

Legal Landscape of Pretrial Release and Detention in Arkansas

December 2021

Matthew W. Alsdorf and Timothy R. Schnacke

About APPR

Advancing Pretrial Policy and Research (APPR) is dedicated to achieving fair, just, effective pretrial practices, every day, throughout the nation. It works with justice professionals and community members to improve pretrial justice systems in ways that prioritize community well-being and safety, racial justice, and the effective use of public resources. APPR is a project of the National Partnership for Pretrial Justice, with support from Arnold Ventures.

C  P P
Center for
Effective
Public Policy

The Center for Effective Public Policy (cepp.com) leads all implementation and technical assistance activities for APPR.

Table of Contents

Foreword	i
National Context	1
I. The Right to Pretrial Release	2
A. Federal Law and National Trends	3
B. Arkansas Law	4
II. The Scope of Pretrial Detention	5
A. Federal Law and National Trends	5
B. Arkansas Law	7
III. Setting Conditions of Release	8
A. Federal Law and National Trends	8
B. Arkansas Law	9
IV. Use of Financial Conditions of Release	11
A. Federal Law and National Trends	11
B. Arkansas Law	15
V. Other Points of Intervention	16
A. Federal Law and National Trends	16
B. Arkansas Law	17
About the Authors	19

Foreword

[Advancing Pretrial Policy and Research](#) (APPR) is supporting jurisdictions across the country as they work to improve their pretrial systems in ways that prioritize safety and promote racial equity. APPR is providing intensive research and implementation assistance in a select number of [Research-Action Sites](#). As of December 2021, six Research-Action Sites are being supported: Fulton County, Georgia; Montgomery County, Alabama; Pierce and Thurston Counties, Washington; Pulaski County, Arkansas; and Ramsey County, Minnesota. APPR’s assistance includes engaging key stakeholders in a data-informed, policy-driven collaborative process aimed at identifying opportunities to improve pretrial practices and their outcomes.

An essential task associated with this work is to understand and assess the national pretrial legal standards as well as the local pretrial legal framework. National pretrial standards emerge from federal constitutional principles (as interpreted by the United States Supreme Court and other federal courts) and from national bodies (such as the American Bar Association). Locally, every jurisdiction operates within a set of state and local laws and/or rules that govern who can be detained pretrial, how they can be detained, who can (or must) be released pretrial, and what conditions can be imposed on a person during pretrial release.

To assist jurisdictions in this examination, APPR sought the assistance of two national experts in pretrial law—Matt Alsdorf and Tim Schnacke—to work together to create a pretrial legal analysis for each state in which APPR is providing intensive technical assistance (Alabama, Arkansas, Georgia, Minnesota, and Washington).¹

APPR and the authors wish to note a few significant caveats to this or any pretrial legal analysis: First, the field is rapidly changing and new case law, rules, and statutes, on both the state and federal levels, may emerge between the time this report is published and when the jurisdiction reviews the analysis. Second, although the authors conducted comprehensive online research (e.g., using publicly available information found through internet searches as well as searches conducted on Lexis, Westlaw, and/or state legislative websites), it is possible that the search did not identify every relevant statute or case. Third, an analysis such as this is the start, not the end, of the process. It is incumbent upon local officials to review this analysis; consider it against local goals, values, and policies and practices; identify areas to explore more deeply; and consider the implications of the legal framework for future advancements.

¹ These analyses can be found on APPR’s [Pretrial Legal Analyses page](#). The legal analysis for Minnesota will be posted in the first half of 2022.

Legal Landscape of Pretrial Release and Detention in Arkansas

The Advancing Pretrial Policy and Research (APPR) initiative provides policy guidance, research capacity, and technical assistance to jurisdictions around the country to help improve their pretrial policies and practices. This legal analysis of federal and state pretrial release and detention laws was written to assist policymakers in understanding the current legal landscape as they assess their own policies and practices and identify opportunities for improvement. This report was written by request of and in collaboration with APPR, and was supported by Arnold Ventures.

National Context

Over the past decade, there have been substantial shifts in the culture and practices surrounding pretrial release and detention. These have been spurred by a growing realization that people with a low likelihood of fleeing or being arrested again before their trials are often detained in high numbers solely because they cannot afford the financial conditions of release that have been imposed upon them (often in the form of a monetary bond), while people who have access to money but who are far more likely to miss court or be arrested again are often released. While the exact path of pretrial improvements has varied from state to state—and even from county to county—the direction has been consistent: jurisdictions across the country are moving toward a more purposeful and intentional system of pretrial release and detention. This typically means shifting from a system where financial conditions of release are the default (which results in unpredictable and somewhat arbitrary release/detention outcomes) to one where judicial officers consider more information and make more reasoned, evidence-based, and explicit decisions about who should be detained, who should be released, and under what conditions. This shift is one of the reasons that jurisdictions look to actuarial pretrial assessment tools, such as the Public Safety Assessment (PSA), to help guide their decisions.

These changes are made against the backdrop of both state and federal laws that govern what policymakers—and individual judges²—can and cannot do when it comes to pretrial release and detention. As jurisdictions consider the possible improvements they could make to increase the effectiveness and fairness of their pretrial system, it is important to understand the legal landscape, to reflect on whether current pretrial practices are consistent with the law (both where it is now and the direction it is presently taking), and to determine how much latitude stakeholders have to change those practices.

² In many jurisdictions, judges are not the only ones who make decisions about pretrial release: magistrates, commissioners, justices of the peace, and other officers of the court may do so as well. For ease of reference, however, throughout this document we use “judge” to refer to *all* judicial officers who make pretrial release decisions.

This document summarizes the legal framework that governs key pretrial decisions in Arkansas. It is organized in the following five sections, each focusing on a central legal issue:

- I. **Right to Pretrial Release:** The legal foundations and scope of the right to be free before trial.
- II. **Scope of Pretrial Detention:** The limited situations under which people can be intentionally detained before trial.
- III. **Setting Conditions of Pretrial Release:** The process and legal requirements for determining whether people who are released should be subject to conditions, and what those conditions should be.
- IV. **Use of Financial Conditions of Release:** When and how financial release conditions can be imposed, and whether inability to pay can result in detention.
- V. **Other Points of Intervention:** How laws impact jurisdictions' practices at other stages of the pretrial process, such as pre-arrest and pre- and post-charge.

Each section has two parts—the first focusing on federal laws and national standards (including constitutional law, recent litigation, and standards promulgated by national groups) and the second focusing on Arkansas law (including the state constitution, statutes, court rules, and court decisions). When relevant, the document notes if current law hinders or is consistent with the use of a pretrial assessment, such as the PSA.

