Filing # 138481950 E-Filed 11/15/2021 09:13:29 AM

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

GEORGE WHITFIELD; CHADWICK STEPHENS; LINDA REED; JOHN HODGES; CHRISTOPHER LESTER; TKHARA PETERSON; VICTORIA GUERRERO; MATTHEW BRIGANTI; DOMINIQUE BREWER; MICHAEL PENNINGTON; and JESSIE LEATH,

Petitioners / Defendants,

v.

KURT HOFFMAN, in his official capacity as Sheriff for Sarasota County, Florida; RICK WELLS, in his official capacity as Sheriff for Manatee County, Florida; and STATE OF FLORIDA,

Respondents / Jailor & Prosecutor.

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Case No.: 2D21-____

Class Representation

Lower Case Nos.:

2021 CF 8572 (Whitfield), Fla. 12th Cir. (Sarasota Cty.))
2020 CF 1465 (Stephens), Fla. 12th Cir. (Sarasota Cty.))
2021 CF 9620 (Reed), Fla. 12th Cir. (Sarasota Cty.))
2021 CF 9255 (Hodges), Fla. 12th Cir. (Sarasota Cty.))
2021 CF 10317 (Lester), Fla. 12th Cir. (Sarasota Cty.))
2021 CF 9090, 21 CF 10268 (Peterson), Fla. 12th Cir. (Sarasota Cty.))
2021 CF 9960 (Guerrero), Fla. 12th Cir. (Sarasota Cty.))
2021 CF 2218 (Briganti), Fla. 12th Cir. (Manatee Cty.))
2019 CF 2026 (Brewer), Fla. 12th Cir. (Manatee Cty.))
2021 CF 2541 (Pennington), Fla. 12th Cir. (Manatee Cty.))
2020 CF 25 (Leath), Fla. 12th Cir. (Manatee Cty.))

PETITION FOR WRIT OF HABEAS CORPUS

A systematic problem persists. Each Petitioner is detained pretrial through an unaffordable bail without due process in violation of the Fourteenth Amendment to the U.S. Constitution. Many others are detained or will be detained in a similar fashion. The problem deserves a systematic solution. This Court should remedy the unconstitutional deprivation of each Petitioner's liberty and of every other similarly situated person detained pretrial in the county jails in Sarasota and Manatee Counties, Florida.

In support, Petitioners state as follows:

I. INTRODUCTION

All people are presumed innocent until convicted.[1] Thus, before a conviction, the State may only deprive pretrial liberty in the "carefully limited exception."[2] Yet, an alarming number of people accused of a criminal offense routinely remain jailed because they cannot afford a monetary bail. In these cases, the lower court does not issue a detention order following the State's motion, as is the established process in Florida. Yet, the result

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[1] "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

[2] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

is the same. Only the pretrial detention is achieved absent the process required by the U.S. Constitution. Thus, an unaffordable bail routinely deprives liberty without due process.

The State may not deprive a person of liberty without due process. U.S. Const., Amend. 14, § 1. The Due Process Clause "confers both substantive and procedural rights." *Albright v. Oliver*, 510 U.S. 266, 272 (1994). Substantively, sufficient facts must justify the need for detention. But facts standing alone are not enough. Procedurally, those facts must be fairly determined with the requisite certainty. This is why we have criminal trials even when the facts are obvious. It is separately "import[ant] to organized society that procedural due process be observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("the right to procedural due process is 'absolute'" and "does not depend upon the merits of … substantive" facts). Convictions, not merely facts, justify prison sentences. *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (holding only guilt properly determined, i.e. "established by a judicial trial," justifies punishment). Only incontrovertible *determinations* justify a deprivation of liberty.

When an accused cannot afford the monetary bail and will as a result remain jailed, lower courts must determine more than just whether the bail

is “reasonable” or set too high. The calculus categorically changes. Now, liberty, not just money, is at stake. Heightened due process attendant to a liberty deprivation is required. Substantively, the unaffordable monetary bail now must not only be *sufficient* to mitigate pretrial risk, but also uniquely *necessary* and essential to justify the resulting pretrial detention—because no other conditions in combination with an affordable monetary bail would both facilitate release and assure the State’s interests. Procedurally, the lower court must determine whether the pretrial detention is clearly and convincingly justified. In this way, “liberty [will remain] the norm, and detention prior to trial …[,] the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987).

Florida law upholds these due process mandates by carefully limiting when a court may render a detention order. Substantively, pursuant to Florida’s Pretrial Detention Statute, § 907.041(4)(c), Fla. Stat., an accused may only be detained when “no conditions of release” would assure the State’s legitimate bail interests. Procedurally, the lower court must determine that the State carried its “burden of showing beyond a reasonable doubt the need for pretrial detention.” Fla.R.Crim.P. 3.132(c)(1-2).

Yet, the State routinely sidesteps the strictures for de jure pretrial detention. In each case of the Petitioners and most other putative class members, the State neither filed a pretrial detention motion nor signaled intent to do so. *See* Fla.R.Crim.P. 3.132; Clerks' Dockets, App. 297-335. Instead, the State detains each Petitioner pretrial through the sub rosa imposition of a monetary bail in an amount the accused declared was unaffordable. Thus, far from designing bail that would facilitate release (bail's historic meaning),[3] Petitioners' monetary bail intentionally effects pretrial detention. *See State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.").

Despite the State's clever workaround, it is the resulting pretrial detention, not the avenue to effect it, that dictates the process due. Pretrial detention—whether through an unaffordable bail or an explicit detention order—may only be imposed with the due process that attaches to a liberty

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[3] For much of America's history, the word "bail" was equivalent to the word "release," and the right to bail was assumed to equal a right to release. This is illustrated by several U.S. Supreme Court opinions, including *Stack v. Boyle*, 342 U.S. 1, 4 (1951), which equated the right to bail to the "traditional right to freedom before conviction" and "the right to release before trial."

deprivation. Because unaffordable bail and a detention order effect the same pretrial detention, they are each "[a] rose by any other name"—each necessitating heightened due process. *See Knight v. Sheriff of Leon County*, 369 F. Supp. 3d 1214, 1219 (N.D. Fla. 2019).

Thus, this Court should reject the State's circumvention and deprivation of due process. The lower court did not determine the State's *clear* need to detain each Petitioner pretrial—either pursuant to the Pretrial Detention Statute or otherwise. It routinely detains people through an unaffordable monetary bail without determining a clear need for detention. Therefore, the predicate determination for detention is missing. *See Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (court must "*determine*[] that alternatives to imprisonment are not adequate" (emphasis added)); *Gerstein v. Pugh*, 420 U.S. 103, 124, 125 (1975) (ruling a *court* must determine probable cause for arrest to justify continued detention). As a result of this shortfall, each Petitioner awaits trial in jail because the lower court imposed an unaffordable monetary bail resulting in de facto detention without the process due under the Fourteenth Amendment to the U.S. Constitution.

