ARKANSAS SUPREME COURT UPHOLDS CONSTITUTIONALITY OF CASH-ONLY BAIL IN *TRUJILLO V. STATE*

*Macy Klein Eldredge**[1]

I'm stuck in jail, the D.A.'s tryin' to burn me,
I'd be out on bail, if I had a good attorney,
Want to label me a criminal and cuff me up,
...
*In the county and I'm mad as f**k,*
Got a record so they put me with the baddest bunch
...
Got me sittin' in a cell, a five by seven
Will I finally get to go to ghetto heaven?

—2Pac, *Out on Bail*[2]

A. INTRODUCTION

Justice Baker made sure to list the facts of the appellant's case in her opinion, holding cash-only bail to be constitutional under the Arkansas Constitution in the case of *Trujillo v. Arkansas* (2016).[3] Ramon Ballesteros Trujillo was arrested on June 1, 2015, in Benton County and "charged with two counts of aggravated assault, one count of second-degree domestic battery, one count of third-degree domestic battering, and an enhanced penalty for an offense committed in the presence of children."[4] On June 3, 2015, Trujillo appeared in district court, and the district court entered a "no contact" order for the alleged victims[5] and set bail at $25,000 cash or surety.[6] Trujillo posted bond and was released that same day.[7]

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[2] 2PAC, *Out on Bail*, *on* LOYAL TO THE GAME (Interscope Records 2004); Justice Howard Brill begins his dissent in this case by quoting Johnny Cash's "Starkville City Jail." *See* Trujillo v. State, 2016 Ark. 49, at *8-9 ,483 S.W.3d 801, 806-07. In comparison, this author presents 2Pac's "Out on Bail."

[3] Trujillo v. State, 2016 Ark. 49, at *8, 483 S.W.3d 801, 806.

[4] *Id.* at *1, 483 S.W.3d at 802.

[5] "Alleged victims" at that time during the pendency of the trial.

[6] *Trujillo*, 2016 Ark. 49, at *1, 483 S.W.3d at 802.

[7] *Id.*, 483 S.W.3d at 802.

Nine days later, the State filed a motion to revoke Trujillo's release status and increase his bail to $150,000.00, alleging that he violated the "no contact" order.[8] Benton County Circuit Judge Robin Green issued a bench warrant that day.[9] In July of 2015, two bail hearings were conducted, and at the completion of the second hearing, the court set Trujillo's bail at "$300,000 cash."[10] Trujillo objected and argued that: (1) Arkansas does not allow cash-only bail; and (2) Trujillo's $300,000.00 cash-only bail was excessive.[11] Trujillo filed a petition for writ of certiorari on August 12, 2015, and three days later, the State responded.[12] The Arkansas Supreme Court took the case as a petition and set it for briefing.[13] The parties timely filed their briefs to review the issues: (1) the circuit court erred in setting a cash-only bail and (2) the circuit erred in ordering $300,000 cash-only bail because $300,000 is excessive.[14]

In this Comment, I disagree with the holding of this case and point to the arguments made in both dissents. In addition, I propose that there is a strong public policy argument that disfavors cash bail for its discriminatory effect on indigent defendants. Cash bail is unconstitutional under Article 2, Section 8 of the Arkansas Constitution.[15] In *Trujillo v. State*, the Arkansas Supreme Court refused to examine the issue of excessive bail because it deemed the issue moot.[16] I believe there to be an exception to the mootness doctrine in this case due to the strong implication of public interest.

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[8] *Id.* at *1–2, 483 S.W.3d at 802.

[9] *Id.* at *2, 483 S.W.3d at 802–03.

[10] *Id.*, 483 S.W.3d at 803.

[11] *Id.*, 483 S.W.3d at 803.

[12] *Trujillo*, 2016 Ark. 49, at *2, 483 S.W.3d at 803.

[13] *Id.*, 483 S.W.3d at 803.

[14] *Id.*, 483 S.W.3d at 803.

[15] "No person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in cases of impeachment or cases such as the General Assembly shall make cognizable by justices of the peace, and courts of similar jurisdiction; or cases arising in the army and navy of the United States; or in the militia, when in actual service in time of war or public danger; and no person, for the same offense, shall be twice put in jeopardy of life or liberty; but if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had, may, in its discretion, discharge the jury, and commit or bail the accused for trial, at the same or the next term of said court; nor shall any person be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law. *All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great*." (emphasis added). ARK. CONST. art. 2, § 8.

