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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

LANA KELLOW,

Petitioner / Defendant,

v.

WALT MCNEIL, in his official capacity as Sheriff for Leon County, Florida, and STATE OF FLORIDA,

Respondents / Jailor & Prosecutor.

/

Case No.: 1D23-546

Lower Case No.:

2022-CF-3569
Fla. 2d Cir. (Leon Cnty.)

PETITION FOR WRIT OF HABEAS CORPUS

The lower court found Lana Kellow could not afford a $12,500 monetary bail, but still conditioned pretrial release on her paying it. Tr., App. 35:6-8, 38. This effected de facto pretrial detention. The substantive and procedural requirements for de jure pretrial detention in Florida's law and rules may not strictly apply when the court imposes detention through an unaffordable bail. Yet, the Due Process Clause animates and mandates those same requirements. So, even when the State bypasses Florida law, it still must comply with the Fourteenth Amendment.

The unaffordable monetary bail deprives Kellow of liberty. And the State may only deprive liberty with due process. Due process requires the

State to prove and the lower court to find the monetary bail that deprives liberty is clearly essential. Yet, the State did not provide that process. Thus, Kellow's continued detention is unconstitutional.

In support, Kellow states as follows:

I. <u>JURISDICTION</u>

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

II. <u>FACTS</u>

<u>A. Charges and Bail Imposed at First Appearance</u>

1. On December 9, 2022, Kellow was arrested and was charged with sale of opium and public order criminal conspiracy. Arrest Affidavit, App.at 3.

2. On December 10, Kellow appeared at first appearance where the lower court set a total monetary bail of $20,000 along with nonmonary conditions. Clerk's First Appearance Worksheet, App. 12.

B. Information

3. On January 4, 2023, the State filed an information charging Kellow with trafficking fentanyl and sale of fentanyl. Information, App. 13.

C. Motion to Modify Bail

4. On February 13, Kellow filed a motion to modify bail, App. 14-18, and argued as follows:

(a) The monetary bail is unaffordable. App. 14, ¶ 3. Accordingly, the unaffordable bail effects de facto pretrial detention. App. 15, ¶ 1.

(b) The Due Process Clause forbids a deprivation of liberty without due process. The imposition of an unaffordable bail must comply with the constitutional substantive and procedural requirements for pretrial detention. App. 14-15.

(c) Before imposing an unaffordable bail resulting in pretrial detention, the State must prove that that no nonmonetary conditions of release alone or in conjunction with an affordable monetary bail would both facilitate release and reasonably assure the government's legitimate bail interests. It must show the unaffordable bail was not only *sufficient* to reasonably assure the State's pretrial interests, but it was *essential*

because nothing else or less than the unaffordable bail would work. App. 15-16, ¶ 2-3.

(d) The *State must establish* this need to detain a person through an unaffordable monetary bail by clear and convincing proof. App. 16, ¶ 4.

(e) The *court must determine* whether the State has shown by clear and convincing proof that nothing short of the unaffordable bail will reasonably assure the State's pretrial interests. App. 16, ¶ 5.

(f) A monetary bail cannot protect the public because no financial consequence results from an accused committing a future crime while on pretrial release. App. 16-17, ¶ 6.

(g) Accordingly, Kellow requested the lower court consider and impose only pretrial conditions that will actually facilitate release. App. 17. Additionally, Kellow requested the lower court to determine whether the State has shown by clear and convincing proof that nothing short of the unaffordable bail will reasonably assure the State's pretrial interests. App. 17, ¶ C.

5. On February 27, the lower court heard Kellow's motion to modify bail. Tr., App. 19-37.

(a) Kellow testified the most she could afford is $300. App. 23:20-23. Before her arrest, Kellow worked at Hardee's and took home about $300-400/week. App. 21:8-22. Kellow has $300 in savings and does not own any significant property. App. 22:7-25. A friend would assist her with the monetary bail. Together the total amount they could afford is $300. App. 23:20-23.

(b) The State did not examine Kellow or dispute that Kellow could only afford a $300 monetary bail. App. 25:8-20.

(c) The lower court found Kellow could not afford a $12,500 monetary bail. App. 35:6-8.

(d) Accordingly, Kellow proposed an affordable monetary bail along with pretrial supervision with drug testing, maintaining employment, and a curfew. App. 26:21–27:5.

(e) Kellow is cooperating with law enforcement and the State in its case against a codefendant. App. 29:10-14, 31:8-19.

(f) Kellow's Ohio Risk Assessment System (ORAS) score is 5. Pretrial Defendant Information, App. 10. This score predicts that people like Kellow will appear for court and not be arrested on pretrial release 82% of the time. Latessa*, The Creation and Validation of the Ohio Risk Assessment System (ORAS),* Federal Probation Vol. 74, No. 1 (2010)[1] at 5.

(g) The State failed to establish that nothing else or less than the unaffordable monetary bail would both facilitate release and reasonably assure the government's legitimate bail interests. App. 19-37; App. 26:21-23 (Kellow noting this).

(h) The State failed to establish a need for pretrial detention through the imposition of an unaffordable monetary bail based on clear and convincing proof. App. 19-37.

(i) The lower court failed to determine whether the State has shown by clear and convincing proof that nothing short of the unaffordable bail will reasonably assure the State's pretrial interests. App. 35:17–36:18.

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[1] Available at https://www.uscourts.gov/sites/default/files/74_1_2_0.pdf.

6. Ultimately, the lower court reduced the aggregate monetary bail to $12,500. Tr., App. 34:13-19; *see also* Clerk's Motion Worksheet, App. 38. It found this amount was "apprropriate." Tr., App. 35:8-10.

