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Bail, Pending Appeal, Mandatory or Discretionary?

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BAIL, PENDING APPEAL, MANDATORY OR DISCRETIONARY?

The past year produced several outstanding cases in federal courts concerning the right to bail after conviction and pending appeal. The excellence and significance of the opinions were solid contributions to the thought of the day. The judges explored the law on the subject to determine specifically what conditions were necessary to allow a person to seek bail. The growing menace of Communism throughout the country was acknowledged but was considered not alone sufficient to defeat a request for bail. [1] The right of even traitors to a fair trial, though guilty beyond question, was examined and found to outweigh a refusal of bail on only that ground.[2]

Bail for convicted defendants has been oftentimes given as a matter of course. The inclination of many judges favoring a rule of liberality in granting bail has been apparent even when merit was obviously absent. [3] As a result there has been a false belief created that pending appeal there is a legal right to bail.

Bail is a means of procuring the release of a prisoner from legal custody upon posting sufficient security, for his appearance at a time and place designated, to answer a criminal charge. The court gives liberty to the prisoner and, at the same time, secures the intent of the law to punish an offender, [4] by insuring his future attendance in court and by compelling him to remain within the jurisdiction of the court. [5]

This qualified freedom was devised to meet conflicting interests of society and the individual. Its primary purpose is to prevent the punishment of an innocent person and yet, at the same time, administer criminal justice. [6] Such an allowance is favored by law, being based on the cardinal principle of justice that every man is presumed to be innocent until proven guilty. However, it is an equally accepted principle of society that the guilty should suffer. These two principles work against each other from the time of the finding of the indictment until the accused has been finally adjudged in a competent court. Any imprisonment before that decision would punish an innocent man. Thus, to meet these conflicting interests, an interval of time is necessary to ascertain the truth of the accusation and to set in motion the machinery fashioned for that purpose. During the interval bail is generally allowed for all offenses except those punishable by death. But when a defendant is convicted, the presumption of innocence vanishes and a heavy presumption of guilt supplants it. [7]

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1. Williamson v. United States, 184 F. 2d 280 (2d Cir. 1950). Bridges v. United States, ___F. 2d ___ (9th Cir. 1950), 19 U.S.L. Week 2099 (9th Cir. Aug. 24, 1950).
2. D'Aquino v. United States, 180 F. 2d 271 (9th Cir. 1950).
3. Bridges v. United States, ___ F. 2d ___ (9th Cir. 1950).
4. Highmore, A Digest of the Doctrine of Bail, 1783.
5. Manning v. State, 190 Okla. 65, 120 P. 2d 980 (1942).
6. United States v. Lee, 170 Fed. 613 (S.D. Ohio 1909).
7. United States v. Burgman, 89 F. Supp. 288 (D.C. D.C. 1950).

The Common Law Rule

The rule at common law for granting or refusing applications for bail was a matter which was held to rest within the sound discretion of the court. [8] All offenses, including treason and murder, were bailable, but bail was not demandable as of right. A party was admitted to bail only when it made little difference whether he was guilty or innocent of the accusation. However, that indifference was removed by the prisoner's conviction, and then bail was generally refused. [9] But, when the judges were satisfied that the conviction might not be sustained or enforced because of some defects in law or fact, the defendant was allowed bail as a matter of favor. [10]

Judicial discretion was exercised according to established rules and was limited according to the degree of proof of guilt. In Rex v. Wilkes [11], Lord Mansfield, speaking of the discretion to be exercised in granting or denying bail, stated, "Discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule not by humor: it must not be arbitrary, vague, and fanciful; but legal and regular." The seriousness of the charge, the nature of the evidence, and the severity of the punishment were chiefly considered. [12] Each case stood on its own facts and circumstances.

The Federal Rule

The federal courts adopted the common law rule as their standard in granting or refusing bail after conviction and pending appeal. [13] There is no provision in the Constitution of the United States which guarantees any right to bail after conviction. [14] Although the Eighth Amendment contains the provision that "Excessive bail shall not be required," the courts have interpreted this amendment as only safeguarding the right to give bail before trial. [15] This provision is the only one in the Constitution which contains any reference whatsoever to the matter of bail. Its practical purpose is to prevent an indirect denial of bail by fixing the amount so unreasonably high that bail could not be given.

