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IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

[REDACTED],

Defendant.

CAUSE NO: [REDACTED]
MOTION FOR RELEASE PENDING
APPEAL OR TO SET APPEAL BOND

MOTION

COMES NOW [REDACTED] the defendant, by and through his attorney,
Neil M. Fox, and asks this Court to release him pending appeal or to set an appeal
bond.

Dated this 15th day of April 2020.

Respectfully submitted,

s/ Neil M. Fox

WSBA No. 15277
Attorney for Defendant

1 prison due to the pandemic. *Colvin v. Inslee*, Sup. Ct. No. 98317-8. The case is on an
2 expedited schedule, with oral argument set for April 23, 2020.¹

3 7. Last week, the petitioners in *Colvin* filed an emergency motion for
4 accelerated review, asking, *inter alia*, for the appointment of a special master. On
5 Friday, April 10, 2020, the Supreme Court unanimously granted portions of the
6 motion. App. A. Justices McCloud, González, and Montoya-Lewis concurred. They
7 would have considered the mandamus petition to be a Personal Restraint Petition and
8 then would have ordered the release of some of the petitioners under RAP 16.15(b).
9 App. A.

10 8. Because Mr. [REDACTED] fears that he will be infected and be sickened due to
11 virus inside DOC, he is asking for release pending appeal.

12 I certify or declare under penalty of perjury under the laws of the State of
13 Washington that the foregoing is true and correct.

14 Dated this 15th day of April 2020, at Seattle, WA.

15 s/ Neil M. Fox
16 WSBA No. 15277
17 Attorney for Defendant

18 MEMORANDUM OF LAW

19 Mr. [REDACTED] has appealed his convictions. The Court should stay the sentence
20 pending appeal, pursuant to Article I, section 22 of the Washington Constitution, RAP
21 7.2(f) and RCW 9.95.062, and to set an appeal bond if required. The stay is necessary
22 to protect Mr. [REDACTED] from immediate harm in the Department of Corrections due to the
23 failure of DOC to protect prisoners from the COVID-19 pandemic.

24 In *Colvin v. Inslee*, *supra*, Justice McCloud concluded that the Supreme Court
25 had the power to consider the mandamus action to be a Personal Restraint Petition and
26 would have considered releasing individual petitioners under RAP 16.15(b):

27 The petitioners' allegations, if proven, would clearly support relief. Of
28 course, the petitioners must prove those allegations. This takes time, and

¹ The briefing for this case can be found at
https://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByCase&courtId=A08.

1 unfortunately, we don't have much of that. But we have prepared for
2 situations in which time is of the essence. Under RAP 16.15(b), we "may
3 release a petitioner on bail or personal recognizance before deciding the
4 petition, if release prevents further unlawful confinement and it is unjust
to delay the petitioner's release until the petition is determined."
[footnote omitted] I can think of no situation more appropriate for our
exercise of that rule, particularly for those petitioners at the greatest risk.

5 *Colvin v. Inslee*, No.98317-8 (4/10/20) (McCloud, J., concurring) at 9-10. RAP
6 16.15(b) governs release of prisoners who have pending Personal Restraint Petitions.
7 If Justice McCloud would have considered release of such people, then there is even a
8 stronger argument for release pending direct appeal where the convictions are not yet
9 even final.

10 To be sure, RCW 9.95.062 appears to preclude the setting of an appeal bond for
11 someone convicted of child molestation:

12 (2) An appeal by a defendant convicted of one of the following
13 offenses shall not stay execution of the judgment of conviction: Rape in
14 the first or second degree (RCW 9A.44.040 and 9A.44.050); rape of a
15 child in the first, second, or third degree (RCW 9A.44.073, 9A.44.076,
16 and 9A.44.079); child molestation in the first, second, or third degree
17 (RCW 9A.44.083, 9A.44.086, and 9A.44.089); sexual misconduct with a
18 minor in the first or second degree (RCW 9A.44.093 and 9A.44.096);
19 indecent liberties (RCW 9A.44.100); incest (RCW 9A.64.020); luring
(RCW 9A.40.090); human trafficking in the first or second degree (RCW
9A.40.100); promoting commercial sexual abuse of a minor (RCW
9.68A.101); any class A or B felony that is a sexually motivated offense
as defined in RCW 9.94A.030; a felony violation of RCW 9.68A.090; or
any offense that is, under chapter 9A.28 RCW, a criminal attempt,
solicitation, or conspiracy to commit one of those offenses.

