UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BRITTANY KNIGHT;

Petitioner,

v. Case No.: 4:17cv464

STATE OF FLORIDA; et al.;

Respondents.

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MEMORANDUM OF LAW
IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to N.D.Fla.Loc.R. 5.7(B), Petitioner Brittany Knight ("Knight") submits this memorandum of law in support of her petition for a writ of habeas corpus to remedy her and other similarly situated inmates' unconstitutional pretrial detention in the county jail in Leon County, Florida.

INTRODUCTION

"In our society liberty is the norm …." *United States v. Salerno*, 481 U.S. 739, 755 (1987). We recede from this default when a person is charged with a criminal offense. To adequately assure the accused will stand trial and submit to sentence if found guilty, we permit minor intrusions on liberty. A monetary penalty may ensure the accused does not flee justice. This monetary bail must be designed to reasonably achieve the government's legitimate interest and set no

higher. Because monetary bail only deprives the pocketbook, courts enjoy wide discretion in setting it. For an accused who can afford the monetary bail, she largely retains her freedom.

When an accused cannot afford the monetary bail, the calculus categorically changes. We no longer ask what monetary penalty will adequately assure a presence at trial. The imposition of an unaffordable monetary bail deprives liberty altogether. Thus, the question becomes whether the monetary bail is so necessary to justify pretrial detention. We demand that the government has a need for pretrial detention—that no less-restrictive alternative will suffice. We demand that the government establish this need with clear and convincing proof at an appropriate hearing. In this way, "detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755.

BACKGROUND

Monetary bail may provide for pretrial release or effect pretrial detention—depending on whether the accused can afford it. Congress grappled with this reality and the constitutional implications of these categorically different consequences in revising the Bail Reform Act.

The Bail Reform Act of 1966 excluded public safety from a federal court's consideration when determining conditions of pretrial release for non-capital

crimes. Assuring required appearances was the only goal. Pub. L. No. 89-465 (1966), 80 Stat. 214,[1] 18 U.S.C. § 3146; *see also* S. Rep. No. 98-225, at 4-5 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3187 ("Danger to the community and the protection of society are not to be considered as release factors under the current law."). Critics observed that this led federal courts to regularly detain defendants perceived as dangerous through the sub rosa method of imposing an unaffordable monetary bail. S. Rep. No. 98-225, at 10. The U.S. Department of Justice testified about a judge's "desperate dilemma" in setting bail for a clearly dangerous criminal defendant under that law:

> On the one hand, the courts may abide by the letter of the law and order the defendant released subject only to conditions that will assure his appearance at trial. On the other hand, the courts may strain the law, and impose a high money bond ostensibly for the purpose of assuring appearance, but actually to protect the public. Clearly, neither alternative is satisfactory. The first leaves the communities open to continued victimization. The second, while it may assure community safety, casts doubt on the fairness of release practices.

Id. at 10-11; *see also* H.R.Rep. No. 91-907, at 84-85 (1970) ("One course perpetuates hypocrisy; the other course is irrational."); *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.").

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[1] Available at http://www.gpo.gov/fdsys/pkg/STATUTE-80/pdf/STATUTE-80-Pg214.pdf.

Congress addressed this dilemma in the Bail Reform Act of 1984. On the one hand, it authorized pretrial detention directly, under carefully limited circumstances, when no conditions of pretrial release would reasonably assure public safety or the accused's required appearance. Pub. L. No. 98-473 (1984), 98 Stat. 1837, 18 U.S.C. § 3142(e)(1). It insisted, consistent with "constitutional due process requirements," S. Rep. No. 98-225, at 22, that the government establish its need, among other procedural safeguards, by "clear and convincing evidence." 18 U.S.C. § 3142(f). On the other hand, it included a provision to stop the government from effecting pretrial detention though an unaffordable bail and thus "circumventing the procedural safeguards and standard of proof requirements of a pretrial detention provision." S. Rep. No. 98-225, at 11, 16. "The judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2). Now, Congress did not intend judges to simply release defendants unable to pay a necessary monetary bail or reduce it to an affordable amount. Instead, it reasoned that when the monetary bail was unaffordable, then there is "no available condition of release that will assure the defendant's appearance." S. Rep. No. 98-225, at 16. In such a circumstance, Congress expected courts to conduct a pretrial detention hearing. *Id.*; *see also United States v. Westbrook*, 780 F.2d 1185, 1188 (5th Cir. 1986) ("If upon reconsideration, the officer concludes that the [unaffordable] bond is necessary to

assure appearance, then it is apparent that no *available* condition of release will assure the accused's appearance. In that instance, the judicial authority could proceed with a detention hearing and, subject to the requisite findings, issue a detention order.").

