PRACTICE ADVISORY | 8/27/2019 | R.K. Brinkmann & Magda Baker

Conditions of Pretrial Release in Superior Court and Courts of Limited Jurisdiction

Overview

Pretrial release conditions are not punitive measures.[1] Criminal Rule (CrR) 3.2 and Criminal Rule for Courts of Limited Jurisdiction (CrRLJ) 3.2 are almost-identical procedural rules intended to limit the hardship stemming from pretrial detention and bail.[2]

There is a presumption that, after a preliminary court appearance, anyone charged with a noncapital offense should be released on personal recognizance pending trial.[3] But, a court may determine that (1) release on personal recognizance does not reasonably assure the defendant's later appearance, or (2) it is likely that the defendant will commit a violent crime, seek to intimidate witnesses, or interfere with the administration of justice. If a court finds one of these scenarios likely, the court can impose conditions on the defendant's release or require bail.[4]

What is a Violent Crime?

A "violent crime" is not limited to the violent offenses defined in RCW 9.94A.030,[5] but must entail "affirmative or [] premeditated use of force;" for example, DUI is *not* a violent crime. [6]

How Soon After Arrest Must the Court Impose Conditions or Bail?

A court must decide to set bail or release the defendant "no later than the probable cause determination," although it can make that determination before the preliminary hearing.[7] The court must make the probable cause determination within 48 hours of the defendant's arrest.[8] If the court does not find probable cause, it must release the defendant without any conditions.[9]

What is the Standard of Evidence Required to Impose Conditions or Bail?

Whether the defendant is likely to flee, endanger others, or interfere with the administration of justice is a factual question within the court's discretion.[10] Although the evidence presented for consideration does not have to meet the standards for admissibility,[11] the findings a court uses to justify imposing conditions must be particularized to the defendant and supported by substantial

---

[1] *Harris v. Charles*, 171 Wn.2d 455, 467 (2011).

[2] *State v. Perrett*, 86 Wn. App. 312, 318 (1997) (describing CrR 3.2's purpose as alleviating hardships associated with pretrial detention and bail, such as defendants' 1) handicaps in preparing defenses; 2) inability to retain jobs and support families; 3) stigma of incarceration before conviction; and 4) actual incarceration from not affording bail) (citing Criminal Rules Task Force, Wash. Proposed Rules of Crim. Proc., Rule 3.2 gen. cmt. at 22 (West 1971)).

[3] CrR 3.2(a); CrRLJ 3.2(a).

[4] CrR 3.2(a); CrRLJ 3.2(a).

[5] CrR 3.2(a)(2); CrRLJ 3.2(a)(2).

[6] *Blomstrom v. Tripp*, 189 Wn.2d 379, 406 (2017) (stating that DUI is not a violent crime and does not fit ordinary meaning of "violent" and "violence.") (citing Webster's Third New International Dictionary 2554 (2002)).

[7] *Westerman v. Cary,* 125 Wn.2d 277, 292 (1994).

[8] *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S. Ct. 1661, 1670, 114 L.Ed.2d 49, 63 (1991) (holding that judicial determinations of probable cause within 48 hours of arrest will generally pass constitutional muster).

[9] CrR 3.2; CrRLJ 3.2. *See Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) ("[T]he Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention.")

[10] *State v. Smith*, 84 Wn.2d 498, 505 (1974).

[11] CrR 3.2(m); CrRLJ 3.2(l).

evidence.[12] Courts may consider numerous factors, and impose restraints singly or in combination on defendants whom the court finds to be flight risks, dangers to the community, or threats to the administration of justice.

When Can a Court Impose Bail?

The Washington Constitution guarantees that anyone charged with a crime "shall be bailable by sufficient sureties," except for capital cases "when the proof is evident, or the presumption great," or cases where clear and convincing evidence indicates that no combination of conditions will prevent the defendant from creating "a substantial likelihood of danger to the community or any persons" if released.[13] The Washington Constitution also prohibits excessive bail.[14]

Important Considerations:

- Courts may impose bail only to guarantee a defendant's appearance in court; bail is not "a revenue measure … or a method to punish sureties."[15]
- A court may impose bail only if no "combination of conditions would reasonably assure the safety of the community" if the defendant were released.[16]
- A court that imposes bail must consider the defendant's financial resources and weigh the effectiveness of less restrictive alternatives.[17]
- While a court can require a defendant who is a flight risk to execute "a bond with sufficient solvent sureties, or [a] deposit of cash in lieu thereof,"[18] courts cannot impose "cash only" bail or demand a cash deposit without allowing the option to post a bond.[19]

What Factors Do Courts Look At?

