

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 04, 2016 1:26 PM
To: Tracy, Mary
Subject: FW: Comment to CrRLJ 3.2
Attachments: 3.2 comment draft--2-.docx; WSMJC GF Final CrR by Fleck 5-11 - revised without factors.doc

For you ☺

Kris

Supreme Court Clerk's Office

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From: Deborah Fleck [mailto:dfleck.jams@hotmail.com]
Sent: Monday, April 04, 2016 1:25 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment to CrRLJ 3.2

Dear Supreme Court Justices,

I have attached my comment to CrRLJ 3.2, together with a draft Order of Release I refer to in the comment.

Sincerely,

Judge Deborah D. Fleck, retired

Issue: The DMCJA proposes to amend CrRLJ 3.2 to make it parallel to the change made to CrR 3.2 following the Barton case. The elimination of CrR 3.2(b)(4) proposed by the SCJA was not necessary.¹ Only a minor change is required to meet the holding of Barton and both CrR 3.2 and CrRLJ 3.2 should be modified to do so.

Background: The Washington State Minority and Justice Commission developed the form of CrR 3.2 that became effective in September of 2002. We did so because bail was often improperly imposed and because the rule significantly and negatively impacted economically disadvantaged people, who were often people of color.

We inserted the presumption of release, divided the rule into sections to distinguish the likelihood of failure to appear, from the likelihood of committing a violent offense, as well as from the likelihood of intimidating witnesses or otherwise interfering with the administration of justice.² We included sections for separate factors and separate conditions, depending on which of the three bases was utilized. We also included a non-exclusive list of factors a court can consider that should help economically disadvantaged people show ties to the community, and we made the rule clear that bail is the last consideration and if set, must be set in light of available information on the accused's financial ability. *Significantly for purposes of this comment, the rule also retained the provision in former CrR 3.2(b)(4) and in current CrRLJ 3.2(b)(4) that allowed the court to impose a bond and require that the accused place up to 10% of the bond amount in cash or other securities in the court registry, instead of using a bonding company.*

This new structure was intended to make it crystal clear that the least restrictive conditions of release must be imposed. Only one of those possible conditions, which should be the last resort, is bail.

Alternate Proposed Change: The provision recently deleted from CrR 3.2 and proposed to be deleted from CrRLJ 3.2 has been part of the rule for decades.³ It should remain part of the rule, with only slight modification to comply with Barton. It is a viable option for all people, including poor people, especially when judges and attorneys are well-educated on its fairness and

¹ Barton: ". . . we conclude the better view is that a defendant must be allowed the option of a surety arrangement in addition to the option of depositing cash or property in the registry of the court."

² It is important to note that a court cannot impose conditions of release including bail if the accused only has a history of property and/or drug offenses, unless one of these three bases is also found by the court.

³ Paragraph 32 from Barton: The history of CrR 3.2 supports our determination that subsection (b)(4) does not itself contemplate a surety arrangement. Adoption of the rule followed a national trend to limit the role of commercial bail bondsmen, who frequently charged a 10 percent "premium" on bail, which the defendant forfeited regardless of whether he appeared. Schilb v. Kuebel, 404 U.S. 357, 359-60, 92 S.Ct. 479, 30 L.Ed.2d 502 (1971) (interpreting similarly worded Illinois statute). The drafters of CrR 3.2 explained that the Bail Reform Act of 1966, 18 U.S.C. secs. 3146-3152, was "the major source of the wording" of the rule. Criminal Rules Task Force to Wash. Judicial Council, Washington Proposed Rules of Criminal Procedure E 22 (1971). "The purpose of the rule," explained the drafters, is to make money bail the trial court's last resort in setting conditions for ensuring the accused's appearance at trial." Id

economic benefits. The significant feature, especially for poor people, is that the accused recovers the amount posted after meeting his or her obligation to make court appearances, rather than forfeiting that money to a bonding company.

Eliminating this section (4), or using entirely new language, creates confusion in the interpretation of the rule and likely eliminates the important rule-making history spelled out in Barton and appearing in footnote 3 of this comment.

The benefit of the former CrR 3.2(b)(4) in my view has to do with the judges. For example, if the "traditional" bail amount for "x" crime is around \$25,000, I think it will be difficult for many or most judges to simply set a \$2,500 unsecured or cash appearance bond under CrR 3.2(b)(3) which is the only alternative to using a bonding company remaining under the current CrR 3.2.

This is true even though a judge who sets traditional bail at \$25,000, for example, knows that the person may be able to post \$2,500 or less, with some security (in most but not all cases), and be released. Using a commercial bonding company of course leads to the accused losing the 10%, whereas the deleted CrR 3.2(b)(4) had the benefit for people, including poor people, to get that money back.

There is a sense among lawyers, judges and the public about what sounds like an appropriate amount of bail for certain charges. Setting bail at \$25,000 and letting a person post \$2,500 through a bonding company or into the registry of the court still has the benefit of setting the bail at \$25,000. Simply setting a \$2,500 appearance bond is not the equivalent.

The following language will solve the issue raised in Barton:

(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 condition is imposed, the court must also authorize a surety bond under (b)(5);

I have also reviewed and agree with proposed language (highlighted) suggested by the Council on Public Defense:

(4) Require, If requested or agreed by the accused, 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;

The current rule has been in place for well over a dozen years. Yet the expected changes in practice have not been realized. In order to avoid the routine default of simply imposing bail, I

propose a mandatory Release Order be implemented at the time any changes are made to CrR 3.2 and CrRLJ 3.2 in order to achieve the intended benefits of the rule, particularly for economically disadvantaged people. The attached order may need slight modification, depending on the language used to conform CrRLJ 3.2 and CrR 3.2 to the Barton decision.