[16] *Trujillo*, 2016 Ark. 49, at *4, 483 S.W.3d at 804.

B. APPELLANT'S ARGUMENTS

At the bail hearing on June 15, 2015, the appellant offered that he had contacted the Rogers Police Department and talked with two police officers who agreed to go "to the residence where the alleged victim lived to act as a civil standby."[17] Once they arrived, one of the officers realized that the appellant "did not have the necessary paperwork for them to act as civil standby, so they all left."[18] The appellant did not make any contact with the alleged victim.[19] The State offered evidence at the hearing that the appellant made three phone calls to the alleged victim's phone, but the alleged victim did not accept the calls.[20] "Further, the appellant's mother testified that she made the phone calls."[21] Judge Green discredited this testimony.[22]

At the conclusion of the hearing, the court revoked Mr. Trujillo's release and ordered him held without bail.[23] At that time, Mr. Norwood, the defense counsel, objected to no bail being set in violation of Arkansas Constitution, Article 2, Section 8.[24] On July 23, 2015, the court set a second hearing on the bail issue, where Judge Green "acknowledged that the court must set a reasonable bail except in capital cases."[25] The prosecutor then asked bail to be set at $500,000.00.[26] Appellant's brief offers that "no reasonable explanation was offered as to why the prosecutor went from the initial request of $150,000.00 to $500,000.00."[27] Judge Green then set the bail at $300,000.00, cash only. Mr. Norwood again objected, this time stating that there is no such thing as cash-only bail in Arkansas.[28] The following colloquy took place:

> THE COURT: He's got to post $300,000.00 cash.
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> MR. NORWOOD: I object to this. There's no such thing of a cash-only bail in Arkansas. I mean, it says sufficient sureties. I don't think that cash-only bond is –
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> THE COURT: I don't think I'm required to order a bondsman –

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[17] Appellant's Brief, Trujillo v. State, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), SC No. 1.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Appellant's Brief, *Trujillo*, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), SC No. 1.

[24] *See* ARK. CONST. art. 2, § 8.

[25] Appellant's Brief, *supra* note 14.

[26] *Id.*

[27] *Id.*

[28] *Id.*

> MR. NORWOOD: Your Honor, that's the equivalent of a 3 million-dollar bond.
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> THE COURT: I understand that. I'm very concerned that if this man is released –
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> MR. NORWOOD: I'm going to object to that.
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> THE COURT: --and this child – and based upon him – the Court finding previously violating the no contact order and the order of protection, I find that to be very reasonable.
>
> MR. NORWOOD: Okay, well, Your Honor, I need to make my objection. It's not only – at this point not only just a state constitutional requirement but also the federal bail thing and the 8th Amendment, which is a totally stand alone thing. Are you denying that, Your Honor?
>
> THE COURT: I am. I find that this is reasonable given the conduct of Mr. Trujillo as determined after the evidentiary hearing.[29]

1. Argument #1: The Trial Court Erred in Setting a Cash-Only Bail

Arkansas Constitution Article 2, Section 8 confers an absolute right before conviction, except in capital cases, to reasonable bail.[30] Bail decisions are generally left to the sound discretion of the trial judge, whose decision is reviewed under the abuse of discretion standard.[31] The issue of whether or not the Arkansas Constitution allows for the use of cash-only bail was argued as a case of first impression in Arkansas.[32] There is a split of authority on the issue of cash-bail. Some states allow for cash bail,[33]

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[29] *Id.*

[30] Appellant's Brief, *Trujillo*, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), ARG No. 1(first citing Reeves v. State, 261 Ark. 384, 387, 548 S.W.2d 822, 824 (1977); and then citing Duncan v. State, 308 Ark. 205, 206, 823 S.W.2d 886, 887 (1992)).

[31] *Id.* (citing Hobbs v. Reynolds, 375 Ark. 313, 316, 289 S.W.3d 917, 920 (2008)).

[32] *See* Appellant's Brief, Trujillo, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638).

