

NO. 14-03-1421-CR  
NO. 14-03-1423-CR

IN THE COURT OF APPEALS  
FOR THE FOURTEENTH JUDICIAL DISTRICT  
HOUSTON, TEXAS

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**EX PARTE  
ROBERT DURST, PETITIONER**

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ON APPEAL FROM THE 212<sup>TH</sup> DISTRICT COURT,  
GALVESTON COUNTY, TEXAS  
TRIAL COURT NO. 01CR1900  
TRIAL COURT NO. 01CR2007

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**PETITIONER'S BRIEF ON APPEAL  
EXPEDITED APPEAL**

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ATTORNEYS FOR PETITIONER

January 14, 2004

**ORAL ARGUMENT REQUESTED**

**REQUEST FOR ORAL ARGUMENT**

Petitioner respectfully requests that his lawyers be permitted to orally argue the issues raised herein in accordance with Texas Rule of Appellate Procedure 39.7

**CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record for Petitioner certifies that to his knowledge only the parties listed below have an interest in the outcome of this case. They are as follows:

1. Robert Durst, Petitioner
2. Dick DeGuerin  
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## TABLE OF CONTENTS

REQUEST FOR ORAL ARGUMENT	ii
CERTIFICATE OF INTERESTED PARTIES	iii
TABLE OF CONTENTS	iv
INDEX OF AUTHORITIES	v
STATEMENT OF THE CASE	2
POINTS OF ERROR NOS. 1-4	3
STATEMENT OF FACTS	4
SUMMARY OF THE ARGUMENT	8
POINTS OF ERROR NOS. 1-4 [RESTATED]	9
ARGUMENT AND AUTHORITIES	10
CONCLUSION	15
CERTIFICATE OF SERVICE	16

## INDEX OF AUTHORITIES

### Cases

<i>Eggleston v. State</i> , 917 S.W.2d 100 (Tex.App. - San Antonio 1966, no pet.)	12
<i>Ex Parte Beard</i> , 92 S.W.3d 566 (Tex.App. - Austin 2002, pet. ref'd.)	13
<i>Ex Parte McDonald</i> , 852 S.W.2d 730 (Tex.App. - San Antonio 1993, no pet.)	12
<i>Ex Parte Ivey</i> , 594 S.W.2d 98 (Tex.Crim.App. 1980)	12
<i>Ex Parte Milburn</i> , 8 S.W.3d 422 (Tex.App. - Amarillo 1999, no pet.)	12
<i>Ex Parte Runo</i> , 535 S.W.2d 188 (Tex.Crim.App. 1976)	5
<i>Ex Parte Simpson</i> , 77 S.W.3d 894, 879 (Tex.App. - Tyler, no pet.)	12
<i>Ex Parte Wood</i> , 952 S.W.2d 41 (Tex.App. - San Antonio 1997, no pet.)	12
<i>Ludwig v. State</i> , 812 S.W.2d 323 (Tex.Crim.App. 1991)	11
<i>Montalvo v. State</i> , 786 S.W.2d 710, 711 (Tex.Crim.App. 1989)	4
<i>Stack v. Boyle</i> , 342 U.S. 1, 4-5, 72 S.Ct. 1, 3 (1951)	10

### Statutes

Eighth Amendment, United States Constitution	4
Article I, §§10, 11 and 13, Texas Constitution	4
Articles 1.07 and 17.15, Texas Code of Criminal Procedure	4

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**PETITIONER'S BRIEF ON APPEAL**

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COMES NOW, Robert Durst, Petitioner, by and through his attorneys of record, Dick DeGuerin, Michael Ramsey, and Chip Lewis, and files this brief on the merits, requesting the Court of Appeals to set reasonable bail.

## **STATEMENT OF THE CASE**

Petitioner filed an Application for Writ of Habeas Corpus seeking reasonable bail in these bond jumping cases. The trial court held a hearing on the application on December 18, 2003. At the close of the hearing, the trial court denied Petitioner's request to reduce his ONE BILLION DOLLAR (\$1,000,000,000.00) bail in each case. I RR 75. Petitioner filed Notice of Appeal on December 18, 2003.

**POINT OF ERROR NO. 1**

THE **ONE BILLION DOLLAR** (\$1,000,000,000.00) BAIL SET IN EACH CASE BELOW IS UNCONSTITUTIONALLY EXCESSIVE ACCORDING TO THE STANDARDS EMBODIED IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND IS AN ABUSE OF THE TRIAL COURT'S DISCRETION.