7. Because Kellow cannot afford the imposed monetary bail, Kellow has been deprived of liberty.

D. Other Facts

8. The State could have requested pretrial detention pursuant to the Pretrial Detention Statute, which allows pretrial detention of those charged with trafficking of fentanyl, *see* Information, App. 13. § 907.041(4)(c)(3), Fla. Stat. Yet, it chose to not seek or signal its intent to detain Kellow through a pretrial detention order pursuant to the law or Rule 3.132. Clerk's Docket, App. 39-41.

9. Pretrial detention has devasting effects on the accused. It hampers the "preparation of a defense," and serves to inflict "punishment prior to conviction." *Pugh v. Rainwater*, 572 F.2d 1053, 1056-57 (5th Cir. 1978) (en banc) ("*Rainwater*").[2] "Pretrial confinement may imperil the

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[2] 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.

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

10. Kellow has been detained pretrial since December 9, 2022. Tr., App. 20:21–21:4. She is being held in the jail by the Respondent Sheriff, who currently has immediate custody over her. *See* § 79.03, Fla. Stat.

11. Kellow has no adequate remedy at law for the denial of the fundamental constitutional right to liberty. Absent intervention by this

Court, Kellow will continue to be detained in violation of the U.S. Constitution.

III. ARGUMENT

Preliminary Argument

All people are presumed innocent until convicted.[3] Thus, before a conviction, the State may only deprive pretrial liberty in the "carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

Due Process Clause

The Constitution forbids the State from depriving a person of liberty without due process. U.S. Const., Amend. 14, § 1. The Due Process Clause "confers both substantive and procedural rights." *Albright v. Oliver*, 510 U.S. 266, 272 (1994). Substantively, sufficient facts must justify the need for detention. But facts standing alone are not enough. Procedurally, those facts must be fairly determined with the requisite certainty. This is why we have criminal trials even when the facts are obvious. It is separately "import[ant] to organized society that procedural due process be observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("the right to

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[3] "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).

procedural due process is ‘absolute’” and “does not depend upon the merits of … substantive” facts). Convictions, not merely facts, justify prison sentences. Only incontrovertible *determinations* justify a deprivation of liberty.

Excessive Bail v. Due Process for Unaffordable Bail

When an accused cannot afford the monetary bail and will as a result remain jailed, state courts must determine more than just whether the bail is “appropriate,” reasonable, or set too high. The calculus categorically changes. Now, liberty, not just money, is at stake. Heightened due process attendant to a liberty deprivation is required. Substantively, the unaffordable monetary bail now must not only exceed what is sufficient to mitigate pretrial risk (nonexcessive), but also be *uniquely* necessary and essential to justify the resulting pretrial detention—because no other conditions in combination with an affordable monetary bail would both facilitate release and assure the State’s interests. Procedurally, the State must justify the detention with clear and convincing evidence. And the state court must determine whether the State satisfied these requirements. In this way, “liberty [will remain] the norm, and detention prior to trial …[,] the carefully limited exception.” *United States v.* Salerno, 481 U.S. 739, 755 (1987).

Kellow's due process claims stand independently of any traditional, excessive-bail claim. The U.S. Constitution requires bail to be both nonexcessive and determined with due process. *In re Newchurch*, 807 F.2d 404, 408 (5th Cir. 1986). The U.S. Supreme Court has rejected the notion "that the applicability of one constitutional amendment pre-empts the guarantees of another." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993). Instead, "[t]he proper question is not which Amendment controls but whether either Amendment is violated." *Id*. Accordingly, the U.S. Supreme Court in *United States v. Salerno* analyzed the deprivation of pretrial liberty under *both* due process, 481 U.S. 739, 746-52 (1987), and the Eighth Amendment, *id.*, at 752-55—because pretrial detention would have been unconstitutional if it violated either provision.

As a practical matter, the argument that a nonexcessive monetary bail is always constitutional would seemingly foreclose clear Fourteenth Amendment claims. For example, imagine a circumstance where the monetary bail set for Catholics, though nonexcessive, was twice that of similarly situated defendants of other denominations. Under a myopic reasoning, the practice would be constitutional because the monetary bail is not excessive. However, this would misidentify the problem. The

practice would deny equal protection even though the bail was not excessive.

Accordingly, the constitutionality of monetary bail does not rise and fall with one provision of the U.S. Constitution; monetary bail is unconstitutional if it violates any provision of the U.S. Constitution.

Circumvention of Florida's Pretrial Detention Statute

Florida law upholds these due process mandates by carefully limiting when a court may render a detention order. Substantively, pursuant to Florida's Pretrial Detention Statute, § 907.041(4)(c), Fla. Stat., an accused may only be detained when "no conditions of release" would assure the State's legitimate bail interests. Procedurally, the State has the "burden of showing beyond a reasonable doubt the need for pretrial detention." Fla.R.Crim.P. 3.132(c)(1-2). The state court must make findings and conclusions supporting a detention order. § 907.041(4)(i), Fla. Stat.

Yet, the State sidestepped the strictures for de jure pretrial detention. No detention order was requested or rendered. Instead, the State detained Kellow pretrial through the sub rosa imposition of an unaffordable monetary bail and without due process. Thus, far from designing bail that would

facilitate release (bail's historic meaning),[4] Kellow's monetary bail intentionally effects pretrial detention.

Despite the State's clever workaround, it is the resulting pretrial detention, not the avenue to effect it, that dictates the process due. Pretrial detention—whether through an unaffordable bail or an explicit detention order—may only be imposed with the due process that attaches to a liberty deprivation. Because unaffordable bail and a detention order effect the same pretrial detention, they are each "[a] rose by any other name"—both necessitating heightened due process. *See Knight v. Sheriff of Leon Cnty.*, 369 F. Supp. 3d 1214, 1219 (N.D. Fla. 2019).

