NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

COUNTY OF FAIRFAX CITY OF FAIRFAX

BRUCE D. WHITE, CHIEF JUDGE
RANDY I. BELLOWS
ROBERT J. SMITH
BRETT A. KASSABIAN
MICHAEL F. DEVINE
JOHN M. TRAN
GRACE BURKE CARROLL
DANIEL E. ORTIZ
PENNEY S. AZCARATE
STEPHEN C. SHANNON
THOMAS P. MANN
RICHARD E. GARDINER
DAVID BERNHARD
DAVID A. OBLON
DONTAÈ L. BUGG

JUDGES

THOMAS A. FORTKORT
J. HOWE BROWN
F. BRUCE BACH
M. LANGHORNE KEITH
ARTHUR B. VIEREGG
KATHLEEN H. MACKAY
ROBERT W. WOOLDRIDGE, JR.
MICHAEL P. McWEENY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLUND
DAVID S. SCHELL
JAN L. BRODIE

RETIRED JUDGES

November 6, 2020

LETTER OPINION

Mr. J. David Gardy
Senior Assistant Commonwealth's Attorney
4110 Chain Bridge Road
Fairfax, VA 22030

Counsel for the Prosecution

Ms. Gretchen Schumaker
Assistant Public Defender
4103 Chain Bridge Road, Suite 500
Fairfax, VA 22030

Counsel for Defendant

Re: *Commonwealth of Virginia v. Corey Hunter*
Case No. KM-2020-441

Dear Counsel:

The question before the Court is whether imposing a cash or surety bond release term upon the Defendant in this case would be an unconstitutional application of the Virginia statutory bail bond scheme. The Court does not undertake examination of this issue lightly given the long history of the use of cash bail as a largely unquestioned

OPINION LETTER

condition of release of suspects by many judges. Based on the following reasoned analysis of this issue, the Court finds as follows: 1) there is no constitutional right to *cash* bail; therefore, when the Court resorts to a secured bond release term it is derived solely from the statutory and inherent power of the Court to impose rational terms of release calculated to promote the safety of the community and the appearance of the accused; and 2) the imposition of a cash or surety bond in the instant case would only be the product of resort to custom, instinct, and arbitrary action, and thus would be an unconstitutional application of the Virginia statutory bail bond scheme, in derogation of the Due Process Clause of the United States Constitution.

Consequently, the Court holds that its release decision of the Defendant was proper, not only as a matter of discretion, but also because the use of the cash bond in this instance would have been unconstitutional.

BACKGROUND

On September 14, 2020, Defendant Corey Hunter ("Hunter") appeared before the Court on appeal from the Fairfax General District Court for his motion to set reasonable bail release conditions. Hunter had been held in custody since his arrest for Driving While Intoxicated ("DWI"), a first offense with an alleged blood alcohol level of .11 percent by weight by volume, occurring on August 29, 2020. Soon after he was booked into the Fairfax Adult Detention Center ("ADC"), Hunter was taken to the hospital to be treated for a health condition. On September 7, 2020, Hunter was returned to the ADC. On September 9, 2020, the Fairfax General District Court set a $2,500.00 cash or surety

bond condition for the release of Hunter, who had been held in state custody without bond.

At the hearing before this Court on appeal from the Fairfax General District Court, the prosecutor averred that while his office did not seek the cash bond imposed, a reason the lower court judge may have set such a term is that Hunter might have had a failure to appear in an unrelated case. The offense charged, however, was not such that it was likely to result in incarceration. This Court addressed its view as to the impropriety of wealth-based detention in the context of an accused who was unlikely to serve jail time but for the imposition of the cash bond, and released Hunter under supervised release and a personal recognizance bond, as a matter of discretion. The Court took under advisement the related issue of whether a secondary reason not to impose a cash bond on Hunter was that it would be unconstitutional to do so in this case. The Court continued the matter to November 6, 2020, for briefing and further consideration of the remaining question presented.

