

**THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION [REDACTED]**

State of Washington, Respondent,	)	No. [REDACTED]
	)	
	)	EMERGENCY
	)	MOTION OBJECTING
v.	)	TO TRIAL COURT'S
	)	DENIAL OF BAIL
[REDACTED],	)	PENDING APPEAL
Appellant.	)	(RAP 8.2(b) AND 17.4(b))

I. IDENTITY OF MOVING PARTY AND RELIEF SOUGHT

[REDACTED], the appellant, objects to the trial court's denial of bail pending appeal, and moves this Court to release him on personal recognizance or, in the alternative, to set bail in the amount of \$5,000 pursuant to RAP 8.2(b). [REDACTED] also requests expedited consideration of this emergency motion pursuant to RAP 17.4(b).

II. GROUND FOR RELIEF SOUGHT

[REDACTED] was convicted of violating a no-contact order after pleading guilty. Appendix at 3–12, 19–20. He is currently serving a 22-month sentence at the [REDACTED] [REDACTED] in [REDACTED] [REDACTED], Washington. Appendix at 21. He believes he has an early release date scheduled for [REDACTED], 2020. Wolfe Dec. [REDACTED]

suffers from [REDACTED] [REDACTED] and takes medication that suppresses his immune system. Appendix at 32–33 (Declaration of Dr. [REDACTED]). Accordingly, he is at heightened risk of serious illness or death should he contract COVID-19. *See id.*

a. [REDACTED]'s arrest and conviction.

[REDACTED] was arrested for violating a no-contact order for standing outside the door of his ex-girlfriend's residence. Appendix at 1–2. [REDACTED] and his ex-girlfriend share a young daughter. *Id.*

[REDACTED]'s ex-girlfriend informed police she maintained regular contact with [REDACTED] despite the no-contact order, and allowed him to visit their daughter. *Id.* She did not allege he had threatened her or been violent in any way, only that she had not invited him over to her residence that day. *Id.*

[REDACTED] pled guilty on [REDACTED], 2019. Appendix at 3–12. His guilty plea did not include a general waiver of the right to appeal. Instead, [REDACTED] waived only the right to appeal a finding of guilt after trial. Appendix at 4. He later moved to withdraw his plea, which the trial court denied. Appendix at 17, 44. He was sentenced to 22 months confinement on [REDACTED], 2020. Appendix at 19–27.

██████████ filed a timely notice of appeal on ██████████, 2020. Appendix at 17–18. Representing himself *pro se*, he also requested bail pending appeal be set in the amount of \$5,000. Appendix at 15–16, 41. In his motion, he stated he had never failed to appear or jumped bail. Appendix at 15. He also stated he had a daughter and strong ties to the ██████████ community. Appendix at 16. He noted his health was declining and he had concerns about contracting coronavirus. Appendix at 15–16, 40.

The prosecutor objected to the request for bail, incorrectly arguing ██████████ did not have an appeal as of right because he had pled guilty and waived those rights. Appendix at 42. The court denied the request for bail, stating it was not “appropriate” because ██████████ had entered a plea of guilty and in his plea colloquy waived his right to appeal. Appendix at 47. Conversely, the court also acknowledged ██████████ had a right to appeal the denial of his motion to withdraw his plea. *Id.*

After the hearing, ██████████ filed a declaration from the ██████████ Jail physician, Dr. ██████████. Appendix at 32–33. Dr. ██████████ indicated ██████████ was “very vulnerable to COVID-19, because of his [██████████]-related compromised immune

system, and should be a prime candidate for compassionate release.”

Appendix at 32. Dr. [REDACTED] also stated [REDACTED] was prescribed the medication [REDACTED] to treat his [REDACTED] [REDACTED], and that this medication suppressed his immune response. Appendix at 33. Dr. [REDACTED] summarized, “incarceration in any correctional facility is inherently a risk factor for contracting infection.” *Id.*

[REDACTED] was subsequently transferred to [REDACTED] [REDACTED], where he is incarcerated at the time of the filing of this motion.

b. Facts related to the COVID-19 pandemic.

Washington State is experiencing a public health emergency due to the COVID-19 pandemic. *See* State of Washington, Office of the Governor, Proclamation by the Governor Amending Proclamation 20-05, “Stay Home – Stay Healthy” (Mar. 23, 2020). COVID-19 is a disease caused by a virus that spreads from person to person and can result in serious illness or death. *Id.* As of the date of this motion, there are

currently 11,790 reported infections of COVID-19 in Washington as well as 634 deaths.<sup>1</sup>

People with compromised immune systems, including those who take immunosuppressant medications, are at particular risk if they contract the virus.<sup>2</sup> [REDACTED] has [REDACTED] [REDACTED] and is prescribed the immunosuppressant drug [REDACTED]. Appendix at 33. According to the [REDACTED], this drug can increase the risk of infection from COVID-19.<sup>3</sup>

According to the World Health Organization, because incarcerated people typically live in close proximity to one another, they are at heightened risk of transmitting COVID-19.<sup>4</sup> Recognizing the constraints

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<sup>1</sup> Washington State Department of Health, “COVID-19 in Washington State,” *available at* <https://www.doh.wa.gov/emergencies/coronavirus>.

