AMERICAN BAIL COALITION

P.O. Box 352
Franklinville, NJ 08322
info@ambailcoalition.org
www.AmericanBailCoalition.org

May 3, 2023

Honorable Andrew J. McDonald
Chair, Rules Committee of the Superior Court
Connecticut Judicial Branch

RE: Testimony in Opposition to Proposed Rule Change to Sec. 38-8, Seven Percent Cash Bail

Dear Justice McDonald and Members of the Rules Committee:

Contained herein are my written remarks against the change to the practice book that would expand the use of 10% bail in Connecticut by creating a 7% partial secured deposit. There is no public policy justification for the change presented other than defendants are refunded greater bail deposits when they show up for court, which benefits are likely completely erased by bond size increases and other substantial negative impacts not quantified by the Sentencing Commission. In addition, we do not believe that disallowing personal sureties from posting partially secured bonds will withstand a challenge pursuant to the Equal Protection clause, state constitutional provisions, or state statute.

First, existing data from the Judicial Department clearly shows that 10% to the court bail in the existing system dramatically under-performed every form of release including cash, non-surety, PTA, and surety releases. In data from 2014 to 2018, 10% to the court failure to appear rates were higher in both felonies and misdemeanors than any form of release over the five-year data set. For example, in 2018, if all of those who posted cash go the 10% option, the failure to appear rate would more than triple, from 7% to 21%. In addition, promises to appear in Connecticut outperform 10% deposits. The supporting data was provided by the Bail Association of Connecticut. While testimony in the most recent February meeting of the committee was that the expanded use of the 10% *has not increased* failures to appear in court, there is no data set in the record that has been presented as part of this process that confirms this fact. In addition, there is no data collected or presented on new crimes while at liberty and particularly data as to *long-term fugitive rates*, which national data clearly establishes that partially secured bonds perform much worse than fully secured bonds on those measures. Data presented by the Bail Association of Connecticut in fact show that recovery rates of surety bonds are much higher than partially secured cash bonds, and that failure to appear in courts have increased since the program of 10% bonds was implemented as a result of the rule change in 2019. In short, no data set has been presented that would allow the Committee to conclude that the program has been a success, save some anecdotal testimony.

The data in Connecticut also comports with national research from data derived from the Bureau of Justice Statistics sampling the 75 largest jurisdictions in the United States over a 15-year period in an article that appeared in the University of Chicago's *Journal of Law and Economics*. That study showed that 10% to the court deposit bonds, typically perform "marginally better" than a simple

AMERICAN BAIL COALITION

P.O. Box 352
Franklinville, NJ 08322
info@ambailcoalition.org
www.AmericanBailCoalition.org

release on recognizance.[1] In addition, the Connecticut data does not include a cure rate—i.e., what occurred after the failure to appear and how successful third-party posters of bonds, compensated or uncompensated, were at returning persons to court. No data presented from the Sentencing Commission would allow the committee to come to an opposite conclusion. To the contrary, data presented by the Bail Association of Connecticut clearly shows that recovery rates are much less in cases of partially secured bails as opposed to those secured by a surety. The economic impact of victims not getting justice may offset the perceived benefit of returning $3.9 million to criminal defendants.

Second, while defendants receive their deposits back, which of course they would if they also posted 100% cash at a rate ten times higher thus arguing for that system, there is no data presented as to the amount of funds the State of Connecticut has lost when folks fail to appear in court and bond is forfeited. While defendants who show up are refunded, defendants who fail to show up are not on the hook for the remaining 90%, and upon information and belief, the State of Connecticut has not collected any of the remaining forfeited bonds. If we are wrong, the Sentencing Commission should contradict us with a dollar figure. Thus, while defendants are able to keep 10% of the penal amount when they appear, defendants who fail to appear are able to avoid paying a 90% penalty when they fail to appear, which is going to increase to 93% of the penal value of the bond under the proposed change. The Sentencing Commission should disclose how much is owed to the State of Connecticut on uncollected partially secured bonds so that such number could be properly understood in the context of the amount refunded.

