No. 100718-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEONEL GONZALEZ,

Petitioner

ON DISCRETIONARY REVIEW FROM THE
SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

Brief of the Petitioner

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A. Introduction

Article I, section 20 requires a trial court set bail in most cases. This provision allows a court to deny bail only when a life sentence is actually possible. CrR 3.2 presumes release without bail in all but capital cases.

The state charged Leonel Gonzalez with a non-capital offense that cannot result in a life sentence. Nonetheless, the trial court denied bail based on a new and overly broad interpretation of the constitutional provision to permit widespread denial of the fundamental right to bail enshrined in the constitution since statehood.

This broad violation of the constitutional right to bail raises significant public interest concerns. Research reveals the prevalence of racially disparate outcomes in pretrial release decisions. The trial court's interpretation of article I, section 20 permitting denial of bail for a broader class of offenses creates a very real risk of exacerbating those disparities.

B. Assignments of Error

1. The trial court violated article I, section 20 when it denied Mr. Gonzalez bail.

2. The trial court violated CrR 3.2 when it denied Mr. Gonzalez bail.

C. Issues Presented

1. Article I, section 20 requires a court set bail in every criminal case with two narrow exceptions: (1) capital cases; and (2) "offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons." The term "possibility of life in prison" means the charged offense can actually result in a life sentence and cannot include those cases for which imposition of a life sentence is legally impossible.

2. CrR 3.2 presumes a person will be released while awaiting trial in every case except capital cases. If the court finds the person is likely to commit a violent crime, likely to

intimidate witness, or likely to fail to appear, the court may impose a variety measures to mitigate those risks. However, the rule does not permit the denial of bail in any circumstance other than capital cases.

D. Statement of the Case

The state charged Mr. Gonzalez with first degree murder and unlawful possession of a firearm. CP 1-9. At an ex parte hearing, the state asked the court to hold him without bail. RP 19. The court granted that request. *Id*.

After counsel was appointed, counsel promptly filed an objection to the denial of bail. CP 13-61; RP 6-8. Pointing to the plain language of article I, section 20, counsel explained Mr. Gonzalez could not receive a life sentence for either charge. RP 7-8.

Despite the fact that Mr. Gonzalez cited to the constitution, the state claimed Mr. Gonzalez had not provided any legal authority requiring the court to give effect to the plain language of the constitutional text. RP 10. Instead, the state

seized upon a recent decision in *In re the Personal Restraint of Sargent*, 20 Wn. App. 2d 186, 499 P.3d 241 (2021), rewriting that plain text to permit courts to deny bail for all class A felonies. RP 10.

The trial court concluded it could constitutionally deny bail regardless of whether a life sentence was legally possible. RP 14-15.

E. Argument

1. The right to bail and pretrial release serves to protect the presumption of innocence. But that protection is not afforded equally to all. That inequity will worsen under the trial court's interpretation of article I, section 20.

The right to bail, for all but the most serious charges, "recognize[s] and honor[s]" the presumption of innocence that lies at the center of criminal law. *State ex rel. Wallen v. Judges Noe, Towne, Johnson*, 78 Wn.2d 484, 487, 475 P.2d 787 (1970). "Its true purpose is to free the defendant from imprisonment and to secure his presence before court at an appointed time." *Id.*

a. Race impacts bail and release decisions.

As with much else in the criminal legal system, protection of the presumption of innocence by way of reasonable bail is not equally available to all. Instead, bail and release decisions have yielded racially disparate outcomes. Race and the Criminal Justice System, Task Force 2.0, *Race and Washington's Criminal Justice System: 2021 Report to Washington Supreme Court*, 7 (2021).[1]

The Task Force's use of the term "disparate" to describe different outcomes is critical. Use of the terms "disproportionate" and "disparate" seeks to "distinguish between racial inequities that result from differential crime commission rates and racial inequities that result from practices or policies." *Id.* As the report explains, it uses the term "disproportionate" to refer to different outcomes across groups where the evidence does not show those different outcomes are driven by the composition of the groups. *Id.* at ix. By contrast

[1] Available at tinyurl.com/cn6nztuw.

the report uses "disparity" "when there is sufficient evidence to indicate that race accounts at least in part to unequal outcomes for one group when compared with outcomes for another group." *Id.* In short, when the report observes racially disparate outcomes in bail and pretrial release decisions it means race is a significant contributing factor driving trial courts' pretrial release decisions.