ANALYSIS

I. There Is No Substantive Constitutional Right to Cash Bail and the Court's Use of Cash Bail Must Therefore Be Properly Rooted in Statutory Authority

Before addressing the constitutional and statutory authority for cash bail, it is necessary to understand the history and meaning of bail. "[A]s a noun, and in its strict sense, bail is the person in whose custody the defendant is placed when released from jail, and who acts as surety for defendant's later appearance in court . . . The term is also used to refer to the undertaking by the surety, into whose custody defendant is placed,

that he will produce defendant in court at a stated time and place." BAIL, Black's Law Dictionary (11th ed. 2019) (quoting 8 C.J.S. Bail § 2 (1988)). Defendants may serve as their own bail, meaning that they can and are frequently released on their own recognizance. "Recognizance" refers to "[a] bond or obligation, made in court, by which a person promises to perform some act or observe some condition, such as to appear when called, to pay a debt, or to keep the peace; specif., an in-court acknowledgment of an obligation in a penal sum, conditioned on the performance or nonperformance of a particular act." RECOGNIZANCE, Black's Law Dictionary (11th ed. 2019).

The current system of cash or surety bail in the United States, and by derivation in Virginia, is not rooted in early constitutional design. Rather, as the United States Court of Appeals for the Third Circuit addressed in *Holland v. Rosen*, there is no substantive right to compel the courts' use of *cash* bail under the United States Constitution. 895 F.3d 272, 295–96 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 440 (2018) (footnotes omitted). The Court in *Holland* provided the history of the enactment of cash bail. *See id.* at 293-96. Cash bail did not come into existence until the mid-to-late Nineteenth Century. *Id.* at 293. This type of bail was introduced once "personal relationships necessary for a personal surety system" began to diminish due to the creation of urban areas and the movement to the West Coast. *Id.* While cash bond was initially barred in many states, it became common for states to integrate cash bail into their statutes in the early to mid-Twentieth Century. *Id.* at 294.

The bail bond business in particular originated in contract rather than by prescriptive laws. *Id.* at 295. In 1912, the Supreme Court of the United States allowed commercial contracts for bail bonds. *Id.* Since that time, there have been many studies

detailing criticisms of the bail bond system including "rampant abuses in professional bail bonding," and the view that the practice is "discriminatory, arbitrary, and ill-suited to ensuring a defendant's appearance in court." *Id.* This created a shift in the legislatures to reform the bail laws to "deprioritize monetary bail." *Id.* The common use of the cash bail in the mid-Twentieth century came at a cost to indigent criminal defendants. *Id.* at 296. The intended purpose of cash bail was not to keep defendants in jail until trial based on an accusation, but rather to allow a defendant to stay out of jail until found guilty. *Id.* (citing *Stack v. Boyle*, 342 U.S. 1, 7-8 (1951)). While cash bail has become a prevalent term to release, "the settled tradition of cash bail we see in our nation's history is that it is only available as an alternative to obtaining a personal surety when a statute so permits, and, in the absence of statutory permission, it is generally unavailable." *Id.* at 295. Therefore, use of cash bail is not a constitutionally mandated right of defendants, nor of prosecutors. This is further buttressed by earlier Supreme Court of the United States precedent in *Carlson v. Landon* which found that the Eighth Amendment was extracted with slight changes from the English Bill of Rights Act which did not afford bail as a matter of right, but stated that bail may not be excessive in cases where bail was appropriate. 342 U.S. 524, 545 (1952).

While there is no constitutional right to cash bail, bail is mentioned in the United States Constitution and in the Virginia Constitution, but only once and in a limiting fashion. "*Excessive bail* shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII (emphasis added). Similarly, the Virginia Constitution states, "[t]hat *excessive bail* ought not to be required[.]" Va. Const. art. I, § 9 (emphasis added). In their use of the terms "bail," both the United States and Virginia

Constitutions direct what is prohibited but not what must be specifically allowed. This lack of specificity delineates the dilemma for judges in the use of cash bail as to how to impose it in a non-excessive quantum.

