HOUSE BILL REPORT
ESHJR 4220

As Amended by the Senate

Brief Description: Amending the state Constitution so that the provision relating to bailable crimes by sufficient sureties is modified.

Sponsors: House Committee on Public Safety & Emergency Preparedness (originally sponsored by Representatives Hope, Kelley, Green, Conway, Parker, Hurst, Campbell, Wallace, Orcutt, Simpson, Ericks, Ericksen, Van De Wege, Morrell, Takko, Appleton, Maxwell, Orwall, Pearson, Kirby, Sells, Kenney, Johnson, Dammeier, Roberts and McCune; by request of Governor Gregoire).

Brief History:

Committee Activity:

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

Floor Activity:

Passed House: 2/5/10, 80-17.

Senate Amended.

Passed Senate: 3/4/10, 48-0.

Brief Summary of Engrossed Substitute Bill

- Proposes an amendment to the state Constitution to give judges discretion to deny bail to a person charged with an offense for which the maximum sentence is the possibility of life in prison.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Hurst, Chair; O'Brien, Vice Chair; Pearson, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Kirby and Ross.

Minority Report: Do not pass. Signed by 2 members: Representatives Appleton and Goodman.

Staff: Alexa Silver (786-7190).

Background:

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.

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).

A. Court Rules Governing Bail.

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. 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.

i. Flight Risk.
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. Conditions include requiring the execution of: (1) an unsecured bond; (2) a bond and the deposit in cash or other security of an amount no more than 10 percent of the bond; and (3) a bond with solvent sureties or cash.

ii. Violent Crime or Interference with the Administration of Justice.
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. For example, the court may require the accused to post a bond or deposit cash, conditioned on compliance with the conditions of release. The court may only impose this condition if no less restrictive condition or combination of conditions would reasonably assure the safety of the community.

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

1. the accused's criminal record;
2. the willingness of community members to vouch for the accused's reliability and assist with compliance with the conditions of release;
3. the nature of the charges;
4. the accused's reputation, character, and mental condition;
5. the accused's past record of interference with the administration of justice;
6. evidence of present intimidation of witnesses;
7. the accused's record of committing offenses while on pretrial release, probation, or parole; and
8. 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.

c. *Delay of Release and Violation of Conditions.*
The court may delay the release of the accused under the following circumstances: (1) the accused is intoxicated and release would jeopardize the safety of the accused or others; or (2) the accused should be interviewed by a mental health professional for possible commitment to a mental treatment facility. The accused must be released within 24 hours, unless grounds exist for continued detention.

If the accused violates the conditions imposed by the court on his or her pretrial release, or if the accused fails to appear in court, the court may issue a warrant for the accused's arrest or impose sanctions or further conditions.

B. Federal Pretrial Detention.

Under the federal Bail Reform Act, 18 U.S.C. §3142 (2006) (Act), a judge may issue an order: (1) releasing the accused on personal recognizance or execution of an appearance bond; (2) releasing the accused on conditions; (3) temporarily detaining the accused; or (4) indefinitely detaining the accused. The accused may be indefinitely 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 detention hearing is held on the motion of the state or the judge in a case that involves a serious risk that the accused will flee or attempt to obstruct justice. The detention hearing is held on the motion of the state in a case that involves a crime of violence, a crime for which the maximum sentence is life imprisonment or death, a controlled substance offense the maximum sentence for which is 10 years or more, or a felony if the accused has been convicted of two or more specified serious offenses.

The Act provides procedures for the detention hearing, as well as a list of factors to be considered in the determination 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 under the Fifth Amendment because it carefully limits the circumstances in which pretrial detention may be imposed. *Salerno*, 481 U.S. at 747-50.

C. 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 Engrossed Substitute Bill:

A person charged with a crime is bailable, except for capital offenses and offenses for which the maximum sentence is the possibility of life in prison, where the proof of the accused's guilt is evident or the presumption of the accused's guilt is great. For those offenses, a judge has the discretion to deny bail.

EFFECT OF SENATE AMENDMENT(S):

A judge may deny bail to a person charged with an offense punishable by life in prison. To deny bail, there must be a showing by clear and convincing evidence that the person has a propensity for violence that creates a substantial likelihood of danger to the community or any persons. The denial of bail under these circumstances is subject to limitations determined by the Legislature.

Appropriation: None.

Fiscal Note: Available.

Staff Summary of Public Testimony:

(In support) This resolution fixes a long-time criminal justice problem. Giving judges more discretion to deny bail to the most dangerous people will protect the public and law enforcement officers. In the Maurice Clemmons case, the judge could not deny bail. The judge's decision to hold an offender in pretrial detention is an initial decision that could be revisited later. After the tragic murders in Lakewood, the Governor convened a group of law enforcement leaders, who recommended this constitutional amendment. Earlier proposed constitutional amendments were limited to persistent offenders. Following discussions among law enforcement, representatives, and the Office of the Governor, it was decided that a judge should have greater discretion in all cases. A trailer bill will provide a state version of the federal bail statute, which provides the criteria, burden, and standards and has been upheld by the U.S. Supreme Court. It is difficult to decide when to amend the Constitution, but if the Legislature doesn't amend the Constitution, any changes to bail in statute will not take root because of the right to bail. At the time the Constitution was adopted, more crimes were considered capital crimes, including the crime of stealing a horse. The law should adjust to the changing landscape.

(Opposed) A constitutional amendment should not be done in haste. It is critical that the Legislature look more carefully and dispassionately at the options, rather than make a political consideration. The Legislature should not sacrifice due process rights in responding to an individual's crime. The Washington Constitution has a stronger preference for bail than the federal Constitution. Historically, the decision whether to allow bail is dictated by the severity of the penalty, not the severity of the offense. There is concern about giving judges unfettered discretion, because there could be unintended consequences. This constitutional amendment will have a disproportionate impact on the poor, the homeless, and people of color, because those people do not have access to competent counsel, and judges will impose de facto preventive detention. Existing laws provide tools for judges to set bail based on factors, including dangerousness, and judges can add conditions on release. Better solutions to the problem include convening a work group to examine the process, improving alert systems, providing more information to judges and officers, and providing benefits to the officers' families. A constitutional amendment denying bail to persistent offenders balances the presumption of innocence against the need to ensure safety of the community. The real public safety issue is mental illness; the Legislature should make services more available.

Persons Testifying: (In support) Representative Hope, prime sponsor; John Lane, Office of the Governor; Tom McBride, Washington Association of Prosecuting Attorneys; Jo Arlow, Washington Association of Sheriffs and Police Chiefs; and Brian Wurts, Lakewood Police Department Guild.

(Opposed) Shankar Narayan, American Civil Liberties Union of Washington; and Amy Muth, Washington Association of Criminal Defense Lawyers and Washington Defender Association.

Persons Signed In To Testify But Not Testifying: None.