

From the law office of

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Court Guide

CITIZEN - POLICE CONTACT AND MIRANDA

There are three levels of citizen-police contact:

1. Voluntary contact. A citizen may talk to the police or walk away at any time.
2. Investigatory detention. The citizen has been temporarily detained and is not free to leave while police investigate. The time limit must be evaluated to determine if the detention is reasonable.
3. Arrest. The citizen is under arrest and not free to leave.

If the police question you, you may politely decline to make a statement. My business card, reproduced below, offers a suggestion.

Officer, I mean no disrespect, but my lawyer has instructed me not to talk about my case or about anything else. On his advice, I hereby invoke my right to remain silent. I refuse to consent to any search of my person, my vehicle or my personal effects. I shall not waive any of my legal rights. I request that my lawyer, identified on the front of this card, be allowed to be present if any identification confrontations, tests or examination are conducted in my case. If I am under arrest, I hereby invoke my Miranda rights and demand an opportunity to consult with my attorney prior to any questioning. I do not consent to any impoundment of my property, and I request a reasonable opportunity to secure same. If I am not under arrest, I want to leave. If I am free to leave, please tell me immediately so that I may go about my business.

The American Civil Liberties Union has its own bust card to assist persons who are contacted by the police.

The following is an example of a written Miranda warning:

Explanation of Rights:

1. You have the right to remain silent.
2. If you give up the right to remain silent, anything you say can be used against you in Court.
3. You have the right to speak with an attorney prior to any questioning, and you may have your attorney with you during questioning.
4. If you desire an attorney and can not afford one, an attorney will be appointed for you free of charge.
5. If you decide to answer questions now without an attorney present, you retain the right to stop the questioning at any time and request that an attorney be made available to you.

Waiver of rights:

I have read the above statement of rights and had these rights read to me by an officer of the law who has identified himself to me as a member of the police department. I understand my rights and am willing to make a statement at this time without an attorney present. I have neither been threatened, coerced, nor promised any rewards regarding this statement.

Date: _____ Defendant's signature: _____

The Miranda warning, and a waiver, is required before a (1) custodial and (2) interrogation. The term "custodial" refers to a person under arrest but not investigatory detention, above. If Miranda warning are not properly given, any statement could be suppressed or excluded from later court proceedings.

The best practice is for the police to use a written Miranda waiver, but there is no requirement that the waiver be in writing.

ARREST AND BOOKING

Generally, a police officer must witness a misdemeanor being committed before he may arrest without a warrant. The legislature has created an exception for misdemeanor domestic violence providing for arrest without witnessing any act of domestic violence. Felony arrests can be on view or by warrant supported by a felony affidavit.

A highway stop is considered seizure under the fourth amendment. The standard for a highway stop is reasonable suspicion to stop a vehicle but probable cause is required to arrest. When a person is booked he will be photographed and fingerprinted. If a person is jailed he will be searched. This process can be slow at

peak times.

SEARCH WARRANTS

The police must have probable cause for a search. A warrant is not always necessary. For example, in the context of a DUI, if the officer has probable cause he can have blood drawn due to the rapidly changing blood-alcohol ratio. This is called exigent circumstances. Search warrants require a sworn affidavit. If the affidavit is based on information obtained from a CI (also called a confidential informer, cooperating individual, criminal informer, citizen witness or snitch), the CI must have proven reliable in the past.

SETTING BOND

Pretrial bail is governed by Section 29 of the Mississippi Constitution of 1890. The Mississippi Supreme Court has adopted the American Bar Association's standards for setting bond. Accordingly, the judge should consider these factors in setting bond:

1. The length of his residence in the community;
2. His employment status and history and his financial condition;
3. His family ties and relationships;
4. His reputation, character and mental condition;
5. His prior criminal record, including any record of prior release on recognizance or on bail;
6. The identity of responsible members of the community who would vouch for defendant's reliability;
7. The nature of the offense charges and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of non-appearance; and
8. Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

Surety bonds are set by law at 10% for in state residents and 15% for out of state residents. In addition, an individual may be eligible for a clerk's bond, property bond, or own recognizance (O.R.) bond. The purpose of bond is to assure the person's attendance at court, not to punish. In some circumstances a person may be released on pretrial house arrest, for example, so treatment can be received for alcohol or drug abuse.