**POINT OF ERROR NO. 2**

THE **ONE BILLION DOLLAR** (\$1,000,000,000.00) BAIL SET IN EACH CASE BELOW IS UNCONSTITUTIONALLY EXCESSIVE ACCORDING TO THE STANDARDS EMBODIED IN ARTICLE I, §§10, 11 AND 13 OF THE TEXAS CONSTITUTION, AND IS AN ABUSE OF THE TRIAL COURT'S DISCRETION.

**POINT OF ERROR NO. 3**

THE **ONE BILLION DOLLAR** (\$1,000,000,000.00) BAIL SET IN EACH CASE BELOW IS EXCESSIVE ACCORDING TO THE STANDARDS EMBODIED IN ARTICLES 1.07 AND 1.09 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, AND IS AN ABUSE OF THE TRIAL COURT'S DISCRETION.

**POINT OF ERROR NO. 4**

THE INDICTMENTS CHARGING TWO ACTS OF BOND JUMPING ON OCTOBER 15, 2001 AND ON OCTOBER 26, 2001 ARE CONTRADICTORY, BOTH CANNOT STAND, AND EFFECTIVELY AND UNLAWFULLY DOUBLE THE AMOUNT OF BAIL REQUIRED OF PETITIONER.

## STATEMENT OF FACTS

The criteria for bail are established by the Eighth Amendment to the United States Constitution, Article I, §§10, 11 and 13 of the Texas Constitution, and Articles 1.07 and 17.15 of the Texas Code of Criminal Procedure. *Montalvo v. State*, 786 S.W.2d 710, 711 (Tex.Crim.App. 1989). The factors which have been developed from these provisions to assess reasonable bail are:

- (1) the nature of the offense;
- (2) the ability to make bail;
- (3) the accused's prior criminal record (if any);
- (4) conformity with previous bond conditions (if any);
- (5) employment record;
- (6) ties to the community; and
- (7) length of residence in the community.

*Id.* Petitioner will address the facts in the order of these factors.

### 1. Nature of the Offense

The indictments in Cause Nos. 01-CR-1900 and 01-CR-2007 charge Petitioner with the 3<sup>rd</sup> Degree Felony of bail jumping/failure to appear (Penal Code §38.10). On October 9, 2001, Petitioner was arrested and charged with the murder of Morris Black and with possession of several marijuana cigarettes; on October 10, 2001, Petitioner posted a total of \$300,000 in bail bonds, \$250,000 for the murder charge and \$50,000 for the marijuana charge, and was he released. On October 16, 2001, the Grand Jury indicted Petitioner for the murder and for bond jumping (Cause No. 01-CR-1900), alleging that he failed to appear on October 16, 2001, on the murder charge. On the 25<sup>th</sup> of October 2001, the Grand Jury indicted Petitioner for jumping the same bail bond (Cause

No. 01-CR-2007), alleging that he failed to appear on the 25<sup>th</sup> of October 2001, on the same murder charge. Both indictments allege forfeiture of the same bail bond. Both indictments are pending and the 212<sup>th</sup> District Court has set bail on both indictments at **ONE BILLION DOLLARS** (\$1,000,000,000.00) each, or a total bail required of **TWO BILLION DOLLARS** (\$2,000,000,000.00).

2. **Ability to Make Bail**

Petitioner presented evidence on his ability to make bail through Mr. Ed Hennessy, the attorney in charge of representing Petitioner in some civil matters, including a lawsuit by relatives of Morris Black, the man Petitioner was acquitted of murdering. I RR 34. One of Mr. Hennessy's duties has been to evaluate Petitioner's assets for the purpose of determining his potential exposure should he lose in the pending litigation. I RR 34. Petitioner's determined liquid assets are between two and four million dollars I RR 45. The principal of the trusts that generate his income cannot be alienated or reached by Petitioner. I RR 37. There is a single annuity that, like the trusts, cannot be executed upon. I RR 38. Mr. Hennessy could not identify any other property or real estate that Petitioner had any personal interest in other than the two trusts and the single annuity. I RR 38.

3. **Prior Criminal Record**

Prior felony convictions are considered in setting bond. *Ex parte Runo*, 535 S.W.2d 188 (Tex. Crim. App. 1976). Petitioner has no criminal history.