Furthermore, the two Constitutions impose the limitation on the denial of bail without answering how compliance with this limiting principle is practically possible, and whether use of the cash bond is an arbitrary and standardless exercise of governmental power over the citizen in at least some circumstances.[1] Nevertheless, implicit in the prohibition against excessive bail is the recognition that the inclusion of cash bail terms in penal statutes is not *per se* unconstitutional. This does not mean that enactment of bail schemes that do not afford proper due process are immune from challenge, but "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The context of this Court's analysis is thus not whether no set of circumstances exist in other cases where a cash or surety bond could be validly employed, but rather, whether it would be unconstitutional to apply the secured bond in *this* case under the Virginia statutory bail bond scheme.

II. The Imposition of a Cash or Surety Bond in the Instant Case Would Only Be Product of Resort to Custom, Instinct, and Arbitrary Action, and Thus Would Be an Unconstitutional Application of the Virginia Statutory Bail

[1] There are certain circumstances where the imposition of a cash bond would be constitutional, like for instance when the cash bond is imposed at the request of the defendant and the Court agrees with the imposition of cash bail. This sometimes occurs when defendants wish to control the timing of their release rather than being freed immediately. This arises, to name but one example, when the defendant has a detainer from another jurisdiction and wants first to secure counsel before being transported to the other forum for court proceedings.

Bond Scheme, in Derogation of the Due Process Clause of the United States Constitution

Having established that the authority for use of the cash bond is principally statutory, the next question is whether application of such authority violates the Due Process Clause of the United States Constitution. In this case, the liberty interest of the Defendant is at issue. That is, to state it bluntly, resort to the cash bond would dictate continued incarceration of the indigent Defendant. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis,* 533 U.S. 678, 690 (2001) *(*citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

In Part I of this opinion, this Court has already observed the United States and Virginia Constitutions impose a prohibition on the excessive use of cash bail. The question comes into particular focus for the indigent defendant like Hunter. For him, any bail causes detention due to his lack of financial resources. This was demonstrated when the imposition of a $2,500.00 cash bond for a factually unremarkable first DWI offense with a .11 blood alcohol level—for which in the experience of the Court Hunter would not receive an actual incarceration sentence—caused Hunter to be in state custody for at least five additional days. It was speculated by the prosecutor at the hearing of this matter that the reason he was initially held without bond and then the lower court judge imposed cash bail was because Hunter possibly had a failure to appear on his record in an unrelated matter.

That begs the question, that even if applying only the lesser Due Process standard that the state must have at least a rational basis for its enactment of cash bond, whether

imposition of cash bond conditions in this cause would be unconstitutional as-applied. The Court typically addresses "an as-applied challenge before a facial challenge because . . . [it] decreases the odds that facial attacks will be addressed unnecessarily[.]" *Volkswagen v. Smit,* 279 Va. 327, 336 (2010) (internal citations omitted). The Court thus turns its analysis to whether *application* of cash bail to the accused in this case would be unconstitutional, for if so, the Court need look no further to whether the statutory scheme itself is facially valid.

The statutory authority for use of cash bail is somewhat oblique. Upon arrest for an incarcerable offense, the accused is generally brought before a judicial officer for a bail determination. Va. Code § 19.2-80. The statutory scheme does not mention use of "cash bail," but its availability is implicit in that the judicial officer is authorized to set a "secure bond," that is, one of monetary value which may be secured by posting cash or for which a bondsperson may serve as a surety. Va. Code § 19.2-123. The fact that the Virginia Code mentions "bail bondsmen" is not an explicit endorsement of cash bail, but rather a legislative acknowledgement of the individual's right to contract when there is resort to a surety bond by the courts, and of the regulation thereof. *See* Va. Code §§ 9.1-185—9.1-185.18, and 58.1-3724. This reflects the strong tradition in Virginia of upholding the right to contract. *See Moore v. Gregory*, 146 Va. 504, 523 (1925) (finding that "every adult person has a right to contract with respect to his property rights and when they have done so, courts are without authority to annul their obligations . . ."). There is, however, no statutory guidance as to how the *amount* set is to be determined beyond that "ability to pay" is to be considered. Va. Code § 19.2-121(A)(iv). The General Assembly has not

seen fit to prescribe or compel generally a minimum amount of cash or surety[2] bail release terms, choosing instead to specify *how* such conditions are regulated if they are imposed. *See* Va. Code §§ 19.2-119 — 19.2-134.

