

# Pretrial Release and Detention: Legal Frameworks

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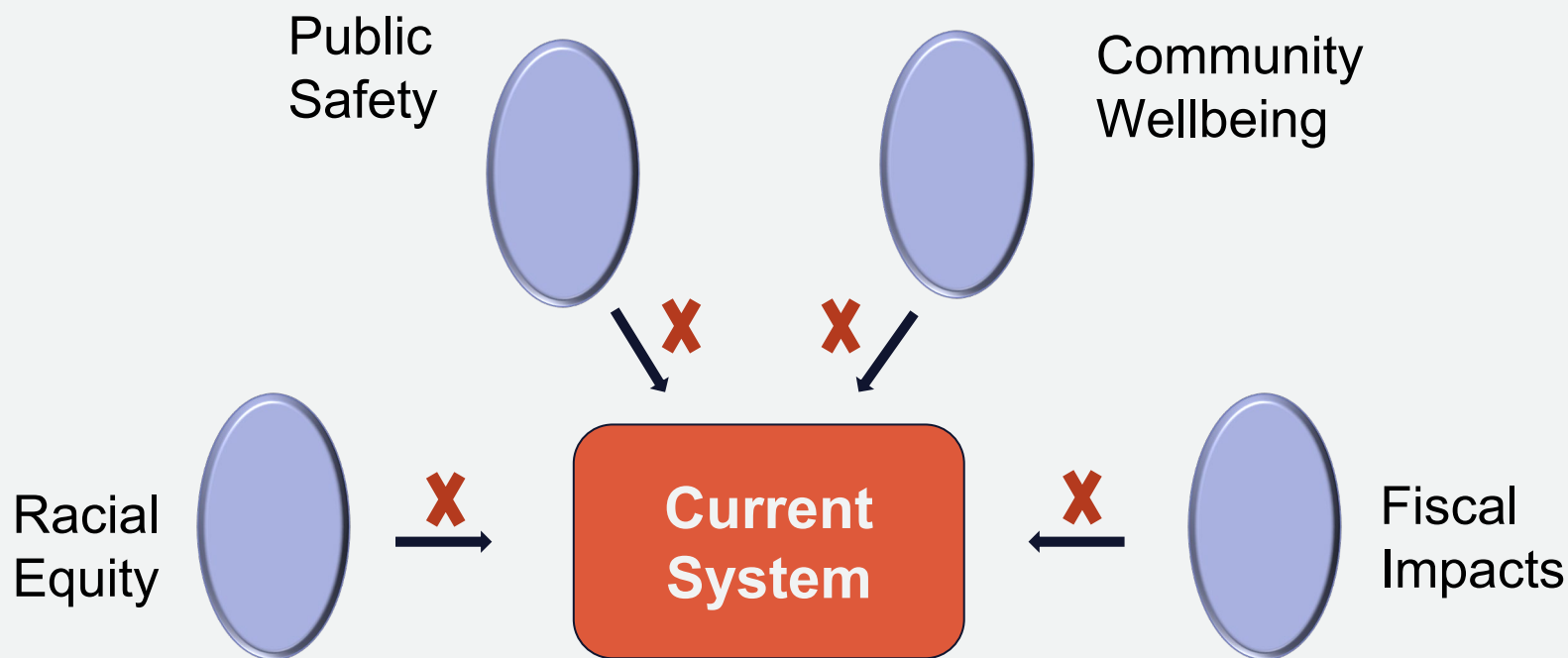
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# Pretrial Detention: The Current System

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We are detaining **too many people**; they're **not the right ones**; and we're creating huge **racial and economic disparities** along the way.

# Agenda

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*Central Question: How can we create a legal framework that leads to better decisions about who is released and who is detained before trial?*

- Quick Recap of Legal Principles
- Structural Elements of a Better System (The Intentional Detention Model)
- The Current System and the Path Forward

# Legal Principles of Pretrial Detention

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# Constitutional Provisions

- The U.S. Constitution does not directly address when a judge can order that someone be detained before trial
- The only provision touching on this issue is the Eighth Amendment: *Excessive bail shall not be required*



# Presumption of Innocence

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People on pretrial status have not been convicted of a crime and are presumed innocent

Legal system holds people accountable for past—not future—actions

Absent a right to pretrial release, “the presumption of innocence... would lose its meaning.”