The research conducted for this document included a review of federal constitutional provisions, federal statutes, and federal case law, as well as a review of Arkansas's constitutional provisions, state statutes, state and local court rules, state case law, and publicly available local rules and laws. The authors did not review current state or local *practices*, except to the extent that they were publicly documented.

I. The Right to Pretrial Release

The right to pretrial release has ancient roots. Indeed, the concept of bail itself began “as a device to free untried prisoners” and can be traced back to the “Anglo-Saxon period in England before the Norman Conquest.”³ Then, as now, detention before trial was meant to be rare since the accused individual was not yet convicted of a crime, and “bail” referred to the process by which a person accused of a crime was to be released from jail. In short, if people were “bailable” or “admitted to bail,” that meant they would be free pending trial. The only people who were to be intentionally detained before adjudication were those deemed “unbailable” by law.⁴

3 *State v. Brown*, 338 P.3d 1276, 1283 (N.M. 2014) (quoting Daniel Freed & Patricia M. Wald, *Bail in the United States* 1 (1964)).

4 See generally Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (2014) [hereinafter *Fundamentals*], <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf>; see also Timothy R. Schnacke, “Model” Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention, 18-28 (2017), http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf.

Some state statutes conflate “bail” and the use of money as a condition of release. Arkansas law, for example, uses the term “bail” in multiple ways—sometimes employing its historical meaning as a process of release and sometimes equating it to financial conditions.⁵ For instance, in 1976, the Arkansas Supreme Court quoted at length language found in the United States Supreme Court’s opinion in *Stack v. Boyle*,⁶ which equates the “right to bail” to the “right to freedom before conviction” and “the right to release before trial.”⁷ But some state statutes imply that “bail” is equivalent to financial conditions of release—for instance, when defining “admission to bail” as “an order...that a defendant be discharged from actual custody on bail and fixing the amount of bail.”⁸

For the sake of clarity, APPR uses “pretrial release” to mean release pretrial and, when referring to the requirement that a person post money in order to be released from jail pretrial, APPR uses the term “financial condition of release,” “financial release condition,” “financial condition,” or “money bond.”

A. Federal Law and National Trends

The right to physical liberty is one of the foundational principles of the United States Constitution. Although the Constitution does not explicitly address the right to release before trial,⁹ the Supreme Court and other federal courts have consistently interpreted key provisions of the Constitution, including the Due Process and Equal Protection Clauses, as well as federal statutes, to mean that the vast majority of people are entitled to be free while awaiting trial. The reasons for this may seem self-evident but are worth underscoring. Freedom from bodily restraint has always been at the core of the liberty interests protected by the Constitution.¹⁰ Indeed, it is hard to conceive of any definition of “freedom” that does not include the right not to be arbitrarily detained by the government. This is why the state always bears an extremely high burden when seeking to deprive someone of their physical freedom—whether that burden is proof of guilt “beyond a reasonable doubt” in criminal proceedings or “clear, unequivocal, and convincing evidence” of likelihood to harm oneself or others when it comes to civil commitments.

These principles are of *particular* importance in the pretrial context, where people accused of a crime are presumed innocent.¹¹ The Supreme Court has emphasized the “fundamental nature”

5 See Cindy Grace Thyer, *Is it Time for Arkansas to Consider Pretrial Reform?* (2019), https://scholarworks.unr.edu/bitstream/handle/11714/5780/Thyer_unr_0139M_12829.pdf?sequence=1. For a more detailed description of the historical and legal definition of bail as a process of pretrial release, see *Fundamentals*, *supra* note 4.

6 342 U.S. 1,3 (1951).

7 *Thomas v. State*, 542 S.W. 2d 284 (Ark. 1976).

8 Ark. Stat. Ann. § 16-84-101(6)(A), (B).

9 The United States Constitution simply requires that, when bail is set, it not be “excessive.” U.S. Const. amend. VIII.

10 See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

11 *Coffin v. United States*, 156 U.S. 432, 453 (1895) (noting that the presumption of innocence is “the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law”); *In re Humphrey* (2018) 19 Cal.App.5th 1006 (recognizing that people’s interest in liberty is especially great before trial because they are presumed innocent).

of a person's interest in pretrial liberty¹² and has underscored the importance of the country's "traditional right to freedom before conviction."¹³ Indeed, the Court has warned that, absent a right to pretrial release, "the presumption of innocence, secured only after centuries of struggle, would lose its meaning."¹⁴ In addition to purely legal or historical reasons for emphasizing an overall right to pretrial release, courts—including the Supreme Court—and a growing number of researchers have recognized equally important practical considerations in that pretrial detention impairs a person's ability to prepare a defense and often leads to adverse consequences, such as the loss of employment and disruption of family life.¹⁵

Therefore, the Supreme Court has been unambiguous in stating that, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."¹⁶ While this does not provide states or counties with a precise formula for determining what percentage of their pretrial population can be detained, it makes clear that the strong default presumption is that people must be released while charges are pending—and courts and legislatures can depart from that outcome only in a relatively small number of cases with a strong justification for doing so.

B. Arkansas Law

While there is no express right to bail in the federal Constitution, the Arkansas Rules of Criminal Procedure appear designed to facilitate the release of people who are eligible for bail.¹⁷ In addition, Article 2, Section 8 of the Arkansas Constitution provides for "all persons" to be "bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."¹⁸ This makes Arkansas like approximately 18 other states having broad pretrial release provisions that carve out only an extremely narrow band of people charged with the most serious crimes as being ineligible for pretrial release.¹⁹ In Arkansas, this understanding would entitle everyone other than people charged with capital offenses to be released before trial.

Although Arkansas's constitution provides for a broad right to pretrial release, courts in Arkansas—as in many other states—do not always require that people eligible for pretrial

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

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

14 *Id.*

15 See *id.*; see also *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972); *Buffin v. City & Cnty. of San Francisco*, No. 15-cv-04959, 2018 U.S. Dist. LEXIS 31875 (N.D. Cal. Feb. 26, 2018); Paul Heaton et al., *The Downstream Consequences of Pretrial Detention*, 69 Stan. L. Rev. 711 (2017), <https://www.stanfordlawreview.org/print/article/the-downstream-consequences-of-misdemeanor-pretrial-detention/>.

16 *Salerno*, 481 U.S. at 755.

17 See, e.g., Ark. R. Crim. P. 9.1(a), providing for release at first appearance based on recognizance or nonmonetary conditions.

