

LITIGATING BAIL

Because freedom
and litigation are fun!

CONSTITUTIONAL RIGHT TO “BAIL”

“Mississippi’s Constitution grants all criminal defendants the right to bail prior to conviction, with certain exceptions.” *Smith v. Banks*, 134 So.3d 715 (Miss. 2014).

Miss. Const. Art. 3, § 29(1) “Excessive bail shall not be required, and all persons shall, before conviction, beailable by sufficient sureties, except....”

THE EXCEPTIONS

EXCEPTION ONE: CAPITAL OFFENSES

MISS. CONST. ART. 3, § 29

“(1) Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses (a) when the proof is evident or presumption great; or (b) when the person has previously been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more.

EXCEPTION ONE: CAPITAL OFFENSES

WHAT IS A “CAPITAL OFFENSE”?

CAPITAL MURDER (and that’s it!)

For the purposes of Article 3, Section 29, “a capital case is any case where the permissible punishment prescribed by the Legislature is death....” *Ex parte Dennis*, 334 So.2d 369, 372 (Miss. 1976) (citation omitted).

EXCEPTION ONE: CAPITAL OFFENSES

WHAT IS A “CAPITAL OFFENSE”?

Do not be led astray by Miss. Code Ann. § 1-3-4, which defines “capital offenses” to include “offenses and crimes punishable by death or imprisonment for life in the state penitentiary.”

EXCEPTION ONE: CAPITAL OFFENSES

WHAT IS A “CAPITAL OFFENSE”?

“We conclude that the legislature [through Section 1-3-4] did not in any manner, expressly or impliedly, change the meaning of ‘capital offenses’ of the constitution so as to include within it punishment for armed robbery which does not permit death as a penalty. ... [T]herefore ... the lower court erred in denying the petitioner bail....” *Ex parte Dennis*, 334 So.2d at 373.

EXCEPTION ONE: CAPITAL OFFENSES

WHAT IF THE DEFENDANT IS A JUVENILE OR INTELLECTUALLY DISABLED?

Again: “A capital case is any case where the permissible punishment prescribed by the Legislature is death...” *Ex parte Dennis*, 334 So.2d 369, 372 (Miss. 1976) (citation omitted).

EXCEPTION ONE: CAPITAL OFFENSES

“The issue raised in Tyler's case is whether he has been charged with a ‘capital offense’ despite the fact that as a juvenile he cannot be given the death penalty. ... [F]or purposes of Article 3, Section 29, Tyler was not charged with a “capital” offense.” *Edmonds v. State*, 955 So.2d 787, 809 (Miss. 2007) (Diaz, J., specialy concurring).

EXCEPTION ONE: CAPITAL OFFENSES

PROOF IS EVIDENT OR PRESUMPTION GREAT

“The word ‘evident’ is construed to mean manifest, plain, clear, obvious, apparent, and notorious, and unless it plainly, clearly, and obviously appears by the proof that the accused is guilty of a capital crime, bail should be allowed.” *Huff v. Edwards*, 241 So.2d 654, 656 (Miss. 1970).

EXCEPTION ONE: CAPITAL OFFENSES

BURDEN

“In a proceeding to obtain bail brought by one who has been indicted by a grand jury for a capital offense, the burden is upon the defendant to show proof of his guilt is not evident or the presumption is not great. The indictment creates a prima facie case of legality of detention. ...” *Huff v. Edwards*, 241 So.2d 654, 655-56 (Miss. 1970).

EXCEPTION ONE: CAPITAL OFFENSES

BURDEN CONT.

“On the other hand, before indictment ... the [defendant] is being held on an order of a justice of the peace pending action by the grand jury. In such instances the burden of proof is upon the State, since there is a presumption of innocence and no indictment creating a prima facie case of valid detention.” *Huff v. Edwards*, 241 So.2d 654, 655-56 (Miss. 1970).

EXCEPTION ONE: CAPITAL OFFENSES

EVEN WHEN THE PROOF IS EVIDENT...

“Since the right to bail is generally within the sound judicial discretion of the court, there may be exceptional circumstances permitting bail in a sound discretion, even where the constitutional exceptions do not exist. **These would include** ‘extraordinary circumstances, such as serious or probably fatal injury to health, or **unusual and protracted delay upon the part of the state in bringing a prisoner to trial.**’” *Huff v. Edwards*, 241 So.2d 654, 656 (Miss. 1970) (citation omitted).

