

# Trends in Pretrial Litigation: The Legal Landscape at the Bail Decision Point

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The U.S. Constitution contains a number of provisions that apply to the early decision to release someone pretrial, and to determine what conditions that release may be subject to. Key among the constitutional rights are the right to due process (5th and 14th Amendments), the right to equal protection under the law (14th Amendment), the right to be free from excessive bail (8th Amendment), the right to a fair trial and the right to counsel (6th Amendment), the freedom from unreasonable searches and seizures (4th Amendment), and the presumption of innocence (generally taken from 6th Amendment trial burdens).

For several decades, and increasingly in the last five years or so, courts across the country have considered the meaning of the overlapping rights at play. In my presentation, I distill some of what we can glean from these court decisions into what I've called the "five pretrial freedoms." This handout offers the caselaw citations for some core principles animating each of those "five pretrial freedoms" discussed and is offered for further reference. As you'll see, some of the "principles" are a component of more than one pretrial freedom.

### 1. Freedom from Unjustified Jailing

Principle	Support
<b>Freedom prior to trial is the default, detention the exception</b>	<i>Stack</i> , 342 U.S. at 4; <i>Salerno</i> , 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); <i>Motamedi</i> (9th Cir.), 767 F.2d at 1405 ("Only in rare circumstances should release be denied."); <i>Herzog v. United States</i> , 75 S. Ct. 349, 351 (1955) (Douglas, J., in chambers); <i>Smith</i> (8th Cir.), 444 F.2d at 62; <i>Bentvena</i> (2nd Cir.), 288 F.2d at 444 ("until trial commences, enlargement on bail is the rule..."); <i>Cohen</i> , 82 S. Ct. at 528; <i>Schultz</i> (N.D. Ala.), 330 F. Supp. 3d at 1358 ("Absent extenuating circumstances like flight risks or dangerous to the community, the State may not incarcerate a defendant pretrial."); <i>O'Donnell</i> (5th Cir.), 892 F.3d at 158 ("courts have sought to limit the imposition of 'preventive pretrial detention' as 'abhorrent to the American system of justice.'") (citing and focusing on Texas law); <i>Booth</i> (S.D. Tex.), 2019 WL 3714455 at * 2
<b>Pretrial liberty is a fundamental right</b>	<i>Salerno</i> , 481 U.S. at 750 (Noting "the individual's strong interest in liberty" and stating "[w]e do not minimize the importance and fundamental nature of this right."); <i>Foucha</i> , 504 U.S. at 80 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); <i>Burks v. Scott County, Miss.</i> , 3:14-cv-0745 (S.D. Miss. 2017); <i>Mock v. Glynn</i> , 18-cv-25 (S.D. Ga. 2019) (Doc. 106); <i>Schultz</i> (N.D. Ala.), 330 F. Supp.3d at 1358 ("Criminal defendants have a constitutional right to pretrial liberty."); <i>Caliste</i> (E.D. La.), 329 F.Supp. 3d at 310; <i>Buffin</i> (N.D. Cal.), 2019 WL 1017537, at *13; <i>Lopez-Valenzuela</i> , (9th Cir.), 770 F.3d at 779 ("subsequent Supreme Court decisions" post- <i>Salerno</i> "have confirmed that Salerno involved a fundamental liberty interest and applied heightened scrutiny...") (citing <i>Reno v. Flores</i> , 507 U.S. at 301); <i>Booth</i> (S.D. Tex.), 2019 WL 3714455 * 2; <i>Weatherspoon</i> (W.D. Tenn.), 2018 WL 1053548 at *6

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## 1. Freedom from Unjustified Jailing, continued

