Bail Jumping While Behind Bars

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Abstract

Some defendants are held in custody while they await trial. Others are released pending trial but are subjected to onerous bond conditions of release, the violation of which leads to "bail jumping" charges. And other defendants, paradoxically, are not released yet are still charged with bail jumping for violating conditions of release while inside the jail.

How can a defendant who is not released be subjected to conditions of release? In other words, how can a defendant possibly be guilty of jumping bail from inside the jail? Of course, it is not logically possible—some courts have even held that it is not legally possible. But other courts do apply conditions of release to in-custody defendants and will consequently uphold their convictions for bail jumping.

Courts have developed four different theories to justify this outcome. This Article debunks those theories and then turns to contract law for some clarity. Criminal bond is, after all, a contract: the court agrees to release the defendant pending trial, and, in exchange, the defendant promises to post bail and follow the non-monetary bond conditions of release. And when disputes arise regarding contracts—including bond contracts—we turn to contract law principles for resolution.

This Article identifies, explains, and applies four different contract law principles—mutual assent, conditions precedent, illusory consideration, and frustration of purpose—to this bail-jumping-while-in-custody paradox. All four doctrines lead to the inescapable (and commonsense) conclusion that bond conditions of release apply only to defendants who have been physically released from custody. This Article then provides litigation strategies for criminal defense lawyers whose clients are at risk of being charged with, or are actually charged with, bail jumping while behind bars.

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I. INTRODUCTION

When a criminal defendant cannot post bail and therefore is held in custody before trial, maintaining their innocence and actually waiting for the trial date is a costly proposition.[1] Such a defendant is therefore more likely than an out-of-custody defendant to accept a plea deal with the hope of receiving probation and getting out of jail sooner.[2]

On the other hand, when a defendant *is* able to post bail, the judge will likely impose onerous, non-monetary bond conditions of release.[3] Many out-of-custody defendants eventually violate these conditions, at which time the prosecutor will file a "bail jumping" complaint.[4] This, too, can lead to a plea deal, as the prosecutor will offer to dismiss the bail jumping case in exchange for the defendant's plea to the original, underlying case.[5]

While the coercive effect of cash bail *or* a bail jumping charge, individually, is great, the combination of those two things is exponentially worse. In other words, when a defendant remains in custody and is *also* charged with bail jumping, the combined, coercive effect all but guarantees a plea deal instead of a trial.[6] That much makes sense, but there is also an underlying paradox at work: How can a defendant who is not released also be charged with bail jumping for violating conditions of release? To put it another way: How can a defendant possibly jump bail from inside the jail?

Of course, it isn't logically possible, and some courts have even held that it isn't legally possible.[7] Nonetheless, other courts have developed at least four theories to justify imposing conditions of release on in-custody defendants, thereby sustaining convictions for bail jumping while behind bars.[8] These judicial justifications, however, do not withstand scrutiny, as they violate basic canons of statutory construction, simple logic, plain language, and even common sense.[9]

Instead, the answer to this paradox is found in contract law, which is an integral part of criminal law. Just as a plea bargain is a contract between

1. *See infra* Section II.A.
2. *See infra* Section II.A.
3. *See infra* Section II.B.
4. *See infra* Section II.B.
5. *See infra* Section II.B.
6. *See infra* Section III.
7. *See infra* Section II.B.
8. *See infra* Section III.A–D.
9. *See infra* Section III.A–D.

the prosecutor and the defendant, criminal bond is nothing more than a contract between the court and the defendant.[10] It is an exchange of promises: The court promises to release the defendant from custody pending trial, and the defendant promises to post the bail and abide by certain non-monetary bond conditions of release.[11]

Naturally, when disputes arise regarding a contract, including a bond contract, we turn to contract-law principles to resolve the matter. This article identifies, discusses, and applies four different contract law principles, all of which lead to this inescapable conclusion: Bond conditions of release apply *only* to defendants who are physically released; therefore, it is not possible to commit bail jumping while behind bars.[12]

More specifically, the application of these four principles reveals the following. First, in cases where the defendant never signs the bond, there is no "mutual assent" and certainly no "acceptance" of the bond terms by the defendant; consequently, there is no contract, and the in-custody defendant is not obligated to follow the conditions of release.[13] Second, when the defendant *does* sign the bond, but for unrelated reasons cannot be released from custody, it is possible that a contract exists.[14] However, the failure to release the defendant is a "failure of a condition precedent"; consequently, the defendant is excused from their obligation to follow the conditions of release.[15]

Third, when a defendant does sign the bond, thereby agreeing to its conditions in exchange for the promise of pretrial release, the failure to actually release the defendant renders the earlier promise to do so "illusory."[16] In other words, there is no "consideration" supporting the bond contract, thereby rendering it unenforceable against the defendant.[17] Fourth and finally, in a closely related principle, when a defendant signs the bond and *is* released, but is then later re-incarcerated for unrelated reasons, the "frustration of purpose" doctrine relieves the defendant of the obligation to follow the bond conditions of release, as the only reason they had promised to do so was, of course, to be released.[18]

10. *See infra* Section IV.
11. *See infra* Section IV.
12. *See infra* Section IV.
13. *See infra* Section IV.A.
14. *See infra* Section IV.B.
15. *See infra* Section IV.B.
16. *See infra* Section IV.C.
17. *See infra* Section IV.C.
18. *See infra* Section IV.D.

Armed with these contract law doctrines and some existing favorable cases in the criminal law arena, the criminal defense lawyer can take steps to protect their in-custody client from bail jumping.[19] Strategies include filing a motion to dismiss the bail jumping case on one or more legal grounds and even defending the bail jumping allegation at trial, where a jury, unlike the judge, may be skeptical of the prosecutor's bizarre theory that a defendant could violate conditions of release without actually being released.[20]

This Article proceeds as follows. Section II discusses how *either* holding defendants in custody *or* charging them with bail jumping coerces them into accepting a plea deal. Section III discusses how these two things, in combination, are exponentially more coercive. Section III also examines and debunks the four judicial theories used to subject in-custody defendants to conditions of release and, consequently, to bail jumping charges.

Section IV of this Article turns to contract law and identifies criminal bond for what it is: a contract between the court and the defendant. This Section identifies the four contract law doctrines applicable to criminal bond and in-custody defendants and argues that conditions of release apply *only* to defendants who have actually been released. Finally, Section V discusses preventative and responsive strategies for defense lawyers whose clients are at risk of, or actually charged with, jumping bail while in jail.

II. BAIL AND BOND: A COERCIVE SYSTEM

When a prosecutor files criminal charges against a defendant, the judge may impose cash bail along with non-monetary bond conditions.[21] In order to be released from custody, the defendant must post the bail and sign the bond, thereby agreeing to follow its conditions.[22] Although bail and bond can serve valid purposes,[23] the following sections explain that they can also create a coercive system in which defendants are incentivized

19. *See infra* Section V.

20. *See infra* Section V.B.

21. *See, e.g.*, WIS. STAT. § 969.01(4) (2023) (discussing the factors judges must consider when setting monetary and non-monetary conditions of release).

22. *See, e.g.*, *Bail/Bond Form CR-203*, WIS. CIR. CT., https://formfiles.justia.com/pdf/wisconsin/0036/45.pdf [https://perma.cc/7KNK-XCAB] (Above the defendant's signature line, the document reads: "I have received a copy of this bail/bond and I agree to its terms.").

23. *See, e.g.*, WIS. STAT. § 969.01(4) (2023) (discussing the official purposes of bail and bond).

to accept plea deals instead of going to trial.

A. The Effect of Bail

In criminal cases, the monetary condition of release is called "cash bail," "money bail," or simply "bail."[24] While a judge might release a defendant on a personal recognizance or signature bond, the imposition of bail is quite common, even for relatively minor charges.[25] And if a defendant is not able to post the bail, then they will remain in custody for the duration of the case.[26] "On any given day, around half a million people are incarcerated having only been accused—not convicted—of a crime."[27]

Ostensibly, the primary purpose of bail is to ensure the defendant's appearance at future court hearings.[28] The theory is commonsense: If the defendant has to post cash before being released, then they will be more likely to appear for court in order to get the bail money refunded at the end of the case; conversely, if the defendant has nothing at stake, then they may skip town or jump bail.[29]

But a typical effect of the bail system is that many defendants simply *remain* in jail, without having been convicted of the crime for which they are charged, while the case is pending. And if the defendant cannot post bail and has to remain in custody during the case, then they will be more likely to accept a plea deal in order to "get the case over with," and hopefully receive probation instead of jail.[30] In other words, to use the

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24. *See generally* Samuel Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235 (2018) (discussing bail as a condition of release in criminal cases and using all three forms of the term).

25. *See* Shima B. Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 872 (2018) ("Misdemeanor defendants are detained before trial almost as often as felony defendants.").

26. *See* Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 879 (2022) (discussing pretrial detention). As an aside, many states permit the defendant to use a bail bondsman to post bail. *See* James Gordon, *Corporate Manipulation of Commercial Bail Regulation*, 121 COLUM. L. REV. F. 115, 117 (2021) ("[T]he problems associated with the commercial bail industry—including arrestees' exposure to bounty hunter violence, exploitative contract terms, and crippling debt—are well documented.").

27. Brook Hopkins, Chiraag Bains, & Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating Its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 681 (2019).

28. *See, e.g.*, *Bail & Bail Bonds*, DELAWARE COURTS: HELP & SUPPORT, https://courts.delaware.gov/help/bail/ [https://perma.cc/X5LB-Z4NV] (last visited Oct. 26, 2024) ("The purpose of bail is to ensure the defendant's appearance at all court trials and hearings.").

29. *See* James A. George, *The Institution of Bail as Related to Indigent Defendants*, 21 LA. L. REV. 627, 627 (1961).

30. Many plea offers involve the prosecutor's recommendation of probation. But as we defense lawyers have to explain to our clients, being on probation as a convicted criminal is *not* "getting the case over with." Rather, much of the negative impact only begins, rather than ends, upon entry of the plea. And even *if* the defendant completes probation, the consequences linger. *See, e.g.*, Michael

economists' terminology, "defendants accept a plea if it 'entails a lower cost than going to trial,' and *pretrial detention makes trial look far more costly to the average defendant*."[31]

Several studies of Pennsylvania, Florida, and Texas courts substantiate this interpretation of the effects of bail on pleas. After controlling for other variables, these studies show that defendants who could not post bail were more likely than out-of-custody defendants to accept a plea deal.[32] This certainly gives prosecutors an incentive to argue for a high cash bail. After all, prosecutors rely on plea bargains—the means by which up to 99 percent of cases are resolved[33]—to keep the system running smoothly. As one scholar concluded, echoing the findings of Chief Justice Warren Burger, "[w]ithout *bail-driven pleas*, the modern system . . . would collapse absent a significant infusion of resources."[34]

Even if coercing the defendant into accepting a plea deal isn't the purpose of bail, it certainly is one of its effects. And as the next section explains, the same can be said of non-monetary bond conditions.

