

Federal Caselaw – Pretrial Bail Practices

Pretrial Release and Detain Decision: Detention Due to Indigency¹

Updated October 24, 2019

Beginning in 2015, various class action lawsuits were filed in several federal courts across the country seeking declaratory relief and preliminary/permanent injunctions for violations of the Sixth,² Eighth,³ and Fourteenth Amendments⁴ of the U.S. Constitution regarding the relevant jurisdiction's bail practices and bail schedules and, specifically targeting those practices on people who are indigent. Procedural details of these cases and each case's current status are below.

Summary of Rulings: Courts have generally ruled that ***within 48 hours of arrest*** if an individual is still detained, a judicial officer must make an ***individual consideration of a defendant's ability to pay***. If indigent, the state must show by ***clear and convincing evidence*** that ***no alternative conditions would assure future court appearance or the safety of others*** (preventative detention).

Variance amongst Rulings: Some jurisdictions and settlement arrangements have gone farther to have a ***presumption of release***, unless certain conditions are met (prior failure to appear, violent crime, and others). Other jurisdictions are continuing with ***bail schedules*** for the setting of the amount, but the individual consideration as described above take effect if an individual is still detained after 48 hours. Some cases also included the right to counsel as being important at first appearance.

Federal Circuits: 5th, 6th, 8th, 9th, 10th, 11th

U.S. Supreme Court: 1 writ of certiorari; Court didn't take the case.

Appellate Level: 6 Cases (4 pending)

District Level: 12 cases (6 pending)

¹ There are also three federal cases dealing with fees being charged to defendants inappropriately. These are not included in this analysis. Those cases are: McNeil v. Community Probation Services, No. 1:18-cv-00033 (M.D. of Tenn. filed April 23, 2018), Egana v Blair's Bail Bonds, Inc., No. 2:17-cv-05899 (E.D., La. filed June 16, 2017), Mitchell v. First Call Bail and Surety, Inc., No. 9:19-cv-00067 (D.Mont. filed April 17, 2019).

² Sixth Amendment: In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

³ Eighth Amendment: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

⁴ Fourteenth Amendment, Section 1: . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pretrial Release and Detain Decision: Detention Due to Indigency

Case Name	Court	Judicial Decision Date
Fifth Circuit		
ODonnell v. Harris County ⁵	U.S. Court of Appeals, Fifth Circuit	June 1, 2018
<p>On June 1, 2018, the Fifth Circuit partially affirmed the ruling of the lower court and partially amended the ruling. The Fifth Circuit affirmed that there were constitutional violations, it held that the preliminary injunction was overbroad. Specifically, the court stated that the lower court’s ruling would amount “to the outright elimination of secured bail for indigent misdemeanor arrestees.” Rather, the court put forth a revised injunction that would be narrowly tailored and remanded the case to the district court to revise its ruling according to the opinion. On June 1, 2018,</p> <p>Ruling: The Fifth Circuit held that the preliminary injunction was overbroad, but indicated that if it was crafted as follows it would be narrowly tailored and be within the guidance of the court. The court held that the revised bail practices should be: 1) individual consider of ability to pay a proscribed bail amount, 2) verification by Pretrial Services Officer of indigency of the arrestee, 3) completion by arrestee of affidavit of indigency within 24 hours, 4) if the arrestee is not able to be released, the arrestee is entitled to a bail hearing within 48 hours in which an impartial decision-maker conducts an individual assessment of whether another amount of bail or other condition provides sufficient sureties.</p>		
Caliste v. Cantrell ⁶	U.S. District Court, Eastern District of Louisiana	August 6, 2018
<p>On August 6, 2018, the court ruled that the defendant’s bail practices violated the Fourteenth Amendment and held that the defendant must conduct a hearing to determine pretrial detention that includes: “1) an inquiry into the arrestee’s ability to pay, including notice of the importance of this issue and the ability to be heard on this issue; 2) 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; and 3) representative counsel.” On June 13, 2019, the parties entered a Consent Judgment outlining the future bail practices of the court.</p> <p>The second issue that was litigated was the defendant’s practice of taking a percentage of the money from the bail fees to support the operations of the court. The court ruled that this constitutes a conflict of interest. The defendant appealed to the Fifth Circuit and the ruling was affirmed on August 29, 2019.⁷</p> <p>Ruling: The District Court ruled that the defendant must use bail practices that inquiry into the arrestee’s ability to pay, consider alternative conditions of release using a clear and convincing standard and arrestees should be represented by counsel.</p>		

⁵ ODonnell v. Harris County, 892 F.3d 147 (5th Cir. 2018) (“ODonnell II”).