This is not a suprising discovery.[2] Indeed, for decades researchers have consistently found bail and release outcomes for Black and Latinx people are significantly worse than for white defendants. Cynthia E. Jones, "*Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U.J. Legis. & Pub. Pol'y 919, 938-39 (2013).[3] Most studies

[2] In *State v. Gregory*, this Court took "judicial notice of implicit and overt racial bias against black defendants in this state." 192 Wn.2d 1, 22, 427 P.3d 621 (2018). Two years later, the Court reaffirmed its recognition of systemic racial bias, including "the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems." Supreme Court Ltr. to the Legal Community, 1 (Jun. 4, 2020).

[3] Available at tinyurl.com/ya4jdecw.

find that Black and Brown people are 10% to 25% more likely to be detained pretrial than white counterparts. Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, Prison Policy Initiative Briefings (Oct. 9, 2019).[4]

Studies document that judges tend to perceive people of color accused of crimes as more "dangerous," more culpable, or less reliable than white counterparts. Norma Cantú et al., U.S. Commission on Civil Rights, *The Civil Rights Implications of Cash Bail*, 4, 35, 38-39 (2022);[5]*see also, In re the Matter of Miller*, 21 Wn. App. 2d 257, 266-67, 505 P.3d 585 (2022) (recognizing "adultification" of children of color is real, a perception that children of color are more dangerous and blameworthy than their white peers). One particularly disturbing study found that judges tended to value the freedom of Black people less than that of white people. *Id.* at 38.

[4] Available at tinyurl.com/2r66zn65.
[5] Available at tinyurl.com/musnmxr6.

The Court need not look far for empirical examples of this. Recently two white officers charged with murder for killing a Black man were allowed to post bail, and a relatively low amount of bail at that. Sara Jean Green, *3 Tacoma Police Officers Plead Not Guilty in Killing of Manuel Ellis*, Seattle Times (June 1, 2021) (state requested $1 million bail for each officer, and the court instead set their bail at $100,000 each).[6] Mr. Gonzalez, who was also charged with murder, was not.

Prosecutors also statistically seek harsher charges and bail decisions for people of color. Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, 8 (2018).[7] While the King County prosecutor argues Mr. Gonzalez is rightly denied bail, the King County Prosecutor asked the court to release a white police officer with no bail at all despite being charged with murder.

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[6] Available at https://www.seattletimes.com/seattle-news/law-justice/tacoma-police-officers-plead-not-guilty-in-killing-of-manuel-ellis/

[7] Available at tinyurl.com/4yn75x4x.

Sara Jean Green, *Auburn Officer Pleads Not Guilty to Murder, Assault Charges in 2019 Fatal Shooting*, Seattle Times (Aug. 24, 2020)[8]. King County prosecutors sought no bail even though that officer had killed two other persons on two prior and separate occasions. Sara Jean Green, *Auburn Police Officer Charged with Murder in 2019 Shooting*, Seattle Times (Aug. 20, 2020)[9].

That race plays a role at all in bail decisions is bad enough on its own. But bail decisions have significant impacts in subsequent stages of the criminal process and in the broader community. Thus, the harm caused by race's role in bail decisions is compounded time and again.

[8] Available at https://www.seattletimes.com/seattle-news/law-justice/auburn-officer-pleads-not-guilty-to-murder-assault-charges-in-2019-fatal-shooting/

[9] Available at https://www.seattletimes.com/seattle-news/law-justice/auburn-police-officer-charged-with-murder-in-2019-shooting/

b. Pretrial detention prejudices the person throughout the case and impacts the person's family and community.

i. Pretrial detention prejudices a person accused of a crime long before they get to trial, increases the likelihood of conviction, and results in harsher punishment.

