Preventative Detention in the United States of America: Legal and Practical Dimensions

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Federal judges in the United States are authorized to detain on danger grounds, as well as flight risk grounds, defendants who are awaiting trial. This authority is carefully circumscribed by statute and caselaw.

This paper shall use the term “preventative detention” or “pretrial detention” to refer to the court’s authority to detain persons charged with ordinary crimes who are awaiting trial or other disposition of their cases.

Preventative detention of enemy combatants or convicted defendants who successfully prove insanity at the time of the commission of the offense are situations beyond the scope of this article.

I. The Fourth Amendment Requirements of Warrant and Probable Cause

Absent probable cause to believe a person has committed a crime, police may not detain a person on mere suspicion of criminal activity. But not all interactions between the police and a person suspected of criminal activity are pursuant to the Fourth Amendment. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

1 Any views expressed in this article are solely those of the author and do not reflect the views of any particular court or the judiciary as a whole. The author acknowledges with gratitude the research contributions of law clerk Ryan Maxey and judicial intern Rachel Malkowski in the preparation of this article.

2 As the author is a U.S. Magistrate Judge in federal district court, this paper is written from that perspective. Bail/detention issues in the Florida state court system are also briefly discussed.

3 The term “preventative detention” has also been used to refer to terrorism cases involving enemy combatants, see, e.g., Al-Bihani v. Obama, 590 F.3d 866, 878 n.4 (D.C. Cir. 2010), as well as situations where a defendant has finished serving a criminal sentence but is subject to continued custody because the defendant is a danger to himself or the community. See Jones v. United States, 463 U.S. 354, 368-70 (1983) (approving indefinite detention of defendant acquitted due to insanity on grounds of danger, even if detention period exceeds the potential sentence had there been a conviction).

4 “Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality.” Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).
police and the people constitute seizures or arrests. Rather, a seizure under the Fourth Amendment requires some application of physical force or a show of authority that in some way restrains a citizen’s liberty. The Fourth Amendment does not prohibit investigatory stops that fall short of arrest. For instance, temporary detention during an on-the-street encounter is tolerated so long as an officer has reasonable suspicion that the person is committing or has committed a crime. However, the legality of an investigatory stop is measured in minutes, not days or weeks. In most instances, an investigatory stop will occur on public property: a sidewalk, a motor vehicle, or a business while police are investigating a crime.

The Fourth Amendment requires a judge to make a prompt determination of whether probable cause supports an arrest. Absent extraordinary circumstances, this determination must take place within forty-eight hours of the arrest. The government must promptly file a complaint establishing probable cause for a warrantless arrest.

The standard for probable cause cannot be precisely defined or quantified “because it deals with probabilities and depends on the totality of the circumstances.” Nonetheless, “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt ... and that the belief of guilt must be particularized with respect to the person to be searched or seized.”

At the initial or first appearance, a defendant must be advised of: his right to remain silent and that any statements made can be used against the defendant, the right to

5 Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).
10 Id. (citing County of Riverside v. McLaughlin, 500 U.S. 44 (1991)).
13 Id. (citations and internal quotation marks omitted) (alteration in original).
counsel, the right to appointed counsel if the defendant cannot afford counsel, and the right to bail/conditions of release (unless special circumstances warrant detention). Unless an indictment has been filed, a defendant arrested on a complaint is also entitled to a preliminary/probable cause hearing.

At the probable cause hearing, the prosecutor must present evidence (usually through the lead police officer investigating the crime) showing that the defendant before the court probably committed the crime charged. Unlike a trial, hearsay is admissible. But testimony subject to cross-examination, not an affidavit, is required. If the judge does not find probable cause the defendant is discharged. If probable cause is shown, the defendant is “held to answer” for further proceedings in the district court.

II. Pretrial Release/Bail

Determining whether to release or detain a defendant pending trial is solely the function of the trial or first instance court.

Each of the fifty states has different laws and procedures applicable to bail or detention of defendants charged with crimes. By way of example, a brief discussion of

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14 The constitutional right to counsel applies where a defendant is subjected to “actual imprisonment” as opposed to a fine. Scott v. Illinois, 440 U.S. 367, 373-74 (1979).


16 An indictment must be issued by a grand jury consisting of members selected from the populace at large who are free to operate without rigid procedural or evidentiary restraints. Costello v. United States, 350 U.S. 359, 362 (1956).

17 Fed. R. Crim. P. 5.1(a)(2). In federal court, a probable cause hearing must be held within 14 days of the initial appearance if the defendant is in custody and within 21 days if the defendant is not in custody. Fed. R. Crim. P. 5.1(c).

18 See Fed. R. Evid. 1101(d)(3) (providing that the Federal Rules of Evidence do not apply to preliminary examinations in criminal cases or to the issuance of warrants for arrest).