CrR 3.2 and CrRLJ 3.2 list factors that courts may evaluate when considering whether to impose conditions on pretrial release.[20] Evidence regarding these factors "need not conform to the rules pertaining to the admissibility of evidence in a court of law"[21]; the court must merely consider "available information" on the "relevant facts" of the case.[22]

---

[12] *See, e.g., State v. Huckins*, 5 Wn. App. 2d 457, 467 (2018) (holding trial court within discretion to consider defendant's criminal record, pending assault charge, and threats made to victim before finding defendant likely to not appear at trial or to commit a violent crime and setting bail); *State v. Rose*, 146 Wn. App. 439, 455–56 (2008) (holding trial court's imposition of UA as pretrial release condition was inappropriate without judicial finding that drug use would make defendant likely to not appear in court, commit a violent crime, intimidate witnesses, or interfere with administration of justice); *Butler v. Kato*, 137 Wn. App. 515, 522 (2007) ("[T]he nature of the charge is only a factor to be considered if it is relevant to the risk of defendant's nonappearance… Bail jumping, escape, perjury, and intimidating a judge all have a nexus intimating a disrespect for the judicial process 'relevant to the risk of nonappearance.' Such a risk of nonappearance is not logically apparent in a charge of DUI.").

[13] Wash. Const. art. I § 20; RCW 10.21.040.

[14] Wash. Const. art. I § 14.

[15] *State v. Darwin*, 70 Wn. App. 875, 877 (1993).

[16] CrR 3.2(d)(6); CrR 3.2(d)(6).

[17] *State v. Ingram*, ___ Wn. App. 2d. ___, ___P.3d ___ (2019), No. 50577-1-II, 2019 Wash. App. LEXIS 2058, at *16-17 (Ct. App. Aug. 6, 2019) (citing CrR 3.2(b)(7), (d)(6)).

[18] CrR 3.2(b)(5); CrRLJ 3.2(b)(5).

[19] *City of Yakima v. Mollett*, 115 Wn. App. 604, 609 (2003).

[20] CrR 3.2(c), (e); CrRLJ 3.2(c), (e).

[21] CrR 3.2(m); CrRLJ 3.2(l).

[22] CrR 3.2(a), (e); CrRLJ(a), (e).

To Determine Whether the Defendant is a Flight Risk: When assessing whether a defendant is likely to not appear at later hearings, courts may—in addition to other factors—weigh:

(1) The accused's history of response to legal process, particularly court orders to personally appear;
(2) The accused's employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;
(3) The accused's family ties and relationships;
(4) The accused's reputation, character and mental condition;
(5) The length of the accused's residence in the community;
(6) The accused's criminal record;
(7) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
(8) The nature of the charge, if relevant to the risk of nonappearance;
(9) Any other factors indicating the accused's ties to the community.[23]

To Determine Whether the Defendant is a Danger to the Community or the Administration of Justice: When evaluating whether a defendant poses a risk to others or the administration of justice, courts may—in addition to other factors—weigh:

(1) The accused's criminal record;
(2) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
(3) The nature of the charge;
(4) The accused's reputation, character and mental condition;
(5) The accused's past record of threats to victims or witnesses or interference with witnesses or the administration of justice;
(6) … [E]vidence of present threats or intimidation directed to witnesses;
(7) The accused's past record of committing offenses while on pretrial release, probation or parole; and
(8) The accused's past record of use of or threatened use of deadly weapons or firearms, especially to victims or witnesses.[24]

Other Factors That Courts Can Consider: When considering pretrial release, courts may weigh defendants' "history and characteristics", which includes "community ties, past conduct, history relating to drug or alcohol abuse"[25] and the "nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;"[26] as well as whether the defendant was arrested while "on community supervision, probation, parole, or on other release."[27]

[23] CrR 3.2(c); CrRLJ 3.2(c)
[24] CrR 3.2(e); CrRLJ 3.2(e).
[25] RCW 10.21.050(3)(a).
[26] RCW 10.21.050(3)(c).
[27] RCW 10.21.050(3)(b).

What Conditions Can Courts Impose?