A decision to detain a person awaiting trial is "tantamount to a decision to convict," increasing conviction rates in various studies by 13% to 25% after controlling for other factors.[10] People detained pretrial also generally receive harsher and longer sentences than those released pretrial. White

[10] Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, 3-5 (2019), available at tinyurl.com/2s3ctrbh (citing studies that found pre-trial detention increased convictions by 13% to 25%); Patrick Liu et al., *The Economics of Bail and Pretrial Detention*, 11 (2018), available at tinyurl.com/2p8u83u3 (citing a 2017 study finding a 13% increase in felony convictions for those held pre-trial); Jones, *supra*, at 936 (noting U.S. Department of Justice statistics that showed an 18% increase in convictions for those held pre-trial.); Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment*, 2 (2016), available at tinyurl.com/2p843k9n ("pre-trial release decreases the probability of being found guilty by 15.1 percentage points" controlling for other factors including crime severity and type and criminal history).

House Council of Economic Advisors, *Fines, Fees, and Bail* 8 (2015);[11] Tracey Meares & Arthur Rizer, The Square One Project, *The "Radical" Notion of the Presumption of Innocence*, 21 (2020).[12] A 2007 study of 36,000 persons charged with felony drug offenses found people detained pretrial were four times more likely to be incarcerated after conviction and received sentences 86% longer than persons released pretrial. Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, 7 J. Inst. Just. & Int'l Studies 261, 277 (2007).[13] That effect is so significant that disparity in pretrial detention might at least partially explain racial disparity in sentencing. *Id.*

ii. <u>The impacts of the bail decision reach beyond the case and exacerbate other forms of inequity</u>.

"[N]o matter how disadvantaged people are when they enter jail, they are likely to emerge with their lives further

[11] Available at tinyurl.com/fnrzz5eh.
[12] Available at tinyurl.com/mrxzucyh.
[13] Available at tinyurl.com/2w2pe8vt.

destabilized and, therefore, less able to be healthy, contributing members of society." Ram Subramanian et al., Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America*, 13 (2015).[14] Without any source of income a person detained pretrial may quickly accrue debt trying to pay for costs like child support and family living expenses on the outside. *Id*. at 15. People's ability to free themselves of such debt is hamstrung as studies have found that pretrial detention decreases future employment rates, even several years after release. Dobbie, *supra*, at 3, 24.

Children of parents or guardians detained pretrial experience significant loss and trauma. These children experience the immediate loss of their guardian's presence in their lives, with the accompanying emotional toll. Subramanian, *supra*, at 18. They face the prospect of being placed with a different family member or into foster care. *Id.* Such changes can be permanent with one study finding previously detained

[14] Available at tinyurl.com/3zbkrmyb.

mothers were half as likely to reunite with their children in foster care as mothers who had not been incarcerated. *Id*. at 18.

The loss of families and individuals due to pretrial detention and its collateral impacts also destabilizes entire communities. *Id*. at 18. Communities with high rates of incarceration tend to experience declines in social and economic well-being as well as in public safety. *Id.* at 17. Because their members are disproportionately detained, Black and Native communities are disproportionately destabilized by pretrial detention.

Because of the racially disparate outcomes regarding bail or release, each of the impacts and harms discussed will disproportionately fall on people of color, their families, and the communities where they live. As is clear, a court's discretion is itself rife with bias. Broadening the court's discretion to deny bail, as *Sargent* and the trial court here did, will exacerbate these harms.

2. The trial court violated article I, section 20 when it denied bail.

The Washington Constitution guarantees Mr. Gonzalez the right to bail on his current charge. Const. art. I, § 20. A court may deny bail only "for offenses punishable by the possibility of life in prison." *Id*. Because the offense charged cannot result in a life sentence, the trial court unconstitutionally denied bail.

The trial court's ruling and the decision in *Sargent* rest on construing the phrase "possibility of life in prison" to include an array of cases in which such a sentence is legally impossible. This Court must reject that patently absurd outcome.

a. The plain constitutional text limits a court's discretion to deny bail to only those cases in which a life sentence is actually possible.

As originally enacted, article I, section 20 permitted denial of bail only in capital cases. The section was amended by the voters in 2010. That amendment added the language:

> Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature.