B. The Effect of Bond

While many defendants will be held in custody on bail, others will get a signature bond or will be able to post the required cash, thus buying their freedom (at least temporarily). In such cases, there will also be non-monetary bond conditions, or conditions of release, which the defendant must agree to follow.[35] This is accomplished by requiring the defendant

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O'Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing a "Violent" Crime*, 109 J. CRIM. L. & CRIMINOLOGY 165, 168 (2019) (stating that conviction "results in a sharp, multidimensional loss of legal status").

31. Wiseman, *supra* note 24, at 253–54 (emphasis added).

32. *See id.* at 250–51.

33. *See* Darryl K. Brown, Response, *What's the Matter with Kansas—and Utah?: Explaining Judicial Interventions in Plea Bargaining*, 95 TEX. L. REV. 47, 62 (2017) ("All this has allowed state and federal courts to reach guilty plea rates of 96 to 99 percent.").

34. Wiseman, *supra* note 24, at 253 (emphasis added) (referring to Chief Justice Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970)). Wiseman does cite studies that disagree with this conclusion. *See id.* at 253 n.83 (citing Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 221–22 (1983) (arguing that the criminal justice system could still operate efficiently without pleas); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 948 (1983) (arguing that "the annual cost of providing three-day jury trials to every felony defendant who reaches the trial stage probably would not exceed $843 million," that this "would represent a 3.2% increase in civil and criminal justice expenditures in the United States over the level in 1979," and that plea bargaining is not essential for an economically efficient criminal justice system)).

35. *See* Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 172–76, 183–92 (2021) (discussing

to sign a bond sheet which, after listing the specific conditions of release, may state something like this above the signature line: "I have received a copy of this bail/bond and I agree to its terms."[36]

While the ostensible purpose of such bond conditions is to protect witnesses and the community in general,[37] defense lawyers have long suspected that something else is afoot. The first red flag is that the conditions imposed often have nothing whatsoever to do with their stated purpose. Instead, "[j]udges impose conditions of release in a near rote fashion—some utilizing a checklist—often with little or no evidence that the condition is necessary to avoid the risk or risks that fuel them."[38]

What are these conditions of release? They often include, most onerously, "no-contact orders" that bar *all forms* of contact with the complaining witness (often the alleged victim), potential eyewitnesses, and others.[39] These individuals often include the defendant's spouse, another family member, a roommate, or a close friend. Such no-contact orders can completely upend a defendant's life, including their living arrangements, and, like other non-monetary conditions, sometimes they serve no clear legitimate purpose.[40] In addition to no-contact orders, other non-monetary conditions of release can be far-ranging, expensive, and equally difficult for the defendant to follow.[41] "For some, the burden of such pretrial conditions is no less insurmountable than monetary bail."[42]

When an out-of-custody defendant eventually violates one of the non-monetary conditions of release, the judge can revoke the bond and re-incarcerate the defendant, and the prosecutor can file a new criminal case

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the imposition of non-monetary conditions of release).

36. *See, e.g.*, *Bail/Bond Form CR-203*, *supra* note 22.

37. *See, e.g.*, WIS. STAT. § 969.01(4) (2023) ("Conditions of release, other than monetary conditions, may be imposed for the purpose of assuring the defendant's appearance in court, *protecting members of the community from serious harm, or preventing intimidation of witnesses*.") (emphasis added).

38. Carroll, *supra* note 35, at 148 (citing EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 37, 39 (2019) ("[The New York City Criminal Justice Agency]'s [bail] recommendations predicted the risk of flight and rearrest more accurately than did prosecutors' recommendations on average," but judges typically followed prosecutors' harsher recommendations anyway.).

39. *Id*. at 146.

40. *See* Hopkins, Bains, & Doyle, *supra* note 27, at 688 ("However, in practice, across the country onerous pretrial conditions are imposed on defendants without sufficient regard to their individual circumstances or whether such conditions will actually serve the government's legitimate pretrial goals.").

41. *See* Carroll, *supra* note 35, at 185–92 (discussing numerous conditions of release and the financial and other costs they impose on the defendant).

42. *Id*. at 149.

charging the defendant with "bail jumping" or a similar crime.[43] ("Bail jumping" is a poorly named crime, as that term should be reserved for the failure to appear for court. Violating other non-monetary conditions of release, such as a no-contact order, should be called "bond jumping." Nonetheless, to be consistent with the established terminology,[44] this Article will refer to the violation of *any* non-monetary bond condition as "bail jumping.")

Just as keeping a defendant in custody on a cash bail often coerces them into accepting a plea deal, bail jumping charges can have the same effect, but in a different way. Assume, for example, that a judge imposed a bond condition ordering the defendant to have "no contact" with their spouse, a potential witness in the case. The prosecutor then learns that the defendant had what would otherwise be non-criminal contact with the spouse, in violation of the bond condition. The prosecutor will then file a bail jumping case—a case that is usually airtight—but will then offer to dismiss it entirely in exchange for the defendant's plea to the original, underlying case that put them on bond in the first place.

Once again, there is empirical support demonstrating these effects of bond conditions. A study of Wisconsin courts revealed that, in 2016, bail jumping was by far the most common criminal charge filed in the state.[45] Yet, despite its apparent importance based on the frequency with which it is charged, prosecutors dismissed about three-fourths of all bail jumping charges as part of a plea deal.[46] After a detailed analysis of the data, the author concluded, "the data . . . suggests that the purpose for charging bail jumping may be *to create leverage against defendants to force them to plead to their original charges* rather than for punishing them for violating their bond conditions."[47]

However, these abuses of bail and bond pale in comparison to the enforcement of bond conditions against defendants who have not yet been released on bond.

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43. *See, e.g.*, WIS. STAT. § 946.49 (2023) (criminalizing "bail jumping"). Other state legislatures have drafted more specific crimes for those who are released from custody on bond. *See, e.g.*, N.C. GEN. STAT. § 14-277.3A(d) ("A defendant who commits the offense of stalking *when there is a court order in effect prohibiting the conduct* . . . is guilty of a Class H felony.") (emphasis added).

44. *See, e.g.*, WIS. J.I. CRIM. 1795 (instructing the jury to find the defendant guilty of "bail jumping" if, among other things, it finds that the defendant "was released from custody on bond" and "intentionally failed to comply with the terms of the bond").

45. Amy Johnson, Comment, *The Use of Wisconsin's Bail Jumping Statute: A Legal and Quantitative Analysis*, 2018 WIS. L. REV. 619, 637 (2018) ("[B]ail jumping was the number one charge in Wisconsin, ahead of disorderly conduct by over 5,000 charges.").

46. *Id.* at 635 (showing that 73.76 percent of all bail jumping charges were dismissed).

47. *Id.* at 623 (emphasis added).

III. JUMPING BAIL WHILE IN JAIL?

Some defendants who are held in custody while their cases are pending are paradoxically charged with bail jumping for violating conditions of release—even though they were not, and are not, released.

As discussed in the previous Section, *either* holding a defendant on a high cash bail *or* charging the defendant with bail jumping is likely to coerce a plea deal. Doing both things in combination—i.e., imposing a high cash bail *and* charging bail jumping—all but guarantees that the defendant will accept a plea deal, regardless of the strength of the underlying case. That much is unsurprising and is easy to grasp. The more perplexing matter is this: How can a prosecutor charge a defendant with bail jumping for violating a non-monetary condition of release when the defendant was never released?

By definition, bond conditions, or non-monetary conditions of release, should apply *only* to defendants who have been released. As a New Mexico court explained, "[i]t would not only be inconsistent but absurd to impose 'conditions of release' on a defendant remanded to custody when it is not intended that he be released."[48] Instead, and quite obviously, "[t]he whole purpose for 'conditions of release' is to place limitations on a person *not* in custody."[49] Consequently, "[i]nasmuch as [a] defendant was in custody at all pertinent times, the conditions of release are not applicable."[50]

But this basic reality hasn't stopped other courts from applying conditions of release to in-custody defendants and then convicting them of bail jumping for violating those conditions. The following subsections present four theories that judges have used to justify this departure from the legal and common-sense justification for bond conditions.

A. The Substance-over-Form Theory

Some courts have held that to apply conditions of release only when the defendant is released would improperly "elevate form over substance."[51] In *State v. Mitchell*,[52] for example, the North Carolina Court of Appeals upheld a stalking conviction that had been enhanced from a

48. State v. Flores, 653 P.2d 875, 877 (N.M. 1982).
49. *Id.*
50. State v. Romero, 687 P.2d 96, 100 (N.M. Ct. App. 1984).
51. United States v. Potter, No. 3:20-mj-00061, 2020 WL 6081894, at *7 (D.V.I. Oct. 15, 2020).
52. 817 S.E.2d 455 (N.C. Ct. App. 2018).

misdemeanor to a felony based on an alleged violation of a no-contact order while the defendant was still in custody.

The trial court had entered a "Conditions of Release and Release Order,"[53] which had many parts, including a monetary condition, i.e., the bail the defendant must post in order to be released.[54] It also contained the following non-monetary conditions of release:

> To the Defendant named above, you are ordered to appear before the Court as provided above [(location, date, and time provided)] and at all subsequent continued dates. If you fail to appear, you will be arrested and you may be charged with the crime of willful failure to appear. You also may be arrested without a warrant if you violate any condition of release in this Order or in any document incorporated by reference.[55]

In addition, this particular Order imposed another non-monetary "condition of release": the defendant was "NOT TO HAVE ANY CONTACT WITH [the complaining witness]."[56] This condition was typewritten into the appropriate "blank area of the form," which appeared "[j]ust below" the document's threat of arrest.[57]

After the trial court entered the above Order, the defendant, *while still in jail*, wrote letters to the complaining witness.[58] The state learned of this and charged him with yet another criminal case—this one for violating the "condition of release" that prohibited contact.[59] (The defendant was not charged with bail jumping, but rather with an enhanced crime. The enhancement was justified, the state claimed, because the defendant violated a court order prohibiting contact with the alleged domestic abuse victim which, the state further contended, was in effect at the time the defendant wrote the letters. In other words, the state argued that the condition of release applied while the defendant was in custody, i.e., had not been released.) The defense to the allegation was straightforward: "conditions of release . . . do not apply *until* the person has been released from custody, and since [the] defendant was in jail when he wrote the

53. *Mitchell*, 817 S.E.2d at 456. The Order referred to in *Mitchell* is contained in a standardized form, *Form AOC-CR-200: Conditions of Release and Release Order*, N.C. ADMIN. OFFICE OF THE CTS., https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/Tab%208-Forms-Feb%202013.pdf [https://perma.cc/DKM9-6E8A].

54. *Mitchell*, 817 S.E.2d at 456–57.

55. *Id*. at 456 (capitalization and bolding removed).

56. *Id*.

57. *Id*.

58. *Id*. at 457.

59. *Id*. at 458.

letters, the [Order] did not apply."[60]

Despite the logic and clarity of that defense, the court rejected it, calling it "deceptively simple and focused on the title of the Order[] and on the word 'release,' while ignoring the substance of the detailed provisions of the Order[]."[61] However, the substance-over-form analysis the court claimed to follow actually dictates that conditions of release apply only if the defendant is released. This can be illustrated by examining the three legs of the court's decision.