<p><b>The appropriate evidentiary standard for detention is clear and convincing evidence</b></p>	<p><i>Salerno</i>, 481 U.S. at 747-48; <i>accord Foucha</i>, 504 U.S. at 81; <i>Schultz</i> (N.D. Ala.), 300 F.Supp. 3d at 1372 (“The level of certainty that the clear and convincing evidence standard provides is necessary to ensure fundamental fairness in bail proceedings.”); <i>Caliste</i> (E.D. La.), 329 F.Supp. 3d at 313 (“In cases where physical liberty is at stake in all kinds of situations, the Court consistently applies the clear and convincing evidence standard.”); <i>Humphrey</i>, (Cal. Ct. App.), 19 Cal App. 5th at 1035 (“We believe the clear and convincing standard of proof is the appropriate standard because an arrestee’s pretrial liberty interest, protected under the due process clause, is ‘a fundamental interest second only to life itself in terms of constitutional importance.’”); <i>Dixon</i> (E.D. Mo.), 2019 WL 2437026, at *16; <i>see also Addington</i>, 441 U.S. 418; <i>but see Weatherspoon</i>, (W.D. Tenn.) 2018 WL 1053548 at *8 (finding c&amp;c evidence not required)</p>
<p><b>Detention only justified if no other less restrictive condition would achieve compelling government interest</b></p>	<p><i>Rhem</i> (2nd Cir.), 507 F.2d at 337 (“it is manifestly obvious that the conditions of incarceration for detainees must, cumulatively, add up to the least restrictive means of achieving the purpose requiring and justifying the deprivation of liberty”); <i>Salerno</i>, 481 U.S. at 750; <i>Bell v. Wolfish</i>, 441 U.S. at 524; <i>Sellers</i>, 89 S.Ct. at 38 (Detention only justified if a danger presented by the individual that “so jeopardizes the public that the only way to protect against it would be to keep the applicant in jail.”); <i>Leathers</i> (D.C. Cir.), 412 F.2d at 171; <i>Burks v. Scott County, Miss</i>, 3:14-cv-0745 (S.D. Miss. 2017) (doc. 108); <i>Humphrey</i> (Cal. Ct. App.), 19 Cal. App. 5th at 1026; <i>Dixon</i> (E.D. Mo.), 2019 WL 2437026, at *16; <i>McNeil</i> (M.D. Tenn.), 2019 WL 633012 * 16</p>
<p><b>Charge alone--no matter how serious--cannot be the basis for unusually high bail or detention</b></p>	<p><i>Stack</i>, 342 U.S. at 6 (“To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.”); <i>Salerno</i>, 481 U.S. at 750 (upholding as constitutional the 1984 Federal Bail Reform Act because, <i>inter alia</i>, it did not present “a scattershot attempt to incapacitate those who are merely suspected of these serious crimes.”); <i>Motamedi</i>, 767 F.2d at 1408; <i>Scott</i> (9th Cir.), 450 F.3d at 874 (“That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody.”); <i>Simpson II</i> (Ariz.), 241 Ariz. at 349 (Due process forbids the government from “deny[ing] bail categorically for those accused of crimes that do not inherently predict future dangerousness.”); <i>Wein</i> (Ariz.), 244 Ariz. at 30-31 (same); Note: can't use poverty as a sole basis to infer dangerousness, either: <i>Bearden</i>, 461 U.S. at 671 (“[T]he State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous.”)</p>

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## 2. Freedom from Wealth Based Jailing