Defendants have no absolute right to release on their own recognizance before trial.[28] CrR 3.2 and CrRLJ 3.2 list pretrial release conditions that courts can impose singly or in combination. [29] A court *must* find that a defendant is likely to commit a violent crime, intimidate witnesses, or interfere with the administration of justice before imposing any conditions.[30]

If the Court Finds That the Defendant is a Flight Risk: If a court finds a defendant unlikely to reappear if released, the court may impose the least restrictive combination of the following conditions that will "reasonably assure" the defendant's presence for later hearings:

> **(1)** Place the accused in the custody of a designated person or organization agreeing to supervise the accused;
> **(2)** Place restrictions on the travel, association, or place of abode of the accused during the period of release;
> **(3)** Require the execution of an unsecured bond in a specified amount;
> **(4)** Require the execution of a bond in a specified amount and the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition of release. If this requirement is imposed, the court must also authorize a surety bond under subsection (b)(5);
> **(5)** Require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof;
> **(6)** Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or
> **(7)** Impose any condition other than detention deemed reasonably necessary to assure appearance as required. If the court determines that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the accused's appearance.[31]

If the Court Finds the Defendant a Danger to the Community or the Administration of Justice: If a court finds a substantial danger that a defendant will commit a violent crime or interfere with the administration of justice, the court may singly or in combination:

> **(1)** Prohibit the accused from approaching or communicating in any manner with particular persons or classes of persons;
> **(2)** Prohibit the accused from going to certain geographical areas or premises;
> **(3)** Prohibit the accused from possessing any dangerous weapons or firearms, or engaging in certain described activities or possessing or consuming any intoxicating liquors or drugs not prescribed to the accused;
> **(4)** Require the accused to report regularly to and remain under the supervision of an officer of the court or other person or agency;
> **(5)** Prohibit the accused from committing any violations of criminal law;

[28] *State v. Goodwin*, 4 Wn.App. 949, 951 (1971).
[29] CrR 3.2(b), (d); CrRLJ 3.2(b), (d).
[30] *Blomstrom*, 189 Wn.2d at 406.
[31] CrR 3.2(b); CrRLJ 3.2(b).

> **(6)** Require the accused to post a secured or unsecured bond or deposit cash in lieu thereof, conditioned on compliance with all conditions of release. This condition may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community. If the court determines … that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the safety of the community…
> **(7)** Place the accused in the custody of a designated person or organization agreeing to supervise the accused;
> **(8)** Place restrictions on the travel, association, or place of abode of the accused during the period of release;
> **(9)** Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or
> **(10)** Impose any condition other than detention to assure noninterference with the administration of justice and reduce danger to others or the community.

Unconstitutional Conditions

While the above are non-exhaustive lists of possible conditions, a court cannot use the rules to limit or diminish defendants' constitutional rights.[32] Courts cannot impose pretrial release conditions that are unconstitutional, such as warrantless searches performed without the authority of law,[33] or conditions that violate defendants' right against self-incrimination.[34]

When Can a Court Delay a Defendant's Release?

Courts may delay a defendant's release in highly limited sets of circumstances. If the defendant is intoxicated and a risk to themselves or others, the court may delay release or transfer the defendant to a treatment center.[35] A court may also delay release if the court believes that the defendant "should be interviewed by a mental health professional for possible commitment to a mental treatment facility pursuant to RCW 71.05."[36] Unless a court finds "other grounds" for continued detention or the defendant has been charged with a capital offense, the court must release the defendant within 24 hours of the preliminary appearance.[37]

---

[32] CrR 1.1; CrRLJ 1.1. *See Butler*, 137 Wn. App. at 530 (quoting *United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2006) ("The right to keep someone in jail does not in any way imply the right to release that person subject to unconstitutional conditions…. Once a state decides to release a criminal defendant pending trial, the state may impose only such conditions as are constitutional.")).

[33] *See, e.g., Blomstrom*, 189 Wn.2d at 402, 404 (holding pretrial release condition of weekly UA testing violated Article I, Section 7 of Washington Constitution because such testing "constitutes an acute privacy invasion by the State" and defendants "suffered no diminution in their privacy interests sufficient to justify" that invasion); *Rose*, 146 Wn. App. at 458 ("We hold that, without a showing that drug use leads to a higher likelihood of absconding or an individual determination by the trial court that [defendant's] drug use would increase the likelihood of him failing to appear, the special needs warrant exception does not apply here.").