First, contrary to the North Carolina court's reasoning, the word "release" is central to any substantive analysis, as it dictates *when* the Order takes effect. As a Wisconsin court explained when interpreting a nearly identically-worded statute and refusing to apply conditions of release before release: "The flaw in the State's analysis is that it focuses only on the purposes of the conditions and ignores the language that provides the context for setting these conditions: *release*."[62] Therefore, "the only reasonable interpretation of this language is that the conditions the court is authorized to impose [under a "conditions of release" statute] are conditions that govern the release of the defendant from custody."[63]

Second, the North Carolina court, when blaming defense counsel for being "deceptively simple" and for supposedly elevating form over substance, claimed that "we look to the entirety of an order when interpreting it and focus on the content, rather than the title, of the order."[64] But studying the entirety and the content of the order quickly exposes the flaw in the court's reasoning and actually forecloses its desired conclusion. That is, the Order's language dictates that bond conditions could not possibly apply *unless* the defendant is released.

For example, one bond condition (reproduced above) requires the defendant to appear for all court dates.[65] But putting the burden on the defendant to come to court is only possible when he is *not* in custody. If

60. *Id.*

61. *Id.* at 459. The case referred to Orders, plural, because there were two underlying cases and therefore two "conditions of release and release orders." However, this is irrelevant for our purposes, as both orders contained the same no-contact condition.

62. State v. Orlik, 595 N.W.2d 468, 473 (Wis. Ct. App. 1999) (emphasis added) (interpreting WIS. STAT. § 969.01(4), which discusses "conditions of release" while the case is pending). For comparison, *see* N.C. GEN. STAT. § 15A-534(a) discussing "conditions of pretrial release").

63. *Orlik*, 595 N.W.2d at 474 (citing WIS. STAT. §§ 969.01(4) and 969.03(1)(e) (2023) ("Considerations in Setting Conditions of Release" and "Release of Defendants Charged with Felonies")).

64. *Mitchell*, 817 S.E.2d at 459.

65. *Id.* at 456; *see also supra* text accompanying note 56.

he is in custody, he cannot just walk out of the jail and come to court; rather, the detaining facility must produce him. That is why a third part of the form, labeled "order of commitment," instructs "the detention facility" to produce jailed defendants for their court hearings.[66]

Likewise, the second bond condition (also reproduced earlier) prohibits "ANY CONTACT WITH [the complaining witness]."[67] In addition to the title of the Order, even the *text* of the Order calls this a "condition of release,"[68] and the consequence for violating it is "arrest[] without a warrant."[69] Even aside from the document's repeated description of the no-contact order as a "condition of release"[70]—a strong clue that it applies only upon release—the sanction of arrest cannot logically apply unless the defendant is released. As a Vermont court explained in a nearly identical situation, "the language of [the statute], which states that 'a warrant for [the defendant's] arrest will be issued immediately upon any such violation,' cannot be harmonized with the trial court's reasoning. The language makes sense only assuming the defendant is on release."[71] Simply put, police cannot possibly arrest, with or without a warrant, a defendant who is already in custody.

Third and finally, the North Carolina court, in claiming to read the Order in its "entirety," points to a section of the document labeled "Order of Commitment."[72] The court then concludes that this section transforms the substance of the Order from one governing "conditions of release" to one that "is a comprehensive order which includes both conditions of release and commitment."[73] Consequently, the court reasons, the conditions of release also apply when the defendant is in custody.[74]

But this misreads the Order. The section titled "Order of Commitment" is directed at the "Custodian of The Detention Facility" and orders them to produce the defendant for upcoming court hearings in the event the defendant could not post bail.[75] This section does not contain

66. *Form AOC-CR-200: Conditions of Release and Release Order*, *supra* note 53.

67. *Mitchell*, 817 S.E.2d at 460; *supra* note 57.

68. *Form AOC-CR-200: Conditions of Release and Release Order*, *supra* note 53.

69. *Mitchell*, 817 S.E.2d at 456.

70. *Form AOC-CR-200: Conditions of Release and Release Order*, *supra* note 53.

71. State v. Ashley, 632 A.2d 1368, 1371 (Vt. 1993), *superseded by statute*, 13 V.S.A. § 7554(a)(3), *as recognized in* State v. Travis, 978 A.2d 465 (Vt. 2003) (brackets around "the defendant's" in original.).

72. *Mitchell*, 817 S.E.2d at 459.

73. *Id*. at 460 (emphasis added).

74. *Id*.

75. *Form AOC-CR-200: Conditions of Release and Release Order*, *supra* note 53.

any "conditions of . . . commitment" whatsoever; rather, all conditions set forth in the document are conditions of release.[76]

In sum, contrary to the North Carolina court's assertions, defense counsel's straightforward reading of the plain language of the Order and its underlying statute were not "deceptively simple" and did not improperly elevate form over substance.[77] Rather, such a clear-headed reading was required for meaningful, substantive analysis. And an analysis of the "entirety" of the order, focusing on its "contents,"[78] compels the following inescapable conclusion: Conditions of release apply only when the defendant has been released from custody.

B. The "Getting Away With It" Theory

Another judicial theory used to justify imposing conditions of release on the incarcerated defendant is this: The defendant should not be allowed to get away with a crime just because they commit it while behind bars; instead, the defendant should be charged with jumping bail from inside the jail.

This superficially-appealing theory was used in a New Hampshire case, in which the defendant was in custody awaiting trial when he allegedly phoned his accuser and "exercise[ed] power and control over [his] victim even from inside a jail cell."[79] This included "manipulat[ing] his accuser so that she los[t] confidence or fear[ed] the consequences of following through" with the prosecution.[80] Because of this, the court reasoned, "the no-contact order should apply 'even before the defendant's release on bail.'"[81] More broadly: "As a policy matter . . . a defendant should not be allowed to avoid the consequences of his criminal conduct" just because he was behind bars at the time he committed the crime.[82]

It is not clear why the court thinks that a jailed defendant would get away with intimidating a witness *unless* the conditions of release applied

76. *Mitchell*, 817 S.E.2d at 460.

77. *Id.* at 459.

78. *Id.*

79. United States v. Potter, No. 3:20-mj-00061, 2020 WL 6081894, at *6 (D.V.I. Oct. 15, 2020) (quoting State v. Ayoub, No. 218-2017-CR-1636, 2018 WL 324996, at *5 (N.H. Super. Ct. Jan. 5, 2018)).

80. *Id.*

81. *Id.* (quoting State v. Ayoub, No. 218-2017-CR-1636, 2018 WL 324996, at *5 (N.H. Super. Jan. 5, 2018)).

82. *Id.* (quoting State v. Ayoub, No. 218-2017-CR-1636, 2018 WL 324996, at *5 (N.H. Super. Jan. 5, 2018)).

to him while he was in custody. But regardless of why the court thinks this, it is wrong.

First, there are already laws in place—laws that apply regardless of whether the defendant is in custody—that criminalize witness intimidation. As a Vermont court explained when deciding that conditions of release do *not* apply to jailed defendants, "the intent of [conditions of release] is to protect the public from defendants who have been released from custody."[83] Instead, other statutory laws are applicable, and witness tampering and similar conduct "is generally proscribed under 13 V.S.A. § 1701 (extortion and threats) as well as the obstruction-of-justice statute, 13 V.S.A. § 3015."[84] The court held that the prosecutor is free to charge the defendant, regardless of custody status, with *those* crimes; therefore, the in-custody defendant isn't getting away with anything.[85] There is no need to contort the conditions-of-release statute beyond recognition to criminalize what other statutes already criminalize.

Second, if the court's fear of the defendant getting away with something refers to the possibility of escaping conviction on the underlying crime for which he was originally incarcerated, that theory also fails. Continuing with the above example, the court is overlooking that the state records jail phone calls.[86] And if the defendant were to successfully intimidate a witness, not only would the defendant be charged with one or more of the obstruction-related crimes discussed above, but the state would also have a *stronger* case on the underlying crime.[87]

More specifically, even if the defendant convinced the witness to leave the jurisdiction, for example, the prosecutor would then have airtight, recorded evidence that the defendant forfeited his right of confrontation.[88] Because of the defendant's witness tampering, not only does the state have a second criminal case, but it would also be allowed to prosecute its original case by using only hearsay, i.e., the witness's original allegations

83. State v. Ashley, 632 A.2d 1368, 1371 (Vt. 1993), *superseded by statute*, 13 VT. STAT. ANN. tit. 13, § 7554(a)(3) (2024), *as recognized in* State v. Tavis, 978 A.2d 465 (Vt. 2009).

84. *Id.*

85. *Id.*

86. *See* Laura M. Cochran, Comment, *Whose Phone Line Is It Anyway: A Prosecutor's Guide to Navigating the Evidentiary Gold Mine of Prison Phone Calls*, 69 OKLA. L. REV. 735, 735 (2017) ("Prison phone calls offer a treasure trove of prospective evidence to be used in a criminal trial.").

87. *See id.* ("[offering] prosecutors a comprehensive guide—paired with simple examples and solutions—to introduce prison phone calls into evidence").

88. *See* Robert P. Mosteller, Giles v. California*: Avoiding Serious Damage to* Crawford*'s Limited Revolution*, 13 LEWIS & CLARK L. REV. 675, 678 (2009) (stating that a defendant forfeits the right to confront a witness at trial when they "engage[] in conduct designed to prevent the witness from testifying") (quoting Giles v. California, 554 U.S. 353, 359 (2008)).

to police or others.[89] Thanks to the defendant, the state would no longer have to produce the witness for in-court confrontation at trial but instead could rely on hearsay and the defendant's subsequent jail calls, which would explain the witness's absence and also demonstrate the defendant's consciousness of guilt.[90]

In sum, when applying conditions of release only to released defendants, as law and logic require, the in-custody defendants are not getting away with anything. Such defendants are still subject to criminal prosecution for their in-custody behavior that is criminal in nature, and those defendants would also forfeit their right of confrontation at their trial on the original, underlying case.

C. The Statutory Silence Theory

A third judicial theory in support of imposing conditions of release on the in-custody defendant is what I will call the statutory silence theory. This theory was on display in an Alaska case in which the judge "orally set conditions of bail" and then finalized those conditions in a written "bail order."[91] One of those conditions was to have no contact with the alleged victim.[92]

Alaska's statute on "[*r*]*elease* before trial" governed the judge's authority to "order a person charged with an offense to be *released . . . on the condition* that the person . . . obey all court orders" and general laws.[93] Further, one such order that a court may impose, and did impose in this case, is to "require the person to avoid all contact with a victim."[94] The subsequent turn of events is, by now, largely predictable: The defendant couldn't post bail, remained in custody, and contacted the alleged victim from jail; he had a preexisting relationship with the alleged victim, and he was not accused of improper influence or anything else improper.[95] The state then charged the defendant for violating the no-contact condition of release, and he was convicted.[96]

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89. *See Giles*, 554 U.S. at 359–60.

