

Release Pending Trial/Sentencing/Appeal (Bail)

I. General.

A. Theory Underlying Pretrial Confinement

1. **Basic Principle.** The Defendant (D) cannot be punished because he/she has not yet been found guilty. Consequently, pretrial confinees' activities must be kept separate/distinct from sentenced prisoners lest it appear they are being punished.

2. **Justifications for Pretrial Confinement.** The burden of proof is on Government to justify pretrial confinement.

a. D is a flight risk and is confined to insure his/her presence for trial.

b. D is a danger to the community, likely to commit crime or subvert justice, and his/her pretrial confinement amounts to preventive detention.

B. D's Right to Release from Pretrial Confinement Under Reasonable Conditions

1. The 8A, US Constitution, does not provide a general right to an accused, but Art. 3, Sec. 29 of MS Constitution, does provide such a right.

2. Exceptions (limitations) to the right of release (bail) [judge must set a bail amount unless...]

a. D is charged with a capital crime and there is strong proof of guilt.

b. Crime charged is punishable by 20 or more years of confinement and there is a prior conviction of a capital offense.

c. D is already on bail and there is probable cause to believe D has committed another crime punishable by 5 or more years of confinement; bail denied and bail for the first offense is revoked.

d. Crime charged is punishable by 20 or more years of confinement and D is a special danger to community or no conditions can reasonably ensure his presence. Only a county or circuit judge can deny bail on this basis; decision is subject to emergency review by a Supreme Court judge.

C. Determining Conditions of Release from Pretrial Confinement (Amount of Bail)

1. Determination of conditions of release occurs at initial appearance and can be reviewed at D's request anytime thereafter.

2. Conditions (amount of bail) are set at the discretion of the judge (that is, are not specified by law) on consideration of the following MS factors:

- a. D's length of residence in the community
- b. Employment status and history
- c. Financial condition
- d. Family ties and relationships
- e. Reputation, character, mental condition
- f. Prior criminal record, prior release on conditions
- g. Identity of responsible members of the community who would vouch for D's reliability
- h. Other factors indicating D's ties to community or bearing on risk of willful failure to appear (Shook v. State, 511 So. 2nd 1386, Miss., 1987)

D. Bail as a Condition of Release (Bail Bond)

1. Theory Underlying Requiring a D (or someone else on his behalf) to Post Bail

a. Bail: creates a financial disincentive to flight by imposing a potential financial burden the D for not appearing.

b. Release of the D to the custody of someone (bail bondsman/surety) responsible for his return: The bondsman/surety suffers a financial penalty if D does not appear.

c. Continuation of D's pretrial confinement by a private person who is a proxy for the state's jailors with the jailor's powers: In this instance, when bail is set, the principal (D) is regarded as having been delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize D and deliver him up in their discharge, and, if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue D into another state; may arrest

II. Release from Confinement After Conviction (Post-Conviction and on Appeal)

A. D has the burden to justify release during these periods.

III. Conclusions

A. Bail bond practice varies according to state and federal practice. MS practice is typical.

B. Bail is available, under jurisdiction rules, for the period before conviction, after conviction (until sentencing), and while the case is under appeal (MS Code S 99-35-115).

C. Release of an arrested D before trial is determined in part by a surety agent deciding whether to assume risk of flight and financial penalty.

D. Pretrial release is not monitored by the police but by private agents. In contracting with a surety, the D selects his own jailor.

E. The bail bond system saves the Government the cost of pretrial imprisonment (facilities, maintenance, labor) as well as the cost of monitoring those released. Through their 10% fees, Ds pay the expense of their pretrial restraint.

F. The bail bond system probably discriminates against poor defendants.