***Stack v. Boyle***, 342 U.S. 1 (1951)

# Presumption of Release

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“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”

*Chief Justice William Rehnquist,*  
**US v. Salerno**, 481 U.S. 739 (1987)

The U.S. Supreme Court has held that the **vast majority** of people arrested are entitled to release before trial.



# High Rates of Pretrial Success

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The vast majority of people succeed  
when released before trial

# Deciding Who Is Detained

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What would a system look like that took these principles—and the impact of these detention decisions—seriously?

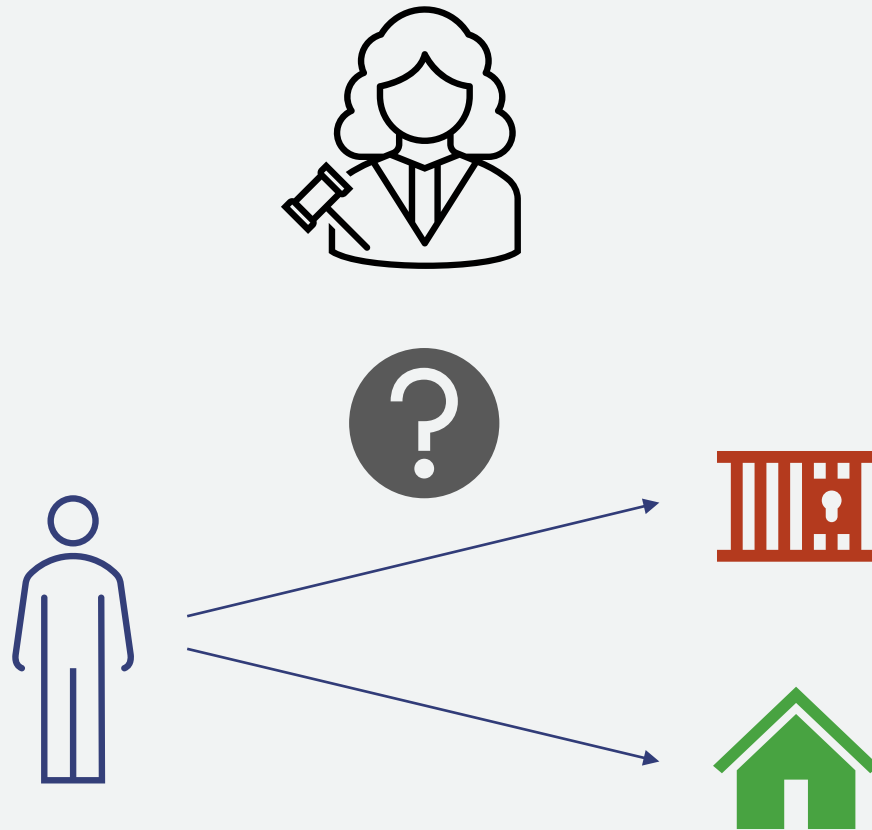
# The Intentional Detention Model: Structural Elements

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# 1. Judges Makes *Intentional* Decisions

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A judge should decide whether someone is released or detained.



# 1. Judges Makes *Intentional* Decisions

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- *Salerno* held that exceptions to pretrial release should not just be limited, but *carefully* limited
- Not arbitrary, not random, not a gamble
- Direct in-or-out decisions by judges provide clarity, certainty, and ability to review
- This is a hard decision to make, but that's why we have judges

## 2. Guided by Legal Criteria

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Laws should set forth:

- Eligibility for detention, e.g.:
  - Charge
  - Criminal history
- Legal findings for detention, e.g.:
  - Danger to community
  - Risk of flight
  - Burden of proof



Example: Detention is permitted when the court finds, by clear and convincing evidence, that no condition or combination of conditions will reasonably prevent willful flight or assure the safety of a particular person or the community

# 3. Evidence from Both Sides

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- In-or-out decision cannot be made in a vacuum
- Should consider evidence such as:
  - Facts of current charge
  - Details of criminal history
  - Additional facts related to the person or the alleged offense

