

LITIGATING PRETRIAL RELEASE

MRCrP 8

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RULE 8.2

(a) Right to Release. Any defendant charged with an offense bailable as a matter of right **shall** be released pending or during trial on the defendant's personal recognizance or on an appearance bond unless the court before which the charge is filed or pending determines that such a release will not reasonably assure the defendant's appearance as required, or that the defendant's being at large will pose a real and present danger to others or to the public at large. ...

Rule 8.2 cont.

... If such a determination is made, the court **shall** impose the least onerous condition(s) contained in Rule 8.4 that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. In making such a determination, the court **shall** take into account the following: ...

WHO IS (NOT) BAILABLE AS A MATTER OF RIGHT?

Rule 8.2(a) Right to Release. Any defendant charged with an offense **bailable as a matter of right** shall be released...

MISS. CONST. ART. 3, § 29

(1) Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except...

EXCEPTION ONE: CAPITAL OFFENSES

ART. 3, § 29(1)

(1) ... 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

ART. 3, § 29(1)

What is a capital offense?

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

ART. 3, § 29(1)

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

ART. 3, § 29(1)

“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

ART. 3, § 29(1)

When is “the proof ... evident or presumption great”?

“Where there is only a ‘probability’ of guilt, or **where, on the whole testimony adduced, the court entertains a reasonable doubt** as to whether the prisoner committed the act, or whether, in doing so, he was guilty of a capital crime, **bail should be granted.**” *Huff v. Edwards*, 241 So.2d 654, 656 (Miss. 1970) (citation omitted).

EXCEPTION ONE: CAPITAL OFFENSES

ART. 3, § 29(1)

“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 that the 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 at 655-56.

EXCEPTION ONE: CAPITAL OFFENSES

ART. 3, § 29(1)

“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 at 656.

EXCEPTION TWO: NEW FELONY

ART. 3, § 29(2)

(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....

EXCEPTION TWO: NEW FELONY

ART. 3, § 29(2)

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: 20 YRS & “A SPECIAL DANGER”
ART. 3, § 29(3)**

(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: 20 YRS & “A SPECIAL DANGER”
ART. 3, § 29(3)**

“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).**

**EXCEPTION THREE: 20 YRS & “A SPECIAL DANGER”
ART. 3, § 29(3)**

“[Pursuant to Art. 3, § 29(3)], 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....” *Edmonds v. State*, 955 So.2d 787, 811 (Miss. 2007) (Diaz, J., specially concurring).

**EXCEPTION THREE: 20 YRS & “A SPECIAL DANGER”
ART. 3, § 29(3)**

“...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 the ability to flee when his entire family resides in Mississippi.” *Edmonds*, 955 So.2d at 811 (Diaz, J. specially concurring)

**EXCEPTION THREE: 20 YRS & “A SPECIAL DANGER”
ART. 3, § 29(3)**

“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).

REASONS FOR DENYING BAIL

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.

REASONS FOR DENYING BAIL

M.R.A.P. 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....**

RELEASE PURSUANT TO 8.2

If “bailable as a matter of right”:

(1) There is a presumption in favor of “personal recognizance.”

(2) If the presumption is overcome, the court must impose “the least onerous conditions.”

PRESUMPTION OF PR

RULE 8.2

8.2(a) Right to Release. Any defendant charged with an offense bailable as a matter of right **shall be released pending or during trial on the defendant's personal recognizance or on an appearance bond unless** the court before which the charge is filed or pending determines that such a release will not reasonably assure the defendant's appearance as required, or that the defendant's being at large will pose a real and present danger to others or to the public at large....

PRESUMPTION OF PR COMMENT TO RULE 8.2

“Under section (a), a defendant charged with an offense that is bailable as a matter of right **is eligible for a personal recognizance release unless** the judge determines that the defendant's presence would not be reasonably assured or that the defendant poses a real and present danger of harm to others.”

PRESUMPTION OF PR JUDICIAL COLLEGE'S "RELEASE ORDER"

WHEREAS this Court HAVING **NOT** BEEN PRESENTED SUFFICIENT EVIDENCE to find that releasing the DEFENDANT on his/her personal recognizance ... will **not** reasonably secure the DEFENDANT'S appearance or protect the public from a real and present danger posed by the DEFENDANT being at large.

IT IS HEREBY ORDERED that the DEFENDANT be released on his/her personal recognizance subject to ... [the mandatory terms of release set forth in Rule 8.4(a)].

PRESUMPTION OF PR

ABA GUIDELINES / *LEE V. LAWSON*

“The American Bar Association Project on Minimum Standards Relating to Pretrial Release serves as a guide to the conservator in the release decision. The standards are the result of a great deal of research and have been formulated by some of the finest observers of criminal justice in this country. **Adherence to these standards will go far toward the goal of equal justice under law.**

There is incorporated in these standards a presumption that a defendant is entitled to be release on order to appear or on his own recognizance.”