[34] *Butler*, 137 Wn. App. at 529 (holding requiring DUI defendant to undergo alcohol evaluation, treatment, and attend three AA meetings per week as release condition was undue restrain on defendant's liberty imposed without sufficient due process)).

[35] CrR 3.2(f)(1); CrRLJ 3.2(f)(1).

[36] CrR 3.2(f)(2); CrRLJ 3.2(f)(2).

[37] CrR 3.2(f)(3); CrR 3.2(g); CrRLJ 3.2(f)(3); CrRLJ 3.2(g). There is essentially no case law addressing 3.2(f)(3).

Capital Cases

In late 2018, the Supreme Court of Washington ruled the death penalty unconstitutional because the penalty was "imposed in an arbitrary and racially biased manner."[38] Statutes authorizing the death penalty remain part of the RCW, even though they are no longer enforceable.[39] Thus, a defendant who has been charged with a capital offense will not be released unless the court finds that no "risk of flight, interference[,] or danger is believed to exist;" if such a risk does exist, the defendant may be detained without the opportunity to post bail.[40]

Practice Tips[41]

Things Every Defender Should Consider

- Get reliable contact information for every client, especially if your client is homeless.
- Establish citizenship status early—some clients may not know that they are non-citizens; finding out last-minute *will* complicate matters.
- Is your client on probation? New criminal charges are usually a probation violation.
- All judges are subject to implicit bias. Furthermore, no judge wants to release a client who seems likely to immediately commit an additional crime. How your client presents him/her/themself *will* affect their conditions of release.
- Telling your client's story:
    - A client who turned herself in is a better candidate for pretrial release than a client who police arrested with open warrants and a record of failing to appear in court.
    - For some offenses, the time spent in jail awaiting trial if a client cannot afford bail may be greater than the amount of time that they would serve if found guilty—consider asking the judge to weigh whether the risk of non-appearance is great enough to justify this.
    - If possible, have your client check with you before saying anything—remind your client of the purpose of the Fifth Amendment.
        - While it may be useful to have your client tell their story in a way that provokes empathy, such a tactic could also backfire.
        - If you do have your client speak, emphasize community ties such as church or volunteering—even work on a local garbage clean-up helps!
        - Military history, especially recent service with an honorable discharge, gives you the chance to cast your client as someone who follows orders.
- **What options does your court system allow that are less restrictive than jail**?
    - Discuss with your client whether they would prefer significant liberty restrictions to jail time.
    - Does your court allow regular appearances or call-ins to verify that your client remains in the area?
    - Other possible liberty restrictions include house arrest, SCRAM (electrodes on skin that monitor alcohol), EHM with breath (handheld device will beep at

[38] *State v. Gregory*, 192 Wn.2d 1, 35–36, 427 P.3d 621, 642 (2018)

[39] *See* RCW 10.95.080.

[40] CrR 3.2(g); CrRLJ 3.2(g).

[41] With thanks to Elizabeth Parisky, Staff Attorney at the Defender Association Division, King County Department of Public Defense, and Chad Law, Staff Attorney at the Northwest Defenders Division, King County Department of Public Defense.

random intervals throughout day to require breath analysis), and an ignition interlock device on the client's vehicle (breathalyzer to drive)—or, in the alternate, an affidavit of non-driving.
    - You may want to argue redundancy if the court imposes more than one of the above conditions.
    - Some courts will impose random urinalysis testing, but this is constitutionally questionable in light of *Blomstrom*.[42] Post-*Blomstrom*, the legislature passed statutes allowing random UAs when the defendant has a prior conviction for DUI or a related crime and the current charge involves alcohol.[43] The constitutionality of those statutes has not yet been litigated.
- Managing client expectations
    - Break down your client's options and explain them in terms that your client understands. Most clients will not want to serve time that they do not have to, and your client is the *final* decision-maker.
    - If a client has cases across multiple courts, and is held on all cause numbers, it *may* be possible to get credit for time served for multiple sentences, *but your client may also spend unnecessary time in jail* depending on the judges' sentencing decisions.

