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.

/

KNIGHT'S REPLY IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT

Petitioner Brittany Knight replies in support of her Motion for Summary Judgment (ECF 94) to the Response (ECF 105) ("Sheriff's Resp.") of Respondent Sheriff for Leon County, Florida ("Sheriff") and the Memorandum of Law (ECF 106) ("Florida's Memo.") of two Florida State officers appearing as amici in their official capacities ("Florida") as follows:

I. MATERIAL FACTS

Knight adopts her statement of material facts in her Motion for Summary Judgment (ECF 94) and her factual assertions in her Response to Sheriff's Motion (ECF 107). In addition, she specifically addresses several factual assertions or suggestions by the Sheriff and Florida.

No dispute of material fact prevents this Court from entering summary judgment in Knight's favor.

1. Sheriff's concessions

The Sheriff concedes numerous substantive facts, while disputing only minor facets:

[1.1] Although the Sheriff contends *some* inmates may chose to remain detained, *see* Sheriff's Interrog. Ans. (ECF 93-13), No. 24, he concedes this is not "a significant number." Sheriff's Resp. (ECF 105), at 12. Thus, the parties agree that the vast majority of those who are eligible for pretrial release upon satisfaction of a monetary bail would choose to post it and be released, but do not because they cannot afford it. Knight's Mot. for Summ. J. (ECF 94) at 4, n.4.

[1.2] The Sheriff concedes that *at times* prosecutors intentionally use an unaffordable bail to detain pretrial inmates who "pose[] a risk to the community."[1] Sheriff's Resp., at 13. He simply argues this does not *always* happen, *id*., in part because often the state court sua sponte detains those of whom the government is "most scared," Cuzzort Dep. (ECF 93-5), 29:21–30:25, 48:8-15. Likewise, he

[1] Knight calls them "unmanageable," Knight's Mot. for Summ. J. (ECF 94), at 5, because presumably the threats they pose cannot be managed outside the jail.

concedes that the prosecutors *at times* use pretrial detention to embolden their plea-negotiation position, while noting it is not *always* the case. Sheriff's Resp. at 34.

[1.3] The Sheriff concedes that the accused cannot *privately* confer with her attorney at first appearance.[2] *Id*., at 15. Yet, he underplays its significance by arguing that they can privately confer *before* first appearance. *Id*. This is irrelevant for two reasons. First, the public defender does not represent the accused until the appointment at first appearance. Beard Dep. (ECF 93-2), 20:6-13; *see also* Aikens Dep. (ECF 93-1), 68:23–69:6 ("I appoint the public defender."). Second, because the government conducts first appearance in the morning, the public defender has no real opportunity to meet with each person beforehand. Beard Dep., 16:17–17:4. The Sheriff argues that Fla.R.Crim.P. 3.131(c)(3), provides the accused with a right to privately confer at first appearance and "nothing prohibits" it, Sheriff's Resp., at 15, but in practice the government denies any opportunity. Aikens Dep., 62:21–64:21 (testifying that the Chief Judge of the Second Circuit decides the accused's location during first appearance—whether she remains at the jail or comes to the courtroom with everybody else); *see also* Hankinson Dep. (ECF 93-6), 27:11-17 (same).

[2] Even if the accused can confer during the week with a co-located second public defender or a paralegal at the jail, *id*., 15, such conferral is not private. Aikens Dep., 58:12–62:11.

[1.4] The Sheriff concedes as "generally accurate" that evidence establishes that "[r]outinely, no inquiry is made into the accused's ability to pay the monetary bail." Sheriff's Resp., at 18. Yet, he argues that the state court *sometimes* inquires about ability to pay and sets bail "based on that information." *Id*., at 16. Sometimes the monetary bail *implicitly* correlates to what the accused can afford. *Id*., at 18-19. He misses the point. Ability to pay is not simply one factor among many, but a constitutionally critical question in determining bail. When the state court imposes an affordable monetary bail, the accused will satisfy it, be released, and never be a member of the putative class. However, when it is unaffordable, the accused will effectively remain detained. For this reason, the state court must do more than merely "consider" the accused's "financial resources." *Id*., at 20. It must also *determine* the accused's financial reach. Knight's Mot. for Summ. J. (ECF 94), § IV(C), p. 29-32. And on that point, Sheriff appears to concede that the state court does not inquire and *explicitly* determine whether the monetary bail would be affordable. Sheriff's Resp., at 18-19.