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

19 See Pretrial Justice Institute, *Guidelines for Analyzing State and Local Pretrial Laws*, 10-13 (2017) [hereinafter *Guidelines*], <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f8c73743-57bc-5065-4b85-324e2bb28ba6&forceDialog=0>.

release actually be released. This results in the pretrial detention of people who are “bailable” under the state constitution. As further discussed in Section IV (Use of Financial Conditions of Release) below, this is legally justified by the so-called “excessive bail loophole,” which allows courts to set financial conditions of release that result in pretrial detention as long as there is no express record of intentional detention.²⁰ The loophole thus turns on intentionality; as long as a judge does not articulate a purpose to detain with money, appellate courts will generally give that judge the benefit of the doubt that they do, in fact, intend to allow release as long as the condition is met.²¹ This practice is common across the United States, but it is inconsistent with the historical notion of bail as a mechanism to secure release, and it has been challenged—often successfully—in lawsuits filed across the country in recent years.

Thus, while it appears that Arkansas law does not *guarantee* the release of people who are eligible for release, judges retain wide discretion to release any person they deem appropriate.

II. The Scope of Pretrial Detention

The fact that pretrial liberty is one of our most jealously guarded constitutional rights does not mean that a state may not detain *anyone*. It means, instead, that instances of pretrial detention must be the “carefully limited exception” to the “norm” of “liberty before trial.”²² The legislature and the judiciary have important—but distinct—roles in determining which people remain in jail while their cases are pending. The legislature (and voters) pass laws and constitutional provisions that define and limit the pool of people who *may* be detained; typically, they establish criteria having to do with the severity of the charge and the likelihood that the person will flee or pose a danger to the community. Judges, in turn, decide whether, in any individual case, those criteria have been met and the person *will* be detained. If either of those things is not true—in other words, if the person is not constitutionally/statutorily eligible for pretrial detention *or* if the judge does not make the required findings—the person cannot legally be detained. They must be released.

A. Federal Law and National Trends

As noted above, the U.S. Constitution requires that bail not be “excessive,” but it does not explicitly address when bail can be denied altogether—that is, when a judge can order that a

20 See Timothy R. Schnacke, *Changing Bail Laws: Moving from Charge to “Risk:” Guidance for Jurisdictions Seeking to Change Pretrial Release and Detention Laws*, 22 (2018) [hereinafter *Changing Bail Laws*], http://www.clebp.org/images/Changing_Bail_Laws_9-23-2018_TRS_.pdf (explaining the loophole).

21 The loophole is typically shown by three main threads of cases. First are cases holding that people eligible for pretrial release must have their release conditions “set,” which appears to be the primary holding of *Henley v. Taylor*, 918 S.W. 2d 713 (Ark. 1996). Second are cases that declare a violation of the Excessive Bail Clause or, more typically, an abuse of discretion when judges set a financial condition of release with an express purpose to detain, which appears to be at least a major part of the holding in *Foreman v. State*, 875 S.W. 2d 853 (Ark. 1994) and in language quoted in *Thomas, supra*, indicating the Court’s recognition that using money to detain intentionally is “contrary to the whole policy and philosophy of bail.” Finally, there are those often extremely numerous cases allowing high financial conditions of release to result in pretrial incarceration when judges do not make a record of intentional detention.

22 *Salerno*, 481 U.S. at 755.

person be detained. Given the importance of the interests at stake, as well as the number of people affected by pretrial release decisions every day, one might expect there to be extensive case law spelling out the precise extent of—and limitations on—the government’s power to deny pretrial release. However, guidance from the Supreme Court is surprisingly limited, and the Court has not weighed in on these issues since 1987. Nonetheless, many lower federal and state courts are articulating the limited universe of situations in which courts can deny release and hold a person behind bars until trial.²³ In brief:

(1) **Court appearance and public safety are the only valid justifications for pretrial detention.**

The U.S. Supreme Court has recognized only two valid purposes for the denial of pretrial release: (1) assuring a person’s presence in court and (2) protecting public safety.²⁴ No other purposes are lawful. Pretrial detention cannot be used as a punishment;²⁵ after all, at this stage, the person has not yet been found to have committed a crime. Moreover, pretrial detention cannot be used to “send a message,” or because a judge believes a person has a mental illness or a substance use problem. The only two factors a judicial officer can consider when deciding whether to deny pretrial release are the likelihood that the person will abscond and the likelihood they will commit a crime while on pretrial release.

(2) **Detention should be reserved for people who are highly likely to flee or commit a serious or violent crime and only when no conditions of release can provide reasonable assurance that the likelihood is mitigated.**²⁶

Of course, every person presents *some* risk of non-appearance and *some* risk of new arrest. Therefore, the law does not permit judges simply to detain anyone they believe *might* misbehave. Rather, there must be a strong justification for doing so. In upholding the Bail Reform Act of 1984, which authorizes pretrial detention in the federal system, the Supreme Court noted that Congress had been careful in narrowly defining which people could be denied bail: “The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses.

23 Some of these decisions arise when courts are asked to review state efforts to change their detention provisions, and these cases should be consulted before modifying the laws governing pretrial detention. See, e.g., *Lopez-Valenzuela v. Arpaio*, 770 F. 3d 772 (2014); *Simpson v. Miller*, 387 P. 3d 1270 (Ariz. 2017).

24 *Salerno*, 481 U.S. at 755; *Stack*, 342 U.S. at 5. On occasion, courts acknowledge that detention can be imposed to protect victims and witnesses and to ensure the integrity of the court and the trial. These are not understood as *separate* bases for detention, however; rather, they are understood as components of the more general overall purposes of public safety and court appearance.

25 *Stack*, 342 U.S. at 4; *Ex Parte Alexander*, 61 S.W3d 398, 404-05 (Tex. Crim App. 2001) (en banc); see also *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law”).

26 This is consistent with a number of national standards. See, e.g., National Conference of Commissioners on Uniform State Laws (NCCUSL), *Uniform Pretrial Release and Detention Act* (UPRDA; 2020), §§ 303-308, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=92ae74f6-5e4e-4a2f-f981-db06f5e77b44&forceDialog=0> (A court “shall issue an order of release on recognizance” for all people who are arrested unless the court determines by clear and convincing evidence that the person “is likely to abscond, not appear, obstruct justice, violate an order of protection, or cause significant harm to another person”); National Association of Pretrial Services Agencies (NAPSA), *Standards on Pretrial Release* (2020), Standard 1.6, https://cdpsdocs.state.co.us/ccjj/committees/PRTF/Handout/2020_NAPSA_StandardsOnPretrialRelease.pdf (holding that pretrial detention should be “limited only to when the court finds by clear and convincing evidence that a detention-eligible defendant poses an unmanageable risk of committing a dangerous or violent crime during the pretrial period or willfully failing to appear at scheduled court appearances”).

Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest.”²⁷

Even in systems that do not place such significant constitutional or statutory restrictions on judges’ ability to deny pretrial release altogether, courts have generally held that detention can be used only as a last resort. That is, judges can deny pretrial release only when they find that no lawful condition of release (or combination of conditions) can provide reasonable assurance that the person will not flee and will not commit a serious or violent crime while released.²⁸

(3) **Detention may be imposed only after procedural safeguards have been followed.**

Because pretrial incarceration is such a significant deprivation of liberty, it cannot be imposed unless a person has been provided with robust due process protections. The Supreme Court has never defined precisely what protections are required, but it has cited with approval the federal process for detention, under which:

- ▶ a person is represented by counsel;
- ▶ a person may testify on their own behalf and cross-examine witnesses as part of a “full-blown adversary hearing”;
- ▶ the judicial officer considering detention is guided by statutorily enumerated factors;
- ▶ the government must prove the need for detention by clear and convincing evidence;
- ▶ the judicial officer must provide written findings of fact and statement of reasons for a decision to detain; and
- ▶ the accused person is entitled to expedited appellate review.²⁹

B. Arkansas Law

As noted above, Article 2, Section 8 of 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.” Indeed, the Arkansas Supreme Court has reinforced this understanding of the constitutional provision by stating that every person charged with a noncapital offense has an “absolute right to bail” that “may only be curbed by the setting of certain conditions upon his release, and not its complete denial.”³⁰ Thus, under current Arkansas law, pretrial release can be denied for those charged with a capital offense, but for those charged with noncapital offenses, pretrial detention can be accomplished only through the setting of unattainable financial conditions or other unattainable release conditions (the so-called “excessive bail loophole” mentioned above, which is under increasing legal challenge across the country).

²⁷ *Salerno*, 481 U.S. at 750.

²⁸ See, e.g., *In re Humphrey* (Cal. Sup. Ct., Mar. 25, 2021), slip op. at 17; see also *Salerno*, 481 U.S. at 750 (endorsing statutory scheme requiring “clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person”). See generally, *Model Bail Laws*, *supra* note 4.

²⁹ *Salerno*, 481 U.S. at 751-52. See also *Fundamentals*, *supra* note 4, at 43-44.

³⁰ *Henley v. Taylor*, 918 S.W. 2d 713 (Ark. 1996) (per curiam).

Arkansas law does not set forth processes that must be followed when denying pretrial release. In the absence of any relevant state laws, local jurisdictions have broad latitude in establishing pretrial procedures, and they are free to institute safeguards, including those enumerated in *Salerno*, to ensure the protection of people’s rights when facing potential detention through the denial of pretrial release or the setting of unattainable financial release conditions.

III. Setting Conditions of Release

When making the pretrial release decision, judges must also decide whether they should subject the person to conditions of release. Many people can be released on their own recognizance—with no conditions other than a promise to return to court and not to commit any crimes while on release. Judges do, however, have the option of imposing conditions aimed at mitigating the likelihood that a person will miss court or be rearrested. The conditions available to judges vary widely from county to county, and may include court date reminders, telephone or in-person check-ins with pretrial supervisors, GPS monitoring, and/or money bond, among others.³¹

A. Federal Law and National Trends

- (1) **The conditions imposed must be the least restrictive necessary.** In *Salerno*, the United States Supreme Court held that conditions of pretrial release must be set at a level designed to assure a constitutionally valid purpose “and no more.”³² 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. “Least restrictive conditions” is a term of art expressly contained in the federal and District of Columbia statutes, the American Bar Association (ABA) best practice standards on pretrial release, and other state statutes based on those standards (or a reading of *Salerno*).³³ The concept has also been adopted in various state high court rulings articulating, for example, that pretrial release may be met only by means that are “the least onerous” or that impose the “least possible hardship” on the person who is accused. In many cases, the “least restrictive conditions” will be no conditions at all, beyond the promise to return to court and not engage in illegal conduct—in other words, release on recognizance: “It should be presumed that defendants

31 Due process should also be safeguarded at this stage in the process—even if a person is not eligible for detention. See, e.g., *NAPSA Standards*, *supra* note 26, Standard 2.5 (“Jurisdictions should ensure that defendants are represented by counsel at the initial pretrial court appearance and all subsequent court appearances”).

32 *Salerno*, 481 U.S. at 754.

33 This is also consistent with best practices established by the National Institute of Corrections (NIC), NAPSA, and NCCUSL. See NIC, *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency*, 10 (2017), <https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf> (endorsing a “presumption of nonfinancial release on the least restrictive conditions necessary to ensure future court appearance and public safety”); *NAPSA Standards*, *supra* note 26, Standard 1.4 (“If the Court determines that release on own recognizance is insufficient, it may impose the least restrictive nonfinancial condition or conditions to reasonably assure court appearance and public safety”). See also *id.*, Standard 2.2 (recommending a presumption of release on recognizance “with a progression...to nonfinancial release conditions to reasonably assure court appearance and public safety”) and UPRDA, *supra* note 26, §§ 305-306.

are entitled to release on personal recognizance on condition that they attend all required court proceedings and they do not commit any criminal offense.”³⁴ Commentary to the ABA Standard recommending release under the least restrictive conditions states the following:

This Standard’s presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally...The presumption constitutes a policy judgment that restrictions on a defendant’s freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.³⁵

- (2) **Judges must make individualized findings regarding the risks a person poses before determining release conditions or detention.** Federal laws as well as most states’ laws or regulations require that judges look at certain factors when deciding what—if any—conditions to impose on a person’s release. The underlying principle is that these decisions must avoid arbitrariness by being individualized—that the judge must look at the person before them and decide whether conditions of release are necessary, and, if so, what those conditions should be.³⁶ In other words, conditions—including financial conditions—should not be imposed categorically or simply based on charge.³⁷ Rather, the judge must determine whether the person requires release conditions in order to reasonably assure they will return to court or avoid a new arrest.

B. Arkansas Law

Arkansas court rules reinforce—both implicitly and explicitly—both of the federal legal principles outlined above.

The rules provide judicial officers with many opportunities to release people on recognizance or with minimally restrictive conditions. In fact, the Arkansas Rules of Criminal Procedure are structured in a way that implies 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 even *without* conducting a full

34 American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release* (3rd ed. 2007), Standard 10-5.1(a), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf. See also *id.*, Standard 10-1.4(c), commentary (“When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first”).

35 *Id.*, Standard 10-1.2 (commentary at 39-41).

36 *Stack*, 342 U.S. at 5-6 (“Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of *that defendant*” (emphasis added)).