⁶ Caliste v. Cantrell, 329 F.Supp.3d 296 (D. La. 2018).

⁷ Caliste v. Cantrell, 882 F.3d 528 (5th Cir. 2019).

Pretrial Release and Detain Decision: Detention Due to Indigency

Daves v. Dallas County	U.S. Circuit Court of Appeals, Fifth Circuit	<i>Pending</i>
<p>On September 20, 2018, the district court issued a preliminary injunction enjoining defendants from continuing the current bail practices instead requiring that the county pretrial staff must determine each individual's ability to pay a financial bond through an affidavit process with each arrestee. The verification and affidavit must be completed within 24 hours. Within 48 hours the arrestee is entitled to a hearing at which the magistrate must make an individual determination about bail and conditions needed in each particular case. If the magistrate does not lower the bail amount, he must make written factual findings about the decision. There are various additional procedural and process requirements in the preliminary injunction as well. In its memorandum and order the court held that this case should follow the binding precedent laid out in ODonnell and its model injunction.</p> <p>Current Status: Defendants have appealed the ruling and the case is set for oral arguments in the Fifth Circuit on November 4, 2019.</p>		
Booth v. Galveston County	U.S. Circuit Court of Appeals, Fifth Circuit	<i>Pending</i>
<p>On September 11, 2019, the district court issued an order adopting the magistrate judge's memorandum and recommendations and preliminary injunction ("Memorandum and Recommendations"). The Memorandum and Recommendations denies plaintiff's motion for preliminary injunction regarding bail practices, but grants plaintiff's motion for preliminary injunction for appointment of counsel. The magistrate judge relies on ODonnell II and the current bail practices of Galveston County which are modeled after the Fifth Circuit Ruling in ODonnell II why preliminary injunction was not granted regarding bail practices. The court did find that indigent defendants are entitled to appointed counsel at the initial hearing.</p> <p>Current Status: Defendants have appealed the ruling. Electronic records are being prepared and notice has been given to the Appellee.</p>		
Little v. Frederick	U.S. District Court, Western District of Louisiana	<i>Pending</i>
<p>Plaintiffs seek injunctive and declaratory relief and an order enjoining defendants from continuing its bail practices where money bail is set without inquiry of defendants ability to pay. A non-jury trial was held on August 6, 2019. The final deadline for post-trial memoranda is December 16, 2019 with the court's decision pending until review of the parties' memoranda.</p> <p>Current Status: Post-trial memoranda are due from the parties to the court. The final deadline is December 16, 2019.</p>		
Russell v. Harris County	U.S. District Court, Southern District of Texas	<i>Pending</i>
<p>On January 21, 2019, plaintiffs filed a complaint against Harris County and its bail practices. This case differs with ODonnell II as it pertains to the bail practices in the district courts (felony cases) whereas ODonnell II dealt with the bail practices in the county court at law (misdemeanor cases).</p> <p>Current Status: The parties have stayed the case while they discuss settlement. The docket of the case lists July 25, 2019 as the last status conference in the case with a minute entry that cannot be downloaded.</p>		

Pretrial Release and Detain Decision: Detention Due to Indigency

Sixth Circuit

Ross v. Blount

U.S. District Court, Eastern District of Michigan

Pending

On April 14, 2019, plaintiffs filed this complaint against the Chief Judge of Michigan’s 36th District Court because of the courts bail practices which disproportionately impact indigent individuals.