[1.5] The Sheriff concedes that "bail imposed at first appearance generally remains the same throughout the duration of the criminal defendant's case," Cuzzort Dep., 87:15-20. Sheriff's Resp., at 15. Yet, he misreads Erin Cuzzort's immediately following testimony to dispute that that bail modification motions are rarely granted. *Id*. Cuzzort disagreed with a conjunctive question: "[1] Rarely do

criminal defendants challenge the monetary bail and [2] even more rarely does the court reduce them?" Cuzzort Dep., 87:21-25. She contended that bail modification motions were "frequent[]." *Id*., 88:4-8. She said nothing of whether they were successful. Accordingly, for all three statements to accord, Cuzzort must have only denied the first part of the conjunctive question. She must believe that because bail modification motions are rarely granted, the bail imposed at first appearance remains the same.

[1.6] Finally, the Sheriff concedes that unless explicitly specified, monetary bail can only be satisfied with "a surety bond or a full cash bond." Sheriff's Resp., at 22.

2. Unfounded disputes

The Sheriff disputes without foundation several facts:

SPTR verification

The Sheriff concedes that "[supervised pretrial release (SPTR)] is rarely able to verify interview answers," yet he downplays this by arguing that verification only occurs when a person is eligible for release and the accused cooperates. Sheriff's Resp., at 22. He assumes, though, that verification occurs in those circumstances. *Id*. It does not. If SPTR verified Vera Point Scale scores when a

person was eligible for release, more than 25 persons (Broxton Dep. (ECF 93-3), 152:3-20) of the 1,184 interviewed and assessed by SPTR (ECF 95-23 at 6) would be released. Ultimately, the Sheriff misidentifies the reason an accused is not released to supervised release before first appearance. Although an accused's refusal to waive "the right to consult an attorney before providing any information" (Bond Schedule (ECF 93-24 at 12)) and submit to an interview with SPTR does prevent verification, Sheriff's Resp, at 22, it is often SPTR staff's lack of time to complete any verifications that prevents release. Broxton Dep., 133:5-8 ("Q. Let me say it this way: It's a notable instance when a pretrial officer has the time to do the verifications, isn't that right? A. The percentage is minimal."). The government, not the accused, fails to verify risk levels. Knight's Mot. for Summ. J., at 19, n.25.

Risk assessment instruments

The Sheriff dispute without foundation that his expert Edward Latessa opined that a judge's subjective determinations of risk are less accurate than validated risk assessments. Sheriff's Resp., at 24-25. In the passage on which the Sheriff relies, Latessa only states that he is unaware of studies about "professional overrides"—where the court vetoes a risk instrument's assessment. Latessa Dep. (ECF 93-7), 39:7-20. However, when Latessa is asked to compare the judge's

independent, subjective risk determination (without a risk instrument or override) with a risk instrument, *id*., 39:21-24, Latessa agrees with Jones that "if a judge is assessing risk subjectively … [h]e will not do it as accurately as a risk assessment instrument," *id*., 40:7-11, 44:12-15. In Latessa's opinion, there is a settled consensus with respect to pretrial risk assessments. *Id*., 117:6-13. Accordingly, the Sheriff erroneously limits the import of a risk assessment. *See* Sheriff's Resp., at 25-26. It may help SPTR decide whom to release before first appearance. But more broadly, it provides a more accurate assessment of risk at first appearance. Thus, the state court's failure to *rely* on the County's risk instrument makes its bail determination prone to error. Knight's Mot. for Summ. J., at 20.

First appearance videos

The Sheriff identified 31 instances among the 401 first appearance hearings summarized by Knight, Zamora Decl. (ECF 83), ¶ 7, where the accused requested a reduced monetary bail.[3] Sheriff's Resp., at 6-7. The Sheriff argues that in 9 of the 31 instances where the monetary bail was set by warrant, the state court lacked discretion to lower it. *Id*., at 7. However, Florida law permits a county court to modify bail amounts set in warrants. *State v. Norris*, 768 So. 2d 1070 (Fla. 2000).