In an early case the court held that a magistrate's discretion to take bail in a criminal case is to be guided by the compound consideration of the prisoner to give bail and the atrocity of the offense. To require greater bail than the prisoner could give would be to require excessive bail, and therefore, in effect, to deny him bail in a case clearly bailable by law. [16]

From the time of the adoption of the Constitution of the United States in 1789 the question regarding the right to bail after conviction and pending appeal in a federal jurisdiction had not been definitely established until the case of Hudson v. Parker [17] in 1895. Speaking for the court in this leading case, Justice Gray said:

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8. Egerton v. Morgan, 1 Bulstr. 69, 80 Eng. Rep. 770 (K.B. 1610); Rex v. Wilkes, 4 Burr. 2527, 98 Eng. Rep. 327 (K.B. 1770).
9. People v. Van Horne, 8 Barb. (N.Y.) 158.
10. Ex parte Exell, 40 Tex. 451, 19 Amer. Rep. 32 (1874).
11. 4 Burr. 2527, 2539, 98 Eng. Rep. 327 (K.B. 1770).
12. 9 Halsbury's Laws of England 324 (1909).
13. Bernacco v. United States, 299 Fed. 787 (8th Cir. 1924).
14. Ex Parte Harlan, 180 Fed. 119 (C.C.N.D. Fla. 1909).
15. United States v. Motlow, 10 F. 2d 657 (7th Cir. 1926).
16. United States v. Lawrence, 26 Fed. Cas. No. 15577 (C.C.D.C. 1835).
17. 156 U.S. 277, 285 (1895).

> "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not after arrest and before trial, but after conviction and pending a writ of error."

This language might seem to infer that bail is a matter of right not only before trial, but also after conviction until the highest court finally rules on the issue. However, the quotation contains a discretionary provision, "may be admitted." Furthermore, the court was not reviewing an exercise of judicial discretion. The holding in this opinion is based on the fact that the district judge had not exercised any discretion in the matter and had declined to act.

Because of the suggestive significance, the rule of Hudson v. Parker, supra, was not uniformly construed by the circuit courts of appeal. Seven years after the leading case had been decided Judge Lorton stated in McKnight v. United States [18] that it was the duty of the court to admit to bail pending an appeal from a conviction the petitioner in all cases except those concerning capital crimes. He said, "The detention ... is only for the purpose of securing the attendance of the convicted person ... If this can be done by requiring bail there is no excuse for refusing or denying release."

Mr. Justice Butler speaking for the 7th Circuit in United States v. Motlow [19] held that the granting or withholding of bail is not a matter of grace or favor. He held that if these writs of error were taken merely for delay bail should be refused; but if taken in good faith, on grounds not frivolous, but fairly debatable, then the petitioner should be admitted to bail.

However, in other circuits it has been held or assumed that the rule laid down in Hudson v. Parker, supra, was a matter within the judicial discretion of the court. In Garvey v. United States [20] it was again pointed out that the theory behind the purpose of bail pending appeal is the same as before conviction, viz. to insure the presence of the accused when required. The court emphasized, however, that due consideration should be given to the prospect of success by the accused in prosecuting his writ of error.

Rossi v. United States [21] clearly shows that although the grant or refusal of the application for bail pending appeal rests within the discretion of the judges, such discretion cannot be exercised by personal preference or desire, but rather by fair, sound judicial discretion governed in accordance with the established rules of law. There is no absolute right to bail, but only the right to the exercise by the judge of reasonable promptness to grant or deny the application. The court stated that there are rare cases in which bail may be properly denied, such as:

> "Where the character and circumstances surrounding the accused or convicted person and the gravity of his offense are such that he would probably forfeit his bail and escape if he were allowed it; where the record proves beyond a reasonable doubt

18. 113 Fed. 451, 453 (6th Cir. 1902).
19. 10 F. 2d 657 (7th Cir. 1926).
20. 292 Fed. 591 (2d Cir. 1923).
21. 11 F. 2d 264 (8th Cir. 1926).

> that the errors assigned by the person convicted are frivolous, and that his writ of errors is taken merely for delay . . . where the crime of which the prisoner is accused or convicted is murder or some other very atrocious offense and there is a serious danger that if he is admitted to bail he will commit another offense of like character before his case can be heard and decided by the appellate court." [22]

The personal attitude of the accused toward society, [23] and the amount of the sentence the petitioner would serve before the case could be heard upon appeal [24] are additional factors to be considered in the exercise of judicial discretion.

Congress, on June 29, 1940, provided for the adoption of the Federal Rules of Criminal Procedure. These Rules were prepared by an Advisory Committee appointed by the United States Supreme Court, and became effective on March 21, 1946.