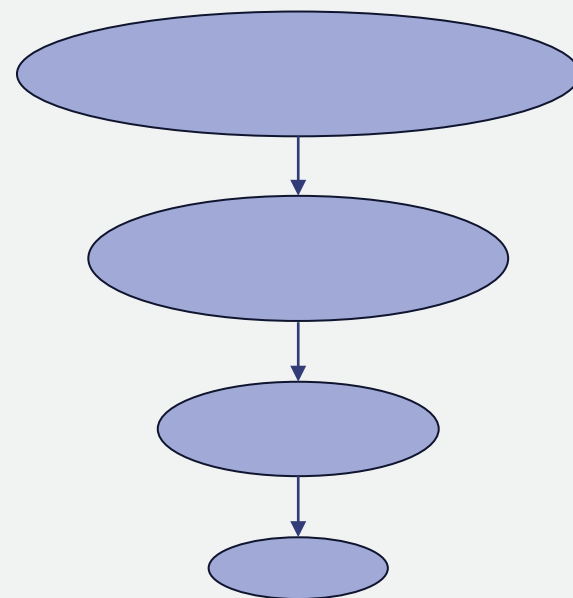


## 4. Multiple Decision Points

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- The decision to detain should not be a single decision, but rather multiple affirmative decisions. For instance:
  - Determination of eligibility based on state law
  - Prosecutorial motion for a detention hearing
  - Judicial decision to grant a detention hearing
  - In-or-out decision at the detention hearing
- At any decision point, there is an option *not* to proceed

### Detention Screens






## 5. Right to Appeal

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- Because a detention order directly removes a fundamental liberty interest (the right to physical freedom), it should be immediately appealable
- The record created at an intentional detention hearing—evidence and a reasoned decision—facilitates meaningful review by a higher court

# Recap: Elements of an Intentional Detention System

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- Judges make intentional in-or-out decisions
  - Decisions are guided by legal criteria
  - Evidence from both sides is considered
  - There are multiple decision points before detention
  - Appeal of detention is readily available

The federal detention system approved by the *Salerno* court had all of these elements

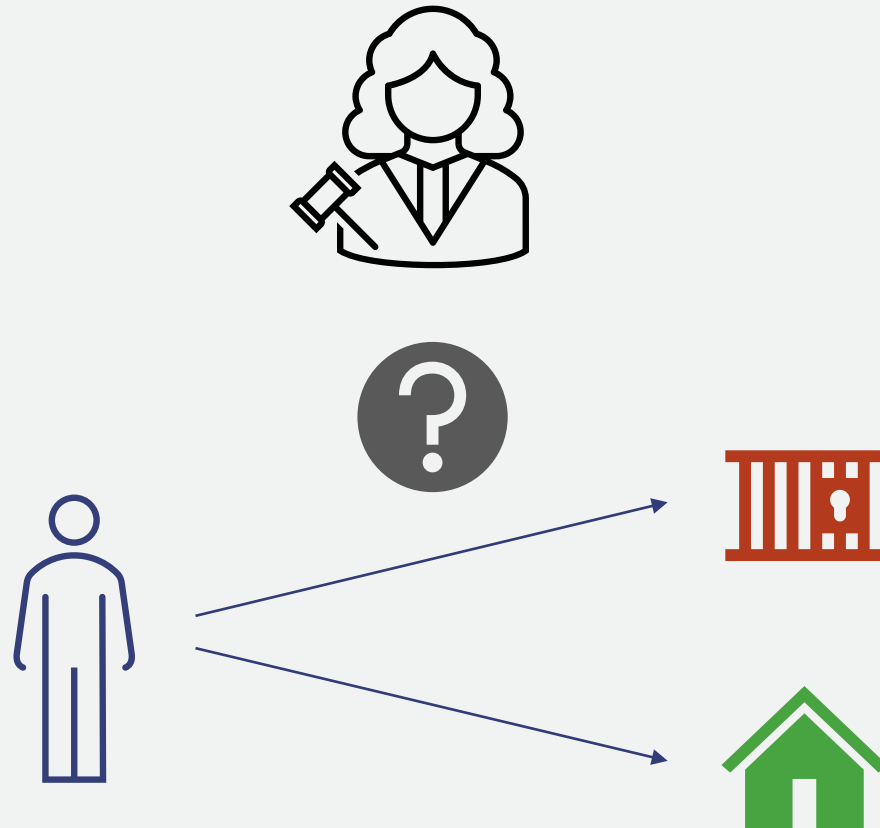
# The Current System and the Path Forward

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# 1. Are Judges Making Intentional Detention Decisions?

