

Pretrial Release and Detention in Alabama

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

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

National

The right to physical liberty is a foundational principle of the U.S. Constitution. The Supreme Court has emphasized the “fundamental nature” of a person’s interest in pretrial liberty¹ and has underscored the importance of the country’s “traditional right to freedom before conviction.”² In short, the U.S. Constitution provides the right to be free before trial to the vast majority of people who are arrested. As the Supreme Court has stated, “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”³

The Supreme Court warned that without a right to pretrial release, “the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951.)

Alabama Constitution

Article I, Section 16 of the Alabama Constitution provides a broad right to pretrial release “by sufficient sureties” for everyone not charged with the most serious violent felonies—that is, capital murder and any of the following in the first degree: murder, kidnapping, rape, sexual torture, domestic violence, human trafficking, burglary, arson, robbery, terrorism, and child abuse. State law also defines admission to bail as a court order “that a defendant be discharged from actual custody on bail.”⁴ Detention for these offenses is not required but is an option for the judge. As such, the state is well-positioned, constitutionally, to ensure that liberty is the “norm” and detention the “carefully limited exception.”

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

National

Detention may be used only when authorized by state law and when there are no conditions of pretrial release that can provide reasonable assurance that a person will not flee and/or commit a serious offense that compromises public safety. Detention cannot be used to punish, “send a message,” or require mental health or substance use treatment.

Alabama Law

As noted earlier, Alabama’s constitution permits intentional detention for only the most serious violent felonies. Those charged with capital murder may be detained if the court “is of the opinion, on the evidence adduced, that he or she is guilty of the offense.”⁵ A court may “deny...bail” (i.e., detain) to those charged with murder, kidnapping, rape, sexual torture, domestic violence, human trafficking, burglary, arson, robbery, terrorism, and child abuse—when in the first degree—only when the prosecutor has proved by clear and convincing evidence at a detention hearing that no condition or combination of conditions of release will reasonably ensure court appearance or protect the community or any person’s safety.⁶

“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”
Supreme Court in United States. v. Salerno, 481 U.S. 739, 750 (1987)

Due process is required before someone may be detained

National

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

Alabama Law

Alabama statute requires that, for the list of charges legally eligible for detention, a detention hearing be held.⁷ At the hearing, the person accused must be represented by counsel and be allowed to testify, present witnesses and evidence, and cross-examine witnesses.⁸ If release is denied, the judge “shall make written findings or state for the record the findings of fact and reasons for denying bail” and shall enter the order within 48 hours of the detention hearing.⁹

Release conditions imposed must be the least restrictive necessary

National

The Supreme Court held that conditions of release must be set at a level designed to assure a constitutionally valid purpose “and no more.”¹⁰ 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.

Alabama Law

The Alabama Rules of Criminal Procedure state that all people charged with offenses that are not eligible for detention may be released on “personal recognizance or on an [unsecured] appearance bond” unless the court determines they pose a risk to safety or of nonappearance.¹¹ In such cases, the rules permit the use of “the least onerous condition or conditions ... that will reasonably assure the defendant’s appearance or that will eliminate or minimize the risk of harm to others or to the public at large.”¹² Similarly, if the court grants release to someone charged with a detention-eligible crime, the “least onerous” conditions should be used.¹³

Release conditions must be individualized

National

A judge must look at the person before them and decide whether and which conditions of release are necessary. Conditions, including financial conditions, should not be imposed categorically or simply based on charges. Some courts have ruled that the use of a monetary bond schedule based on charge is unconstitutional.¹⁴

Alabama Law

Alabama Rules of Criminal Procedure list 14 factors that courts may consider when determining appropriate release conditions.¹⁵ These factors include some that are common nationally, such as criminal history, family and community ties, and the nature of the offense. The list is inclusive enough to allow Alabama judges to consult a pretrial assessment when setting release conditions.

Money cannot be used to intentionally detain

National

A growing body of appellate case law holds that financial conditions may not be used to intentionally detain someone.¹⁶ These cases also hold that unaffordable financial conditions will be subject to increased scrutiny, and a person’s ability to pay must be assessed before setting financial conditions. When a state’s constitution and/or statutes have defined who can be detained and how, judges must abide by those laws and not set a secured financial condition in order to detain. If they did, it would effectively negate the state’s laws regarding which people are eligible for pretrial detention.

Alabama Law

While Alabama’s Constitution allows for the outright detention of people charged with the most serious violent offenses, it does not allow for the detention (i.e., denial of bail) of people charged with any other crimes. However, courts often set financial conditions of release at levels people cannot afford, resulting in their detention. This phenomenon is known as the “excessive bail loophole,” which facilitates the pretrial detention of people eligible for release as long as there is no express record of intentional detention.¹⁷

Endnotes

- 1 *United States v. Salerno*, 481 U.S. 739, 750 (1987).
- 2 *Stack v. Boyle*, 342 U.S. 1, 4 (1951).
- 3 *Salerno*, 481 U.S. at 755.
- 4 Ala. Code § 15-13-1.
- 5 Ala. Code § 15-13-3(a).
- 6 Ala. Code § 15-13-3(b)(1).
- 7 The one exception, as noted above, is for those charged with capital murder, who may be detained if the court believes, based on the evidence, that the person is guilty of the offense. Ala. Code § 15-13-3(a).
- 8 Ala. Code § 15-13-3(b)(4)a.
- 9 Ala. Code § 15-13-3(b)(8).
- 10 *Salerno*, 481 U.S. at 754.
- 11 Ala. R. Crim. P. 7.2(a)(3).
- 12 *Id.*
- 13 Ala. R. Crim. P. 7.2(a)(1)-(2).
- 14 In 2019, a federal district court ruled that the use of a bond schedule “significantly deprives plaintiffs of their fundamental right to liberty.” *Buffin v. San Francisco*, No. 15-cv-04959-YGR (N.D. Cal., March 4, 2019).
- 15 Ala. R. Crim. P. 7.2(a)(3).
- 16 See, e.g., *O'Donnell v. Harris County*, 892 F.3d 147, 158 (5th Cir. 2018) (“[M]agistrates may not impose a secured bail solely for the purpose of detaining the accused”).
- 17 See Timothy R. Schnacke, *Changing Bail Laws*, 22 (2018), www.clebp.org/images/Changing_Bail_Laws_9-23-2018_TRS_.pdf (explaining the loophole).