37 See *NAPSA Standards*, *supra* note 26, Standard 1.2 (“Bail should be individualized to a defendant’s risk of failure to appear at scheduled court appearances and risk to public safety...Bail also should not be set based on a single factor (i.e., charge for bail schedules)”).

pretrial hearing, unless: (1) a law enforcement officer opposes release on recognizance (for charges with a penalty of less than one year), or (2) the prosecutor does not stipulate to release on recognizance (for charges with a penalty of more than one year).

If a matter proceeds to a full pretrial hearing—called a “pretrial release inquiry”—a judge must assess *individualized* “factors relevant to the pretrial release decision” before imposing release conditions.³⁸ These factors include, among others, the nature of the charge, the possibility of legal violations upon release, criminal history, employment status, community ties, and available assistance in attending court.³⁹

Consistent with the principle of “least restrictive” conditions, the rules provide that, after conducting the pretrial release inquiry, a judge may release any person on recognizance.⁴⁰ Other conditions may be imposed only if the judge finds, based on the pretrial release inquiry, that such conditions are necessary to reasonably ensure appearance in court⁴¹ or that it “appears that there exists a danger that the defendant will commit a serious crime or will seek to intimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice.”⁴²

The rules of criminal procedure specify the available conditions that may be imposed to mitigate either of these risks:

- (1) The available conditions to reasonably ensure court appearance⁴³ are listed in order from least restrictive (“place the defendant under the care of a qualified person or organization agreeing to supervise the defendant and assist him in appearing in court”) to most restrictive (“release the defendant during working hours but require him to return to custody at specified times”).⁴⁴ As discussed further in Section IV (Financial Conditions of Release) below, the rules reserve “money bail” only for situations in which *no other conditions* will reasonably ensure court appearance.⁴⁵ These provisions suggest that the state’s rules are designed to encourage judicial officers to impose only those conditions that are necessary for a reasonable level of confidence that someone will return to court—and no more.
- (2) The conditions that may be imposed to prevent future acts of crime, witness intimidation, or interference with the administration of justice are stay-away orders, limitations on travel,

38 Ark. R. Crim. P. 8.5.

39 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) to avoid the arbitrary setting of pretrial release conditions. The issue in this generation of pretrial reform is often whether to replace or augment these statutory lists with the sort of statistical information available through actuarial pretrial assessment tools.

40 Ark. R. Crim. P. 9.1(a).

41 Ark. R. Crim. P. 9.1(b).

42 Ark. R. Crim. P. 9.3.

43 Rule 9.1 does not explicitly state that it focuses *solely* on ensuring court appearance. But its structure and content—as well as the fact that a separate provision (Rule 9.3) governs conditions aimed at protecting public safety—strongly imply that these conditions are meant to encourage people to appear in court.

44 *Id.* This rule also permits the imposition of “any other reasonable restriction to ensure the appearance of the defendant.”

45 Ark. R. Crim. P. 9.2(a).

prohibitions on possessing dangerous weapons, prohibitions on the use of alcohol or drugs, and pretrial supervision.⁴⁶ Court rules *do not* authorize the imposition of financial conditions for the purpose of preventing criminal conduct.

Nothing in Arkansas law would appear to hinder a court's ability to consult a pretrial assessment, such as the PSA, when setting release conditions.

IV. Use of Financial Conditions of Release

Across the country, financial conditions of release have become so common that many confuse the term “bail” with those conditions. As noted above, using money to determine who is released and who is detained before trial has yielded outcomes that are not desirable from the standpoint of public safety, fairness, or cost.⁴⁷ As a result, many jurisdictions—including, most notably, New Jersey and New Mexico⁴⁸—have engaged in efforts to reduce their reliance on financial conditions and to encourage judges to make more purposeful release/detention decisions. In other states—including, most notably, Texas and California—litigation is encouraging local pretrial systems to move in the same direction. And prominent national organizations, such as the National Association of Pretrial Services Agencies (NAPSA), have come out against the use of financial conditions entirely.⁴⁹ While the precise role that financial release conditions will play in the future in the pretrial system remains to be determined, it seems likely that their role will be significantly reduced.

A. Federal Law and National Trends

In recent years, multiple groups have filed a string of lawsuits challenging various aspects of the use of financial conditions of release, forcing increased state and federal scrutiny of these release conditions.⁵⁰ Plaintiffs in these suits are typically people who are detained in jail because they cannot afford to pay their financial conditions but who would have been released if they had access to money. While the U.S. Supreme Court has yet to weigh in, a number of lower courts have ruled on critical issues related to the use of financial conditions. In most cases, the courts have ordered that jurisdictions make significant changes to their use of financial release conditions at the pretrial phase.

⁴⁶ *Id.*

⁴⁷ See, e.g., Texas Judicial Council, *Criminal Justice Committee Report & Recommendations* (2016), <https://www.txcourts.gov/media/1436204/criminal-justice-committee-pretrial-recommendations-final.pdf>; California Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice* (2017), <https://www.courts.ca.gov/documents/PDRReport-20171023.pdf>; Luminosity, *New Jersey Jail Population Analysis* (2013), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cd0d8307-d9cb-beb0-d160-a3b5e60ddbfa&forceDialog=0>.

⁴⁸ *Collins v. Daniels*, 916 F.3d 1302 (10th Cir. 2019) (upholding New Mexico's law); *Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018) (upholding New Jersey's law).

⁴⁹ *NAPSA Standards*, *supra* note 26, Standard 1.5 (“Financial conditions of bail should be prohibited”).

⁵⁰ See, e.g., *O'Donnell v. Harris County*, 892 F.2d 147, 158 (5th Cir. 2018); *In re Humphrey*, 228 Cal. Rptr. 3d 513 (Ct. App. 2018); *Shultz v. Alabama*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018).

Although the decisions—and the legal rationales—are varied, a few key principles have emerged: (1) judges cannot use financial release conditions to *intentionally* detain a person; (2) if a person remains in jail because they cannot pay a financial condition, the judge’s decision will be subject to heightened scrutiny; and (3) a person is entitled to individualized determinations about their ability to pay a financial condition. These principles have not been adopted by *all* courts, nor have they been articulated in the exact same way in each opinion, but they represent the direction in which the jurisprudence is clearly moving. These principles, and related case law, are discussed below.