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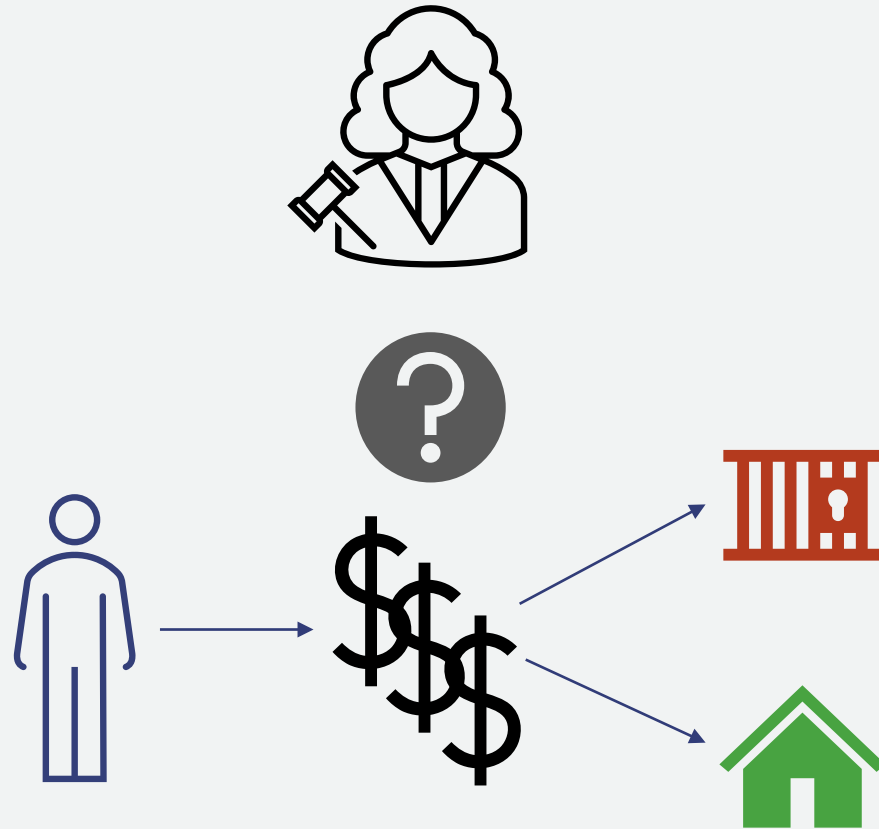
Judges are not asked: Should this person be released or detained before trial?



# 1. Are Judges Making Intentional Detention Decisions?

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Instead, they are asked: How much money should this person pay to get out of jail?



# 1. Are Judges Making Intentional Detention Decisions?

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- In some cases, judges may set a money bond *in order to* detain someone
- But in most cases, detention is a byproduct of a money bond, and the judge's intent is unclear

A \$3 million money bond is likely intended to detain.  
But what about a \$75,000 bond? A \$5,000 bond?

**Remember:** Money bond is meant to be a condition **of release**. These financial conditions typically appear on a “Release Order.”

# Key Takeaways

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Money plays two roles in our system—both of which need to change

A means to  
detain



- Eliminate the use of money as a means to detain;
- Establish that judges make an intentional in-or-out decision