EXCEPTION TWO: NEW FELONY

“(2) If a person charged with committing any offense that is punishable by death, life imprisonment or imprisonment for one (1) year or more in the penitentiary or any other state correctional facility is granted bail and (a) if that person is indicted for a felony committed while on bail; or (b) if the court, upon hearing, finds probable cause that the person has committed a felony while on bail, then the court shall revoke bail and shall order that the person be detained, without further bail, pending trial of the charge for which bail was revoked. For the purposes of this subsection (2) only, the term “felony” means any offense punishable by death, life imprisonment or imprisonment for more than five (5) years under the laws of the jurisdiction in which the crime is committed. In addition, grand larceny shall be considered a felony for the purposes of this subsection.”

**EXCEPTION THREE:
FACING TWENTY YEARS OR MORE
& POSING “A SPECIAL DANGER”**

(3) In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a **county or circuit court judge** may deny bail for such offenses when the proof is evident or the presumption great upon making a determination that the release of the person or persons arrested for such offense **would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required.**

**EXCEPTION THREE:
FACING TWENTY YEARS & POSING “A SPECIAL DANGER”**

“COUNTY OR CIRCUIT COURT JUDGE” ONLY

“Article 3, Section 29 of the Mississippi Constitution ... grants authority to deny bail only to County and Circuit Judges.” *Mississippi Com’n on Judicial Performance v. Martin*, 921 So.2d 1258, 1264 (Miss. 2005).

“Section 29 of the Mississippi Constitution of 1890 prohibits municipal courts and justice courts from denying bail.” Op. Atty. Gen. No. 94-0069, 1994 WL 68455 (Miss. A.G. 1994).

**EXCEPTION THREE:
FACING TWENTY YEARS & POSING “A SPECIAL DANGER”**

“SPECIAL DANGER”

“Beckwith is over seventy years of age, in failing health, and has been in jail now over a year. Unless the State can satisfy the court that he does indeed constitute a special danger, he should be granted bail in a reasonable amount.”
Beckwith v. State, 615 So.2d 1134, 1148-49 (Miss. 1992).

EXCEPTION THREE:

FACING TWENTY YEARS & POSING “A SPECIAL DANGER”

“The State was required to prove that Tyler constituted a danger to the community or another person or that there was a substantial risk of flight. At no point did the State produce a scintilla of evidence of either. On the other hand, numerous teachers, members of the community, and even the Sheriff of Oktibbeha County testified that Tyler was not a danger to the community or even a violent person. He had never even been disciplined at school. Additionally, it is difficult to imagine a thirteen-year-old having that ability to flee when his entire family resides in Mississippi.” *Edmonds v. States*, 955 So.2d 787, 811 (Miss. 2007) (Diaz, J., specially concurring).

WRITTEN FINDINGS

&

BAIL CHALLENGES

Miss. Const. Art. 3, § 29(4)

(4) In any case where bail is denied before conviction, the judge shall place in the record his reasons for denying bail. Any person who is charged with an offense punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment and who is denied bail prior to conviction shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court. The provisions of this subsection (4) do not apply to bail revocation orders.

M.R.A.P. 9

MRAP 9(a) **“Release Prior to a Judgment of Conviction.** A petition challenging an order refusing or imposing conditions of release shall be heard promptly by the Supreme Court or the Court of Appeals if the case has been assigned to the Court of Appeals. Upon entry of an order refusing or imposing conditions of release, the trial court shall state in writing the reasons for the action taken....”

HABEAS CORPUS

“The writ of habeas corpus shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty ... except in the cases expressly excepted.’ [Miss.Code Ann. § 11-43-1](#) (Rev.2012). ‘The function of the habeas corpus court in Mississippi in criminal cases is to release a prisoner who is being unlawfully held **or to grant him a bail bond which he can make.**’ [Keller v. Romero, 303 So.2d 481, 483 \(Miss.1974\).](#)” *Smith v. Banks*, 134 So.3d 715, 719 (Miss. 2014).

HABEAS CORPUS

“The writ of habeas corpus may be granted by a judge of the Supreme Court, or a judge of the circuit or chancery court, in term time or in vacation, returnable before himself or another judge.” Miss. Code Ann. § 11-43-7.

“....If no court has entertained any proceeding on the movant's matter, excepting bond, the motion for habeas corpus shall be filed with the clerk of the circuit court in the county in which the movant is detained.” UCCCR 2.07(A)(5).