Current Status: On August 23, 2019, the court entered a stipulated order staying the case while the parties negotiate a settlement.

Eighth Circuit

Pierce v. City of Velda

U.S. District Court, Eastern District of Missouri

June 3, 2015

On June 3, 2019, the court entered its order supporting the settlement agreement between plaintiffs and defendants. The order and settlement agreement defined future bail practices which included that the defendant will no longer use secured money bail. Defendants are expected to be released except if the case involves “intentionally assaultive or threatening conduct.” In those cases, defendant may impose conditions for release or make a determination that “release must be denied to prevent danger to a victim, the community or any other person under applicable constitutional standards.”

Ruling: The court entered an order accepting the settlement agreement with revised bail practices.

Dixon v. City of St. Louis

U.S. Circuit Court of Appeals, Eighth Circuit

Pending

On June 11, 2019, the court issued its memorandum and order which denied defendant’s motion to dismiss and granted plaintiff’s motion for preliminary injunction which required defendants to discontinue the practice of “enforcing monetary condition of release that results in detention solely by virtue of an arrestee’s inability to pay, unless the order is accompanied by a finding that detention is necessary because there are no less restrictive alternatives to ensure the arrestee’s appearance or the public’s safety. The order must reflect that: (1) a hearing was held on the record **within 48 hours of arrest** or, for those currently detained, within seven days of this order; (2) the arrestee had an opportunity to present and rebut **evidence as to whether detention is necessary**, with the **government bearing the burden of proof**; and (3) if financial conditions of release are imposed, the court made **specific findings regarding the arrestee’s ability to pay** and found, by **clear and convincing evidence**, that no alternative conditions would reasonably assure the arrestee’s future court appearance or the safety of others.”

The State of Missouri also amended its **Supreme Court Rule 33.01** which took effect on July 1, 2019. It requires release of defendants without conditions pretrial unless the court finds that conditions are necessary and, if so, it must seek non-monetary conditions first. If the court finds that there are no conditions that will ensure that the defendant will return to court and ensure the safety of the community, under clear and convincing evidence, the court can detain the defendant.

Current Status: Defendants appealed the ruling and the preliminary injunction has been stayed until the ruling by the Eighth Circuit. The electronic transcripts are being prepared and notice of appeal are being served on appellees.

Pretrial Release and Detain Decision: Detention Due to Indigency**Ninth Circuit****Buffin v. City and County of San Francisco** U.S. District Court, Northern District of California*Pending*

On March 4, 2019, the district court issued an order granting Plaintiffs' Motion for Summary Judgment holding that the use of the bail schedule to determine pretrial release violates the Due Process and Equal Protection Clauses of the Constitution. The parties then reached a settlement on most issues on August 30, 2019. However on September 3, 2019, the district court filed a final judgment and injunction to resolve the issues that remained outstanding. The court held that the ***sheriff is enjoined from using the bail schedule***. The judgment and injunction provides a process for determining bail of individuals based on charge and a pretrial risk assessment instrument. Under the stipulated judgment, the court is waiting for the City and County of San Francisco to enact legislation that mimics the settlement.

Current Status: The court has retained jurisdiction for 18 months to await further information from the City and County of San Francisco.

Tenth Circuit**Parga v. Tulsa County** U.S. District Court, Northern District of Oklahoma*Pending*

The defendants filed a motion to dismiss which was granted on November 19, 2018. Plaintiffs amended their complaint and the court issued an opinion dismissing portions of the complaint and staying other portions as the Oklahoma Legislature had proposed legislation (Senate Bill 252) that would put for a process for determining bail based on an ***individualized determination*** of the person and, if detention is requested, then ***by clear and convincing evidence*** the state must show that it is ***necessary for public safety and/or to ensure that the defendant will appear in court***. The purpose of the stay was to wait until the end of the current legislative session or until Senate Bill 252 is signed into law, whichever occurs first. Senate Bill 252 passed in the Senate, but it did not pass in the House.

Besides seeking relief under the Fourteenth Amendment's Due Process Clause, plaintiffs are claiming a Sixth Amendment Right to Counsel violation due to the amount of time it takes to obtain a public defender.

