



### **17-19-301. Premiums.**

With the exception of other provisions of this section, the premium or compensation for giving bond or depositing money or property as bail on any bond shall be **ten percent (10%)**, except that the amount may be rounded up to the nearest five-dollar amount.

Full Payment required prior to release ?

Any minimum payment required prior to release ?

### **CASH ONLY**

The right to bail in noncapital cases has firm roots in the United States, dating back to colonial times and originating in English law. From the passage of the Judiciary Act of 1789 to the present Federal Rules of Civil Procedure, a federal law has unequivocally provided that a person arrested for a noncapital offense shall be admitted to bail. Bail set at a figure higher than an amount reasonably calculated to fulfill the purpose is 'excessive' under the Eight Amendment. U.S. v Motlow, 10F.2d 657.

**The Constitution of the State of Arkansas in so far as here pertinent provides: Art. 2, Section 8, "All persons shall before conviction, beailable by sufficient sureties, except for capital offenses. Art. 2, Section 9. "Excessive bail shall not be required."**

Arkansas Criminal Procedure Rule 9.1 At the **first appearance** the judicial officer may release the defendant on his **personal recognizance** or upon an order to appear.

Arkansas Criminal Procedure Rule 9.2 Release on Money Bail

- A) The judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court.

B) If it is determined that money bail shall be set, the judicial officer shall require one (1) of the following:

1. The execution of an **unsecured bond** in an amount specified by the judicial officer, either signed by other persons or not;
2. The execution of a unsecured bond in an amount specified by the judicial officer , accompanied by a deposit of cash or securities equals to ten per cent (10%) of the face amount of the bond. Ninety percent **(90%) of the deposit shall be returned** at the conclusion of the proceeding, provided the defendant has not defaulted in the performance of the conditions of the bond; or
3. The execution of a bond secured by the deposit of the full amount in **cash**, or by other property, or by **obligation of qualified sureties**.

(The drafting committee’s comment to Rule 9.2 states: “Money bail in any form ought to be a last resort and should be used only to assure the defendant’s appearance)

“Finally, we must agree that Rule 9.2 contemplates that in fixing money bail, the judicial officer will use the **least restrictive type of money bail arrangement** set out in Rule 9.2 for securing the appearance of an arrested person. **Thomas v State, Supreme Court of Arkansas, 542 S.W.2d 284 (1976)**.

The United States Constitution governs pretrial detention and bail. For money bail systems, particularly as they apply to indigent defendants, the key provisions are the Eight Amendment’s Excessive Bail Clause and the Fifth and Fourteenth Amendments’ Due Process and Equal Protection Clause.

The Eighth Amendment states “excessive bail shall not be required”. Bail is ‘excessive’ when “set higher than an amount that is reasonably likely to ensure the defendant’s presence at the trial. Some courts have viewed claims of excessive bail premised solely on indigence (ability to pay) noting that excessive bail may trigger equal protection concerns. And some courts have held that bail systems that incarcerate indigent individuals without considering their ability to pay are unconstitutional. The United States Supreme Court has consistently invalidated statutes or actions that arguably punish individuals on indigence (ability to pay).

Under the Constitution’s equal protection provisions, courts reviewing government action that distinguishes between classes of people apply different levels of scrutiny depending on the classification used. In a series of cases, the United States Supreme Court held that imprisonment solely because of indigence constitutes invidious discrimination and is constitutionally impermissible.

Due process requires that statutes imposing pretrial detention serve a compelling governmental interest and do not impose punishment before adjudication of guilt.

