

HOUSE BILL REPORT

HB 3056

As Passed House:
February 5, 2010

Title: An act relating to pretrial release or detention.

Brief Description: Concerning pretrial release or detention.

Sponsors: Representatives Pearson, Hurst, Kessler, Klippert, Kirby, Kenney and Kelley; by request of Governor Gregoire.

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 1/26/10 [DP].

Floor Activity:

Passed House: 2/5/10, 95-2.

Brief Summary of Bill

- Provides procedures for the pretrial release on conditions or the pretrial detention of defendants.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

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.

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 and bail are favored by courts in appropriate circumstances because the accused is presumed innocent and 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. 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).

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 and local criminal court rules govern the release of an accused in 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.

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. In noncapital cases, 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: (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.

The court may delay the release of the accused if: (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 fails to appear in court, the court may issue a warrant for arrest or impose sanctions or further conditions.

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) detaining the accused. 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 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.

Summary of Bill:

The Legislature finds there is a need to consider the safety of others and the community in setting non-financial pretrial conditions of release and to permit pretrial detention if no conditions of release will assure public safety. When a person charged with an offense appears before a judge, the judge must issue an order that pending trial, the person be: (1) released on personal recognizance; (2) released on a condition or combination of conditions; (3) temporarily detained; or (4) detained.

Order of Release on Conditions.

If release of the person would endanger the safety of any other person or the community, the judge must order the pretrial release of the person subject to the least restrictive condition or combination of conditions that will reasonably assure the safety of any other person or the community. The release order may be amended at any time. It must include a written statement of the conditions of release, and it must advise the person of the penalties and consequences of violation.

Conditions of release include the following: (1) placing the person in the custody of a person or organization; (2) placing restrictions on travel, association, or residence; (3) imposing a curfew; (4) requiring reporting or electronic monitoring; (5) prohibiting the person from

approaching or communicating with certain people; (6) prohibiting the person from going to certain places; (7) prohibiting the person from possessing dangerous weapons or firearms; (8) prohibiting the person from possessing or consuming drugs or alcohol; (9) prohibiting the person from operating a vehicle without an ignition interlock device; (10) requiring the person to regularly report to an officer of the court or other person or agency; and (11) prohibiting the person from violating criminal law.

Hearing.

On the prosecutor's motion, the judge must hold a hearing on whether any condition or combination of conditions will reasonably assure the safety of any other person or the community in the following cases: violent offenses as defined by law, an act of domestic violence, and an offense for which the maximum sentence is life imprisonment or death.

If there is probable cause to believe that the person committed an offense for which the penalty is life imprisonment or death, there is a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of the community. If the person is charged with a capital offense, the person may not be released unless the judge finds that release on conditions will reasonably assure that the person will not pose a danger to another or the community.

In determining whether any conditions of release will reasonably assure the safety of any other person or the community, 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. This includes the person's character, physical and mental condition, family ties, employment, financial resources, community ties, past conduct, history of drug or alcohol abuse, criminal history, and record of appearance at court proceedings. The court may also consider whether the person was on community supervision or other release at the time of the offense and the nature and seriousness of the danger posed by release.

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 must be held at the person's preliminary appearance, unless the person or the prosecutor seeks a continuance, during which time the person is detained. The continuance may not exceed five days on the motion of the person or three days on the motion of the prosecutor. The hearing may be reopened anytime before trial, if new material information becomes available.

Detention Order.

If, based on clear and convincing evidence, the judge determines after the hearing that no condition or combination of conditions will reasonably assure the safety of others or the community, the judge must order the pretrial detention of the person. The person is entitled to expedited review of the detention order.

The detention order must contain findings of fact and a written statement of the reasons for detention. The order must direct that the person be confined separately, to the extent practicable, from people serving sentences or being detained pending appeal. The order must

also direct that the person be afforded reasonable opportunity for private consultation with an attorney. The judge may permit the temporary release of the person to prepare a defense or for another compelling reason.

Appropriation: None.

Fiscal Note: Requested on January 21, 2010.

Effective Date: The bill takes effect January 1, 2011, if the amendment to Article I, section 20 of the state Constitution proposed in House Joint Resolution 4220 is approved and ratified by the voters at the next general election. If the proposed amendment is not approved and ratified, this act is void in its entirety.

Staff Summary of Public Testimony:

(In support) This bill addresses concerns about House Joint Resolution 4220 by creating procedural safeguards of the presumption of innocence. The high standards for imposing pretrial detention are necessary to survive constitutional scrutiny. Because it mirrors federal law, there will be cases available in applying this law. A continuance could be requested by a defendant or the government, but would not be a matter of right.

(Opposed) This bill erodes the presumption of innocence. It is alarming that a person could be held in detention for three days if the government is granted a continuance. The state Constitution has a stronger preference for bail than the federal Constitution.

Persons Testifying: (In support) Representative Pearson, prime sponsor; John Lane, Office of the Governor; and Tom McBride, Washington Association of Prosecuting Attorneys.

(Opposed) Shankar Narayan, American Civil Liberties Union of Washington.

Persons Signed In To Testify But Not Testifying: None.