19 Fed. R. Crim. P. 5.1(e).


21 Fed. R. Crim. P. 5.1(e).

22 For a comprehensive study of state bail and detention statistics, see Thomas H. Cohen & Brian A. Reeves, Bureau of Justice Statistics, Pretrial Release of Felony
Florida’s procedures precedes the discussion of federal law on this issue.

In many states, a set amount of bail covers certain crimes. For instance, in Hillsborough County, Florida, the amount of a bail bond turns on the classification and degree of the defense; the amount can be as low as $250 for a city or county ordinance violation or as high as $15,000 for a first degree felony.\(^23\) But there are a number of exceptions to the standard bond amounts.\(^24\)

A. The State of Florida

The Florida Constitution guarantees a criminal defendant the right to pretrial release under reasonable conditions.\(^25\) Preventative detention is permitted, however, where no conditions of release would reasonably protect the community from risk of physical harm to persons or reasonably assure either the presence of the accused at trial or the integrity of the judicial process.\(^26\) Excluded from this constitutional right are defendants charged with a capital offense for which the death penalty may be imposed or an offense punishable by life imprisonment where the proof of guilt is evident or the presumption great.\(^27\)

A prosecutor seeking preventative detention must file a motion at or within three days of the defendant's first appearance hearing.\(^28\) The state bears the burden of proving the need for pretrial detention beyond a reasonable doubt.\(^29\) At the pretrial detention hearing, the defendant is entitled to representation by counsel and may present evidence


\(^24\) See id.

\(^25\) FLA. CONST. art. I, § 14.

\(^26\) Id. See Fla. Stat. § 907.041 (the primary consideration is "the protection of the community from risk of physical harm to persons"). The statute also creates a presumption in favor of release on non-monetary conditions for any person not charged with a dangerous crime.

\(^27\) FLA. CONST. art. I, § 14.

\(^28\) Fla. R. Crim. P. 3.132(a).

\(^29\) FLA. R. CRIM. P. 3.132(c)(1).
and witnesses, as well as conduct cross-examination of prosecution witnesses.\textsuperscript{30}

\textbf{B. Federal Court}

In federal court, bail and detention issues are governed by the Bail Reform Act of 1984 ("the Act") which authorizes federal courts to detain defendants charged with specified serious federal crimes.\textsuperscript{31} Prior to 1984, bail was viewed as a procedure to ensure a defendant's presence at trial.\textsuperscript{32} The Act was Congress's response to a bail crisis in the federal courts and an effort to curtail criminal activity by defendants on pretrial release.\textsuperscript{33} It broadened the court's power to deny bail based on danger to the community (or specified individuals), in addition to flight risk. Although the Act permits judges to assess future dangerousness in addition to flight risk, its provisions do not modify or limit the presumption of innocence.\textsuperscript{34}

In 1987, the Supreme Court rejected a constitutional challenge to the Act and held that because pretrial detention is regulatory rather than punitive in nature, the Act did not violate the constitutional prohibition against punishment without due process of law.\textsuperscript{35}

At the defendant's first appearance, unless the prosecutor requests a detention hearing, the court must set bail if the defendant is reasonably assured to attend future court appearances and will not pose a danger to the community if released.\textsuperscript{36} The judge may also require the defendant to be supervised by a family member; to maintain or seek employment or education; to abide by restrictions on travel, residence, or personal associations; to avoid contact with alleged victims or potential witnesses; to report to a law enforcement or pretrial services agency; to comply with a curfew; to not possess firearms; to refrain from excessive use of alcohol or any unauthorized use of controlled substances; and to undergo drug or mental health testing and treatment among other conditions of

\begin{enumerate}
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{See 18 U.S.C. § 3141 et seq.}
\item \textsuperscript{32} \textit{See Stack v. Boyle, 342 U.S. 1 (1951) (reiterating the importance of the right to bail in non-capital cases and suggesting its main purpose is to assure presence at trial).}
\item \textsuperscript{34} \textit{18 U.S.C. § 3142(j).}
\item \textsuperscript{35} \textit{See Salerno, 481 U.S. at 747-48.}
\item \textsuperscript{36} \textit{18 U.S.C. § 3142(b).}
\end{enumerate}
release. A federal court agency known as Pretrial Services interviews defendants and makes bail/detention recommendations and monitors defendants released on bail. State courts generally do not have these resources. Additionally, the judge may require that the defendant post collateral such as real estate, cash, or a bond issued by a corporate surety company to guarantee the defendant’s future appearances in court.

The judge must decide at the first appearance whether a defendant will be granted bail or will be detained pending trial unless either the prosecutor or defense counsel requests a continuance. Absent good cause, a continuance cannot exceed five days.