90. *See id.*

91. Hicks v. State, 377 P.3d 976, 977 (Alaska Ct. App. 2016).

92. *Id.*

93. ALASKA STAT. § 12.30.011 (2024) (emphasis added).

94. *Id.* at § 12.30.011(b)(8).

95. *Hicks*, 377 P.3d at 977. In this case, unlike other cases, there was no allegation that the defendant made any threats or otherwise intimidated the complaining witness. Rather, he made what would otherwise have been non-criminal phone calls but for the no-contact order.

96. *Id*. at 977–78.

On appeal, the majority decision conceded that "there [were] significant problems" with the conviction.[97] For example, the trial judge told the defendant only "that one of his *conditions of release if he posted bail* was to refrain from contacting the alleged victim."[98] The judge never told him that the release conditions applied even if he was not released; therefore, "it is doubtful that the judge's words gave [the defendant] reasonable notice that the prohibition took effect" before release.[99] Further, based on the record before the appellate court, it was not even clear "that it was the [trial] judge's *intention* to have this prohibition [on contact] take effect" before release.[100]

Despite those unsettling facts, which clouded the integrity of the conviction, the appellate court nonetheless upheld the conviction by deciding only the narrow legal issue that the defense elected to raise on appeal.[101] The court merely decided that a trial judge has the legal *authority* to apply conditions of release to defendants who have not been released.[102] The court's basis for its conclusion is this: "[T]here is no statute that either grants or denies Alaska courts the authority to impose no-contact orders on defendants in pretrial detention." Therefore, "courts retain their inherent authority to" do so.[103] A federal court has seized upon this reasoning as well.[104]

First, it is not clear why the appellate court would think that a statute titled "[*r*]*elease* before trial,"[105] which enumerates the mandatory and permissible conditions *of release* that the trial judge must or may impose, would address whether the judge may impose conditions of *custody*. It should be expected that a statute on conditions of release would be silent on conditions of custody. Further, under this statutory silence theory, the trial judge's "inherent authority" to protect witnesses would be virtually

97. *Id.* at 978.

98. *Id.* at 980 (Mannheimer, J., concurring) (emphasis added) (internal punctuation omitted).

99. *Id.* (Mannheimer, J., concurring).

100. *Id.* (Mannheimer, J., concurring).

101. *Id.* at 980 ("We emphasize that we are *not* deciding whether the arraigning judge's order *actually* prohibited Hicks from contacting N.A. while he was in jail . . . or whether Hicks received constitutionally adequate *notice* of the no-contact order, *as those questions are not before us*.") (emphasis added).

102. *Id.* at 978 ("Hicks's sole claim on appeal is that, as a general matter, Alaska courts have no authority to order a defendant in pretrial detention to refrain from contacting the alleged victim of the crime.").

103. *Id.* at 979.

104. *See* United States v. Potter, No. 3:20-mj-00061, 2020 WL 6081894, at *3 (D.V.I. Oct. 15, 2020) (citing *Hicks*, 377 P.3d at 979).

105. ALASKA STAT. § 12.30.011 (emphasis added).

limitless.[106] With such sweeping authority there would be little need for statutes—even and especially the statute authorizing judges to impose conditions of release.

Second, the absence of a statutory grant of authority is not a basis to conclude that judges have such authority. To the contrary, "the negative-implication canon" dictates that the opposite is true: "the expression of one thing implies the *exclusion* of others (expression [sic] unius est exclusion [sic] alterius)."[107] And that is just common sense, as "the principle that specification of the one implies exclusion of the other validly describes how people express themselves."[108]

Third, even putting aside the more troubling issues in this Alaska case—i.e., whether the defendant had notice that the condition applied, and whether the trial judge even intended that it apply, before release—this is a *criminal case*. And in criminal cases, the rule of lenity should bar the court's conclusion that the conditions-of-release statute applies to in-custody defendants.[109] Under the rule of lenity, "[a]ny reasonable doubt about the application of a penal law must be resolved in favor of liberty."[110]

Also, if a legislature wanted courts to have the authority to impose conditions on an in-custody defendant, it would say so. Some legislatures have said so. For example, a Wisconsin court decided that a conditions-of-release statute does not give judges the authority to impose conditions on incarcerated defendants; however, "another statute permits just that."[111] Similarly, in Vermont, because neither the conditions-of-release statute nor the vague concept of "inherent authority" gives judges the power to impose conditions on incarcerated defendants, the legislature enacted a statute granting courts the specific authority to do so.[112]

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106. *See* State v. Orlik, 595 N.W.2d 468, 473 (Wis. Ct. App. 1999) (rejecting the state's argument that "the court's authority to impose conditions to achieve these broader purposes [such as protecting witnesses] is entirely unrelated to the defendant's custodial status.").

107. Eliot T. Tracz, *Words and Their Meanings: The Role of Textualism in the Progressive Toolbox*, 45 SETON HALL LEGIS. J. 355, 375 (2021) (emphasis added) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012)).

108. *Id.*

109. *See generally* Maciej Hulicki & Melanie Reid, *The Rule of Lenity as a Disruptor*, 113 J. CRIM. L. & CRIMINOLOGY 803 (2023).

110. Wooden v. United States, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring).

111. *Orlik*, 595 N.W.2d at 475 (citing WIS. STAT. § 940.47 (2023), which is unrelated to the conditions-of-release statute).

112. *See* State v. Tavis, 978 A.2d 465, 467–68 (Vt. 2009) (discussing the applicability of no-contact orders to in-custody defendants under a recently amended statute, VT. STAT. ANN. tit. 13, § 7554(a)(3) (2024)).

Appellate courts are therefore wise to insist on a specific legislative grant of authority and to reject the vague, catchall inherent authority justification. "Because of their very potency, inherent powers must be exercised with restraint and discretion."[113] Therefore, "[a] court's inherent power is limited by the *necessity* giving rise to its exercise."[114] The *Hicks* court itself recognized this limitation, even as it asserted its common-law authority:

> This inherent judicial authority is not unlimited: it must be exercised in a manner that does not explicitly conflict with constitutional or statutory law, and that does not defeat the policies embodied in those laws. But unless the legislature removes or limits this common-law judicial power, courts may continue to exercise it.[115]

A conditions-of-release statute should therefore not be read to also convey the power to impose conditions of custody.[116] Those two types of statutes—conditions of release and conditions of custody—employ dramatically different standards. And the standard for imposing conditions of custody, like the standard for the use of inherent authority, hinges on actual *necessity*, not future risk.

This distinction is demonstrated with a federal example. "The Bail Reform Act's text only explicitly allows a court to enter a pretrial no-contact order in cases where the defendant *has been released*."[117] In cases where the defendant remains jailed, the court "might issue a pretrial no-contact order"—but it may only do so under a different statute.[118] And "as Judge Browning noted . . . the text of that statute constrains courts to issuing orders only when there are 'reasonable grounds to believe that harassment . . . exists.'"[119]

This high standard of necessity (for both the invocation of inherent powers and the imposition of statutory conditions of custody) stands in

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113. Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (citing Roadway Exp., Inc. v. Piper, 447 U.S. 752, 764 (1980)).

114. Degen v. United States, 517 U.S. 820, 829 (1996) (emphasis added).

115. Hicks v. State, 377 P.3d 976, 979 (Alaska Ct. App. 2016).

116. *Orlik*, 595 N.W.2d at 474–75.

117. United States v. Paquin, 676 F. Supp. 3d 970, 974 (D.N.M. 2021) (statutory citation omitted) (emphasis added).

118. *Id.* (citing 18 U.S.C. § 3142(c)(1)(v)).

119. *Id.* (citing United States v. Streett, 437 F. Supp. 3d 940, 947 (D.N.M. 2020)). Similarly, a state statute that authorizes conditions of custody requires "*substantial evidence* . . . that knowing and malicious prevention or dissuasion of any person who is a victim or who is a witness has occurred or is reasonably likely to occur." WIS. STAT. § 940.47 (2023) (emphasis added).

stark contrast to the weaker standard used to impose conditions of release. As we have seen, conditions of release may be imposed with minimal explanation or reason to believe that the conditions are necessary or even likely to fulfill the legitimate purposes of bail and bond.[120] Consequently, neither the concept of inherent authority nor a conditions-of-release statute justifies the imposition of conditions on an in-custody defendant.

D. The "Released While in Custody" Theory

Finally, some courts justify imposing conditions of release on in-custody defendants with a "released while in custody" theory. This theory has been embraced by Wisconsin courts, and it hinges on a legal fiction.

To begin, and to their credit, Wisconsin courts agree that in order to be subjected to conditions of release, the defendant has to be released.[121] Typically, then, if the judge imposes a cash bail and conditions of release, but the defendant cannot post the cash and doesn't sign the bond, the bond conditions cannot apply because the defendant hasn't been released.[122] Therefore, the defendant could not be charged with bail jumping. But this is where the legal fiction begins: the redefinition of the word "release."

Suppose a defendant is charged criminally in Case A, and the court imposes a low cash bail of $250.00. After the defendant posts the bail, the jailers present him with his bond sheet containing the non-monetary conditions of release,[123] one of which is a no-contact order with his roommate, a potential witness. The defendant eagerly signs the bond, but instead of being released, the jailers learn that something else—an unrelated commitment for unpaid parking tickets, a newly filed charge from the prosecutor in Case B for which another judge issued a warrant, or any number of other things—is holding him in custody.

Given this, instead of being released from custody, the defendant remains behind bars. While in jail, he calls his roommate—the person he would be prohibited from contacting upon release for Case A. The prosecutor learns of this phone call and charges and convicts the defendant for bail jumping for violating the no-contact bond condition of release in Case A. The defendant's position is simple: "the bail jumping conviction[] [was] invalid because he was still a prisoner in jail when he violated the

120. *See supra* note 40.

121. *See Orlik*, 595 N.W.2d at 475 (holding that conditions of release do not apply to defendants unless they are released).

122. *Id.*

123. *See Bail/Bond Form CR-203*, *supra* note 22.

no contact order."[124] In other words, the defendant did not violate the bond because he was never released.

In response to this defense argument, and to uphold the bail jumping conviction, the appellate court employs the following legal fiction. The court claims that the word "release," does not necessarily mean "physical release from custodial confinement."[125] Rather, the defendant was "released," says the court, when he signed his bond, thus agreeing to the non-monetary bond conditions of release that were set forth therein.[126]

To justify this redefinition of "release," the court begins by conceding that the bond statute does not define the word and, further, that "it is fair to say that the common meaning of the word contemplates physical release from custody."[127] That concession should be important, of course, because "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."[128]

However, the court goes on to claim that this bedrock canon of statutory construction should be trumped by a hypothetical scenario which, while not applicable to the facts of the case before it, is nonetheless a possibility provided for by statute: A judge could, if they wished, "impose a condition [of release] that the defendant return to custody after specified hours."[129]

In *State v. Dewitt* the court claimed that, in such a scenario where the defendant is released for part of each day, "it would be absurd[130] to conclude that conditions of release would then apply when the defendant was outside the jail, but be 'turned off' upon return to custody."[131] Therefore, the court held, once a defendant signs the bond, the conditions

124. State v. Dewitt, 758 N.W.2d 201, 203 (Wis. Ct. App. 2008).

125. *Id.* at 204.