20 However, contrary to what the defense expects to be the State's arguments, this
21 statute does not bar the Court from setting an appeal bond. The language of RCW
22 9.95.062(2) has to be viewed in context to the history of the statute – since early
23 statehood, until the late 80s, the statute provided that the mere filing of an appeal
24 automatically stayed the execution of the sentence:

25 An appeal by a defendant in a criminal action shall stay the
execution of the judgment of conviction.

26 Former RCW 9.95.062; Laws of 1891, ch. 146, § 40, p. 350; Laws of 1893, ch. 61, §
27 30, p. 133; Rem. Rev. Stat. § 1745; Laws of 1955, ch. 42, § 2, p. 332.

28 The statute has been changed to no longer provide for an automatic stay upon
the mere filing of the appeal. However, the statutory changes are notable because they

1 do not purport to remove from the trial court the power to set an appeal bond and to
2 attach various conditions of release to that appeal bond. The statute merely makes it
3 clear, as opposed to former law, that a stay of sentence is no longer automatic. If the
4 Legislature intended to divest trial courts from setting appeal bonds in sex cases, it
5 would have clearly prohibited the practice and RCW 9.95.062(2) would read that for
6 the listed categories of offenses “the court shall not set an appeal bond and that the
7 offender shall serve the sentence while the appeal is pending.” This language is not in
8 the statute and thus this Court should not read such language into it.

9 Moreover, another statute makes it clear that an appeal bond can be obtained in
10 all criminal actions except capital cases:

11 In all criminal actions, except capital cases in which the proof of
12 guilt is clear or the presumption great, upon an appeal being taken from a
13 judgment of conviction, the court in which the judgment was rendered,
14 or a judge thereof, must, by an order entered in the journal or filed with
15 the clerk, fix and determine the amount of bail to be required of the
16 appellant . . .

17 RCW 10.73.040. Accordingly, there is no legal impediment to the setting of an appeal
18 bond.

19 Further, to the extent that RCW 9.95.062 precludes an appeal bond in a child
20 molestation case, such an interpretation would violate the constitutional right to an
21 appeal. While there is no right to an appeal bond under article I, section 20, of the
22 Washington Constitution, *State v. Smith*, 84 Wn.2d 498, 527 P.2d 674 (1974); *In re*
23 *Berry*, 198 Wash. 317, 88 P.2d 427 (1939), there is a constitutional right to an appeal
24 in Washington under article I, section 22. From the time of statehood, the Washington
25 Supreme Court has recognized that the right to appeal includes within it the right to a
26 reasonable bail while the appeal is pending. In *Packenhams v. Reed*, 37 Wash. 258,
27 260, 79 Pac. 786 (1905), the Supreme Court held that a child committed to reform
28 school had “a right of appeal from the judgment and order of commitment, and
incidentally a right to be admitted to bail pending the appeal.” Similarly, in *State ex*
rel. Syverson v. Foster, 84 Wash. 58, 146 Pac. 169 (1915), the Supreme Court held that
a person imprisoned to satisfy a judgment had the right to obtain bail, pending the

1 appeal of the trial court's order, even though the person was not protected under art. 1,
2 § 20:

3 While the Constitution (article 1, § 20) refers in terms to parties charged
4 with crime, we think, nevertheless, that there is an inherent power in the
5 courts, sustained by reference to the doctrines of the common law and the
6 guaranties of the Bill of Rights (article 1 of our Constitution) to grant
7 bail in all proceedings pending a final hearing and determination of the
8 merit of the controversy. The Constitution (article 1, § 22) guarantees
9 the right of appeal. That guaranty includes every incident and every
10 privilege attending the right. While there seems to be no cases in point,
11 having established the principle, it is not difficult to follow it into the
12 adjudged cases.

13 84 Wash. at 62.

14 Accordingly, the Court has the power to release Mr. [REDACTED] pending appeal in
15 this case, a result that is particularly appropriate given the COVID-19 pandemic that
16 makes prisons incredibly dangerous. Given Mr. [REDACTED]'s lack of criminal history, his
17 local ties and work history, he is a good candidate for release. He has family in the
18 area and will not have any difficulties finding a place to live. The Court should release
19 Mr. [REDACTED] on personal recognizance or set an appeal bond.

20 Dated this 15th day of April 2020.

21 Respectfully submitted,

22 s/ Neil M. Fox
23 _____
24 WSBA No. 15277
25 Attorney for Defendant
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