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## Criminal Procedure - Wyoming Recognizes a Substantive Right to Bail Pending Appeal of Conviction - State v. District Court of the Second Judicial District

Drake D. Hill

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**CRIMINAL PROCEDURE—Wyoming Recognizes a Substantive Right to Bail Pending Appeal of Conviction. *State v. District Court of the Second Judicial District*, 715 P.2d 191 (Wyo. 1986).**

On April 18, 1985, a Lovell, Wyoming, jury convicted Dr. John H. Story of felony sexual assault.<sup>1</sup> At sentencing, the trial court denied Story's motion for bail pending appeal of his conviction.<sup>2</sup> Story was then committed to the Wyoming State Penitentiary to serve his sentence.<sup>3</sup>

Story petitioned for habeas corpus relief, contending that the Wyoming Statutes created a substantive right to bail pending appeal and denial of that substantive right constituted unlawful restraint.<sup>4</sup> The District Court of the Second Judicial District granted Story's petition and set bail pending Story's criminal appeal.<sup>5</sup>

The state appealed the grant of habeas corpus and release on bail. The Wyoming Supreme Court affirmed the judgment of the district court and recognized a substantive right to release after conviction under sections 7-11-507 and 7-11-511 of the Wyoming Statutes.<sup>6</sup> The court also recognized that, under these statutes, bail "shall" be afforded in all bailable cases<sup>7</sup> and that release pending appeal of conviction may be denied only in a narrow class of nonbailable cases.<sup>8</sup>

This casenote compares the unconditional postconviction bail right under the Wyoming statutes with the conditional bail right recognized by federal law. Examination of the conditional bail approach indicates that Wyoming should amend its current bail statutes to comport with the "dangerousness" and "likelihood-of-flight" standards for refusing bail after conviction.

## BACKGROUND

### *Wyoming*

With the exception of first and second degree murder, the Wyoming bail statutes create an unconditional right to bail pending appeal. Section 7-11-507 of the Wyoming Statutes provides that upon application

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1. Brief for Respondent at 1, *State v. District Court of Second Judicial Dist.*, 715 P.2d 191 (Wyo. 1986) (No. 85-171).

2. *Id.*

3. Brief for Petitioner at 5, *State v. District Court* (No. 85-171).

4. Brief for Respondent at 1.

5. The district court granted a writ of habeas corpus under WYO. R. CRIM. P. 8(h). That rule provides for the right to bail before conviction and upon review. Subsection (h) of the rule states that "[a]ny accused person aggrieved by the application of this rule may apply for a writ of habeas corpus."

6. *State v. District Court*, 715 P.2d at 196.

7. A "bailable" offense is any non-capital offense. The term "bailable" in the Wyoming Statutes incorporates article I, section 14 of the Wyoming Constitution, which provides: "all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted." WYO. CONST. art.I, § 14.

8. *State v. District Court*, 715 P.2d at 191.

of a convicted person, execution of the sentence against him shall be suspended "until the next term of the court."<sup>9</sup> Section 7-11-511 of the Wyoming Statutes grants the postconviction bail right. That section provides that the court "shall" fix reasonable bail whenever the defendant is convicted of a felony other than first or second degree murder.<sup>10</sup> Section 7-11-507 has remained unchanged since its adoption in 1876.<sup>11</sup> Section 7-11-511 has appeared unchanged since 1909.<sup>12</sup>

In 1968, the Wyoming Supreme Court adopted the Wyoming Rules of Criminal Procedure. Rule 8(a)(2) provides that pending appeal, a judge "may" admit a defendant to bail in all bailable cases.<sup>13</sup> Thus, the "may" language of Rule 8(a)(2) directly conflicts with the language of section 7-11-511 that bail "shall" be provided in all bailable cases.

The authority to promulgate rules of procedure is given to the Wyoming Supreme Court by section 5-2-114 of the Wyoming Statutes.<sup>14</sup> That section grants to the Supreme Court the authority to adopt rules of procedure for all "courts of this state," in addition to those powers already held by the court to adopt procedural rules for the Supreme Court itself.<sup>15</sup> Thus, in *Barnes v. State*,<sup>16</sup> the court found that a rule of procedure, to the extent that the rule does not contravene a statutory or constitutional right, "has the force and effect of law."<sup>17</sup>

The court's authority to promulgate rules of procedure is limited, however, by section 5-2-115(b) of the Wyoming Statutes.<sup>18</sup> That statute

9. WYO. STAT. ANN. § 7-11-507 provides:

Suspension of sentence on notice of appeal.