Things to Consider When Preparing for Arraignment

- **ALL CLIENTS**
    - Remind the court: bail is a last resort, and there is a presumption of *release*.
    - Remember that you are making a record for use on appeal.
        - If you receive an unfavorable ruling, do not give up, especially if you believe that your client has a strong case for release! Make an oral motion for reconsideration and ask for clarification to build the record for appeal.
            - Point out the relevant case law and portion of CrR/CrRLJ 3.2.
        - The standard of review for pretrial conditions is abuse of discretion, so judges have fairly wide latitude in imposing conditions of pretrial release.
    - Judge *cannot* base their decisions on speculative, generalized fears—they must have specific fears, specifically addressed by the conditions they apply.[44]
    - In *very* limited circumstances, having your client plead guilty to one charge may preclude additional charges.
- *Risk of Failure to Appear* – The court is likely to have concerns if your client has open warrants or a record of failing to appear.
    - Build your story for why your client is not at risk of nonappearance.
        - Establish living situation and job status—was the notice sent to an old address? Will being held interfere with job interviews/stability?
        - Establish family ties—do they have young children to care for?
        - How long have they lived in the area?
        - Do they have pre-existing supervision, oversight, or other commitments?

[42] *Blomstrom v. Tripp*, 189 Wn.2d 379, 405–06 (2017).
[43] RCW 10.21.015; RCW 10.21.030; RCW 10.21.045; RCW 10.21.050; RCW 10.21.055.
[44] *State v. Rose*, 146 Wn. App. 439 (2008).

        - This can cut both ways, but if your client is receiving treatment or does parole/probation check-ins, this can show accountability
        - You may want to argue that imposing additional obligations will set your client up to fail.
    - *Caution:* if your client is receiving help with bail from friends or family, the judge may believe that the client will not "miss" the money as much as if it came out of their own wallet and still consider the client a flight risk.
- *Risk of Violent Crime* – Obviously, the court will have concerns if your client is currently charged with a violent offense.
    - Understanding the context of the alleged offense is crucial.
        - For assaults on strangers, the court will worry about your client recidivating with another attack on a stranger.
        - For highly personal violent crimes such as domestic violence, the court will worry about your client violating no-contact orders.
    - While DUI is not a violent crime,[45] the judge may still be concerned about vehicular assaults when a client is charged with DUI.
- *Threat to the Administration of Justice* – Due to the limited nature of the other two categories, judges may use this as a catch-all encompassing a wide range of behavior
    - This is usually a factor for defendants who have a record of violating court orders, such as no-contact orders in domestic violence cases.
    - Prosecutors may raise many things in your client's history to support their argument for conditions, such as obstruction of justice or false reporting charges.

Areas of Frequent Confusion

- Make sure that your client understands the strike system.
- Make sure that your client understands that non-compliance with conditions can result in new charges, and that certain violations will leave them exposed to felony charges.
- If a client has an open warrant, make sure that you know the date of the alleged offense and the date that charges were filed.
    - If the charges were filed well after the offense and the prosecutor mailed notice to the client, who never received it, that is a much more sympathetic story than a client who was charged at the time of offense and failed to appear.
- **DUI Clients**
    - Ignition interlock devices (IIDs) require a SR-22 license and insurance, and renting the device can cost upwards of $100 per month.
        - If your client has to get an IID, the court may set an additional status check hearing to ensure they are completing the process—make sure your client does not wait until the last second to begin!
        - After the first DUI offense, an IID will be mandatory.[46]
        - Driving without the IID **will** result in new charges.
- **No Contact Orders:** Many clients ***do not*** understand the implications of no-contact orders (NCOs), especially in domestic violence cases, and do not take them seriously.

[45] *Blomstrom v. Tripp*, 189 Wn.2d 379

[46] RCW 10.21.055

- Almost all domestic violence cases result in NCOs. Even if the complaining witness testifies in favor of your client, the court is likely to issue an NCO.
    - Even if the relationship with the victim improves, local police are likely to be on the look-out for your client. If an officer witnesses your client violating the NCO, the complaining witness's testimony will not be necessary to prosecute your client for a new charge of violating an NCO (VNCO).
- NCOs usually prohibit electronic *and* third-party communications with the alleged victim. Asking a mutual friend to deliver a message **is** a violation.
- Even if the victim asks your client to return home, the victim will retain the ability to report a violation of the NCO if the relationship sours again.
    - Make a list of things that your client *needs* to talk to the victim about—children, money, etc.—and give the judge the name of a potential third party who can be present to mediate interactions between your client and the victim.
- After the second VNCO conviction, additional VNCOs can be charged as felonies.
- If the first violation of a domestic violence NCO involves an assault, the *first* VNCO can be charged as a felony.
- *Emphasize:* A violation of an NCO **will** result in new charges.