[33] *See e.g.*, Sanders v. Hornecker, 344 P.3d 771, 782 (Wyo. 2015) (holding that the term "sufficient sureties" under rule of criminal procedure guaranteeing bail permits cash-only bail); State v. Jackson, 384 S.W.3d 208, 217 (Mo. 2012) (holding "[t]he trial court had authority to set a cash-only bond as sufficient surety to secure [defendant's] appearance at trial"); State v. Gutierrez, 140 N.M. 157 (N.M. App. 2006) (holding "in a matter of first impression, [the] rule governing secured bonds as condition of release did not violate provision of State Constitution providing that all persons 'be bailable by sufficient sureties'"); Fragoso v. Fell, 210 Ariz. 427 (Ariz. App. 2005) (holding that the "provision of State Constitution stating that '[a]ll persons charged with crime shall be bailable by sufficient sureties' did not prohibit trial court from imposing 'cash only' restriction on defendant's pretrial release bond"); Ex Parte Singleton, 902 So.2d 132, 135-36 (Ala. Crim.

while others do not.[34] The appellant argued as to the meaning of the phrase "sufficient sureties" as it is found in many state Constitutions, including the Arkansas Constitution.[35] In relevant part, the Arkansas Constitution Article 2, Section 8 states: "…All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, which proof is evident or the presumption is great." The appellant pointed the court to the case of *State v. Barton*, where that "court traced the history of the meaning 'sufficient sureties' and concluded that the correct interpretation of the term prohibits cash-only bail."[36] Namely, the court noted that the plain common language meaning of "sufficient sureties" is where third parties essentially guarantee the appearance.[37] Because the trial court did not allow for "sufficient sureties" in allowing for a cash-only bail, the trial court erred.

2. Argument #2: $300,000.00 Cash Bail is Excessive in this Case

On June 3, 2015, bail was set at $25,000.00 cash or surety.[38] On July 23, 2015, bail was set at $300,000.00 cash-only, or the equivalent of a $3 million corporate bond.[39] The state did not prove that any contact was made with the alleged victim.[40] Judge Green ordered no bail to be set at the June 15, 2015 hearing, implying that she did not want the defendant to be released from jail.[41] Appellant's attorney compared this situation to analysis

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App. 2004) (holding that the State Constitution did not prohibit trial judge from setting a cash only pretrial bail, and cash only bail of $150,000 was not excessive); State v. Briggs, 666 N.W.2d 573, 584–85 (Iowa 2003) (holding imposition of cash only bail on prostitution defendant did not violate sufficient sureties and excessive bail clauses).

[34] *See e.g.*, State v. Barton,181 Wash.2d 148, 150 (2014) (holding as a matter of first impression, constitutional provision mandating that a criminal defendant "shall be bailable by sufficient sureties" requires that the defendant be allowed the option of a surety arrangement); People v. Horn, 18 N.Y.3d 660, 666 (2012) (holding that the Supreme Court was prohibited under criminal procedure rule from imposing "cash only" bail); State v. Hance, 180 Vt. 357, 358 (2006) (holding statute allowing imposition of cash-only bail violated State Constitution); Smith v. Leis, 106 Ohio St.3d 309, 323 (2005) (holding cash-only bail violates Ohio Constitution, even after constitutional amendment permitting courts to determine at any time the type, amount, and conditions of bail); State v. Brooks, 604 N.W.2d 345, 354 (Minn. 2000) (holding that the bail clause of the Minnesota State Constitution prohibited cash only bail).

[35] Appellant's Brief, *supra* note 28.

[36] *Id.*

[37] *Id.*

[38] Trujillo v. State, 2016 Ark. 49, at *1, 483 S.W.3d 801, 802.

[39] *Id.* at *2, 483 S.W.3d at 803.

[40] Appellant's Brief, *Trujillo*, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), ARG No. 2.

[41] *Id.*

performed in *Best v. State*, quoting:

> It is clear from these statements that it was the trial judge's intent to set a bond that was unattainable for Petitioner based on his financial circumstances in order to keep him incarcerated. The court abuses its discretion when it sets an excessive bail that is designed to be the functional equivalent of no bail.[42]

Appellant argued that no poor person in Arkansas could make this type of bail.[43] A $300,000.00 cash-only bail is excessive under the facts of this case in violation of Arkansas Constitution, Article. 2, Section 9.[44] This author could imagine only a slim set of facts that would necessitate a $3 million surety bond. None of those facts would involve a defendant who is not extremely wealthy in conjunction with a crime that is less than murder.