126. *Id.* at 205. In so holding, the appellate court confuses the defendant's acceptance of the bond terms (by signing the bond) with the trial court's duty under the bond agreement to release the defendant after they sign the bond. These are very odd and unlikely things to confuse. In any event, the concept of bond as contract is developed more fully in Section IV.

127. *Id.* at 204.

128. Smith v. United States, 508 U.S. 223, 228 (1993) (citing Perrin v. United States, 444 U.S. 37, 42 (1979)).

129. *Dewitt*, 758 N.W.2d at 204 (citing the bond statute, WIS. STAT. § 969.02(3)(d) (2023)).

130. There is a recognized legal principle called the absurdity doctrine. *See* Michael D. Cicchini, *The New Absurdity Doctrine*, 125 PENN. ST. L. REV. 353, 356–61 (2021). Unfortunately, it is almost impossible for defendants to prove that the application of a law is absurd, even when it obviously is, yet prosecutors and courts invoke that word incredibly loosely and liberally, finding even the most reasonable things to be "absurd"—provided that doing so benefits the government. *See generally id.* (discussing and remaking the absurdity doctrine).

131. *Dewitt*, 758 N.W.2d at 204.

are in effect all of the time, even in cases where he is never released from custody at all.[132]

But such a scenario of alternating custody and release was not a part of the bond conditions in Dewitt's case, so the court's application of it to the question in *Dewitt* is inapt. That a court can make periodic confinement a condition of release doesn't change the meaning of "release." It still means actual, physical freedom from custody. In the situation contemplated by the *Dewitt* court, a condition *of release* would be to come back into custody at designated times. Such a condition is impossible without actual, physical release; how could a defendant return to custody if the defendant hasn't been released? The statutory provision in fact proves the opposite of what the Wisconsin court thought it did. Conditions of release—including periodic return to custody—only make sense when actual, physical release from custody is granted.

Further, even under the appellate court's hypothetical scenario, it is not clear why the court would think that it is "absurd" for "conditions of release" to apply when the defendant is physically released but not upon the return to custody after a specified hour.[133] Considering the no-contact order, why would it be "absurd" for that condition to apply when the defendant is out of custody, but not when he is back in custody after specified hours? When he is *in* custody, all such calls and letters constituting contact would be recorded or monitored by the government,[134] so there is no need to prohibit such contact. It is perfectly reasonable to allow contact under those circumstances, but not during the hours of release—the time at which any such contact would be completely unrecorded and unmonitored. Far from meeting the standard of absurdity, it would actually be quite reasonable.

And not only would it be reasonable, but that is the entire justification for the no-contact order to begin with. As the New Mexico courts have explained, it would actually be "absurd" to hold otherwise: "It would not only be inconsistent but absurd to impose 'conditions of release' on a defendant remanded to custody" as "[t]he whole purpose for 'conditions of release' is to place limitations on a person *not* in custody."[135] Consequently, "[i]nasmuch as [a] defendant was in custody at all pertinent times, the conditions of release are not applicable."[136]

132. *Id.*
133. *Id.*
134. *See supra* Section III.B.
135. State v. Flores, 653 P.2d 875, 877 (N.M. 1982) (emphasis added).
136. State v. Romero, 687 P.2d 96, 100 (N.M. Ct. App. 1984) (emphasis added).

Yet, despite the absurdity—to use the language of the New Mexico Supreme Court—of the Wisconsin court's redefinition of "release" in order to bypass clear statutory language and sound underlying policy, the court has (quite inadvertently) stumbled upon something else important when it discusses the defendant's signing the bond sheet. A written, signed agreement, wherein the court promises to release the defendant in exchange for the defendant's promise to do or refrain from doing certain things while released, has the familiar scent of contract law.

IV. CRIMINAL LAW MEETS CONTRACT LAW (AGAIN)

A contract is a "set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[137] Even more simply, a contract is "a legally enforceable agreement."[138]

Contract law plays an integral role in criminal law and procedure. For example, it is well settled that "[a] *plea bargain* is a contract, the terms of which necessarily must be interpreted in light of the parties' reasonable expectations."[139] That is, a plea bargain is a "set of promises."[140] The defendant typically agrees to plead to one or more charges in exchange for the prosecutor's agreement to dismiss the remaining charges, to recommend a particular sentence, or both.[141] And this set of promises is "legally enforceable."[142] Therefore, when disputes over plea bargains arise, the court will apply "contract-law principles to determine a criminal defendant's rights thereunder."[143] These principles include offer and acceptance, breach, detrimental reliance, consideration, performance, good faith, defenses, damages, remedies, and others.[144]

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137. JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 1.1 (5th ed. 2003) (quoting 1 WILLISTON ON CONTRACTS § 1.1 (4th ed. 1990)).

138. *Id.*

139. United States v. Fields, 766 F.2d 1161, 1168 (7th Cir. 1985) (emphasis added) (quoting United States v. Mooney, 654 F.2d 482, 486 (7th Cir. 1981)); *see also* United States v. Ballis, 28 F.3d 1399, 1409 (5th Cir. 1994) ("Plea bargain agreements are contractual in nature, and are to be construed accordingly."); United States v. Hembree, 754 F.2d 314, 317 (10th Cir. 1985) (holding that the parties' plea agreement "was simply a contract"). For a landmark law review article on the subject, *see* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

140. PERILLO, *supra* note 137, at § 1.1.

141. *See, e.g.*, People v. Killebrew, 330 N.W.2d 834, 836 (Mich. 1982) (discussing "charge bargaining" and "sentence bargaining").

142. PERILLO, *supra* note 137, at § 1.1.

143. State v. Scott, 602 N.W.2d 296, 301 (Wis. Ct. App. 1999).

144. *See generally* Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159 (2008) (discussing numerous contract-

But plea bargaining isn't the only area of criminal law that is impacted, or even governed, by contract law.[145] Another such area is the law governing the release of a defendant on bond while their case is pending. The fundamental difference between a plea bargain and a bond agreement is that, instead of having a contract between the defendant and the prosecutor as is the case with a plea bargain,[146] criminal bond is a contract between the defendant and the court.

As one court explained, "bond is essentially a contract between a defendant and a circuit court that 'binds' the defendant 'to comply with such conditions as are set forth' in the agreement."[147] This characterization of criminal bond as contract is not controversial. Another way of conveying this legal principle is that "[a] bail bond is a written contract running to the state from the accused as principal with his bail as surety."[148] And the defendant is bound to follow the bond's conditions because they get something in return—a "consideration." In contract terms, the "consideration" for the formation of the bond contract "is the release of the [accused] from custody."[149]

More specifically, then, criminal bond is a "set of promises" that is a "legally enforceable agreement."[150] The court promises to release the defendant from custody while the case is pending, and the defendant promises to do or not do certain things when released—such as, for

law principles applied to plea bargains).

145. *See, e.g.*, Roni Rosenberg, *The Contract: Between Contract Law and Criminal Jurisprudence*, 26 ST. THOMAS L. REV. 444 (2014) (discussing the interaction between criminal law and contract law in charges involving a criminal omission).

146. This is the majority view. *See, e.g.*, CHRISTINE M. WISEMAN & MICHAEL TOBIN, 9 WIS. PRAC., CRIM. PRAC. & PROC. § 23.12 (2d ed. 2024) ("The trial judge may be neither a party to a plea agreement nor a part of the plea-negotiation process."). However, a minority view is that the court is also a party to the plea bargain. *See, e.g.*, Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 884–85 (2004) (arguing that the judge "accepts" a plea offer made jointly by the prosecutor and the defendant).

147. State v. Jacobs, 997 N.W.2d 130, 139 (citing WIS. STAT. § 967.02(1h) (2023), which defines "bond" in contract terms, i.e., "an undertaking either secured or unsecured entered into by a person in custody by which the person binds himself or herself to comply with such conditions as are set forth therein"); *see also* State v. Braun, 301 N.W.2d 180, 183 (Wis. 1981) ("The State asks that, as with other contracts, we enforce the intent of the parties as expressed by the plain meaning of the terms of the bond.").

148. James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases*, 6 FORDHAM L. REV. 387, 387 (1937). Sometimes, bond-related disputes may involve a third party: a bail bondsman. *See, e.g.*, Nunley v. Farrar, No. M2020-00519-COA-R3-CV, 2021 WL 1811750, at *3–5 (Tenn. Ct. App. May 6, 2021) (discussing "general contract law principles," including the "impossibility" defense, in the context of a legal dispute between a criminal defendant and a criminal bail bondsman).

149. Hayes, *supra* note 148, at 387 (citing Ewing v. United States, 240 F. 241, 247 (6th Cir. 1917)).

150. PERILLO, *supra* note 137, § 1.1.

example, to appear for all court hearings, to refrain from consuming alcohol, or to refrain from contacting the complaining witness, among other conditions.[151]

But can a criminal bond, wherein the defendant promises to follow conditions of release in exchange for being released, apply when the defendant is *not* released? Just as contract-law principles are used to resolve plea bargain disputes, such principles must also be applied to resolve this bond contract dispute. And as the sections below demonstrate, four contract-law principles dictate that a criminal bond and its conditions of release apply *only* when the defendant is physically released.

A. No Mutual Assent or Acceptance

Consider, once again, the common scenario discussed earlier in which the defendant is charged with an underlying crime. The court imposes a cash bail and several non-monetary "conditions of bail release," including a condition to "have no direct or indirect contact" with the complaining witness.[152] The defendant is unable to post the bail and *never signs the bond*; he therefore remains in custody.[153] While in jail, he contacts the complaining witness, but there is no allegation of any threats or intimidation.[154] Despite that, the prosecutor charges the defendant with bail jumping for violating the no-contact condition of release.[155]

Under this scenario, contract law dictates that there was no meeting of the minds and certainly no acceptance by the defendant, and therefore a contract was never even formed in the first place. "[A]n essential prerequisite to the formation of a contract is an agreement: a mutual manifestation of assent to the same terms."[156] And in this case, there is nothing in the language "condition of bail [or bond] release" to indicate that the judge, let alone the defendant, intended to create a condition of confinement as a term of the contract. As the Alaska court stated when discussing this identical situation, regardless of whether the judge had the

151. *See supra* Section II.B.; *see also* State v. Ayala, 610 A.2d 1162, 1169 (Conn. 1992) (discussing the statute that "enumerates possible sanctions for violation of a condition of release or the commission of a crime while on release, ranging from the imposition of different or additional conditions of release *to the revocation of release*") (emphasis added).

152. Hicks v. State, 377 P.3d 976, 977 (Alaska Ct. App. 2016) (internal quotations omitted).

153. *Id.* ("Hicks was never released on bail.").