II. JURISDICTION

This Court has subject-matter jurisdiction over this matter pursuant to Art. V, § 4(b)(3), Fla. Const. *See also* Fla.R.App.P. 9.030(b)(3). "A petition for writ of habeas corpus is the proper method to seek review of an order setting pretrial release conditions." *Norton-Nugin v. State*, 179 So. 3d 557, 559 (Fla. 2d DCA 2015).

III. PARTIES

1. Petitioners George Whitfield, Chadwick Stephen, Linda Reed, John Hodges, Christopher Lester, Tkhara Peterson, and Victoria Guerrero await trial detained in the jail for Sarasota County, Florida.

2. Petitioners Matthew Briganti, Dominique Brewer, Michael Pennington, and Jessie Leath await trial detained in the jail for Manatee County, Florida.

3. Respondent Kurt Hoffman is the Sheriff for Sarasota County, Florida, and is sued in that official capacity. He currently has immediate physical custody over each person in the Sarasota jail, including seven named Petitioners and each putative class member in that jail.

4. Respondent Rick Wells is the Sheriff for Manatee County, Florida, and is sued in that official capacity. He currently has immediate

physical custody over each person in the Manatee jail, including four named Petitioners and each putative class member in that jail.

5. Respondent State of Florida, through the Florida Attorney General and the State Attorney for Florida's Twelfth Judicial Circuit, has caused each Petitioner and all other putative class members to be detained in violation of the U.S. Constitution. It has an interest in the Petition's outcome and the pretrial detention of each Petitioner and all other putative class members.

IV. PETITIONERS' INDIVIDUAL ALLEGATIONS

A. Charges and Bail Imposed at First Appearances

6. Each Petitioner was arrested and charged with one or more criminal offenses. Informations, App. 23-53.

7. Each Petitioner appeared at first appearance where a lower court made an initial bail determination. First Appearance Orders, App. 5-22.

B. Motions to Modify Bail

8. On behalf of his clients, the Public Defender for Florida's Twelfth Judicial Circuit regularly requests a modification of bail set at first

appearance using a standard, template motion. Edwards Decl., App. 336 at ¶ 4; Sanchez Decl., App. 339 at ¶ 4; Adams Decl., App. 342 at ¶ 4.

9. Each Petitioner filed a motion to modify bail. App. 54-99. Ten of the eleven Petitioners filed the Public Defender's standard motion and *identically* argued as follows:

(a) The monetary bail is unaffordable. App. 55-85, 88-99, at ¶ 4 (or 5) of motions' Facts section. Accordingly, the unaffordable bail effected de facto pretrial detention. App. 55-85, 88-99, at ¶ 2 of motions' Argument section.

(b) Before imposing an unaffordable bail resulting in pretrial detention, the State must prove that no nonmonetary conditions of release alone or in conjunction with an affordable monetary bail would both facilitate release and reasonably assure the government's legitimate bail interests. App. 55-85, 88-99, at ¶¶ 3-4 of motions' Argument section. That is, the unaffordable bail was not only sufficient to reasonably assure the State's pretrial interests, but it was essential because nothing else or less than the unaffordable bail would work.

(c) The State must establish a need to detain a person through an unaffordable monetary bail by clear and convincing proof. App. 55-85, 88-99, at ¶ 5 of motions' Argument section.

(d) Accordingly, each Petitioner requested the lower court consider and impose only pretrial conditions that will actually facilitate release. App. 55-85, 88-99, at motions' Prayer for Relief section.

10. Petitioner Matthew Briganti was denied bail at first appearance pursuant to *State v. Arthur*, 390 So. 2d 717 (Fla. 1980). App. 19. Accordingly, he did not employ the standard motion, but focused his motion to modify bail on his entitlement to bail. App. 86-87. Still, like the other Petitioners, he argued an unaffordable bail results in pretrial detention and the trial court should consider workable alternatives to detention. App. 86-87, 203-212.

C. Bail Hearings & Results

11. A lower court heard each Petitioner's motion to modify bail. Transcripts, App. 100-286.

(a) Each Petitioner testified or proffered about their financial resources and how each could not afford the imposed monetary bail.

(b) The State did not dispute that the monetary bails were unaffordable for any of the Petitioners.

(c) For each Petitioner, the lower court made no finding about affordability.

(d) The State failed to establish and the lower court failed to determine that nothing else or less than the unaffordable monetary bail would both facilitate release and reasonably assure the government's legitimate bail interests.

(e) Instead, the State argued the monetary bail was reasonable, i.e., not excessive, in light of the accused persons' past criminal history and nature of the current charge(s).

(f) The State failed to establish and the lower court failed to determine a need for pretrial detention through the imposition of an unaffordable monetary bail based on clear and convincing proof.

12. Ultimately, for each Petitioner, the lower court kept in place or imposed an unaffordable monetary bail. Orders on Motions to Modify Bail, App. 287-296; Hodge's Transcript, App. 134 (orally denying Hodge's motion). The monetary bails range from $500 to $250,000.

13. Each Petitioner is eligible for pretrial release upon satisfaction of the monetary bail.

14. Yet, because they cannot afford the imposed monetary bail, each Petitioner has been deprived of liberty.

D. Other Facts

15. The State has not sought or signaled its intent to detain any Petitioner through a pretrial detention order pursuant to § 907.041(4), Fla. Stat., or Rule 3.132. Clerks' Dockets, App. 297-335.

16. Each Petitioner has no adequate remedy at law for the denial of the fundamental constitutional right to liberty. Absent intervention by this Court, they will continue to be detained in violation of the U.S. Constitution.

V. CLASS REPRESENTATION ALLEGATIONS

17. The government has acted or refused to act on grounds generally applicable to all the members' classes, thereby making class-wide relief appropriate. *See* Fla.R.Civ.P. 1.220(b)(2).

18. An unaffordable monetary bail results in detention.

19. Pretrial detention has devasting effects on the accused. It hampers the "preparation of a defense," and serves to inflict "punishment

prior to conviction." *Pugh v. Rainwater*, 572 F.2d 1053, 1056-57 (5th Cir. 1978) (en banc) ("*Rainwater*").[4] "Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975); *see also Barker v. Wingo*, 407 U.S. 524, 532-33 (1972). It also adversely affects the defendants' trial outcomes. *ODonnell v. Harris County, Texas*, 251 F. Supp. 3d 1052, 1105 (S.D. Tex. 2017) (discussing extensive evidence that detained misdemeanor defendants are more likely to plead guilty and "abandon valid defenses" than those released pretrial "to obtain faster release than if they contested their charges"). Indeed, prosecutors may use pretrial detention to embolden their plea-negotiation positions. *See Knight v. Sheriff of Leon County*, 369 F. Supp. 3d 1214, 1219 (N.D. Fla. 2019) (detaining a defendant pending trial sometimes has an unwarranted coercive effect). And it costs each county approximately $100/day per inmate.