If a person is released on felony bond and is arrested for a new felony which

carries over five (5) years, the court shall revoke all bonds and hold the defendant without bond under the Mississippi State Constitution. Pretrial release in the Federal Court is governed by the Bail Reform Act of 1984 and involves similar considerations or to enforce a restraining order.

INITIAL APPEARANCE

Under federal law and local rules, the initial appearance must be held within 48 hours. However, if the charge is domestic violence, the initial appearance must be held within 24 hours. There is no requirement that the defendant be held in jail for 24 hours before bonding. Initial appearance is a due process hearing to make sure the police have arrested the correct defendant, filed the correct charge, and bond has been considered.

PRELIMINARY HEARING AND BOND REDUCTION

A preliminary hearing is not your trial. The judge will not find you guilty or innocent. There is no jury. The rules of evidence do not apply. Hearsay is admissible. The judge at the preliminary hearing will not allow a suppression motion. The issue of bond reduction is also addressed.

At a preliminary hearing the judicial officer shall determine probable cause and the conditions for release, if any. A finding of probable cause may be based on hearsay evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary hearing.

If from the evidence it appears that there is probable cause to believe that an offense has been committed by you, the judicial officer shall bind the defendant over to await action of the grand jury. If from the evidence it appears that there is no probable cause to believe that an offense has been committed by you, the defendant shall be discharged from custody. The discharge of the defendant shall not preclude the state from instituting a subsequent prosecution for the same offense. This means the charge can still be presented to the Grand Jury, even if it was dismissed at preliminary hearing.

If a defendant is in custody, he has a right to a preliminary hearing. If the defendant has been released on a bond, he may petition the court for an out of custody preliminary hearing, but this is not a right.

HABEAS CORPUS AND EXTRADITION

Habeas Corpus is a civil suit, generally against the sheriff, stating the defendant is being illegally held in jail. If the bond is set so high the defendant is unable to post the bond, he can allege he is being illegally held. The defendant may request a bond reduction on this ground.

Habeas Corpus is also available in extradition matters. Many Mississippi sheriffs

refuse to approve extradition or fugitive bonds. The Attorney General represents the state in all governor's warrant extraditions. If a defendant is not timely extradited, the defendant can file a Habeas Corpus and request release. (Mississippi has abolished post conviction Habeas Corpus in favor of the statutory post conviction relief).

CIVIL FORFEITURE

The government may seize and forfeit money and property used in the commission of a crime. Typically a vehicle may not be forfeited for simple possession of controlled substances. A vehicle, money or other property may be seized and forfeited if it was used to facilitate crimes of possession of drugs with intent to distribute and sales of drugs, or if the prosecution can prove it was purchased with the proceeds of a crime. There are different procedures for values under and over \$10,000.00. You must act quickly if you are going to contest a forfeiture. Federal asset forfeitures have different procedures, but in all cases time is critical.

GRAND JURY INDICTMENT AND BILL OF INFORMATION

Once a felony investigation is complete, including witness statements, evidence, crime lab, criminal history, co-defendants and any other considerations, the case detective or investigator sends the case file to the District Attorney's office. The responsible Assistant District Attorney reviews the charge and evidence and presents it to the Grand Jury. The Grand Jury is composed of 20 registered voters. It takes 15 Grand Jurors to convene and 12 to render an indictment. The Grand Jury hears the witnesses, typically the case detective and any other witnesses it deems necessary. The Grand Jury deliberates in secret; neither the case detective, Assistant District Attorney, nor anyone else is present while the Grand Jury deliberates and votes whether to indict.

The Grand Jury may dispose of the case in three ways. The Grand Jury may True Bill a case, meaning it renders an indictment. This means the case will proceed to trial. The Grand Jury may also No True Bill a case, which is a dismissal. The Grand Jury is also authorized to send the case to Justice Court to be handled as a misdemeanor. The evidentiary standard for indictment is probable cause, meaning more likely than not. This the same standard used in preliminary hearings and revocation hearings. The Grand Jury may also pass a case until a later time for additional investigation. At the end of the six month term, the Grand Jury issues a report on the matters it has considered.