Lee v. Lawson, 375 So.2d 1019, 1024 (Miss. 1979)

PRESUMPTION OF PR
SEE ALSO 18 U.S.C. § 3142(b)

“The judicial officer shall order the pretrial release of the person **on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court ... unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”**

PR = MANDATORY CONDITIONS ONLY
RULE 8.4(a)

Appear in court, when required, and comply with all orders of the court;

Commit no crime;

Promptly notify the court of any change of address; and

Meet with your public defender or retained attorney, as directed.

LEAST ONEROUS CONDITIONS

RULE 8.2

If the Court determines that personal recognizance and the mandatory conditions of release are insufficient:

“...the court **shall** impose **the least onerous condition(s)** contained in Rule 8.4 that will reasonably assure the defendant’s appearance or that will eliminate or minimize the risk of harm to others or to the public at large.”

LEAST ONEROUS CONDITIONS COMMENT TO RULE 8.2

“...Rule 8.2 is based on the **presumption of innocence** of the accused, the constitutional right of a defendant charged with a noncapital offense to be released on bail, and **the policy that a defendant should be released pending trial whenever possible....**”

LEAST ONEROUS CONDITIONS

“Bail” does NOT mean
financial condition of release.

Rule 8.1(g): “‘Bail’ is a monetary amount for or
condition of pretrial release from custody,
normally set by a judge at the initial
appearance.

LEAST ONEROUS CONDITIONS

“Bail” does NOT mean
financial condition of release.

Comment to Rule 8.2(a): “Section (a) makes it possible **to release on bail** indigent defendants **on non-financial conditions** that make it reasonably likely that the defendant will appear. See **Bandy v. United States**, 81 S. Ct. 197, 5 L. Ed. 2d 218 (1960) (questioning constitutionality of holding indigent defendant in custody for no reason other than the inability to raise money for bail).”

LEAST ONEROUS CONDITIONS

LEE v. LAWSON ?

“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).

ADDITIONAL CONDITIONS

RULE 8.4(B)

(b) Additional Conditions. An order of release may include any one (1) or more of the following conditions **reasonably necessary to secure a defendant's appearance or to protect the public: ...**

ADDITIONAL CONDITIONS

RULE 8.4(B)

(1) execution of an appearance bond in an amount specified by the court, either with or without requiring that the defendant deposit with the clerk security in an amount as required by the court;

[Rule 8.1(b) **Unsecured Appearance Bond.** An “unsecured appearance bond” is an undertaking to pay a specified sum of money to the clerk of the circuit, county, justice, or municipal court, for the use of the State of Mississippi or the municipality, on the failure of a person released to comply with its conditions.]

ADDITIONAL CONDITIONS RULE 8.4(B)

(2) execution of a secured appearance bond;

(3) placing the defendant in the custody of a designated person or organization agreeing to supervise the defendant;

(4) restrictions on the defendant's travel, associations, or place of abode during the period of release:

ADDITIONAL CONDITIONS

RULE 8.4(B)

- (5) restrictions on the defendant's direct or indirect contact with any specified person(s);**

- (6) return to custody after specified hours;**

- (7) participation in, and successful completion of, any drug, alcohol, anger management, mental health, or other treatment required by the court, and/or substance testing;**

ADDITIONAL CONDITIONS

RULE 8.4(B)

(7) participation in, and successful completion of, any drug, alcohol, anger management, mental health, or other treatment required by the court, and/or substance testing;

(8) participation in General Educational Development (GED®) classes and testing or in any other educational activities required by the court;

(9) electronic monitoring; or

ADDITIONAL CONDITIONS

RULE 8.4(B)

(10) any other conditions which the court deems reasonably necessary.

HEARING

In determining whether additional conditions are necessary --- and which conditions are necessary --- “the court **shall** take into account” the factors listed in Rule 8.2(a).

Which means you should be prepared to present evidence on the factors.

HEARING

You should also:

(1) Remind the Court of the presumption of release on personal recognizance.

(2) Remind the Court that --- *if additional conditions are necessary* --- the Court must impose the least onerous conditions.

HEARING

(3) Argue for specific conditions that are favorable to your client (and plan your evidence with those conditions in mind).

(4) Question the need for proposed conditions (e.g. How does a secured bond keep the community safer than a stay away order, or electronic monitoring, or a curfew? How does a secured bond make appearance more likely?)

HEARING

(5) Request written findings.

See M.R.A.P. 9 “Upon entry of an order refusing or imposing conditions of release, the trial court shall state in writing the reasons for the action taken....”