Only if the judge determines after a hearing that no conditions of release will reasonably assure the appearance of the defendant in court and/or the safety of the community may the defendant be detained. For certain offenses involving drugs, violence, or minor (child) victims, a rebuttable presumption exists that no condition or combination of conditions will reasonably assure the defendant’s court appearances or protect the community. In such instances, the government retains the burden of

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37 Id. at § 3142(c)(1)(B)(i)-(x).

38 A surety must agree to forfeit an amount reasonably necessary to assure the defendant’s appearance, must provide the court with information regarding the value of its assets and liabilities, and must have sufficient net worth to pay the amount of the bail bond. Id. at § 3142(c)(1)(B)(xii).

39 Id. at § 3142(c)(1)(B)(xi)-(xii). Although a defendant may not be detained solely due to the inability to satisfy a financial condition, such inability does not preclude detention where the amount of a bond is necessary to prevent flight or preserve community safety. United States v. Fidler, 419 F.3d 1026, 1028 (9th Cir. 2005) (per curiam); 18 U.S.C. § 3142(c)(2).


41 Id.

42 Either the prosecutor or judge may move for the hearing where the case involves a serious risk of flight or a serious risk that the arrestee will "obstruct justice, or threaten, injure, or intimidate ... a prospective witness or juror." Id. Alternatively, the prosecutor may seek a hearing if the case involves certain types of crimes. Id. at § 3142(f)(1).

43 Id. at § 3142(e)(1).

44 Id. at § 3142(e)(3). These include drug crimes with a maximum term of imprisonment of ten years or more, crimes involving firearms, acts of terrorism, or crimes involving a minor. Id.
Factors the judge must weigh in determining whether to detain a defendant include the nature and circumstances of the offense charged - for example, whether the crime involves violence, terrorism, or a minor victim - and the weight of the evidence against the defendant. The judge must also consider the history and characteristics of the defendant, including character, physical and mental condition, family and community ties, and criminal history, as well as whether the defendant was on probation, parole, or other release at the time of the offense.

At the detention hearing, the defendant has the right to be represented by counsel as well as the right to cross examine witnesses. One somewhat controversial aspect of the Act is that evidence may be presented by “proffer” in lieu of witness testimony. The court has the discretion to permit testimony or a proffer at the detention hearing.

If detention is ordered, the judge must enter a written decision summarizing the legal and factual basis for detention and the pertinent findings. Where detention is based on flight risk, the judge must find by a preponderance of evidence that no conditions of release will reasonably insure the defendant’s future appearance in court. But when detention is based on danger grounds, the burden of proof is greater: clear and convincing evidence. Defendants detained pretrial must be confined “in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody

45 United States v. Quartermaine, 913 F.2d 910, 916 (11th Cir. 1990).

46 18 U.S.C. § 3142(g)(1)-(2).

47 Id. at § 3142(g)(3).

48 Id. at § 3142(f).


51 18 U.S.C. § 3142(i)(1). These decisions are usually short, but may be elaborate depending on the particular facts of the case, especially where detention is based on danger grounds due to the charged offense and the defendant has no prior criminal history.

52 United States v. Shakur, 817 F.2d 189, 194-95 (2d Cir. 1987).

III. Methods of Challenging Pretrial Detention in Federal Court

A. Appeal

Since the initial decision to detain or release a defendant on bond is almost always made by a magistrate judge, an appeal may be filed with the district judge assigned to the case. The district judge will review, de novo, the challenged decision, the legal arguments of the prosecutor and the defense attorney, and a copy of the transcript of the hearing.

An interlocutory appeal of the district judge’s order may be filed with the court of appeals. But such appeals are rare because of the deferential standard of review accorded factual findings of the trial court and because the criminal case is usually over before the appellate court can decide the appeal.

B. Petition for Writ of Habeas Corpus

The writ of habeas corpus guards against “all manner of illegal detention.” The right to petition a federal court for a writ of habeas corpus extends not only to those detained post-conviction but also to pretrial detainees. Federal district courts have jurisdiction to issue writs of habeas corpus when a pretrial detainee is “in custody in violation of the Constitution or laws or treaties of the United States.” This remedy covers the unnecessary deprivation of pretrial liberty or the denial of bail for reasons that are not rational, reasonable, and nondiscriminatory.

Before seeking a writ of habeas corpus from a federal court, a pretrial detainee charged with a state crime must first exhaust any available state judicial remedies.