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

20. The vast majority of Class Members have limited financial resources and have been appointed counsel at the State's expense. Edwards Decl., App. 338 at ¶ 12; Sanchez Decl., App. 341 at ¶ 12.

21. Before a defendant may be appointed counsel at the State's expense, the defendant must provide financial information on a standard application to the clerk of court. *See* § 27.52(1), Fla. Stat.; Fla.R.Crim.P. 3.111; Fla.R.Crim.P. 3.984 (Florida's form *Application for Criminal Indigent Status*). The applicant must "attest[] to the truthfulness of the information provided" under penalty of perjury. § 27.52(1)(a), Fla. Stat. The clerk should find a criminal defendant is indigent if his income is "equal to or below 200 percent of the then-current federal poverty guidelines" and his net assets are less than $2,500 (excluding one vehicle whose value is no more than $5,000). § 27.52(2), Fla. Stat.

22. In Florida's Twelfth Judicial Circuit, the State rarely seeks a pretrial detention order pursuant to § 907.041(4), Fla. Stat., or Rule 3.132. Edwards Decl., App. 337 at ¶ 10; Sanchez Decl., App. 340 at ¶ 10; Adams Decl., App. 344, at ¶ 10.

23. Instead, the State regularly detains inmates pretrial through the imposition of an unaffordable bail. It does not establish (a) no nonmonetary

conditions of release alone or in conjunction with an affordable monetary bail would both facilitate release and reasonably assure the government's legitimate bail interests (b) by clear and convincing proof. Instead, it argues the monetary bail is reasonable, i.e. not excessive under the Eighth Amendment, in light of the accused criminal history and nature of the current charges(s). Edwards Decl., App. 337 at ¶ 6; Sanchez Decl., App. 340 at ¶ 6; Adams Decl., App. 343, at ¶ 6.

24. When imposing a monetary bail that the accused contends is unaffordable, the lower court does not determine whether (a) the monetary bail is affordable, or both whether (b) it is necessary because nothing else and nothing less would suffice and (c) the State established its need for the monetary bail by clear and convincing proof. Edwards Decl., App. 337 at ¶ 7; Sanchez Decl., App. 340 at ¶ 7; Adams Decl., App. 343 at ¶ 7.

25. These practices result in the deprivation of liberty without the due process required by the Fourteenth Amendment to the U.S. Constitution for numerous persons and often for months. Edwards Decl., App. 337 at ¶ 9; Sanchez Decl., App. 340 at ¶ 9; Adams Decl., App. 343 at ¶ 9.

26. A class action is a superior means for the just, inexpensive, and efficient adjudication of the constitutionality of these practices.

27. The Class Members have no adequate remedy at law for the denial of the fundamental constitutional right to liberty. Absent intervention by this Court, they will continue to be detained in violation of the U.S. Constitution.

A. Class Definition

28. Petitioner Dominique Brewer seeks to represent a Manatee class defined as follows:

All current and future persons
(a) who are detained awaiting trial;
(b) who are detained in the county jail for Manatee County, Florida;
(c) who filed a motion to modify the bail in which
(1) they proffer they are unable to afford their monetary bail and
(2) they argue
(A) the unaffordable bail deprives them of liberty,
(B) before depriving them of pretrial liberty, the Fourteenth Amendment to the U.S. Constitution requires the State to establish that nothing other or less than the monetary bail will reasonably assure the government's legitimate bail interests,
(C) the State must establish this need by clear and convincing proof; and
(d) whose motion to modify bail was heard by the lower court and the lower court then kept in place or imposed a monetary bail without finding or determining
(1) the accused can afford the imposed monetary bail

or

(2) the State established no nonmonetary conditions of release alone or in conjunction with an affordable monetary bail would both facilitate release and reasonably assure the government's legitimate bail interests,

and

(3) the State established a need for the unaffordable bail based on clear and convincing proof; and

(e) who are eligible for pretrial release from the county jail upon satisfaction of the monetary bail.

29. Petitioner Victoria Guerrero seeks to represent a Sarasota class defined in the preceding paragraph with a single exception. Subparagraph (b) is replaced with the following: "(b) who are detained in the county jail for Sarasota County, Florida."

B. Numerosity

30. Each proposed class is both so fluid and so numerous that joinder of all members is impracticable and uneconomical.

31. Pretrial detention is by nature temporary. As people are continually arrested, file and hear motions to modify bail, and are released or sentenced, the members in the class constantly change. It is unlikely that any given person detained without due process could obtain immediate relief to cure the constitutional violations before they suffer the adverse effects of pretrial detention.

32. Several thousand persons are admitted to each county jail annually. In August 2021, the average daily pretrial inmate population in each jail was more than 600. *See* Florida Department of Corrections, *County Detention Facilities Average Inmate Population* (August 2021), App. 349-50, *available from* http://www.dc.state.fl.us/pub/jails/. Roughly half of the pretrial inmate population in Sarasota has been admitted to bail and is eligible for pretrial release upon satisfying a monetary bail.

33. The Manatee class includes approximately 75 people at any given time. Sanchez Decl., App. 341 at ¶ 16.

34. The Sarasota class includes approximately 40-50 people at any given time. Edwards Decl., App. 338 at ¶ 14.

35. Judicial economy is served by avoiding multiple actions.

36. Class members and the Public Defender have limited resources with which to weekly file a dozen individual habeas petitions.

C. Commonality

37. Questions of law are common to the members of each class. The same policies and practices apply to each class's members.[5] Questions common to all members of each class predominate and include the following most important questions: (a) Whether an unaffordable bail constitutes pretrial detention? (b) Whether a monetary bail that results in pretrial detention must be narrowly tailored to the government's compelling interests? (c) Whether a monetary bail that results in pretrial detention must have no less-restrictive alternative? (d) Whether the government bears the

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[5] This Court has been presented the due process argument in this Petition in 14 previous cases in last two years. *Jackson v. Sheriff For Manatee County, Fla*., No. 2D2019-4337 (Fla. 2d DCA); *El-Kadi v. Wells*, No. 2D2020-1599 (Fla. 2d DCA); *Nelson v. Gualtieri*, No. 2D2020-3024 (Fla. 2d DCA); *McCloskey v. Gualtieri*, No. 2D2020-3065 (Fla. 2d DCA); *Callaway v. Wells*, No. 2D2020-3293 (Fla. 2d DCA); *Hunt v. Gualtieri*, No. 2D2020-3324 (Fla. 2d DCA); *Williams v. Gualtieri*, No. 2D2021-361 (Fla. 2d DCA); *Crane v. Gualtieri*, No. 2D2021-381 (Fla. 2d DCA); *Williams v. Gualtieri*, No. 2D2021-730 (Fla. 2d DCA); *Rivera v. Wells*, No. 2D2021-979 (Fla. 2d DCA); *Schultes v. Wells*, No. 2D2021-2153 (Fla. 2d DCA); and *Dothe v. Gualtieri*, No. 2D2021-2845 (Fla. 2d DCA).