HABEAS CORPUS

URCCC 2.07(A)(2) “If the person for which habeas relief is sought is charged with a crime in this state for which the accused may be imprisoned or confined to jail, and the accused is indigent and makes an affidavit of indigence, then the court shall appoint an attorney, if one has not already been appointed.”

**UNLESS YOUR CLIENT FALLS INTO ONE
OF THE EXCEPTIONS, HE SHOULD NOT
BE IN JAIL PRETRIAL (UNLESS HE
WANTS TO BE THERE).**

**Again: “[Subject to the exceptions,] all
persons shall, before conviction, be bailable.”**
Miss. Const. Art. 3, § 29.

BAIL DOES NOT MEAN “MONETARY BAIL”

“A consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional. However, the Mississippi bail system provides for release of pretrial detainees on terms other than monetary bail.” *Lee v. Lawson*, 375 So.2d 1019, 1023 (Miss. 1979).

THERE IS A PRESUMPTION IN FAVOR OF RECOGNIZANCE

In Mississippi, there is “a presumption that a defendant is entitled to be released on order to appear on his own recognizance.” *Lee v. Lawson*, 375 So.2d 1019, 1024 (Miss. 1979).

THERE IS A PRESUMPTION IN FAVOR OF RECOGNIZANCE

“The record in the case at bar is devoid of any consideration by the judicial officer of alternative forms of release. There is no evidence that there is a substantial risk of non-appearance. For that reason, we remand this case to the County Court of Pike County, with instructions for the court to consider whether a form of pretrial release other than money bail would adequately assure the defendant's presence at trial.” *Lee v. Lawson*, 375 So.2d 1019, 1024 (1979).

Purpose of Bail

“The purpose of bail is to secure the presence of the accused at trial.” *Lee v. Lawson*, 375 So.2d 1019, 1021 (Miss. 1979).

In most cases, monetary bail is not necessary to secure the presence of the accused at trial.

FACTORS

The Supreme Court has identified factors that should be considered to determine whether there is a risk of non-appearance and thus whether (and how much) money bail should be required.

See Lee v. Lawson, 375 So.2d 1019, 1024 (Miss. 1979). *See also Clay v. State*, 757 So.2d 236, 240 (Miss. 2000); *Shook v. State*, 511 So.2d 1386, 1387 (Miss. 1987).

FACTORS

Moreover, MRAP 9(a) states:

“Where the petition challenges an order denying bail or setting bail which the challenged party contends is excessive, the challenging party shall file contemporaneously with the petition such papers, affidavits, and portions of the record as will show ...”

And then requires information that tracks the factors identified in the caselaw.

**You should be prepared to address
EACH of these factors.**

(You should add supplemental
information regarding the factors in a
bond reduction motion.)

(1)The length of his residence in the community.

See, e.g., Lee, 375 So.2d at 1024. See also MRAP 9(a)(7)

(2) His employment status and history and his financial condition.

See, e.g., Lee, 375 So.2d at 1024. See also MRAP 9(a)(4) (“employment status”); MRAP 9(a)(5) (“financial resources”).

(3) His family ties and relationships.

See, e.g., Lee, 375 So.2d at 1024. See also MRAP 9(a)(3).

(4) His reputation, character and mental condition.

See, e.g., Lee, 375 So.2d at 1024. See also MRAP 9(a)(6)

(5) His prior criminal record, including any record of prior release on recognizance or on bail.

See, e.g., Lee, 375 So.2d at 1024. See also MRAP 9(a)(8) (“record of prior convictions”); MRAP 9(a)(9) (“record or appearances or flight”).

(6) The identity of responsible members of the community who would vouch for defendant's reliability.

See, e.g., Lee, 375 So.2d at 1024.

(7) The nature of the offense charged and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of non-appearance.

See, e.g., Lee, 375 So.2d at 1024. See also MRAP 9(a)(1) (“nature and circumstances of the offense charged”); MRAP 9(a)(2) (“weight of the evidence”).

(8) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

See, e.g., Lee, 375 So.2d at 1024. See also MRAP 9(a)(12) (“such other matters as may be deemed pertinent”)

“EXCESSIVE” BAIL IS UNCONSTITUTIONAL

“Excessive bail shall not be required, and [subject to the listed exceptions] all persons shall, before conviction, beailable by sufficient sureties.” Miss. Const. Art. 3, § 29.

