

Litigating Pretrial Release

MSPD CONTRACT DEFENDER TRAINING – MARCH 24, 2022

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Agenda

1) Applicable Law

2) Strategies for Arguing Bond Motions

Applicable Law

- Statutes

- 544.455
- 544.457, 544.676

- Rules

- Rules 22, 29
- Rule 33

- Case Law

- *Salerno*
- *Lopez-Matias*
- *Bearden*

Preliminary Notes

- Always subject to change (inc. the rules of procedure)
- Adherence to these laws may vary by jurisdiction, but “we don’t do it that way where I practice” is an opportunity, not an excuse

Statutes

544.455

1. Any person charged with a bailable offense, at his or her appearance before an associate circuit judge or judge may be ordered released pending trial, appeal, or other stage of the proceedings against him **on his personal recognizance**, unless the associate circuit judge or judge determines, in the exercise of his discretion, that such a release **will not reasonably assure the appearance of the person as required** . . .

Statutes (con't)

544.455

2. In determining which conditions of release will reasonably assure appearance, the associate circuit judge or judge **shall**, on the basis of available information, take into account the nature and circumstances of the offense charged, **the weight of the evidence against the accused**, the accused's family ties, employment, **financial resources**, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings.

Statutes (con't)

544.457

Notwithstanding the provisions of Section 20 of Article I of the Missouri Constitution to the contrary, **upon a showing that the defendant poses a danger** to a crime victim, the community, or any other person, the court may use such information **in determining the appropriate amount of bail, to increase the amount of bail, to deny bail entirely or impose any special conditions** which the defendant and surety shall guarantee.

- Denial of bail under this statute probably facially unconstitutional

Statutes (con't)

544.676 (also probably unconstitutional)

1. Upon a showing by the state that a defendant poses **a danger to a crime victim, witness, or the community**, the court may **deny bail** to a defendant or impose such conditions as it deems appropriate to protect a crime victim, witness or the community.
2. In determining whether a defendant poses a danger to a crime victim, witness, or the community, the court may consider **all relevant evidence**, including but not limited to:
 - (1) The defendant's criminal **record**;
 - (2) Whether the defendant **was on probation or released on bail** at the time the crime for which the court is considering bail was committed;
 - (3) The **nature and circumstances of the crime** for which bail is being sought.

Statutes (con't)

544.676

3. A defendant who is denied bail because he poses a danger to a crime victim, witness, or the community shall, **upon written request filed at arraignment**, be entitled to a trial which **begins within one hundred twenty days of his arraignment or within one hundred twenty days of an order granting a change of venue**, whichever occurs later. The provisions of this subsection shall be **waived and of no effect if the defendant requests and receives a continuance or if bail is set for the defendant.**

Rules of Crim. Proc.

Rule 22.04

(a) When a complaint is filed pursuant to Rule 22.02 and sufficient facts have been stated to show probable cause that a felony has been committed, **a summons shall be issued** unless the court finds there are reasonable grounds to believe:

(1) The defendant will **not appear** upon the summons; or

(2) The defendant **poses a danger** to a crime victim, the community, or any other person.

If the court so finds, a warrant of arrest for the defendant may be issued.

Rules of Crim. Proc. (con't)

Rule 22.03

A statement of probable cause must be in writing and shall:

... If a warrant will be requested, **state the facts**, if any, that support a finding of reasonable grounds to believe the defendant will not appear upon a summons or the defendant poses a danger to a crime victim, the community, or any other person ...

Rules of Crim. Proc. (con't)

Rule 22.08

Upon the defendant's initial appearance: **[i.e. within 48 hours of arrest—see Rule 22.07]**

(c) If the defendant is in custody after arrest on a warrant, the court shall **inform the defendant of the conditions of release, if any, and determine whether the defendant can meet the conditions**. If a defendant is unable to meet the conditions, then, **subject to the right of a victim to be informed of and heard** at a bail hearing, the court **may modify the conditions of release, if the court determines the circumstances of the defendant and the case require modification of the conditions**. The court shall inform the defendant that a warrant for arrest may be issued immediately upon any violation of a condition of release. If the defendant is not released from custody following the initial appearance, the court shall **advise the defendant of the right to a release hearing pursuant to Rule 33.05**.