An application for bail pending appeal is now governed by Rule 46 (a) 2 of the Federal Rules of Criminal Procedure which provides:

> "Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or the justice allowing bail may at any time revoke the order admitting the defendant to bail." [25]

It was the purpose of this rule to directly eliminate any basis for the claim that bail was a matter of right. The language chosen was carefully considered. When the Advisory Committee submitted this rule to the Supreme Court the wording in the first sentence was that "bail shall be allowed," however, Mr. Chief Justice Stone directed that the wording should be changed to "bail may be allowed." [26]

In the treason case of D'Aquino v. United States [27] bail, although denied by the trial judge and the Court of Appeals, was granted by Mr. Justice Douglas sitting as Circuit Justice for the 9th Circuit. He quoted with approval the views previously expressed herein by Justice Butler in the case of United States v. Motlow, supra. The test of the right to bail as set out in Rule 46 (a) 2 of the Federal Rules of Criminal Procedure was held to be whether the case involved a substantial question which should be determined by the appellate court. Since there was no indication that the appeal was frivolous and the question was fairly debatable (i.e. ... substantial) the granting of bail after conviction became a matter of right.

Another recent case decided by the 9th Circuit is Bridges v. United States [28]. There the court refused to revoke the bail of Bridges who had been con-

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22. Rossi v. United States, 11 F, 2d 264, 265 (8th Cir. 1926).
23. United States v. Delaney, 8 F. Supp. 224 (D.C. N.J. 1934).
24. Rossi v. United States, 11 F. 2d 264 (8th Cir. 1926).
25. Fed. R. Crim. P. 46 (a) 2.
26. Williamson v. United States, 184 F. 2d 280 (2d Cir. 1950) n. 4 at 281.
27. 180 F. 2d 271 (9th Cir. 1950).
28. ___F. 2d___ (9th Cir. 1950), 19 U.S.L. Week 2099 (9th Cir. Aug. 24, 1950).

victed of perjury for falsely swearing that he was not a Communist. At the time of the appeal to the court, taken immediately after conviction, his existent bail was increased by the District Judge and he was freed pending appeal because his case involved a substantial question to be determined by the appellate court. The Government's argument that Bridges was a proven Communist and that the subsequent outbreak of the Korean War rendered him a menace to public security was not sustained. The court in interpreting Rule 46 (a) 2 held that since a substantial question existed bail was a matter of right.

The interpretation of Rule 46 (a) 2 as set down by the D'Aquino and Bridges cases, holding a right to bail is absolute if the appeal involves a meritorious question, was not accepted by Justice Jackson in Williamson v. United States [29]. However, the same substantive result was reached by a proper exercise of judicial discretion in awarding bail to the Communist Party leaders, who had been recently convicted for conspiring to advocate and teach the violent overthrow of the United States Government. The Court of Appeals had affirmed the convictions and the defendants made application for the extension of their bail pending a review to the Supreme Court. Justice Jackson ruled that since the convictions were clouded by substantial Constitutional questions they were open to review by the Supreme Court. His interpretation of Rule 46 (a) 2 is that bail is a matter of discretion rather than one of right. A pre-requisite for obtaining bail must be the existence of a substantial question not only in the sense of its being fairly doubtful, but also that it is not trivial or merely technical, but has substantial importance on the merits.

A careful study of Rule 46 (a) 2 will show that before the court can exercise its discretionary powers regarding bail upon appeal there must be a condition precedent. This condition precedent is that the case must involve a meritorious question. If the court finds that such a question exists then the court can exercise its discretion in granting or refusing bail. [30]

The State Rule

> "In a criminal prosecution, the State is arrayed against the subject; it enters the contest with a prior inculpatory finding of a grand jury in its hands; with unlimited command of means; with counsel usually of authority and capacity, who are regarded as public officers, and therefore as speaking semi-judicially, and with an attitude of tranquil majesty, often in striking contrast to that of a defendant engaged in a perturbed and distracting struggle for liberty, if not for life. These inequalities of position the law strives to meet by the rule that there is to be no conviction when there is a reasonable doubt of guilt." [31]

Thereby, society favors the accused with a presumption of innocence. But, when the State has proven that the defendant is guilty beyond a reasonable doubt and the jury has returned its verdict to that effect, the presumption of innocence is no longer with the defendant. It is at this stage of the proceedings that the constitutional provisions of the majority of states no longer guarantee the defendant a right to bail. [32] However, the majority of states, prompted

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29. 184 F. 2d 280 (2d Cir. 1950).
30. United States v. Burgman, 89 F. Supp. 288 (D.C. D.C. 1950).
31. 1 Wharton, Criminal Evidence 2 (10th ed. 1912).
32. See note, 19 A.L.R. 807 (1920).

by a desire to inflict no punishment until the convicted has had a reasonable opportunity to question his conviction, have provided by statutory enactments a method of appeal and circumstances under which bail pending an appeal may be granted. Under most constitutional and statutory provisions the granting of bail pending appeal is generally within the sound judicial discretion of the court. Several states grant bail after conviction as a matter of right only when the appeal is from a judgment imposing a fine. [33] Again, there are states which make the right to bail pending dependent upon whether or not the crime committed was misdemeanor or a felony. [34] There are no states which grant an individual a right to bail pending an appeal where he has been convicted of a capital offense.