Argument Outline

Section 0 will establish that an unaffordable bail deprives a fundamental liberty interest in freedom from confinement. Section 1 will

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[4] For much of America's history, the word "bail" was equivalent to the word "release," and the right to bail was assumed to equal a right to release. This is illustrated by several U.S. Supreme Court opinions, including *Stack*, 342 U.S. at 4, which equated the right to bail to the "traditional right to freedom before conviction" and "the right to release before trial." "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." *Id*. at 7-8 (Jackson, J, concurring).

discuss the substantive due process the State must provide before it deprives a petitioner of liberty—*what* the State must prove before a person may be detained through an unaffordable monetary bail. Section 2 will detail the constitutionally required procedural due process—*how* and by what standard of proof the State must make the substantive due process showings. Finally, Section 3 will explain the lower court's error is refusing to make a determination justifying pretrial detention.

Because the State satisfied neither substantive nor procedural due process, Kellow is deprived of liberty without due process. This Court should order Kellow's release unless the state court complies with the U.S. Constitution.

0. An unaffordable bail deprives a fundamental liberty interest.

To delineate the private right at issue, the Court must resolve two threshold questions. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

1. Does an unaffordable bail deprive liberty?

2. Is that liberty "fundamental"?

"Yes" is the answer to each.

0.1. An unaffordable bail effects detention.

An unaffordable monetary bail presents an "illusory choice."[5] Because the accused cannot satisfy the monetary bail, confinement is the only possible outcome of the bail determination. For this reason, "unaffordable bail [is] equivalent to detention." *Knight*, 369 F. Supp. 3d at 1219. *See also Best v. State*, 28 So. 3d 134, 135 (Fla. 5th DCA 2010) (ruling an unaffordable bail is the "functional equivalent" of pretrial detention); *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 460 P.3d 976, 987 (Nev. 2020) (unaffordable bail "functions as a detention

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[5] *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).

order”); *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017) (unaffordable monetary bail “is the functional equivalent of an order for pretrial detention”).

When the lower court conditions pretrial release on payment of the national debt, time travel, or growing a third eye, the illusory choice is obvious. Yet, the choice is no less illusory when monetary bail is set beyond the accused’s financial reach—because it is equally impossible.

Consequently, the lower court’s imposition of an unaffordable bail results in Kellow’s de facto pretrial detention and the denial of liberty.

0.2. Liberty, at a minimum, is freedom from detention.

A liberty interest is “fundamental” and “specially protect[ed]” by the Due Process Clause when it is “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty[.]” *Glucksberg*, 521 U.S. at 720-21 (citations omitted). This inquiry often turns on whether the right or liberty interest at issue has traditionally been recognized as fundamental. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). An examination of the historical meaning of the term “liberty” in the Due Process Clause demonstrates that freedom from confinement is a fundamental liberty interest.

The Framers adopted the Magna Carta's concept of due process and meaning of liberty in our Constitution. *Kerry v. Din*, 576 U.S. 86, 91-92 (2015) (detailing the history of due process starting with "its origin in [the] Magna Carta."). The Magna Carta prohibited deprivations of liberty except "by the law of the land." Magna Carta, ch. 29, in 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797). The "words, 'due process of law,' … convey[ed] the same meaning as the words, 'by the law of the land,'" in the Magna Carta. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855) (explaining that "Lord Coke, in his commentary on the words ['by the law of the land'], says they mean due process of law" (cleaned up)).

Additionally, the Magna Carta informed the meaning of "liberty" in the U.S. Constitution. William Blackstone explained the Magna Carta protected the "personal liberty of individuals" "consist[ing] in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint." 1 W. Blackstone, Commentaries on the Laws of England 130 (1769). Historically, "liberty" in the U.S. Constitution has meant the same. *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) ("While the contours of [the Due Process Clause's] historic liberty interest … have not been

defined precisely, they always have been thought to encompass freedom from bodily restraint"); *Holmes v. Jennison*, 39 U.S. 540, 564 (1840) ("If a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy. It is his suit in Court, to recover his liberty."); *Trustees of Dartmouth Coll. v. Woodward*, 1 N.H. 111, 130 (1817) (noting that an individual who had been arrested and detained had been "deprived of his liberty 'by the law of the land'"); *In re Stacy*, 10 Johns. 328, 333 (N.Y. Sup. Ct. 1813) (confinement by the military on the charge of treason deprived citizen of his "personal liberty" where the military lacked authority to hold him); *Trustees of Univ. v. Foy*, 3 N.C. 310, 323 (N.C. Super. L. & Eq. 1804) (defining the phrase "deprived of his liberty" as meaning the deprivation of "his freedom from unjust confinement").[6]

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[6] The Supreme Court's newest substantive due process opinion, *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022), provides additional guidance that only confirms the strength of the historical evidence Kellow has presented here. First, the Court lauded *Timbs v. Indiana*, 139 S. Ct. 682 (2019), for tracing the history of the right in that case back to the Magna Carta and Blackstone's Commentaries. *Dobbs*, 142 S.Ct. at 2246-47. That is something Kellow did with the liberty interest at issue here. Next, when the Supreme Court listed the sources that could have supported finding a fundamental right in *Dobbs*, it specifically noted historic "federal or state judicial precedent[s]." *Id.*, at 2259. Kellow has offered a long list of federal and state precedents confirming that freedom from confinement is a fundamental liberty interest and accords with the original meaning of "liberty" in the Due Process Clause.

This understanding of liberty has carried forward. In *Glucksberg*, Chief Justice Rehnquist noted that a person's interest in "the absence of physical restraint" (i.e., freedom from confinement) is the baseline "fundamental … liberty interest[]." 521 U.S. at 719-20. In *Reno v. Flores*, 507 U.S. 292, 302 (1993), Justice Scalia wrote that the Due Process Clause's "liberty" interest in the "freedom from physical restraint" includes the interest not to be placed in "shackles, chains, or barred cells." In *Kerry v. Din*, he held that the plaintiff had not been deprived of a fundamental liberty interest because the government did not "imprison[]" or otherwise "confine[]" her. 576 U.S. at 92. *See also* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 Va. L. Rev. 493, 508 (1997) ("Understood most narrowly, liberty is simply freedom from physical restraint, the ability to move about as one chooses. Someone who has been imprisoned has been deprived of liberty in this sense.").

