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**Public Safety & Emergency Preparedness  
Committee**

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**HB 2625**

**Brief Description:** Addressing bail for felony offenses.

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

**Brief Summary of Bill**

- Requires an individualized judicial determination of bail for the release of a person arrested and detained for a felony.

**Hearing Date:** 1/19/10

**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 non-capital 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).

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*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.*

## **A. Bail and the Separation of Powers**

The state Constitution implicitly recognizes the separation of the three branches of government. The separation of powers doctrine is violated when one branch's activity 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, however, enact statutes related to bail so long as the statutes can be harmonized with court rules; if the statute and rule cannot be harmonized, the court rule governs. *Blilie*, 939 P.2d at 693-95.

## **B. 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 Noncapital Cases*

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 Capital Cases*

In capital cases, 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.

### **C. 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. For example, a court's bail schedule may require that bail for certain serious offenses (*e.g.*, class A felonies, domestic violence-related felonies, driving under the influence, or felonies against a person) be determined by a judicial officer. 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.

Criminal court rules require that an accused make a preliminary appearance in court as soon as practicable after conditions of release are imposed or the accused is detained, but no later than by the close of business the next court day. Wash. CrR 3.2.1; *Westerman*, 125 Wn.2d at 291. Thus

bail for a person released on booking bail is reviewed by a judge no later than the close of business the next court day.

**Summary of Bill:**

If a person is arrested and detained for a felony offense, a bail determination for release of the person must be made by a judicial officer on an individualized basis.

**Appropriation:** None.

**Fiscal Note:** Requested on January 14, 2010.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.