Therefore, in addition to providing a method to detain uncontrollable defendants outright (with necessary constitutional constraints), it foreclosed detaining them through the imposition of an unaffordable bail. It intended that the pretrial detention provision would "replace" the sub rosa method of detaining uncontrollable defendants through the imposition of high monetary bail and thereby "allow the courts to address the issue of pretrial criminality honestly and effectively." S. Rep. No. 98-225, at 11. Congress reasoned:

> [A pretrial detention provision] would also be fairer to the defendant than the indirect method of achieving detention through the imposition of financial conditions beyond his reach. The defendant would be fully informed of the issue before the court, the government would be required to come forward with information to support a finding of dangerousness, and the defendant would be given an opportunity to respond directly. The new bail procedures promote candor, fairness, and effectiveness for society, the victims of crime—and the defendant as well.

S. Rep. No. 98-225, at 11.

The federal pretrial detention statute was quickly challenged as unconstitutional in *United States v. Salerno*, 481 U.S. 739 (1987). In its briefing, the United States defended the pretrial detention statue as an "open procedure for

assessing pretrial dangerousness, [that] eliminate[ed] the past objectionable practices of detaining dangerous defendants by imposition of unattainable financial conditions." Brief for Petitioner (United States) at 35, *United States v. Salerno*, 481 U.S. 739 (1987) (No. 86-87), 1986 WL 727530. The U.S. Supreme Court upheld the federal pretrial detention against a due process and excessive bail challenge. *Salerno*, 481 U.S. 739. In particular, the Court held a federal court may order pretrial detention when following the Bail Reform Act's procedural safeguards. The government must establish its need for pretrial detention "by clear and convincing evidence," *id*., at 752, in a hearing "specifically designed to further the accuracy of that determination," *id*., at 751.

Around the same time that Congress addressed this dilemma, so did Florida. Ch. 1982-398, Laws of Fla. It too empowered a state court to directly detain an uncontrollable criminal defendant subject to substantive and procedural requirements. The government must establish "a substantial probability" exists that "no conditions of release will reasonably" assure public safety or the defendant's appearance at subsequent proceedings. § 907.041(4)(c), Fla. Stat. The government must establish this need "beyond a reasonable doubt." Fla. R. Crim. R. 3.132(c)(1); *see Merdian v. Cochran*, 654 So. 2d 573, 576 (Fla. 4th DCA 1995) ("It is the state's burden to prove the need of pretrial detention, which it must show beyond a reasonable doubt.") (citations omitted). In this way, Florida's pretrial

detention statute permits the government to honestly detain pretrial a criminal defendant when the government shows it is necessary.

Today, the Northern District of Florida faithfully applies the Bail Reform Act of 1984. The U.S. Attorney requests pretrial detention and satisfies the procedural safeguards or the criminal defendant is released on nonmonetary conditions. No federal pretrial inmate sits in jail because she cannot afford a monetary bail. In stark contrast, Florida's pretrial detention statute is largely unused and ignored in the state courts in Leon County, Florida. Instead, pretrial detention is regularly effected through the sub rosa method of imposing an unaffordable monetary bail. And in this way, it sidesteps the heightened protections guarding pretrial liberty and violates the U.S. Constitution.

ARGUMENT

Because an unaffordable monetary bail results in pretrial detention, the bail must be necessary with no less-restrictive alternatives. Furthermore, the government may not sidestep the constitutionally required procedure to effect pretrial detention. Instead, it must establish its need by clear and convincing proof at an adequate hearing it requests. Nevertheless, in Leon County, an unaffordable monetary bail is regularly imposed with neither the "degree of confidence" required to deprive a person of liberty nor consideration of less-restrictive

alternative measures to achieve the government's legitimate interests. This results in numerous pretrial inmates being detained in violation of the U.S. Constitution.

A. <u>An unaffordable bail constitutes pretrial detention.</u>

An unaffordable monetary bail presents an "illusory choice."[2] Because the accused cannot satisfy the monetary bail, jail is the only possible outcome of bail determination. For this reason, the imposition of an unaffordable monetary bail "is the functional equivalent of an order of pretrial detention." *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017); *see also United States v. Fidler*, 419 F.3d 1026, 1028 (9th Cir. 2005) (characterizing an unaffordable bail as "de facto preventative detention"); *United States v. McConnell*, 842 F.2d 105, 109 (5th Cir. 1988) (characterizing an unaffordable bail "as a *de facto* automatic detention"); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) ("the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all").