“Where excessive bail is required it is tantamount to a denial of bail which is in direct contradiction to Article 3, Section 29 of the Mississippi Constitution.” *Clay v. State*, 757 So.2d 236, 241 (Miss. 2000).

WHAT IS “EXCESSIVE”?

More than the defendant can afford?

WHAT IS “EXCESSIVE”?

“Bail must not be in a prohibitory amount, more than the accused can reasonably be expected under the circumstances to give, for, if so, it is substantially a denial of bail within the constitutional provision.” *Jones v. State*, 112 So. 170, 173 (Miss. 1927).

WHAT IS “EXCESSIVE”?

“... However, a mere inability to procure bail in a certain amount does not of itself make such amount excessive; but regard must be had to the circumstances and ability of the prisoner, in connection with the atrocity of the offense, or the turpitude of the crime and punishment involved, in determining whether the bail is or is not excessive.” *Jones v. State*, 112 So. 170, 173 (Miss. 1927)

WHAT IS “EXCESSIVE”?

“The function of the habeas corpus court in Mississippi in criminal cases is to release a prisoner who is being unlawfully held or **to grant him a bail bond which he can make.**” *Smith v. Banks*, 134 So.3d 715, 719 (Miss. 2014) (citation omitted).

WHAT IS “EXCESSIVE?”

More than necessary to assure his appearance at trial.

WHAT IS “EXCESSIVE?”

Again: “The purpose of bail is to secure the presence of the accused at trial.” *Lee v. Lawson*, 375 So.2d 1019, 1021 (Miss. 1979).

WHAT IS “EXCESSIVE?”

“[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.” *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

See, e.g., Royalty v. State

“The record does not support the trial court's finding that petitioner is ‘of a transient nature.’ He has lived in Jackson most of his life, and his mother and other close relatives live there. He has had no prior convictions, except on a misdemeanor charge in city court, now on appeal to the county court with a trial de novo. It is uncontested that petitioner is unable to make a \$10,000 bail bond.” 235 So. 2d 718, 720 (Miss. 1970)

See, e.g., Royalty v. State

“With these unrefuted facts in the record, it is manifest that the requirement of a \$10,000 bail bond for petitioner, who has not been convicted and is presumed innocent until found guilty by a jury, is in violation of [article 3] section 29. That section prohibits ‘excessive bail’ and provides that ‘all persons shall, before conviction, be bailable * * *,’ with stated exceptions.” *Id.*

Fixed Bail Schedules Are Unconstitutional

“Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements. The incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.” *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (footnote omitted).

Fixed Bail Schedules Are Unconstitutional

“The term [“master bond schedule”] as here used refers to a schedule with the amount of a bond specified for each listed offense. It contemplates that each accused's pretrial money bail is to be set automatically on the basis of the offense charged.” *Pugh v. Rainwater*, 572 F.2d 1053, 1057 n.6 (5th Cir. 1978) (en banc)

Fixed Bail Schedules Are Unconstitutional

See also Chevon Elizabeth Thompson, et al v. Moss Point, Mississippi, 1:15cv182LG-RHW, Declaratory Judgment (doc. no. 18) (S.D. Miss. Nov. 6, 2015).

Consider Requesting An Unsecured Appearance Bond

A type of bail consisting of the accused's written promise to appear in court, coupled with the accused's unsecured promise to pay a specified sum of money if the accused fails to appear as required.

No money required on the front-end, but it provides an extra incentive for your client to appear in court.

Don't forget about UCCCR 6.02(C)

For defendants who have “never been convicted in any court ... of a crime punishable by more than one year’s imprisonment, been charge with escape, or had an order *nisi* entered on a previous bond,” UCCCR 6.02(C)(1), and who are not charged with a crime punishable by 20 years or more, UCCCR 6.02(B).

“The accused must tender to the clerk of the circuit court ten percent (10%) of the amount of the bond as set, in cash, or \$250.00 in cash, whichever is greater.” UCCCR 6.02(C)(4).

Don't forget about UCCCR 6.02(C)

“...The money deposited with the clerk shall be disbursed in the following manner: first, to pay any court costs assessed against the defendant; second, to pay any restitution the defendant has been ordered to make; third, to pay any fines imposed against the defendant; fourth, to pay any assignment of the sum made by the defendant to defendant's attorney; and fifth, any refund to the defendant or other disbursements as allowed by the court.” UCCCR 6.02(C)(7).