4. **Conformity with Previous Bond Conditions**

Although the offense for which Petitioner is now held alleges noncompliance with his previous bond conditions, bond jumping is an offense for which one is entitled to reasonable bail. Additionally, both pending indictments allege forfeiture of the *same* bail bond. If the bail bond was

forfeited on October 16, 2001 by Petitioner's failure to appear on that date then it was impossible for the bail bond to be also forfeited on October 25; similarly, if the prosecution continues to assert that the bail bond was forfeited on October 25, by necessary implication the bail bond was not forfeited on October 16. Only one charge can stand. They are contradictory and mutually exclusive. Nonetheless, both indictments are pending, and the 212<sup>th</sup> District Court has set bail on both indictments at **ONE BILLION DOLLARS** (\$1,000,000,000.00) each. The resulting **TWO BILLION DOLLARS** (\$2,000,000,000.00) bond is unprecedented. I RR 4.

5. **Employment Record**

Petitioner's chief occupation has been in the real estate business, first as a member of his family's company, the Durst Organization<sup>1</sup>, and then as a private investor in real estate.

6. **Ties to the Community**

Although Petitioner has no current ties to Galveston County, he proposes to establish residency there. He has volunteered to employ, at his own expense, a guard or guards of the trial court's choosing to watch him twenty-four hours a day and to report daily to pre-trial services. I RR 69. Additionally, bond forfeiture and life as a fugitive would preclude Petitioner from being able to access the spendthrift trusts. I RR 65-66.

7. **Length of Residence in Community**

Petitioner's home is New York City, although he established a residence in Galveston in November of 2000, under an assumed name. He has resided in the Galveston County Jail for more than two years. If released on bail he proposes to establish residency in Galveston County until this

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<sup>1</sup>Although Petitioner no longer is a part of the family business, he remains a beneficiary of various family trusts.

case is resolved.

8. **Additional Factor of Safety of Victim/Community**

Article 17.15(5) suggests that the additional factor of the future safety of the victim and the community shall be considered in setting reasonable bail. It cannot be emphasized enough that Petitioner has been acquitted of the death of Morris Black. I RR 50. No additional evidence was offered that Petitioner would be a danger to any other person or to the community.

**SUMMARY OF THE ARGUMENT**

Bail of **ONE BILLION DOLLARS** (\$1,000,000,000.00) in each of these cases is unsupported by the record or by case law and is an abuse of the trial court's discretion. Bail should be set at no more than \$50,000.

## **ARGUMENT**

### **POINTS OF ERROR NOS. 1-4 [RESTATED]**

#### **POINT OF ERROR NO. 1 [RESTATED]**

THE ONE BILLION DOLLAR (\$1,000,000,000.00) BAIL SET IN EACH CASE BELOW IS UNCONSTITUTIONALLY EXCESSIVE ACCORDING TO THE STANDARDS EMBODIED IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND IS AN ABUSE OF THE TRIAL COURT'S DISCRETION.

#### **POINT OF ERROR NO. 2 [RESTATED]**

THE ONE BILLION DOLLAR (\$1,000,000,000.00) BAIL SET IN EACH CASE BELOW IS UNCONSTITUTIONALLY EXCESSIVE ACCORDING TO THE STANDARDS EMBODIED IN ARTICLE I, §§10, 11 AND 13 OF THE TEXAS CONSTITUTION, AND IS AN ABUSE OF THE TRIAL COURT'S DISCRETION.

#### **POINT OF ERROR NO. 3 [RESTATED]**

THE ONE BILLION DOLLAR (\$1,000,000,000.00) BAIL SET IN EACH CASE BELOW IS EXCESSIVE ACCORDING TO THE STANDARDS EMBODIED IN ARTICLES 1.07 AND 1.09 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, AND IS AN ABUSE OF THE TRIAL COURT'S DISCRETION.

#### **POINT OF ERROR NO. 4 [RESTATED]**

THE INDICTMENTS CHARGING TWO ACTS OF BOND JUMPING ON OCTOBER 15, 2001 AND ON OCTOBER 26, 2001 ARE CONTRADICTORY, BOTH CANNOT STAND, AND EFFECTIVELY AND UNLAWFULLY DOUBLE THE AMOUNT OF BAIL REQUIRED OF PETITIONER.