The proposed amendment was sent to the voters by the legislature. H.J. Res. 4220, 61st Leg., Reg. Sess. (2010). As the amendment's sponsors explained, the change would permit denial of bail "only if [the person is] facing life in prison." *Voter's Pamphlet*, November 2, 2010, General Election, 52 (Rebuttal of Argument Against).

Courts employ familiar statutory construction tools when examining constitutional text, beginning with the plain language of the constitutional provision at issue. *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). Courts gives the words "their common and ordinary meaning, as determined at the time they were drafted." *Id.* (citing *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 557, 452 P.2d 943 (1969)). If constitutional text is plain and

unambiguous a court must give the words the plain, natural, and most obvious meaning the framers intended. *Auto. United Trades Org. v. State*, 175 Wn.2d 537, 545, 286 P.3d 377, 381 (2012) (internal citations omitted). The Court should not resort to "forced construction for the purpose of limiting or extending" the meaning of the text. *Id*.

Where, as here, an amendment is enacted by a vote of the people, the focus is on the voters' intent. *City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 97, 758 P.2d 480 (1988). A "court focuses on the language as the average informed voter voting on the initiative would read it." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762, 780 (2000) A court must follow the plain, unambiguous language "well understood according to its natural and ordinary sense." *Id. (citing State v. Thorne*, 129 Wn.2d 736, 762–63, 921 P.2d 514 (1996) *abrogated on other grounds Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)).

The words "offenses punishable by the possibility of life in prison" are clear and unambiguous. Courts look to the dictionary to determine a term's plain meaning. *Nissen v. Pierce County*, 183 Wn.2d 863, 881, 357 P.3d 45 (2015). "Possibility" means "something that can develop or become actual." Meriam-Webster.com Dictionary (accessed Aug. 11, 2022).[15] Thus, "offenses punishable by the possibility of life in prison" means only those offenses for which a court could *actually* impose a life sentence.

There only four instances in which an offense can actually result in a life sentence: (1) an offense which would make the person a persistent offender under RCW 9.94A.570; (2) certain class A sex offenses under RCW 9.94A.507; (3) the crime of aggravated first degree murder; and (4) a class A felony committed prior to the effective date of the SRA in 1984. For any other charge, including the one pending against

[15] Available at https://www.merriam-webster.com/thesaurus/possibility

Mr. Gonzalez, a life sentence is legally impossible. The court wrongly denied bail.

The average informed voter would understand the phrase "offenses punishable by the possibility of life in prison" to mean a charged offense which could actually result in a life sentence. That is the natural and an unstrained meaning of the phrase. Indeed, if voters had any doubts they could have looked to the voter's pamphlet which said the amendment would permit denial of bail for a person "only if they are facing life in prison." *Voter's Pamphlet*, at 52. *See Amalgamated Transit Union Local 587*, 142 Wn.2d at 205–06 (If there is ambiguity in voter enacted provisions a court may look to the voter's pamphlet in order to determine the voters' intent.). Having been told this provision permits denial of bail only when a person is "facing" a life sentence, voters would have understood it to not apply when a life sentence is not legally possible.

The plain text of article I, section 20 guarantees Mr. Gonzalez bail.

b. Rather than give effect to the plain text, Sargent improperly and illogically interpreted the term "possible" to include cases in which a life sentence is impossible.

The only "offense" relevant to a bail determination is the offense charged. Thus, when determining if an offense can possibly result in a life sentence the only relevant "offense" is the charged offense. Beyond the plain text of article I, section 20, statutes makes this point clear.

A judge makes a bail and release determination"[u]pon the appearance . . . of a person **charged** with an offense. . . ." RCW 10.21.020 (emphasis added); *see also* Const. art. I, § 20 ("All persons **charged**"). Bail decisions must be case specific. RCW 10.19.055. Both RCW 10.19.055 and RCW 10.21.020 were part of the enabling legislation for the 2010 amendment of Article 1, section 20, which permitted the denial of bail in limited cases. Laws of 2010, ch. 254; H.J. Res. 4220, .

These enabling statutes make clear the provisions of article 1, section 20 come into play only when the State charges

a person with an offense. The drafters of the resolution could only have intended the term "offense" to refer to the charged offense as that is the trigger for the amendment's discretionary provisions and for which the judge must make a case-specific determination.