When a person shall be convicted of a felony, and shall give notice to the court of his intention to apply for a writ of error, or other process by which, according to law, cases are taken to the supreme court, the court shall, on application of the person convicted, suspend the execution of the sentence or judgment against him until the next term of the court.

10. *Id.* § 7-11-511 (1977) (emphasis added) provides:

Custody after conviction and before judgment; bail; escape.

[P]rovided, that whenever a person is convicted of a bailable felony, except murder in the second degree, and the judgment shall be suspended as aforesaid, it shall be the duty of the court to fix reasonable bail to be given by the defendant . . .

11. *Id.* § 7-11-507 (1977) reflects the original wording of *id.* § 161, ch. 14 (1876).

12. *Id.* § 3326 (1887) was amended in 1909 to provide for bail pending appeal. This language is currently found in *id.* § 7-11-511 (1977).

13. WYO. R. CRIM. P. 8(a)(2) (emphasis added) provides:

(a) Right to bail.

(2) Upon Review.—During the pendency of appeal, a judge or justice of a court having jurisdiction may admit a defendant to bail in such sum as shall be deemed proper in all bailable cases. The judge or justice allowing bail may at any time revoke or amend the order admitting the defendant to bail.

14. WYO. STAT. ANN. § 5-2-114 (1977) provides: "The supreme court of Wyoming may from time to time adopt, modify and repeal general rules and forms governing pleadings, practice, and procedure, in all courts of this state, for the purpose of promoting the speedy and efficient determination of litigation upon its merits."

15. *Id.*

16. 642 P.2d 1263 (Wyo. 1982).

17. *Id.* at 1266.

18. WYO. STAT. ANN. § 5-2-115(b) (1977) provides: "Such rules shall neither abridge, enlarge nor modify the substantive rights of any person nor the jurisdiction of any of the courts nor change provisions of any statute of limitations."

provides that the court may not "abridge, enlarge nor modify" substantive rights by the adoption of procedural rules.<sup>19</sup> In *Goodman v. State*,<sup>20</sup> the court defined the scope of its powers under this provision. The court recognized that "our rule making authority cannot extend so far as to affect the substantive rights of our citizens and these concerns will be left to the legislature."<sup>21</sup> The Wyoming Statutes granted Goodman a right to jury trial in a Justice of the Peace Court. The state argued that, because no rule of procedure provided for a jury trial for a justice court defendant, Goodman did not have a right to jury trial. The court held that the right to jury trial, when guaranteed by statute, is a substantive right. The court held that the statute stood "unassailed by any rule of this court which purports to either supersede the statute or with which the statute is said to be in conflict."<sup>22</sup> Thus, in *Goodman*, the Wyoming Supreme Court made clear that no rule of procedure may supersede a substantive statutory right.

### *Federal*

Until 1966, Rule 46(a)(2) of the Federal Rules of Criminal Procedure governed postconviction bail. Then in 1966, the Bail Reform Act of 1966<sup>23</sup> supplanted the Federal Rule. Most recently, the Bail Reform Act of 1984 repealed the Bail Reform Act of 1966 and defined the current conditional right to bail pending appeal in federal proceedings.<sup>24</sup>

Like the Bail Reform Act of 1984, the Bail Reform Act of 1966 provided for the conditional release on bail of a convicted federal defendant. Section 3148 of the 1966 Act<sup>25</sup> limited the bail right, providing that postconviction release could be denied where the appeal was frivolous or taken for delay or where the convicted person was dangerous or posed a risk of flight.<sup>26</sup> Under the Act, the defendant carried the burden of showing that he would not flee and that he was not a danger to the community.<sup>27</sup> The government carried the burden of showing that the appeal was frivolous or was taken for the purpose of delay.<sup>28</sup>

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19. *Id.*

20. 644 P.2d 1240 (Wyo. 1982).

21. *Id.* at 1243.