A true  
condition of  
release

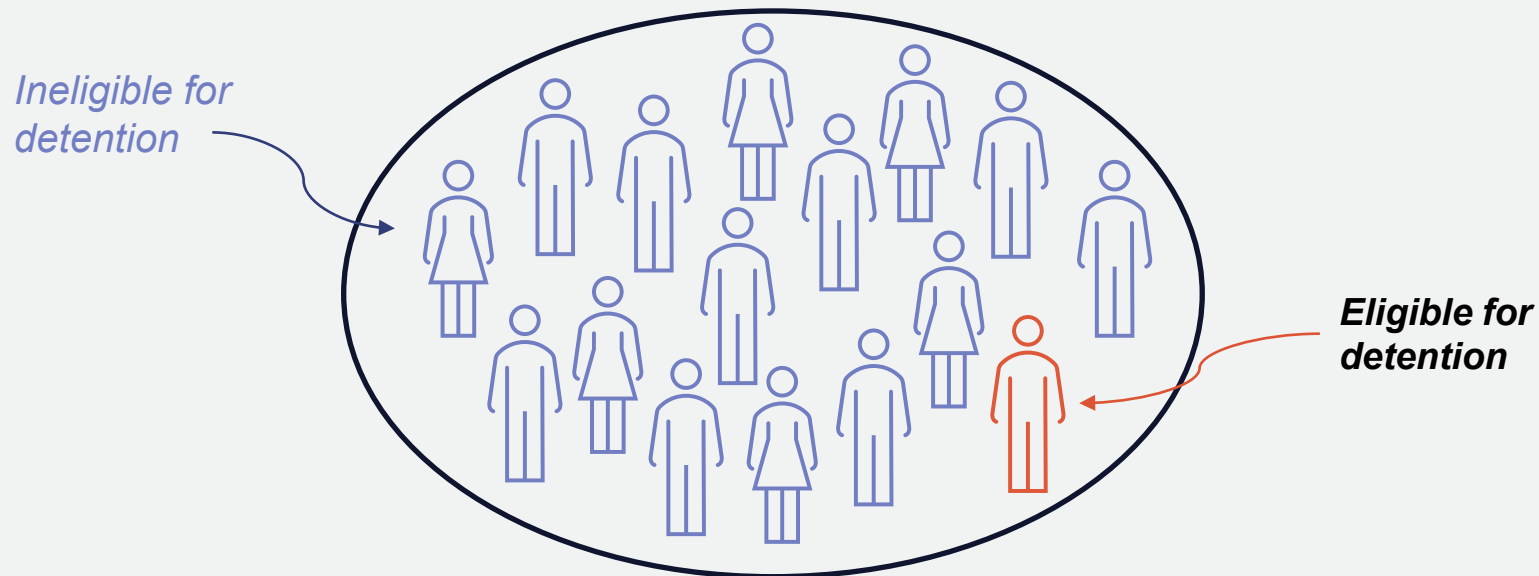


If money is not eliminated entirely, ensure that it remains a *release* condition:

- Considered last among conditions
- Require ability-to-pay determination
- Implement sequential bail review

## 2. Are There Clear Legal Criteria for Detention?

- State constitutions and statutes often set forth a limited pool of people who may be “denied bail” (i.e., detained) while charges are pending
  - But the list of eligible charges is often so narrow (e.g., capital crimes) that these provisions are rarely followed