See *also* Judicial College’s “Release Order”

HEARING: FACTORS

RULE 8.2(a) (1)-(15)

(1) the age, background and family ties, relationships and circumstances of the defendant;

HEARING: FACTORS

RULE 8.2(a)

(2) the defendant's reputation, character, and health;

“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.” *Edmonds*, 955 So.2d at 811 (Diaz, J. specially concurring)

HEARING: FACTORS

RULE 8.2(a)

(3) the defendant's prior criminal record, **including prior releases on recognizance or on unsecured or secured appearance bonds**, and other pending cases;

HEARING: FACTORS

RULE 8.2(a)

(4) the identity of responsible members of the community who will vouch for the defendant's reliability;

[Don't just identify them. Try to get these people to the hearing.]

HEARING: FACTORS

RULE 8.2(a)

(5) violence or **lack of violence** in the alleged commission of the offense;

HEARING: FACTORS

RULE 8.2(a)

(6) the nature of the offense charged, the apparent probability of conviction, and the likely sentence, **insofar as these factors are relevant to the risk of nonappearance;**

HEARING: FACTORS

RULE 8.2(a)

(7) the type of weapon used (e.g., knife, pistol, shotgun, sawed-off shotgun, assault or automatic weapon, explosive device, etc.);

HEARING: FACTORS

RULE 8.2(a)

(8) Threats made against victims or witnesses;

HEARING: FACTORS

RULE 8.2(a)

(9) the value of property taken during the alleged commission of the offense;

HEARING: FACTORS

RULE 8.2(a)

(10) whether the property allegedly taken was recovered or not, and damage or lack of damage to the property allegedly taken;

HEARING: FACTORS

RULE 8.2(a)

(11) residence of the defendant, including consideration of real property ownership, and length of residence in the defendant's domicile;

HEARING: FACTORS

RULE 8.2(a)

(12) in cases where the defendant is charged with a drug offense, evidence of selling or distribution activity that should indicate a substantial increase in the amount of bond;

HEARING: FACTORS

RULE 8.2(a)

(13) consideration of the defendant's employment status and history, the location of defendant's employment (e.g., whether employed in the county where the alleged offense occurred), and the defendant's financial condition;

[Comment to Rule 8.2(a): Citing *Bandy v. United States*, 81 S. Ct. 197, 5 L. Ed. 2d 218 (1960) (questioning constitutionality of holding indigent defendant in custody for no reason other than the inability to raise money for bail).]

HEARING: FACTORS

RULE 8.2(a)

(14) sentence enhancements, if any, included in the charging document; and

HEARING: FACTORS

RULE 8.2(a)

(15) any other fact or circumstance bearing on the risk of nonappearance or on the danger to others or to the public.

HEARING: FACTORS COMMENT TO RULE 8.2(a)

“Section (a) is intended to provide a helpful, non-exhaustive list for any court making such an inquiry, and **is written to ensure that a judge not give inordinate weight to the nature of the present charge.**”

INITIAL DETERMINATION

RULE 8.5(a)

Rule 8.5(a) Initial Decision. When a defendant is brought before a court for **initial appearance**, a determination of the conditions of release shall be made. The judge shall issue an order containing the conditions of release and shall inform the defendant of the conditions, the possible consequences of their violation, and that a warrant for the defendant's arrest may be issued immediately upon report of a violation.

[Initial appearance should be **no later than 48 hours after arrest**. Rule 5.1(b)(3) & (c)(2)(A).]

If at first you don't succeed...

MOTION TO AMEND CONDITIONS RULE 8.5(B)

(b) Amendment of Conditions. The court may, for good cause shown, on its own initiative **or on application of either party**, modify the conditions of release, after first giving the parties an adequate opportunity to respond to the proposed modification.

REVIEW BY SENIOR CIR. CT. JUDGE RULE 8.5(C)

(c) Review by Circuit Court. No later than seven (7) days before the commencement of each term of circuit court in which criminal cases are adjudicated, the official(s) having custody of felony defendants being held for trial, grand jury action, or extradition within the county (or within the county's judicial districts in which the court term is to be held) shall provide the presiding judge, the district attorney, and the clerk of the circuit court the names of all defendants in their custody, the charge(s) upon which they are being held, and the date they were most recently taken into custody. ...

REVIEW BY SENIOR CIR. CT. JUDGE RULE 8.5(C) (CONT.)

... The senior circuit judge, or such other judge as the senior circuit judge designates, **shall review the conditions of release for every felony defendant who is eligible for bail and has been in jail for more than ninety (90) days.**

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.’ ... **‘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) (internal and external citations omitted).

HABEAS CORPUS CONT.

“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.

SEE ALSO UCCCR 2.07.

HABEAS CORPUS CONT.

“....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).

CONDITIONS SHOULD NOT CHANGE UPON INDICTMENT

Rule 8.7(a) Transfer Upon Supervening Indictment. An appearance bond or release order issued to assure the defendant's presence for proceedings following the filing of a charging affidavit **shall automatically be transferred to the same, related, or lesser charge subsequently prosecuted by indictment** unless, following indictment, the judge presiding, for good cause, shall order revocation or modification of the conditions of release, as provided in Rule 8.6(a) and (b).

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)

THE END