C. STANDARD OF REVIEW

The remedy of the writ of certiorari is appropriate to review bail-bond proceedings.[45] The scope and nature of the writ of certiorari is as follows: certiorari lies to correct proceedings erroneous on the face of the record where there is no other adequate remedy, and it is available to the appellate court in its exercise of superintending control over a lower court that is proceeding illegally where no other mode of review has been provided.[46]

To grant a writ of certiorari, a demonstration of a "plain, manifest, clear, and gross abuse of discretion" is essential.[47] The Arkansas Supreme Court reviews the circuit court's interpretation of the Arkansas Constitution de novo.[48] However, the Arkansas Supreme Court accepts the circuit court's interpretation as correct on appeal in the absence of a showing that the circuit court erred.[49]

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[42] *Id.* (citing Best v. State, 28 So.3d 134, 135 (Fla. App. 2010)).

[43] *Id.* ("How many people in a poor state like Arkansas have $300,000.00 cash just sloshing around in their checking account? Seriously, how many lawyers or doctors could write that check?"). *Id.*

[44] *Id.*

[45] Trujillo v. State, 2016 Ark. 49, at *2, 483 S.W.3d 801, 803.

[46] *Id.*, 483 S.W.3d at 803.

[47] *Id.* at *2–3, 483 S.W.3d at 803.

[48] *Id.* at *3, 483 S.W.3d at 803.

[49] *Id.*, 483 S.W.3d at 803 (citing Shipp v. Franklin, 370 Ark. 262, 264, 258 S.W.3d 744, 747 (2007)).

D. MOOTNESS

The Arkansas Supreme Court first assessed whether the issues presented in the case were ripe for review.[50] The State argued that the issues were moot because a trial date had been set before the Arkansas Supreme Court reached the merits of Trujillo's arguments.[51] It is also true that "Trujillo plead guilty to aggravated assault, second-degree domestic battery, and third-degree domestic battery on November 30, 2015, and was in the custody of the Arkansas Department of Correction" at the time the Arkansas Supreme Court took up the case.[52] However, Trujillo argued that despite these facts, "his petition falls within an exception to the mootness doctrine as an issue of substantial public interest."[53]

The Arkansas Supreme Court does not typically review issues that are moot because those opinions would be construed as advisory opinions.[54] The Arkansas Supreme Court offered two exceptions to the mootness doctrine:

> …one of which involves issues that are capable of repetition, yet evade review. The other mootness exception concerns issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation. This exception arose early in our caselaw and continues today.[55]

The court determined that because "the imposition of 'cash only' bail affects all criminal defendants seeking pretrial release," it falls under an "exception to the mootness doctrine as an issue of substantial public interest."[56] However, the court determined the excessive bail issue to be moot, stating that the issue presented was "specific to Trujillo."[57] I respectfully disagree with this decision. The excessive bail issue is a matter of substantial public interest, affecting all criminal defendants. In addition, it is an issue that is capable of repetition, not just once, but every day that a criminal court sets a bond in the state of Arkansas.

The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor

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[50] *Id.* at *3, 483 S.W.3d at 803.

[51] *Trujillo*, 2016 Ark. 49, at *3, 483 S.W.3d at 803. The State also argued that Trujillo's arguments lacked merit. *Id.*, 483 S.W.3d at 803.

[52] *Id.*, 483 S.W.3d at 803.

[53] *Id.*, 483 S.W.3d at 803.

[54] *Id.*, 483 S.W.3d at 803.

[55] *Id.* at *4, 483 S.W.3d at 804.

[56] *Id.*, 483 S.W.3d at 804.

[57] *Trujillo*, 2016 Ark. 49, at *4, 483 S.W.3d at 804.

cruel and unusual punishments inflicted."[58] Arkansas's constitutional version of the U.S. Eighth Amendment appears in Article 2, § 8, which has been interpreted by the Arkansas Supreme Court to confer an absolute right before conviction, except in capital cases, to a *reasonable* bond.[59] In *Foreman v. State*, the Arkansas Supreme Court held that in setting a $1 million cash-only bail, the circuit court purposely set the bond out of Foreman's reach and did not take into account "all facts relevant to the risk of wilful [sic] nonappearance," such as those examples appearing in Ark.R.Crim.P. 9.2(c).[60] In *Foreman*, the Arkansas Supreme Court held that the circuit court's action in setting bail at so high a figure was arbitrary and exceeded the circuit court's discretion.[61] The same should have been held in *Trujillo* where the bail was set at $300,000 cash-only.[62]