Since the constitutional and statutory provisions are not in harmony as to the admission to bail pending appeal, it is difficult to deduce a general rule of any value. In each state the nature of the offense and the various provisions governing the particular case must be considered. Therefore, it is necessary to view the pertinent sections of the statute of each state. The following states have been selected as having representative statutes concerning the law on the subject.

Alabama ... Code 1940, Tit. 15, Sec. 372; Bail after conviction is a matter of right except for offenses punished capitally or by imprisonment exceeding ten years.

Arizona ... Code 1939, Tit. 44, Sec. 427; Bail after conviction is a matter of right when judgment imposes a fine only. It is a matter of discretion in all other cases except capital offenses.

California ... Penal Code, 1949, Sec. 1272; Bail is a matter of right not only when the appeal is from a judgment imposing a fine but also when the appeal is from a judgment imposing imprisonment in cases of misdemeanor. It is a matter of judicial discretion in all other cases not involving the death penalty.

District of Columbia ... Code 1940, Sec. 11-602; Sec. 23-404; 19 U.S.C. 3141; bail is fixed by the court in its discretion.

Illinois ... Smith-Hurd Anno. St. c. 38, Sec. 609,774; Bail is a matter of right in all cases less than capital and discretionary in capital offenses.

Indiana ... Burns Stat. 1942, Sec. 9-2312; Bail is a matter of right except where the sentence is death or imprisonment for life.

Iowa ... Code, Sec. 76.1; Bail is a matter of right in all cases less than capital.

Louisiana ... Rev. Stat. 1950, Sec. 15-84, 15-86; Bail is a matter of right except after conviction of a felony where minimum sentence is more than five years at hard labor.

Michigan ... Mich. Stat. Anno., Vol. 24, Sec. 28.888; Bail is a matter of discretion in all offenses except treason and murder.

Maryland ... Anno. Code 1939, Art. V, Sec. 6; Bail is a matter of right in all cases less than felony and a matter of discretion in all other cases not capital.

Minnesota ... Minn. Stat. Anno., Sec. 632.07; Bail is a matter of discretion in all cases less than capital.

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33. Alabama, Arizona, California, Idaho, Illinois, Iowa, Louisiana, Maryland Mississippi, New Mexico, New York, Oregon, South Dakota, Texas, Utah.
34. Alabama, California, Illinois, Indiana, Iowa, Louisiana, Maryland, Mississippi, New Mexico, North Carolina, Oregon, Texas.

Mississippi ... Code 1942, Sec. 1180; Bail is a matter of right except where conviction is for an offense of murder, rape, arson, burglary, or robbery. In these it is discretionary.

New Jersey ... Tit. 2, c.195, Sec. 11; 1946, c. 187 Sec. 6; Rule 1:2-17; Except in case of conviction for capital offense, pending prosecution of appeal or proceedings for certification, defendant may be admitted to bail on certificate of reasonable doubt as to validity of conviction signed by trial court or by designated part of appellate division of Superior Court.

New York ... Code Crim. Proc. Sec. 552,552-A; Bail is a matter of right when the appeal is from a judgment imposing a fine only. Discretionary in all other cases except from convictions of a felony while armed, or capital cases or when the conviction is a fourth offense.

New Mexico ... Code, Tit. 42, Sec. 1502; Bail is permitted except where death or sentence of life imprisonment is imposed ... in which case they are forbidden.

North Carolina ... Gen. Stat. 1943, 15-103; Bail is a matter of right in cases of misdemeanors. Discretionary in all other cases; however, Superior or Supreme Court can bail in capital cases.

Ohio ... Gen. Code, 13453-1, 13459-9; Ex Parte Thorpe, 5 N.E. 2d 333 (1936); Bail is discretionary in cases of felonies only when the punishment is less than life imprisonment.

Oregon ... Compiled Laws Anno. 1940, Sec. 26-103, Sec. 26-105; Bail is a matter of right except where conviction is for the offenses of murder or treason.

Pennsylvania ... Commonwealth v. Meyers, 137 Pa. 407, 21 Atl. 246 (1891); The matter of bail pending an appeal is not a matter of right but rests in the discretion of the court.

South Carolina ... Code 1942, Sec. 1032; Bail is discretionary in all cases except felonies where the imprisonment is over ten years or life.

Texas ... Cr. Pr., Art. 815; Bail is a matter of right in all cases except where the sentence is over fifteen years imprisonment or where the offense committed is of a capital nature.

Virginia ...Va. Code Anno., Vol. 14, Sec. 19-254; Bail is a matter of right in cases of misdemeanor. In capital cases and felonious convictions the matter of bail is discretionary.

West Virginia ... c. 62, Art. 1, Sec. 6; All offenses are bailable after conviction except those punishable by death or life imprisonment.

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