- (1) **Money may not be used to intentionally detain.** From the start, financial conditions of release were meant to provide greater assurance that released individuals would return to court, and, because they were typically set in unsecured form, they did not lead to detention.⁵¹ As the use of secured bonds grew in America, they were still not intended to be used as a mechanism to keep people in jail. If a judge wished to detain a person, the appropriate method for doing so would be to deny them pretrial release altogether. Every state has the ability to permit this sort of “preventive detention” in at least some cases—although many state constitutions and statutes strictly limit the pool of people for whom denying pretrial release is permitted (e.g., only those charged with a capital offense or a violent felony)—and to impose some heightened evidentiary standard on those arguing for detention (e.g., the proof must be “evident” and the “presumption great,” or there must be “clear and convincing evidence” that the person poses a significant risk of a serious or violent crime).

Today, however, the majority of people in jail before trial have not been preventively detained. Rather, they have been detained because their financial conditions of release have been set at levels they cannot afford. Appellate courts have not generally held that the Excessive Bail Clause of the Eighth Amendment entitles people to affordable money bond.⁵² But federal courts (and every state court to address the issue) has ruled that judges cannot set high financial conditions *in order to* detain a person.⁵³ In other words, if, through its constitution and/or statutes, a state has defined which people can be denied pretrial release and has set forth a process by which to do so, judges cannot circumvent that

51 *Stack*, 342 U.S. at 5 (“[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused”). With an unsecured bond, a person pledges to pay an amount of money set by the judicial officer or unsecured property if they do not appear in court as scheduled. The person does not pay any money or pledge property prior to their pretrial release from jail. If the person does not appear in court, the full monetary amount may be forfeited. For a longer explanation of the history of bail, see *Fundamentals*, *supra* note 4; *Guidelines*, *supra* note 19.

52 See, e.g., *United States v. James*, 674 F.2d 886, 888 (11th Cir. 1982); *United States v. McConnell*, 842 F.2d 105 (5th Cir. 1988).

53 The idea that people who are eligible for pretrial release should not be detained using money on purpose was first articulated in 1951 by Justice Jackson of the U.S. Supreme Court, who wrote, in a concurring opinion, that using money not to provide reasonable assurance during release but instead to provide assurance that people remain in jail was “contrary to the whole policy and philosophy of bail.” *Stack*, 342 U.S. at 10. See also *Bandy v. United States*, 81 S.Ct. 197, 198 (Douglas, Circuit Justice 1960) (“It is unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom.”); *Galen v. County of Los Angeles*, 477 F.3d 652 (9th Cir. 2007) (“The court may not set bail to achieve invalid interests”) (citing *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987) (affirming a finding of excessive bail where the facts established the state had no legitimate interest in setting money bond at a level designed to prevent a person from posting that bond)); *O’Donnell*, 892 F.2d at 158 (“[M]agistrates may not impose a secured bail solely for the purpose of detaining the accused”).

system by using financial conditions to detain; after all, if they were able to do so, it would effectively negate the state's laws regarding pretrial detention.

Until recently, though, the practical impact of this principle was quite limited. Because appellate courts typically struck down unaffordable financial conditions only if the judge made an express record of intentional detention (i.e., if the judge explicitly said the amount of the financial condition was designed to detain), judges could effectively detain anyone they wanted to simply by remaining silent about—or articulating another justification for—the amount of the money bond.⁵⁴ As discussed below, this is beginning to change, as appellate courts are starting to look more carefully at the justifications for (and consequences of) financial conditions of release, and as jurisdictions begin to make more purposeful decisions about pretrial release and detention. But in the meantime, it is worth underscoring that, in accordance with the U.S. Constitution, *intentionally detaining a person who is entitled to pretrial release by using financial conditions is impermissible*.

- (2) **Unaffordable financial conditions will be subject to increased scrutiny.** There is an emerging stream of federal and state cases in which plaintiffs claim that *any* detention resulting from the use of financial release conditions—whether intentional or not—violates the Equal Protection and/or Due Process Clauses of the U.S. Constitution. The legal arguments are nuanced, but essentially amount to the following:
- (a) Detaining a person who is indigent when a similarly situated person who is *not* indigent would be released is a violation of Equal Protection.
 - (b) Detention is the deprivation of a fundamental right and therefore can be imposed in only very limited circumstances and after thorough due process. Current pretrial systems typically fall far short of the mark.

People who have been criminally accused have prevailed in the significant majority of these types of recent cases. While courts offer somewhat varied rationales for their opinions, the upshot of this line of cases is clear: if people are detained because financial conditions of release are set at levels they cannot afford, courts' decisions will be subject to more searching review on appeal. The technical level of legal scrutiny (e.g., "strict," "heightened," or "intermediate") and when, precisely, financial conditions of release trigger these levels remain the subject of some debate among federal circuit courts.⁵⁵ However, it is apparent that appellate courts will no longer simply defer to the lower courts' discretion in establishing the amount of a financial release condition, particularly if that amount results in pretrial detention.⁵⁶ Indeed, there has been a move among many courts to treat

⁵⁴ This is referred to as the "excessive bail loophole" and is discussed in greater detail in *Guidelines*, *supra* note 19.

⁵⁵ For the most recent analysis of the cases and arguments, see Kellen Funk, *The Present Crisis in American Bail*, Yale L. J. Forum (April 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376045.

⁵⁶ In a recent ruling, the 11th Circuit endorsed a more lenient standard of review to unaffordable release conditions. *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018). However, that court's holding pertained to the use of a standing bond schedule to establish money bond amounts during the first 48 hours post-arrest, after which a person who could demonstrate indigency was *entitled* to release on recognizance. It is not entirely clear what implications this ruling might have for a pretrial system with longer periods of detention or without a guarantee of release.

unaffordable financial release conditions as being akin to a denial of pretrial release altogether—in other words, to review such rulings as if the judge had ordered the person detained.⁵⁷ According to these decisions, the circumstances in which such orders may be allowed are narrowly circumscribed, and the people accused must be provided with robust procedural protections.

- (3) **A person's ability to pay must be assessed before setting the amount of a financial release condition.** In many jurisdictions, fixed bond schedules are used to set the financial release condition. While judges are typically free to deviate from the pre-set amount in any given case (and have a choice of ordering a secured or unsecured bond), they often simply default to the bond schedule. It is precisely this lack of individualization that leads to the outcomes that appellate courts have deemed constitutionally problematic—namely, people being detained based not on how likely they are to succeed or fail on pretrial release but on their access to money.