Principle	Support
<p><b>Detention due to inability to pay a sum of money is illegally discriminatory</b></p>	<p><i>Pugh v. Rainwater</i>, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc) (“[I]mprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.”); <i>Frazier</i> (5th Cir.), 457 F.2d at 728 (a system of punishment that results in incarceration for people who cannot afford fees creates suspect classification triggering strict scrutiny review); <i>Williams</i>, 399 U.S. at 242-43; <i>Tate v. Short</i>, 401 U.S. at 397-98; <i>Mayer v. City of Chicago</i>, 404 U.S. at 197 (“The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed.”); <i>United States v. Leathers</i> (D.C. Cir.), 412 F.2d at 171 (“the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all.”); <i>Jones v. City of Clanton</i>, 2:15-cv-0034 (M.D. Ala. 2015) (Doc. No. 77); <i>Pierce v. City of Velda</i>, No. 4:15-cv-0570 (E.D. Mo. 2015); <i>Thompson v. Moss Point</i>, No. 15-cv-0182 (S.D. Miss 2015); <i>Burks v. Scott County, Miss</i>, 3:14-cv-0745 (S.D. Miss. 2017) (Doc. 108); <i>Mock v. Glynn</i>, 18-cv-25 (S.D. Ga. 2019) (Doc. 106); <i>Schultz</i> (N.D. Ala.), 330 F. Supp. 3d at 1358; <i>Caliste</i> (E.D. La), 329 F. Supp. 3d at 312; <i>Walker</i> (11th Cir. 2018), 901 F.3d at 1258; <i>Buffin</i> (N.D. Cal.), 2019 WL 1017537, at *16; <i>ODonnell</i> (5th Cir.), 892 F.3d at 157; <i>Humphrey</i>, (Cal. Ct. App.), 19 Cal App. 5th at 1027-28; <i>Dixon</i> (E.D. Mo), 2019 WL 2437026 at *12; <i>Cooper v. City of Dothan</i> (M.D. Ala), 2015 WL 10013003; <i>Snow v. Lambert</i> (M.D. La.), 2015 WL 5071981; <i>McNeil</i> (M.D. Tenn.), 2019 WL 633012 at *16; <i>Daves</i> (N.D. Tex.), 341 F. Supp. 3d at 694-95; <i>Booth</i> (S.D. Tex.), 2019 WL 3714455 at * 8 (accepting principle but finding any violation already remedied by post-litigation changes)</p>
<p><b>The duration of any pretrial incarceration, either before or after a hearing, needs to be short and limited</b></p>	<p><i>Salerno</i>, 481 U.S. at 747 (Maximum length of detention limited by “the stringent time limitations of the Speedy Trial Act” and noting that there may be “a point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal” but does not opine as to where that point might be); <i>accord Foucha</i>, 504 U.S. at 81-82 (describing the scheme upheld in <i>Salerno</i> as “sharply focused”); <i>Mock v. Glynn</i>, 18-cv-25 (S.D. Ga. 2019) (Doc. 106) (citing <i>Walker</i> for the proposition that “bail systems that make indigency determinations for purposes of setting bail within forty-eight hours of arrest are presumptively constitutional”); <i>ODonnell</i> (5th Cir. 2018) (“We conclude that the federal due process right entitles detainees to a hearing within 48 hours.”); <i>Dixon</i> (E.D. Mo.), 2019 WL 2437026, at *16; <i>Daves</i> (N.D. Tex.), 341 F. Supp. 3d at 697; <i>see also Jones</i>, 463 U.S. at 368 (discussing the need for civil commitments in mental illness context to be limited in duration only for as long as person is “both mentally ill and dangerous”)</p>

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### 2. Freedom from Wealth-Based Jailing, continued

<p><b>Even short-term pretrial incarceration carries serious consequences for the individual</b></p>	<p><i>Gerstein</i>, 420 U.S. at 114; <i>Foucha</i>, 504 U.S. at 80 (discussing civil commitments after acquittals for insanity defense); <i>Barker</i>, 407 U.S. at 532-33; <i>Schultz</i> (N.D. Ala.), 300 F. Supp. 3d at 1361 (“deprivation of pretrial liberty takes a high toll on a criminal defendant, and the negative effects of pretrial incarceration compound each day that a defendant is detained... detention for even 24 hours can cause a defendant to lose a job.”); <i>Buffin</i> (N.D. Cal.), 2019 WL 1017537 at *18 (“individuals can also lose their housing, public benefits, and child custody, and be burdened by significant long-term debt due to a short period of detention...”); <i>McNeil</i> (M.D. Tenn.), 2019 WL 633012 at *16 (“Detention of those arrestees... due to inability to pay the secured bail amount on the arrest warrant can result in loss of work, separation from family, undue pressure to plead guilty, and other negative consequences...”)</p>
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### 3. Freedom from Unnecessary Conditions of Release

Principle	Support
<p><b>The conditions of bail must be individualized</b></p>	<p><i>Stack</i>, 342 U.S. at 5 (“the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the present of <i>that defendant</i>”) (emphasis added); <i>Salerno</i>, 481 U.S. at 754 (bail conditions or detention may not be excessive in light of the “perceived evil” the government seeks to guard against); <i>Pugh</i> (5th Cir.), 572 F.2d at 1057 (“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.”) (citing <i>United States v. Motlow</i>, 10 F.2d 657 (7th Cir. 1926)); <i>Cohen v. United States</i>, 82 S. Ct. at 528 (1962); <i>Leathers</i> (D.C. Cir.), 412 F.2d at 172 (“Nonfinancial conditions, our decisions have made clear, should be used flexibly, varying with the needs of the individual defendant.”); <i>Humphrey</i> (Cal. Ct. App.), 19 Cal. App. 5th at 1041 (“Bail determinations must be based upon consideration of individualized criteria”)</p>
<p><b>Detention only justified if no other less restrictive condition would achieve compelling government interest</b></p>	<p><i>See above</i></p>
<p><b>Charge alone--no matter how serious--cannot be the basis for unusually high bail or detention</b></p>	<p><i>See above</i></p>