Third, if a defendant absconds and the bond is forfeited, the defendant will then have a disincentive to return to court because he/she will wrongly believe the state will collect such deposits. In other states, we have not seen states making any attempt to collect the other 93% when a bond forfeits, which is why the City of Philadelphia was ultimately owed over $1 billion in uncollected 10% forfeitures when its program disbanded. On the other hand, if the State is to collect the other 93% from defendants, this will involve costs to the State that the State may or may not be able to then pass along to defendants.

Fourth, when a defendant absconds on a 7% to the court bond, there is no third-party or bail agent to formally arrest them or to informally get their case back on track by having them to return to court. We simply hope they come back, which typically they do not unless they are rearrested for something else. Certainly, the Sentencing Commission should have the data to contradict national peer-reviewed research that demonstrates that partially secured bonds fail in comparison to fully secured bonds. Yet, such research has not been presented. There was simply anecdotal testimony that failure to appears did not increase, but there was no actual data presented to confirm that.

Fifth, 7% or 10% bonds are confusing and potentially disingenuous to victims of crimes who will wrongly believe that the entire bail amount is secured. In fact, a criminal defendant is going to get a

[1] "Defendants released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time. **Deposit bonds perform only marginally better than release on own recognizance**." https://mason.gmu.edu/~atabarro/PublicvsPrivate.pdf

AMERICAN BAIL COALITION

P.O. Box 352
Franklinville, NJ 08322
info@ambailcoalition.org
www.AmericanBailCoalition.org

90% bail discount because the State, barring some major investment in collections on criminal defendants, will never collect the other 90% or 93%.

Sixth, the prior rule and proposed rule violates the State Constitution's guarantee of a defendant's constitutional right to a personal surety. The right to bail by sufficient sureties (or security) is understood as the right to a personal surety. The meaning of the phrase bail by sufficient sureties is well-settled. If the data from the Sentencing Commission does indeed show that partially secured bails work in terms of guaranteeing appearance and protecting public safety, then national data shows that if personal sureties are allowed to post the partially secured bails, then such will achieve even better results than partial cash-only being posted. For example, if the Sentencing Commission's data shows that the 10% program did work by all measures, then national data would support the fact that surety agents posting the 10% would outperform the cash that is posted by measures that judges are allowed to take into account as the purposes of bail (which do not include defendant refunds and instead rely on guaranteeing appearance in court and guaranteeing public safety). In any event, discriminating between the two, partial security only allowed by cash and not surety, will not pass equal protection muster under the constitutional guarantee of bail by sufficient security when a defendant who could post a 7% surety bond but not a 7% cash bond remains in jail pending trial, as noted below.

In fact, the vast majority of state supreme courts have held that the right to bail by sufficient sureties means access to a personal surety to post an amount of security. Here, the Sentencing Commission is asking the Committee to approve a rule to specifically compete with the right to a personal surety so that cash must be posted. The 10% option previously enacted allows a 90% bail discount but then denies the right to a personal surety. So does the 7%, which allows a 93% bail discount, but only if the defendant posts the 7% in cash and may not use a personal surety.

While this is a matter of first impression in Connecticut, other states have held that the right to bail by sufficient sureties means that courts cannot impose cash-only bail, *regardless of whether it requires a fully or partially secured bail*. In other words, if partially secured bails are allowed, the right to bail by sufficient sureties means that personal sureties shall be allowed to post such partially secured bails. These states include Ohio, Michigan, and Washington State to name a few.

The question presented is whether a rule allowing a 7% cash bail (a partial deposit) without the possibility of a third-party surety to post the 7% violates the Connecticut Constitution's enumerated right that the accused shall have a right "to be released on bail upon sufficient security." Numerous other states, however, have addressed the meaning of identical "sufficient sureties" provisions in state constitutions and have persuasively concluded that the "sufficient sureties" means a defendant must be allowed the option to secure the bail amount required via a surety, as distinct from cash or other security.