The reliance on bond schedules is increasingly being questioned and undercut by recent court decisions.⁵⁸ Courts are holding that judges must provide a rationale for setting financial release conditions at a particular level—or setting financial release conditions at all.⁵⁹ First, the amount must be connected to the risk they are hoping to mitigate, since setting financial release conditions for the purpose of detention is legally impermissible. Second, the amount must take into account the person's ability to pay.⁶⁰ After all, a \$1,000 bond could be a detention order for one person but be readily paid by another. Therefore, it is only by taking into account a person's ability to pay that a judge can make a legally justifiable decision about the level of the financial condition—if any. The ABA Standards go even further, stating that no person should have financial release conditions set at a level that “results in the pretrial detention of the defendant solely due to an inability to pay.”⁶¹

57 See, e.g., *O'Donnell*, 892 F.2d at 158; *Schultz v. Alabama*, 330 F. Supp 3d 1344, 1358 (N.D. Ala. 2018). These decisions are consistent with circuit court interpretations of the Federal Bail Reform Act, which have required the same procedural protections for people subject to unaffordable release conditions as for those denied release outright. See e.g., *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991); *United States v. McConnell*, 842 F.2d 105, 108-10 (5th Cir. 1988).

58 Most recently, a federal district court applied strict scrutiny to Equal Protection and Due Process claims arising from the use of a money bond schedule and 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, slip op at 40 (N.D. Cal., March 4, 2019).

59 See, e.g., *O'Donnell* at 160 (requiring judicial officers to “specifically enunciate their individualized, case-specific reasons” for imposing financial release conditions on people who are indigent).

60 See, e.g., *Caliste v. Cantrell*, 329 F.Supp. 3d 296 (E.D. La. 2018) (requiring “an inquiry into the arrestee’s ability to pay” and “consideration of alternative conditions of release, including findings on the record applying the clear and convincing standard and explaining why an arrestee does not qualify for alternative conditions of release”); *Humphrey*, 19 Cal. App. 5th at 1041 (requiring release condition determinations to be based upon consideration of individual criteria, including ability to pay).

61 *ABA Standards*, *supra* note 34, Standard 10-5.3. Even more forcefully, the federal statute governing pretrial release strictly forbids any money-based detention: a judge “may not impose a financial condition that results in the pretrial detention of the person.” 18 U.S.C. § 3142(c)(2).

B. Arkansas Law

Arkansas appears to have come to rely greatly on what the rules term “money bail” not just as a condition of release but also as a means of effectuating pretrial detention. But almost none of this is required by law or court rules. In short, local jurisdictions and judicial officers retain wide latitude to adopt best practices regarding the use—or non-use—of financial conditions of release.

First, Rule 9.1 allows judicial officers to release persons on recognizance (OR) as well as OR with conditions, seemingly with no limitations.⁶² Financial conditions do not appear to be required for any person, regardless of charge, nor are bond schedules expressly mandated in Arkansas statutes or court rules.

Second, Rule 9.2 is dedicated to setting money bond, and includes an important limitation—often overlooked in other states—that money be used only for flight and not public safety.⁶³ There are several historical, legal, empirical, and practical reasons for not using money to promote public safety. Among the most important, as at least one federal court recently held, is that when the law only allows forfeiture of money for missing court but not for being rearrested—as it does in Arkansas—setting money for public safety is irrational.⁶⁴

Third, the rules include the significant limitation that a judicial officer may set money bond “only after he determines that no other conditions will reasonably assure the appearance of the defendant in court.”⁶⁵ In other words, financial conditions may only be used as the *last resort* for assuring court appearance. And the rules expressly provide for the use—even preference for—unsecured bonds.⁶⁶ Research has shown that such bonds can result in more releases than secured bonds while not affecting court appearance or public safety rates.⁶⁷

Finally, the rules provide a list of factors that a judge must consider before setting the bond amount, including the financial condition of the person who is accused—which is, effectively, an ability-to-pay provision.⁶⁸

62 Ark. R. Crim. P. 9.1(a) (“At the first appearance the judicial officer may release the defendant on his personal recognizance or upon an order to appear”).

63 Ark. R. Crim. P. 9.2.

64 See *Reem v. Hennessy*, No. 17-cv-06628-CRB (N.D. Cal., Dec. 21, 2017).

65 Ark. R. Crim. P. 9.2 (a).

66 Ark. R. Crim. P. 9.2 lists the “types” of bond allowed when money bail is set by ordering the options in a way that is commonly agreed to be least to most restrictive—starting with an unsecured bond and ending with a cash, property, or surety bond. Looking at essentially the same language in 1976, the Arkansas Supreme Court wrote that Rule 9.2 was crafted to ensure that financial conditions were used only as a “last resort” and that the rule “contemplates that in fixing money bail, the judicial officer will use the least restrictive type of money bail arrangement set out in Rule 9.2(b) for securing the appearance of an arrested person.” *Thomas v. State*, 542 S.W. 2d 284 (Ark. 1976).

67 See Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, 12 (2013).
https://www.ncsc.org/__data/assets/pdf_file/0017/1655/unsecured-bonds-the-as-effective-and-most-efficient-pretrial-release-option.ashx.pdf

68 Ark. R. Crim. P. 9.2 (c) (ii).

In summary, very little—if any—of the local court’s current reliance on secured money bond appears to be required by state law or court rules. Judges appear to be free *not* to impose financial conditions of release—or any other conditions of release—when they deem it suitable.

V. Other Points of Intervention

While the pretrial release decision has important impacts on the course of a case, there are many other points during the pretrial phase at which different decisions might affect critical outcomes. Some of the most important are when a law enforcement officer decides whether or not to arrest a person, when a prosecutor decides to charge someone or divert them to a diversion program, and when a judge delegates release authority to another agency that can process release more expeditiously.

A. Federal Law and National Trends

Beyond the broad constitutional requirements set forth in the Bill of Rights, federal law has little to say about how these other early decisions are made. However, other bodies, like the American Bar Association and the U.S. Department of Justice, have promulgated various standards to govern these decision points. And while the standards are varied, the intent seems consistent: to identify and release people charged with low-level offenses—as well as those people who are most likely to succeed outside of the criminal justice system—as early in the process as possible.

As the National Institute of Corrections has stated: “Early release of lower-risk arrestees redirects law enforcement and corrections resources at arrest and booking to individuals whose risk level requires a judicial officer’s determination of release or detention. Release in lieu of arrest has the added benefit of keeping an arrest from a person’s criminal record, and less chance of the collateral consequences that incur.”⁶⁹ The ABA Standards echo this, saying that citations in lieu of arrest should be issued “to the maximum extent consistent with the effective enforcement of the law.”⁷⁰ And the UPRDA recommends citations for misdemeanors that carry a potential sentence of six months or less.⁷¹ In addition, the ABA Standards recommend the development of “diversion and alternative adjudication options, including drug, mental health, and other treatment courts.”⁷² Additionally, both NIC and NAPSA endorse courts permitting corrections or pretrial staff to release certain people prior to an initial court appearance (known as “delegated release authority”), as long as that pool is limited to people facing lower-level charges and having a low likelihood of failing to appear in court pretrial or being arrested on a new offense while on pretrial release.⁷³

69 NIC, *supra* note 33, at 20.

70 ABA Standards, *supra* note 34, Standard 10-2.1.

71 UPRDA, *supra* note 26, § 201.

72 *Id.*, Standard 10-1.5.