Further, in Appellant's Reply Brief, appellant's counsel cites a Wyoming court ruling where the issue of a specific cash-only bail was reviewed under the "likely to evade review" exception to mootness.[63] The Wyoming Supreme Court concluded that "pretrial bail issues are likely to evade review, namely because they are generally short-lived."[64] The effect of this is that a "failure to decide this issue impacts those defendants who are unable to post cash-only bail."[65]

In Arkansas, "the Public Defender system represents approximately

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[58] U.S. CONST. amend. 8.

[59] *See* Duncan v. State, 308 Ark. 205, 206, 823 S.W.2d 886, 887 (1992) (holding that the defendant's prior tendering of guilty plea which was deferred was not equivalent of conviction, and thus defendant was entitled to bail); Reeves v. State, 261 Ark. 384, 387, 548 S.W.2d 822, 824 (1997) (holding that the rule permitting revocation of bail constitutional, but that it was unconstitutionally applied as to deny all bail to defendant rather than merely imposing new and reasonable bail with new terms and restrictions); *see also* Kendrick v. State, 180 Ark. 1160, 24 S.W.2d 859, 860 (1930) (holding that the accused charged with selling liquor had legal right to bail); Thomas v. State, 260 Ark. 512, 521–22, 542 S.W.2d 284, 289 (1976) (holding that circuit court erred in refusing to direct municipal court to conduct pretrial release inquiry before setting money bail and to require municipal court to make determination that no other condition would ensure accused's appearance in court before setting money bail only); Stack v. Boyle, 342 U.S. 1, 4 (1951) ("Federal law has unequivocally provided that person arrested for noncapital offense shall be admitted to bail, since the traditional right of accused to freedom before conviction permits unhampered preparation of defense and serves to prevent infliction of punishment prior to conviction, and presumption of innocence, secured only after centuries of struggle, would lose its meaning unless such right to bail before trial were preserved.").

[60] Foreman v. State, 317 Ark. 146, 148, 875 S.W.2d 853, 855 (1994).

[61] *Id.* at 149, 875 S.W.2d at 855.

[62] *See Trujillo*, 2016 Ark. 49, at *8, 483 S.W.3d at 806.

[63] Appellant's Reply Brief, Trujillo v. State, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), ARG No. 1.

[64] *Id.* (quoting Saunders v. Hornecker, 344 P.3d 771, 775 (Wyo. 2015)).

[65] *Id.*

90-95% of those persons prosecuted by the State of Arkansas in which an attorney is involved for the defendant."[66] Indigent defendants cannot make excessive cash-bails by nature of their indigence. Therefore, this issue affects 90-95% of criminal defendants in the state of Arkansas. An issue that affects 90-95% of criminal defendants in the state of Arkansas is a matter of substantial public interest, and had the court addressed it, they could have prevented future litigation. The Arkansas Supreme Court erred in deciding that the issue was moot.

E. CASH-ONLY BAIL

The only issue that the Arkansas Supreme Court addressed was "whether the circuit court erred in setting a "cash only" bail."[67] Trujillo argues that "cash only" bail in in violation of the Arkansas Constitution, Article 2, section 8.[68] The Arkansas Constitution states: "All persons shall, before conviction, be bailable by *sufficient sureties*, except for capital offenses, when the proof is evident or the presumption great."[69] Rule 9.2 of the Arkansas Rules of Criminal Procedure, "Release on Money Bail," provides:

> (a) The judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court.
> (b) If it is determined that money bail should be set, the judicial officer shall require one (1) of the following:
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> (i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not.
>
> (ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by a deposit of cash or securities equal to ten per cent (10%) of the face amount of the bond.
> (iii) the execution of a bond secured by the deposit of the full amount in cash, or by other property, or by obligation of qualified sureties.[70]

Money (cash) bail is only mentioned in the last option.[71] Money bail

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[66] 2017–2019 ARK. STATE LEGIS. BIENNIUM BUDGET INFO. REP. vol. 4, at 541.
[67] Trujillo v. State, 2016 Ark. 49, at *5, 483 S.W.3d 801, 804.
[68] *Id.*, 483 S.W.3d at 804.
[69] ARK. CONST. art. 2, § 8.
[70] ARK. R. CRIM. P. 9.2.
[71] *See Trujillo*, 2016 Ark. 49, at *15, 483 S.W.3d at 810 (Hart, J., dissenting).

