

HOUSE BILL REPORT

HB 2625

As Passed Legislature

Title: An act relating to bail for felony offenses.

Brief Description: Addressing bail for felony offenses.

Sponsors: Representatives Kelley, Ericks, Conway, Driscoll, O'Brien, Lias, Blake, Finn, Simpson, Orwall, Morrell and Campbell.

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 1/19/10, 1/22/10 [DP].

Floor Activity:

Passed House: 2/3/10, 96-0.

Senate Amended.

Passed Senate: 3/5/10, 48-0.

House Concurred.

Passed House: 3/8/10, 96-0.

Passed Legislature.

Brief Summary of Bill

- Requires an individualized judicial determination of bail for the release of a person arrested and detained for a felony.
- Requires a judge to order the pretrial detention of a person charged with a capital offense or an offense punishable by life in prison if the judge finds by clear and convincing evidence that the person has a propensity for violence that creates a substantial likelihood of danger to the community or other persons and no conditions of release will reasonably assure the safety of another or the community.
- Provides procedures for pretrial release and detention.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

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.

Majority Report: Do pass. Signed by 8 members: Representatives Hurst, Chair; O'Brien, Vice Chair; Pearson, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Appleton, Goodman, Kirby and Ross.

Staff: Alexa Silver (786-7190).

Background:

Pretrial release is the release of the accused from detention pending trial. The state Constitution guarantees the right to bail for people charged with noncapital crimes, and this right has been interpreted as the right to a judicial determination of either release or reasonable bail. Wash. Const., art. I, §20; *Westerman v. Cary*, 125 Wn.2d 277, 291-92 (1994). For capital offenses where the proof of the accused's guilt is evident or the presumption of the accused's guilt is great, there is no right to bail.

Pretrial release and bail are favored by courts in appropriate circumstances because the accused is presumed innocent and because the state is relieved of the burden of detention. *Westerman*, 125 Wn.2d at 291. The purpose of bail is to secure the accused's presence in court; bail is neither punishment nor a revenue collection vehicle. See *State v. Banuelos*, 91 Wn. App. 860, 863 (1998); *Landry v. Luscher*, 95 Wn. App. 779, 778 (1999); *United States v. Salerno*, 481 U.S. 739, 746-47 (1987) (overruled on other grounds).

Bail and the Separation of Powers.

The separation of powers doctrine is violated when the activity of one branch of government invades the prerogatives of another branch. Courts have inherent power and the statutory authority to make rules regarding procedure and practice in the courtroom. Courts have ruled that setting bail and releasing individuals from custody is a traditional function of the courts. *State v. Blilie*, 939 P.2d 691, 693, 695 (1997); *Westerman*, 125 Wn.2d at 290-91. The Legislature may enact statutes related to bail so long as the statutes can be harmonized with court rules. *Blilie*, 939 P.2d at 693-95.

Court Rules Governing Bail.

General criminal court rules, which are promulgated by the Supreme Court, and local criminal court rules govern the release of an accused in superior court criminal proceedings. Wash. CrR 3.2, 3.2.1; Wash. CrRLJ 3.2, 3.2.1. The criminal court rules provide the following framework for pretrial release.

a. *Pretrial Release in a Noncapital Case.*

In a noncapital case, there is a presumption that the accused should be released unless the court determines either: (1) the release will not reasonably assure that the accused will appear; or (2) there is a likely danger that the accused will commit a violent crime or interfere with the administration of justice. Whether the accused poses a danger to the community or is a flight risk is a factual determination within the judge's discretion.

If the court finds that based on specified relevant factors the accused is *not likely to appear*, then the court imposes the least restrictive conditions necessary to reasonably assure the accused's appearance. If the court finds that there is a *substantial danger* that the accused will either *commit a violent crime or interfere with the administration of justice*, the court may impose conditions of release.

Factors that the court considers in determining which conditions to impose to reduce the danger that the accused poses to the community include:

- the accused's criminal record;
- the willingness of community members to vouch for the accused's reliability and assist with compliance with the conditions of release;
- the nature of the charges;
- the accused's reputation, character, and mental condition;
- the accused's past record of interference with the administration of justice;
- evidence of present intimidation of witnesses;
- the accused's record of committing offenses while on pretrial release, probation, or parole; and
- the accused's record of use or threatened use of deadly weapons, especially against victims or witnesses.

b. *Pretrial Release in a Capital Case.*

In a capital case, the criminal court rules provide that the accused shall not be released unless the court finds that releasing the accused with conditions will reasonably assure the accused's appearance, will not significantly interfere with the administration of justice, and will not pose a substantial danger to another or the community.

Booking Bail and Bail Schedules.