22. *Id.*

23. 18 U.S.C. §§ 3146, 3148 (1982); FED. R. APP. P. 9(c).

24. The Bail Reform Act of 1984, 18 U.S.C. § 3143(b) (Supp. III 1985) provides: Release or detention Pending Appeal by the defendant.

The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or petition for a writ of certiorari, be detained, unless the judicial officer finds:

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and

(2) that the appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

25. Bail Reform Act of 1966, 18 U.S.C. §§ 3146, 3148 (1982); FED. R. APP. P. 9(c).

26. *Id.*

27. See *United States v. Affleck*, 765 F.2d 944, 946 (10th Cir. 1985).

28. *Id.*

To qualify for postconviction release under the 1984 Act, the convicted person must first show, by clear and convincing evidence, that he "is not likely to flee or pose a danger to the safety of any other person or the community if released."<sup>29</sup> Secondly, the 1984 Act requires that the convicted person demonstrate that he is not appealing "for the purpose of delay" and that his appeal raises "a substantial question of law or fact" likely to result in reversal or an order for new trial.<sup>30</sup>

The Bail Reform Act of 1984 marks a significant departure from the former criteria for postconviction release and shifts the burden to the defendant to show that he has met all the new Act's criteria.<sup>31</sup> Thus, Congress has reversed the presumption in favor of the postconviction bail right. In contrast, the unconditional bail right under the Wyoming statutes recognizes a virtually unlimited right to bail pending appeal.

#### THE PRINCIPAL CASE

In *State v. District Court*, the Wyoming Supreme Court recognized that the right to postconviction bail is a manifestation of the individual's interest in his personal liberty.<sup>32</sup> Although the court failed to provide definition, "personal liberty interest" in the postconviction bail context apparently refers to the defendant's right to avoid incarceration in the event his conviction is subsequently overturned.<sup>33</sup>

The Wyoming Supreme Court, in 1895, interpreted the Wyoming Constitution to require only a preconviction bail right.<sup>34</sup> In *State v. District Court*, however, the court found an interest of personal liberty in the Wyoming Constitution.<sup>35</sup> Although only preconviction bail is a constitu-

29. 18 U.S.C. § 3143(b) (Supp. III 1985).

30. *Id.*

31. 18 U.S.C. § 3143(b) (Supp. III 1985); see *Affleck*, 765 F.2d at 946.

32. *State v. District Court*, 715 P.2d at 194 (Wyo. 1986).

33. *Id.*; see *State v. Sorrentino*, 32 Wyo. 410, 233 P. 142 (1925). The Wyoming Supreme Court commented upon the nature of the right to bail pending appeal:

Bail on appeal is not permitted simply for the purpose of delaying the payment of the penalty by law. The object, is to protect the defendant in his rights, leave him there in status quo, pending the appeal, and not to put any undue hardship on him if it should turn out that he is not convicted lawfully.

*Sorrentino*, 32 Wyo. at 411, 233 P. at 144.

34. In *In re Boulter*, 5 Wyo. 263, 39 P. 875 (1895), the petitioner contended that the Wyoming Constitution granted the right to bail before and after conviction. Prior to amendment in 1909, section 3326 of the Wyoming Revised Statutes of 1887 required that a convicted person be committed to the sheriff's custody until completion of appellate proceedings and did not expressly provide for bail pending appeal. The court held that the Wyoming Constitution, reconciled with the statute, did not grant the right to bail pending appeal. The court, however, recognized the right of the legislature to confer the bail right after conviction. "While we recognize the right of a constitutional grant so as to include persons sentenced for a felony, this court has no power and no inclination to invade the domain of the legislature." *Id.* at 265, 39 P. at 878.