[3] Because the state court *initially* imposes bail at first appearance, the requests were for reductions from the amount reflected in the Bail Schedule.

In 4 of the 31 instances, the Sheriff oddly credits the state court for imposing a monetary bail *below* the Bond Schedule (which should not apply at first appearance)[4] while denying further requested reductions. In the 6 of 31 instances[5] the state court refused the reduction to an affordable amount.

He overstates the remaining 12 "granted" requests. *Id*., at 7 n.7. In 5 instances, the state court imposed bail without any determination of whether it was affordable.[6] In 1 instance, it merely reallocated the same total bail amount between the two charges.[7] One hearing does not exist because its time exceeds the recording's running time.[8]

Thus, the Sheriff identified only 5 instances from the 401 hearings in which the state court actually released the accused on affordable conditions upon request.

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[4] Bond Schedule (ECF 94-24), at 10 ("This bond schedule is implemented only for purposes of release of a defendant prior to first appearance.").

[5] The Sheriff twice categorized 12/22/17 at 2:25, which is more accurately included among the 4 instances in which the state court reduced the monetary bail below the Bond Schedule.

[6] ECF 85, 10/2/17 at 0:17, 10/10/17 at 0:23 (released person for one week with instructions to either pay imposed $100 or return to jail), 11/18/17 at 1:38 (to $8,250), 0:54 (to $75,000); 12/8/17 at 0:17 ($1,000 to $500).

[7] *Id*., 12/22/17 at 2:21.

[8] *Id*., 11/18/17 (pt. 1) at 2:18.

3. Witness foundations

The Sheriff questions the foundation of three witnesses. Knight considers them in turn.

Layssa Zamora

The Sheriff asserts two objections to Zamora's declaration (ECF 83) summarizing the first appearance videos (ECF 85). First, he claims her testimony is hearsay. Sheriff's Resp., at 16-17. Yet, her declaration is admissible as a summary of her own personal observations of the first appearance videos, which themselves are admissible[9] and were shared with the Sheriff (ECF 85 and ECF 83 at ¶ 6). Fed.R.Ediv. 1006.

Second, the Sheriff also claims Zamora lacks a foundation because she failed to develop "a statistically valid random sample and an instrument to be used to collect specific information from first appearance videotapes for evaluation purposes." Sheriff's Resp., at 17 (quoting without attribution Latessa Decl. (ECF 104-5), ¶ 30). The Sheriff's reliance on Latessa is misplaced. Latessa explained how to *evaluate* practices, not *describe* them. Latessa Decl., ¶ 30.

[9] The Sheriff admitted to their admission as public records pursuant to Fed. R. Evid. 803(8). Sheriff's Admission (ECF 93-13), No. 35.

Still, the Sheriff questions whether the 401 first appearances on 21 days before 11 judges (ECF 83) is representative because she is not an expert. Sheriff's Resp., at 17. Zamora (ECF 83) summarized what transpired in those digital records: the state court made few inquiries into, *id*., ¶ 7(d), and no explicit findings of, *id*., ¶ 7(e), the accused's ability to pay a monetary bail. It made no findings of a need for pretrial detention when it imposed monetary bail, *id*., ¶ 7(g), and never by clear and convincing proof, *id*., ¶ 7(h). At a minimum, the government does not deny the Zamora accurately summarized the practice in the hearings she reviewed. Although Knight cannot identify the margin of error for the conclusion that other first appearances practices proceeded in the same way, after going to the well 21 times and coming up dry, it would be extraordinary if the government consistently provided robust due process on the other days. It is exceedingly unlikely that Zamora just happened to select (in advance of seeing them) the days on which the procedures fell short of constitutional due process. Indeed, the Sheriff's legal argument denying Knight's claim for further due process safeguards undermines his factual dispute that the government provided it already on the days Zamora did not review.

Andy Thomas

The Sheriff's criticisms of the elected Public Defender Andy Thomas are misplaced. Sheriff's Resp., at 8-10. Thomas has represented numerous clients at first appearances 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. Although he has not handled a first appearance since 2016, he has witnessed them and discussed them with his assistants[10] to guide their practice and the private bar. *Id*., at 184:7–186:4.

