

INDIANA
STATE BAR
ASSOCIATION

CRIMINAL JUSTICE SECTION

**MEANINGFUL FIRST
APPEARANCE:
C.R. 26 PRETRIAL RELEASE
PRACTICE AND
ADVOCACY**

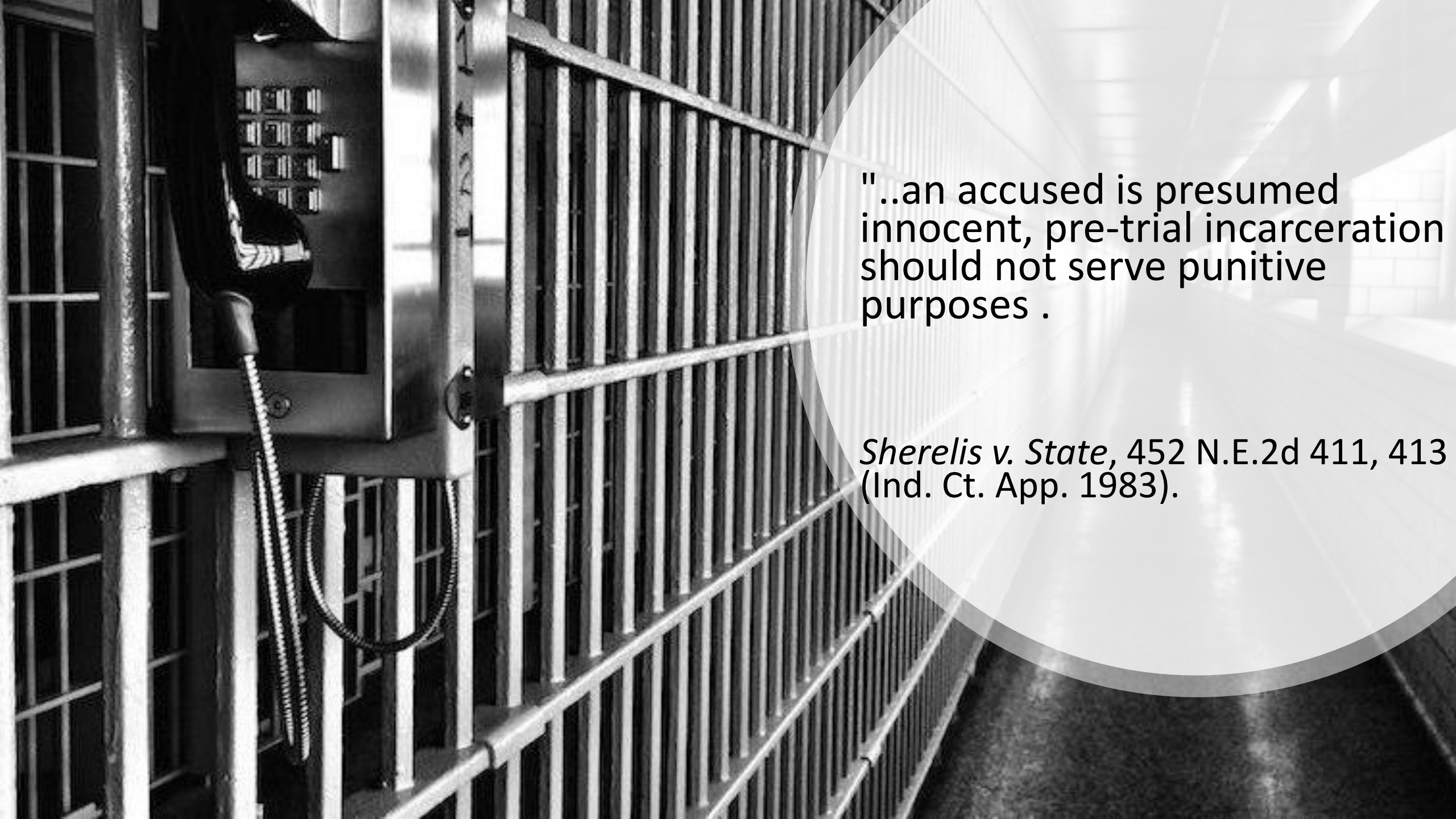
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TODAY

- Review Criminal Rule 26: Pretrial Release
- Defender's Ethical Advocacy Duties
- Individualize Assessment Based on Evidenced-Based Tool





"..an accused is presumed innocent, pre-trial incarceration should not serve punitive purposes .

Sherelis v. State, 452 N.E.2d 411, 413 (Ind. Ct. App. 1983).

U.S. Constitution, “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

The bail provisions of the Indiana Constitution afford an even “greater right” than the federal Constitution.

Ray v. State, 679 N.E.2d 1364, 1366 (Ind. Ct. App. 1997).