In considering whether to apply a cash bond in this cause, this Court would abuse its discretion if "(1) failing to take into account a significant relevant factor; or (2) giving significant weight to an irrelevancy; or (3) weighing the proper factors but committing a clear error of judgment in doing so." *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 353 (2011) (quoting *Trucking Corp. v. Westmoreland Coal Co.*, 1992 WL 344770, at *5 (4th Cir. Nov. 23, 1992)). This Court "must exercise 'not an arbitrary discretion, but a sound judicial discretion.'" *Commonwealth v. Duse,* 295 Va. 1, 7 (2018) (quoting *Judd v. Commonwealth*, 146 Va. 276, 277, 135 S.E. 713, 714 (1926)). In the context of cash bond, any imposition of such a term in this case arguably violates the two initially stated precepts in *Landrum*.

First, the Court has no practical way to take into account the significant relevant factor of Hunter's ability to pay and the effect of the setting of any quantum of cash on his greater likelihood to appear. He is represented by the Public Defender and thus has been determined to be indigent. His continued detention after the lower court set a cash bond

---

[2] In narrow instances, the Code does require a "secure bond" as a bail release term, unless the Commonwealth's Attorney acquiesces in excuse of the requirement:

> Any person arrested for a felony who has previously been convicted of a felony, or who is presently on bond for an unrelated arrest in any jurisdiction, or who is on probation or parole, may be released only upon a secure bond. This provision may be waived with the approval of the judicial officer and with the concurrence of the attorney for the Commonwealth or the attorney for the county, city or town.

Va. Code § 19.2-123(A). Because no particular amount of a secure bond is specified, which could be set as low as one cent, it appears this provision may have been designed to encourage the courts to solicit input from the Commonwealth's Attorney before releasing an accused on just a personal recognizance bond.

of $2,500.00 suggests that he did not have the cash to post nor was able to afford a bondsperson.

Second, the reasoning underlying a cash bond in this case was presumably that the lower court judge had a concern that Hunter had a failure to appear in an unrelated case. The supposed logic is that the cash measure would somehow strengthen the incentive for the accused to appear at trial. The record in this case is devoid of any relevant evidence to suggest this assumption is reasonable. "Evidence is relevant if it 'tends to cast any light upon the subject of the inquiry.'" *Townes v. Virginia State Bd. of Elections*, 843 S.E.2d 737, 747 (Va. 2020) (quoting *McNeir v. Greer-Hale Chinchilla Ranch*, 194 Va. 623, 629 (1953)). Rather than light, a shadow of unanchored assumption that the cash measure is relevant was cast upon Hunter's cause. The Court has been presented no evidence in this case that the imposition of a cash bond makes it appreciably more likely that Hunter will appear for trial. Indeed, the Court has in its quiver more proven and effective arrows to guard against reoffending and failures to appear while on bond, which include but are not limited to supervised release, GPS bracelets, text-message reminders of court dates, substance abuse testing and treatment, mental health referrals, cognitive behavioral interventions, to name a few.[3]

---

[3] It appears to be no accident that resort to supervised release, restrictions on travel and contact with persons, and the *unsecured* bond, are listed as options in the Code before reaching the alternative of a "secure bond." Va. Code § 19.2-123(A). Virginia Code § 19.2-123(A) includes additional authorized conditions other than the cash bond that may be imposed for release, including to

> (i) maintain employment or, if unemployed, actively seek employment; (ii) maintain or commence an educational program; (iii) avoid all contact with an alleged victim of the crime and with any potential witness who may testify concerning the offense; (iv) comply with a specified curfew; (v) refrain from possessing a firearm, destructive device, or other dangerous weapon; (vi) refrain from excessive use of alcohol, or use of any illegal drug or any controlled substance not prescribed by a health care provider; and (vii) submit to testing for drugs and alcohol until the final disposition of his case;