35. *State v. District Court*, 715 P.2d at 195 (Wyo. 1986). There, the court stated:

In the declaration of rights in Article I of the Wyoming Constitution we find a recognition of the inherent right to liberty; a requirement for due process of law before a person can be deprived of liberty; a denial of absolute arbitrary power over the liberty of free men; a provision about which more will be said, that "[a]ll persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great."

tional right, the court held that postconviction bail is one aspect of the *interest* in personal liberty. This interest, therefore, is substantive. The substantive interest in postconviction bail is converted to a statutory right by section 7-11-511 of the Wyoming Statutes.<sup>36</sup>

The state argued that Rule 56 of the Wyoming Rules of Criminal Procedure<sup>37</sup> had superseded sections 7-11-507 and 7-11-511.<sup>38</sup> If those statutes had been superseded, Rule 8(a)(2) would place bail questions in the trial court's discretion. Story contended that the unconditional language of section 7-11-511 required that postconviction bail be afforded in allailable cases.<sup>39</sup> This bail right, Story asserted, is substantive and cannot be superseded by procedural rule.<sup>40</sup>

The court agreed with Story and held that the scope of the Wyoming postconviction bail right is governed by section 7-11-511.<sup>41</sup> Recognizing that section 7-11-511 creates a substantive bail right, the court found that the statute could not be superseded by a rule of procedure.<sup>42</sup> The court noted that, if the postconviction bail right is to be denied in Wyoming, "it must be by action of the legislature which up until this time has maintained a statute which grants that substantive right."<sup>43</sup>

The court concluded that Rule 8 provides the procedure for setting bail and admitting the convicted person to bail as required by section 7-11-511.<sup>44</sup> Rule 8(h) provides the method of redress for denial of the substantive bail right pending appeal.<sup>45</sup>

36. WYO. STAT. ANN. § 7-11-511 (1977). The court goes out of its way to make this issue needlessly difficult. Any right created by statute is substantive.

37. WYO. R. CRIM. P. 56 provides for the supersession of the 1957 versions of Wyo. STAT. ANN. §§ 7-11-507 to -511 (1977).

38. The state pointed to the noncompulsory language of Rule 8(a)(2) as granting to trial courts the discretion to deny postconviction bail. Rule 8(a)(2) provides that a judge "may" admit a defendant to bail in allailable cases. This language directly conflicts with the unconditional language of § 7-11-511 that bail "shall" be afforded in allailable cases.

39. Brief for Respondent at 1.

40. *Id.* at 14.

41. *State v. District Court*, 715 P.2d at 196 (Wyo. 1986).

42. Both the Wyoming Statutes and common law recognize this principle. WYO. STAT. ANN. § 5-2-115(b) (1977) provides that procedural rules "shall neither abridge, enlarge nor modify the substantive rights of any person nor the jurisdiction of any of the courts nor change provisions of any statute of limitation." In *Goodman v. State*, the court recognized that "our rule-making authority cannot extend so far as to affect the substantive rights of our citizens and these concerns will be left to the legislature." 644 P.2d 1240, 1242 (Wyo. 1982).

43. *State v. District Court*, 715 P.2d at 196.

44. *Quaere* how a rule of procedure inconsistent with a statute can implement the requirements of the statute. The court failed to recognize that WYO. R. CRIM. P. 8(a)(2) directly conflicts with WYO. STAT. ANN. § 7-11-511 (1977). Rule 8(a)(2) provides that bail "may" be granted in allailable cases, while § 7-11-511 provides that bail "shall" be granted in allailable cases.

45. *Id.* WYO. R. CRIM. P. 8(h) provides that an accused person aggrieved by the application of Rule 8 "may apply for a writ of habeas corpus." WYO. STAT. ANN. § 1-17-104 (1977) requires that the writ of habeas corpus be sought before the nearest judge, which is the Second Judicial District sitting in Rawlins for inmates at the Wyoming State Penitentiary. The court found that Rule 8(h) expands habeas corpus to afford the District Court of the Second Judicial District the independent authority to proceed in connection with the issue of bail pending appeal. *State v. District Court*, 715 P.2d at 194. Where Story had been denied his substantive bail right, the Wyoming Supreme Court held that the district court properly granted habeas corpus under Rule 8(h). *Id.* at 196.

Currently, then, the Wyoming bail statutes grant an unconditional, substantive right to postconviction release. The Wyoming Supreme Court correctly resolved *State v. District Court* under these statutes. This unconditional approach to bail after conviction is nevertheless problematical. A more balanced approach to postconviction bail is needed.