Although the Court has granted some petitions, it has not yet definitively specified the constitutional process due before a court may impose an unaffordable bail resulting in pretrial detention. This Court's guidance remains needed. *See, e.g.,* Appendix, *Dothe v. Gualtieri*, No. 2D2021-2845 (Fla. 2d DCA), at 64:14-16 (Judge Chris Helinger stating "maybe if [the defendant] take[s] it up, we'll get some guidance from the Second District.").

burden to establish the need for a monetary bail that results in pretrial detention by clear and convincing evidence?

D. Typicality

38. The claims of each class's putative Class Representative are typical of the claims of the members of the class. They have been deprived of liberty in the same way, for the same reason, and to the same extent as others in the class. They are each detained because they cannot afford the monetary bail. Each had pretrial detention imposed through an unaffordable monetary bail without due process. Their claims raise questions of fact and law common to the class.

E. Adequacy of Representation

39. The Class Representatives will fairly and adequately protect the interests of the class. They have no interest that is now or may potentially be antagonistic to the interests of the class. They understand the duties and responsibilities of serving as class representatives. The Class Representatives are represented by attorneys employed by or working in cooperation with the ACLU Foundation of Florida. They have extensive experience in class action cases involving constitutional claims. The Class Representatives seek relief to end the unconstitutional practices applicable and desirous of all in the class. The answer to whether each Class

Representative has been detained pretrial without due process will determine the claims for every other member of each class.

VI. ARGUMENT

Petitioners advance both a substantive and a procedural due process claim. The imposition of an unaffordable monetary bail without substantive and procedural due process violates the Fourteenth Amendment's Due Process Clause. Before depriving pretrial liberty through an unaffordable bail, the State must *clearly* establish its need for the bail amount—that nothing else and nothing less will suffice to assure its pretrial interests.

Petitioners do *not* argue here their monetary bail is excessive—i.e., that it is "higher than an amount reasonably calculated to fulfill" the State's pretrial interests. *Stack v. Boyle*, 342 U.S. 1, 5 (1951). Further, they do *not* argue that an unaffordable bail is "per se excessive." *Mehaffie v. Rutherford*, 143 So. 3d 432, 434 (Fla. 1st DCA 2014). Instead, Petitioners argue the imposition of an unaffordable bail necessarily results in pretrial detention. And the Fourteenth Amendment to the U.S. Constitution mandates that the State must not deprive liberty without first providing due process. Petitioners and other similarly situated people were detained without due process, regardless of whether their monetary bail was

excessive. They merely seek the process that they are due. This requires more than ensuring their monetary bail is not excessive.

Thus, Petitioners' due process claims stand independently of an excessive-bail claim. The U.S. Constitution requires bail to be both determined with due process and non-excessive. The U.S. Supreme Court has rejected the notion "that the applicability of one constitutional amendment pre-empts the guarantees of another." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993). Instead, "[t]he proper question is not which Amendment controls but whether either Amendment is violated." *Id*. Accordingly, the U.S. Supreme Court in *United States v. Salerno* analyzed the deprivation of pretrial liberty under *both* due process, 481 U.S. 739, 746-52 (1987), and the Eighth Amendment, *id.*, at 752-55—because pretrial detention would have been unconstitutional if it violated either provision.

As a practical matter, the argument that a non-excessive monetary bail is always constitutional would seemingly foreclose clear Fourteenth Amendment claims. For example, imagine a circumstance where the monetary bail set for Catholics, though non-excessive, was twice that of similarly situated defendants of other denominations. Under a myopic

reasoning, the practice would be constitutional because the monetary bail is not excessive. However, this would misidentify the problem. The practice would deny equal protection even though the bail was not excessive.

Accordingly, the constitutionality of monetary bail does not rise and fall with one provision of the U.S. Constitution; monetary bail is unconstitutional if it violates any provision of the U.S. Constitution. Thus, the imposition of a non-excessive monetary bail can still violate due process.

This Petition will first establish that an unaffordable bail is the equivalent to pretrial detention, requiring the heightened process attendant to liberty deprivations. Next, the Petition will discuss the substantive due process the State must provide before it deprives a petitioner of liberty—essentially, this is *what* the State must prove before it can detain a person pretrial. Finally, the Petition will detail the constitutionally required procedural due process—*by what standard of proof* the State must establish these substantive due process showings. Because the State satisfied neither substantive nor procedural due process, it violated the

Fourteenth Amendment rights of Petitioners and the putative class members.

A. An unaffordable bail constitutes pretrial detention triggering heightened procedural requirements.

1. An unaffordable bail constitutes pretrial detention.

An unaffordable monetary bail presents an "illusory choice."[6] Because the accused cannot satisfy the monetary bail, jail is the only possible outcome of the bail determination. For this reason, "unaffordable bail [is] equivalent to detention." *Knight v. Sheriff of Leon Cnty.*, 369 F. Supp. 3d 1214, 1222 (N.D. Fla. 2019); *see also Best v. State*, 28 So. 3d 134, 135 (Fla. 5th DCA 2010) (ruling an unaffordable bail is the "functional equivalent" of pretrial detention); *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017) (unaffordable monetary bail "is the functional equivalent of an order for pretrial detention").

When the lower court conditions pretrial release on payment of the national debt, time travel, or growing a third eye, the illusory choice is

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[6] *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (reasoning that an indigent defendant has only an "illusory choice" between jail and paying an unaffordable fine).

obvious. Yet, the choice is no less illusory when monetary bail is set beyond the accused's financial reach—because it is equally impossible.

Consequently, the lower court's imposition of an unaffordable bail results in each Petitioner and each class member's de facto pretrial detention and the denial of liberty.