A Bill of Information is a waiver of indictment and agreement to prosecution in Court. The defendant may voluntarily give up his right to have the charge presented to the Grand Jury. Typically, this is done when a favorable plea agreement has been reached.

HABITUAL OFFENDER, ENHANCEMENT AND TRIGGER LOCK

A habitual offender has been convicted of two prior felonies arising on different occasions. A habitual offender must serve the maximum sentence day-for-day without early release. A life habitual offender has two prior felonies, one of which is violent and has served at least year on each. In this case, a life habitual offender must serve life without parole. These statutory maximums must be weighed against the U.S. Constitution eighth amendment's prohibition against cruel and unusual punishment. Habitual offender sentences may be reduced on this ground.

Enhancement means doubling the penalty for a drug charge because of a prior drug conviction, or possession or sale near a church or playground.

Possession of a firearm in proximity to controlled substance (drugs) also carries extra jail time. Mississippi modeled this provision after the federal trigger lock law.

An indictment can be amended by the court on a motion of the prosecution at any time, even after trial, to include enhancement or habitual offender status.

DISCOVERY

Many District Attorney offices provide "open file" discovery, meaning the defendant's attorney can obtain a complete copy of the District Attorney's file. This includes the police case file, audio-video recordings, witness list, crime lab reports and anything else. The defendant may file a motion for discovery if the prosecution does not voluntarily provide it. Discovery procedures are quite different in Federal Court but the purpose is the same: to inform the defendant of the evidence against him and provide opportunity to defend.

ARRAIGNMENT

Arraignment is the first court appearance after indictment. The bonding company will notify the defendant of the first court appearance. At the arraignment you will be given a trial date. After the arraignment, it is the responsibility of the attorney and the defendant to appear for court.

WHAT YOU SHOULD TELL YOUR LAWYER

1. Write down the name, address, and telephone number of all witnesses and a summary of testimony of each.
2. When and where you were arrested and whether the police found anything pertaining to the crime in proximity to you.
3. What you know about the prosecution witnesses.
4. Whether you made any statements to anyone.
5. Your criminal history including whether you are currently on any type of

supervised release, probation or parole.

6. Whether you have an alcohol or drug problem, or were using at the time of the crime charged against you.
7. Anything else you think is important, for example, citizenship status, professional licenses and employment.

FAILURE TO APPEAR

If you do not appear for court, the judge will issue a judgment nisi which does three things: A judgement nisi acts as an arrest warrant, a bond revocation and a scire facias requiring the surety and the bonding company to pay the full amount of the bond to the Sheriff. The police will arrest you on the warrant and hold you in jail without bond so the court can find you when your case comes up. The bonding company will also try to deliver you to the jail. Under some circumstances the Judgment NISI can be set aside and bond reinstated if there is good cause for not appearing in court.

Remember, it is your responsibility to keep on touch with your lawyer and your bonding company. Your first notice of court comes from the bonding company, not your lawyer.

PRE-SENTENCE REPORT

The defense, prosecution or the court may request a pre-sentence investigation. The pre-sentence investigation is prepared by the probation officer. It presents defendant's family history, social, physical mental health, criminal histories and anything else significant. The victim will also be contacted. The defendant can also have input in the pre-sentence investigation and tell the court what the defendant thinks is a fair resolution. A pre-sentence investigation is available in both state and federal cases.

SENTENCING

Unlike the federal system, Mississippi has no sentencing guidelines. This means that any sentence up to the maximum prison time and fine is a valid sentence. However, the Mississippi Supreme Court has held that the upper end of the sentencing range should be reserved for the most serious offenders and cases.

SENTENCING: FIRST OFFENDER ALTERNATIVES

A person with no prior convictions may under some circumstances, get through court without a felony conviction. This depends on many factors. The charge cannot involve violence, sex, manufacture, sale, transfer of drugs, or possession of a controlled substance with intent for consideration to the alternative programs.