Booking bail, which allows a person who has been arrested to post bail without a judicial officer's determination, is available in some counties. In counties that permit booking bail, a law enforcement officer or a prosecutor may set the bail. The amount of bail set may be based on a bail schedule, which specifies the availability and amount of bail for particular offenses. Bail schedules are contained in local court rules, and an advisory statewide bail schedule is also available.

Approaches to bail schedules vary by county and type of court. The Washington Supreme Court has held that whether to promulgate a bail schedule is a question best left to the counties. *Westerman*, 125 Wn.2d at 291-92.

Federal Bail Reform Act.

Under the federal Bail Reform Act, 18 U.S.C. §3142 (2006) (Act), a judge may issue an order releasing the accused on personal recognizance or execution of an appearance bond, releasing the accused on conditions, or detaining the accused temporarily or indefinitely. The accused may be detained following a detention hearing in which the judge determines that no condition or combination of conditions will reasonably assure the accused's appearance and the safety of any other person and the community.

The hearing is held in cases involving: a serious risk of flight or an attempt to obstruct justice; a crime of violence; a crime for which the maximum sentence is life imprisonment or death; certain controlled substance offenses; and a felony if the accused has been convicted of two or more specified serious offenses.

The Act provides procedures for the hearing and factors relevant to whether any condition of release will reasonably assure the accused's appearance and the safety of any other person and the community. The U.S. Supreme Court has held that the Act does not violate an accused's right to due process because it carefully limits the circumstances in which pretrial detention may be imposed. *Salerno*, 481 U.S. at 747-50.

Sentencing.

Aggravated murder in the first degree is a capital offense. Offenses for which the maximum sentence is the possibility of life in prison include class A felonies, third strike offenses for persistent offenders, and second strike offenses for persistent sex offenders.

Summary of Bill:

Booking Bail.

If a person is arrested and detained for a felony offense, a judicial officer must make a bail determination on an individualized basis. This provision expires August 1, 2011.

Procedures for Pretrial Release or Detention.

Upon the appearance before a judge of a person charged with an offense, a judge must issue an order releasing the person on personal recognizance, releasing the person on conditions, temporarily detaining the person as allowed by law, or detaining the person.

If a judge issues an order releasing the person on conditions, appropriate conditions include, among others, restrictions on travel and association, curfews, electronic monitoring, placement in custody of a person or organization, and prohibitions on the consumption of drugs and alcohol. A release order must include a written statement of the conditions of release, as well as the penalties and consequences for violation of the conditions.

A judge must order the pretrial detention of a person charged with a capital offense or an offense punishable by life in prison if the judge finds by clear and convincing evidence that (1) the person shows a propensity for violence that creates a substantial likelihood of danger to the community or any persons and (2) no condition or combination of conditions will reasonably assure the safety of the community or any persons. In making this determination, the judge must consider information regarding the nature and circumstances of the offense, the weight of the evidence, and the person's history and characteristics.

A judge must hold a detention hearing for capital offenses and offenses punishable by life in prison upon the government's motion. The hearing must be held at the person's preliminary appearance unless the person or the government seeks a continuance. The continuance may

not exceed five days on the motion of the person or three days on the motion of the government. At the hearing, the person has the rights to an attorney, to testify, to present witnesses, to cross-examine witnesses, and to present information. The rules of evidence do not apply. The hearing may be reopened anytime before trial if new material information becomes available.

A detention order must include written findings of fact and the reasons for the detention. The detention order must direct that, to the extent practicable, the person be committed to custody for confinement separate from persons serving sentences, and it must direct that the person be afforded reasonable opportunity for consultation with his or her attorney. A judge may later temporarily release the person for the preparation of the person's defense or another compelling reason.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect January 1, 2011. Sections 3-10, relating to provisions regarding pretrial detention take effect only if the people ratify House Joint Resolution 4220 in the next general election. Sections 3-11 are null and void unless ratified by the people.

Staff Summary of Public Testimony:

(In support) This bill takes a flexible approach by allowing judges to determine bail based on the circumstances. Pierce County and other counties practice booking bail, which does not take into consideration prior convictions or other circumstances. Because of Supreme Court cases, the court cannot hold a person more than 48 hours. Other states and counties have a different process for weekends where the judge either comes in for bail hearings or appears telephonically.

(In support with concerns) From an administrative point of view, eliminating bail schedules will create a backlog. Bail schedules are not the problem, and a bail schedule was not the problem in the Maurice Clemmons case. Instead, law enforcement should have the discretion to trigger judicial review of bail for individuals who pose a threat.

(Opposed) None.

Persons Testifying: (In support) Representative Kelley, prime sponsor; Shankar Narayan, American Civil Liberties Union of Washington; and LeRoi Brashears, First Amendment Social Action Commission.

(In support with concerns) Rob Hayes, Aladdin Bail Bonds.

Persons Signed In To Testify But Not Testifying: Amy Muth, Washington Association of Criminal Defense Lawyers and Washington Defenders Association.