**INDIANA
CONSTITUTION**

2020 EDITION

INDIANA LEGISLATURE

NATIONAL GOALS FOR PRETRIAL JUSTICE

The 3 M's:

- Maximize pretrial liberty
- Maximize public safety
- Maximize court appearance

PROSECUTOR ROLE AT FIRST APPEARANCE

ABA Prosecution Function Standard 3-5.1:

“A prosecutor should be present at any first appearance of the accused before a judicial officer,…”

National District Attorneys Association (NDAA) National Prosecution Standard 4-4.4:

“Prosecutors should recommend bail decisions that facilitate pretrial release rather than detention…”

DEFENSE ROLE AT FIRST APPEARANCE

ABA Defense Function Standard 4-2.3:

“A defense counsel should be made available in person to a criminally accused person for consultation at or before any appearance before a judicial officer, including the first appearance.”

The right to
counsel in
Indiana
attaches prior
to the IH.

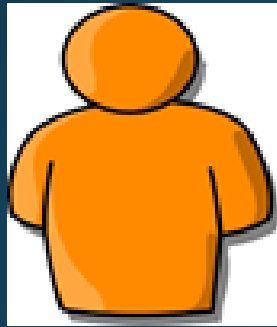
The Indiana Supreme Court, relying on *Rothgery*, stated that an Indiana criminal defendant's Sixth Amendment right to counsel attaches when charges are filed.

See Leonard v. State, 73 N.E.3d 155, 166 (Ind. 2017). Under Article 1, § 13 of the Indiana Constitution, the right to counsel can attach earlier than under the Sixth Amendment.

FIRST APPEARANCE IS A CRITICAL STAGE REQUIRING MEANINGFUL REPRESENTATION

- An adversarial judicial proceedings
- The accused is informed of the charges, probable cause determination is made, and bail is set.
- Sixth Amend rights attach
- State is obligated to appoint counsel within a reasonable time once a request for assistance has been made.

The relationship between pretrial detention and post-disposition recidivism is strongest for low-risk defendants



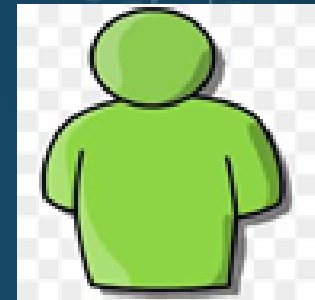
Mike

Length of stay
1 day



Ruth

Length of stay
3 days



Jack

Length of stay
5 days

Ruth is 39% more likely than Mike to be arrested on new criminal activity while on pretrial release

Jack is 50% more likely than Mike to be arrested on new criminal activity while on pretrial release

If both are sentenced to a prison sentence



Mike



Jack

Likely to be 3
times longer



Harm to the Accused & Society

- Family isolation
- Lost employment
- Racial disparity
- Health needs unmet
- Acquiesce to plead
- No net effect on future crimes

- https://law.yale.edu/sites/default/files/area/workshop/leo/leo16_yang.pdf

MEANINGFUL FIRST APPEARANCE

- 1) reduce the number of people languishing in jail while, simultaneously, presumed innocent;
- 2) reductions in average bail amounts;
- 3) reduce unnecessary costs the person is required to pay; and
- 4) increase the level of client satisfaction and the perception that the proceedings are fair.



INDIANA CRIMINAL RULE 26

**Presumption is
release with
no-money bail**

STANDARD:
Ind. Code § 35-33-8-3.2



STATE: clear and
convincing evidence

COURT: preponderance
of the evidence that the
risk exists.



SUBSTANTIAL:
FLIGHT OR DANGER



SCARY...Not the Standard

+

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Release

is

Release

- **Rule 26. Pretrial Release**

- **(A)** If an arrestee does not present a substantial risk of flight or danger to self or others, the court should release the arrestee without money bail or surety subject to such restrictions and conditions as determined by the court except when:

- when:

- (1) The arrestee is charged with murder or treason.

- (2) The arrestee is on pre-trial release not related to the incident that is the basis for the present arrest.

- (3) The arrestee is on probation, parole or other community supervision.

CR. 26—HOW IS SUBSTANTIAL RISK DETERMINED?

- Courts should utilize the results of an evidence-based risk assessment
- However, a risk assessment is not required to be completed in order for an individual to be released.
- The risk assessment must be one approved by the Indiana Office of Court Services.