2. Pretrial detention through an unaffordable bail must comply with due process attendant to a liberty deprivation.

Thus, just like an order of pretrial detention, § 907.041(4), Fla. Stat., the imposition of an unaffordable bail must comply with the substantive and procedural requirements for constitutional pretrial detention. *Knight*, 369 F. Supp. 3d at 1220 ("Unaffordable bail, in the absence of constitutionally permissible grounds for detention, is [unconstitutional]"); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (holding when a district court imposes an unaffordable monetary bail, "it must satisfy the procedural requirements for a valid *detention* order"); *Brangan*, 80 N.E.3d at 963 (ruling the decision to impose an unaffordable monetary bail "must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty"); *see also Dothe v. Gualtieri,* 2D21-2845, 2021 WL 5150161 (Fla. 2d DCA Oct. 19, 2021) (unpublished) (ordering a new bail hearing after State sought detention through an unaffordable bail without

showing pretrial risks "cannot be mitigated by lesser monetary bond amounts and other reasonable conditions" (citing § 907.041(4)(c)(5), Fla. Stat.)); *Hunt v. Gualtieri*, 321 So.3d 193 (Fla. 2d DCA 2020) (unpublished) (ordering a new bail hearing when the defendant could not afford the monetary bail and the State presented no "evidence to support" pretrial detention, i.e., that "'no conditions of release'" will reasonably assure the State's pretrial interests (quoting Fla. Const., Art. I, § 14)); *Nelson v. Gualtieri*, No. 2D20-3024 (Fla. 2d DCA Nov. 20, 2020) (ordering a new bail hearing when the unaffordable monetary bail resulted in detention and the State failed to satisfy the requirements of Rule 3.132); *Jackson v. Sheriff for Manatee Cnty.*, 288 So. 3d 588 (Fla. 2d DCA 2019) (unpublished) (granting a habeas petition when the unaffordable monetary bail "result[ed] in pretrial detention" and the trial court failed to make necessary findings to justify detention (citing § 907.041(4), Fla. Stat.)).

Pretrial detention—whether ordered directly or through the imposition of an unaffordable bail—must be proven and determined to be clearly necessary. The State may not bypass the Fourteenth Amendment and the strictures of Florida's Pretrial Detention Statute, § 907.041(4)(c), Fla. Stat., by simply choosing to detain an accused through an unaffordable monetary bail.

B. Substantive Due Process Claim: An unaffordable bail must be necessary because nothing less and no other conditions will suffice.

1. Pretrial liberty is a fundamental right mandating strict scrutiny.

Pretrial liberty is a "fundamental" right. *United States v. Salerno*, 481 U.S. 739, 750-51 (1987) (noting pretrial liberty's "fundamental nature," *id*. at 750, and examining whether its deprivation violated substantive due process only after recognizing that such a claim would only be cognizable if pretrial liberty were fundamental, *id*. at 751 (citing *Snyder v. Com. of Mass.*, 291 U.S. 97, 105 (1934)). The U.S. Supreme Court has repeatedly explained that freedom from physical restraint—the right at issue here—"has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992).

Accordingly, the U.S. Supreme Court mandates strict scrutiny of pretrial detention. *Salerno*, 481 U.S. at 749-751 (analyzing the "fundamental" liberty interest, the government's "compelling" interest, and the "narrow[] focus" of the application—the hallmarks of strict scrutiny).[7] A

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[7] *See also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 779 (9th Cir. 2014) (observing that "*Salerno* applied heightened scrutiny"); *Buffin v. City & County of San Francisco*, No. 15cv4959, 2018 WL 424362, at *5-6 (N.D. *(con't)*

deprivation of liberty must be necessary and "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citing *Salerno*, 481 U.S. at 746). "Narrow tailoring requires serious, good faith consideration of workable … alternatives." *Parents Involved in Cty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007) (quotation omitted).

Additionally, the State bears the burden to prove that the imposition of an unaffordable monetary bail that results in pretrial detention is narrowly tailored. *Foucha*, 504 U.S. at 81-82; *Salerno*, 481 U.S. at 751; *see also Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665-66 (2004) ("the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute"—that is, "whether the challenged regulation is the least restrictive means among available, effective alternatives").

2. The State must establish an absence of workable, alternative conditions to an unaffordable bail that results in pretrial detention.

The U.S. Supreme Court has repeatedly applied its narrow-tailoring requirement specifically to where the inability to pay resulted in deprivation

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Cal. Jan. 16, 2018) (reviewing *Salerno* and *Lopez-Valenzuela* to conclude strict scrutiny applied in an unaffordable bail case).

of liberty. Beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court reviewed several criminal law cases in which persons were treated differently because they lacked the ability to pay. The trend continued from *Williams* v. *Illinois*, 399 U.S. 235, 240-42 (1970) (forbidding as "invidious discrimination" the incarceration of impoverished persons beyond the statutory maximum term), and *Tate v. Short*, 401 U.S. 395, 397-98 (1971) (forbidding the state from "subject[ing]ed [a person] to imprisonment solely because of his indigency"), through *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (forbidding a state from revoking probation and detaining a person "simply because, through no fault of his own, he cannot" pay a fine unless the court first considered and found no "alternate measures" existed to adequately meet the government's legitimate interests). In each case, the Court held that the Fourteenth Amendment prohibits detaining a person because he is unable to pay unless the court first considers and finds that the government has no less-restrictive, alternative methods to achieve its legitimate interests.

Similarly, our federal circuit requires the government to justify and the court to approve pretrial detention through an unaffordable bail only when narrowly tailored—i.e., no other bail form or amount would reasonably assure its interests. In *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir.

1978) (en banc), the court observed that "[t]he incarceration of those who cannot [pay the bail amount], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." Accordingly, if the government's interest in "appearance at trial could reasonably be assured by … alternate [conditions] of release, pretrial confinement for inability to post money bail" is unconstitutional. *Id.* at 1058. Over the last several years, numerous federal district courts and state courts have reached the same conclusion.[8]

Each time they are confronted with this issue, courts have held that the imposition of an unaffordable bail is unconstitutional where the government had at its disposal, but declined to utilize, alternatives that would both facilitate release and achieve its pretrial goals. Each time, the deprivation of liberty was held to violate the Fourteenth Amendment unless no less-restrictive measures or bail forms would suffice.

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[8] *See, e.g.*, *In re Humphrey*, 482 P.3d 1008, 1019 (2021) (holding detention through an unaffordable bail "is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests"); *Daves v. Dallas County, Texas,* 341 F. Supp. 3d 688 (N.D. Tex. 2018); *Schultz v. State*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018); *ODonnell v. Harris County, Texas*, 251 F. Supp. 3d 1052, 1059 (S.D. Tex. 2017).

Florida law echoes these Fourteenth-Amendment mandates. Fla.R.Crim.P. 3.131(b)(1) specifies that before the trial court may impose a secured monetary bail (cash or surety bond) in subsection (b)(1)(E), it must consider and reject four less-restrictive alternatives.[9] *Sewell v. Blackman*, 301 So. 3d 354, 356 (Fla. 2d DCA 2020) ("[Rule 3.131(b)(1)] requires the court to impose the first, least restrictive, listed condition that would reasonably" achieve the government's pretrial interests). The rule was designed to guard against detention through an unaffordable bail without due process. It was enacted[10] in response to a due process challenge of Florida's practice of imposing unaffordable monetary bail "without meaningful consideration of other possible alternatives." *Rainwater*, 572 F.2d at 1057.