The U.S. Supreme Court has recognized this liberty interest as "fundamental" in the pretrial detention context. *United States v. Salerno*, 481 U.S. 739, 750 (1987) (noting pretrial liberty's "fundamental nature," *id*. at 750, and examining whether its deprivation violated substantive due process only after recognizing that such a claim would only be cognizable if pretrial liberty were fundamental, *id*. at 751 (citing *Snyder v. Com. of Mass.*,

291 U.S. 97, 105 (1934)). Further, the Court has repeatedly held that freedom from confinement is a fundamental liberty interest in other preventative detention cases, including immigration detention, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); the detention of enemy combatants, *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty"), and *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) ("We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law," *id*. at 531, it "is the most elemental of liberty interests," *id*. at 530); and the involuntary commitment of the mentally ill, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action*."), followed by Turner v. Rogers*, 564 U.S. 431 (2011). This Court need only take the U.S. Supreme Court at its word. Freedom from confinement is a fundamental liberty interest. *Cf. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (noting that the State's "affirmative act of restraining the individual's

freedom … through incarceration … is the 'deprivation of liberty' triggering the protections of the Due Process Clause").

Our nation has traditionally and consistently recognized freedom from confinement as a fundamental liberty interest. In accordance with the aforementioned binding Supreme Court precedents, this Court should hold the same.

1. **<u>Substantive Due Process Claim</u>: An unaffordable bail must be essential.**

1.1. The fundamental liberty interest mandates strict scrutiny.

Because the liberty interest here is fundamental, its deprivation must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citing *Salerno*, 481 U.S. at 746), *followed by Glucksberg*, 521 U.S. at 720 (ruling the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests.").

This strict scrutiny applies to pretrial detention. *Salerno*, 481 U.S. at 749-51 (analyzing the "fundamental" liberty interest, the government's "compelling" interest, and the "narrow[] focus" of the application—the hallmarks of strict scrutiny). The U.S. Supreme Court has observed *Salerno* applied strict scrutiny. *Foucha*, 504 U.S. at 80-83 (quoting *Salerno*

to note a "fundamental" liberty interest was at issue and faulting the Louisiana law for not being "carefully limited" like the law in *Salerno*); *id*. at 93 (Kennedy, dissenting) (the "heightened due process scrutiny" in *Salerno* should not apply to convicted persons); *Flores*, 507 U.S. at 301-02 (Scalia, J.) (citing *Salerno* as support for the rule that deprivations of fundamental liberty interests are analyzed under strict scrutiny).[7]

No one doubts that preventing flight and protecting the community are each compelling interests. *Campbell v. Johnson*, 586 F.3d 835, 842 (11th Cir. 2009). The sole substantive question is whether an unaffordable bail is narrowly tailored to serve them. "Narrow tailoring requires serious, good faith consideration of workable … alternatives." *Parents Involved in Cty. Schs. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 735 (2007) (quotation omitted).

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[7] *See also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 779 (9th Cir. 2014) (observing that "*Salerno* applied heightened scrutiny"); *Artway v. Att'y Gen. of State of N.J.*, 81 F.3d 1235, 1268 (3d Cir. 1996) ("[T]he Court has recognized [physical liberty] as a fundamental constitutional right triggering heightened scrutiny," citing *Salerno*); *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).

Just like a detention order, the imposition of an unaffordable bail must comply with the substantive requirements for constitutional pretrial detention. *Knight*, 369 F. Supp. 3d at 1220 ("Unaffordable bail, in the absence of constitutionally permissible grounds for detention, is [unconstitutional]"). A pretrial detention order requires consideration and rejection of other workable alternatives. The State may detain a person only when "no conditions of release" will reasonably assure the State's pretrial interests. § 907.041(4)(c), Fla. Stat. The test applied to the imposition of an unaffordable bail is no different. Because the Due Process Clause animates detention statutes, courts demand the state satisfy the detention statutes before imposing an unaffordable bail. *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 upon reconsideration, the officer concludes that the [unaffordable] bond is necessary to assure appearance, then it is apparent that no *available* condition of release will assure the accused's appearance. In that instance, the judicial authority could proceed with a detention hearing and, subject to the requisite findings, issue a detention order."); *Valdez-Jimenez*, 460 P.3d at 987

(unaffordable bail "is subject to the same due process requirements applicable to a deprivation of liberty" through 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 Dothe v. Gualtieri,* 2D21-2845, 2021 WL 5150161 (Fla. 2d DCA Oct. 19, 2021) (unpublished) (ordering a new bail hearing after State sought detention through an unaffordable bail without showing pretrial risks "cannot be mitigated by lesser monetary bond amounts and other reasonable conditions" (citing § 907.041(4)(c)(5), Fla. Stat.)); *Hunt v. Gualtieri*, 321 So.3d 193 (Fla. 2d DCA 2020) (unpublished) (ordering a new bail hearing when the defendant could not afford the monetary bail and the State presented no "evidence to support" pretrial detention, i.e., that "'no conditions of release'" will reasonably assure the State's pretrial interests (quoting Fla. Const., Art. I, § 14)); *Nelson v. Gualtieri*, No. 2D20-3024 (Fla. 2d DCA Nov. 20, 2020) (ordering a new bail hearing when the unaffordable monetary bail resulted in detention and the State failed to satisfy the requirements of Rule 3.132); *Jackson v. Sheriff for Manatee Cnty.*, 288 So. 3d 588 (Fla. 2d DCA 2019) (unpublished) (granting a habeas petition when the unaffordable monetary

bail “result[ed] in pretrial detention” and the lower court failed to make necessary findings to justify detention (citing § 907.041(4), Fla. Stat.)).