The Sheriff questions Thomas's class-number estimation in his declaration (ECF 5-1). Sheriff's Resp., at 9-10. Looking at every fifth person detained in jail on a given day, Thomas counted the number those only barrier to release was a monetary condition. He found that about 22% were eligible for pretrial release upon satisfaction of a monetary bail. Thomas Dep., 115:19-24. He stated the ranged of 210-300, Thomas Decl. (ECF 5-1), at ¶ 2, based on the fluctuation with

[10] The Sheriff suggests that because Thomas received emails detaining mental health concerns at first appearance, he has no knowledge of other aspects. Sheriff's Resp., at 9. This neglects to give weight to Thomas's immediately preceding testimony: Q. Do you discuss with the assistant public defenders what occurs at first appearances? A. Yeah. Yes. …" Thomas Dep. (ECF 93-8), 184:17-19.

the jail population. Thomas Dep., 115:8-14. The number may exceed Knight's count of 165-plus, Knight's Mot. for Summ. J. (ECF 94) at 3-4, but either far exceeds the minimal numerosity threshold for class certification, *Cox v. Amer. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986). In any case, the Sheriff does not contest class numerosity. Sheriff's Resp. to Class Certification (ECF 69) at 28.

The Sheriff questions the foundation of Thomas's claim that pretrial detention adversely affects an accused. Sheriff's Resp., at 14. Setting aside that our Circuit and the U.S. Supreme Court have long recognized these adverse effects, Knight's Mot. for Summ. J., § II(E), p. 23-24, the Sheriff misreads Thomas's testimony. Although Thomas's assistant attorneys told him about first appearance, Thomas Dep., 103:3-13, he does not suggest his knowledge about adverse effects comes from them, *id*., 103:13-20. Instead, it plainly comes from his three decades of criminal law practice in this community. Thomas Decl., ¶ 1.

The Sheriff calls it "speculation" when Thomas testifies that the state court rarely grants motions to reduce bond. Sheriff's Resp., at 14. However, Thomas has years of experience. That he failed to request a custom JIS report identifying motions to reduce and then review individual case files to determine the outcome, Thomas Dep., 24:5-14, does not undermine his knowledge.

Michael Jones

Knight's expert Michael Jones opinioned that less-restrictive alternatives to pretrial detention through the imposition of an unaffordable bail, e.g., unsecured monetary bail, may reasonably assure the government's interests. Jones Decl. (ECF 93-10), ¶ 46. This was the result of his own study[11] and others' subsequent studies. *Id*., ¶¶34-40. The Sheriff takes issue with Jones's conclusion for three reasons.

First, he misreads Bechtel's finding that "more restrictive bond types are associated with lower failure to appear rates"[12]—a finding with which Jones agrees. Sheriff's Resp., at 29. However, far from meaning that higher monetary bails resulted in lower failure to appear rates as Latessa interprets Bechtel, Latessa Dep., at 123:2-5, 69:17–70:6, Bechtel simply compared "bond types," not bond amounts. Bechtel (ECF 109-1), at 454, n.5; Jones Dep. (ECF 103-1), 315:16–316:10. Unremarkably, imposing monetary bail or supervision (more restrictive) improves pretrial success as compared to nothing. However, "the issue is not how much threat the defendant would pose if he were as free as any law-abiding citizen,

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[11] Michael R. Jones, Pretrial Justice Institute, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (Oct. 2013) (ECF 103-2).

[12] Bechtel, Kristin, et al., *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 Am. J. Crim. Just. 443, 460 (2017) (ECF 109-1).

but how much threat he would pose if he were released on the most restrictive available conditions" short of detention. *United States v. Ailemen*, 165 F.R.D. 571, 580 (N.D. Cal. 1996).

Second, the Sheriff faults Jones for relying on research that has not been peer-reviewed. Sheriff's Resp., at 26-27. However, one primary research on which Jones relies is his own. ECF 103-2. He explained his methodology in pages 6-9. *Id*. He noted that "multiple pretrial justice" "experts peer-reviewed" his study. *Id*., at 2. Latessa admitted that he could rely on findings that were not peer-reviewed, if the methodology was sound. 106:22–108:5. Jones's findings are sound. Betchel marked Jones's *Unsecured Bonds* with an asterisk, Bechtel, at 465, to denote it was sufficiently rigorous, *id*., 459, to be "included in the analysis," *id*., at 463.