Thus, just like an order of pretrial detention, the imposition of an unaffordable bail must comply with the substantive and procedural requirements for constitutional pretrial detention. *See United States v. Mantecon-Zayas*, 949

[2] *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).

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"). Pretrial detention—whether ordered directly or through imposition an unaffordable bail—must be clearly proven necessary.

B. Substantive Due Process & Equal Protection (Count 1): <u>An unaffordable bail must be necessary with no less-restrictive alternative</u>.

Pretrial liberty is a fundamental right mandating strict scrutiny.

The "commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (quoting *Jones v. United States,* 463 U.S. 354, 361 (1983)); *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990) (pretrial liberty is "vital").[3] Accordingly, the U.S. Supreme Court strictly scrutinizes pretrial detention. *United States v. Salerno*, 481 U.S. 739, 749-751 (1987) (analyzing the "fundamental" liberty interest, the government's "compelling" interest, and "narrow[] focus" of

[3] Pretrial liberty is especially important for additional reasons. It "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Pugh v. Rainwater*, 572 F.2d 1053, 1056-57 (5th Cir. 1978). "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 improves trial outcomes. *See, e.g.*, *ODonnell v. Harris Cty.*, --- F. Supp. 3d ---, No. H-16-1414, 2017 WL 1735456, at *36-40 (S.D. Tex. Apr. 28, 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").

the application—the hallmarks of strict scrutiny).[4] A deprivation of liberty must be necessary and "narrowly tailored to serve a compelling state interest." *See 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 Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007) (quotation omitted).

Courts must consider and reject less-restrictive alternatives before imposing unaffordable bail resulting in detention.

The U.S. Supreme Court has repeatedly applied its narrow-tailoring requirement specifically where inability to pay resulted in deprivation of liberty. Beginning with *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), the U.S. Supreme Court reviewed several criminal law cases in which a person was treated differently because she lacked the ability to pay. In each case, the Court held that the Fourteenth Amendment prohibits detaining a person because she 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.

[4] *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 779 (9th Cir. 2014) (observing that "*Salerno* applied heightened scrutiny"); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (describing *Salerno*).

In *Griffin*, the Court struck down an Illinois law that prohibited an appeal of a criminal conviction unless the criminal defendant first procured a trial transcript at his own expense. 351 U.S. at 13. The law violated equal protection because "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id*. at 19. In so concluding, the Court clarified that the state need not necessarily purchase the transcripts itself because there were likely "other means of affording adequate and effective appellate review to indigent defendants." *Id*. In *Williams* v. *Illinois*, 399 U.S. 235, 240-42 (1970), the Court struck down the "invidious discrimination" of incarcerating a person beyond the statutory maximum term when he could not pay the imposed fine and court costs. Importantly, the Court observed that the "State is not powerless" to collect judgments or punish indigent criminals—it has "numerous alternatives" to detention to collect fines and it may impose "alternative [penal] sanctions." *Id*. at 244-45. Similarly, in *Tate v. Short*, 401 U.S. 395, 397-98 (1971), the Court forbid incarcerating a person when he could not afford to "satisfy" the imposed fine because it "subjected [him] to imprisonment solely because of his indigency." And again the Court left open the possibility of detention of the poor "when alternative means are unsuccessful" to enforce the law. *Id.* at 400-401. Then, in *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983), the Court prohibited a state from revoking probation and imprisoning a person who

cannot afford to pay a fine and restitution unless the court first considers and finds no "alternate measures" exist to adequately meet the government's legitimate interests.