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

1.2. The State must establish an absence of workable, alternative conditions to an unaffordable bail.

Because strict scrutiny is the appropriate mode of analysis, the government must prove that its detention of Kellow is narrowly tailored. *See Flores*, *supra*, 507 U.S. at 301-02. 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 Court reviewed several criminal law cases in which persons were treated differently because they lacked the ability to pay. The trend continued from *Williams* v. *Illinois*, 399 U.S. 235, 240-42

(1970) (forbidding as "invidious discrimination" the incarceration of impoverished persons beyond the statutory maximum term), and *Tate v. Short*, 401 U.S. 395, 397-98 (1971) (forbidding the state from "subject[ing]ed [a person] to imprisonment solely because of his indigency"), through *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (forbidding a state from revoking probation and detaining a person "simply because, through no fault of his own, he cannot" pay a fine unless the court first considered and found no "alternate measures" existed to adequately meet the government's legitimate interests). In each case, the Court held that the Fourteenth Amendment prohibits detaining persons because they are unable to pay unless the court first considers and finds that the government has no less-restrictive, alternative methods to achieve its legitimate interests.

Similarly, our federal circuit requires the government to justify and the court to approve pretrial detention through an unaffordable bail only when narrowly tailored—i.e., no other bail form or amount would reasonably assure its interests. In *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978), the court observed that "[t]he incarceration of those who cannot [pay the bail amount], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection

requirements." Accordingly, if the government's interest in "appearance at trial could reasonably be assured by … alternate [conditions] of release, pretrial confinement for inability to post money bail" is unconstitutional. *Id.* at 1058. Over the last several years, numerous federal district courts and state courts have reached the same conclusion.[8]

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

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[8] *See, e.g.*, *In re Humphrey*, 482 P.3d 1008, 1019 (Cal. 2021) (holding detention through an unaffordable bail "is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests"); *Valdez-Jimenez*, 460 P.3d at 987 ("[G]iven the important nature of the liberty interest at stake, the State has the burden of proving by clear and convincing evidence that no less restrictive alternative will satisfy its interests in ensuring the defendant's presence and the community's safety."); *Brangan*, 80 N.E.3d at 964-65 (2017) (pretrial detention through an unaffordable monetary bail is only justified when "no alternative, less restrictive financial or nonfinancial conditions will suffice to assure his or his presence at future court proceedings"); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 310-15 (E.D. La. 2018), *aff'd,* 937 F.3d 525 (5th Cir. 2019); *ODonnell*, 251 F. Supp. 3d at 1059.

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

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

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

imposing unaffordable monetary bail "without meaningful consideration of other possible alternatives." *Rainwater*, 572 F.2d at 1057.

1.3. The State did not establish the absence of less-restrictive alternatives.

Alternatives to an unaffordable bail that result in pretrial detention (e.g., an affordable monetary bail, pretrial release supervision, curfew, maintaining employment, GPS monitoring, or a combination of these conditions) would both facilitate release and reasonably assure the government's legitimate bail interests.

The State did not establish why conditions that would facilitate release would not suffice. And the lower court simply imposed an unaffordable monetary bail without rejecting these alternatives.

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

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

Because there are available less-restrictive alternatives, Kellow's pretrial detention violates the Fourteenth Amendment's substantive commands. The State failed to establish that no pretrial release condition other than the unaffordable monetary bail would suffice. *Sewell*, 301 So. 3d at 358 (monetary bail was unnecessary "in light of the other conditions prescribed by the court or available to it").

2. Procedural Due Process Claim: Clear and convincing proof must justify an unaffordable bail.

The Due Process Clause of the Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law … ." The State denies procedural due process when it deprives liberty through an inadequate process. *Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056, 1070 (Fla. 3d DCA 2018). The process used to deprive Kellow of pretrial liberty was inadequate because the State effected detention through an unaffordable monetary bail, yet failed to justify its amount or detention by clear and convincing proof.

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

The Fourteenth Amendment's procedural mandate guards against the "mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus,* 435 U.S. 247, 259 (1978). It achieves this by dictating the "degree of confidence" or standard of proof by which a court should approve a deprivation. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quotations omitted). It sets the required standard of proof and allocates its burden to minimize the risk of an erroneous decision. *Heller v. Doe by Doe*, 509 U.S. 312, 348 n.1 (1993) (standard); *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) (risk). The standard of proof "indicate[s] the relative importance attached to the ultimate decision" and "the value society places on individual liberty." *Addington*, 441 U.S. at 423, 425 (quotation omitted).

Procedural safeguards should be proportional to the individual's private interests at stake. "[W]hen the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money," greater certainty and a higher standard of proof is required. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quotations omitted).

“An intermediate standard of proof—‘clear and convincing evidence’” applies to liberty deprivations. *Id.* at 756. The U.S. Supreme Court “has deemed this level of certainty necessary to preserve fundamental fairness” where state action threatens “significant deprivation of liberty,” like here. *Id*. Because an unaffordable monetary bail results in the accused’s detention, liberty—not money—is at stake. And the “commitment for *any* purpose constitutes a significant deprivation of liberty.” *Hamdi*, 542 U.S. at 530.