Rules of Crim. Proc. (con't)

Rule 29.18

(d) Release Pending Final Hearing. A defendant arrested and confined under a warrant for a probation or judicial parole violation shall be brought for an appearance, in person or by interactive video technology, before a judge of the court from which the warrant was issued forthwith, but **no later than seven days**, excluding weekends and holidays, after the defendant is confined in the county that issued the warrant, or in a county with which the county issuing the warrant has a contractual agreement to hold the defendant. The court **shall consider the conditional release of the defendant pursuant to Rule 33.01** pending a final determination of the probation or judicial parole violation.

Rules of Crim. Proc. (con't)

Rule 33.01

- (a) A defendant charged with a bailable offense **shall be entitled to be released** from custody pending trial or other stage of the criminal proceedings.
- (b) The defendant's release shall be upon the conditions that:
 - (1) The defendant will **appear** in the court in which the case is prosecuted or appealed, from time to time as required to answer the criminal charge;
 - (2) The defendant will **submit** to the orders, judgment and sentence, and process of the court having jurisdiction over the defendant;
 - (3) The defendant shall **not commit any new offenses** and shall not **tamper** with any victim or witness in the case, nor have any person do so on the defendant's behalf; and
 - (4) The defendant will **comply** fully with any and all conditions imposed by the court in granting release.

Rules of Crim. Proc. (con't)

Rule 33.01

(c) The court ***shall release the defendant on the defendant's own recognizance subject only to the conditions under subsection (b) with no additional conditions of release unless the court determines such release will not secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses.*** If the court so determines, it shall set and impose additional conditions of release pursuant to this subsection.

The court shall set and impose the ***least restrictive condition or combination of conditions of release***, and the court shall not set or impose any condition or combination of conditions of release greater than necessary to secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses.

Rules of Crim. Proc. (con't)

Rule 33.01

When considering the least restrictive condition or combination of conditions of release to set and impose, the court ***shall first consider non-monetary conditions***. Should the court determine non-monetary conditions alone will not secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses, then the court may consider monetary conditions or a combination of non-monetary and monetary conditions to satisfy the foregoing. ***After considering the defendant's ability to pay, a monetary condition fixed at more than is necessary to secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses, is impermissible.***

If the court determines additional conditions of release are required pursuant to this subsection, it shall set and impose one or more of the following conditions of release:

[16 options]

Rules of Crim. Proc. (con't)

Rule 22/33 Waterfall

- 1) Summons
- 2) Recog bond with three standard conditions
- 3) Least restrictive non-monetary condition
- 4) Mix of non-monetary conditions
- 5) Mix of non-monetary conditions that includes electronic monitoring
- 6) Mix of non-monetary conditions that includes electronic monitoring, plus a monetary condition (but not \$1 more than necessary)
- 7) Detained without bond

Rules of Crim. Proc. (con't)

Rule 33.01

(4) Require the use of **electronic monitoring** of defendant's location, the testing of defendant for drug or alcohol use, or the installation and use of ignition interlock devices. The court may order the eligible defendant to pay all or a portion of the costs of such conditions, but the court **shall consider how best to minimize the costs to the defendant and waive the costs for an eligible defendant who is indigent and who has demonstrated to the court an inability to pay all or a portion of the costs . . .**

Rules of Crim. Proc. (con't)

Rule 33.01

(d) Should the court determine upon **clear and convincing evidence** that **no combination of non-monetary conditions and monetary conditions** will secure the safety of the community or other person, including but not limited to the crime victims and witnesses, then the court shall order the defendant detained pending trial or any other stage of the criminal proceedings. A defendant so detained shall, upon **written request filed after arraignment**, be entitled to a trial which **begins within 120 days of the defendant's request or within 120 days of an order granting a change of venue**, whichever occurs later. Any request by the defendant to **continue the trial beyond the 120 days** shall be considered a waiver by the defendant of the right to have the trial conducted within 120 days.

Rules of Crim. Proc. (con't)

Rule 33.01

(e) In determining whether to detain the defendant pursuant to subsection (d) or release the defendant with a condition or combination of conditions of release, if any, pursuant to subsection (c), the court shall base its determination on the individual circumstances of the defendant and the case. Based on available information, the court shall take into account: . . . **financial resources, including ability to pay, . . . and any validated evidentiary-based risk assessment tool approved by the Supreme Court of Missouri.**

Rules of Crim. Proc. (con't)

Rule 33.01

(f) A court detaining or releasing the defendant under this Rule shall enter an order stating the condition or combination of conditions of release, if any, set and imposed by the court. If the defendant is detained and unable to comply with any condition of release, the defendant **shall have the right to a release hearing pursuant to Rule 33.05**. At any hearing conducted under Rule 33, the court **shall permit but not require either party to make a record on the defendant's financial status and ability to pay any monetary condition or other relevant issue**. At such hearing, the court shall also make **written or oral findings on the record** supporting the reasons for detention or conditions set and imposed. The court shall inform the defendant of the conditions set and imposed, if any, and that the conditions of release may be revoked and the defendant detained until trial or other stage of the criminal proceedings for violation of any of the conditions of release and that a warrant for the defendant's arrest may be issued immediately upon notification to the court of any such violation.