is designed to be a last resort when all other conditions have been exhausted to ensure that a defendant will appear in court.[72] Further, a "judicial officer is required to use the "least restrictive" type of bail arrangement as found in Rule 9.2(b) in securing the appearance of an arrested person."[73] However, in *Trujillo*, the least restrictive option was not imposed.[74] The circuit court erred in not considering the possibility of sections (b)(i) or (b)(ii) of Rule 9.2.[75] In effect, the circuit court "circumvented the requirement of the least restrictive bail."[76]

Trujillo argued that his cash-only bail violated the "sufficient sureties" as required by Article 2, section 8 of the Arkansas Constitution.[77] The State argued "that the obvious and common meaning of "sufficient" and "surety" includes cash", and that cash is not precluded from acting as surety.[78] As stated, this was a case of first impression before the Arkansas Supreme Court, and at the time of this publication, no other cases have challenged *Trujillo*'s holding. The majority analyzed a split of authority between Washington and Wyoming.[79] The Washington case held "that "surety" contemplates a third-party arrangement, as distinguished from a cash-only or property deposit with the court."[80] The Wyoming Supreme Court, however, held that "cash only" bail was permissible under Wyoming's Constitution when used to ensure the defendant's presence to answer the charges "without excessively restricting the defendant's liberty pending trial."[81] The majority determined that Arkansas was akin to Wyoming in that bail is set to ensure the presence of defendants.[82]

The majority noted that the definition of "sufficient" is "adequate: of such quality, number force, or value as is necessary for a given purpose."[83] "Surety" as defined is: "A formal assurance, esp., a pledge, bond, guarantee, or security given for the fulfillment of an undertaking."[84] The majority adopted the reasoning in *Saunders* and held that "sufficient sureties" refers

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[72] *Id.* at *7, 483 S.W.3d at 806.

[73] *Id.* at *15–16, 483 S.W.3d at 810 (Hart, J., dissenting) (citing Thomas v. State, 260 Ark. 512, 522, 542 S.W.2d 284, 290 (1976)).

[74] *Id*. at *16, 483 S.W.3d at 810.

[75] *Id*. at *16, 483 S.W.3d at 810.

[76] *Id*. at *16, 483 S.W.3d at 810.

[77] *Id*. at *5, 483 S.W.3d at 805.

[78] *Id*., 483 S.W.3d at 805.

[79] *Trujillo*, 2016 Ark. 49, at *6–7, 483 S.W.3d at 805–06.

[80] *Id*. at *6, 483 S.W.3d at 805 (citing State v. Barton, 181 Wash.2d 148, 331 P.3d 50, 59 (2014)).

[81] *Id.* at *7, 483 S.W.3d at 805–06 (citing Saunders v. Hornecker, 344 P.3d 771, 780–81 (Wyo. 2015).

[82] *Id.*, 483 S.W.3d at 806.

[83] *Id.*, 483 S.W.3d at 806.

[84] *Id.*, 483 S.W.3d at 806.

to a "broad range of methods," including cash.[85] However, the majority neglects to effectively analyze "cash bail" as opposed to "cash-only bail," which is the issue in this case. Though cash may be *included* as a "sufficient surety" under Rule 9.2 and Article 8, section 2 of the Arkansas Constitution, it may not be the *only* option for defendants.[86] There can be no plain meaning reading that allows a single option of cash-only bail to be either reasonable or an effective means of ensuring a defendant's presence except in the most extreme cases.[87]

Justice Brill offers a "plain and ordinary meaning" analysis of "sufficient sureties," pointing to the intent of the framers in adopting the guarantee to bail by sufficient sureties.[88] He offers:

> 'Bailable' meant 'entitled to be discharged on bail,' and 'bail' was defined as 'delivery of a person arrested, out of the custody of the law, into the safe keeping or friendly custody of persons who become sureties for his retorn of appearance.' A 'surety' was '[o]ne who engages to be answerable for the debt, default, or miscarriage of another; one who undertakes to do some act in the event of the failure of another to do it, and as security for its being done.' Taking these definitions together, 'bailable by sufficient sureties' meant that in a case where bail was available, the prisoner was entitled to be released into the custody of a person, a 'surety,' who was answerable for any subsequent failure of the prisoner to appear.[89]

The idea and effect of bail has evolved since the framers' time.[90] However, the same purpose can hold true today.[91] If cash-only bail is to be a method of last resort to ensure an appearance, then all other avenues need to be exhausted. Appearance agreements should be standard practice, and the bail requirements need only increase according to the facts. District and Circuit judges have far too much latitude in deciding what a reasonable

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[85] *Trujillo*, 2016 Ark. 49, at *8, 483 S.W.3d at 806.