Three cases involving a pretrial or regulatory detention[11] confirm clear and convincing evidence is required to deprive liberty. In *United States v. Salerno*, 481 U.S. 739, 751 (1987), the Court upheld the pretrial detention of criminal defendants posing a danger to the community pursuant to a procedure “specifically designed to further the accuracy of that determination.” The procedure included the requirement that the government “prove its case by clear and convincing evidence,” *id.* at 752, “that no conditions of release can reasonably assure the safety of the

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[11] *Salerno* described pretrial detention as “not penal,” 481 U.S. at 746, but regulatory, *id.* at 747. *See also United States v. Quintero*, 995 F.3d 1044, 1060 (9th Cir. 2021) (noting that the involuntary commitment of an accused person to restore competency is a form of “regulatory” detention).

community or any person," *id.* at 750. Other analogous regulatory detention cases explicitly mandated clear and convincing evidence. In *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992), the Court held Louisiana's civil commitment statute failed due process because the individual was denied an "adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community."[12] In *Addington*, 441 U.S. at 433, the U.S. Supreme Court held that a court could not civilly commit a person with a mental illness without determining by "clear and convincing evidence" that the person was dangerous to others.[13]

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[12] It would be illogical to require a lower standard of proof here for a pretrial detainee like Kellow, who has not had her day in court, than was required in *Foucha* for an insanity detainee, who had his day in court and "obtained an adjudication." *Foucha v. Louisiana*, 504 U.S. 71, 93 (1992) (Kennedy, J., dissenting).

[13] *See also Caliste*, 329 F. Supp. 3d at 313 ("In cases where physical liberty is at stake in all kinds of situations, the Court consistently applies the clear and convincing standard."); *In re Humphrey*, 482 P.3d at 1020 ("[W]e agree with Humphrey that the standard of proof should likewise be clear and convincing evidence."); *Valdez-Jimenez*, 460 P.3d at 987 ("[G]iven the important nature of the liberty interest at stake, the State has the burden of proving by clear and convincing evidence"); *Brangan,* 80 N.E.3d at 963 (holding pretrial detention—whether ordered outright or imposed through an unaffordable bail—must pass heightened procedural due process).

The result dictates the process due. Both a pretrial detention order and an unaffordable bail result in pretrial detention. Through each, the State deprives an accused of pretrial liberty. Consequently, higher stakes require greater certainty. The Due Process Clause demands the State justify pretrial detention with clear and convincing evidence—no matter the route.

2.2. The State did not establish its need for an unaffordable bail by clear and convincing proof.

The State failed to justify the need for a $12,500 monetary bail or the resulting detention by clear and convincing evidence. Kellow was denied due process.

The State offered no rationale why $12,500 is essential or why nonmonetary conditions would not reasonably assure its pretrial interests. It offered no study that compares monetary bail amounts with rates of failures to appear or arrests for new criminal activity—violent or otherwise.[14] Instead, the monetary bail appears to be a guess. Or worse,

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[14] *See ODonnell*, 251 F. Supp. 3d at 1118 ("Harris County has not coded, collected, or analyzed data on the different types of pretrial misconduct. … [Accordingly,] the County is imposing secured money bail … with no ability to tell how effective this type of bond is to prevent failures *(con't)*

it is amount designed to ensure pretrial detention and circumvent the Pretrial Detention Statute. *Brown*, 338 P.3d at 1292 ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.").

Colloquial belief suggests the monetary bail yields better outcomes (fewer FTA and new criminal activity) than nonmonetary conditions, and the higher the monetary bail, the greater the incentive to appear. Yet, empirical research debunks these myths:

- A recent study of the Philadelphia prosecutor's "no-cash-bail" policy found "no evidence" that monetary bail reduces failures to appear or rearrests on pretrial release. Aurelie Ouss, *Does Cash Bail Deter Misconduct?* (2022) at 26.[15]
- A 2021 study of Palm Beach County found that when the bond schedule was reduced for most third-degree felonies from $3,000 to $1,000, more people were released while failures to appear and arrests for new criminal violations fell. Jennifer Copp, *Pretrial Detention, Public Safety, and Court Efficiency*, Florida State University (2021). App. 56, 59, 60.
- Another study found "no evidence that money bail increases the probability of appearance." Arpit Gupta *et al.*, *The Heavy Costs of*

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to appear or new criminal activity compared to release on unsecured or nonfinancial conditions.").

[15] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138.

High Bail: Evidence from Judge Randomization, 45 J. Leg. Stud. 471, 475 (2016).[16]

- In 2017, New Jersey shifted away from monetary bail. Under its Criminal Justice Reform Act a "court may set monetary bail 'only when ... no other conditions of release will reasonably assure the eligible defendant's appearance in court.'" *State v. Robinson*, 160 A.3d 1, 7 (N.J. 2017) (quoting N.J. Stat. Ann. § 2A:162-15). In 2018, only 102 of 44,400 (~0.25%) persons statewide were ordered by the court to post money bail. Grant, *2018 New Jersey Criminal Justice Reform: Report to the Governor and the Legislature*, Administrative Office of the Courts (2019),[17] at 7. As a result, New Jersey's pretrial jail population declined 44% from 2015 (8,899) to 2018 (4,995). *Id*., at 38-39. At the same time, rate of alleged new criminal activity remained constant, *id*., at 13, and the court appearance rate fell slightly (92.7% in 2014 to 89.4% in 2017),[18] *id*., at 14-15.

- A fifth study looked at the effect on pretrial outcomes of the requirement that monetary bail be secured (with cash or a bond as opposed to simply a promise to pay upon failure to appear). It found secured bail did not reduce failures to appear and new arrests for criminal activity. Michael R. Jones, *Unsecured Bonds: The As Effective And Most Efficient Pretrial Release Option,*

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

[17] Available at https://www.njcourts.gov/sites/default/files/2018cjrannual.pdf.

[18] The court appearance rate later rose to 97% by 2020. Grant, *2021 New Jersey Criminal Justice Reform: Report to the Governor and the Legislature*, Administrative Office of the Courts (2022) at 19, available at https://www.njcourts.gov/sites/default/files/courts/criminal/criminal-justice-reform/cjr2021.pdf.