Third, the Sheriff questions whether Jones's findings would hold true in Leon County. Sheriff's Resp., at 10. Jones has helped "[s]everal dozen" jurisdictions refine pretrial processes to reduce jail populations while improving pretrial outcomes. Jones Dep., 288:15–289:3, 299:4-14; Jones's Decl., ¶¶ 1-4. "That's [his] profession." Jones Dep., 289:2. And although at times a jurisdiction will initially express skepticism that best practices in other jurisdictions will work locally, he has "yet to encounter a jurisdiction … that have not found one or more

positive results that they thought they would get." *Id*., 299:17-22. He expects that if Leon County relied on a validated risk assessment and used less-restrictive alternatives borrowed from another jurisdiction, it would realize the same positive results "[b]ecause so far that has been true in every previous jurisdiction's experience, so that's kind of the real-life answer." *Id*., 300:6-20. In particular, he sees no reason why unsecured monetary bail or other non-financial conditions of release, instead of monetary bail, would not be effective in achieving the government's interests in Leon County. *Id*., 300:21–301:1, 302:21–303:2.

Yet, the Sheriff demands Knight expend up to $100,000 and study the pretrial practices to verify that reliance on risk assessments and less-restrictive alternatives will work in Leon County. Sheriff's Resp., at 11. Even if Knight had the time and money, *see* Fed.R.Civ.P. 1, she would still need the government's cooperation. Jones Dep., 280:14–281:4. Ultimately, that is the Sheriff's burden to disprove unsecured monetary bail or other innovations. *Foucha v. Louisiana*, 504 U.S. 71, 80, 81-82 (1992).

In the face of limited uncertainty of whether best practices borrowed from other jurisdictions will work locally, the government seems content to sit on its hands and do nothing. Yet, success can only be verified after the jurisdiction

changes its pretrial practices. Unless the government tries something new, it will not succeed.

II. Argument

The parties categorically disagree over the nature of Knight's claims and what law controls. Knight asserts Fourteenth Amendment claims of substantive and procedural due process. The Sheriff recharacterizes her claims as complaining of excessive bail arising under the Eighth Amendment. Knight asserts putative class members have a fundamental right to pretrial liberty protected by the U.S. Constitution and claims the government discriminatorily deprives them of this right and a state substantial benefit of pretrial release because of their impecunity. She argues that pursuant to *United States v. Salerno*, 481 U.S. 739 (1987), *Bearden v. Georgia*, 461 U.S. 660 (1983), and *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978), unaffordable monetary bail that results in *de facto* pretrial detention fails under strict scrutiny because the government has available less-restrictive alternatives to assure its interests. In his Motion for Summary Judgment (ECF 96), the Sheriff denies any fundamental right to pretrial liberty and argues her equal protection claim fails because unaffordable bail is not intended and similarly situated accused persons are not detained discriminatorily. Knight responded to

the Sheriff's substantive arguments in her Response (ECF 107) and incorporates that response here.

Knight argues the government deprives pretrial liberty arising under the U.S. and Florida constitutions without adequate process. *Salerno*, 481 U.S. 739, requires the state court to determine if the government established by clear and convincing proof its need for the unaffordable bail that results in pretrial detention. In his Response (ECF 105), the Sheriff says nothing about the standard of proof. Instead, he argues *Salerno* requires only a mere proffer—not actual evidence—of a need for pretrial detention. He argues the Bail Reform Act's procedures well exceed the constitutional minimum and no adversarial hearing is required because the appointment of counsel provides all the process that is due. Knight replies to these procedural arguments here.

The Sheriff mistakes Knight's claims and misapprehends the applicable law. Knight is entitled to summary judgment as a matter of law on the undisputed facts.

1. Bail determinations are adversarial

The U.S. Constitution requires adversarial bail determinations and State law and the government's practice comply. The Sheriff misreads *Gerstein v. Pugh*, 420 U.S. 103 (1975), to argue that bail determinations, like probable cause determinations, need not be adversarial because they occur at the same hearing.