The phrase "shall be bailable by sufficient sureties" is contained in approximately two-thirds of the states' constitutions. State v. Brooks, 604 N.W.2d 345, 349-350 (Minn. 2000). As stated above, it is a question of first impression in Connecticut whether the imposition of cash only bail without the option of a third-party surety violates the "sufficient sureties" clause, but the majority of states, especially in the eastern half of the United States, who have addressed this issue have held that "sufficient sureties"

AMERICAN BAIL COALITION

P.O. Box 352
Franklinville, NJ 08322
info@ambailcoalition.org
www.AmericanBailCoalition.org

requires the option to secure bail via a surety. See e.g., Brooks at 36 ("we conclude that cash only bail violates Minnesota's Constitution"); Smith v. Leis, 106 Ohio St. 3d 309 (Ohio 2005) ("After due consideration, we hold that cash-only bail is unconstitutional under Section 9, Article I of the Ohio Constitution"); State v. Hance, 910 A.2d 874, 876 2006 VT 97 (Vt. 2006) ("We agree that, to the extent § 7554(a)(1)(F) permits imposition of cash-only bail, it violates our Constitution."); State v. Barton, 331 P.3d 50 (Wash. 2014) ("We hold that article I, section 20 means a defendant must be allowed the option to secure bail via a surety, as distinct from cash or other security.").

The "Brooks" line of cases center their analysis on the history of the provision "bailable by sufficient sureties," the purposes of bail, and the plain meaning of the provision based on historical and contemporary definitions of surety.

The prevalence of the "bailable by sufficient sureties" provision in state constitutions stems from "Pennsylvania's Great Law of 1682," which provided that "all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where the proof is evident or presumption great." Id. at 531. This language, which was ultimately incorporated into the Pennsylvania Constitution, became the model for almost every state constitution adopted after 1776." Brooks at 350 (internal citations omitted). The history of this provision stems from the fact that the Quakers who founded Pennsylvania, like many of the founders of Connecticut, had faced persecution in England and had greater sympathy for detained defendants than for a powerful judiciary, and as a result sought to make almost all offenses bailable. Id. The Minnesota Supreme Court states,

> As previously noted, the general purpose of bail is to ensure an accused's appearance and submission to the judgment of the court. However, when viewed in its historical context, it becomes clear that the section 7 Bail Clause [sufficient sureties provision] has a broader purpose. In essence, the clause limits government power to detain an accused prior to trial. The clause is intended to protect the accused rather than the courts. It is this broader purpose that distinguishes the rights granted under Article I, Section 7 of the Minnesota Constitution from the bail rights granted under the Eighth Amendment of the United States Constitution.

Id. (emphasis added). The United States District Court for the District of Delaware has likewise held that bail serves these same two purposes under Delaware law. The court states:

> The system of bail is firmly established in the American legal system, and is recognized both by the United States and by the Connecticut constitution. One purpose of bail is to allow an accused, who is presumed innocent, to avoid unnecessary incarceration and adequately prepare his defense. However, the right to release before trial is conditioned upon the accused's providing adequate and reasonable assurance that he will stand trial when summoned by the Court and submit to sentence if convicted. Stack v. Boyle, 342 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951).

United States v. DEPARTMENT OF CORRECTIONS OF STATE OF DEL., 268 F.Supp. 242, 243 (D. Del. 1967). (emphasis added). In State v. Mitchell, the Delaware Superior Court examined the history of bail dating back to English Common Law, discussed the rise of commercial bail, and concluded that the accused

AMERICAN BAIL COALITION

P.O. Box 352
Franklinville, NJ 08322
info@ambailcoalition.org
www.AmericanBailCoalition.org

"had a clear right to bail--if he could get a bondsman," which is an acknowledgement of the fundamental role that third-party sureties play under Delaware law. State v. Mitchell, 212 A.2d 873, 884 59 Del. 11 (Del. Super. 1965). In short, the reasoning behind the Brooks line of cases with respect to the history of "bailable sureties" and the dual purposes of bail apply equally to Connecticut law.