In an Arkansas Supreme Court case, Trujillo v State, CR-15-638, (2016) the issue being “whether the circuit court erred in setting a “cash only” bail as being in violation of Arkansas Constitution, article 2, section 8: “All persons shall be bailable by sufficient sureties”:

The Wyoming court ultimately held that the purpose of bail is to secure the appearance of the defendant and held that cash-only bail was constitutional. In Arkansas, like Wyoming, we have held that the purpose of bail is to ensure the presence of the defendant. The purpose of bail is to ensure the accused’s presence at trial. Therefore, bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is excessive under the Eighth Amendment of the United States Constitution and under Article 2, § 8 and § 9 of the Arkansas Constitution. *Stack v. Boyle*, 342 U.S. 1 (1951). In considering the purpose for which bail is set, we emphasized in *Thomas*, supra, that “Money bail in any form ought to be a last resort and should be used only to assure the defendant’s appearance.” *Grey v. State*, 276 Ark. 331, 333, 634 S.W.2d 392, 394 (1982)

With this background, we move to the meaning of the term “sufficient sureties,” Black’s Law Dictionary defines “sufficient” as “Adequate; of such quality, number, force, or value as is necessary for a given purpose.” “Surety” as: “A formal assurance; esp., a pledge, bond, guarantee, or security given for the fulfillment of an undertaking.” Black’s Law Dictionary, 1661, 1670 (10th ed. 2014).

Here, applying the obvious and common meaning to the language in the constitution, “sufficient sureties” is an adequate, formal assurance or guarantee for the stated purpose. In other words, an adequate guarantee to ensure the accused’s presence at trial. Further, we find the analysis of the Wyoming Supreme Court’s analysis in *Saunders* persuasive and adopt that same reasoning here. The purpose of bail in Arkansas is to ensure the presence of the defendant, and cash only does not restrict a defendant’s constitutional rights pending trial. Accordingly, based on the plain language of the constitution and our stated purpose for bail, we hold that the term “sufficient sureties” refers to a broad range of methods to accomplish “sufficient sureties,” including cash. Accordingly, our constitution permits cash-only bail, as determined by the circuit court pursuant to Rule 9.2, and is subject to the constitutional protections of article 8, section 2 of our constitution

**Note: Dissenting opinions point out that the court seemed to be concerned more on the “defendant deserving the cash only bond as he was arrested for violating a previous no-contact order that was a condition of his release on a prior \$25,000 bond in a domestic battery case”. This was the defendant’s second time around, not first appearance. I believe this case can be distinguished on this basis and the following opinions should be considered as controlling in our “cash only” issue**

**HOWARD W. BRILL, Chief Justice, dissenting:** “the issue is whether an Arkansas judge, after concluding that a prisoner is eligible to be released on bail, may inform him that the only acceptable form of bail is cash. I agree that no Arkansas law answers the question of whether cash-only bail is permitted by the Arkansas Constitution. I see no reason to look to the opinions of Washington, Wyoming, or any other sister state. (Arkansas Attorney General Opinion No. 99-158 relied on an Ohio decision in concluding that, under certain circumstances, an Arkansas judge can deny a commercial surety bond and impose a “cash only” requirement).

The issue before us is whether a judicial order requiring cash-only for bail violates the language in article 2, section 8 of the Arkansas Constitution, which provides, “All persons shall, before conviction, beailable by sufficient sureties. The plain language of article 2, section 8, as well as contemporaneous legal principles regarding bail, reveal the object sought to be accomplished by the framers and the citizens. If a prisoner could procure a surety with sufficient property, then he was entitled to be released prior to trial. Though our methods of bail have evolved somewhat since 1874, the same purpose must be given effect today. If a prisoner can procure a sufficient surety that satisfies the amount set for bail, then he is entitled to be released. Cash-only bail may have definite advantages: for example, the court may believe that the defendant is unlikely to appear or to flee the jurisdiction; a cash bond may be a stronger incentive for a defendant to appear for the hearing. On the other hand, cash-only bail has drawbacks. It may have an unfair, even disparate impact, upon lower-income defendants without resources. Cash-only bail, particularly in larger amounts, may be used punitively. But my dissent is not based on practice or policy. It is based on the language of the Arkansas Constitution. Any possible advantages must give way to the constitutional intent that has been a declared right guaranteed in Arkansas since 1836. Requiring cash-only for bail strips a person of his constitutional right to provide any sufficient surety for his release. Accordingly, **I would hold that imposing a cash-only bail requirement violates article 2, section 8 of the Arkansas Constitution.**