Sheriff's Resp., 36-38. Nothing in *Gerstein* supports the conclusion that all determinations are non-adversarial simply because they occur at first appearance. The Fourth Amendment allowance for state courts to determine probable cause supporting an arrest in a non-adversarial setting—whether before or promptly after arrest—does extend to other criminal determinations after arrest. Indeed, the *adversarial* proceedings begin with the bail determination. *See Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 213 (2008).

Regardless of whether bail determinations must be adversarial, Florida law makes them so. *Parker v. State*, 843 So. 2d 871, 880 (Fla. 2003) (noting the law requires "a full adversarial [bail] hearing" at first appearance); *see also* Fla.R.Crim.P. 3.130(c) (requiring the appointment of counsel at first appearance). The government appears to provide this in Leon County. Sheriff's Resp., at 37-38. Consequently, Knight does not seek (nor could she seek) to undo the adversarial bail determination that the government already must and does provide.

2. Post-conviction cases like *Bearden* apply

The Sheriff baldly argues that post-conviction cases cannot support Knight's pretrial claims. Sheriff's Resp., at 38. He offers neither authority nor argument in support. *Id*. However, this Circuit has applied in the pretrial context the Supreme Court's prohibition on detention resulting from an inability to satisfy a monetary

condition. In resolving a challenge brought by indigent arrestees to Florida's bail system, our Circuit relied on *Tate v. Short*, 401 U.S. 395 (1971), and *Williams v. Illinois*, 399 U.S. 235 (1970), to affirm "the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc). The Court had "no doubt" about the propriety of applying the *Williams-Tate-Bearden* principle "in the case of an indigent [suffering] pretrial confinement for inability to post money bail." *Id.* at 1058. In fact, the Court observed that the principle has "broader effects and constitutional implications" in the pretrial context than with post-conviction fines because it implicates a "deprivation of liberty" of those "accused but not convicted." *Id.* at 1056.

3. <u>Bail Reform Act approximates the minimal procedure</u>

The Sheriff correctly observes that "*Salerno* presents one way in which pretrial detention may be justified under the Fourteenth Amendment." Sheriff's Resp., at 42. Likewise, Knight's requests a *constitutional* procedure that could be achieved by substantial "compl[iance] with the Bail Reform Act of 1984, 18 U.S.C. § 3142," Pet., ¶¶50, B(3), or one "pursuant to Fla.R.Civ.P. 3.132 and § 907.041(4), Fla. Stat.," Pet., ¶ C(2)(iii). The procedural requirements of the Bail Reform Act do not far-exceed the constitutional threshold, but are in line with the

precedent on which *Salerno* relied. *Id*., 481 U.S. 739, 748-49 (citing *Addington v. Texas,* 441 U.S. 418 (1979)).

4. *Salerno* requires evidence, not simply a proffer

The Sheriff misreads *Salerno*, 481 U.S. at 743, to permit pretrial detention on the government's mere proffer of evidence and without actual evidence. Sheriff's Resp., at 42-43. Yet, *Salerno*, 481 U.S. at 745-46, involved a facial challenge to Congressional authority to detain pretrial on the "the basis of future dangerousness." Thus, the underlying, case-specific details did not underpin the Court's ruling that the accused failed to demonstrate that "no set of circumstances exists under which the Act would be valid." *Id*., at 745. Nevertheless, although the government in *Salerno* made a proffer in the district court, it also "offered the testimony of two of its trial witnesses" to establish "clear and convincing evidence" the need for pretrial detention. *Id*., at 743-44. *Salerno* does not support the Sheriff's claim that a mere proffer can justify a deprivation of liberty.

5. Threshold burden of establishing inability to pay

The Sheriff places the initial burden on the accused to establish inability to satisfy the monetary condition. Sheriff's Resp., at 45. This allocation may be fair once the government notifies her that affordable bail is constitutionally critical. Yet, the *Leon County First Appearance* Introductory Video (ECF 86) shown to the

accused in advance of first appearance notably does not alert her. Zamora Decl. (ECF 83), at ¶¶ 13-14. Setting aside the bedrock foundation that due process includes notice, the mere presence of the public defender in a downtown courtroom without an opportunity to confer with accused at the jail does not ameliorate the lack of notice. *See* Sheriff's Resp., at 47-48. The public defender has no way to privately confer with her to develop this argument. *See* infra at p. 3.