After addressing the history and purpose of bail, the courts in the Brooks line of cases turn their attention to the plain meaning of the term "surety." Under both contemporary and historical definitions, the most common meaning of surety is a third party who is responsible for the actions or debt of another. As the Washington Supreme Court states,

> The key word at issue in article I, section 20 ["sufficient sureties" provision] is "sureties." Black's Law Dictionary defines "surety" as "[a] person who is primarily liable for paying another's debt or performing another's obligation." BLACK'S LAW DICTIONARY 1579 (9th ed. 2009). This modern definition is not markedly different from the definition of "surety" at the time the provision in question was adopted, which the State acknowledges. An 1891 edition of Black's Law Dictionary defined "surety" as "one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." BLACK'S DICTIONARY OF LAW (1891). The 1897 edition of the Bouvier's Law Dictionary defined "surety" as "[a] person who binds himself for the payment of a sum of money, or for the performance of something else, for another." 2 BOUVIER'S LAW DICTIONARY 1073 (1897).

State v. Barton, 331 P.3d 50, 54-55 (Wash. 2014). The plain meaning of sufficient sureties requires the option to secure bail via a surety. The plain meaning of "surety" when combined with the dual purposes of bail, ensuring the appearance of the defendant and protecting the liberty interest of the accused, leads to the option of a third-party surety as the only plausible way to read the requirements of "bailable by sufficient sureties." The only apparent purpose of cash only bail is to detain the accused by denying access to a surety, and this is a constitutionally impermissible purpose under various states including Art. 1, § 11 , of the Delaware Constitution. See e.g., State v. Hance, 910 A.2d 874, 878 (Vt. 2006) ("The court reasoned that 'the only apparent purpose in requiring a `cash only' bond to the exclusion of . . . other forms . . . is to restrict the accused's access to a surety and, thus, to detain the accused in violation of Section 9, Article I. [sufficient sureties provision].') citing Smith v. Leis, 106 Ohio St. 3d 309, 314 (Ohio 2005).

In those states that have held the sufficient sureties clause means access to a personal surety, the result is that personal sureties, including those compensated, *must be allowed to post partially secured deposits*. As a result, such options are not used as often because the defendants are able to post 10% of 10% by using a compensated surety (or 25% of 10% in Michigan). We think the same rule would emanate from litigation on this point in Connecticut due to the sufficient security language in the State Constitution, and from an equal protection challenge, which would easily conclude with a finding that a compensated surety who posts a 7% bond is going to outperform a 7% posted in cash by the defendant himself by measure of public safety, appearance in court, and long term fugitive rates. Thus, defendants will ultimately have the right to have a personal surety post the partially secured bonds, which in essence defeats the purpose of such bonds in the first place. This is why many states simply

AMERICAN BAIL COALITION

P.O. Box 352
Franklinville, NJ 08322
info@ambailcoalition.org
www.AmericanBailCoalition.org

have chosen not go in the direction of partially secured bonds, or in such states where sureties may post partially secured, do not use them particularly often.

Next, we question whether the Supreme Court in rule-making power has the power to set rates on partially secured bonds where the courts acts as surety, which is what is occurring here. In any event, setting such rates is purely a legislative function and the judicial branch is constrained by the rates set by the legislature. There is no existing statutory authority for the 10% to the court rate upon which the 2019 rule change was based. There is further no statutory authority for a 7% rate. The only rationale for the 7% rule is to directly compete against compensated sureties, which is to set up a system that is designed to require cash at the exclusion of a constitutional right to a personal surety. Setting partially secured criminal bond rates is purely a legislative function, and the Colorado Supreme Court held that only the legislature may enable courts to act as surety and without legislative authority courts may not act as surety on partially secured bonds. People v. Dist. Ct., 196 Colo. 116, 118 (Colo. 1978)("We have previously held that the legislature may designate the kind and character of the security that is to be provided for release on bail provided that the provisions are not unreasonable. … The statute does not expressly or impliedly authorize courts to permit 10% Cash bail deposits. … The court, therefore, exceeded its jurisdiction by permitting the defendant to post a 10% Cash bond. Accordingly, the rule to show cause is made absolute."). Here, the rules committee is setting rates below those allowed by statute. Not only is there no statutory authority for the previous 10% rate, there is no statutory authority for the 7% rate either.