**JOSEPHINE LINKER HART, Justice, dissenting:** “The circuit court’s decision to set a cash-only bail of \$300,000 is in contravention of the Arkansas Constitution. Further, our rules of criminal procedure do not permit it. In defying the Arkansas Constitution, the majority takes from the people the fundamental, absolute right to reasonable bail before conviction. In its place, and by affirming the imposition of cash-only bails, the majority creates and grants to the government an absolute right to incarcerate until the time of trial an accused who is not affluent. This decision will disproportionately impact the poor, as well as those whose wealth is invested and do not have readily at their disposal large sums of cash. The Arkansas Constitution affirms that the people have a constitutional right to bail for noncapital offenses, stating that “[a]ll persons shall, before conviction, beailable by sufficient sureties.” Ark. Const. art. II, § 8. Further, the Arkansas Constitution specifically recognizes a right against excessive bail. Ark. Const. art. 2, § 9 (stating that “[e]xcessive bail shall not be required”). Thus, the Arkansas Constitution affirms that, other than in capital cases, the people have an absolute right to a reasonable bail before conviction. *Reeves v. State*, 261 Ark. 384, 387, 548 S.W.2d 822, 824 (1977). In keeping with these constitutional dictates, this court promulgated Rule 9.2 of the Arkansas Rules of Criminal

Procedure, which sets out our rules regarding bail. In essence, promulgation of Rule 9.2 was this court's implicit expression of the requirements of art. II, section 8 of the Arkansas Constitution. See *Miller v. State*, 262 Ark. 223, 226, 555 S.W.2d 563, 564 (1977) (noting that the Arkansas Rules of Criminal Procedure implicitly rejected an argument that the court had no inherent rule-making authority absent an enabling statute). Further, this court's comments to Rule 9.2 fortify its connection to the Arkansas Constitution, as we stated, "Money bail in any form ought to be a last resort and should be used only to assure the defendant's appearance. It is believed that damage to the integrity of the legal process will best be avoided by limiting bail to its lawful function." According to Rule 9.2(b), if a judicial officer determines that money bail should be set, one of the following could be selected: (i) the "execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not"; (ii) the "execution of an unsecured bond in an amount specified by the judicial officer, accompanied by a deposit of cash or securities equal to ten per cent (10%) of the face amount of the bond"; or (iii) the "execution of a bond secured by the deposit of the full amount in cash, or by other property, or by obligation of qualified sureties." Only the third option speaks in terms of a "bond secured by the deposit of the full amount in cash." Yet, even there, the defendant has two other alternatives: the execution of a bond secured by the deposit of other property or the execution of a bond secured by obligation of qualified sureties. These three alternatives under Rule 9.2(b)(iii) for the execution of a bond are for the benefit of the defendant. It cannot seriously be suggested that a judicial officer could reject a deposit of cash and instead demand the deposit of the defendant's real property, or vice versa. Treating these alternatives as choices to be made by the defendant is in keeping with our case law. A judicial officer must use the least restrictive type of money-bail arrangement set out in Rule 9.2(b) for securing the appearance of an arrested person. *Thomas v. State*, 260 Ark. 512, 522, 542 S.W.2d 284, 290 (1976). **By decreeing that only a cash-only bail would suffice, without considering the possibility of imposing the two other alternatives in Rule 9.2(b)(iii), the circuit court effectively circumvented the requirement of the least restrictive bail. See *Foreman v. State*, 317 Ark. 146, 875 S.W.2d 853 (1994)** (granting a petition for writ of certiorari and remanding to the circuit court where it set bond in the amount of \$1,000,000 "cash only" and failed to consider factors relevant to the risk of willful nonappearance ). The circuit court's decision to require a cash-only bail does not comport with Rule 9.2. Thus, I cannot see how the circuit court's decision to forgo our mandated rules regarding bail, and instead create out of nothing a requirement for cash-only bail, can possibly comport with the **constitutional requirement of bail by "sufficient sureties."**

Later cases:

The 5<sup>th</sup> U.S. Circuit Court of Appeals in New Orleans, October 3, 2017, upheld a ruling claiming that Texas Harris County's bail practices unfairly discriminate against poor misdemeanor defendants who can't afford their bail by requiring cash only bonds sit in jail.