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54 Id. at § 3142(i)(2).
55 Id. at § 3145(b).
58 See Walck v. Edmondson, 472 F.3d 1227, 1235 (10th Cir. 2007).
59 28 U.S.C. § 2241(a) & (c)(3); see Medberry v. Crosby, 351 F.3d 1049, 1062 (11th Cir. 2003).
60 Meechaicum v. Fountain, 696 F.2d 790, 791-92 (10th Cir. 1983).
Pretrial detainees in the federal system, by contrast, are generally required to exhaust their appellate remedy under the Bail Reform Act.62

C. Other Remedies

A dismissal of charges is not an appropriate remedy for detaining a defendant without a probable cause hearing within 48 hours.63 Rather, a pretrial detainee may demand a hearing to challenge any further detention.64 However, speedy trial laws penalize delays; dismissal is a sanction available for denial of a speedy trial if justified by the facts of the case.65

Suppression of evidence solely due to the passage of time is not a remedy for a delay between arrest and first appearance.66 But delay may be considered in determining whether a defendant’s confession was voluntary or coerced.67

A federal statute, 42 U.S.C. § 1983, authorizes civil actions for the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” A defendant may seek damages pursuant to § 1983 to redress an unlawful pretrial detention.68 Pretrial detainees have had little success in bringing such suits against municipalities, however, due to having to prove that the unlawful detention resulted from a government policy or custom.69

62 See, e.g., Fassler v. United States, 858 F.2d 1016, 1017-18 (5th Cir. 1988) (per curiam).

63 See, e.g., United States v. Means, 252 F. App’x 830, 835 (9th Cir. 2007).

64 United States v. Basso, 632 F.2d 1007, 1011 (2d Cir. 1980).


66 See United States v. Davis, 174 F.3d 941, 946 n.8 (8th Cir. 1999); United States v. Fullerton, 187 F.3d 587, 590 (6th Cir. 1999).

67 See 18 U.S.C. § 3501(b) (the time between the defendant’s arrest and first court appearance is one of five statutory factors relevant to the voluntariness of a confession).


IV. Practical Consequences of Preventative Detention

Pretrial detention is much more costly than pretrial supervision. For example, in the Middle District of Florida, the cost of monitoring defendants released on bond was $300,402 in 2008. Of this amount, $88,401 was for electronic monitoring and global positioning system (GPS) tracking devices as alternatives to detention. If those defendants had been detained, the cost would have been $4.47 million.70

However, protecting the community and crime victims from dangerous defendants is a legitimate and compelling government interest.71 Alternatives such as electronic monitoring may not prevent a defendant from dealing drugs at home or endangering a family member.

Sometimes, a defendant will not challenge the prosecutor’s detention request because the defendant intends to plead guilty at the outset and faces a definite prison sentence. This happens most often in immigration and drug cases. Time spent in pretrial detention is credited against the prison sentence received when the defendant is sentenced.72

Although the Eighth Amendment prohibits excessive bail, it does not guarantee an absolute right to bail.73 The inability to post a financial condition of bond can result in pretrial detention of defendants including those charged with misdemeanors who cannot post even a small financial amount to secure bond.74 Faced with a lengthy pretrial detention, some defendants choose to forgo a trial and plead guilty even though they assert

70 There are few federal facilities for defendants detained pretrial. The United States Marshals Service leases jail space from state and local governments. The average cost to house federal pretrial detainees during fiscal year 2008 was $67.85 per day. The average length of pretrial detention is three and one-half months. Defendants facing drug, weapons, and violent offenses serve an average of six months in pretrial detention. U.S. Dep’t of Justice, Office of the Federal Detention Trustee: Statistics, http://www.justice.gov/ofdt/statistics.htm (last visited March 29, 2010).


73 United States v. Fernandez-Toledo, 737 F.2d 912, 920 (11th Cir. 1984).

74 In the author’s experience, these situations occur primarily in state court because few misdemeanors (other than immigration offenses) are prosecuted in federal court.

Pretrial detention facilities are jails which offer few opportunities for rehabilitation such as drug treatment, mental health counseling, and education. A defendant who does well on stringent conditions of release has an advantage at sentencing in arguing for a lower sentence because of the defendant’s compliance with bail conditions.

V. Conclusion

Preventative detention of defendants facing trial is solely a judicial function. It may be based on danger to the community (or specific individuals) as well as risk of flight. However, the court's authority to detain a defendant is justified only when there are no other reasonable alternatives to detention. Also, the evidence supporting a detention order based on dangerousness requires a stronger evidentiary showing than the evidence to support a detention order based on risk of flight. A defendant has the right to challenge the government's evidence at an adversarial hearing with the assistance of counsel. A judge should consider the availability of other reasonable alternatives before ordering detention.

Preventative detention can be costly both to a defendant and to the taxpayer. In some instances, a defendant lacking the financial resources to post bail may plead guilty (especially to a minor crime) to avoid a prolonged pretrial detention. On the other hand, preventative detention of a defendant who is likely to be a flight risk or who most certainly will endanger the community or specified persons - if released on bond - does serve a compelling governmental interest as long as the defendant’s right to a full and fair hearing and right to counsel are fully protected.