Nonetheless, the trial court reasoned the constitutional language focuses on the offense in the abstract rather than the actual charge: "we're not talking about subjective possibilities, we're talking about objective possibilities." RP 14-15. But even that is a distinction without a difference. There are no circumstances where the offense of first degree murder, by itself, carries a possibility of a court imposing a life sentence.

Moreover, it is an illogical distinction and requires a conclusion that voters intended to permit courts to deny bail even where the charged offense could not be punished by life in prison. This contradicts the plain language. Even though the words appear nowhere in the text of the constitutional amendment, the trial court and *Sargent* imagined that voters

really meant to permit the denial of bail for all class A felonies regardless of the actual penalty available in a particular case. *Sargent*, 20 Wn. App. 2d at 198.

Rather than give effect to the plain language of the constitutional text, *Sargent* concluded "'possibility of life in prison' is a term of art referring to the statutory maximum sentence" for class A felonies. *Id*. A "term of art" is "a term that has a specialized meaning in a particular field or profession." Merriam-Webster.com Dictionary (accessed Aug. 11, 2022).[16] Typically a term of art appears regularly and means the same thing. "Possibility of life in prison" is not a regularly used term in statutory or constitutional provisions and seems to have appeared for the first time in the 2010 amendment of article I, section 20. Certainly "statutory maximum" and "class A felony" are terms of art. But neither of those terms appears anywhere in the constitutional text.

[16] Available at https://www.merriam-webster.com/dictionary/term%20of%20art

Further, because this was an amendment enacted by the voters rather than judges or the legislature, it does not matter how courts have interpreted other terms. Interpretation of voter approved measures must focus on "*the voters'* intent and the language of the initiative as the average informed lay voter would read it." *Taxpayers of City of Spokane*, 111 Wn.2d at 97 (emphasis added).

Rather than start with the plain language of article I, section 20, "offenses punishable by the possibility of life in prison," *Sargent* begins with a discussion of "statutory maximum." 20 Wn. App. 2d at 195. The court never explains why that is the beginning of its analysis. No one disputes that "'statutory maximum' means the maximum sentence under RCW 9A.20.021." *See Sargent*, 20 Wn. App. 2d at 195. But that is not relevant to the analysis as "statutory maximum" appears nowhere in the constitutional text. In addition, *Sargent* never bothers to explain how it reaches the conclusion that

"possibility of life in prison" means "statutory maximum." Instead, the court just says so.

The average voter could not have known of the jurisprudence regarding the meaning of the term "statutory maximum" in case law. *See Sargent* 20 Wn. App. 2d. at 195 (discussing case law interpreting "statutory maximum" to mean term defined in RCW 9A.20.021). Nor should anyone have expected voters to understand such case law as the term "statutory maximum" appears nowhere in article I, section 20 and thus its definition in case law or statute is wholly irrelevant to the issues before voters. Instead, all that matters is what voters understood the word "possible" to mean. A court must assume voters intended "the natural and most obvious import" of the word "possible." *Auto. United Trades Org.*, 175 Wn.2d at 545. There is no reasonable interpretation of the word "possible" that includes that which is impossible.

If the drafters intended the amendment to simply mean "class A felonies," admittedly a term of art, they would have

said so. There is no explanation for why they did not just say as much. That phrase appears throughout the criminal code and the sentencing statutes. Its use predates the 2010 amendment of article I, section 20. It predates the 1981 enactment of the Sentencing Reform Act and the 1975 comprehensive revision of the criminal code. The term "class A felony" has existed in Washington law for decades, and throughout that time the phrase has been readily understood to mean a felony with a statutory maximum of life.