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[9] The preamble to Fla.R.Crim.P. 3.131(b)(1) reads: "The judicial officer shall impose the first of the following conditions of release that will reasonably [assure the state's pretrial interests]; or, if no single condition gives that assurance, shall impose any combination of the following conditions."

[10] The prioritizing of conditions of pretrial release that would facilitate release over secured monetary bail was included in the criminal Florida rules in 1977 upon the urging of the plaintiffs' attorney in *Rainwater* and the U.S. Eleventh Circuit's suggestion. *Pugh v. Rainwater*, 557 F.2d 1189, 1194, 1194 n.11 (5th Cir. 1977), *opinion vacated on reh'g en banc,* 572 F.2d 1053 (5th Cir. 1978); *The Florida Bar*, 343 So. 2d 1247, 1250 (Fla. 1977) (defining bail in Fla.R.Crim.P. 3.130(b)(4)(i)(2) (1977) to include for the first time an "unsecured appearance bond").

3. The State did not—and routinely does not—establish the absence of less-restrictive alternatives.

Alternatives to an unaffordable bail that results in pretrial detention would both facilitate release and reasonably assure the government's legitimate bail interests. Yet, the State did not in each Petitioner's case—and routinely does not in other cases—establish why conditions that would facilitate release would not suffice. Indeed, as the California Supreme Court recently observed:

> The experiences of those jurisdictions that have reduced or eliminated financial conditions of release suggest that releasing arrestees under appropriate nonfinancial conditions—such as electronic monitoring, supervision by pretrial services, community housing or shelter, stay-away orders, and drug and alcohol testing and treatment—may often prove sufficient to protect the community.

In re Humphrey, 482 P.3d 1008, 1020 (2021) (citations omitted). Had the State transparently moved in each Petitioner's case for pretrial detention pursuant to Florida's Pretrial Detention Statute, § 907.041(4), Fla. Stat., no pretrial detention could have been ordered because the State failed to establish that "no condition of release" would reasonably assure the legitimate State interests. This Court should not condone the State's bypassing these statutory strictures by effecting de facto pretrial detention through an unaffordable bail. Ultimately, the Fourteenth Amendment

requires the State to justify pretrial detention (no matter the method) with a showing of necessity.

In light of these less-restrictive alternatives, each Petitioner's pretrial detention violates the Fourteenth Amendment's substantive commands. The State failed to establish that no pretrial release condition other than the unaffordable monetary bail would suffice. *Sewell*, 301 So. 3d at 358 (monetary bail was unnecessary "in light of the other conditions prescribed by the court or available to it"). Likewise, nonmonetary conditions alone or in conjunction with an affordable monetary bail will often suffice for class members.

The Due Process Clause's substantive mandates forbid the lower court from imposing an unaffordable monetary bail for class members unless the court determines those conditions that will facilitate release are inadequate. It is not enough for the State to have an unfounded substantive need for detention. The lower court must also determine whether the State established it. Detention through an unaffordable bail is only permitted if the "court *determines* that alternatives to imprisonment are not adequate." *Bearden*, 461 U.S. at 672 (emphasis added). Yet, the

lower court never made such a determination in any of Petitioners' cases, and it routinely makes no determination in other cases.

C. Procedural Due Process Claim: The lower court may only impose an unaffordable bail when it determines the State established the need for the unaffordable bail resulting in detention by clear and convincing proof.

The Due Process Clause of the Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." The State denies procedural due process when it deprives liberty through an inadequate process. *Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056, 1070 (Fla. 3d DCA 2018). The Petitioners were denied due process when they were deprived of pretrial liberty through an unaffordable bail without adequate process. The class members were also denied their liberty without the required process due.

1. Procedural due process guards against erroneous deprivations by demanding an appropriate degree of confidence.

The Fourteenth Amendment's procedural mandate guards against the "mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus,* 435 U.S. 247, 259 (1978). It achieves this by dictating the "degree of confidence" or standard of proof by which a court should approve a deprivation. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quotations

omitted). It sets the required standard of proof and allocates its burden to minimize the risk of an erroneous decision. *Heller v. Doe by Doe*, 509 U.S. 312, 348 n. 1 (1993) (standard); *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) (risk).

2. The Fourteenth Amendment mandates heightened procedural due process to deprive pretrial liberty.

The *Mathews*[11] test sets the constitutionally required procedural safeguards. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (*Mathews* is the "framework to evaluate the sufficiency of particular procedures"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (*Mathews* test is "ordinary mechanism"). The U.S. Supreme Court has explained:

> *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards."

Hamdi, 542 U.S. at 529 (citations omitted).

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[11] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Procedural safeguards should be proportional to the individual's private interests at stake. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (constitutional test considers the "risk of an erroneous deprivation of such [private] interest"). In practice, that means the greater the private interests, the greater the certainty required before the State may deprive them. *See, e.g.*, *Heller*, 509 U.S. at 324 (justifying a lower standard of proof for the commitment of those with intellectual disabilities than the "mentally ill" because the treatment of those with intellectual disabilities is "much less invasive" and therefore they have less interest in avoiding erroneous commitment). Ultimately, the standard of proof "indicate[s] the relative importance attached to the ultimate decision" and "the value society places on individual liberty"—that is, the private interest at stake here. *Addington*, 441 U.S. at 423, 425 (quotation omitted).

When an unaffordable monetary bail results in the accused's detention, much more than money is at stake. The court must determine the State's need for pretrial detention based on a high standard of proof. The "commitment for *any* purpose constitutes a significant deprivation of liberty." *Hamdi*, 542 U.S. at 530. And when an individual's stake is "both 'particularly important' and 'more substantial than mere loss of money,'"

greater certainty and procedural safeguards are required. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quoting *Addington*, 441 U.S. at 424).

Before imposing an unaffordable monetary bail that effects pretrial detention, the trial court must decide the necessity of the monetary bail by clear and convincing proof at an adequate hearing.[12]

3. Clear and convincing evidence must support a deprivation of pretrial liberty.

Using the *Mathews* test, the U.S. Supreme Court has consistently held that a court may only order civil commitment—including pretrial detention[13]—when it determines a need based on clear and convincing

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[12] An adequate hearing would also include at a minimum (1) notice of the hearing and that ability to pay will be a critical factor, (2) an opportunity to be heard, present evidence including the accused's testimony, and cross examine other witnesses, (3) right to counsel, (4) a neutral and detached decision maker, and (5) a determination and an explanation of the court's findings. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *see also Turner v. Rogers*, 564 U.S. 431, 447 (2011) (notice of criticalness of ability to pay); *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 617 (1993) (decision maker); *Salerno*, 481 U.S. at 751-52 (right to counsel, presentation of evidence); *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974) (explanation); *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972) (explanation); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (be heard).

