AMERICAN BAIL COALITION

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May 17, 2023

Justices of the Connecticut Supreme Court
Connecticut Supreme Court
231 Capitol Avenue
Hartford, CT 06106

RE: Proposed Rule Change Regarding the Setting of Appearance Bonds

Dear Chief Justice Robinson and Justices of the Connecticut Supreme Court:

I write to encourage you to reject the proposed rule change regarding a 7% partially secured cash-to-the-court premium on bail bonds.

First, state statute already prohibits courts from refusing to accept a bond posted by a surety. See Criminal Procedure § 54-64a. Under this partially secured bail scheme, sureties are prohibited from posting such 10% (proposed 7%) bonds, in contradiction of state statute. The statute also says that the court shall not set an amount that is more than "necessary." Here, the state courts do not collect the unsecured portion of the bond, and thus arguably, there is no need therefor to collect it. In addition, it strains credulity to suggest that a rule can made that can comply with the dictates of Stack v. Boyle, 341 U.S. 1, 5 (1951) in that a court is tasked with setting bail that is not "*at a figure* higher than an amount reasonably calculated" to assure the appearance of the defendant in court. To this point, as we noted before the rules committee, there is authority from other state supreme courts that stands for the proposition that specific statutory authorization is needed for the judiciary to have authority to engage in the practice of partially secured bonding, where a court acts as surety. Here, partially secured cash to the court bonds are prohibited by statute, and at a minimum certainly not authorized.

Justice McDonald, however, as Chair of the Rules Committee, made the following public statement to the media, arguing that the legislature has failed to act or engage in the rules process: "There's a very good argument to be made that bail is purely a Judicial Branch function and not a Legislative Branch, but we've never had those hard lines. It is a communication." He then said: "If the legislature steps up and gives us different input at some point, obviously we would take that into consideration." Candidly, we feel a state statute prohibiting denial of the right to a surety is "different input."

Further, to the point, we believe the Court, unfortunately, is going to have to ultimately rule on the constitutionality of the rule change that was brought on by unnecessary policy-making best left to the General Assembly. This policy requires that cash-only be posted when a partially secured bail is allowed. This denies defendants to access to a surety bond to post that bail, violating the sufficient security provision of the Connecticut State Constitution. As we noted, the vast majority of state supreme courts, which have similar right to bail by sufficient surety provisions, have held that the right to bail is the right

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to a personal surety, and thus setting a "cash-only" provision is unconstitutional.[1] Courts have then in numerous states applied the same rule to partially secured bonds, arguing that while partially secured bails may be granted, defendants have a constitutional right to have a surety post the partially secured amount. These include but are not limited to Ohio, Michigan, and Washington State. In addition, this is further indicia that the Connecticut General Assembly is on firm ground when they codify this right to personal surety in state statute, i.e., that whatever amount courts deem is "necessary" they cannot prohibit a "surety" from posting a "bond." Thus, we forecast that this regime will ultimately be undone, and unfortunately the Supreme Court will have the appearance of impropriety in having to rule on the constitutionality of a cash-to-the-court bond program it created by court rule that was directly contrary to state statute.

Second, no data has been presented that would suggest that this change is warranted or would aid in the defense of the trial judges who will violate the equal protection clause when discriminating against defendants who choose to use a personal surety rather than posting cash. The only data presented in this process has been anecdotal testimony from the Sentencing Commission. There is no data set in the record. We requested the same from the Sentencing Commission and have received nothing. While Justice McDonald, as chair of the rules committee, publicly dismissed the testimony of the bail industry as not reliable ("Frankly, I am more comfortable relying on their [Sentencing Commission] statistics and data than what I consider to be a somewhat loose recitation of data that was presented in some of the testimony."), we think the better approach would have been to require the Sentencing Commission to actually the pull the data if the recitation of the data was "somewhat loose." For example, if the previous rule change actually increased the average size of the bond in Connecticut by 70% and the average size of bonds posted by sureties by 120%, **the economic impact of that unintended consequence far overwhelms the potential savings to defendants of roughly $4 million in refunds**. As a matter of equal protection, however, surety bonds outperform 100% cash, and **there is no evidence in the record to contradict the fact established by the U.S. Department of Justice, Bureau of Justice Statistics that long-term fugitive rates are much lower when commercial sureties are used instead of cash.**

Thus, there is no basis in the record to deny the right to a personal surety when courts set a partially secured bail amount. If the state collected the remaining 90% of the bonds when forfeited, perhaps this would be a different analysis, but no one does. It is truly a 90% discount that is written-off by the state and defendants who know they are never going to have to pay it. Indeed, we alleged based on information and belief that not a single partially secured bail has been collected upon forfeiture, and if we are wrong in our "recitation" of such facts, the Sentencing Commission or the judiciary should put up the numbers. There are none. Indeed, it would be worth knowing how much has been written-off in unpaid partially secured bail forfeitures in Connecticut as another consideration as to the effectiveness of this program. Or, if the Supreme Court believes this program works, subject it to an independent audit.

In short, we are not comfortable with the recitation of the facts by the Connecticut Sentencing Commission or the consideration thereof by the rules committee. The Committee was clearly dismissive

[1] For example, See State v. Brooks, 604 N.W.2d 345 (Minn. 2000) and State v. Barton, 331 P.3d 50 (Wash. 2014).

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of statistics that suggested against the rule change, and rather than request the judiciary or Sentencing Commission to provide data that assist the Committee in resolving factual questions, the committee simply dismissed, and according to Justice McDonald, simply did not rely on anything but data presented by the Connecticut Sentencing Commission.

Trial judges should be tasked with setting bail. If the General Assembly believes an option should be allowed for partially secured bails, which national data have largely debunked, then they should consider the evidence and pass such a statute. Otherwise, as we testified, because of the ineffectiveness of the partially secured bail programs, **if we can argue that there is a percentage of people who will show up if they get a 93% discount on their bail, then there are likely a good percentage of those people who will also show up on a 100% discount**.

Sincerely,

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Jeffrey Clayton, M.S., J.D.
Executive Director
American Bail Coalition