<sup>2</sup> Center for Disease Control, “People Who Are at Higher Risk for Severe Illness,” *available at* [cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html](http://cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html).

<sup>3</sup> [REDACTED]

<sup>4</sup> World Health Organization, “Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance (Mar. 15. 2020), *available at* [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf](http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf).

the Washington Department of Corrections faces with “the ability to achieve safe distancing” to slow the spread of the virus, Governor Inslee recently ordered the Department to release inmates through Rapid Reentry, furlough, commutation, or emergency medical release. State of Washington, Office of the Governor, Proclamation by the Governor 20-50, “Reducing Prison Population” (Apr. 15, 2020). The Governor indicated that inmates with release dates in the coming weeks and months would be prioritized.<sup>5</sup>

Shortly after, the Department of Corrections began publishing lists of inmates for release in response to the Governor’s proclamation.<sup>6</sup> As of the filing of this motion, [REDACTED]’s name does not appear on the lists of inmates slated for release. He believes he has an early release date schedule for [REDACTED], 2020. Wolfe Dec.

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<sup>5</sup> KOMO, “Inslee signs order for early release of some inmates to limit COVID-19 spread” (Apr. 15, 2020), *available at* <https://komonews.com/news/coronavirus/inslee-signs-order-for-early-release-of-nonviolent-inmates-to-limit-covid-19-spread>.

<sup>6</sup> Washington Department of Corrections, “Incarcerated Population Reduction Efforts,” *available at* <https://www.doc.wa.gov/news/covid-19.htm>.

Also at the time of filing, there were 16 reported staff infections 12 reported inmate infections in the Washington Department of Corrections.<sup>7</sup>

Two of the staff infections reported are at the [REDACTED] [REDACTED],<sup>8</sup> where [REDACTED] is currently incarcerated. [REDACTED] currently has close contact with other inmates and unable to practice social distancing. *See Wolfe Dec.*

c. [REDACTED]'s release plan.

Should [REDACTED] be permitted to post bail pending appeal, his plan is to reside at [REDACTED]. *See Wolfe Dec.* The manager of this property is currently holding an apartment empty for him. *See id.*

d. Notice given to the State.

On Friday, April 17, 2020, undersigned counsel contacted the [REDACTED] [REDACTED] Prosecuting Attorney's Office via email and informed [REDACTED], an attorney in the appellate division, of the intent to file this motion by Monday, April 20, 2020. *See Wolfe Dec.* On April 18, [REDACTED] indicated the State would not be joining the

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<sup>7</sup> Washington Department of Corrections, "Confirmed Cases," *available at* <https://www.doc.wa.gov/news/covid-19.htm>.

motion. *Id.* On April 19, 2020, undersigned counsel informed [REDACTED] via email of the intent to file this motion on an emergency basis pursuant to RAP 17.4(b). *Id.* Other attorneys and staff in the [REDACTED] [REDACTED] Prosecuting Attorney’s Office were included on this email, including [REDACTED], [REDACTED], and [REDACTED]. *Id.*

### III. ARGUMENT

#### 1. **This objection should be decided on an expedited basis in light of the significant risks to [REDACTED]’s health.**

A party may seek “expedited consideration” on a motion in an emergency. RAP 17.4(b). In seeking an expedited consideration of a motion on an emergency basis, the moving party must show “(1) that adequate relief cannot be given if the motion is considered in the normal course, and (2) the movant has taken reasonable steps under the circumstances to give notice to persons who would be affected by the ruling sought.” RAP 17.4.

Here, adequate relief cannot be given if the motion is considered in the normal course. COVID-19 is highly contagious and fast-acting. One recent Center for Disease Control study indicated the average time from

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<sup>8</sup> See note 7, *supra*.



symptom onset to death is 16.1 days.<sup>9</sup> Further, is impossible to practice social distancing in prisons, increasing the risk of spread of COVID-19 in incarcerated populations. *See* State of Washington, Office of the Governor, Proclamation by the Governor 20-50, “Reducing Prison Population” (Apr. 15, 2020). [REDACTED] is at particular risk given his underlying health conditions and the immunosuppressant medication he is prescribed. Appendix at 32–33. There are already reported staff infections at the facility where he is incarcerated.<sup>10</sup>

If this motion is decided in the normal course, [REDACTED] may become infected before the motion is decided. If he is infected, [REDACTED] is at risk of serious illness and death. Additionally, undersigned counsel has taken reasonable steps to notify the [REDACTED] [REDACTED] Prosecuting Attorney’s Office of the intent to file this motion and seek emergency review. *See* Wolfe Dec. Accordingly, expedited consideration of this motion is appropriate. RAP 17.4(b).