## ARGUMENT AND AUTHORITIES

All prisoners shall be bailable by sufficient surety. Tex. Const. art. I, §11; Tex. Code Crim. P. art. 1.07. Excessive bail shall not be required. U.S. Const. amend. VIII; Tex. Const. art. I, §13; Tex. Code Crim P. art. 1.09. Bail functions as a compliment to the Anglo-American presumption of innocence by permitting a person charged with a criminal offense to regain his liberty with some assurance of his presence at trial. Tex. Const. art. I, §11 (interpretive commentary). The traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. *Stack v. Boyle*, 342 U.S. 1, 4-5, 72 S.Ct. 1, 3 (1951). Unless this right to bail before trial is preserved the presumption of innocence secured only after centuries of struggle would lose its meaning. *Id.* Admission to bail always involves a risk that the accused will take flight. *Id.* at 7-8, 72 S.Ct. at 5 (Jackson, J. concurring). That is a calculated risk which the law takes as the price of our system of justice. *Id.* In allowance of bail, the duty of the judge is to reduce the risk by fixing an amount reasonably calculated to hold the accused available for trial and its consequence. *Id.* But the judge is not free to make the sky the limit. *Id.*

The factors to be considered in setting reasonable bail are in the statement of facts for organizational purposes. Comparison with other cases demonstrates that the **ONE BILLION DOLLAR** (\$1,000,000,000.00) bail set in each case here is so far out of step with bail in similar cases as to be marching in a separate parade.

The trial court had before it for its consideration the testimony of Officer Ray Davis of the Galveston County Sheriff's Office. I RR 5-9. As Secretary of the Galveston County Bail Bond Board, he testified that the largest bonding company in Galveston, Gulf Coast Bail Bonds, could not

make a single bond larger than 2.2 million dollars. I RR 6. He also testified that no bonding agency or company outside of Galveston, not registered with Galveston, could make the bond. I RR 6-7. Petitioner also introduced evidence that the average bond set for bond jumping cases in Galveston since 1984 is approximately \$56,000. I RR 14. Since 1984, no single bond in a bond jumping case in Galveston County has been more than \$400,000. I RR 14.

The trial court thus effectively holds Petitioner without bail as though he were still awaiting trial for capital murder where the proof was evident, as opposed to a third degree felony. Comparison of the bail set in this case to the following cases, *which are capital murder cases*, further illustrates the ridiculous nature of Petitioner's bond.

In *Ludwig v. State*, 812 S.W.2d 323 (Tex.Crim.App. 1991), the defendant was charged in three indictments with the murder of two individuals, and with capital murder for having murdered both of them during the same criminal transaction. *Ludwig*, 812 S.W.2d at 324. Bail was initially set at an aggregate of \$2,000,000, covering all three charges. *Id.* Ludwig filed a habeas application seeking to reduce the total bail amount but the district court denied relief. *Id.* The Waco Court of Appeals held that the \$2,000,000 was excessive, and ordered it reduced to \$1,000,000. *Id.* On discretionary review, the Court of Criminal Appeals deemed a \$1,000,000 total bail for a double capital murder excessive. *Id.* At 328. The court stated that it "has yet to condone a bail amount even approaching seven figures, even in a capital case." *Id.* The court made that statement even with evidence that Ludwig had threatened his victims, a brother-in-law and a nephew by marriage, before he allegedly killed them. *Id.* Taking all facts into consideration, **the court reduced bail from \$1,000,000 to \$50,000**, citing *Ex parte Ivey*, 594 S.W.2d 98 (Tex. Crim. App. 1980) (bail reduced from \$250,000 to \$50,000, even though there was testimony the Applicant would pose a danger to

potential witnesses in his prosecution).

In *Ex parte Milburn*, 8 S.W.3d 422 (Tex.App. - Amarillo 1999, no pet.), the Court of Appeals **reduced bail from a \$2,000,000 surety bond or a \$500,000 cash bond to \$100,000** despite the violent nature of the crime. Milburn was charged with the capital murder of a child accomplished by blunt force trauma to the abdomen. *Milburn*, 8 S.W.3d at 423.