In pretrial diversion, the defendant must admit guilt but is never convicted. Diversion is similar to probation. The defendant is supervised and monitored, including drug tests. Any restitution must be paid. At the conclusion of pretrial diversion the case is closed and the defendant is discharged without a conviction. Pretrial diversion is run by the District Attorney's office.

Under non-adjudication or deferred adjudication, the court accepts a plea of guilty but declines to enter a finding of guilt. The plea is held in abeyance. There are separate laws for non-adjudication of drug and non-drug offenses. This means that when the defendant completes all conditions including payment of fine, restitution and probation, he is discharged without a felony conviction. However the person's arrest record (NCIC, FBI, Triple I (Interstate Identification Index or III), and local criminal history) will show a felony arrest. After discharge, the defendant may apply to expunge (erase) the felony arrest from his record.

SENTENCING: DRUG COURT

Drug Court is a national movement. See www.nadcp.org. In Mississippi, Drug Courts can be established under either the Drug Court statute or non-adjudication statute. The Drug Court statute accepts persons with certain prior convictions excluding violence, sex and drug sales convictions. Drug Court employs a "carrot and the stick" approach to treatment using close supervision, rigorous drug testing and treatment tailored to individual needs.

PROFESSIONAL LICENSES

Years of education, college, graduate school, professional licenses and technical certifications can be jeopardized by a felony arrest. If you have a professional degree or technical certification it is important to obtain counsel immediately. Addressing the underlying issues which preceded the arrest is the key to success in many cases. We have represented doctors, registered nurses, engineers, lawyers, military (both officers and enlisted), pilots, masters (ship captains) and helped them save their professional license and career. The key is to get started early.

REVOCATION

Violation of Probation, Post Release Supervision, ISP (house arrest) and Parole are not automatic. The defendant has a due process right to confront the evidence and witnesses against him. Revocations are not automatic. The prosecution must present credible evidence that the defendant violated the terms and conditions of probation. In most cases, the defendant does not have a right to an attorney at a revocation but may have an attorney. If revoked, the judge or hearing officer may have discretion to order a sentence less than the maximum. A revocation may include rehabilitative programs, alcohol and drug treatment, anger management or other appropriate measures. If a defendant has not paid his fines, he can be

sentenced to a restitution center run by the Mississippi Department of Corrections.

POST CONVICTION RELIEF

Mississippi has abolished Post Conviction Habeas Corpus in favor of Post Conviction Relief (PCR). A PCR is a civil action which alleges fundamental unfairness or error. PCR can confer jurisdiction to the court in order to obtain relief when appropriate. A PCR is a civil suit subject to statutes of limitation and complex jurisdictional issues. A PCR is heard by the sentencing judge unless the case is an appeal, in which case it is heard by the Mississippi Supreme Court. Federal Habeas Corpus is governed by Section 2255 of the Federal Criminal Code.

EXPUNGEMENT

When a person has been arrested but not convicted, the original arrest may be expunged (erased) from the person's criminal history. Expunction of an arrest from the NCIC, FBI, Triple I (Interstate Identification Index), or local criminal history must be done in accordance with Mississippi law. Special rules apply to expungement of drug convictions for youthful offenders. Expungement may be available when a felony arrest has been concluded as a misdemeanor, pre-trial diversion, or non-adjudication. There are different expungement statutes and laws for felonies and misdemeanors, and different courts.

Generally, first offenders may have a felony expunged as long as the charge is not violence, sex offense, or sale or possession with intent to distribute drugs. Expungement may depend on the age of the offender at the time of arrest. There are several misdemeanor statutes which apply in various Justice and Municipal Courts. In some cases, the person's age at the time of arrest can be factor granting expungement.

YOUTH COURT

Youth Court presents special challenges. Generally youth under 17 will have his case heard in Youth Court unless it involves a firearm or DUI. Youth Court maintains a private, non-public record of delinquent adjudications. If the Youth Court judge determines that the child is ungovernable, he may "certify" the case to Circuit Court and the child will be treated as an adult.

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