154. *Id.* ("Hicks called [the complaining witness] four times from jail, leaving messages on her voice mail.").

155. *Id.* ("[T]he State charged Hicks with four counts of first-degree unlawful contact.").

156. PERILLO, *supra* note 137, § 2.1.

authority to impose a condition of confinement, there is no reason to believe that is what the judge *intended* when dictating conditions of release.[157]

And even if, contrary to the above language, the judge *had* intended to create a condition of confinement, "mutual assent is established by a process of offer and acceptance."[158] Generally, as is the situation here, there must be "a communicated acceptance."[159] And the defendant's method of communicating acceptance of a bond contract is quite clear: the defendant must *sign the bond*.

For example, after spelling out the conditions of release, the North Carolina bond form states that "I, the undersigned, promise to appear at all hearings, trials or otherwise as the Court may require and to abide by any restrictions set out above." It then has a place for the "[s]ignature of [d]efendant."[160] Similarly, after listing the conditions of release, the Wisconsin bond form states: "I have received a copy of this bail/bond and agree to its terms." It then has a place for the "defendant's signature."[161]

When the defendant does not accept, i.e., does not sign the bond, there is no mutual assent, regardless of what the judge (who dictated the terms of the bond) might have intended. Without mutual assent, there is no contract. And without a contract, the defendant is not bound by the terms set forth in the unsigned bond sheet. Contract law therefore mandates that the defendant cannot be convicted of, or even charged with, bail jumping for contacting the complaining witness from jail under these circumstances.

B. Failure of a Condition Precedent

In some situations, there arguably *is* a meeting of the minds and an acceptance by the defendant. For example, consider a slight variation from the scenario presented in the previous subsection. Assume the defendant is charged with a crime, but this time the court imposes a signature bond, or a low cash bail which the defendant posts. The court also imposes (once again) a "condition of bail [or bond] release" that the defendant "have no

157. *Hicks*, 377 P.3d at 980 (Mannheimer, J., concurring). Recall that the Alaska court decided the matter on much narrower grounds, i.e., whether the court had *the authority* to impose conditions of release on the in-custody defendant, as the defense never raised the more powerful arguments. *See id.* at 980.

158. PERILLO, *supra* note 137, at § 2.1 (emphasis added).

159. *Id.* at § 2.18.

160. *Form AOC-CR-200: Conditions of Release and Release Order*, *supra* note 53.

161. *Bail/Bond Form CR-203*, *supra* note 22.

direct or indirect contact" with the complaining witness.[162] But in this modified scenario, the defendant actually *signs the bond sheet*, thereby agreeing to its terms.

After the defendant signs the bond, however, assume the jailers do *not* release him from custody. This may be due to any number of things, such as an unrelated arrest warrant, an unrelated commitment for which several days remain to be served, or another pending case with a high cash bail which the defendant is unable to post. Regardless of the reason, assume that, while the defendant remains in jail, he contacts the complaining witness (e.g., because he had a preexisting and possibly even familial relationship with the witness). Once again, there is no allegation of any intimidation, yet the prosecutor charges the defendant with bail jumping for violating the no-contact condition of release while behind bars.

In this scenario, despite signing the bond and promising to follow its conditions, the defendant should be released from that obligation and, therefore, should not be charged with bail jumping. This is due to the failure of a condition precedent. "A condition precedent is an act or event . . . which must either exist or occur *before a duty to perform a promise arises*."[163] The failure of a condition precedent could mean that no contract was ever formed to begin with or, even if it was formed, the defendant's performance under the contract is excused.[164]

1. Condition Precedent to Contract Formation

With regard to a condition precedent to the formation of a contract, "the contract itself does not arise *unless and until the condition occurs*. This means that each party is free to retreat from the transaction until the condition occurs and a contract is formed."[165]

For example, in a well-known New York business case the parties entered into, and even signed, a merger contract.[166] When the defendant never transferred corporate stock, as required by the contract, the plaintiff sued.[167] The defendant asserted, and the court agreed, that the signed merger contract never took effect because of the failure of a condition

162. *Hicks*, 377 P.3d at 977.

163. PERILLO, *supra* note 137, at § 11.5 (emphasis added) (citing Internatio-Rotterdam v. River Brand Rice Mills, 259 F.2d 137 (2d Cir. 1958)).

164. *Id.*

165. *Id.* (emphasis added).

166. Hicks v. Bush, 180 N.E.2d 425, 426 (N.Y. 1962).

167. *Id.*

precedent: Though not expressly stated in writing, the parties' contract was premised on first raising $672,500 for the "successful operation of the proposed merger."[168] In other words, "the writing was not to become operative as a binding contract until the specified equity expansion funds were obtained."[169] And because the parties could not obtain the funds—i.e., the "condition precedent" failed to occur—"no operative or binding contract ever came into existence."[170]

Similarly, when the judge dictates conditions of release and the defendant signs the bond, the parties have premised their contract on the defendant's release, which is a condition precedent to the contract coming into existence. (Release cannot happen, of course, until the unrelated warrant is cancelled, the unrelated commitment is satisfied, or the unrelated bail is posted.) Just as the parties to the merger contract could not carry out a successful merger without first obtaining the necessary funds, neither can the court and the defendant carry out their agreement for the defendant's conditional release unless and until the defendant is released from custody.

To ignore the condition precedent in either situation would be absurd. In the merger case, it would be absurd for the parties to merge corporations when the venture is doomed to fail before it begins due to insufficient pre-merger funding. Likewise, as one court has already explained with regard to bond contracts, "[i]t would not only be inconsistent but absurd to impose 'conditions of release' on a defendant remanded to custody" as "[t]he whole purpose for 'conditions of release' is to place limitations on a person *not* in custody."[171]

2. Condition Precedent to Contract Performance

On the other hand, even if a valid contract *did* come into existence when the defendant signed the bond, the failure of a condition precedent (i.e., release from custody) to the *performance* of the contract means that the defendant is discharged from their obligation to follow the conditions of release.

This concept is illustrated with another business-related scenario. "[A]ssume A promised to paint B's house and B promised to supply the

168. *Id.*; *see also* PERILLO, *supra* note 137, at § 11.5 (discussing "express conditions," "constructive conditions," and "conditions implied in law").

169. *Bush*, 180 N.E.2d at 426.

170. *Id.* at 428 (emphasis added).

171. State v. Flores, 653 P.2d 875, 877 (N.M. 1982).

paint. By the terms of the contract, A cannot perform without B supplying the paint. Thus, supplying the paint is an implied in fact condition [precedent] to A's duty to paint."[172] And if B fails to provide the paint, then A is not obligated to paint. There might be excellent reasons for B failing to supply the paint—perhaps the retailer's store burned down or perhaps the manufacturer stopped producing the agreed-upon paint color. Regardless, from A's perspective, "[t]he nonoccurrence of that condition [B supplying the paint] entitled [A] to rescind or to treat its contractual obligations as discharged."[173]

Similarly, when the court dictates conditions of release and the defendant signs the bond, the defendant is not required to comply with its conditions unless and until the defendant is released. That is, release is a condition precedent to the defendant's obligation to comply with the conditions of release. Just as with the paint example, there might be excellent reasons why the defendant is not released—e.g., there could be unrelated warrants, commitments, or bail obligations. Nonetheless, from the defendant's perspective, the nonoccurrence of that condition precedent, i.e., release, entitles the defendant to "rescind or to treat [their] contractual obligations as discharged."[174]

Once again, to think otherwise in either situation would be absurd. In the painting case, it would be absurd to hold the painter liable for damages when the homeowner failed (even if for good reason) to deliver the promised paint; and in the bond situation, it would be absurd to charge the defendant with bail jumping for violating conditions of release when the court (even if for good reason) was unable to effectuate the defendant's release.

C. Illusory Consideration

Returning to the example in the previous subsection—in which the defendant *signed* the bond but then was not released due to an outstanding but unrelated warrant, commitment, or cash bail obligation—there is also a lack of consideration. As a result, the defendant is not obligated to follow the conditions of a release.

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172. PERILLO, *supra* note 137, § 11.13. This simple example seems to be based on the more complex fact pattern in Internatio-Rotterdam v. River Brand Rice Mills, 259 F.2d 137 (2d Cir. 1958), in which the plaintiff-buyer failed to provide adequate and timely shipping instruction to the defendant-seller, which was a condition precedent to the defendant's performance.

173. *Internatio-Rotterdam*, 259 F.2d at 140.

174. *Id.*

"Consideration is the glue that binds the parties to a contract together."[175] Without it, there is only an unenforceable one-way promise.[176] While consideration need not be equal, it must be real; that is, it cannot be illusory.[177] If the consideration *is* illusory, then it is invalid and there is no binding contract.[178]

As discussed earlier, plea bargaining is another area that is governed by contract law. And the concept of illusory consideration is nicely illustrated by a Pennsylvania case in which the defendant agreed to plead guilty in exchange for the prosecutor's recommendation of county jail time.[179] Despite the plea deal, the judge disregarded the agreed-upon sentence and actually imposed "four to eight years" in prison.[180] But when the defendant entered into that plea deal, he was *not* bargaining for the prosecutor merely to utter that he "recommend[s] a county sentence."[181] Rather, "the truth is that most defendants rely on the prosecutor's ability to secure the sentence" that was bargained for.[182] The prosecutor's mere lip service, without substantively delivering on the promise, has no value. Therefore, because the court failed to impose the agreed-upon sentence, "the Commonwealth's side of the bargain is mostly an *illusory promise*."[183] And because contracts based on illusory consideration cannot be enforced, the defendant was permitted to rescind the contract, i.e., withdraw his plea.[184]

Likewise, in a bond contract case, the defendant is not merely bargaining for the judge to utter these words: "promise to follow these conditions of release and you shall be released." Instead, the defendant is bargaining for the judge's ability to secure the defendant's actual, physical release. After all, "it is fair to say that the common meaning of the word

175. *In re* Owen, 303 S.E.2d 351, 353 (N.C. Ct. App. 1983).

176. *See* PERILLO, *supra* note 137, at § 4.2 (discussing the elements of legally valid consideration). In the bond situation, other methods of enforcing promises, such as promissory estoppel and detrimental reliance, for example, are unlikely to apply.

177. *See id.* § 4.12(b)(4) (discussing illusory consideration in commercial contracts).

178. *See id.*

179. Commonwealth v. White, 787 A.2d 1088, 1090–91 (Pa. Super. Ct. 2001).

180. *Id.* at 1090 (parenthetical numerals omitted).

181. *Id.* at 1089.

182. People v. Killebrew, 330 N.W.2d 834, 842 (Mich. 1982).

183. *White*, 787 A.2d at 1093 (emphasis added).

184. *Id.* at 1094. This is the majority view, but some states do permit judges to sandbag defendants on their sentence, without recourse for the defendant, under the theory that the defendant got what they bargained for—the prosecutor's recommendation—even when the judge jumps the plea deal. *See* Michael D. Cicchini, *Deal Jumpers*, 2021 U. ILL. L. REV. 1325, 1353–54 (2021).