#### ANALYSIS

In his concurring opinion in *State v. District Court*, Justice Brown agreed that Story had a substantive right to bail pending appeal. Justice Brown, however, articulated the concern that a convicted defendant could pose a danger to those persons contributing to his criminal conviction, especially witnesses and victims.<sup>46</sup>

Although Justice Brown's point is well taken, the Wyoming statutes reflect a different approach. The unconditional language of section 7-11-511 mandates that trial courts fix reasonable bail for all bailable offenders.<sup>47</sup> Thus, section 7-11-511 effectively nullifies Rule 8(a)(2) of the Wyoming Rules of Criminal Procedure.

The problems posed by postconviction release are real. Bail in the pre-trial context is illustrative. Studies since the mid-1960s and their findings regarding crime committed by persons on bail indicate an unnecessary recidivist rate. The President's Commission On Crime in the District of Columbia<sup>48</sup> examined release and recidivist rates in the District of Columbia between January 1, 1963, and October 8, 1965. Of 2,776 felony defendants released on bail during that period, 207 or 7.5 percent were subsequently rearrested on one or more felony charges.<sup>49</sup> The Commission also found (1) that more than eighty percent of the recidivists committed crimes as serious or more serious than the original offense<sup>50</sup> and (2) that eighty-eight percent of the two-hundred-seven recidivists had prior adult arrest or conviction records in the District of Columbia.<sup>51</sup>

Even in the face of these disturbing figures, however, one must not lose sight of the fact that the wholesale denial of postconviction bail to all convicted persons will not solve the problem. Rather, a more tempered approach is needed; some persons do not pose the appeal problems associated with bail offenders. The foregoing statistics demonstrate that only a few convicted persons are threatening. Thus, denial of bail to all, to stop a few bail offenders, is incongruous and creates an entirely different set of problems. It violates rights that the Wyoming Supreme Court has long recognized as fundamental to the convicted person.

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46. *State v. District Court*, 715 P.2d at 196.

47. *Id.*

48. SENATE COMM. ON JUDICIARY, PRES. COMM. ON CRIME IN DISTRICT OF COLUMBIA, S. DOC. NO. 317, 97th Cong., 2d Sess. (1982).

49. *Id.* at 23.

50. *Id.*

51. *Id.*

*The Interest of the Individual*

Wyoming's unconditional approach to postconviction bail acknowledges that freedom is a highly valued personal right.<sup>52</sup> At the very least, the right to bail after conviction means that the defendant should not be incarcerated until his conviction has been upheld on appeal.<sup>53</sup>

The Wyoming Supreme Court recognized this prescription in *State v. District Court*. The court characterized the right as inherent to liberty and a requirement of due process of law before a person may be deprived of liberty.<sup>54</sup> The court found this principle in the Wyoming Constitution's declaration of rights.<sup>55</sup> If the defendant is incarcerated, but his conviction is overturned on appeal, he will have been imprisoned on the basis of an erroneous determination of his guilt, and his liberty interest will have gone unprotected.

*The Interests of the State*

The conditional approach to postconviction bail, as typified by federal law, addresses the concerns raised by Justice Brown. Contrasted to the current Wyoming bail statutes, the conditional approach recognizes that bail should be denied only when the defendant poses a danger to individuals or to the community or when the defendant poses a likelihood of fleeing after his conviction.

Upon conviction of the defendant, the interests of society are threefold. Society must protect itself from dangerous defendants; it must maintain the integrity of the legal and correctional processes; and it must make certain that the conviction is free of error which may result in the punishment of an innocent person.<sup>56</sup>

The question of whether future criminality can be predicted is one which neither experience nor empirical analysis can conclusively answer. Nonetheless, Congress recognized that certain combinations of offender and offense characteristics<sup>57</sup> are strongly correlated with the probability that the defendant will commit another offense while on bail or while released.<sup>58</sup> Thus, Congress believed that judges can, by considering these and other factors, make such predictions with reasonable accuracy.<sup>59</sup>

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52. Beletz, *Post-Conviction Criminal Rights: Parole and Revocation and Bail*, 8 CREIGHTON L. REV. 682, 695 (1974).

53. *Id.* at 695.

54. *State v. District Court*, 715 P.2d at 194-95.

55. *Id.*

56. Beletz, *supra* note 52, at 694.

57. Congress referred to such factors as the extent of prior arrests and convictions and the nature and seriousness of the offense in predicting the probability that the defendant will commit another crime while on release. SENATE COMM. ON JUDICIARY, BAIL REFORM ACT OF 1983, S. Doc. No. 147, 98th Cong., 1st Sess. 215 (1983).