[13] *Salerno* described pretrial detention as "not penal," *id.*, 481 U.S. at 746, but regulatory, *id.* at 747.

proof.[14] *Santosky*, 455 U.S. at 756 (collecting cases) ("the Court has deemed ["clear-and-convincing's"] level of certainty necessary to preserve fundamental fairness" in proceedings involving liberty). In *United States v. Salerno*, 481 U.S. 739, 751 (1987), the Court upheld the pretrial detention of criminal defendants posing a danger to the community pursuant to a procedure "specifically designed to further the accuracy of that determination." The procedure included the requirement that the government "prove its case by clear and convincing evidence," *id.* at 752, "that no conditions of release can reasonably assure the safety of the community or any person," *id.* at 750. In *Addington*, 441 U.S. at 433, the Supreme Court held that a court could not civilly commit a person with a mental illness without determining by "clear and convincing evidence" that the person was dangerous to others. In *Foucha v. Louisiana*, 504 U.S. 71,

[14] Notably, Florida law always requires clear and convincing proof to civilly detain a person in other contexts, e.g., **(a)** Baker Act, *D.F. v. State*, 251 So. 3d 276, 279 (Fla. 2d DCA 2018) ("The State must prove by clear and convincing evidence that the statutory criteria authorizing involuntary commitment have been met.") (quotation omitted); **(b)** involuntary civil detention of a person with an intellectual disability, § 393.11(7)(g), Fla. Stat.; **(c)** Marchman Act, § 397.6957(2), Fla. Stat.; **(d)** Jimmy Ryce Act, § 394.916(4), Fla. Stat.; and **(e)** involuntary civil detention of defendants incompetent to stand trial § 916.13(1), Fla. Stat. (mental illness) & § 916.302(1), Fla. Stat. (intellectual disability).

81 (1992), the Court held Louisiana's civil commitment statute failed due process because the individual was denied an "adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community."[15]

For four reasons, heightened procedural due process is appropriate when the State seeks to detain a person through an unaffordable monetary bail. First, neither the accused nor the State has an interest in a court erroneously setting an unaffordable monetary bail that results in detention when less-restrictive conditions of release will suffice. *Addington*, 441 U.S. at 426 ("[T]he State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others.").

Second, "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is

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[15] *See also Schultz v. State*, 330 F. Supp. 3d 1344, 1372 (N.D. Ala. 2018) ("The level of certainty that the clear and convincing evidence standard provides is necessary to ensure fundamental fairness in bail proceedings"); *In re Humphrey*, 482 P.3d at 1020 ("we agree with Humphrey that the standard of proof should likewise be clear and convincing evidence."); *Brangan,* 80 N.E.3d at 963 (holding pretrial detention—whether ordered outright or imposed through an unaffordable bail—must pass heightened procedural due process).

significantly greater than any possible harm to the state." *Id.* at 427. The injury flowing from pretrial detention[16]—the loss of liberty—dwarfs the State's additional administrative burdens.

Third, the least amount of monetary bail necessary to achieve the State's goal may be difficult to determine. *See Heller*, 509 U.S. at 322 (ruling Kentucky's assignment of a higher burden of proof to the more difficult question of dangerously "mentally ill" than intellectually disabled was a reasonable way to "equalize the risks of an erroneous determination" about commitment).

Fourth, a full examination of the State's justification for the monetary bail would better enable the court to finely tune the amount. "[P]robable value," *Mathews*, 424 U.S. at 335, exists in the accused being able to cross-examine any government witnesses and rebut its evidence.

The result dictates the process due. Both a pretrial detention order and an unaffordable bail result in pretrial detention. Through each, the State deprives an accused of pretrial liberty. Consequently, the U.S.

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[16] *See supra* at 12, ¶ 19.

Constitution demands the lower court determine the need for pretrial detention based on clear and convincing evidence—no matter the route.

4. The lower court failed—and routinely fails—to determine that the State established a need by clear and convincing proof.

An unaffordable monetary bail may be viewed in two ways.

It may simply be a really high amount designed to ensure the accused remains in jail. Through this lens, for example, a $5,000 monetary bail is no different than a $5 million, $5 billion, or a $5 trillion bail so long as they are all unaffordable and thus accomplish the same detention goal. The lower court did not explicitly announce an intent to detain any Petitioner. It rarely reveals its intent in other cases. Yet, the monetary bails for Guerrero ($101,500), Briganti ($250,000), or Brewer ($200,000), App. 292-94, are difficult to view as anything other than intended detention. In this light, the monetary bail is simply a circumvention of the Pretrial Detention Statute. *Brown*, 338 P.3d at 1292 ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."). It is "[a] rose by any other name." *Knight*, 369 F.

Supp. 3d at 1219. And it would be as unlawful as an order of pretrial detention on the court's own accord.[17]

Alternatively, the monetary bail may be seen as an honest estimation of what is sufficient to assure the State's pretrial interests. Yet, from this perspective, it is hard to understand on what the estimation is based. The State offered no rationale why the precise amount is essential or why nonmonetary conditions would not accomplish the same goal. And it rarely, if ever, does. It offers no study that compares monetary bail amounts with rates of failures to appear or arrests for new criminal

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[17] The Pretrial Detention Statute and Rule each require the *State* to request pretrial detention before a court is authorized to impose it. Rule 3.132(a); § 907.041(4)(f), Fla. Stat. (stating the pretrial detention hearing is held after the State seeks it). The Florida Supreme Court rejected an amendment to Rule 3.132 to permit the "court to sua sponte determine whether to require pretrial detention." *In re Amendments to Florida Rule of Criminal Procedure 3.132*, 19 So. 3d 306, 308 (Fla. 2009). The high Court was concerned that permitting a *sua sponte* determination may both "place the judicial officer in an impermissible adversarial role" and "impermissibly shift the burden to the defendant to prove that he should not be detained." *Id*., at 307. Thus, a court may not impose pretrial detention unless the State requests it by filing a motion. *Sewell v. Blackman*, 301 So. 3d 354, 356 (Fla. 2d DCA 2020) (ruling accused could not be denied bail pursuant to the Pretrial Detention Statute because "the State has not affirmatively invoked it by filing a motion" for it); *Kendall v. State*, 290 So. 3d 150 (Fla. 5th DCA 2020) (granting habeas seeking pretrial release on reasonable conditions because State did not request pretrial detention).

activity—violent or otherwise.[18] The trial court did not explain how it arrived at this amount—when some lesser amount might also suffice. Instead, the monetary bail appears to be a guess.