It is illogical to assume that after decades of using that term of art, the drafters of the amendment to article I, section 20 would have minted a new phrase to mean the same thing. More importantly, it is nonsensical to assume voters would have understood that new term to mean the same thing. That is especially true where supporters of the amendment told voters the denial of bail was only permissible where the person was facing a life sentence. Instead, by choosing a different phrase, it

is clear the drafters and the voters understood and intended the term to mean something else.[17]

In response to Mr. Gonzalez's motion for discretionary review, the deputy prosecutor's principal argument is to point to a case interpreting the phrase "capital offense" in the context of bail on appeal. Answer at 8 (citing *Ex Parte Berry*, 198 Wash. 317, 88 P.2d 427 (1939)). This is not helpful to the analysis here. First, the Court in *Berry* declined to address the

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[17] In support of its conclusion of what legislators intended, the *Sargent* court points to bill reports as evidence of legislative intent. *Sargent*, 20 Wn. App. 2d at 199-201. Setting aside the irrelevance of any legislator's intent when interpreting a voter approved amendment, the cited bill reports expressly state they are not statements of legislative intent. Emblazoned on the first page of each is the language:

> This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. **This analysis is not a part of the legislation nor does it constitute a statement of legislative intent**.

Final Bill Report, H.J. Res. 4220, 61st Leg., Reg. Sess. (2010). What legislative staff believed the effect of the legislation would be is wholly irrelevant to what legislators thought. And more importantly it sheds no light on what voters intended. In short, they offer no support for the court's conclusion.

provisions of article I, section 20, because the Court found it was inapplicable post-conviction. *Berry*, 198 Wash. at 320. Thus, it sheds no light on the interpretation of the constitutional provision. Never mind the constitutional language at issue here was not even adopted until more than 80 years after *Berry*.

In addition, the petitioner in *Berry* actually faced a capital offense. The charged offense could have yielded either a death sentence or life in prison. *Id*. at 318. At trial, the jury rejected the death sentence. *Id*. Thus, the petitioner actually faced the possibility of death. As the court explained, an offense is a capital offense "not [when] the death penalty must necessarily be imposed, but whether it may be imposed." 198 Wash. at 319. That was the case in *Berry*.

Here by contrast, a life sentence may not be imposed under any circumstances. Mr. Gonzalez has not been charged with an offense for which a life sentence is actually possible. To be clear, Mr. Gonzalez has never argued the "the possibility of life in prison" means only offenses for which a life sentence

must be imposed. Instead, he has argued the term cannot include offenses for which a life sentence is legally impermissible, such as for the offense he is charged with.

c. Aside from ignoring the plain text, Sargent's interpretation leads to absurd results.

Sargent's construction of the term "possible" is both over- and under-inclusive. It leads to the absurd result of requiring bail for offenses which actually require a life sentence while permitting the denial of bail for an offense for which a life sentence is impossible. The court concluded that "offense punishable by possibility of life in prison" means class A felony. *Sargent*, 20 Wn. App. 2d at 194. By that logic, a trial court could not deny bail for a person charged with second degree assault as a persistent offender as it is only a class B felony, which carries a statutory maximum of 10 years, even though a conviction on the charge would require a sentence of life without parole. *See* RCW 9A.36.021; RCW 9.94A.030(32), (37); RCW 9.4A.570. Yet *Sargent* concludes a trial court may

deny bail for an offense which could not yield a life sentence merely because it has a statutory maximum of life.

In the first scenario, the court could not deny bail because an assault in the second degree is only a class B felony, with a statutory maximum of just 10 years, even though a life sentence is mandatory. But in the second scenario a court could deny bail even though a life sentence, or anything approaching a life sentence, is not legally possible. That is absurd and violates the guiding principle of statutory construction: to avoid absurd results. *State v. Schwartz*, 194 Wn.2d 432, 443, 450 P.2d 141 (2019).

The State urges, however, that where a person faces a life sentence on a class B or C felony as a persistent offender, the statutory maximum has in fact changed from 5 or 10 years to life. *See* Answer at 12-13. That ignores the plain language of RCW 9.94A.570 that "*Notwithstanding* the statutory maximum . . . a persistent offender shall be sentenced to a term of life without the possibility of parole." (emphasis added).

"Notwithstanding" means "despite." Merrian-Webster.com Dictionary (accessed Aug. 11, 2022).[18] Rather than change the statutory maximum, the life sentence is imposed despite the statutory maximum.

