconstitutional." Id. at 882. The court ruled that surety meant "a third party who guarantees the accused's appearance in exchange for accepting the substantial financial obligation that will be imposed should the accused fail to appear." Id. "Thus, the intervention of a surety is a critical mechanism for protecting the rights of the accused as well as the interests of the courts." Id. "The bail statutes themselves assume that a defendant will be released on personal recognizance or an unsecured appearance bond unless a finding is made that such measures will be insufficient." Id. at 880. Allowing cash-only bail "would increase government power to engage in pretrial confinement . . . ." Id.

The applicable counterpart to our Rule 33.01(d)(3) and section 544.455.1(3) was amended in 2002 to allow a court to "'[r]equire the deposit with the clerk of court of cash bail in a specified amount.'" Id. at 877. Prior to the legislative amendment a ten percent bond and a surety bond were types of possible bonds. Id. The court interpreted this section of the statute to allow for cash-only bail. Id. at 877-878. In interpreting Vermont's constitution, the court distinguished Fragoso v. Fell, 111 P.3d 1027 (Ariz. Ct. App. 2005) and Arizona's Constitution stating that Vermont's Constitution "makes clear that defendant, who is after all presumed innocent, has liberty interests that must be balanced against the court's interest in securing his or her appearance." Id. at 881. The court also noted the confusion in the legal reasoning of State v. Briggs, 666 N.W.2d 573 (Iowa 2003). Id. at 881 n.5 ("The decision is internally confusing . . . . 'if the accused

shows that the bail determination absolutely bars his or her utilization of a surety of some form, a court is constitutionally bound to accommodate the accused's predicament.' Briggs, 666 N.W.2d at 583. It is difficult to reconcile this statement with the court's ultimate holding.").

1. Comparative Analysis

a. Cases that support cash-only bail are easily distinguishable.

Conspicuously absent from State v. Briggs, 666 N.W.2d 573 (Iowa 2003); Ex parte Singleton, 902 So. 2d 132 (Ala. Crim. App. 2004); and Fragoso v. Fell, 111 P.3d 1027 (Ariz. Ct. App. 2005) are the words "cash-only." Briggs' is distinguishable because of the procedural context in which the issue of cash-only bail was presented to the court. Singleton and Fragoso both reason that no law expressly prohibited cash-only bail, therefore it is allowable. See supra Singleton and Fragoso. Again, since the words "cash-only" do not appear anywhere in their statute, such reasoning seems dangerously close to adding words to reach the result it wants. State ex rel. Young v. Wood, 254 S.W.3d 871, 873 (Mo. banc 2008) (quoting from Asbury v. Lombardi supra that a "court may not add words by implication [when the language] is clear and unambiguous.").

In addition, in the case of Fragoso, Arizona had amended its constitution to actually change the purpose of bail. See supra Fragoso. In contrast, State v. Gutierrez, 140 P.3d 1106 (N.M. Ct. App. 2006) expressly allowed for cash-only bail in their rule. However, the concern with Gutierrez's legal reasoning lies in the fact that based on defendant's charge of murder there was supposed to have been a hearing to determine under the constitution whether the proof is evident or the presumption great. The opinion

was silent regarding the constitutional standard. Instead, the opinion seemed to give greater emphasis to the fact that the judge had problems with the practices of bonding companies as the reason for justifying a cash-only bail on a defendant charged with murder in the first degree. Id. at 1107-1108.

Also, and excluding Singleton, the consensus seems to be that in reaching the result that cash-only bail does not violate the "sufficient sureties" phrase, there seems to be a great deal of unease as evidenced the exceptions and/or disclaimers in the cases. Gutierrez, 140 P.3d at 1111 (stating "[c]ash only bail is the last option and should only be imposed after careful consideration."); and Fragoso, 111 P.3d at 1034 (stating "nothing in this decision should be interpreted as blanket authority for cash-only bail.").

b. Cases that indicate cash-only bail should not be allowed are sufficiently persuasive. State v. Golden, 546 S0. 2d 501 (La. App. 1989); State v. Brooks, 604 N.W.2d 345 (Minn. 2000); Yakima v. Mollett, 63 P.3d 177 (Wash. Ct. App. 2003); Smith v. Leis, 835 N.E.2d 5, 17 (Ohio 2005); and State v. Hance, 910 A.2d 874 (Vt. 2006).

In brief, even in Hance, where the court found cash-only to be allowable under the rule, Vermont's drafters had made that type of bail a discrete option, but even so, it was still found to be unconstitutional. State v. Hance, 910 A.2d 874 (Vt. 2006); see also Smith v. Leis, 835 N.E.2d 5, 17 (Ohio 2005) (stating "[f]ourth, and most important, even had [the rule] expressly permitted cash-only bial, it would have violated the sufficient-sureties clause of Section 9, Article I of the Ohio Constitution."). In contrast to Arizona's constitutional amendment in Fragoso supra, Missouri's constitutional provision has not

been amended. And the words "cash-only" (or an equivalent such as in Gutierrez supra "deposit with the clerk of the court, in cash, of one-hundred percent (100%) of the amount of the bail set") are also conspicuously absent from all of Missouri's applicable law.

CONCLUSION

Based on the historical evolution, or lack thereof, of the guiding documents and vocabulary therein from inception to the present day, in cases where the initial warrant has been served, defendant has been admitted to bail, but has not posted bond, and a capital offense is not charged, it seems strikingly clear to us that both our nation's Founding Fathers and the Framers of our State Constitution intended cash-only bail to be unconstitutional and it should be so recognized.

Respectfully submitted,

/s/ *Lou Horwitz*

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and excluding the cover, certificate of service, and appendix, the attached brief contains 11,683 words as determined by Microsoft Word 2007 software. I further certify on this 2nd day of August, 2012, a copy of this brief was electronically served via the Missouri eFiling System to Ms. Rebecca Shaffar, Assistant Prosecuting Attorney for the County of St. Charles and a registered user of the Missouri eFiling system.

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No. SC92532

In The
Supreme Court of Missouri

STATE OF MISSOURI,

Plaintiff,

v.

KIRK JACKSON,

Defendant.

Rule 33.09 Application Regarding
Conditions for Release Pending Trial
from St. Charles County Circuit Court,
Eleventh Judicial Circuit,
(case presently pending before)
The Honorable Nancy Schneider, Circuit Judge

DEFENDANT'S APPENDIX

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