Pretrial Justice Inst. (Oct. 2013)[19] at 10, 11. Instead, the accuseds' mere promise to pay the monetary bail *if* they fail to appear or are rearrested yields the same results as a surety bond.

- A Texas federal court reached the same conclusion. *ODonnell v. Harris County, Texas*, 251 F. Supp. 3d 1052, 1119-20 (S.D. Tex. 2017) ("Secured money bail in Harris County does not meaningfully add to assuring misdemeanor defendants' appearance at hearings or absence of new criminal activity during pretrial release.").

The research is clear. Nonmonetary conditions work just as well as monetary conditions to prevent non-appearance and new criminal activity. Yet, nonmonetary conditions also preserve liberty, the presumption of innocence, reduce incarceration costs, and avoid the devastating consequences that result from pretrial detention. *See, e.g.,* Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. Econ. & Org. 511 (2018) (after Philadelphia reduced reliance on monetary bail, pretrial detention increases conviction rate by 13%, sentence length by 42%, and court fees by 41%).

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

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

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

In the face of empirical research that shows nonmonetary conditions work just as well as monetary conditions, the State failed to explain why the research is wrong. The State did not present any evidence, proffer, or argument for why the unaffordable amount was the magic number to assure its interests. It failed to clearly establish that the $12,500 was essential because nonmonetary conditions would not also reasonably advance it pretrial interests.

Thus, Kellow was denied fundamental fairness and due process before being deprived of liberty through an unaffordable monetary bail. In violation of the Fourteenth Amendment, the State failed to justify the unaffordable monetary bail that resulted in Kellow's detention by clear and convincing evidence required for a deprivation of liberty. *Santosky*, 455 U.S. at 756.

3. <u>Procedural Due Process</u>: Pretrial detention must be judicially determined as justified.

3.1. The Due Process Clause requires a decision.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). At its minimum, an action is arbitrary unless it is deliberate or chosen. A nondecision is as arbitrary as a coin flip. Without a deliberate decision that a deprivation of life, liberty, or property is appropriate, the governmental action is inherently arbitrary and unconstitutional. *Marbury v. Madison,* 5 U.S. 137, 153 (1803) ("[D]iscretion of a court always means a found, legal discretion, not an arbitrary will."). The exact framework or considerations to make the decision may be debated, but a process that excludes a decision sanctioning a deprivation inherently violates fundamental fairness. *See Jackson v. Indiana,* 406 U.S. 715, 738 (1972) ("due process requires" a deprivation serve a valid purpose).

The decision is the foundation of due process; the decision guides the process. Due process requires "*some* kind of notice and ... *some* kind of hearing." *Goss v. Lopez,* 419 U.S. 565, 579, (1975) (emphasis in original). Yet, notice and hearing are not end goals themselves. Instead, these essential features ensure the *decision* to deprive of life, liberty, or property is not "mistaken or unjustified." *Carey v. Piphus*, 435 U.S. 247,

259 (1978). Similarly, notice and hearing requirements are “flexible.” *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). Yet, they always depend on the “ultimate decision that is being made.” *Parham v. J. R.*, 442 U.S. 584, 608 (1979). A decision that a deprivation is appropriate is the foundation of due process. *Rochin v. California*, 342 U.S. 165, 169 (1952) (“the Due Process Clause ‘inescapably imposes upon this Court an exercise of judgment’”) (quoting *Malinski v. New York*, 324 U.S. 401, 416 (1945)); *Coffin v. United States*, 156 U.S. 432, 463 (1895) (holding that even a trial by an impartial but confused jury was not sufficient to deprive a defendant of liberty). Notice and hearing are pointless unless someone will then decide a deprivation is justified. *See Clark v. Cohen*, 794 F.2d 79, 86 (3d Cir. 1986) (“The hearing required by the due process clause is not a moot court exercise.”), *cited with approval in J.R. v. Hansen*, 803 F.3d 1315, 1324 (11th Cir. 2015).

Like notice and a hearing, due process requires a neutral decision-maker. *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 617 (1993). Yet, without a decision being made, there is no “decision maker.” We only have a person. And neutrality becomes irrelevant.

Without a decision, there can be no due process of law. Without a decision, the foundational judicial or quasi-judicial function to resolve disputes in a civilized society without resort to physical altercations is rendered meaningless. "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and *have its merits fairly judged*." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (emphasis added).

The Due Process Clause requires a decision.

3.2. The decision must resolve the applicable claim.

In the motion and at the hearing, Kellow explained the lower court must determine whether the State has shown by clear evidence that the bail is essential. It is not enough that the court decide another issue—whether bail is set above a sufficient amount. The Due Process Clause forbids a state court from depriving liberty unless the court decides the deprivation is justified. That cannot be answered by deciding whether the bail is excessive or "appropriate." After all, an excessive bail, when affordable, only deprives property, not liberty. Excessive bail does not result in a deprivation of liberty unless it is also unaffordable. And bail being unaffordable does not make it excessive. Thus, only the imposition of an unaffordable monetary bail deprives liberty. The Due Process Clause

requires that a liberty deprivation be sanctioned by the state court. The lower court was required to decide this independent claim. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993).

Furthermore, it is not enough to make a holistic decision. Justifying a deprivation requires confronting and disposing of each reason why the deprivation is unjustified. In the face of an accused's argument that a liberty deprivation is not justified, setting an unaffordable bail without the state court finding appropriate the resulting deprivation is arbitrary.

In Kellow's case, the state court only decided the traditional excessive-bail question: Whether Kellow's monetary bail was higher than an amount reasonably calculated to assure the State's pretrial interests. The lower court did not resolve Kellow's due process claims: Whether the unaffordable bail was clearly essential because nothing less or else would suffice. Thus, it failed to determine whether her detention was justified because it comported with substantive and procedural due process.