OFFENSE CLASS	CASH AMOUNT +	SURETY AMOUNT
Murder	No Bond	No Bond
Level 1 felony	\$5,000	\$50,000
Level 2 felony	\$2,500	\$25,000
Level 3 felony	\$1,500	\$15,000
Level 4 felony	\$1,000	\$10,000
Level 5 felony	\$500	\$5,000
Level 6 felony	\$500	
Misdemeanors	\$250	
Escape (L6f) Failure to Register (L6f)		\$5,000 surety only

BAIL SCHEDULES



The court may continue to utilize its bond schedule when warranted to maximize the likelihood of the arrestee’s appearance at trial and for the protection of the public.”

- <http://indianacourts.us/times/2017/02/faq-criminal-rule-26>

Odonnell v.
Harris County,
892 F.3d
147, 163 (5th Cir.
2018) (opinion
on rehearing)

- ... “the County’s mechanical application of the secured bail schedule *without regard for the individual arrestee’s personal circumstances*” violates both the Due Process and Equal Protection Clauses of the U.S. Constitution.”
- To the extent that Criminal Rule 26 allows predetermined bail schedules, it violates both the Due Process and Equal Protection Clauses under the reasoning of Odonnell.

FIRST APPEARANCE



ATTORNEY-CLIENT COMMUNICATION AT FIRST APPEARANCE

- It is critical that counsel have the ability to have private communications with the person
- If first appearances are held electronically or via remote video conferencing, **Rule 14 (c) Indiana Rules of Criminal Procedure** requires that:
 - “[t]he facility and equipment provide counsel with the ability to confer privately with an out of court party, or with other counsel, off the record, before, during, and immediately following the hearing or proceeding”

Name: _____ Date of Assessment: _____
 Case#: _____ Name of Assessor: _____

INDIVIDUALIZE
ASSESSMENT

EVIDENCE-BASED

Item	Score	Verified
1. Age at First Arrest 0=33 or older 1=Under 33	<input type="text"/>	<input type="checkbox"/>
2. Number of Failure-to-Appear Warrants Past 24 Months 0=None 1=One Warrant for FTA 2=Two or More FTA Warrants	<input type="text"/>	<input type="checkbox"/>
3. Three or more Prior Jail Incarcerations 0=No 1=Yes	<input type="text"/>	<input type="checkbox"/>
4. Employed at the Time of Arrest 0= Yes, Full-time 1= Yes, Part-time 2= Not Employed	<input type="text"/>	<input type="checkbox"/>
5. Residential Stability 0=Lived at Current Residence Past Six Months 1=Not Lived at Same Residence	<input type="text"/>	<input type="checkbox"/>
6. Illegal Drug Use During Past Six Months 0=No 1=Yes	<input type="text"/>	<input type="checkbox"/>
7. Severe Drug Use Problem 0=No 1=Yes	<input type="text"/>	<input type="checkbox"/>
Total Score:		<input type="text"/>

Scores	Rating	% of Failures	% of Failure to Appear	% of New Arrest
0-2	Low	5%	5%	0%
3-5	Moderate	18%	12%	7%
6+	High	29%	15%	17%

Indiana Pretrial Release and Supervision Matrix Template

Risk Level	Offense Level			
	Non-violent Misdemeanor*	Non-Violent Felony*	Violent Offense**	Murder, Treason***
Category 1	ROR	ROR and Supervision Level 1	Supervision Level 2	Not Bailable
Category 2	ROR	ROR and Supervision Level 2	Supervision Level 3	Not Bailable
Category 3	ROR and Supervision Level 1	ROR and Supervision Level 3	Supervision Level 3	Not Bailable

Release conditions should be the least restrictive to ensure court appearance and protect public safety. Every released pretrial defendant will receive court date reminders. Release on recognizance (ROR) means release without financial obligation. Factors relevant to risk of nonappearance considered by the court can be found at IC 35-33-8-4(b).

Supervision Levels

- Level 1—at least one contact every two weeks; monthly criminal record check
- Level 2—at least one contact and one face-to-face meeting every month; monthly criminal record check; other conditions pursuant to a court order
- Level 3—at least two contacts and two face-to-face meetings every month; monthly criminal record check; other conditions pursuant to a court order

Yeager v.
State,

148 N.E.3d 1025,
1028 (Ind. Ct.
App. 2020),
trans. pending.

- Yeager is charged with neglect of a dependent and three counts of battery, all as Level 3 felonies
- Has minimal criminal history, lived in the same county his entire life, was buying a home, agreed to no-contact order
- Indiana Risk Assessment Score (IRAS) was “0 (Low).”
- Regardless, trial court set bond in the amount of \$250,000 “cash only”
- On appeal of denial of change of bond, COA found no evidence that Yeager is a danger and that release was consistent with Crim. R. 26
- Ordered Yeager released immediately, before the 30 day certification period.

Evidence to Support Least Restrictive Means

- Family relationships and ties to the community
- Interruption of physical or mental health treatment
- Housing
- Employment
- Public Benefits
- Child care and parenting/custody