Current Status: The stay has been lifted and the case is proceeding through the court. Dispositive motions are due in February 2020.

Eleventh Circuit**Cooper v. City of Dothan⁸** U.S. District Court, Middle District of Alabama

June 26, 2015

The case was dismissed on June 26, 2015 as the parties have reached a settlement in the case. On April 13, 2016, the parties entered a Consent Decree which included a Standing Order signed by the Municipal Court Judge for the City of Dothan. The Standing Order allows for release of defendants on an unsecured bond if an individual does not have any prior failures to appear. If there are prior failures to appear, then money bail is

⁸ Cooper v. City of Dothan, 2015 WL 10013003 (M.D. Ala. 2015).

Pretrial Release and Detain Decision: Detention Due to Indigency

requested according to a bail schedule. If after 48 hours, the defendant is unable to pay the money bail, he is entitled to a bail hearing for indigency consideration.

Ruling: The case was dismissed and a consent decree was entered which included new bail practices. New bail practices include **release on unsecured bond** unless there are **prior failures to appear. If so, money bail is set.** If the defendant cannot pay the money bail, a **hearing is held within 48 hours to determine indigency.**

Snow v. Lambert⁹

U.S. District Court, Middle District of Louisiana

September 3, 2015

On, September 3, 2015, the Court issued an order supporting the settlement agreement between the parties. The settlement agreement calls for all misdemeanor arrestees to be released on their own recognizance after booking except for in the case of people arrested under 11 specified charges. In those cases, the sheriff will call the judge to make a case-by-case determination of releasing the individual. Those who are detained will appear in front of a judge by the next business day for a bail hearing. The bail hearing will meet the requirements of due process under the Fourteenth Amendment and no one will be held if the individual is unable to pay the bond.

Ruling: The case was dismissed and a settlement agreement was reached by the parties. The settlement agreement calls for the release of defendants on their own recognizance except for certain crimes that may be committed. In those cases, an individual determination is made.

Thompson v. Moss Point¹⁰

U.S. District Court, Southern District of Mississippi

November 6, 2015

Ruling: On November 6, 2015, the court entered a declaratory judgment ruling “no person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.”

Walker v. City of Calhoun¹¹

U.S. Court of Appeals, Eleventh Circuit

April 1, 2019

While litigation was pending, the City of Calhoun revised its bail practices and issued a Standing Bail Order which adopted a bail schedule where the bail amounts were aligned with the fines and fees a defendant would receive if found guilty of the charge. If a defendant is unable to pay the bail amount, he or she must be seen by a judge within 48 hours. At initial appearance, the defendant may claim indigency and the judge must make an individualized determination of indigency and, if indigent, the defendant must be released on recognizance. If the initial appearance occurs after more than 48 hours, the defendant must be released on his own recognizance. If the charge is a city charge (low level charge) only, the defendant is released on an unsecured bond. 11th Circuit vacated the district court preliminary injunction and remanded the case back to the district court.

⁹ Snow v. Lambert, 2015 WL 5071981 (M.D. La. 2015).

¹⁰ Thompson v. Moss Point, 2015 WL 10322003 (S.D. Miss., 2015).

¹¹ Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir., 2018).

Pretrial Release and Detain Decision: Detention Due to Indigency

Ruling: The Court held that indigency is not an equal protection class requiring heightened scrutiny, but rather a due process analysis is the correct analysis. The Court held that the Standing Bail Order is constitutional with requiring an ***appearance within 48 hours*** and having a ***judicial determination of indigency***. Petitioner filed a writ of certiorari with the U.S. Supreme Court that was **denied** on April 1, 2019.

Mock v. Glynn County

U.S. District Court, Southern District of Georgia Brunswick Division

July 2, 2019

On July 2, 2019, this case was dismissed as the parties reached a settlement. The settlement included Judge Altman, state court judge of Glynn County, entering an Amended Standing Bail Order that complies with the settlement. The order states that those who are not able to make bond, should timely ***have the bond reduced, have an unsecured bond, or be released on own recognizance***. This decision is based on an ***affidavit of ability to pay*** completed by the arrestee and ***occurs within 48 hours*** of arrest at initial appearance. There are certain exceptions laid out in the order as well including state and federal holds as well as holds because of intoxication or mental health reasons.