Nearly 40 years ago, in a Florida case this Circuit reached the same conclusion in the pretrial context. In *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc), the court observed "[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." This reaffirmed this Circuit's general principle that a system in which "[t]hose with means avoid imprisonment [while] the indigent cannot escape imprisonment" violates the Fourteenth Amendment. *Frazier v. Jordan*, 457 F.2d 726, 728-29 (5th Cir. 1972). Over the last two years, federal district courts in Mississippi, Louisiana, Missouri, Tennessee, Georgia, and Texas have reached the same conclusion.[5] And the Ninth Circuit recently applied *Bearden* to uphold a district

[5] *See, e.g.*, *ODonnell*, 2017 WL 1735456, at *3 ("[A]t the heart of this case are two straightforward questions: Can a jurisdiction impose secured money bail on misdemeanor arrestees who cannot pay it, who would otherwise be released, effectively ordering their pretrial detention? If so, what do due process and equal protection require for that to be lawful? . . . [T]he answers are that, under federal and state law, secured money bail may serve to detain indigent misdemeanor arrestees only in the narrowest of cases, and only when, in those cases, due process safeguards the rights of the indigent accused."); *Walker v. City of Calhoun*, No. 4:15cv0170, 2016 WL 361612, at *10 (N.D. Ga. Jan. 28, 2016) ("Certainly, keeping individuals in jail because they cannot pay for their release, whether via fines, fees, or a cash bond is impermissible."), *vacated on other grounds*, 682 Fed.Appx. 721 (11th Cir. 2017), *reinstituted*

court's mandate that immigration officials consider less-restrictive alternatives before imposing unaffordable bail. *Hernandez v. Sessions*, No. 16-56829, 2017 WL 4341748 (9th Cir. Oct. 2, 2017).

Each time they are confronted, the U.S. Supreme Court, this Circuit, and numerous federal district courts have held that the imposition of an unaffordable bail was arbitrary and invidious discrimination because the government had at its disposal, but declined to employ, alternatives to achieve its goals. Each time, the deprivation of liberty was held to violate the Fourteenth Amendment unless no less-restrictive measures would suffice.

Numerous less-restrictive alternatives exist.

For Knight and other class members, several less-restrictive alternatives to pretrial detention through an unaffordable bail are available to reasonably assure the government's interests. The government's legitimate interests can be achieved by (1) reducing the monetary bail to an affordable amount, (2) permitting an

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with more specific injunction, 2017 WL 2794064 (N.D. Ga. June 16, 2017); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 768-69 (M.D. Tenn. Dec. 17, 2015); *Thompson v. Moss Point*, No. 1:15cv182, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *Jones v. City of Clanton*, No. 2:15cv34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015) (holding pretrial detention on unaffordable monetary bail violates the Fourteenth Amendment unless the court conducts a hearing on the "need for bail or alternatives to bail[.]"); *Cooper v. City of Dothan*, No. 1:15cv425, 2015 WL 10013003 (M.D. Ala. June 18, 2015); *Snow v. Lambert*, No. CV 15-567-SDD-RLB, 2015 WL 5071981 (M.D. La. Aug. 27, 2015); *Pierce v. City of Velda City*, 4:15-cv- 570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015).

accused to satisfy any monetary bail through an unsecured appearance bond,[6] Fla.R.Crim.P. 3.131(b)(1)(B), (3) restricting travel, association, or residence, (4) electronic monitoring in extreme cases, or a combination of these measures.[7]

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[6] *See Walker*, 2017 WL 2794064, at *4 ("Indeed, other alternatives exist, including unsecured bonds, in which an arrestee need not pay money in advance but may be released with an obligation to pay the amount listed in the bail schedule if the arrestee fails to appear for his or her scheduled court date."); Michael R. Jones, Pretrial Justice Institute, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (Oct. 2013), https://goo.gl/UENBKJ ("Unsecured bonds are as effective as secured bonds at achieving court appearance."); Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization* (Aug. 18, 2016), https://goo.gl/OW5OzL ("Our results suggest that money bail has a negligible effect or, if anything, increases failures to appear."). Opponents of bail reform may argue that common sense suggests that monetary bail improves appearance rates. However, no published study supports this colloquial belief.

[7] *ODonnell*, 2017 WL 1735456, at *51 ("According to the most recent and credible evidence, secured financial conditions of pretrial release do not outperform alternative nonfinancial or unsecured conditions of pretrial release in ensuring the appearance of misdemeanor defendants at hearings."); *see also* Int'l Ass'n of Chiefs of Police, *Resolution: Pretrial Release and Detention Process* 15-16 (Oct. 21, 2014), https://goo.gl/a5JUpe ("[D]efendants rated low risk and detained pretrial for longer than one day before their pretrial release are more likely to commit a new crime once they are released, demonstrating that length of time until pretrial release has a direct impact on public safety."); Christopher T. Lowenkamp et al., Laura and John Arnold Foundation, *The Hidden Costs of Pretrial Detention* 3 (2013), http://www.arnoldfoundation.org/wpcontent/ uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf (studying 153,407 defendants and finding that "when held 2–3 days, low risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours"); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 768 (2017), https://goo.gl/Waj3ty ("While pretrial detention clearly exerts a protective effect in the short run, for misdemeanor defendants it may ultimately service to compromise public safety," and finding that in a representative group of 10,000 misdemeanor offenders, pretrial detention would cause an additional 600 misdemeanors and 400 felonies compared to if the same group had been released pretrial); Timothy R. Schnacke, Dep't of Just., Nat'l. Inst. of Corrs., *Fundamentals of Bail* 13 (Sept. 2014), https://goo.gl/jr7sMg ("[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 purpose.").