Thus, even though a class B or C felony can result in a life sentence in these situations, the statutory maximum under RCW 9A.20.021 remains 10 or 5 years—not life. *See Thorne*, 129 Wn.2d at 756. And under *Sargent*, only the statutory maximum sentence matters. 20 Wn. App. 2d at 248 ("[W]e hold that the maximum punishment 'possible' under article I, section 20 is the statutory maximum as defined in RCW 9A.20.021."). Moreover, the State's position requires defining "possibility of life in prison" to mean "offenses for which the statutory maximum under RCW 9A.20.021 is life and all other offenses which as charged can result in life." This twisted definition is

[18] Available at https://www.merriam-webster.com/dictionary/notwithstanding

certainly no natural reading of the constitutional or statutory text.

Thus, the point remains, if "possibility of life in prison" means only the statutory maximum as *Sargent* says, a court may not deny bail for some persons actually facing a life sentence but may deny bail for persons who cannot receive a life sentence. That is absurd.

d. *Mr. Gonzalez is constitutionally entitled to bail.*

"[O]ffenses punishable by the possibility of life in prison" means a charged offense the conviction of which can actually result in a life sentence for the person charged. It does not mean class A felony. The term cannot include offenses for which a life sentence is not legally authorized under any circumstances. *Sargent's* interpretation of the term "possible" to include offenses for which a life sentence is legally impossible, all the while excluding offense where a life sentence is required, is patently absurd.

The state did not charge Mr. Gonzalez with committing a crime that is one of the four situations that can actually result in life imprisonment. The charged offense is not a sex offense or aggravated first degree murder. Mr. Gonzalez is not alleged to have committed the current offense prior to the effective date of the SRA. A conviction for the charged offense would not render Mr. Gonzalez a "persistent offender." Thus, a life sentence is not possible based upon the charges Mr. Gonzalez faces.

The maximum possible sentence a court could impose if Mr. Gonzalez were convicted is a standard range determinate sentence, not a life sentence. A life sentence is not "possible" in this case. The court did not have discretion to deny bail.

3. The trial court violated the plain language of CrR 3.2 when it denied Mr. Gonzalez any opportunity for release.

A court uses ordinary rules of statutory construction when interpreting court rules. *State v. Blilie*, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). The drafter's intent is determined

first from the plain language of the rule. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015).

CrR 3.2 permits the denial of bail only in capital cases. This is not a capital case.

In all other cases, the rule requires release unless the court determines the person (1) will not appear, (2) will commit a violent crime, or (3) will intimidate witnesses or victims. CrR 3.2(a). If a court makes any of these findings it may impose a variety of conditions such as required supervision, restrictions of travel, electronic surveillance, or posting a bond. *See* CrR 3.2(b)(d). However, the rule makes no provision for the wholesale denial of bail. *Id.*

When construing a statute, the principle "'expressio unius est exclusio alterius'" means "the express inclusion of specific items in a class impliedly excludes other such items that are not mentioned." *State v. Linville*, 191 Wn.2d 513, 520, 423 P.3d 842 (2018). Subsections (b) and (d) of the rule respectively set forth specific lists of conditions which may be

imposed if the court finds a person will likely fail to appear or poses a danger. CrR 3.2. Neither of those specific lists include denial of bail.

Even if the court made specific findings that Mr. Gonzalez might fail to appear or pose a danger, which the court did not, it cannot deny bail. Thus, denial of bail is not permissible.

CrR 3.2 does not permit the trial court to deny Mr. Gonzalez bail.

E. Conclusion

Article I, section 20 is not ambiguous; its plain language controls. A court may only deny bail where the charge carries the possibility of a life sentence. There are no circumstances in which the charge against Mr. Gonzalez could result in a life sentence. It is impossible. The court clearly erred and violated the provisions of article I, section 20 in denying bail.

CrR 3.2 is equally clear and similarly does not permit denial of bail.

Mr. Gonzalez is entitled to bail.

I certify this document contains 5074 words and complies with RAP 18.17.

Respectfully submitted this 15th day of August 2022.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LEONEL GONZALEZ, Petitioner.	)))))))))	NO. 100718-3

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF AUGUST, 2022, I CAUSED THE ORIGINAL **BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES WHISMAN, DPA [Jim.Whisman@kingcounty.gov] [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF AUGUST, 2022.

X_____

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