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## 4. Freedom to Demand a Fair Trial

<b>Principle</b>	<b>Support</b>
<b>The bail determination is (likely) a "critical stage" of the prosecution such that counsel's presence is required</b>	<i>Coleman</i> , 399 U.S. at 9-10 (“Plainly the guiding hand of counsel at the preliminary hearing is essential” because, <i>inter alia</i> , “counsel can... mak[e] effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.”); <i>McNeal</i> , 501 U.S. at 173; <i>Rothgery</i> , 554 U.S. at 208 (rejecting the argument that “prejudice to a defendant’s pretrial liberty” should not be part of the 6th Amendment attachment calculus); <i>Leathers</i> (D.C. Cir.), 412 F.2d at 173 (“[T]he judicial officer... can greatly be assisted by defense counsel who can help frame the best minimal set of restrictions which would fit his client’s situation.”) (note: not discussing 6th Amendment, but protocols following 1966 BRA); <i>Burks v. Scott County, Miss</i> , 3:14-cv-0745 (S.D. Miss. 2017) (doc. 108) (“absent a valid waiver, counsel must be provided for indigent defendants prior to indictment, at or promptly after the first judicial proceeding, to preserve an indigent arrestee’s right to a preliminary hearing and meaningful representation at all critical stages before trial.”); <i>Caliste</i> (E.D. La.), 329 F. Supp. 3d at 313-14 (Note - finds counsel required as a 14th Amendment matter, but did not involve an evaluation re: 6A “critical stage,” because argument was not brought); <i>Booth</i> (S.D. Tex.), 2019 WL 3714455 * 11 (on the question of whether a bail hearing is a “critical stage,” under the 6th Amendment, the answer is a “no brainer” in the affirmative).
<b>Even short-term pretrial incarceration carries serious consequences for the individual</b>	<i>See above</i>

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### 5. Freedom to be Presumed Innocent

<b>Principle</b>	<b>Support</b>
<p><b>Deprivation of rights pretrial (i.e. while presumed innocent and unconvicted) is particularly problematic</b></p>	<p><i>Pugh</i> (5th Cir.) 572 F.2d at 1056 (“We view such deprivation of liberty of one who is accused but not convicted of crime as presenting a question having broader effects and constitutional implications than would appear from a rule stated solely for the protection of indigents.”); <i>Barker</i>, 407 U.S. at 533 (“Imposing” the significant consequences of pretrial incarceration “on anyone who has not yet been convicted is serious”); <i>Motamedi</i>, 767 F.2d at 1407 (citing <i>Truong Dinh Hung</i>, 439 U.S. at 1329; <i>Harris</i>, 404 U.S. at 1232; <i>Sellers</i>, 89 S.Ct. at 38); <i>Buffin</i> (N.D. Cal.), 2019 WL 1017537, at *16 (“the bonds of history remind us that the ‘presumption of innocence, secured only after centuries of struggle,’ should not vanish under the guise of the universal benefits of a bail option...”); <i>Scott</i> (9th Cir.), 450 F.3d at 874 (“Defendant is, after all, constitutionally presumed innocent pending trial, and innocence can only raise an inference of innocence, not of guilt.”); <i>Humphrey</i> (Cal. Ct. App.), 19 Cal. App. 5th at 1028 (“[t]he liberty interest of the defendant, who is presumed innocent, is even greater [than the probationer in <i>Bearden</i>]”); <i>Jones</i> (M.D. Ala.) 2015 WL 5387219 at *3 (“Criminal defendants, presumed innocent, must not be confined in jail merely because they are poor.”); <i>Booth</i> (S.D. Tex.), 2019 WL 3714455 at * 2; <i>but see Bell</i>, 441 U.S. at 533 (Focusing on presumption of innocence as a burden of proof at trial, though noting that it dealt specifically with conditions in a jail: “We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails.” at 533-34).</p>
<p><b>Charge alone--no matter how serious--cannot be the basis for unusually high bail or detention</b></p>	<p><i>See above</i></p>