

Pretrial Release and Detention: Arkansas

A combination of federal and state laws govern each state's pretrial system. These laws govern who can be detained pretrial, who should be released, and under what, if any, conditions. Federal guidance is found in the U.S. Constitution and federal court decisions. State guidance is found in state constitutions, statutes, court rules, and court decisions.

"Bail" refers to the process of pretrial release. It does not refer to money bond or any other financial condition of release. Although money is one possible condition of bail, it is not bail itself.

Pretrial release is the norm, and detention before trial is the carefully limited exception

National

The right to physical liberty is a foundational principle of the U.S. Constitution. The Supreme Court has emphasized the "fundamental nature" of a person's interest in pretrial liberty¹ and has underscored the importance of the country's "traditional right to freedom before conviction."² In short, the U.S. Constitution provides the right to be free before trial to the vast majority of people who are arrested.

The Supreme Court warned that without a right to pretrial release, "the presumption of innocence would lose its meaning." Stack v. Boyle, 342 U.S. 1, 4 (1951).

Arkansas Constitution

Article 2, Section 8 of the Arkansas Constitution contains broad pretrial release provisions that limit intentional pretrial detention to only a small group of people charged with the most serious crimes. All people charged with noncapital offenses are eligible for pretrial release "by sufficient sureties."³

However, in practice, in Arkansas, there is no *guarantee* of release, and judicial officers may end up setting conditions of release, including financial conditions, that may result in detention—although this practice is undergoing increased legal scrutiny across the country.

1 *United States v. Salerno*, 481 U.S. 739, 750 (1987).

2 *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

3 Ark. Const. art. 2, § 8. Article 2, § 9 articulates a typical state excessive bail clause, which is similar to the federal provision.

Detention is permitted only for certain purposes—and it must be the last resort

National

Detention may be used only when there are no conditions of pretrial release that can provide *reasonable assurance* that a person will not flee and/or commit a serious offense that compromises public safety. Detention cannot be used to punish, to "send a message," or because mental health or substance use treatment is needed.

Arkansas Law

The Arkansas Constitution appears to permit intentional detention only in cases where a person is charged with a capital offense and "the proof is evident or the presumption great."⁴ The Arkansas Supreme Court has stated that the "absolute right to bail" for every person charged with a noncapital offense "may only be curbed by the setting of certain conditions upon his release, and not its complete denial."⁵

Due process is required before a person may be detained

National

Because detention is such a significant deprivation of liberty, it may not be imposed unless a person is provided robust due process. The federal process, which has been approved by the Supreme Court, requires—among other things—a hearing in court where the state bears a heavy burden of proof, the person is represented by counsel and is allowed to provide evidence, and a judicial officer's decision is justified in writing.

4 Ark. Const. art. 2, § 8.

5 *Henley v. Taylor*, 918 S.W. 2d 713 (Ark. 1996) (per curiam).

Arkansas Law

Arkansas law does not set forth processes that must be followed when denying pretrial release, providing wide latitude for local jurisdictions to establish processes and safeguards that ensure the protection of people's rights.

Release conditions imposed must be the least restrictive necessary

National

The Supreme Court held that conditions of release must be set at a level designed to assure a constitutionally valid purpose "and no more."⁶ This is one way of expressing the legal principle that courts must impose the "least restrictive conditions" necessary to provide a reasonable assurance of appearance and public safety.

Arkansas Law

Arkansas court rules provide judicial officers with many opportunities to release people with a promise to appear in court and remain law-abiding, or with minimally restrictive conditions. In fact, the Arkansas Rules of Criminal Procedure imply that these outcomes are preferred, wherever possible, to the imposition of more restrictive conditions of release, such as financial conditions.

Rule 8.4 states that a judicial officer may release someone on recognizance *without* conducting a full pretrial hearing unless there is an objection from prosecution or law enforcement. In other words, Arkansas rules presume release on recognizance in the absence of reasons to do otherwise. If a hearing is conducted, any release conditions imposed must be limited to those that are necessary to ensure court appearance or to prevent a future serious crime, witness intimidation, or interference with the administration of justice.⁷ However, court rules *do not* authorize the imposition of financial conditions for the purpose of preventing criminal conduct.

Release conditions must be individualized

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A judicial officer must look at the person before them and decide whether and which conditions of release are necessary. Conditions, including financial conditions, should not be imposed categorically

⁶ *United States v. Salerno*, 481 U.S. 739, 754 (1987).

⁷ Ark. R. Crim. P. 8.4.

or simply based on charges. Some courts have ruled that the use of a monetary bond schedule based on charge is unconstitutional.⁸

Arkansas Law

Arkansas Rules of Criminal Procedure state that a judicial officer must assess *individualized* "factors relevant to the pretrial release decision," including but not limited to the nature of the charge, criminal history, employment status, community ties, and available assistance in attending court, before determining release conditions.⁹

Money cannot be used to intentionally detain

National

A growing body of appellate case law holds that financial conditions may not be used to intentionally detain someone.¹⁰ These cases also hold that unaffordable financial conditions will be subject to increased scrutiny, and a person's ability to pay must be assessed before setting financial conditions. If a state's constitution and/or statutes have defined who can be detained and how, judicial officers must abide by those laws and not set a secured financial condition in order to detain. If they did, it would effectively negate the state's laws regarding which people are eligible for pretrial detention.

Arkansas Law

In Arkansas, local jurisdictions and judicial officers retain wide latitude regarding the use—or nonuse—of financial conditions of release. Financial conditions do not appear to be required for any person, nor are bond schedules expressly mandated. And, when used, Rule 9.2 states that money bond can only be imposed to discourage flight and not for public safety aims.¹¹

For more information, read the [Legal Landscape of Pretrial Release and Detention in Arkansas](https://advancingpretrial.org/legal-analyses/) (at advancingpretrial.org/legal-analyses/).

⁸ Recently, a federal district court ruled that the use of a bond schedule "significantly deprives plaintiffs of their fundamental right to liberty." *Buffin v. San Francisco*, No. 15-cv-04959-YGR (N.D. Cal., March 4, 2019).

⁹ Ark. R. Crim. P. 8.5. States began enacting these lists of individualizing factors after the United States Supreme Court decision in *Stack v. Boyle*, 342 U.S. 1 (1951).

¹⁰ See, e.g., *O'Donnell v. Harris County*, 892 F.3d 147, 158 (5th Cir. 2018) ("[M]agistrates may not impose a secured bail solely for the purpose of detaining the accused").

¹¹ Ark. R. Crim. P. 9.2.