Rules of Crim. Proc. (con't)

Rule 33.05

A defendant who **continues to be detained after the initial appearance** under Rule 21.10 or Rule 22.08 shall have the defendant's detention or conditions of release reviewed at a hearing by the court subject to the right of a victim to be informed of and heard at the hearing. The hearing shall occur **as soon as practicable but no later than seven days**, excluding weekends and holidays, after the initial appearance, absent good cause shown by the parties or the court. At the hearing, the court shall determine if the defendant shall be detained or released as provided in Rule 33.01 . . . Nothing herein shall prohibit a defendant from making subsequent application for review of the defendant's detention or conditions of release under Rule 33.01.

Rules of Crim. Proc. (con't)

- Rule 33.06: can re-apply for modification of conditions
- Rule 33.07: rules of evidence don't apply

Rules of Crim. Proc. (con't)

Rule 33.09

Pursuant to these rules, applicable statutes and constitutional provisions, if the defendant or the state allege the court unlawfully detained the defendant failed to detain the defendant, or set inadequate or excessive conditions of release, the defendant or the state **may seek remedial writ relief** in a higher court pursuant to Rule 84.24.

Select Caselaw

United States v. Salerno, 481 U.S. 739 (1987)

“The Bail Reform Act of 1984 (Act) allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions ‘will reasonably assure . . . the safety of any other person and the community.’

In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination . . . violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.”

Select Caselaw (con't)

Lopez-Matias v. State, 504 S.W.3d 716 (2016)

“Accordingly, the **wholesale denial of pretrial release for an entire class** of defendants under section 544.470.2 violates the **right to reasonable and individualized bail set forth in article I, section 20**. Such a denial **cannot be justified by the authority in article I, section 32**, for a trial court to deny bail in a particular case where the defendant poses a risk of harm to a victim, witness, or the public that cannot be addressed adequately by the special conditions for release.”

Select Caselaw (con't)

Bearden v. Georgia, 461 U.S. 660, 664 (1983)

“This Court has long been sensitive to the treatment of indigents in our criminal justice system.” Over a quarter-century ago, Justice Black declared that ‘there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.’” (internal citation omitted).

Strategies for Arguing Bond Motions

You Win Before the Hearing

- Know your case, know your client
 - Includes understanding what the PC statement says (and what it doesn't say)
 - Know what the bond paperwork (e.g. pretrial office report) says
- Preparation vs. Speed: discuss with your client on day 1

Your Case is Unique

- Cannot tolerate “bond by category”
 - *Lopez-Matias*
 - But it’s our job to actually present our clients as individuals
- If the facts are ridiculous—*i.e.* this isn’t your ordinary robbery—say so
 - Rule 33.01(e) says the court “shall” consider the weight of evidence

Addressing Danger

- Any danger presented by your client is always hypothetical
- The harm suffered by your client (and likely others) by pretrial confinement is real and ongoing
- Demonstrate the harm with concrete details if you can
 - “She needs to get back to work” vs. “The power shut-off notice was hanging on the door”
 - “She has three children” vs. “She can’t believe she won’t be there to do her daughter’s hair for the first day of school”
 - Judge doesn’t necessarily have to take this into account, but it can make an impact

Addressing Danger (con't)

- **GET THE STATE AND COURT TO ACTUALLY ARTICULATE WHY YOUR CLIENT IS A DANGER**
- “Nature of the charges” is not, in and of itself, enough evidence of danger
 - Presumption of innocence
 - “Probable Cause” is less than “Clear and Convincing Evidence”

Addressing Danger (con't)