CrR 3.2 and CrRLJ 3.2 are somewhat complex rules; although this draft mandatory release order is two pages long, it requires the attorneys and the judge to apply the rule correctly. Similar to the way judges and attorneys apply Washington's complex sentencing law by using a lengthy mandatory Judgment and Sentence form, judges and attorneys quickly will become accustomed to using such a mandatory Release Order and will determine the release of an accused correctly under the rule.

SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR KING COUNTY

STATE OF WASHINGTON Plaintiff, vs. _____ Defendant.)))))	NO. _____ Order re Release of Accused Not Charged with Capital Offense (CrR 3.2)
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1.1 The accused is hereby released without conditions. **Personal recognizance, without further conditions, will reasonably assure the accused's appearance, when required. CrR 3.2 requires release on personal recognizance, without further conditions, unless the court makes a determination under Paragraph 2.2, 3.1(a) and/or 3.1(b), below.**

2.1 In determining which conditions of release will reasonably assure the accused's appearance, the court shall, on the available information, consider the relevant facts, including but not limited to those listed in CrR 3.2 (c) (1)-(9).

2.2 **Personal recognizance, without further conditions, will not reasonably assure the accused's appearance, when required. Do not impose any of the following conditions unless paragraph 2.2 is checked.**
 The following condition, or combination of conditions, is the least restrictive that will reasonably assure that the accused will be present for later hearings and is imposed: [CrR 3.2(b)(1)-(7)]

The accused is placed in the custody of the following person/organization, who has agreed to supervise him/her: _____

The accused is restricted as follows as to travel, association and/or place of abode: _____

If the court determines that the accused must post a 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 his/her appearance. [CrR 3.2(b)]

- The accused shall execute an unsecured bond in the amount of \$ _____; **OR**
- The accused shall execute a bond in the full amount of \$ _____, of which the following (not to exceed 10% of the full amount) shall be deposited in the registry of the court:
 a) \$ _____ (cash) or b) _____ (other security)
 (The required deposit will be returned upon performance of the conditions of release, or forfeited upon further court order for violation of any condition of release.); **OR**
- A bond shall be executed in the amount of \$ _____, with sufficient solvent sureties, or cash deposited in the registry of the court in lieu of such surety bond.
- The accused shall return to custody between ____ am/pm to ____ am/pm; **OR**
- The accused shall be placed on electronic home monitoring, if available.
- The accused shall comply with the following condition(s) other than detention, which are reasonably necessary to assure his/her appearance. _____

- 3.1(a) **A likely danger has been shown that the accused will commit a violent crime if released.**
(For the purpose of CrR 3.2, "violent crimes" are not limited to crimes defined as violent offenses in RCW 9.94A.030.)
- 3.1(b) **A likely danger has been shown that the accused will seek to intimidate witnesses or otherwise unlawfully interfere with the administration of justice if released.**

3.2 Upon a determination of 3.1(a) and/or 3.1(b), above, the court may impose one or more of the conditions of release listed in paragraph 3.3, after considering on the available information the relevant facts, including but not limited to: those listed in CrR 3.2 (e)(1)-(8).

Do not impose any of the following conditions unless paragraph 3.1(a) and/or 3.1(b) are checked.

- 3.3 The court may impose one or more of the following conditions to reasonably assure the accused's noninterference with the administration of justice and to reduce danger to others or the community. The following condition, or combination of conditions, is imposed: [CrR 3.2 (d)(1)(10)]
- The accused shall not approach or communicate in any manner with the following persons or classes of persons: _____.
 - The accused shall not enter the following geographic areas or premises: _____.
 - The accused shall not possess any dangerous weapon or firearm.
 - The accused shall not engage in the following activities: _____.
 - The accused shall not possess or consume intoxicating liquors.
 - The accused shall not possess or consume controlled substances without a valid prescription.
 - The accused shall report regularly to and remain under the supervision of _____
_____ (an officer of the court or another person or agency).
 - The accused shall not commit any violation of criminal law.

Bond may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community. The court shall consider, on available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the safety of the community and prevent the accused from intimidating witnesses or otherwise unlawfully interfering with the administration of justice. [CrR 3.2(d)(6)] The following bond is conditioned on compliance with all conditions of release:

- The accused shall execute an unsecured bond in the amount of \$_____. **OR**
- The accused shall execute an unsecured bond in the amount of \$_____, of which the following portion of the full amount shall be deposited in the registry of the court.
a) \$_____ (cash) **OR** b) _____ (other security)
(The required deposit will be returned upon performance of the conditions of release, or forfeited upon further court order for violation of any condition of release.) **OR**
- The accused shall execute a secured bond in the amount of \$_____.
- The accused shall be placed in the custody of the following person/organization who has agreed to supervise him/her: _____.
- The accused's travel, association and/or place of abode are restricted as follows:
_____.
- The accused shall return to custody during the following hours: _____AM/PM to _____AM/PM.
- The accused shall comply with the following condition(s) other than detention to assure noninterference with the administration of justice and reduce danger to others or the community:
_____.

A warrant for the arrest of the accused may be issued upon a showing of probable cause that the accused has committed any violation of the conditions of release. [CrR 3.2 (i)]

4.1 The accused is hereby released, subject to the above restrictions or conditions, if any.

DATED: _____

JUDGE _____