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<sup>9</sup> Steven Sanche, et. al., “High Contagiousness and Rapid Spread of Severe Acute Respiratory Syndrome Coronavirus 2” (slated for publication July 2020), *available at* [https://wwwnc.cdc.gov/eid/article/26/7/20-0282\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-0282_article).

<sup>10</sup> *See* note 7, *supra*.

**2. The trial court abused its discretion in denying the motion for bail pending appeal.**

Under RAP 8.2(b), “[a] party may object to a trial court decision relating to release of a defendant or a juvenile, or relating to a stay of execution of sentence, during a review of a criminal case or a juvenile offense proceeding by motion in the appellate court.” The denial of a motion for bail pending appeal is reviewed for abuse of discretion. *State v. Cole*, 90 Wn. App. 445, 446, 949 P.2d 841 (1998). A court abuses its discretion when it applies the wrong legal standard or adopts a view that no reasonable person would take. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

In all criminal actions where an appeal has been filed, the trial court “must” enter an order of bail pending appeal. RCW 10.73.040. A court may deny bail only if the court finds by a preponderance of the evidence that (1) the defendant poses a flight risk or a danger to the community; (2) the delay will diminish the sentence’s deterrent effect; (3) the delay will unreasonably traumatize a victim; or (4) the defendant has not adequately undertaken to pay legal financial obligations. RCW 9.95.062(1).

Here, ██████ requested \$5,000 in bail on the basis his health was declining and he had concerns about coronavirus. Appendix at 15–16, 40. However, the trial court denied the request, indicating it did not believe bail was “appropriate” in light of the court’s mistaken view that ██████ had waived his right to appeal in his guilty plea. Appendix at 47. In fact, ██████ had only waived the “right to appeal a determination of guilt after trial.” Appendix at 4. Further, ██████’s notice of appeal included the denial of his motion to withdraw his plea. Appendix at 17.

In denying the motion for bail, the court vastly misconstrued the scope of the limited appeal waiver ██████ entered. Both the State and the court misunderstood ██████’s right to appeal under RAP 2.2. Appendix at 42, 47; *see also State v. Krois*, 74 Wn.2d 404, 406 445 P.2d 24 (1968) (“An appeal from a judgment and sentence entered after a plea of guilty brings before the [the appellate court] for review an order denying a motion, made prior to entry of the judgment and sentence, to withdraw the plea of guilty.”) However, as defense counsel noted, the merits of ██████’s appeal were not the purview of the trial court. Appendix at 44. Further, the court did not consider the correct legal

factors in determining whether to grant bail. RCW 9.95.062(1).

Accordingly, the court's decision denying the request for bail pending appeal applied the wrong legal standard and was thus an abuse of discretion. *Mayer*, 156 Wn.2d at 684.

**3. ██████ should be released on bail pending appeal.**

█████ meets the criteria for release pursuant to RCW 9.95.062(1). He has access to stable housing and seeks to maintain a relationship with his young daughter, and thus does not post a flight risk. Appendix at 16; Wolfe Dec. Further, due to his ill health and the current Stay at Home Proclamation, he will need to quarantine at home and thus will not pose a danger to the community. Appendix at 15–16, 32–33. Additionally, there was no accusation that ██████'s alleged violation of the no contact order was violent in this case. Appendix at 1–2.

█████ only recently began serving his sentence, and thus a delay will not diminish its deterrent effect. Appendix at 30. Further, because the protected party has repeatedly invited contact with ██████, his presence in the community is unlikely to traumatize her. *See* Appendix at 1–2. Finally, the Court only imposed mandatory legal financial obligations, which ██████ is constrained in his ability to pay

due to the current nature of his incarceration. Appendix 23–24. The prerequisites for denying bail pursuant to RCW 9.95.062(1) are therefore not met, making the setting of bail appropriate in this case.

As the Massachusetts Supreme Court recently recognized, in considering a stay of sentence pending appeal, a court must balance any risks posed by releasing the defendant with “the risk that the defendant might die or become seriously ill if kept in custody.” *Christie v. Commonwealth*, SJC-12927, 2020 WL 1545877 at \*1 (Mass. Apr. 1, 2020). Given the unprecedented public health crisis posed by COVID-19, the particular risks ██████████ faces due to his underlying health condition, and his inability to protect himself from infection while incarcerated, this Court should order ██████████ immediately released upon his own recognizance or upon posting bail of \$5000.

IV. CONCLUSION

██████ moves this Court to release ██████ on personal recognizance, or, in the alternative, to set bail pending appeal in the amount of \$5000.

Respectfully submitted this 20th day of April, 2020.

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