

# Pretrial Release and Detention: Washington

A combination of federal and state laws govern each state's pretrial justice system. These laws govern a judge's individual decision about whether to detain or release a person, and if released, whether to impose conditions to reasonably assure court appearance and mitigate the risk of violence. Federal guidance is found in the U.S. Constitution and federal court decisions. State requirements are found in state constitutions, statutes, court rules, and court decisions.

*"Bail" refers to the process of pretrial release. It does not refer to money bond or any other financial condition of release. Although money is one possible condition of bail, it is not bail itself.*

## 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 liberty<sup>1</sup> and has underscored the importance of the country's "traditional right to freedom before conviction."<sup>2</sup> In short, the U.S. Constitution provides the right to be free before trial to the vast majority of people who are arrested.

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

### Washington Constitution

Article I, Section 20 of the Washington Constitution provides a broad right to pretrial release "by sufficient sureties" for everyone not charged with a capital offense or an offense punishable by life in prison. Washington's courts have stated, "[Bail's] true purpose is to free the defendant from imprisonment and to secure his presence before court at an appointed time. It serves to recognize and honor the presumption that an accused is innocent until proven guilty."<sup>3</sup>

<sup>1</sup> *United States v. Salerno*, 481 U.S. 739, 750 (1987).

<sup>2</sup> *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

<sup>3</sup> *State ex rel. Wallen v. Noe*, 78 Wn.2d 484, 487 (1970).

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

### National

Detention may be used only 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.

### Washington Law

State statutes do not allow detention if "any condition or combination of conditions will reasonably assure the safety of any other person and the community."<sup>4</sup>

## Due process is required before a person 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.

<sup>4</sup> RCW § 10.21.060.

## Washington Law

State law<sup>5</sup> provides specific protections similar to those in the federal process for people who could be subject to detention (those charged with capital or life imprisonment crimes).

## 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.”<sup>6</sup> 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.

## Washington Law

Washington Superior Court Criminal Rules set forth the presumption that all people accused of a noncapital offense are released on recognizance.<sup>7</sup> Conditions are permitted only if the court finds that (1) release on recognizance will not reasonably assure a person’s appearance or (2) there is a “likely danger” the person will commit a violent crime, intimidate witnesses, or interfere with the administration of justice.

## 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.<sup>8</sup>

<sup>5</sup> RCW § 10.21.060.

<sup>6</sup> *United States v. Salerno*, 481 U.S. 739, 754 (1987).

<sup>7</sup> With release on recognizance, a person is released from custody based on a promise to make future court appearances and remain law-abiding during the pretrial period.

<sup>8</sup> Most recently, 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).

## Washington Law

Washington Superior Court Criminal Rules set forth procedures for determining whether each individual should be subject to any release conditions—and, if so, which ones.<sup>9</sup>

## 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.<sup>10</sup> 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. If 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.

## Washington Law

Financial conditions of pretrial release are not mandated by Washington law—and there are presumptions against their use in the Superior Court Rules. If the court determines that a person must post a money bond, the court must consider the person’s financial resources when setting the amount.

Although Washington’s constitution provides for a broad right to release, financial conditions of release are often set at levels people cannot afford, resulting in the pretrial detention of people who are entitled to release before trial.<sup>11</sup>

For more information, read the [Legal Landscape of Pretrial Release and Detention in Washington](https://advancingpretrial.org/legal-landscapes/) (at [advancingpretrial.org/legal-landscapes/](https://advancingpretrial.org/legal-landscapes/)).

<sup>9</sup> CrR 3.2.

<sup>10</sup> 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”).

<sup>11</sup> *State v. Reese*, 15 Wn. App. 619 (1976).