These alternatives to pretrial detention have adequately achieved government's interest in the District of Columbia, New Jersey, the Northern District of Florida, and other jurisdictions. And any claims to the contrary must be grounded in reality—not just theatrical conjecture or a conceivable basis. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016), *as revised* (June 27, 2016) (ruling district courts should review a regulation impacting fundamental rights against a judicial record and not simply conceivable justifications that would otherwise support economic legislation).

Conclusion

Instead of establishing why these alternatives would not suffice, the government sidestepped the issue under the guise that the defendant was imposed monetary bail, not pretrial detention. Yet, this misapprehends the paradigm shift from liberty with a minor intrusion of a monetary bail to an entire deprivation of liberty as a result of an unaffordable bail. Thus, the government effects pretrial detention when alternatives would suffice. This violates the Fourteenth Amendment.

C. Procedural Due Process (Count 2):
Government must prove an unaffordable bail's necessity with clear and convincing proof.

When an accused requests a lower monetary bail because the current bail results in her pretrial detention, the government's obligation shifts. Because her

liberty, not just her money, is at stake, the government has a heightened burden. The U.S. Constitution's mandate of procedural due process requires the government to show the necessity of such a high bail through clear and convincing evidence. This mandate applies equally whether pretrial detention is ordered outright or is effected through the imposition of an unaffordable bail.

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

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 due process's procedural variety 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" a court should have to approve a deprivation. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). It sets the required standard of proof and allocates the 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).

The U.S. Constitution mandates heightened procedural due process to detain a person and deprive liberty.

Procedural safeguards must be proportional to the individual's private interest at stake. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (constitutional

test considers the "risk of an erroneous deprivation of such [private] interest"). The greater the private interest, the greater the certainty required before the government may deprive it. *See, e.g., Heller*, 509 U.S. at 324 (justifying a lower standard of proof for the commitment of the intellectually disabled than the mentally ill because the intellectually disabled's treatment 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. *Addington*, 441 U.S. at 423, 425 (quotation omitted).

Yet, when the unaffordable monetary bail results in the accused's detention, much more than money is at stake and greater proof is required. The "commitment for *any* purpose constitutes a significant deprivation of liberty." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004). And when a person'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); *see also Gilmore v. Taylor,* 508 U.S. 333, 342 (1993) ("[T]he Eighth Amendment requires a greater degree of accuracy and factfinding [when a defendant's life is at stake] than would be true in a noncapital case.").

The *Mathews* test determines the constitutional procedural safeguards. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (*Mathews* is the "framework to evaluate the sufficiency of particular procedures"); *Hamdi*, 542 U.S. at 529 (*Mathews* test is "ordinary mechanism"). The U.S. Supreme Court 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).

Using the *Mathews* test, the U.S. Supreme Court has consistently held that the government must justify civil commitment—including pretrial detention[8]—with clear and convincing proof. 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

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

no conditions of release can reasonably assure the safety of the community or any person," *id*. at 750. *See also Zadvydas v. Davis*, 533 U.S. 678, 691 (2001) (noting the Court has only approved of preventative detention, like in *Salerno*, when it was subject to "strong procedural protections"). In *Addington*, 441 U.S. at 433, the Court held that a government could not civilly commit the mentally ill without showing by "clear and convincing evidence" that the person was dangerous to others. In *Foucha v. Louisiana*, 504 U.S. 71, 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."[9]

The heightened procedural due process is appropriate for several reasons. First, "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Addington*, 441 U.S. at 427. Second, neither the accused nor the government has an interest in a court erroneously setting monetary

[9] Relying on *Salerno* and *Foucha*, the Massachusetts Supreme Court struck down a state bail law because it provided insufficient procedural due process by permitting a judge to animate the monetary bail based merely on the court's "unbridled discretion to determine whether an arrested individual is dangerous." *Aime v. Com.*, 611 N.E.2d 204, 214 (Mass. 1993). Later, when state officials sidestepped Massachusetts's pretrial detention statute by imposing unaffordable bail, the Massachusetts Supreme Court again held that pretrial detention—whether ordered outright or imposed through an unaffordable bail—must pass heighten procedural due process. *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017).

bail in excess of the criminal defendant's financial resources. *See id.* at 426 ("Under the Texas Mental Health Code, however, the 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."). Third, the proper amount of monetary bail necessary to achieve the government's goal may be difficult to determine. *Heller*, 509 U.S. at 322 (1993) (ruling Kentucky's assignment of a higher burden of proof to the more difficult question of dangerously insane than intellectually disabled was a reasonable way to "equalize the risks of an erroneous determination" about commitment). Fourth, a full examination of the government'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.

When an accused sits in jail on an unaffordable bail set in excess of an amount sufficient to ensure his trial presence, he loses his liberty, the government must pay to incarcerate him, and the government's interests could be achieved for a lesser bail amount. Because the government has nothing to gain when the court erroneously detains a person, it must be more certain.

The result dictates the procedure. Both a pretrial detention order and an unaffordable bail result in pretrial detention. Through each, the government

deprives an accused of pretrial liberty. Consequently, the U.S. Constitution demands the same heighten procedural due process—no matter the route.

Florida law would, if followed, mandate heightened procedural due process to detain a person pretrial and deprive liberty.

Florida law recognizes too that when a defendant has more than money, but her liberty, at stake, greater procedural due process is required to reduce "the risk of an erroneous" decision. *Mathews*, 424 U.S. at 335. Its heightened procedural safeguards limit significantly a court's consideration when the government seeks outright pretrial detention. To succeed, the government "has the burden of showing beyond a reasonable doubt the need for pretrial detention," Fla. R. Crim. R. 3.132(c)(1), namely, that "no conditions of release will reasonably" assure the defendant's appearance at subsequent proceedings, § 907.041(4)(c), Fla. Stat. *See Merdian v. Cochran*, 654 So. 2d 573, 576 (Fla. 4th DCA 1995) ("It is the state's burden to prove the need of pretrial detention, which it must show beyond a reasonable doubt.") (citations omitted).

The Petitioner asserts no current challenge to Florida's pretrial detention statue and rule. Instead, the present problem is that the government regularly bypasses them. An accused is detained pretrial through the imposition of an unaffordable bail, which is measured by a more lenient standard. *Mehaffie v. Rutherford*, 143 So. 3d 432, 434 (Fla. 1st DCA 2014) ("The determination of bail

is generally left to the discretion of the trial court, and is reviewed under an abuse of discretion standard."). The government reaches the same result of pretrial detention without the procedural due process.

Conclusion

Here, the government deprives an accused of liberty without the required procedural due process. It bypassed Florida's pretrial detention statute and reached the same result by imposing an unaffordable bail. In this way, the government provides *none* of the procedural safeguards that the *Salerno* Court found "must attend" any order of pretrial detention. *Salerno*, 481 U.S. at 755. It effected pretrial 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. This violates the Fourteenth Amendment.

D. Excessive Bail—Total Amount (Count 3):
$250k monetary bail is excessive.

The Eighth Amendment to the U.S. Constitution prohibits excessive bail. Monetary bail is excessive when it is "higher than an amount reasonably calculated to fulfill" the government's interests. *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *see also Baze v. Rees,* 553 U.S. 35, 47 (2008) (noting the excessive bail clause was incorporated in the Fourteenth Amendment).

Here, Knight's $250,000 monetary bail is excessive. Knight has lived in the community for nearly 30 years. She has significant family ties to the community. Knight has been employed in the community her entire adult life. She has no criminal history and has no other pending criminal cases—and consequently, she has never failed to appear for a criminal proceeding or fled to avoid prosecution and she was not on any supervised release at the time of arrest. For over a year between the alleged unlawful death in June 2015 and the government's indictment in June 2016, she remained in the community. The monetary bail exceeds tenfold the bail amount proposed in the local bail schedule.

Considering these factors, $250,000 is "higher than an amount reasonably calculated" to ensure Knight will appear at trial. *Stack*, 342 U.S. at 5. It is excessive.

E. Excessive Bail—Consideration of Public Safety (Count 4): <u>Monetary bail cannot be set in consideration of dangerousness.</u>

In any pretrial release determination, the government has only two interests: the accused's trial appearance and "preventing crime by arrestees." *Salerno*, 481 U.S. at 749. Some conditions of pretrial release may further both interests; some conditions further only one interest. For example, requiring the defendant to wear a GPS tracking device could both prevent him from fleeing and alert the police when he returns to a victim's home. On the other hand, a travel restriction may

assure a trial appearance, but makes the community no safer; or prohibiting victim contact may mitigate the risk of future violence, but does not help get the defendant to his court dates.

The Eight Amendment mandates weighing a monetary bail against the proffered government's interest the bail is "designed to ensure" or achieve. *See Salerno*, 481 U.S. at 754.[10] Theoretically, monetary bail may help assure the accused's presence at trial.[11] If she shows up to trial, she gets her money back. § 903.31, Fla. Stat. (specifying conditions to cancel a bond). However, monetary bail does nothing to assure an accused will not harm the public. So long as the criminal defendant does not flee, no financial consequence results from her committing a future crime. *See* § 903.28, Fla. Stat. (prescribing that a forfeited bond shall be remitted and judgment satisfied upon the apprehension of the defendant). The money is returned if the criminal defendant is arrested for a new crime while on pretrial release. Therefore, monetary bail cannot be used to mitigate the risk of a release of a dangerous person because it has no effect on

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[10] *See also Campbell v. Johnson*, 586 F.3d 835, 842 (11th Cir. 2009) ("To determine whether bail is excessive, we must compare the terms of the bail against the interest the government seeks to protect."); *Galen v. Cnty. of Los Angeles*, 477 F.3d 652, 660 (9th Cir. 2007) ("*Salerno* confirms that the Excessive Bail Clause prevents the imposition of bail conditions that are excessive in light of the valid interests the state seeks to protect by offering bail.").

[11] Reality does not always match theory. *See, e.g.,* Jones, *Unsecured Bonds, supra,* n.6.

preventing future crime. *See* Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 Berkeley J. Crim. L. 1, 23 (2008) ("To have a meaningful inhibiting effect, bail [forfeiture] should appear to flow directly from the commission of the new offense"). Other jurisdictions have come to this conclusion that "[m]oney bail may not be used to protect the community by preventing release." *State v. Steele*, 61 A.3d 174, 181 (N.J. App. Div. 2013); D.C. Code Ann. § 23-1321(c)(3) (prohibiting monetary bail to assure safety); *State v. Pratt*, --- A.3d ---, 2017 WL 894414 (Vt. 2017) ("bail may be used only to assure the defendant's appearance in court and cannot be used as a means of punishing the defendant, nor of protecting the public.") (internal quotations omitted); *Aime v. Com.*, 611 N.E.2d 204, 214 (Mass. 1993); *see also ABA Standards for Criminal Justice, Pretrial Release Standard,* (2d ed. 1988), 10-5-3(b), goo.gl/NsChP8 ("Monetary conditions should not be set to punish or frighten the defendant, to placate public opinion, or to prevent anticipated criminal conduct."); Nat'l Ass'n of Pretrial Servs. Agencies, *Standards on Pretrial Release* (3d ed. 2004), Stand. 2.5(c), goo.gl/VQM1kr ("Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person").[12]

[12] The National Association of Pretrial Services Agencies recommends that "concerns about possible dangerousness of a defendant should be dealt with through special release conditions or, if necessary, through detention ordered after a hearing with fair procedures, and

Therefore, monetary bail—in any amount—is not "reasonably calculated to fulfill" the government's interest in public safety. *See Stack*, 342 U.S. at 5. To the extent monetary bail was set in consideration of public safety, it is per se excessive because it does nothing to achieve this intended aim. *Id*.

In Knight's case, the lower court set this bail so high because of its perception that Knight "does pose a danger to the community." *Id*., App. 52. Without this consideration, all the remaining factors could not justify a $250,000 bail. Yet, because this monetary bail does nothing to achieve this intended aim, it is excessive and violates the Eighth Amendment of the U.S. Constitution. *Stack*, 342 U.S. at 5.

N.D. FLA. LOC. R. 7.1(F) CERTIFICATE OF WORD LIMIT

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not *sub rosa* through the setting of high money bail that is beyond the ability of the defendant to post." *Standards*, commentary to Stand. 2.5(c), at 39.

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Respectfully Submitted,

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