[86] *Id.,* 483 S.W.3d at 806.

[87] For instance, when a defendant is wealthy and poses a flight risk. In addition, a high bond could be set when a defendant poses a serious risk of re-offending while out on bail. However, those facts were not present in *Trujillo*'s case. *See* Appellant's Brief, *Trujillo*, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), ABS No. 18. He never violated the no contact order. *Id.* There was no basis for revoking and then increasing his bail. *Id.*

[88] *Trujillo*, 2016 Ark. 49, at *11–12, 483 S.W.3d at 808-09 (Brill, C.J., dissenting).

[89] *Id.* at *11, 483 S.W.3d at 808.

[90] *Id.* at *12, 483 S.W.3d at 808–09.

[91] *Id.* at *12, 483 S.W.3d at 808–09.

bond may be, and in instances where cash-only bail is the only option, these courts are setting bonds in a punitive fashion. Lastly, in requiring cash-only bail, courts in Arkansas are depriving defendants of their "constitutional right to provide any sufficient surety for their release."[92]

F. ARKANSAS POLICY IMPLICATIONS

Indigent persons charged with crimes are by nature of their indigence unable to afford large cash-only bails. As an effect, they must sit in jail unless they are released upon their own recognizance or until their trial has completed. During the COVID-19 pandemic, "speedy trial" was tolled[93] in felony cases in the state of Arkansas and trials were continued until in-person court could safely resume, jury members could be safely empaneled, et cetera. The effect of this is that indigent persons charged with felonies have been incarcerated in jails across the state without the possibility of release for possibly years pending their trials.[94] Cash-only bails have a "disparate impact on lower-income defendants without resources."[95] Cash-only bail cannot be construed as reasonable, except in the most extreme of cases, in which a surety bond should still be used to ensure a defendant's appearance. Cash on its own is not a "sufficient surety;" it has no practical effect over a surety bond except to act as a punitive measure for lower-income defendants that are "innocent until proven guilty" and are awaiting their trials in jail.

The Arkansas Supreme Court erred in its holding in *Trujillo*. Cash-only bail is unconstitutional under the U.S. Constitution, the Arkansas Constitution, and under the Arkansas Rules of Criminal Procedure. The Arkansas Constitution calls for "sufficient sureties," which does not contemplate cash-only bail. Allowing cash-only bail has a discriminatory effect on indigent defendants, who comprise an estimated 90-95% of all criminal defendants in the state of Arkansas. The purpose of bail is to

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[92] *Id.* at *13, 483 S.W.3d at 809.

[93] *In re Response to the COVID-19 Pandemic,* 2021 Ark. 72, 2 (per curiam) (first citing *In re Response to the COVID-19 Pandemic*, 2020 Ark. 384, 3 (per curiam); and then citing *In re Response to the COVID-19 Pandemic*, 2020 Ark. 116, 3 (per curiam)).

[94] For instance, a person arrested in December 2019 or January 2020 may have had their original plea and arraignment set in a Circuit Court in March 2020, which had been postponed when the courthouses closed on March 17, 2020. Even if the court set a "low bond," if that person was incapable of making any sort of bail, then they would still be in jail today if they have plead "not guilty" and are awaiting a jury trial. In those cases, someone who may be found guilty will have been incarcerated for years until their verdict comes down. *See Trujillo*, 2016 Ark. 49, at *13, 483 S.W.3d at 809 (Hart, J., dissenting) ("[T]he majority creates and grants to the government an absolute right to incarcerate until the time of trial an accused who is not affluent.").

[95] *Id.*, 483 S.W.3d at 809 (Brill, C.J., dissenting).

ensure a defendant's appearance at trial. To allow cash-only bail far exceeds that aim, treading dangerously into unconstitutional waters.

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