Hester v. Gentry (Schultz v. Alabama)¹²

U.S. Court of Appeals, Eleventh Circuit

Pending

While litigation was pending, judicial defendants drafted a standing order to amend bail procedures. However, the court still granted the preliminary injunction as the revised bail procedures were not being followed. The opinion of the court also indicated that the bail procedures of Cullman County are unconstitutional. The preliminary injunction requires the defendants to release arrestees with unsecured bond with some exceptions. For the excepted cases, ***initial appearance must occur within 48 hours***. During the initial appearance, the ***judge must determine, by clear and convincing evidence, that “the defendant poses a significant risk of flight or danger to the community.”*** Those detained must complete a questionnaire about flight or dangerousness and an affidavit about financial means.

Besides seeking relief for pretrial practices, this case also sought relief for those detained for post-sentence collection of court costs, fines, and restitution.

Current Status: Court found bail practices unconstitutional and issued a preliminary injunction with procedures to correct practices. Defendants appealed the case to the 11th Circuit. Briefs have been submitted to the Court.

Edwards v. Cofield

U.S. District Court, Middle District of Alabama

Pending

On November 11, 2018, defendant filed a motion to stay in order to await the outcome of the Hester v. Gentry case as the issues in that appellate case are similar to this case.

Current Status: On July 26, 2019, defendant’s motion to stay was granted and the case will be stayed pending the Eleventh Circuit's decision in Hester v. Gentry.

¹² Schultz v. State of Alabama, 330 F.Supp.3d 1344 (N.D. Ala., 2018).

Other relevant state cases:

New Mexico: State v. Brown¹³ is a case from 2014 where the Supreme Court of New Mexico held that the district court erred in setting bail at \$250,000 and not considering the least restrictive conditions of pretrial release. Under New Mexico's Constitution, a defendant has a right to bail except for in certain capital cases and repeat offenders. The New Mexico Rules of Criminal Procedure provides a list of factors a judge must consider when determining bail. In this case, the trial judge only considered the charge which is one of the factors. However, the Supreme Court held that the trial judge must consider all the factors. The Supreme Court further held that "[n]either the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release. . . . Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."¹⁴

Illinois: Robinson v. Martin is a case from 2016 that was filed in the Circuit Court of Cook County, Illinois seeking a preliminary injunction because of Cook County's bail practices. In April 2017, the defendants filed a motion to dismiss because the lawsuit was moot after Chief Judge Timothy Evans issued a General Order for bail practices. The General Order went into effect September 2017 for felonies and January 2018 for all other cases. In June 2018, the court granted to **motion to dismiss** due to the implementation of the General Order.

Nevada: Valdez-Jimenez v. Clark County is a case from 2019 filed with the Nevada Supreme Court seeking to find the bail system in Clark County, Nevada unconstitutional on Eighth Amendment and Fourteenth Amendment grounds. Oral arguments were held September 4, 2019. The ruling is **pending**.

California: In re Kenneth Humphrey is a habeas case out of California from 2018. The First District Court of Appeal in California ruled in January 2018 that the superior court judge violated due process and equal protection clauses of the Fourteenth Amendment by imprisoning the defendant prior to trial solely because he could not afford to pay bail. The ruling required Superior Court judges to **consider both a defendant's ability to pay** the amount of bail ordered and, if not, **whether less restrictive conditions of bail are adequate to serve the government's interests**. In this case, the appellate court found that the trial court failed to make either of these findings. In other words, the appellate court found that a trial court cannot detain someone based solely on a defendant's inability to pay. The Supreme Court of California has agreed to hear the case. A date for oral arguments has not yet been set.

¹³ State v. Brown, 338 P.3d 1276 (N.M. 2014).

¹⁴ Id., 1292 (N.M. 2014).