If this Court were thus to impose a cash bond in the instant case, it would be giving significant weight to an irrelevancy. One prominent voice, the highly respected former Commonwealth's Attorney of Richmond, Mike Herring, had these rather colorful observations about the fallacies associated with how prosecutors arrive at suggestions for cash bond amounts to be set as part of bail release terms:

> Richmond Commonwealth's Attorney Mike Herring says he never got much in the way of training about how much money it takes to make sure someone charged with a crime stays out of trouble and shows up for court, the purpose of cash bail.
> "So, 20 or however many years ago when I was a junior commonwealth's attorney and the judge looked down at me and said 'Mr. Herring, what's your recommendation on bond?' I literally pulled it out of my ass," he says. "I'd think, 'OK, it's a felony, seems like it ought to be four figures, $3,500 sounds right.'"
> *And that, he says, is the way it's gone for years: Prosecutors making bail recommendations to judges based on "custom, instinct and anything else arbitrary" and defendants going free if they have enough money to hire a bondsman or languishing in jail if they don't.*

Ned Oliver, *While Virginia Studies Cash Bail Alternatives, Local Prosecutors and Judges Increasingly Take Reform into Their Own Hands*, VIRGINIA MERCURY, Nov. 26, 2018, https://www.virginiamercury.com/2018/11/26/while-virginia-studies-cash-bail-alternatives-local-prosecutors-and-judges-increasingly-take-reform-into-their-own-hands/ (emphasis added). As prosecutors, including those in this case, charged with making bail recommendations can point to no objectively reasonable way to link a quantum of cash to a release decision, so does the undersigned judge of this Court, despite in excess of 31 years of experience in criminal justice, first as a lawyer and then

---

and "any other condition deemed reasonably necessary to assure appearance as required, and to assure . . . good behavior pending trial [.]" *Id.*

as a jurist, find that there is no reasonable method to determine a cash amount to be used in this instance.

The inherent arbitrariness of the use of the cash bond is as palpable as it is counterproductive. The Office of the Fairfax Commonwealth's Attorney appears to agree with this conclusion and did not itself seek the cash bond first imposed in this cause by the lower court. A landmark study conducted by the Virginia Department of Criminal Justice Services makes clear the damage done to justice for those subjected to wealth-based detention:

> • Defendants who are detained, even for short periods of time, are more likely to lose stability in the areas of employment, residence, and pro-social connections with family and community.
> • Requiring low risk defendants to spend as little as two days in jail disrupts their stability factors in a way that increases the likelihood they will fail to appear and commit new criminal offenses while on release.
> • Requiring low risk defendants to spend as little as two days in jail can increase the likelihood of long-term recidivism.

Kenneth Rose, *A "New Norm" For Pretrial Justice in the Commonwealth of Virginia Pretrial Risk-based Decision Making*, DCJS, Dec. 2013, at 3, https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/new-norm-pretrial-justice-commonwealth-virginia.pdf. It is for reasons such as these that the undersigned judge has not imposed discretionary cash bond conditions on defendants since assuming office on July 1, 2017.[4] This does not mean that the Court has released the dangerous. Removing cash from the equation merely has allowed the Court to focus

[4] Justin Jouvenal, *A Judge Appears to be the First in Northern Virginia to Drop Cash Bonds*, WASHINGTON POST, June 14, 2018, https://www.washingtonpost.com/local/public-safety/a-judge-appears-to-be-the-first-in-northern-virginia-to-drop-cash-bonds/2018/06/14/848d9a4c-5ea0-11e8-b2b8-08a538d9dbd6_story.html.

on risk, unclouded by the false comfort that cash terms may somehow warrant the dangerous safe for release.[5]

In this case, the Court undertook to decide whether the accused should be released without resort to posting cash not only as a matter of mere discretion, but also in consideration of whether a cash bond condition imposed on him would be unconstitutional. This Court finds there is no reasonable method of determination to impose cash terms on Hunter, which would instead amount to little more than judicial whim leavened only by intuition devoid of evidence-based validation. Imposition of the *amount* of cash bond is not undergirded by specific guidance from policymakers in the General Assembly. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge,* 424 U.S. 319, 332 (1976). Use of the cash bond allows similarly situated individuals appearing before the Court on the same offense charged to be treated in a disparate manner based only on the variable of wealth. Hunter's lack of wealth ensured that he was detained in jail for at least five additional days on a first time DWI offense, where a wealthier defendant before the Court on the same offense would not likely have spent a