58. *Id.* Congress addressed the question of predictability with regard to release decisions in the context of pre-trial bail. Predictability considerations, however, have equal application to the dangerousness and likelihood-of-flight standards of postconviction release.

59. *Id.*



By adopting the Bail Reform Act of 1984, Congress recognized that once guilt of a crime has been established, a court should not grant release unless it further examines the circumstances surrounding the conviction.<sup>60</sup> A conviction based upon a finding beyond a reasonable doubt is presumably correct in law.<sup>61</sup>

In *United States v. Gilbert*,<sup>62</sup> the court addressed the question of whether pre-trial detention was constitutional if a defendant threatened the safety of witnesses. The court held that the judicial interest in detaining the suspect under these circumstances outweighs his statutory right to bail.<sup>63</sup>

In the postconviction context, the conditional approach also permits the denial of bail where a substantial probability of danger to witnesses or victims is posed by the defendant's release.<sup>64</sup> The arguments advanced in the pre-trial context have even stronger application in the post-trial context where the defendant's presumption of innocence no longer exists. The possibility of denying post-trial bail encourages participation in the trial process by witnesses, whose safety is assured to a greater extent than if the defendant is guaranteed postconviction release.

The federal conditional approach also allows judges to deny bail when the defendant poses a likelihood-of-flight while his appeal is pending.<sup>65</sup> Congress recognized that, in some cases, bail and conditions of release do not assure that the defendant will return to serve the sentence, if upheld.<sup>66</sup> The 1984 Act, like the Bail Reform Act of 1966, establishes that fleeing after imposition of sentence, but prior to its commencement, is a violation of the bail-jumping statute.<sup>67</sup> Penalties for bail-jumping under the 1984 Act have been modified to parallel more closely the severity of the underlying offense for which the defendant was convicted.<sup>68</sup>

60. H. REP. NO. 1030, 98th Cong., 1st Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3209.

61. *Id.*

62. 425 F.2d 490 (D.C. Cir. 1969).

63. *Id.* at 491.

64. See *Carbo v. United States*, 369 U.S. 868 (1962).

65. 18 U.S.C. § 3143(b)(1) (Supp. III 1985). The defendant is released on bail pending appeal if he shows by clear and convincing evidence that he "is not likely to flee."

66. *Id.*

67. The current bail-jumping statute is 18 U.S.C. § 3146 (1982 & Supp. III 1985). That statute provides that a person commits an offense if after having been released pursuant to the provisions of the chapter, "(1) he knowingly fails to appear before a court as required by the conditions of his release or (2) he knowingly fails to surrender for service of sentence pursuant to court order."

68. The penalties for the new § 3146 have been designed to parallel the penalty for the offense for which the defendant was convicted. Under current 18 U.S.C. § 3146 (Supp. III 1985), the penalties for bail jumping are: (1) up to \$25,000 fine and ten years' imprisonment where the offense was punishable by death, life imprisonment, or up to fifteen years imprisonment; (2) up to \$10,000 fine or imprisonment for 5 years, where the offense was punishable by more than five, but less than fifteen years' imprisonment; (3) a fine of not more than \$5,000 and imprisonment for not more than two years, if the offense was any other felony; and (4) a fine of not more than \$2,000 and imprisonment for not more than one year, if the offense was a misdemeanor.

The conditional approach taken under federal law imposes, however, an anomalous standard apart from the dangerousness and flight standards. Under the "substantial question" standard of federal law, the defendant must show that the appeal raises a substantial question of law or fact likely to result in reversal or order for new trial.<sup>69</sup> If the defendant fails to meet this standard, the appeal is considered frivolous or taken for delay, and bail is denied.

The "substantial question" standard has several disturbing features. This standard requires a defendant seeking postconviction bail to submit his issues of appeal to the trial court to be admitted to bail. Thus, a federal judge is asked to find that defendant's appeal is "likely to result in reversal" of the jury finding or the court's own judgment. This standard places the trial judge in an incongruous position. If the trial court admits the convicted person to bail, he has confessed the error of the verdict; if the trial court upholds the verdict, bail pending appeal is barred.<sup>70</sup> The "substantial question" standard, then, represents the single flaw of the federal approach.