In *Ex parte Wood*, 952 S.W.2d 41 (Tex.App. - San Antonio 1997, no pet.), the Court of Appeals **reduced bail in a capital murder case from \$350,000 to \$50,000. Bail in an unrelated aggravated robbery case was also lowered from \$100,000 to \$20,000.** *Wood*, 952 S.W.2d at 42. The capital murder charge was based on an aggravated robbery of a gas station. *Id.* Wood and an accomplice targeted a gas station where a friend worked as the cashier. *Id.* Wood remained in his truck while the accomplice went inside the station. *Id.* When Wood heard a gunshot he went inside, saw the cashier covered in blood, and assumed he had been killed. *Id.* Wood took the safe and a VCR. *Id.* Wood and his accomplice drove back to Wood's house where they watched the security tape showing the murder on the VCR that they stole while they broke into the safe. *Id.*

Other cases include *Ex parte Simpson*, 77 S.W.3d 894, 897 (Tex.App. – Tyler 2002, no pet.) (**\$1,000,000 bail excessive** in “brutal gang related murder”; bail reset at \$600,000 by the district court); *Ex parte McDonald*, 852 S.W.2d 730 (Tex.App. – San Antonio 1993, no pet.) (defendant accused of kidnaping and killing his former wife, son testified he would feel threatened if defendant were released on bond, **\$1,000,000 bail excessive, reduced to \$75,000**); *Eggleston v. State*, 917 S.W.2d 100 (Tex.App. – San Antonio 1996, no pet.) (defendant accused of killing nine year old son, hiding body, reporting him kidnaped. Defendant was a military man with contacts all over the world, **\$1,000,000 bail excessive, bail reduced to \$300,000**).

The recent capital murder case of *State v. Celeste Beard* (Cause No. 9020236, 390<sup>th</sup> District Court, Travis County, Texas), in which undersigned counsel was involved, is also instructive as to an abuse of discretion by the trial court in setting excessive bail. Reported as *Ex parte Beard*, 92 S.W.3d 566 (Tex.App. – Austin 2002, pet. ref’d.), the Austin Court of Appeals **reduced bail from \$8,000,000 to \$50,000**. In that case, as in the instant case:

“The factor that makes this case unusual is Beard’s apparent wealth. Viewing the evidence in the light most favorable to the district court’s order, it is evident that Beard has access to financial resources exceeding those of most criminal defendants.” *Beard* at p. 573.

Notwithstanding Beard’s wealth, the court held that a defendant’s ability to make bail

“does not in itself justify bail in that amount. In setting bail, a balance must be struck between the defendant’s presumption of innocence and the State’s interest in assuring the defendant’s appearance at trial. [citations omitted]

\* \* \*

**When bail is available, it is excessive if it is set in an amount greater than is reasonably necessary to satisfy the government’s legitimate interests.** *See, United States v. Salerno*, 481 U.S. 739, 753-54, 107 S.Ct. 295, 95 L.Ed.2d 697 (1987).” *Ibid.* (emphasis added)

Finally, the *Beard* court said:

“In deciding whether the district court’s order in this cause is within the zone of reasonable disagreement, we cannot disregard the extraordinary amount of bail ordered. At oral argument, Beard’s counsel suggested without contradiction by the State that \$8,000,000 is the largest bail ever set in a reported Texas Criminal case. This amount is more than eight times higher than the highest bail previously determined to be reasonable in a reported Texas capital murder case. Such a dramatic departure from prior practice is at least suggestive of an abuse of discretion.” *Ibid.*

The allegations against Petitioner in the instant case concern flight to avoid prosecution for the murder of Morris Black. A Galveston County jury found him not guilty of the murder on November 11, 2003. Bond jumping is a third degree felony with a maximum prison sentence of ten years. The indictments do not allege violence of any kind. Furthermore, maintaining two contradictory indictments effectively doubles the amount of bail required. In far worse cases; such as those cited above, the Courts have repeatedly reduced bail to an amount thousands of times lower than Petitioner's.

The trial court abused her discretion in capriciously setting bail at a total of **TWO BILLION DOLLARS** (\$2,000,000,000.00) following Petitioner's acquittal on the far more serious underlying charge of murder. The facts of this case justify bail no higher than \$50,000.

**CONCLUSION**

Taking all factors into account, bail should be set at no more than \$50,000.00.

Respectfully submitted,

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ATTORNEYS FOR Applicant

**CERTIFICATE OF SERVICE**

This will certify that a true and correct copy of the foregoing has been mailed certified mail, return receipt requested to Kurt Sistrunk and Joel Bennett, Galveston County District Attorney's Office, 300 Courthouse, 722 Moody Ave., Galveston, Texas 77550, on this \_\_\_\_ day of January 2004.

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Dick DeGuerin