Colloquial belief suggests the higher the monetary bail, the greater the incentive to appear. Yet, empirical research debunks this myth. One study found "no evidence that money bail increases the probability of appearance." Arpit Gupta *et al.*, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. Leg. Studies 471, 475 (2016).[19] Another study looked at the effect on pretrial outcomes of the requirement that monetary bail be secured (with cash or a bond as opposed to simply a promise to pay upon default). It found secured bail did not reduce failures to appear and new arrests for criminal activity. Michael R. Jones, *Unsecured Bonds: The As Effective And Most Efficient Pretrial Release*

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[18] *See ODonnell*, 251 F. Supp. 3d at 1118 ("Harris County has not coded, collected, or analyzed data on the different types of pretrial misconduct. … [Accordingly,] the County is imposing secured money bail … with no ability to tell how effective this type of bond is to prevent failures to appear or new criminal activity compared to release on unsecured or nonfinancial conditions.").

[19] Available at http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf.

Option, Pretrial Justice Inst. (Oct. 2013)[20] at 10, 11. Instead, the accused's mere promise to pay the monetary bail *if* he fails to appear or is rearrested yields the same results as a surety bond. A Texas federal court reached the same conclusion. *ODonnell*, 251 F. Supp. 3d at 1119-20 ("Secured money bail in Harris County does not meaningfully add to assuring misdemeanor defendants' appearance at hearings or absence of new criminal activity during pretrial release."). The research is clear. "[T]he financial condition of a bail bond is typically arbitrary; even when judges are capable of expressing reasons for a particular amount, there is often no rational explanation for why a second amount, either lower or higher, might not arguably serve the same purposes." Timothy R. Schnacke, Dep't of Just., Nat'l. Inst. of Corrs., *Fundamentals of Bail* 13 (Sept. 2014), https://goo.gl/jr7sMg. Increasing monetary bail and demanding it be paid in cash or bond does not clearly achieve the goals folk wisdom suggests.

Maybe a hunch alone that a monetary bail is necessary is fine when the accused can afford it. Afterall, someone who can afford it will be

[20] Available at https://www.courts.ca.gov/partners/documents/pdr-nat-bail_unsecured_bonds_pji_2013.pdf.

released and reimbursed. It is only money. However, greater certainty is required when liberty is at stake.

In each Petitioner's case, the State did not present any evidence, proffer, or argument for why an unaffordable amount was the magic number to assure its interests or why nonmonetary conditions would not suffice. *See* Motion to Modify, App. 55-85, 88-99, at ¶ 5 of motions' Argument section (arguing such a showing was required). The State rarely, if ever, does. Edwards Decl., App. 337 at ¶ 6; Sanchez Decl., App. 340 at ¶ 6; Adams Decl., App. 343, at ¶ 6. The lower court did not determine the State had shown the clear evidence making the unaffordable monetary bail's unique necessity "highly probable." *See Bouie v. State*, 292 So. 3d 471, 481 (Fla. 2d DCA 2020) (describing the clear and convincing standard). Again, the lower court never does. When empirical studies discredit and ineffectiveness of surety bails are known, the trial court must speak plainly about what it clearly finds.

Each Petitioner was denied fundamental fairness and due process before being deprived of liberty through an unaffordable monetary bail. In violation of the Fourteenth Amendment, the lower court erred by failing to determine the unaffordable monetary bail that resulted in each Petitioner's

detention through a procedure that would constitutionally ensure the proper "degree of confidence," *Addington*, 441 U.S. at 423, to minimize the "risk of an erroneous deprivation," *Mathews*, 424 U.S. at 335. Each class member is similarly deprived of liberty without procedural due process.

VII. CONCLUSION

This Court should reject the circumvention and deprivation of due process. The lower court did not determine the State had proven by clear and convincing proof nothing other or less than the unaffordable bail would suffice—and thus the predicate determination for detention is missing. *See Gerstein*, 420 U.S. at 124, 125 (ruling a *court* must determine probable cause for arrest to justify continued detention); *Bearden*, 461 U.S. at 672 (court must "*determine*[] that alternatives to imprisonment are not adequate" (emphasis added)). As a result of the due process shortfalls, Petitioners await trial in jail because the lower court imposed an unaffordable monetary bail resulting in de facto detention without due process in violation of the Fourteenth Amendment to the U.S. Constitution.

VIII. RELIEF REQUESTED

Based on the foregoing arguments and authorities, Petitioners respectfully request the following relief:

A. Certify the Manatee and Sarasota classes and permit the respective Class Representatives and the ACLU Foundation of Florida to represent each class.

B. Issue a writ of habeas corpus requiring the Respondents to justify the pretrial detention through an unaffordable monetary bail of each Petitioner and each member of either class.

C. Declare the following:

(1) An unaffordable monetary bail constitutes pretrial detention.

(2) The Fourteenth Amendment to the U.S. Constitution mandates that an accused's pretrial release may only be conditioned on an unaffordable bail after the State establishes and the lower court determines no nonmonetary conditions of release alone or in conjunction with an affordable monetary bail would both facilitate

release and reasonably assure the government's legitimate bail interests.

(3) The Fourteenth Amendment to the U.S. Constitution requires the State to establish and the lower court to find the State established this need for an unaffordable monetary bail that results in pretrial detention by clear and convincing proof.

D. *For each class member whose motion to modify bail was heard <u>before</u> this Court's final order and for each Petitioner*: Direct the appropriate lower court to do one of the following within five days:

(1) Order each accused be released on nonmonetary conditions; or

(2) Order each accused be released on nonmonetary conditions, an affordable monetary bail, or both, unless the lower court conducts a new bail hearing and makes these explicit finding(s)—after which the lower court may impose any nonexcessive bail amount:

i) The accused can afford the monetary bail;

or

ii) No nonmonetary conditions of release alone or in conjunction with an affordable monetary bail would both facilitate release and reasonably assure the government's legitimate bail interests;

and

iii) The State established its need for an unaffordable monetary bail by clear and convincing proof.

E. *For each class member whose motion to modify bail was heard <u>after</u> this Court's final order*: Order each Sheriff to release each class member.

F. Such further and different relief as is just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to the following person(s) on the E-filed date of this document by filing the document with service through the e-Service system (Fla.R.Jud.Admin. 2.516(b)(1)):

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CERTIFICATE OF COMPLIANCE WITH RULE 9.045

I certify that this petition complies with the font (Arial 14-point) and word-count requirements. This filing contains 9,922 words (including sections permitted to be excluded), which is within the 13,000 word-limit prescribed in Fla.R.App.P. 9.100(g).

Respectfully Submitted,

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