["release"] contemplates *physical release from custody*."[185] If the defendant is not actually released, it renders the consideration illusory—even if, as in the above example, the failure to receive such consideration is not the fault of the other contracting party (i.e., the prosecutor in the plea bargain contract or the judge in the bond contract).

And this leads into another aspect of consideration: "Mutual promises for the future performance of acts by the parties may constitute consideration for each other *if the promises are capable of being performed*."[186] Conversely, when a promise cannot be performed, then the consideration is illusory and there is no binding contract.

Once again, the plea-bargaining context provides a useful example. Suppose a defendant agrees to plead guilty to a felony charge in exchange for several concessions, including a "reopen-and-amend provision in the plea agreement" which would reduce his felony to a misdemeanor upon successfully completing probation.[187] However, unbeknownst to the defendant, the lawyers, and the judge, such a provision is not legally enforceable.[188] Consequently, the prosecutor's promise to reopen and amend is illusory and, therefore, the defendant is allowed to rescind the plea bargain.[189] In *State v. Dawson*, the Wisconsin Court of Appeals explained: "Because he relied on the possibility of ultimately avoiding a felony conviction when entering his plea, *a possibility that did not, in fact, exist*," the defendant was released from his obligations under the plea deal and was allowed to withdraw his plea.[190]

Similarly, when the court and the defendant enter into a bond contract, the consideration is an exchange of promises: the court's promise to release the defendant from physical custody in exchange for the defendant's promise to abide by certain bond conditions of release. However, when the anticipated physical release from custody is "a possibility that did not, in fact, exist"[191]—due to an unrelated warrant, commitment, or cash bail in another case, for example[192]—then the bond agreement lacks consideration. The defendant must be permitted to rescind, or withdraw from, the bond contract. The defendant therefore is

185. State v. Dewitt, 758 N.W.2d 201, 204 (Wis. Ct. App. 2008) (emphasis added) (holding, despite the plain and ordinary meaning of "release," that a defendant is legally "released" by merely signing the bond sheet).

186. WIS. J.I. CIV. 3020 (1993) (emphasis added).

187. State v. Dawson, 688 N.W.2d 12, 14 (Wis. Ct. App. 2004).

188. *Id.*

189. *Id.* at 16.

190. *Id.* (emphasis added).

191. *Id.*

192. *See supra* Section III.D.

not bound to follow the bond conditions, and the state may not charge bail jumping for violating conditions of release while in custody.

D. Frustration of Purpose

Yet another contract-law principle, frustration of purpose, would prevent the state from charging the defendant with jumping bail while in jail. Recall the example from the previous subsection, in which the defendant signed the bond but then could not be released due to a preexisting warrant, commitment, or cash bail in a different case. Assume those same facts except that, after signing the bond, the defendant *is* released—only to be re-incarcerated later due to a *subsequent* warrant, commitment, or cash bail in a different case. In such a situation, the defendant should also be discharged from the bond contract and its conditions of release due to the frustration of the purpose doctrine. The business context provides an illustrative example:

> [I]f A agreed to supply B with a number of barges to carry a finished product from B's plant and B promises to pay a fixed sum per barge, and A was unable to supply the barges, A would attempt to use the defense of [impossibility or] impracticability. *If B had no product to ship, B would attempt to use the frustration doctrine. . . . [I]t is still perfectly possible for B to pay. The problem is that B is getting nothing for the money*.[193]

Likewise, in the case of the bond contract, it is still *possible* for the defendant to follow the conditions of release after he is returned to custody. But "[t]he problem is that [the defendant] is getting nothing" in return.[194] The purpose of entering into the bond contract in the first place has been frustrated.

This is very similar to the consideration problem discussed in the previous subsection, in which the "consideration" the court promised, but could not deliver, was "the release of the [accused] from custody."[195] In both cases—the illusory consideration scenario and the frustration of purpose scenario—the defendant gets nothing of value.

The elements of a frustration of purpose defense are these. First, "[t]he object of one of the parties in entering into the contract must be

193. PERILLO, *supra* note 137, at § 13.12 (emphasis added).

194. *Id.*

195. *See* Hayes, *supra* note 148, at 387 (quoting Ewing v. United States, 240 F. 241, 247 (6th Cir. 1917)).

frustrated."[196] Here, the only reason the defendant signed the bond was to be released, yet he is in custody. Second, "[t]he attainment of this object [(release from custody)] was a basic assumption common to both parties."[197] Here, the court was fully aware that the defendant was signing the bond to gain his release; the bond's terms are even called "conditions of release." Third, "[t]he frustration must be total or nearly total."[198] Here, the defendant did not bargain for and receive something else of value other than the contemplated release.

As a practical matter, the primary difference between illusory consideration and frustration of purpose is the timing of the thing that renders the consideration illusory or frustrates the defendant's purpose. With frustration of purpose, the warrant, commitment, or high cash bail in the case that is preventing the defendant's release normally has to be "supervening," i.e., it must have occurred after the bond contract was formed.[199] Arguably, however, the mere subsequent realization of that event, even if the event itself predated the bond contract, might also qualify as supervening.[200]

In any case, when the defendant signs the bond and agrees to follow its conditions of release, but then is either not released or re-incarcerated, the agreement becomes a grossly one-sided contract that completely lacks any form of consideration and frustrates the defendant's purpose for entering into the contract in the first place. To require the defendant to follow the bond's conditions of release when not released is a prime example of what the frustration of purpose doctrine is designed to prevent.

E. Nuances and Other Doctrines

The above factual scenarios will likely cover nearly all real-life situations, but nuances may arise. For example, in most situations, when a defendant signs the bond in Case A but cannot be released due to a warrant, commitment, or high cash bail in Case B, it would be nonsensical to say that the defendant is "released in Case A" and therefore received the

196. PERILLO, *supra* note 137, at § 13.12.

197. *Id.*

198. *Id.*

199. *Id.*

200. *See, e.g.*, Everett Plywood v. United States, 651 F.2d 723, 729–30 (Fed. Cl. 1981) (discussing situations where the supervening event could arguably be the subsequent "knowledge or realization" of the underlying event, even though the underlying event occurred or existed before the contract formation, provided that the event was not "within the contemplation and intentions of the parties" and the "risk of the occurrence of the event" was not allocated to one of the parties).

benefit for which he bargained. He is not released. He remains in custody. The far more accurate way to describe such a state of affairs is that the defendant is in custody, but "isn't being held on Case A." The consideration promised to the defendant for signing the bond in Case A—the promise of actual, physical release from custody—is illusory.[201]

However, in rare cases, a defendant may sign the bond in Case A and not gain his freedom in the classic sense but still see value in being released to the custody of a different county or state. For example, if the defendant signs a bond in Case A, which is in County A or State A, and has other, outstanding cases in County B or State B, then release in Case A may still have value and therefore be legally valid consideration, provided that law enforcement in County B or State B actually picks up and transports the defendant to appear in those courts. Being physically transported out of County A or State A would enable the defendant to resolve those other, out-of-county or out-of-state cases in a timely manner, something he wouldn't have been able to do if he did not sign the bond in Case A.

This situation would not be common, but it is one of the factual nuances that could arise. Contract law is ideally suited to deal with these nuances, as the theories and philosophies which underpin contract law allow its doctrines to be applied in a rational way to any set of facts.

In addition to different factual scenarios, additional legal doctrines can also come into play. The deeper one dives into contract law, the greater number of doctrines that become potentially applicable. These include, for example, the doctrines of mistake (i.e., the judge, the defendant, or both are unaware that the defendant does not qualify for release),[202] impossibility (i.e., when other impediments make release impossible),[203] and illegality (i.e., when releasing the defendant pursuant to the bond

201. In *State v. Dewitt*, 758 N.W.2d 201 (Wis. Ct. App. 2008), the court held that merely signing the bond constituted release, even though the defendant could not be "physically released." *Id.* at 205. This completely ignores the defendant's purpose in signing the bond, which was of course frustrated, and it even misapplies the concept of consideration. The defendant's signing of the bond does not constitute his release from custody; rather, his release from custody is what he bargained for, and was entitled to, when he signed the bond.

202. *See* PERILLO, *supra* note 137, at §§ 9.25–29 (discussing numerous mistake doctrines, including unilateral and mutual mistake, among others). The failure to qualify for release could be due to an unrelated arrest warrant, for example.

203. *Id.* at § 13.1 (discussing impossibility and the more relaxed, modern day version of the doctrine called "impracticability"). When it is impossible for the court to physically release the defendant, this would also serve to excuse the defendant's performance under the contract due to the court's "prospective failure of performance." *Id.* § 13.3. Release may be impossible due to an unrelated commitment that has yet to be served, for example.

contract would be illegal due to other impediments).[204]

These doctrines share tremendous overlap with the previously discussed doctrines—just as, for example, the doctrines of illusory consideration and frustration of purpose, both of which were discussed earlier, share a tremendous amount of common ground.[205] Nonetheless, the applicability of contract law to criminal bond scenarios is not necessarily limited to the contract law principles that are specifically discussed in this Article.

Also, criminal courts should hold themselves "to something stricter than the morals of the market place"[206] when applying contract law principles to bond conditions, for the stakes are much higher than those in the commercial setting. The valuable consideration involved is of incomparable value: it is a person's liberty.

V. STRATEGIES FOR THE DEFENSE

How can defense counsel advise the in-custody defendant in order to minimize the risk of being charged with bail jumping while behind bars? And if the in-custody defendant is charged, which strategies can defense counsel use to defend against bail jumping? The following two subsections provide potential strategies, both preventative and responsive. (Formulating actual, effective strategies will, of course, require a full understanding of the facts of a given case and the applicable, state-specific laws.)

A. An Ounce of Prevention

First, as a preventative measure, defense counsel should consider advising the in-custody defendant to follow all conditions of release even if they are never released. Such advice seems necessary in states that automatically impose conditions of release on in-custody defendants. Without the lawyer's warning, how would even a literate and rational defendant have any way of knowing that their conditions of release would apply before (and even without) release?[207]

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204. *Id.* at §§ 13.5 (discussing supervening illegality) and 22.1 (discussing existing illegality at the time of the contract formation). Illegality could arise, for example, when the jailer receives notice of unrelated probation and parole warrants for the defendant.

205. *See supra* Sections IV.C and IV.D.

206. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, C.J., writing for the majority).

207. *See* Hicks v. State, 377 P.3d 976, 980 (Alaska Ct. App. 2016) (Mannheimer, J., concurring)

Even in states in which conditions of release apply only *after* release, the advice to follow such conditions, regardless of custody status, could still be good advice. For example, advising the defendant not to contact the complaining witness, even without legal consequences, provides the state with less evidence (e.g., recorded jail calls) to use against the defendant at the subsequent trial.[208] Further, not contacting the complaining witness prevents the state from creatively interpreting the defendant's words as a form of witness tampering or intimidation.[209] An ounce of prevention is indeed worth a pound of cure.