---

[5] The anecdotal record is alive with instances where dangerous individuals, which tend to be in the Court's experience relatively few in proportion to those detained, are released on a cash bond based on the best judgment of highly respected judges, yet are undeterred by such term to commit grievous crimes. *See, e.g.,* Tom Jackman, *Released From Jail at Height of Pandemic, Virginia Rape Suspect Allegedly Killed His Accuser*, Washington Post, Aug. 6, 2020, https://www.washingtonpost.com/crime-law/2020/08/06/released-jail-height-pandemic-alexandria-rape-suspect-allegedly-killed-his-accuser/ ("released [defendant] on $25,000 bond, with the condition that he only leave his Maryland home to meet with his lawyers or pretrial services officials"); Brendan Ponton, *Prosecutors say Norfolk Man Killed Girlfriend After Judge Granted Him Bond*, WTKR.COM, Nov. 2, 2018, https://www.wtkr.com/2018/11/01/undetermined-death-of-woman-found-in-norfolk-hotel-room-ruled-as-homicide (defendant released on a "$15,000 surety bond").

single of those days in jail. Thus, both parties in this cause urge this Court to strike down the use of cash bond as unconstitutional, based on Equal Protection, among other stated grounds.

The most relevant question is, however, not whether the wealthy are favored by the cash bond, but rather whether there is any fair means for arriving at an amount to be set for a cash bail term, be the defendant wealthy or poor. There is no reasonable objective measure of consistent correlation between amount of cash bond imposed and type of offense or offender history. There is no meaningful training that the undersigned judge received to ensure discretion is applied in accordance with uniform principles set by policymakers or which are at a minimum rational and evidence-based.

> [T]he Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochon v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325–326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, *it must still be implemented in a fair manner. Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

Salerno, 481 U.S. at 746 (emphasis added).[6] There is no "fair manner" by which to implement use of the cash bond. Imposition of cash bond terms in this cause would only be a product of resort to "custom, instinct and anything else arbitrary," an unconstitutional denial of Due Process.

---

[6] The fifth amendment to the United States Constitution, including thus the Due Process Clause pertaining to criminal proceedings, "is [made] applicable to the states through the fourteenth amendment to the United States Constitution." *See Simon v. Commonwealth*, 220 Va. 412, 415 (1979) (citing *Lee v. Commonwealth*, 219 Va. 1108 (1979)).

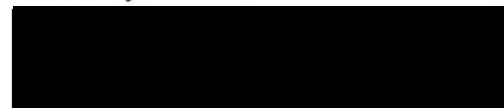
CONCLUSION

The Court has considered the question whether imposing a cash or surety bond release term upon the Defendant in this case would be an unconstitutional application of the Virginia statutory bail bond scheme. The Court did not undertake examination of this issue lightly given the long history of the use of cash bail as a largely unquestioned condition of release of suspects by many judges. Based on the above examination and reasoned analysis of this issue, the Court finds as follows: 1) there is no constitutional right to *cash* bail; therefore, when the Court resorts to a secured bond release term it is derived solely from the statutory and inherent power of the Court to impose rational terms of release calculated to promote the safety of the community and the appearance of the accused; and 2) the imposition of a cash or surety bond in the instant case would only be the product of resort to custom, instinct, and arbitrary action, and thus would be an unconstitutional application of the Virginia statutory bail bond scheme, in derogation of the Due Process Clause of the United States Constitution.

Consequently, the Court holds that its release decision of the Defendant was proper, not only as a matter of discretion, but also because use of the cash bond in this instance would have been unconstitutional.

This Court shall enter an order incorporating its ruling herein, and until such time, jurisdiction over this bail cause continues.

Sincerely,



David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER