UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BRITTANY KNIGHT et al.;

Petitioner,

v. Case No.: 4:17cv464 RH/CAS

SHERIFF FOR LEON COUNTY, FLORIDA;

Respondent.

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"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).

KNIGHT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed.R.Civ.P. 56, Petitioner Brittany Knight, on behalf of herself and a putative class of all others similarly situated ("Knight"),[1] moves the Court for summary judgment and states as follows:

I. 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

[1] Petitioner's Motion to Certify a Class (ECF 5) remains pending and at issue.

sentence if found guilty, we permit minor intrusions on liberty. A monetary penalty may assure the accused does not flee justice. This monetary bail must be designed to reasonably assure the government's legitimate interest and set no higher. When 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 unaffordable monetary bail is so necessary to justify pretrial detention. Our Constitution demands that the government has a need for pretrial detention—that no less-restrictive alternative will suffice. Our Constitution demands 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.

However, in Leon County, over 165 people accused of a criminal offense remain jailed pretrial because they cannot afford the imposed monetary bail. The accused's ability to pay is rarely investigated; and with no known exception, the

court does not explicitly decide whether the monetary bail is affordable. The government does not establish and the court does not determine the need for the pretrial detention, much less through clear and convincing evidence at an adequate hearing. As a result of these substantive and procedural shortfalls, the Respondent Sheriff for Leon County, Florida ("Sheriff"), detains accused inmates without due process in violation of the Fourteenth Amendment to the U.S. Constitution.

II. STATEMENT OF MATERIAL FACTS

Pursuant to the Scheduling Order (ECF 25)[2], ¶ 7(B), Knight submits the following statement of material facts:

A. Numerous inmates are held on unaffordable monetary bail

At any one time, over 165 presumptively innocent persons in the Leon County jail ("Jail") are (a) Florida residents, (b) detained awaiting trial, and (c) eligible for pretrial release upon satisfaction of monetary bail. *See Inmates with Open Charges* (ECF 93-14 through 93-17) (numbering in handwriting over 165 Jail inmates with a listed monetary bail amount for each charge[3] on specific days

[2] "ECF" refers to the docket entry of the document filed with the Court.

[3] In some instances, "NINF" is listed in place of a bond amount to indicate that the prosecutor filed a "No Information," dismissing the charge.

within four identified months (Dec. 2017 – Mar. 2018));[4] *see also* Sheriff's Admission (ECF 93-12), No. 23 (admitting 100 persons). They could get out of jail once they satisfy the monetary bail. Of these 165 persons, the vast majority also cannot afford the monetary bail and thus constitute the putative class. Pet. (ECF 1), ¶ 34 (defining the class). An accused would rarely if ever choose to remain detained, if she could buy her freedom.[5] Thomas[6] Decl. (ECF 5-1), ¶ 2(e). In this way, an unaffordable bail results in pretrial detention for over a hundred of pretrial inmates in the Jail.

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[4] *See* Zamora's Decl. (ECF 47-1), ¶¶ 2-3 (describing how these inmates may be identified).

[5] The Sheriff believes a significant number of pretrial inmates eligible for release *prefer* pretrial detention over release. Sheriff's Interrog. Ans. (ECF 93-13), No. 24. Yet, really only a small minority *choose* to stay jailed. Thomas Dep. (ECF 93-8), 108:1–109:23, 112:11-18, 133:5-20. Indeed, most Jail inmates are indigent and represented by the public defender and thus likely cannot afford the monetary bail. Thomas Dep., 122:11–123:1. Whether the number is over 165 or some number slightly less, the Sheriff admits the class is sufficiently numerous to satisfy Rule 23(a)(1). Sheriff's Admission (ECF 93-12), No. 20; Sheriff's Resp. to Class Certification (ECF 69) at 28.

[6] Andy Thomas is the elected Public Defender for Florida's Second Judicial Circuit. Thomas Decl. (ECF 5-1), ¶ 1. He has represented numerous clients at first appearance over his two decades of work in the Circuit. Thomas Dep. (ECF 93-8), 73:10-12. He handled all weekday first appearances for the public defender for six to eight months. *Id*., at 50:10-11. He confirmed with people in his office that first appearances had not changed for his declaration. *Id*., at 83:6-22. He has not handled first appearance since 2016. *Id*., at 98:2. Although he has not handled a first appearance since 2016, he has witnessed them and discussed them with his assistants to guide their practice and the private bar. *Id*., at 184:7–186:4.

B. Florida authorizes orders of pretrial detention — Leon County simply imposes unaffordable bail

1. Pretrial detention statute

Florida law permits the government to directly detain an unmanageable criminal defendant subject to substantive and procedural requirements. Fla. Const., art. I, § 14. The government must establish its need for pretrial detention—that "no conditions of release will reasonably" assure public safety or the defendant's appearance at subsequent proceedings.[7] § 907.041(4)(c), Fla. Stat. The government must establish this need "beyond a reasonable doubt" at an appropriate hearing. Fla.R.Crim.P. 3.132(c)(1).

However, prosecutors in Leon County seek this de jure pretrial detention in only a handful of cases annually. Cuzzort[8] Dep. (ECF 93-5), at 35:3-7; 49:18-21. Instead, prosecutors detain unmanageable pretrial inmates through the imposition of an unaffordable bail. Cuzzort Dep., 48:3-19; Thomas Decl. (ECF 5-1), ¶ 4; Thomas Dep. (ECF 93-8), 140:3-8. This is understandable: Effectuating pretrial detention through unaffordable bail is easier than satisfying the strictures of the

[7] Florida law also authorizes detention orders of those charged with a life or capital offense or arrested for a new crime while on pretrial release. *State v. Arthur*, 390 So. 2d 717, 717 (Fla. 1980); § 903.0471, Fla. Stat.

[8] Erin Cuzzort is a state prosecutor in Leon County. She testified as the State Attorney's Rule 30(b)(6) designee. She has handled "thousands" of bail hearings in Leon County in state court. Cuzzort Dep., 65:16-18.

pretrial detention statute. Cuzzort Dep., 49:10-16. The government achieves the same pretrial detention without the due process hurdles.

2. Indifference to resulting detention

Even when monetary bail is imposed without an intent to detain, it is often unaffordable and results in pretrial detention nonetheless. A summary of cases opened in 2017 shows that nearly half of the accused who were eligible for release upon satisfaction of a monetary bail imposed at first appearance were still detained five days later. Baggs's Decl. (ECF 82), ¶ 26.

In 2017, the clerk opened 7,269 cases in the CF, MM, CT and HV divisions[9] in which an arrest was made at some point in the case.[10] Baggs's Decl., ¶ 13. The cases include 14,512 individual charges. *Id*., ¶ 14. For each charge, Knight's

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[9] These are criminal divisions. "CF" means felony; "MM" means misdemeanor; and "CT" means criminal traffic. Fla.R.Jud.Admin. 2.245(b); Fla. Supreme Court Administrative Order, *Uniform Case Numbering System* (Dec. 3, 1998) at 4, http://www.flcourts.org/core/fileparse.php/255/urlt/AO_Uniform_Case_Numbering_12-03-98_amended.pdf. "HV" denotes the clerk's cases created for holds based on probable cause of a violation of probation in another county. Bauman's Decl. (ECF 82-4), ¶ 3(a).

Civil (CA and CT) and domestic relations (DR) cases were excluded from Baggs's review, although occasional arrests occur in these divisions, e.g., contempt of court. Baggs's Decl. (ECF 82), ¶ 12.

[10] The Clerk for Leon County provided Knight an extract of cases created or opened in which an arrest was made at some point in the case. *See* Bauman's Decl. (ECF 82-4) at 1, ¶ 3(a) (detailing the cases included in the extract). Baggs downloaded and summarized the case information in this extract. Baggs Decl. (ECF 82), ¶¶2-3. The case information Baggs summarized was filed at ECF 84.

summary witness John Baggs recorded four things in Exhibit 1 (ECF 82-1). (1) Under "First Appearance Result," he recorded the monetary bail amount, if any,[11] imposed at a first appearance held shortly after the case opening, otherwise, he left the field blank. Baggs's Decl., ¶ 17. (2) Under "Detention Status," he recorded whether the accused remained detained 5 days after the case was opened. *Id*., ¶ 23. (3) Under "Holds," he recorded whether at the time of first appearance the person was denied bail in previously filed case (VOP or violation of pretrial release terms), had an out-of-county arrest warrant, or was already in jail on another case. *Id*., ¶¶ 18-21. (4) Under "Attorney," Baggs recorded the most recent attorney assigned to the case was a private counsel or one provided by the government. *Id*., ¶ 22.

Of course, release is an all-or-nothing affair. Satisfying bail for one charge, but not all, does not result in release. Accordingly, Baggs aggregated the charges in all cases opened on the same day against a single defendant to provide a comprehensive picture of her barrier to release. Combining these charges, he

[11] If the court ordered pretrial release without monetary bail (e.g., release on own recognizance (ROR) or supervised pretrial release), Baggs recorded a de minis amount ($0.0001) to distinguish these instances from those in which no bail was imposed at first appearance, e.g., when the accused was released prior to first appearance. Likewise, to indicate circumstances where the court denied bail, Baggs recorded an incredibly high amount ($987,654,321). Baggs Decl., ¶ 17.

found there were 7,000 same-day-charge-combinations of arrested criminal defendants in 2017. Baggs Decl. (ECF 82), ¶ 15. And for each combination, Baggs aggregated his notations from Exhibit 1 (ECF 82-1). In Exhibit 2 (ECF 82-2) he added together the individual bail amounts ("Sum of First Appearance Results") and noted whether the clerk recorded a result from first appearance in every charge ("First Appearances Occurred"), the accused was released within 5 days on all charges (otherwise noting "detained") ("Aggregate Detention Status"), her attorney was a public defender on a single charge ("Overall Attorney"), and whether any holds thwarted release on the current Leon County charges ("Any Holds"). Baggs Decl., ¶ 25. Based on the aggregate bail amount, Baggs also recorded under "Bail Determination" whether bail was denied on any charge ("No Bail Imposed") or whether no monetary bail was ever required at first appearance ("Bail Denied"), otherwise he recorded "Bail Assessed." *Id*.

Of these 7,000 aggregated combinations from 2017, Baggs found 2,148 involved an accused who was eligible for pretrial release upon satisfaction of a monetary bail imposed at first appearance. Baggs's Decl. (ECF 82), ¶ 26. Of these 2,148 accused, 44% (936/2,148) remained detained 5 days after the case was

opened.[12] *Id*.; *see also* Exhibit 3 (ECF 82-3). Most were indigent. Strikingly, those who could not afford a private attorney were twice as likely to be detained (52% (828/1,584)) compared to those who could afford a private attorney (19% (97/523)). *Id*. This suggests, unsurprisingly, that indigency for purposes of counsel correlates with an inability to satisfy a monetary bail.

Therefore, whether by intent or indifference, the state court routinely imposes a monetary bail that is unaffordable and results in pretrial detention.

C. Monetary bail determinations in Leon County

In Leon County state courts, the bail determination—largely done at first appearance—is constitutionally inadequate. The accused's ability to afford the monetary bail is routinely disregarded and rarely if ever decided. The government does not justify any need for the likely detention following the imposition of an unaffordable monetary bail, much less with clear and convincing proof.

1. First appearance

The vast majority of bail determinations occur at first appearance. Cuzzort Dep. (ECF 93-5), 14:5-8. Those who request a bail rehearing remain jailed at a

[12] Notably, 60% of the 936 detained accused were black. ECF 82-2. However, according to the U.S. Census, blacks compromise only 32% of Leon County's population. Accordingly, blacks are detained pretrial on an unaffordable at over twice the rate of others.

minimum while her attorney confers with her, prepares and files a motion to modify the bail, and schedules it. The court usually hears the motion some weeks later. Beard[13] Dep. (ECF 93-2), 55:4-15 (2 weeks); Thomas Dep. (ECF 93-8), 61:19-24, 103:13-15 (2-3 weeks); Hankinson Dep. (ECF 93-6), 48:13-21 (no more than 2 weeks). However, even within these first few weeks, the accused has often already incurred the collateral consequences of pretrial detention. Thomas Dep., 103:13-20 (job and housing loss). The court rarely grants motions to reduce monetary bail. Beard Dep., 27:6-14; Thomas Dep., 61:19–63:2, 99:20-23. Habeas relief is rarely granted. Beard Dep., 44:13–45:4, PD-30(b)(6) Dep.[14] (ECF 93-9), 25:13-15. Consequently, the bail imposed at first appearance generally remains the same throughout the duration of the accused's case. Cuzzort Dep., 87:15-20. Unless the accused as some initial luck, the bail determination at first appearance is dispositive for the entire case.

Five Leon County Court judges conduct first appearance hearings Monday through Friday for a given week on a 5-week rotation: Judges Aikens, Ashenafi-

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[13] Allen Beard is an assistant public defender. He represented Knight before the state trial court in the underlying criminal case.

[14] Andy Thomas, *see supra,* note 6, designated himself as the Public Defender's Rule 30(b)(6) designee. To differentiate Thomas's individual deposition from his designee deposition, Knight identifies the second as "PD-30(b)(6) Dep."

Richardson, Everett, Flury, and Smith. Cuzzort Dep. (ECF 93-5), 77:13–78:1; *see also Second Judicial Circuit's Circuit and County Judge Assignments*, Admin. Order 2016-03 (2nd Amended) (ECF 83 at 9) (listing judges). Weekend duties are handled by all judges throughout the Second Circuit on rotation. Cuzzort Dep., 78:2-13.

In Leon County, an accused's first appearance court occurs the morning after arrest. Campbell[15] Dep. (ECF 93-4), 15:16-20; Cuzzort Dep., 79:10-14; Fla.R.Crim.P. 3.130(a). The hearings follow a routine. Campbell Dep., 41:8-14. First, the court reviews the accused's financial affidavit and appoints the public defender as necessary. Fla. R. Crim. P. 3.130(c)(1). Second, the court determines whether probable cause supports an unwarranted arrest. Fla. R. Crim. P. 3.133(a)(1). Third, the court determines whether the accused is eligible for pretrial release, and if so, its conditions, including monetary bail. On average, an individual's first appearance lasts less than 3½ minutes. Zamora Decl. (ECF 83), ¶ 7(i).

[15] Christina Campbell is a senior pretrial release officer with Leon County. Campbell Dep., 7:6-7. For the last two years, she has attended every first appearance during the workweek aside from vacations and sick days. Campbell Dep., 19:3-7.

At first appearance, when the accused is first appointed a public defender, Beard Dep., 20:6-13, she has no opportunity to privately confer with her attorney. Aikens Dep. (ECF 93-1), 60:7–62:11 (conversation would be broadcasted in courtroom); Campbell Dep., 58:12-25; Beard Dep., 19:9-17. Conferrals of any kind during weekday first appearances are further impeded because the accused remains at jail, while the other hearing participants are in courtroom downtown. Campbell Dep., 58:2-7.

2. Bail determinations

When determining bail, the state court rarely inquires into an accused's ability to pay monetary bail and it does not determine whether the monetary bail is affordable or whether less-restrictive alternatives are available. Twenty-three digital recordings of 401 first appearance hearings (ECF 85)[16] on 21 days before 11 judges in the fall of 2017, Zamora Decl. (ECF 83), corroborate witnesses' testimony as to these undisputed facts. Notably, the judges' practices during first appearance vary little. Campbell Dep. (ECF 93-4), 43:1-21, 54:11-16. It is an "assembly line." PD-30(b)(6) Dep. (ECF 93-9), 30:9-24. First appearance hearings proceed as follows:

[16] Notice of Filing (ECF 85) inaccurately stated that 24 digital recordings were filed. However, there are only 23 recordings. Zamora Decl., at 3, ¶ 5.

(a) The focus at first appearance is the determination of probable cause and the appointment of counsel, not the bail determination. Judges usually spend most of the time reading the probable cause statement in arrest reports. Zamora Decl., ¶ 7(a); Campbell Dep., 37:6-11; Cuzzort Dep. (ECF 93-5), Hankinson Dep. (ECF 93-6), 24:1-10; 82:6-17; PD-30(b)(6) Dep., 43:21–44:8. Bail is generally determined "immediately following" the determination of probable cause—almost as an afterthought. Zamora Decl., ¶ 7(a); PD-30(b)(6) Dep., 44:9-12.

(b) Most judges impose monetary bail based on the charged offense in conformity with the Bond Schedule.[17] Cuzzort Dep., 83:19-22, 51:3–52:4; Thomas Dep. (ECF 93-8), 28:19–29:5, 54:8-23; PD-30(b)(6) Dep., 32:2-4; Thomas Decl. (ECF 5-1), ¶ 5(c).

(c) Judges routinely determine bail with neither arguments nor an evidentiary presentation from the prosecutor. Zamora Decl., ¶ 7(a); Cuzzort Dep., 32:3-9, 50:15–51:2; Thomas Dep., 167:9-20, 168:18–169:22; Thomas Decl., ¶ 5(c).

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[17] Revised Bond Schedule (Apr. 2018) (ECF 93-24), like its predecessor (ECF 93-23), lists a monetary bail amounts based on the charged offense. Notably, the charged offense is not a good predicter of failures to appear or new criminal activity. Latessa Dep. (ECF 93-6), 53:19-23. Experts agree that other considerations should determine bail.

(d) Routinely, no inquiry is made into the accused's ability to pay the monetary bail.[18] Zamora Decl. (ECF 83), ¶ 7(c); Thomas Dep., 152:8-21 (rarely occurs); PD-30(b)(6) Dep., 44:13-21; Thomas Decl. (ECF 5-1), ¶ 5(a, d); Beard Dep. (ECF 93-2), 97:13–98:1; *see also* Sheriff's Interrog. Ans. (ECF 93-13), No. 23 (stating the Sheriff does not possess contrary information). Judges only inquire into financial status to determine the appointment of the public defender. Zamora Decl., ¶ 7(c). In only a "handful" of the 401 hearings did the court inquire about the accused's ability to pay a monetary bail. Zamora Decl., ¶ 7(d). Judge Hankinson explains the ability to pay simply cannot be determined at first appearance. Hankinson Dep. (ECF 93-6), 34:12-22.

(e) Even if the court inquiries into ability to pay, judges do not explicitly find what monetary bail would be affordable.[19] Zamora Decl.,

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[18] Before late April 2018, the County's supervised pretrial release program ("SPTR") did not ask pretrial detainees about what monetary bail they could afford. Campbell Dep., 20:20–21:2. The Bond Schedule (April 2018) (ECF 93-24 at 14), includes a "minor change" (Hankinson Dep., 63:8–64:2) that requests that SPTR interview inmates about "the maximum amount of financial security that you can post or pay up front within 24 hours of this arrest." However, some accused may lack the education to understand that "financial security" means cash or property. *See* PD-30(b)(6) Dep., 34:3-4 (literacy problem with some clients).

[19] The Court precluded discovery of judges' unspoken considerations at first appearance. Order (ECF 89). However, Florida caselaw and judicial training suggest judges do not consider the accused's ability to pay the monetary bail or the availability of less-restrictive alternatives to pretrial detention through an unaffordable bail.

¶ 7(e); Campbell Dep, 44:17–46:8; Cuzzort Dep., 86:12-16; PD-30(b)(6) Dep., 44:22–45:6; Beard Dep., 91:7-17.

(f) When imposing monetary bail, judges do not specifically find whether the likely pretrial detention is necessary or whether less-restrictive alternatives to the monetary bail that may result in pretrial detention exist.[20] Zamora Decl., ¶ 7(g); Campbell Dep., 51:18–52:15; Thomas Decl. (ECF 5-1), ¶ 5(e); Thomas Dep., 165:5-18; Cuzzort Dep., 72:8-20, 74:4-18 (explaining she sees no reason the court would ever determine need for pretrial detention in setting a monetary bail—"that's an oxymoron"—regardless if the bail is unaffordable), 87:7-14, 89:11–90:24; PD-30(b)(6)

Binding Florida First District Court of Appeal opinions permit judges to impose unaffordable bail. *Mehaffie v. Rutherford*, 143 So. 3d 432, 434 (Fla. 1st DCA 2014). Financial resources is one consideration among many in setting bail; inability to satisfy the monetary bail does not trigger due process safeguards attendant to de facto detention. *Id*. No state law reason suggests judges should consider affordability or the availability of less-restrictive alternatives.

Likewise, the Florida Supreme Court mandates new judges complete the Florida Judicial College program. Fla.R.Jud.Admin. 2.320(b)(2). The program includes a course entitled *First Appearance and Pleas* (2018) (ECF 93-18), at 11-12, and *First ~~Impressions~~ Appearances* (2016) (ECF 93-19), at 8-9. Aikens Dep., 10:12-25, 13:12-23. The courses' materials summarize court rules and laws and provide practical guidance. Aikens Dep., 12:5–13:6, 14:12-14. Similarly, the Florida Court Education Council's *Criminal Benchguide for Circuit Judges* (2016) (ECF 93-20), at pdf-page 25-26, instructs judges about what to consider in determining bail. *See* Aikens Dep., 21:21–22:23, 23:20–27:11. However, none of these educational materials instruct (or even mention) judges to consider or determine whether the accused can *afford* the monetary bail or availability of less-restrictive alternatives.

[20] *See supra,* note 19.

Dep., 46:5–47:9; *see also* Sheriff's Interrog. Ans. (ECF 93-13), Nos. 17, 19 (stating the Sheriff does not possess contrary information). Indeed, judges rarely justify the imposed monetary bail at all.[21] Campbell Dep., 51:22–52:15; PD-30(b)(6) Dep., 45:19–46:4.

(g) Likewise, judges do not specifically find whether the government established any possible resulting pretrial detention by clear and convincing proof (or beyond a reasonable doubt). Zamora Decl., ¶ 7(h); Campbell Dep., 52:16–53:1; Cuzzort Dep., 65:19–66:10, 68:4-8; PD-30(b)(6) Dep., 47:10–48:6; Thomas Decl. (ECF 5-1), ¶ 5(e); *see also* Sheriff's Interrog. Ans. (ECF 93-13), No. 18 (stating the Sheriff does not possess contrary information).

Together, the routine practice of determining bail in Leon County fails to ensure a person is not unnecessarily detained because she cannot afford the monetary bail. Indeed, often the judge appoints the public defender because the accused is indigent and then imposes a monetary bail that results in her detention.

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[21] Indeed, judges often arbitrarily settle on a specific amount of monetary bail. *See* 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.").

Baggs's Decl. (ECF 82), ¶ 26 (52% (828/1,584) of those eligible for pretrial release upon satisfaction of a monetary bail imposed at first appearance, but remained detained 5 days later, were represented by a public defender).

3. Monetary bail must be secured

In Leon County, the court requires its monetary bail to be satisfied by a professional surety bond, cash, or in exceptional instances real property; a mere promise to pay—an unsecured appearance bond—is insufficient. Cuzzort Dep. (ECF 93-5), 53:12-21; Judge Hankinson Dep. (ECF 93-6), 39:8-24; Judge Aikens Dep. (ECF 93-1), 75:8-12, 76:9-13; Campbell Dep. (ECF 93-4), 53:2–54:3; PD-30(b)(6) Dep. (ECF 93-9), 48:7–49:4; Beard Dep. (ECF 93-2), 77:19-23, 82:1-7. Although the Sheriff may approve unsecured bail for release, § 903.34, Fla. Stat., he does not accept unsecured, personal promises to pay the monetary bail. He only accepts cash and surety bonds.

D. Unaffordable bail is unnecessary

Pretrial detention through the imposition of an unaffordable bail is rarely necessary. Jones Decl. (ECF 93-10), ¶ 10. The government may reasonably assure its sole constitutionally-recognized bail interests—the accused's trial appearance[22]

[22] Oddly, Florida undermines its professed interest in securing the defendant's presence at trial, *see* § 903.046, Fla. Stat., in two ways. First, a criminal defendant who appears at trial, but is convicted, does not get back his entire cash bond or appearance bond deposit. § 903.286(1),

and "preventing crime by arrestees,"[23] *Salerno*, 481 U.S. at 749—without imposing unaffordable bail. It can do so by properly assessing the accused's risk of pretrial failure and managing it with available nonfinancial conditions. Indeed, other jurisdictions similar to Leon County successfully release accused person, while maintaining community safety and speedy administration of justice.

1. Pretrial release program

Leon County operates a supervised pretrial release program (SPTR) with a $1.2M budget and 14 employees to provide alternative to monetary bail and

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Fla. Stat. (permitting the clerk to withhold court costs from a cash bond). This is constitutionally suspect inasmuch as it converts the purpose of bail from securing appearance at trial to satisfying a judgment. *See Cohen v. United States,* 82 S.Ct. 526, 528 (1962) (Douglas, J., dissenting on denial of certiorari) (arguing bail was excessive when conditioned on bail bond operating as supersedeas to a judgment for the payment of a fine).

Second, Florida does not use the proceeds it receives from a forfeited bond to make any effort to achieve its stated goal of ensuring the defendant appears for trial. Instead of specially employing someone or an agency to apprehend the defendant with this forfeited windfall, the clerk keeps it. § 903.26(3)(a), Fla. Stat. (directing that state and county forfeited money shall be deposit in the clerk's fine and forfeiture fund); § 142.01(1), Fla. Stat. (permitting the clerk to use this fund "in performing court-related functions"). This too is constitutionally suspect as the "purpose of bail … is not to enrich the government." *United States v. Rose*, 791 F.2d 1477, 1480 (11th Cir. 1986).

[23] "Money bail, however, has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes." *In re Humphrey*, 228 Cal. Rptr. 3d 513, 528 (Ct. App. 2018), *cert. granted*, 2018 WL 2375685 (Cal. May 23, 2018); *Reem v. Hennessy*, 17cv6628, 2017 WL 6539760, at *3 (N.D. Cal. Dec. 21, 2017) ("[monetary] bail the person posts does nothing to incentivize him not to commit crimes"). Indeed, in Florida, posted monetary bail is returned when a person is arrested for a new crime on pretrial release. § 903.31, Fla. Stat. (specifying conditions to cancel a bond); § 903.28, Fla. Stat. (prescribing that a forfeited bond shall be remitted and judgment satisfied upon the apprehension of the defendant).

incarceration. Broxton[24] Dep. (ECF 93-3), 24:2-6, 27:7–28:17; Leon County Budget (FY2018) (ECF 93-21 at 13, 23). The County hopes SPTR will reduce the jail population and save the taxpayers $10M in incarceration costs. Broxton Dep., 26:4-6; Budget (ECF 93-21 at 22). To accomplish this, SPTR both assesses the accused's risk of pretrial release success and monitors those enrolled in its program to manage that risk. Broxton Dep., 38:10-25, 67:2-18; Campbell Dep., 23:9-17.

2. Risk assessment

To assess the accused's risk of pretrial release success, SPTR prepares a Pretrial Defendant Information sheet. It always includes the accused's current and pending charge(s) and prior criminal history. Broxton Dep., 133:20-24; Campbell Dep., 19:16-17. It also may include a Vera Point Scale assessment of the accused's risk of pretrial release success (ECF 58-3 at 5). Broxton Dep., 67:2-4, 16-18. This is provided to the court before first appearance.[25] Broxton Dep., 79:12-19.

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[24] Teresa Broxton is the Director for the Leon County Office of Intervention Detention Alternatives. Broxton Dep., 10:8-10. She oversees the County's Supervised Pretrial Release Division (SPTR). *Id.,* at 10:13-17.

[25] Verification is necessary for release to SPTR prior to first appearance pursuant to the Bond Schedule (April 2018) (ECF 93-24), p. 8, ¶ II(B). Broxton Dep., 149:12-14; *see also* Bond Schedule (2006) (ECF 93-23), ¶ II(B) (same). However, SPTR is rarely able to verify interview answers. Broxton Dep., 74:1-6, Campbell Dep., 28:2-4. Consequently, SPTR only releases annually about 25 people *per year* before first appearance. Broxton Dep., 152:3-20. Indeed, because only the prior criminal history is automatically verified by SPTR, Campbell Dep., 79:6-

Notwithstanding the availability of the risk assessment, the government poorly assesses the accused's risk of failure to appear or new criminal activity. Judges do not rely on the SPTR's Vera risk assessment.[26] Campbell Dep., 30:8–31:6; *see also* Zamora Decl., ¶ 7(f) (judges do not discuss the county's Vera Point Scale score). Instead, they appear to independently and subjectively determine the accused's risk. Yet, research establishes that the judge's subjective determinations of risk are less accurate than validated risk assessments. Latessa[27] Dep. (ECF 93-7), 40:7-11. And reliance on a validated risk assessment would better enable judges to tailor pretrial release conditions to actual risk. Jones Decl., ¶¶ 17, 44; Latessa Dep., 41:2-21, 161:17-24. Unnecessarily high and unaffordable bail could be avoided.

3. Risk management

Once the accused's risk is properly assessed, less-restrictive alternatives to pretrial detention through the imposition of an unaffordable bail may reasonably

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17, 80:1-4, and the highest score from criminal history is 3 (no convictions) (ECF 58-3 at 5), Broxton Dep., 75:15-20, few could be released pursuant to the Bond Schedule that requires a verified score of 4, Bond Schedule (April 2018), ¶ II(B).

[26] This is peculiar given that SPTR prepares the risk assessment at the judiciary's demand. Broxton Dep., 86:10-14; Campbell Dep., 84:25–85:3. Ultimately, if the state court demanded another tool, SPTR would prepare it as ordered. Broxton Dep., 63:4-7; Campbell Dep., 84:22-24.

[27] Edward Latessa is the Sheriff's expert.

assure these interests. Jones Decl. (ECF 93-10), ¶ 46; *ODonnell v. Harris County, Texas*, 251 F. Supp. 3d 1052, 1120 (S.D. Tex. 2017) ("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.") (citing 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.")) *aff'd as modified,* No. 17-20333, 2018 WL 2465481 (5th Cir. June 1, 2018).

In particular, unsecured appearance bonds—where the accused is release on the promise to pay an amount, if she fails to appear—equally assure pretrial success.[28] Jones Decl. (ECF 93-10), ¶¶ 35-40; *see also* Latessa Dep. (ECF 93-7), 69:4-16 (no opinion about the efficacy of unsecured bail as compared to secured monetary bail), 121:4–123:1 (same). Although Florida law permits unsecured bonds, Fla.R.Crim.P. 3.131(b)(1)(B),[29] they are not used in Leon County. *See*

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[28] The State Attorney and Judge Aiken have no reason to doubt that unsecured appearance bonds may effectively achieve the aims of bail. Cuzzort Dep., (ECF 93-5) at 54:16–55:9; Aikens Dep. (ECF 93-1), 76:18–77:7.

[29] Notably, the availability of unsecured appearance bonds and other non-monetary conditions underpinned *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978). The provision of unsecured appearance bonds was finally included in the criminal Florida rules in 1977 upon the urging of the plaintiffs' attorney and the Circuit's suggestion. *Pugh v. Rainwater*, 557 F.2d

supra, §II(C)(3), p. 17. Judges Aikens and Hankinson believe that unsecured bonds logically cannot incentivize a poor, judgment-proof defendant who has nothing to lose by failing to appear. Aikens Dep., 88:7-19, 92:12–93:5; Hankinson Dep., 57:10–59:9. Yet, if the accused cannot afford to later satisfy an unsecured appearance bond, it is indeed questionable how she is able to satisfy a secured monetary bond at the onset. In any case, after the accused purchases a secured bond, she likely also has nothing more to lose by failing to appear. *See ODonnell*, 251 F. Supp. 3d at 1109 ("[T]he unsecured personal bond and the secured surety bond provide an equivalent lack of financial incentives to appear during pretrial release."). Ultimately, inasmuch as the government finds no need for and does not detain the majority of criminal defendants *after* trial, detaining them *before* trial does not appear necessary. *See* Florida Department of Corrections, Florida's Criminal Punishment Code: A Comparative Assessment (Sept. 2017) (ECF 93-22), at 37 (pdf-page 45), Table 3 (showing state courts resolve most criminal cases (54.3%) in Leon County by sentencing the criminal defendant to probation, not incarceration).

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").

Two additional, less-restrictive alternatives to unaffordable monetary bail exist. "[C]ourt date reminders are the single most effective pretrial risk management intervention for reducing failures to appear." Jones Decl., ¶ 42; *see also* Latessa Dep. (ECF 93-7), 60:10-14. However, they do not appear to be used in Leon County. Additionally, pretrial supervision often assures the government's bail interest while also reducing pretrial detention. Jones Decl., ¶ 43. Leon County operates a program that could be better utilized.

The government has at its disposal, but fails to use, these less-restrictive alternatives to detention through an unaffordable monetary bail.

E. Pretrial detention adverse effects

Pretrial detention has devasting effects on the accused. Jones Decl. (ECF 93-10), ¶¶18-28. It hampers the "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) (en banc) ("*Rainwater*").[30] "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*

[30] 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.

also Barker v. Wingo, 407 U.S. 524, 532-33 (1972). It adversely effects the accused's trial outcomes. *ODonnell,* 251 F. Supp. 3d at 1105 (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, Leon County prosecutors use pretrial detention to embolden their plea-negotiation position. Cuzzort Dep., 16:3-11; Thomas Dep. (ECF 93-8), 80:1-9, 81:1-4, 82:22–83:2. And it costs Leon County about $78/day per inmate. Broxton Dep. (ECF 93-3), 26:19-21.

F. Factual Summary

Whether by design or indifference, un unaffordable monetary bail results in the pretrial detention for over a hundred of pretrial inmates in the Jail. The government does not establish its need for the pretrial detention or why other less-restrictive alternatives will not suffice. It does not prove this with clear and convincing proof. Yet, an unsecured appearance bond, pretrial supervision, or simply release on own recognizance often would assure the government's interests in trial appearance and community safety. As a result, the accused inmates remain detained pretrial and risk losing their job, housing, and proper preparation of a defense. Some accused inmates simply fold under the pressure and plea guilty in exchange for their freedom.

III. SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Looney v. Moore*, 886 F.3d 1058, 1062 (11th Cir. 2018) (quoting Fed.R.Civ.P. 56).

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party must identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting former Fed. R. Civ. P. 56(e)). It is not sufficient for the nonmoving party "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, Rule 56 "requires the nonmoving party to go beyond the pleadings" and

present some type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S. at 324.

Cross-motions for summary judgment do not change the summary judgment standard, but "simply requires a determination of whether either of the parties deserves judgment as a matter of law on the facts that are not disputed." *Proch v. DeRoche*, No. 3:08-cv-484, 2011 WL 6841319, at *6 (N.D. Fla. Dec. 20, 2011) (citing *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328, 1331 (11th Cir. 2005)).

As demonstrated below, there are no material facts in dispute, and Knight and the class members are entitled to judgment in their favor as a matter of law.

IV. Argument

An unaffordable monetary bail results in pretrial detention. To assure that a monetary bail provides a means of pretrial release, as opposed to pretrial detention, the state court must inquire and determine whether it is affordable. If the monetary bail is unaffordable, then the resulting pretrial detention must be determined necessary with no less-restrictive alternatives. Furthermore, the government may not sidestep the constitutionally required procedure to effect pretrial detention. Instead, the prosecutor must establish and the court must determine this need by clear and convincing proof at an adequate hearing the prosecutor requests.

Nevertheless, in Leon County, the state court regularly impose monetary bail without determining if it is affordable—and in many cases it is not. Furthermore, an unaffordable monetary bail is regularly imposed without a determination that the pretrial detention is necessary with the degree of confidence required to deprive a person of liberty. This results in numerous accused inmates being detained in violation of the U.S. Constitution.

A. An unaffordable bail constitutes pretrial detention.

An unaffordable monetary bail presents an "illusory choice."[31] Because the accused cannot satisfy the monetary bail, jail is the only possible outcome of the 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

[31] *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).

no conditions at all"); *ODonnell*, 251 F. Supp. 3d at 1156 (holding that secured money bail set in an amount that an arrestee cannot afford is constitutionally equivalent to an order of detention).

Here, monetary bail routinely results in pretrial detention because it is unaffordable. Baggs's Decl. (ECF 82), ¶ 26; *see also supra*, note 5. A declaration is warranted. Pet. (ECF 1), ¶ B(1).

B. Pretrial detention though an unaffordable bail must comply with substantive and procedural requirements for pretrial detention.

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 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"); *United States v. Westbrook*, 780 F.2d 1185, 1188 (5th Cir. 1986) ("If … 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."); *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* S. Rep. No. 98-225, at 16 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 (reporting that in passing the Bail Reform Act of 1984 Congress believed that when the monetary bail was unaffordable, then there is "no available condition of release that will assure the defendant's appearance" and courts should conduct a pretrial detention hearing).

Pretrial detention—whether ordered directly or through the imposition of an unaffordable bail—must be clearly proven and determined necessary.

C. Government must determine whether the accused can afford the monetary bail.

Pretrial detention must serve a purpose. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). However, to ensure pretrial detention actually serves a purpose, the government must inquire and determine whether detention results from the accused's inability to satisfy a monetary bail. *Hernandez v. Sessions*, 872 F.3d 976, 992-93 (9th Cir. 2017) ("[T]he government has no way of knowing if the detention that results from failing to post a bond in the required amount is reasonably related to achieving that interest," without inquiring into ability to pay). "[A]n express finding by the court that the defendant has the ability to pay" is an essential procedural safeguard to reduce the risk of erroneous deprivation of liberty. *Turner v. Rogers*, 564 U.S. 431, 448 (2011). This determination ensures the monetary bail will serve as a condition of release, not pretrial detention.

Indeed, unless the state court inquires and determines the accused's ability to satisfy a monetary bail, the accused may be deprived pretrial liberty "simply because, through no fault of [her] own, [s]he cannot pay" it. *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983); *ODonnell*, 251 F. Supp. 3d at 1143–44 (explaining that Harris County's automatic use of secured money bail, without an inquiry into ability to pay, presents an intolerably high risk of erroneous deprivation of a fundamental right); *id.* at 1161 (requiring an inquiry into ability to pay and notice to arrestees about the significance of the financial information they are asked to provide); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 534 (Ct. App. 2018) ("A determination of ability to pay is critical in the bail context to guard against improper detention based only on financial resources."), *cert. granted*, 2018 WL 2375685 (Cal. May 23, 2018); *De Luna v. Hidalgo County*, 853 F.Supp.2d 623, 648 (S.D. Tex. 2012) ("the absence of any inquiry into a defendant's indigency unless the defendant 'raises' it of his or her own accord does not provide the process due" and "risks that defendants who do not think to 'speak up' during arraignment about their inability to pay fines may be jailed solely by reason of their indigency, which the Constitution clearly prohibits").

The state court's failure to determine ability to pay is unconstitutional under the *Mathews* test[32] "because the minimal costs to the government of such a requirement are greatly outweighed by the likely reduction it will effect in unnecessary deprivations of individuals' physical liberty." *Hernandez*, 872 F.3d at 993. 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"). It considers the private interest, the government's interest, and risk of erroneous deprivation and probable value of additional safeguards. *Mathews*, 424 U.S. at 335. Here, the accused's interest in pretrial release is substantial. *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004). The government has no interest in detaining a person who may reasonably be released on less-restrictive conditions. *Hernandez*, 872 F.3d at 994. The inquiry and determination will not create an additional administrative burden. Indeed, the County's SPTR already includes ability to pay in its questionnaire, *see supra*, note 18, and Florida law already requires inquiry into financial conditions, § 903.046(2)(c), Fla. Stat. ("court shall consider … financial resources"); *Sylvester v. State*, 175 So. 3d 813 (Fla. 5th DCA 2014) (same). Finally, without this inquiry and determination, the accused will likely be needlessly deprived of the

[32] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

fundamental right to pretrial liberty. Baggs's Decl. (ECF 82), ¶ 26. The risk of erroneous deprivation only increases when the accused asserts that she cannot afford the monetary bail. *See* Pet. (ECF 1), ¶ C(2)(a). The considerations weigh heavily in favor of requiring the state court to determine whether the monetary bail is affordable.

Yet, here, the accused's ability to pay the monetary bail is routinely disregarded and never determined. *See supra,* §II(C)(2)(e-f), p.14. The Fourteenth Amendment requires the state to determine the accused's ability to pay. *See* Pet. (ECF 1), ¶ C(2)(i-ii).

* * *

In Leon County, a significant number (44%) of accused eligible for pretrial release upon satisfaction of a monetary bail imposed at first appearance remain detained five days later. Baggs's Decl. (ECF 82), ¶ 26. Most remain detained because they cannot afford the monetary bail. Thomas Decl. (ECF 5-1), ¶ 2(e); *supra*, note 5. When the monetary bail is unaffordable, the state court must proceed to determine if the resulting pretrial detention is necessary. The government bears the burden of establishing this necessity by clear and convincing proof at an adequate hearing. Only if the court determines government has

available no less-restrictive alternatives to pretrial detention through an unaffordable bail, may the court impose one.

D. An unaffordable bail must be necessary with no less-restrictive alternative.

1. 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"). Accordingly, the U.S. Supreme Court strictly scrutinizes pretrial detention. *Salerno*, 481 U.S. at 749-751 (1987) (analyzing the "fundamental" liberty interest, the government's "compelling" interest, and "narrow[] focus" of the application—the hallmarks of strict scrutiny).[33] A 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).

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

Strict scrutiny is also appropriate under an equal protection analysis. When the government does not utilize Florida's pretrial detention statute, but admits an accused to monetary bail, it must not discriminate by releasing a rich accused and detaining a poor one. *Bearden*, 461 U.S. at 672-73; *Pugh v. Rainwater*, 572 F.2d 1053, 1057-58 (5th Cir. 1978). Detaining poor defendants because of their indigence is subject to heightened scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973); *ODonnell v. Harris County*, No. 17-20333, 2018 WL 2465481, at *9 (5th Cir. June 1, 2018) (approving "[h]eightened scrutiny").

Consequently, the Respondent Sheriff bears the burden to prove that the imposition of an unaffordable monetary bail that results in pretrial detention is narrowly tailored. *Foucha v. Louisiana*, 504 U.S. 71, 80, 81-82 (1992); *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"); *Johnson v. Mortham*, 915 F. Supp. 1574, 1577 (N.D. Fla. 1996) ("Supreme Court has consistently required the government to demonstrate that the challenged actions are narrowly tailored to a compelling governmental interest" when applying strict-scrutiny test).

2. The government must establish there are no less-restrictive alternatives to pretrial detention through an unaffordable bail.

The U.S. Supreme Court has repeatedly applied its narrow-tailoring requirement specifically to where the inability to pay resulted in deprivation of liberty. Beginning with *Griffin v. Illinois*, 351 U.S. 12 (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.

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 forbade 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."

Accordingly, if the government's interest in "appearance at trial[34] could reasonably be assured by … alternate [conditions] of release, pretrial confinement for inability to post money bail" is unconstitutional. *Id.* at 1058. 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 three years, numerous federal district courts and state courts have reached the same conclusion.[35]

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[34] Monetary bail does nothing to advance the government's public safety interest. *See supra*, note 23.

[35] *See, e.g.*, ***ODonnell*** *v. Harris County, Texas,* 251 F. Supp. 3d at 1059 ("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."), *aff'd as modified*, No. 17-20333, 2018 WL 2465481 (5th Cir. June 1, 2018); ***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 with more specific injunction*, 2017 WL 2794064 (N.D. Ga. June 16, 2017); ***Rodriguez*** *v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 767 (M.D. Tenn. Dec. 17, 2015) ("Fourteenth Amendment requires an inquiry into indigency before probationers are held on secured money bonds and before they can be jailed solely on the basis of nonpayment."); ***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, *2 (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. 15cv567, 2015 WL 5071981 (M.D. La. Aug. 27, 2015); ***Pierce*** *v. City of Velda City*, No. 4:15cv570, 2015 WL 10013006 (E.D. Mo. June 3, 2015); *In re* ***Humphrey***, 228 Cal. Rptr. 3d 513, 526 (Ct. App. 2018) ("court may not order pretrial detention unless it finds … that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance"), *cert. granted*, 2018 WL 2375685 (Cal. May 23, 2018); *see also* ***Hernandez*** *v. Sessions*, 872 F.3d 976, 992–93 (9th Cir. 2017) ("when a

Each time they are confronted, this Circuit and numerous federal district courts have held that the imposition of an unaffordable bail would be unconstitutional where the government had at its disposal, but declined to utilize, 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.

3. The government has numerous less-restrictive alternatives.

For the class members detained pretrial in Leon County, several less-restrictive alternatives to pretrial detention through an unaffordable bail are available to reasonably assure the government's interests. The government's legitimate bail interests can be achieved if (1) the government permits an accused to satisfy the monetary bail through an unsecured appearance bond, Fla.R.Crim.P. 3.131(b)(1)(B).[36] (2) The government may also rely on a validated risk assessments tool to narrowly tailor pretrial release conditions to actual risk. (3) It may employ reminders to prevent negligent failures to appear. (4) It may better utilize the County's SPTR program to monitor defendants on pretrial release

person's freedom from governmental detention is conditioned on payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release").