Second, defense counsel may wish to advise the defendant not to sign the bond sheet unless and until the defendant knows that they are otherwise eligible for physical release. In addition to the scenarios discussed previously, if, for example, the defendant cannot be released due to a probation or parole hold in a preexisting case, or because they are unable to post the high cash bail in the pending case, there likely will be no benefit to signing the bond.

As one court held when affirming an in-custody defendant's bail jumping conviction for violating a condition of release, the defendant "was not obligated to sign the bond, especially if he knew he would not be" released from custody due to other impediments.[210] But because he *did* sign the bond, even though he was not "physically released," he was subjected to its conditions and to the bail jumping charge.[211] In that case, the mere stroke of the defendant's pen landed him in a quagmire that could have been easily avoided.

Third, in the event the defendant signed the bond but later realizes that they cannot actually be released from custody due to an unrelated reason, defense counsel may wish to rescind or cancel the bond contract on the client's behalf. Such cancellation might have to be in writing and include the defendant's name and case number, with defense counsel filing it with the court and serving a copy on the prosecutor and the detaining facility.[212]

("The arraigning judge told Hicks that one of his conditions of release (if he posted bail) was to refrain from contacting the alleged victim. . . . [I]t is doubtful that the judge's words gave Hicks reasonable notice that the prohibition took effect immediately [while Hicks was still in custody.]").

208. *See* Cochran, *supra* note 86, at 735 ("Prison phone calls offer a treasure trove of prospective evidence to be used in a criminal trial.").

209. *See* State v. Ashley, 632 A.2d 1368, 1371 (Vt. 1993) (discussing criminal charges for threats, intimidation, and obstructing justice as a result of the defendant committing such acts while behind bars).

210. State v. Dewitt, 758 N.W.2d 201, 205 (Wis. Ct. App. 2008).

211. *Id.*

212. Many of the contract law cases imply that the party must, or at least should, communicate

There is no guarantee that a prosecutor or judge bent on conviction would recognize such a cancellation, though; therefore, defense counsel may wish to reiterate the earlier advice that the client continue to follow the conditions, even when in custody.

B. A Pound of Cure

Even if a defendant is actually charged with a bail jumping case for violating conditions of release while in custody, all is not lost. First, defense counsel should consider filing a motion to dismiss the bail jumping complaint. Such a motion should, to begin, be based on any well-settled, state-specific case law. For example, as discussed earlier, some courts have held that conditions of release do not apply while in custody.[213] Others have held that conditions of release do not apply while in custody *unless* the defendant signed the bond;[214] therefore, if the defendant did not sign the bond, the defense would have a strong motion to dismiss a bail jumping case. And even in states in which judges have the *authority* to impose conditions of release on in-custody defendants, the prosecutor would still have to allege facts in the bail jumping complaint that (1) the judge intended to, and did in fact, impose conditions on the defendant while in custody, and (2) the judge then gave proper notice to the defendant that the conditions of release applied before release.[215] The prosecutor's failure to allege such facts could also be the basis for a motion to dismiss.

When considering a motion to dismiss, defense counsel should also consider the contract-law principles discussed in this Article. Simply stated, because bond is a contract, and because contract-law principles apply to contracts formed in the criminal-law setting, the doctrines of (1) mutual assent and acceptance,[216] (2) conditions precedent,[217] (3) illusory

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to the other party its decision to rescind or cancel the contract. *See, e.g.*, Internatio-Rotterdam v. River Brand Rice Mills, 259 F.2d 137, 139 (2d Cir. 1958) (holding that, after the failure of a condition precedent, i.e., the receipt of shipping instructions from appellant, "the appellee *rescinded the contract*") (emphasis added).

213. *See* State v. Romero, 687 P.2d 96, 100 (N.M. Ct. App. 1984) ("Inasmuch as [a] defendant was in custody at all pertinent times, the conditions of release are not applicable.").

214. *See Dewitt*, 758 N.W.2d at 205 (holding that the defendant "was not obligated to sign the bond," and had he not signed it, he would not have been subjected to its conditions).

215. *See* Hicks v. State, 377 P.3d 976, 981 (Alaska Ct. App. 2016) (Mannheimer, J., concurring) ("Hicks did not raise these issues on appeal . . . . But I would be remiss if I failed to point out these significant problems in the proceedings that led to Hicks's conviction.").

216. *See supra* Section IV.A.

217. *See supra* Section IV.B.

consideration,[218] and (4) frustration of purpose[219] dictate that conditions of release are not applicable unless and until the defendant is physically released. Therefore, the defense argument would continue, because the defendant was in custody, the conditions of release did not apply and the bail jumping complaint must be dismissed.

Finally, when an in-custody defendant is charged with bail jumping, defense counsel should consider recommending to the defendant that they demand a trial. The idea of a condition of release applying without actual, physical release is a fictional concept. A jury might not fall for it; at trial, the prosecutor may be unable to prove beyond a reasonable doubt that the defendant had the same bizarre reading of the bond as the prosecutor.

For example, consider once again the factual scenario in which the prosecutor charges the defendant with bail jumping for making a non-threatening phone call while in jail, allegedly in violation of the condition of release to have "no contact" with a specified person. Further assume that the jurisdiction's pattern jury instruction on bail jumping reads, in relevant part, as follows:

> Before you may find the defendant guilty of [bail jumping], the State must prove by evidence which satisfies you *beyond a reasonable doubt* that the following [] elements were present. . . .
>
> 2. The defendant was *released from custody on bond*. . . .
>
> 3. The defendant intentionally failed to comply with the terms of the bond.
>
> This requires that the defendant had *the mental purpose to fail to comply with the terms of the bond*. This also requires that the defendant knew of the terms of the bond and *knew that (his) (her) actions did not comply with those terms*.[220]

The defendant's trial testimony about their understanding of the bond conditions, the bond sheet itself which labels the conditions as "conditions of release," and the transcript of the bond hearing—which would show the absence of any instruction by the previous judge that "conditions of release" apply even without release—could combine to raise reasonable doubt about the defendant's guilt. The questions defense counsel may pose to the jury could include:

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218. *See supra* Section IV.C.

219. *See supra* Section IV.D.

220. WIS. J.I. CRIM. 1795 (emphasis added).

- Are you convinced, beyond a reasonable doubt, that the defendant was "released from custody on bond," when they were actually sitting behind bars?

- Are you convinced, beyond a reasonable doubt, that the defendant "knew that their actions" of calling the person from the jail would violate the "conditions of release"?

- Put another way, are you convinced, beyond a reasonable doubt, that the defendant knew or believed they were "released from custody" while they were actually sitting behind bars? And if not, how could the defendant possibly have known "that his actions did not comply with those terms" of the bond?

- Are you convinced that the defendant had "the mental purpose to fail to comply with the terms of the bond"—which the judge told him were "conditions of release" and which the bond sheet labels "conditions of release"—when he made a phone call while he was in jail?

- If the defendant really "knew" that it was against the law, why would he have made the phone call given that inmates are warned several times, including on the phone call itself, that all phone calls are being recorded?

When these and other questions are posed to fair-minded citizens who attach commonly-accepted definitions to everyday language, the results could be dramatically different than what the prosecutor has in mind.

VI. CONCLUSION

When a court imposes a high cash bail, the defendant will likely remain in custody while they await trial.[221] When the defendant is able to post bail, the court will likely impose onerous, non-monetary bond conditions of release, the violation of which can lead to "bail jumping" charges.[222] And in some cases, paradoxically, a defendant will remain in custody *and* get charged with bail jumping for violating a condition of

221. *See supra* Section II.A.
222. *See supra* Section II.B.

release.[223] But how can a defendant be subjected to a condition of release when they were never released? In other words, how can a defendant be convicted of, or even charged with, bail jumping while behind bars?

Of course, it is not logically possible, and some courts have even held that it is not legally possible.[224] But in some states, courts have developed several theories to justify convicting an in-custody defendant of bail jumping for violating a bond condition of release while in custody.[225] These judicial theories fail, however, because they contradict basic rules of statutory construction, simple logic, plain language, and even common sense.[226]

Instead of the faulty reasoning of some courts, contract law solves this jumping-bail-while-in-jail paradox. After all, criminal bond is nothing more than a contract between the court and the defendant: The court agrees to release the defendant from custody pending trial, and the defendant agrees to post bail and abide by certain non-monetary bond conditions of release.[227] And when disputes arise concerning any contract, including a bond contract, we turn to contract-law principles for resolution.[228]

To begin, in cases where the defendant never signed the bond in the first place, there is no "acceptance" of the bond contract by the defendant, and therefore there is no "mutual assent" or meeting of the minds.[229] In short, no contract was ever formed, and the defendant cannot be held to the terms dictated by the court and printed in the unsigned bond sheet.[230]

In cases where the defendant does sign the bond but then, for unrelated reasons such as an outstanding warrant in another case, cannot be released from custody, there is a "failure of a condition precedent."[231] The result is either that the contract never took effect to begin with[232] or that the defendant is no longer bound by it because they were never released, i.e., the condition precedent never occurred.[233]

Another applicable principle of contract law is that a contract must be

223. *See supra* Section III.
224. *See supra* Section III.
225. *See supra* Section III.A–D.
226. *See supra* Section III.A–D.
227. *See supra* Section IV.
228. *See supra* Section IV.
229. *See supra* Section IV.A.
230. *See supra* Section IV.A.
231. *See supra* Section IV.B.
232. *See supra* Section IV.B.1.
233. *See supra* Section IV.B.2.

supported by "consideration."[234] In the case of a bond contract, the defendant promises to abide by conditions of release and, as return consideration, the court agrees to release the defendant from jail.[235] However, when release is not possible due to unrelated reasons, the consideration, i.e., the promise to release the defendant, is "illusory."[236] As a result, the contract is unenforceable and the defendant cannot be held to its terms or conditions of release.[237]

Finally, when a defendant signs a bond sheet and *is* released, but then is re-incarcerated for an unrelated reason, the defendant's obligation to follow the conditions of release are discharged under the "frustration of purpose" doctrine.[238] This is closely analogous to the requirement of consideration in that, if the contract were to be enforced against the defendant, they would get nothing of value in exchange.[239] In other words, the sole purpose for signing the bond sheet was to be released from custody, and that sole purpose has, in turn, become completely frustrated by a supervening event, thus discharging the defendant's contractual obligations.[240]

These contract-law principles, along with existing criminal cases decided in favor of the defense, provide the criminal defense lawyer with several options for defending a client accused of bail jumping while behind bars.[241] Effective strategies are, of course, highly dependent on the facts of the case and the law of the applicable state.[242] Such strategies may include filing a motion to dismiss the bail jumping case based on one or more legal theories, and even trying the case to a jury—a group of reasonable people that may be unreceptive to the theory that conditions of release should apply to defendants who have never even been released.[243]

234. *See supra* Section IV.C.
235. *See supra* Section IV.C.
236. *See supra* Section IV.C.
237. *See supra* Section IV.C.
238. *See supra* Section IV.D.
239. *See supra* Section IV.D.
240. *See supra* Section IV.D.
241. *See supra* Section V.
242. *See supra* Section V.
243. *See supra* Section V.B.