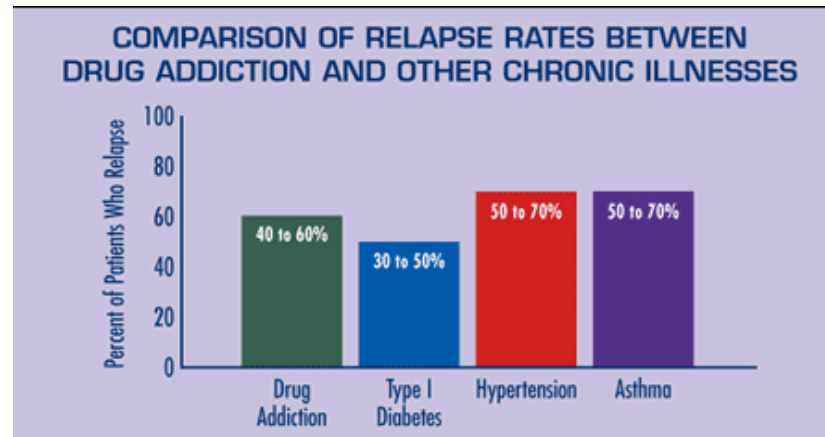
- There is no logical connection between high bonds and threat to the community, at least under the current system
 - ABA Pretrial Release Standard 10-5.3(b): **Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person**
 - “De facto” detention orders require detention order procedures/findings
- Priors: not all of them are created equal

Putting Financial Conditions In Context

2022 POVERTY GUIDELINES FOR THE 48 CONTIGUOUS STATES AND THE DISTRICT OF COLUMBIA	
Persons in family/household	Poverty guideline
1	\$13,590
2	\$18,310
3	\$23,030
4	\$27,750
5	\$32,470
6	\$37,190
7	\$41,910
8	\$46,630
For families/households with more than 8 persons, add \$4,720 for each additional person.	

Use Data When You Can

Addiction is a chronic disease that requires multiple rounds of treatment. See, e.g., The National Center on Addiction and Substance Abuse at Columbia University, *Addiction Medicine: Closing the Gap Between Science and Practice* (June 2012), p. 25. And while there is frustration when someone returns to the legal system repeatedly on drug-related charges, the relapse rate for drug addiction is comparable to other chronic diseases, and multiple drug offenses should be considered in this context—there is nothing uniquely "bad" about a relapsing addict any more than there is someone with relapsing asthma. The chart below from the National Institute on Drug Abuse is illustrative:



Use Data When You Can (con't)

The Court will not formally decide Barry's guilt or innocence at the hearing on this motion, but the hearing will shape the outcome of his case. A 2012 report found major differences in outcomes depending on whether the accused was detained pretrial. People who spent less than a day in detention pretrial were convicted 59% of the time, compared with an 85% conviction rate for those whose pretrial detention lasted at least a week. See New York City Criminal Justice Agency, Inc., "A Decade of Bail Research in New York City" (August 2012). A longer period of pretrial detention also means that a defendant charged with a felony is less likely to receive a reduced, misdemeanor charge. Those initially charged with a felony who spent less than a day incarcerated pretrial were convicted of felonies 22% of the time, while those who were incarcerated pretrial for at least two months had a 72% felony conviction rate. Id.

Use Data When You Can (cont'd)

Approximately 4% of people charged in St. Louis City are granted release on their own recognizance, despite the statutory presumption in favor of such release. By contrast, Philadelphia grants such release to 40% of its accused, New York City to 60%, and Washington, D.C. to 85%. St. Louis City can and must do better—and the law requires better in Levi's case for the reasons set forth below.

Constitutionalize the Issues

- Due Process
- Right to Individualized Bail Determination
- Eighth Amendment
- * Equal Protection *

Potential Resources

- Pretrial Justice Institute: <https://www.pretrial.org/>
- Civil Rights Corps: <https://civilrightscorps.org/our-work/>
- NACDL: <https://www.nacdl.org/Landing/PretrialReleaseAdvocacy>
- § 221.300 Grand Jury Report(s)

Big Picture

- It's easy for bond decisions to become tethered to tradition rather than the law
 - That's where we come in
- Every bond hearing is first and foremost a chance to make a huge difference for your client
 - But it's also a chance to make our argument that things can—and must—be different
 - Almost everyone agrees in the abstract that we shouldn't be jailing people just because they're poor, but very few people are willing to put that idea into practice

Big Picture (con't)

- The best arguments will:
 - If necessary, get out in front of issues raised by PC statement/bond paperwork early on
 - Show the human side of our clients while demonstrating the harm of pretrial confinement
 - Bring discussions about danger back to the realm of reality
 - Use statistics and social science where they fit the case

QUESTIONS?

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