In any case, Knight only seeks relief for those who assert they cannot afford the monetary bail and request a reduction. Pet. (ECF 1), ¶ C(2)(a-b). And at first appearance, the accused may satisfy any burden of persuasion to establish inability to pay, Sheriff's Resp., at 45, with testimony of her current income, assets, and debts. Even if she does not testify, the accused's *Application for Criminal Indigent Status* (ECF 48-2 at 2), which the state court has available at first appearance (Sheriff's Resp., at 23, 24; Sheriff's Mot. for Summ. J. (ECF 96), at 28-29), contains sworn testimony of these facts. Indeed, the state court's reliance on the *Application* to appoint the public defender stands in stark, inconsistent contrast to its refusal to recognize that the same financial status often times makes the monetary bail unaffordable.

Still, the Sheriff demands more. He argues that the accused must also affirmatively establish that no close friend or family member has or would pledge

to help satisfy the monetary bail. Sheriff's Resp., at 46. Although Knight swore no one pledged assets to secure her release, Affidavit (ECF 1-4 at 38), ¶ 4(e), Sheriff faults Knight for also testifying that she did not ask anyone to help her. Yet, Florida law does not require the accused to solicit bail funds; it only requires consideration of pledged amounts. *Watkins v. Lamberti*, 82 So. 3d 825, 827 (Fla. 4th DCA 2011) (discounting any consideration of family and friends' assets and distinguishing the "dicta" in *Henley* because "there is no evidence in the record that any of his friends were pledging their assets to secure his appearance at trial."). If the government has evidence that friends and family would help, it can present that evidence. However, the accused is not required to exhaustively disprove it initially.

Once the accused establishes inability to pay the imposed monetary bail, the burden reverts to the government to establish and the state court to determine whether less-restrictive alternatives exist to the unaffordable bail that will result in pretrial detention. At this stage, the government, not the accused, bears the burden, for example, of establishing unmanageable flight risk.[13] *See* Sheriff's Resp., at 46-47.

[13] The Sheriff relies on double hearsay to argue Knight presented a flight risk because she fled the community. The decedent's mother "learned" from an unnamed source that Knight fled to Georgia. Tr. (Aug. 11, 2016) (ECF 1-4 at 20). She wrote a letter to the judge that the state

6. An unaffordable bail constitutes pretrial detention

Florida argues an accused "retains her right to be free before trial," even when the government conditions pretrial release on an unaffordable bail. Florida's Memo. (ECF 106), at 4. However, Florida permits a right without a remedy and detaches a theoretical right to pretrial liberty from its actual, possible enjoyment. The law marries the two. *Marbury v. Madison*, 5 U.S. 137, 147 (1803). The conditioning of a right on an impossible prerequisite amounts to a denial of the right. *Cummings v. State of Missouri,* 71 U.S. 277, 327 (1867) ("[t]o make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right"); *see also United States v. Mojica-Leguizamo*, 447 Fed. Appx. 992, 996 (11th Cir. 2011) (agreeing that the district court erred in probation revocation for failure to comply with an "impossible" condition).

7. Putative class injury

The Sheriff complains the Knight failed to establish an individual injury. Sheriff's Resp., at 2. However, Knight plainly established the putative class member's injury. Knight's Mot. for Summ. J. (ECF 94). That Knight may no

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attorney's office read. *Id*. This hearsay contradicts Knight's testimony. Knight testified that she has lived in Leon County since she was five years old. Tr. (Aug. 11, 2016) (ECF 1-4 at 14). She swore that she has "resided in Leon County since 1987" and worked her entire adult life in the community. Affidavit (ECF 1-4 at 37), ¶¶ 3(a), 4(d).

longer have a redressable injury is irrelevant to whether she can represent the class who does. Knight's Resp. to Mot. to Dismiss (ECF 36), at 4-7.

III. CONCLUSION

Based on the foregoing arguments and authorities, Knight respectfully requests that this Court deny the Sheriff's Motion for Summary Judgment.

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

This filing contains a total of 4,994 words—in excess of the 3,200 word limit. Knight requested an enlargement to 5,000 words. ECF 108. The Sheriff takes no position as to this motion. The unopposed 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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