[36] *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.").

without imposing a monetary bail. (5) It may reduce the monetary bail to an affordable level.[37] Because less-restrictive alternatives to pretrial detention through an unaffordable bail are available, the government in Leon County violates the Fourteenth Amendment by failing to instead utilize them.

These alternatives to pretrial detention have adequately achieved the government's interest in the District of Columbia, New Jersey, Illinois, the Northern District of Florida, and other jurisdictions. For example, effective Jan. 1, 2017, New Jersey enacted sweeping criminal justice reform that minimized the use of monetary bail. N.J. Stat. § 2A:162-15–25. It commands courts to utilize, in lieu of monetary bail, an evidence-based risk assessment and non-financial release conditions based on the accused's risks. Glenn Grant, Criminal Justice Reform Report to the Governor & the Legislature (2017), 1-2.[38] In 2017, only 0.1% (44/44,319) arrested criminal defendants were imposed a monetary bail. *Id*. at 4. Detention turned on public safety, not financial resources. *Id*., at 7. And the sky did not fall. In fact, crime statistics from the New Jersey State Police show no

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[37] *See* 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.").

[38] *Available at* https://www.judiciary.state.nj.us/courts/assets/criminal/2017cjrannual.pdf

major bump in violent offenses across New Jersey. Instead, for many serious crimes, the rates dropped. NJ Dep't of Law & Public Safety, Uniform Crime Report -1st Q (May 4, 2018).[39]

4. The government does not establish the absence of less-restrictive alternatives.

Here, no reason suggests that in individual cases the government establishes there are less-restrictive alternatives to pretrial detention through an unaffordable bail. Prosecutors rarely make any arguments and the state court routinely fails to determine this fact. *See supra,* §II(C)(2)(f), p.15. The government routinely does not meet its burden to establish that the pretrial detention through an unaffordable bail is necessary. This violates the Fourteenth Amendment. Pet. (ECF 1), ¶ B(2).

* * *

Of course, it is not enough for the government to have a substantive need for detention, the state court must determine whether the prosecutor 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

[39] *Available at* http://www.njsp.org/ucr/pdf/current/20180504_1stqtr2018.pdf

(emphasis added). However, in Leon County, that determination is not made. *See supra*, §II(C)(2)(f), p.15.

E. The state court may only impose an unaffordable bail when it determines the need for pretrial detention is established with clear 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 government denies procedural due process when it deprives liberty through an inadequate process. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). No serious dispute exists about the fundamental nature of liberty or its pretrial deprivation. *See supra*, § IV(D)(1), p. 33. Accordingly, Knight focuses on the inadequacy of the procedure of detaining an accused through an unaffordable bail.

When an accused's liberty, not just her money, is at stake, the government has a heightened standard of proof. The U.S. Constitution's mandate of procedural due process requires the state court to determine the need for pretrial detention 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.

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

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).

2. The U.S. Constitution mandates the state court to determine the need for a liberty deprivation based on clear proof.

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).

When the unaffordable monetary bail results in the accused's detention, much more than money is at stake and the state court must determine the government's need for pretrial detention based on a high standard of proof. 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).

Using the *Mathews* test,[40] the U.S. Supreme Court has consistently held that a court may only order civil commitment—including pretrial detention[41]—when it determines a need based on clear and convincing proof at an adequate hearing.[42]

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[40] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

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

[42] 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) 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,

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 v. Texas*, 441 U.S. 418, 433 (1979), the Court held that a court could not civilly commit the mentally ill without determining 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

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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).

Because the imposition of an unaffordable bail amounts to pretrial detention, the government should comply with Florida's detention procedures—§ 907.041(4), Fla. Stat., and Fla.R.Crim.P. 3.132. If the government complies with Florida's pretrial detention procedures, as requested, *see* Pet. (ECF 1), ¶ C(2), it would provide an adequate hearing so long as counsel represents and is able to confer with the accused. Notably, the accused is unable to confer privately with the public defender or her attorney at first appearance. Accordingly, the adequate hearing would have to take place either after first appearance, *see* Pet., ¶ C(2) (requesting hearing be conducted within 5 days), or at first appearance after a modification to permit private conferrals.

must prove by clear and convincing evidence that he is demonstrably dangerous to the community."[43]

The heightened procedural due process is appropriate here for several reasons. First, neither the accused nor the government 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 significantly greater than any possible harm to the state." *Id.*, at 427. The injury flowing from pretrial detention, *supra*, § II(E), p. 23, dwarfs the government's additional administrative burdens. Third, the least 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

[43] *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017) (holding pretrial detention—whether ordered outright or imposed through an unaffordable bail—must pass heightened procedural due process).

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.

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

3. Florida law, if followed, would require the state court to determine a need for detention based on clear proof.

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 state court's determination when the government seeks outright pretrial detention. § 907.041(4), Fla. Stat.; Fla. R. Crim. R. 3.132. The Petitioner asserts no current challenge to Florida's pretrial detention statue and rule. Instead, the present problem is that the state court routinely fails to follow these state pretrial detention procedures when imposing an unaffordable monetary.

4. Conclusion

In Leon County, no reason suggests that state court determines unaffordable bail any differently than affordable bail. Indeed, the court does not appear to ever determine the need for the monetary bail based on clear and convincing evidence. *See supra,* §II(C)(2)(g), p.16. 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 effects pretrial detention through a procedure that does not 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. When the monetary bail is unaffordable and results in detention, this procedure violates the Fourteenth Amendment. Pet. (ECF 1), ¶¶ B(3), C(2)(iii).

V. CONCLUSION

For nearly a half century, the inequities of the monetary bail system in Florida have been known. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 69-72 (Fla. 1972) (Ervin, J., dissenting) (describing the "inequities" of the "current discriminatory" money-bail system and favoring a rule that only permitted secured money bail as "a last resort" after the "judicial officer [gave] reasons" for rejecting alternatives). Nevertheless, detention in Leon County routinely continues to turn on whether the accused can afford the monetary bail, instead of whether the

government has a need for pretrial detention, established with clear and convincing proof. Without intervention from this Court, the government will continue to violate the Fourteenth Amendment.

Based on the foregoing arguments and authorities, Knight respectfully requests that this Court enter summary judgment on her and the putative class and provide the requested relief.

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

This filing contains a total of 11,340 words—in excess of the 8,000 word limit. The parties stipulated to a 12,000 word limit and requested the court approve this enlargement (ECF 91). The motion remains pending.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the date stamped in the CM/ECF header that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered for this case, including any opposing counsel that have appeared.

Respectfully Submitted,

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