

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

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Michigan Joint Task Force on Jail
and Pretrial Incarceration

Overview

- Discuss core principles at the initial release decision (20-25 minutes)
- As time permits, tee up emerging and related issues (5-10 minutes)

Origin of Legal Principles

- Constitutional provisions: Amendments 4, 5, 6, 8, & 14
- Decisions from federal and state courts



Five Pretrial Freedoms

1. From unjustified jailing
2. From wealth-based jailing
3. From unnecessary conditions of release
4. To demand a fair trial
5. To be presumed innocent

Freedom from Unjustified Jailing

- “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”
- Pretrial liberty = fundamental right
- *Any* decision to place a person in jail must be taken seriously

United States v. Salerno, 481 U.S. 739, 746-47 (1987); *Reno v. Flores*, 507 U.S. 292, 301 (1993); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 779 (9th Cir. 2014)

Freedom from Unjustified Jailing

- Strong substantive right triggers procedural protections
- Before pretrial jailing, likely must provide:
 - Notice
 - Chance to testify and offer evidence
 - Counsel*
 - Evidentiary standard
 - Reasons for imposing detention
 - Chance to appeal

Freedom from Wealth-Based Jailing

- Longstanding principle that cannot deprive people of equal treatment in the criminal process due to inability to pay
- Stems from a “converge[nce]” of equal protection and due process; *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).

Williams v. Illinois, 399 U.S. 235, 242 (1970); *Tate v. Short*, 401 U.S. 395, 397 (1971); *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971)

Freedom from Wealth-Based Jailing

- Balancing test required between gov't interests and personal
- Even short term period of incarceration have significant, irreparable harm to individuals and their families
- There are alternative conditions to secured money bail

A brief note on length of jailing

“We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal.”

Salerno, 481 U.S. at 748 n.4

Freedom from Unnecessary Conditions of Release

- Conditions must be necessary to address an identified need, and least restrictive to achieve that need
- Must be individualized
- Emerging: charging costs



Freedom to Demand a Fair Trial

“[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); accord *Bearden v. Georgia*, 461 U.S. 660, 664 (1983).



Freedom to be Presumed Innocent

“Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951)

Advice from the 5th Circuit

“Systems which incorporate a presumption favoring personal recognizance avoid much of the difficulty inherent in the entire subject area.” *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978)

Related and Emerging Issues

- Booking diversion, use of citations
- Using jail to extract payment of other fees (or in connection with license revocation)
- Requiring payment for pretrial release conditions
- Using bail deposit to recoup fees
- Permissible “nets” of charges authorizing pretrial detention

Wrap Up



That's a Wrap

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