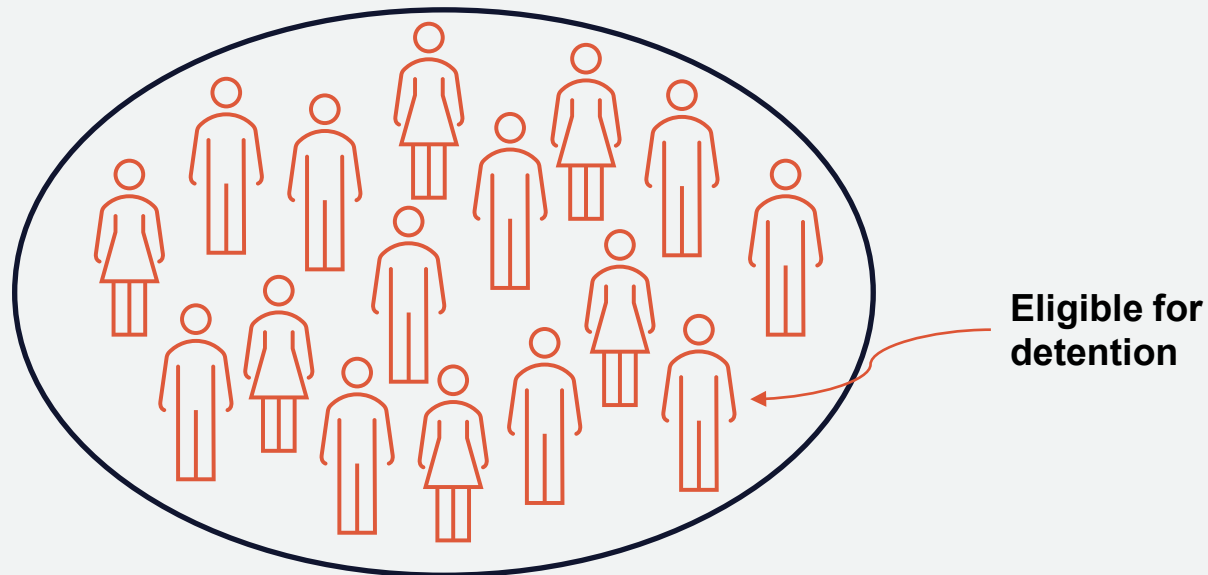




## 2. Are There Clear Legal Criteria for Detention?

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- Instead, the use of money effectively permits *nearly anyone* to be detained: If they cannot afford the bond, they are not released



# Key Takeaways

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Establish legal criteria for:

- Eligibility for detention
- Findings necessary for detention
  - Pay careful attention to language around flight and public safety
  - Note difference between **initial detention decision** and decision to detain after **violation of release conditions**

# 3. Is Evidence Presented by Both Sides?

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- At first appearance, typically only the alleged facts of the case and the readily available criminal history are presented
- Little opportunity to challenge facts or provide context

## 4. Are There Multiple Decision Points?

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- Decisions are typically made **once—at first appearance**
- Subsequent hearings may revisit release conditions, but initial money bond amounts aren't frequently modified by significant amounts, let alone eliminated

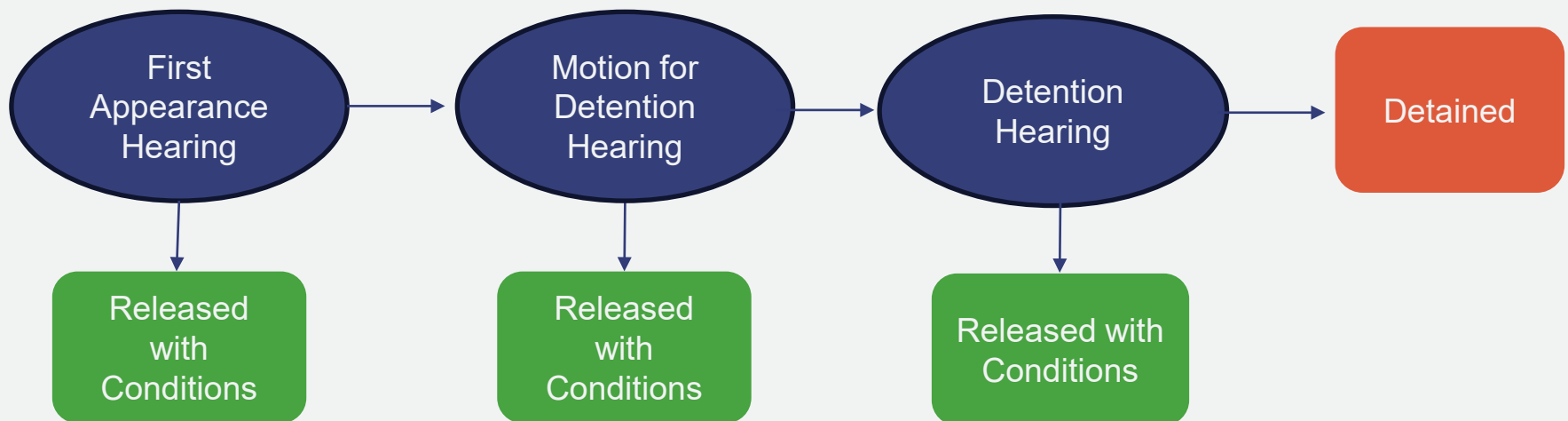
## 5. Are Appeals Readily Available?

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- Designated “bail review hearings” are rare and often require a motion by the defense
- The fact that people are not technically detained makes appeal more challenging
  - Appellate courts defer to lower courts’ initial bond amounts without significant analysis, *though this is beginning to change*

# Key Takeaways

- Require that detention decisions be made at a hearing that is **separate from** and held **within a few days** of first appearance
  - Prosecutor must move for, and judge must order, a detention hearing in order for it to proceed



# Key Takeaways

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- Provide adequate funding for public defenders to provide meaningful representation at first appearance and detention hearings
  - Particularly important to consider in rural jurisdictions

# Questions?

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