73 NIC, *supra* note 33, at 21; NAPSA Standards, *supra* note 26, Standard 2.1; UPRDA, *supra* note 26, § 203.

B. Arkansas Law

(1) Citations/Summonses

Although there appear to be no clear statutory provisions addressing the use of citations and summonses, the Arkansas Rules of Criminal Procedure do address the issue.⁷⁴ Rule 5.2 expressly allows law enforcement officers acting without a warrant to issue a citation in lieu of custodial arrest when that officer has reasonable cause to believe the person has committed a misdemeanor and the officer has considered certain enumerated factors.⁷⁵ Moreover, if the person is arrested, the ranking officer at the place of detention may issue a citation in lieu of continued custody after considering the same factors.⁷⁶ Finally, that ranking officer may also release people arrested for felonies on citations with the recommendation of a prosecuting attorney.⁷⁷ These rules go further than many states by allowing citations for felonies as well as misdemeanors, and by seemingly containing no limitations on officer discretion, such as excepted charges.

Likewise, Rule 6.1 allows judicial officers, and in some cases prosecutors, to issue (or authorize the issuance of) a criminal summons in lieu of an arrest warrant, but excepts cases involving violence and cases in which it appears the person would not respond to the summons.⁷⁸ Like the rules on citations, the rules governing the issuance of summonses appear to grant wide discretion to expand the practice to suit a local jurisdiction's values and goals.

(2) Diversion

Arkansas state laws authorize judicial districts to create pre- and post-trial treatment programs for drug abuse,⁷⁹ as well as a range of specialty courts,⁸⁰ many of which Pulaski County appears to operate.⁸¹ However, a growing body of research supports the use of a variety of diversion programs that extend well beyond drug treatment and specialty courts.⁸² Arkansas does not appear to place any limitations on local jurisdictions' ability to create and implement diversion programs—including ones that are not specifically enumerated in the statutes.

74 For obvious reasons, virtually all court rules only address procedures within the control of judges, such as issuing a summons in lieu of a warrant. Interestingly, however, Arkansas Rules of Criminal Procedure also address police procedures, including the authority to issue citations versus arresting a person.

75 Ark. R. Crim. P. 5.2 (a).

76 Ark. R. Crim. P. 5.2 (b).

77 Ark. R. Crim. P. 5.2 (c).

78 Ark. R. Crim. P. 6.1.

79 Ark. Stat. Ann. § 16-98-201.

80 Ark. Stat. Ann. § 16-98-301, 302; § 16-100-101, 201; § 16-100-101, 201; § 16-101-101; § 16-102-101, 102.

81 See Specialty Court Programs, found at <https://www.arcourts.gov/courts/circuit-courts/specialty-court-programs>. The site also refers to family treatment courts, juvenile drug courts, and two specialty programs designed for post-trial use.

82 NAPSA and the Center for Effective Public Policy have authored a series of articles ("Diversion 101") that provides a roadmap for planning, implementing, and sustaining research-based diversionary options. The articles are available at <https://cepp.com/diversion-101-a-new-framework-for-understanding-diversion/#:~:text=Developed%20by%20the%20Center%20for,sustaining%20research%2Dbased%20diversionary%20options.>

(3) Delegated Release Authority

In many jurisdictions, judicial officers may turn over their authority to release those detained to other actors in the pretrial system. This might include pretrial agencies, law enforcement, or jail staff. Delegating this release authority serves the cause of justice by ensuring that those who are eligible for release do not spend any more time in jail than absolutely necessary.

The most common form of delegated release authority (typically given to the sheriff or a pretrial services agency) across America is the bond schedule and, to a lesser extent, warrants that provide for quick release if a financial condition is met. These schedules appear to be commonly used in Arkansas, which suggests that there is likely no legal barrier to creating other forms of delegated release—for instance, ones that employ release matrices and assessment scores, rather than charge and money, to help determine who can be quickly released from jail.

About the Authors

Matthew W. Alsdorf

Matt Alsdorf is the associate director of the Center for Effective Public Policy. He also founded Pretrial Advisors, an organization that advises state and county governments on pretrial policy and bail reform. Until November 2017, he was Vice President of Criminal Justice at the Laura and John Arnold Foundation (LJAF), where he had primary responsibility for strategy and giving at one of the country's largest justice system funders. With grants of more than \$40 million in 2016, his team's work covered critical areas including policing, forensic science, bail, and justice system debt. Over his six years at LJAF, Matt's leadership was central to the development and expansion of the Foundation's most prominent initiative: reforming pretrial justice across the U.S.

Matt has worked with dozens of jurisdictions nationally on improving pretrial release policies and practices, and he speaks frequently on these issues before judicial, legislative, and executive-branch audiences, as well as leaders in business and technology.

Prior to LJAF, Matt spent many years as a litigator, representing both victims and defendants in federal criminal and civil cases. He has taught criminal procedure at Fordham Law School, served as a visiting lecturer at Yale Law School, and developed and taught a Yale College seminar on constitutional law. Matt received his Bachelor of Arts degree from Williams College and his Juris Doctor degree from Yale Law School.

Timothy R. Schnacke

Tim Schnacke is the executive director of the Center for Legal and Evidence-Based Practices (www.clebp.org), a Colorado nonprofit corporation that provides research and consulting for jurisdictions exploring and/or implementing improvements to the administration of pretrial justice. In addition to his consulting role, he serves as a pretrial legal analyst and has authored foundational pretrial materials, including *Fundamentals of Bail*, *Money as a Criminal Justice Stakeholder*, *"Model" Bail Laws*, and *Changing Bail Laws*. In 2014, he served as co-chair of the American Bar Association's Pretrial Justice Committee, and he received the John C. Hendricks Pioneer Award from the National Association of Pretrial Services Agencies for his work promoting pretrial justice in America.

Tim's legal career includes private practice in Washington, DC, and public work with the City of Aspen, Colorado; Jefferson County, Colorado; the United States Court of Appeals for the Tenth Circuit as both a law clerk and as staff counsel; and the Colorado Court of Appeals, where he was a staff attorney specializing in state criminal appeals.

Tim received his Bachelor of Science and Bachelor of General Studies degrees from the University of Kansas, his Juris Doctor degree from the University of Tulsa College of Law, his Master of Laws degree from George Washington University's National Law Center, and his Master of Criminal Justice degree from the University of Colorado.