Next, **state statute specifically affirms the right to a personal surety to post any bond that is required by a court for the release of a defendant** and specifically prohibits the denial of the right to a personal surety to post an amount ordered by the court for a release. Criminal Procedure § 54-64a specifically states in subsection (a)(1)(d) that a defendant shall be released "upon execution of a bond with surety in no greater amount than necessary, **but in no event shall a judge prohibit a bond from being posted by surety**." Under the statute, a court selects the amount of the bond, and a surety is empowered to post that bond. This is an affirmation of the state constitutional right to a personal surety, and the statute clearly applies to a partially secured bond because it refers to an "amount" of the bond that is "no greater than necessary." The proposed rule instead allows a court to set a bond that may not be posted by a surety. That directly conflicts with state statute. There is no reason to believe under Connecticut's constitutional system of government that the Supreme Court's rule-making power extends to the over-ruling of Criminal Procedure § 54-64a. Whether the legislature may impose a 7% to the court, cash-only, bond is an open question since Connecticut statute currently does not allow partially secured bonds.

In terms of an equal protection challenge to the denial of a right to a personal surety to post the 7% partially secured bond, there was no data presented, nor is there likely any available, that the imposition of partially secured cash-only bail does a better job of guaranteeing appearance, long-term fugitive rates, or protecting the safety of the public than other forms of partially secured bond. To restrict the defendant's ability to use a third-party bonding agent, the rules committee must have some rational basis to make such a rule. That rational basis should ostensibly include some data or some rationale other than defendants get their money back. None exists, and national data to the contrary contradicts any rational basis to discriminate. Because surety bonding agents have arrest powers,

AMERICAN BAIL COALITION

P.O. Box 352
Franklinville, NJ 08322
info@ambailcoalition.org
www.AmericanBailCoalition.org

national data from the U.S. Department of Justice makes clear that surety bonds outperform cash-only bonds when it comes to pretrial misconduct and specifically as it pertains to long-term fugitive rates. Thus, not only is there no data to conclude that there is a rational basis to exclude sureties from posting partially secured bonds, **there is national data to suggest that excluding sureties from posting partially secured bonds is actually worse for appearance rates, long-term fugitive rates, and crimes while out on bond**. So, this rule is unlikely to survive an equal protection challenge when a defendant remains in jail on a 7% cash-only partially secured bond when he is able to post a 7% surety partially secured bond.

The final reason to not expand the practice of partially secured bonds is that it is creating economic imbalance in the bail market that drives higher than necessary bonds and bail premiums. As a result of the 10% rule, the data from the Bail Association of Connecticut has shown that the average bond size has increased by 70%. So while millions may be refunded, the cost of bail for many others is substantially going up, and there is no data to indicate that the amount refunded is not being offset by the increases. As we have seen in California, when premiums go down, penal liability continues to increase, which is not a desirable result. We can expect that to continue under a 7% to the court model. The Sentencing Commission has failed to provide any data as to the other economic impacts of this change.

For the reasons set forth above, the practice of denying a surety in the imposition of partially secured bails without the option of a third-party surety would likely be successfully challenged as a violation of the state constitution's guarantee of a personal surety, as contrary to the state statutory right to a personal surety, and contrary to the equal protection clause insofar as denying the right to a personal surety lacks any basis in terms of discriminating against a 7% cash bond versus a 7% surety bond.

Respectfully submitted,

DocuSigned by:
Jeffrey Clayton
45CB1FFA6278476...

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