If a defendant poses a threat to public safety or a risk of flight, releasing that defendant after conviction would be irresponsible. Federal law supports this view by granting trial courts discretion to deny bail in such cases.<sup>71</sup> Under the conditional approach, the defendant has the burden to show that he is not dangerous and that he will not flee.<sup>72</sup> To this extent, then, the conditional approach intrudes upon the defendant's liberty interest only when the defendant appears that he will not exercise that right responsibly. The "substantial question" requirement, however, goes too far. This standard has the unorthodox effect of forcing the trial judge to sit in judgment of himself. Where the trial judge must find that the convicted person's appeal is "likely to result in reversal," it is simply unlikely that postconviction bail will be granted in the majority of cases.

### *Merging The Unconditional and Conditional Approaches*

Wyoming courts currently cannot deny bail to dangerous defendants. Wyoming's unconditional approach to postconviction bail protects the public only from those persons convicted of first and second degree murder. All other criminal defendants, including those convicted of rape, armed robbery, and other varieties of violent offenses, are statutorily entitled to the automatic postconviction bail right. Only by making bail unobtainable through an excessive bail amount can Wyoming courts assure a defendant's presence after appeal.

In his concurrence in *State v. District Court*, Justice Brown recognized this flaw in the Wyoming postconviction bail statute. Brown asserted, however, that Rule 8(c) of the Wyoming Rules of Criminal Pro-

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69. *Id.* § 3143(b)(2).

70. Mandelbaum, *Bail Pending Appeal in Federal Criminal Cases—Major Changes and Questions Concerning the New 1984 Bail Reform Act*, LX FLA. B.J. 59 (Jan. 1986).

71. Bail Reform Act of 1984, 18 U.S.C. § 3143(b) (Supp. III 1985).

72. See *United States v. Affleck*, 765 F.2d 944, 946 (10th Cir. 1985).

cedure alleviates this problem by authorizing a judge to restrict the activities of one being admitted to bail after conviction.<sup>73</sup> A literal reading of Rule 8(c), however, indicates that those terms of release apply only to one awaiting trial.<sup>74</sup>

Clearly, if the Wyoming postconviction bail system is to be sensitive to Justice Brown's concerns, then the legislature must effect these changes statutorily. The federal statutes address those concerns the Wyoming system ignores. Through a "merger" of the unconditional and conditional approaches, section 7-11-511 of the Wyoming Statutes should be amended to allow trial courts to deny bail to those defendants that present a danger to the community or to those defendants likely to flee upon release. Rule 8(a)(2) would then comport with and would implement the requirements of the postconviction bail statute.

By considering the defendant's disposition, the trial court can easily balance the individual's liberty interest with the state's interest in a safe community. When a defendant poses a danger to others or a risk of flight, the state has compelling justification to deny bail.<sup>75</sup> Further, if the defendant does not meet the standards set for postconviction bail, then restraint imposed to protect the public safety and to assure the punishment of criminals does not offend the liberty interest of the defendant.

#### CONCLUSION

Section 7-11-511 of the Wyoming Statutes preserves the unconditional right to postconviction release for allailable felonies. This right is substantive and may not be altered or limited by the Wyoming Rules of Criminal Procedure.

In *State v. District Court*, Justice Brown articulated the concern that release of defendants after conviction may place the community at risk. The conditional approach taken under federal law is responsive to Justice Brown's concerns. Thus, the Wyoming legislature should adopt this approach to postconviction bail. Wyoming's criminal procedure would then fairly and sensibly comport with the practical recognition that some defendants are undeserving of postconviction bail.

DRAKE D. HILL

73. *State v. District Court*, 715 P.2d at 196.

74. WYO. R. CRIM. P. 8(c) (emphasis added) provides:

(1) Any person charged with an offense other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released *pending trial* on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the judicial officer determines in the exercise of his discretion that such a release will not reasonably insure the appearance of the person as required. When such a determination is made the judicial officer shall, either in lieu of or in addition to the above methods of relief, impose the first of the following conditions of release which will reasonably assure the appearance of the person *for trial* or, if no single condition gives that assurance, any combination of the following conditions . . . .

75. Beletz, *supra* note 52, at 694.

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