3.3. A court must justify a deprivation of liberty.

Before depriving liberty, the U.S. Supreme Court has routinely required courts to *decide* whether the deprivation is justified.

Bearden v. Georgia, 461 U.S. 660, 661 (1983), addressed whether "the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution." It rejected the argument that a person may automatically be sent back to prison for nonpayment. It held depriving a person of liberty "because, through no fault of his own, he cannot pay the fine" would violate "fundamental fairness required by the Fourteenth Amendment." *Id*. at 672-73. Consequently, before depriving liberty, a court must justify the deprivation by "determin[ing] that alternatives to imprisonment are not adequate." *Id*. at 672. Absent the state court's determination that less restrictive alternatives are unworkable, the person cannot be deprived liberty. In this sense, the state court's determination is the prerequisite for a liberty deprivation. *See Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (holding a "judicial determination of probable cause as a prerequisite to detention" and neither facts nor the police's assessment of facts are sufficient). Without the determination, the state cannot deprive liberty.

Likewise, in *Bell v. Burson*, 402 U.S. 535, 536 (1971), the U.S. Supreme Court considered a Georgia law automatically suspending the license of an uninsured driver involved in an accident unless the driver posted a security to cover possible damages. Georgia law provided for a

hearing, but "fault and liability" were excluded from consideration. *Id*. at 541. The Court held that Georgia must justify the license suspension. *Id*. at 539. Suspending the license for failure to post security of a driver who is not at fault was senseless. *Id*. at 541. As a result, the Due Process Clause required Georgia to decide whether the person was at fault before suspending the license. "A hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended" is not meaningful. *Id*. "[Georgia] must provide a forum for the *determination*" that would justify the suspension. *Id*. (emphasis added).

Zinermon v. Burch, 494 U.S. 113, 115 (1990), considered whether a person may be deprived of liberty without a decision supporting the deprivation. There, Burch signed a consent form to be admitted to the Florida State Hospital for a mental condition, and the staff never made an independent determination of whether he should be detained. Yet, because of his mental condition, the form may have been legally meaningless. *Id*. at 131 n.17. After release, Burch sued the hospital staff for damages asserting a procedural due process claim. He claimed the staff "should have afforded him procedural safeguards required by the Constitution before involuntary commitment." *Id*. at 115. The Court ruled

the confinement without a "determin[ation] either that he validly had consented to admission, or that he met the statutory standard for involuntary placement, clearly infringes on this liberty interest." *Id.* at 131.

Collectively, these cases demonstrate that a determination of constitutionally critical questions is the prerequisite for a liberty deprivation. *See also Turner v. Rogers*, 564 U.S. 431, 447-78 (2011) (noting "an express finding by the court that the defendant has the ability to pay" is a safeguard that "can significantly reduce the risk of an erroneous deprivation of liberty"). Furthermore, when a person asserts a monetary bail is unaffordable, a foreseeable risk that it will result in detention requires determining whether it is justified and comports with due process.

A fair hearing includes a reasoned determination. *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Morrissey v. Brewer*, 408 U.S. 471 (1972). Accordingly, when a person is detained pursuant to a monetary bail, the court must make findings. *ODonnell v. Harris Cnty.*, 892 F.3d 147, 160 (5th Cir. 2018) (agreeing that a judicial officer must make an oral finding of a need for a secured monetary bail, but not necessarily a written determination), *overruled on other grounds by Daves v. Dallas Cnty., Tex.*, 22 F.4th 522 (5th Cir. 2022) (en banc).

3.4. Florida law requires lower courts to decide claims.

Lower courts are expected to decide claims. Their reasons show the claims were decided. *See Jones v. Marceno*, 256 So. 3d 857 (Fla. 2d DCA 2018) (granting habeas petition and remanding to trial court make a new bail determination when trial court had previously "made no factual findings and offered no explanation for its rulings"); *Sylvester v. State*, 175 So.3d 813, 813 (Fla. 5th DCA 2014) (granting petition, ordering further consideration, and requiring "appropriate findings in the order," after concluding it was unclear whether the trial court considered the proper factors). A resolution cannot be inferred from the transcript. *Mendoza v. Cross,* 143 So.3d 1155, 1157 (Fla. 3d DCA 2014) (observing that "[w]e decline to hold that this judicial determination may be implied from the transcript, especially given the constitutional dimension of an accused's right to pretrial release.").

3.5. The state court never decided Kellow's due process claims.

Kellow argued she was deprived of pretrial liberty without due process. Yet, the lower court did not decide Kellow's due process claim. It did not determine the State had shown the clear evidence making the unaffordable monetary bail's unique necessity "highly probable." *See Bouie v. State*, 292 So. 3d 471, 481 (Fla. 2d DCA 2020) (describing the

clear and convincing standard). When imposing pretrial detention, whether de jure or de facto, the lower court must speak plainly about what it clearly finds.

The lower court also did not *implicitly* decide whether the State had established a need to detain—because nothing else or less than the unaffordable bail would reasonable assure its interests. And given *Dyson v. Campbell*, 921 So. 2d 692, 693 (Fla. 1st DCA 2006), the lower court did not believe unaffordability is a separate, constitutionally critical question. Thus, the lower court did not implicitly determine a clear need for detention. *See Madison v. Alabama*, 139 S. Ct. 718 (2019) (explaining Alabama's contrary law made it unclear that the court applied the correct constitutional test to approve a death sentence).

With neither an explicit or implicit determination of Kellow's due process claims, the state court either rejected them as meritless or ignored them. It left unresolved whether other pretrial release conditions would also work. The lower court did not justify detention resulting from an unaffordable bail through reasoned consideration and a finding that nothing else and nothing less would suffice. Its refusal to decide Kellow's due process claims is itself a violation of due process.

3.6. The state court must render a decision on Kellow's due process claims.

The "most basic purpose" of habeas is to avoid the government depriving liberty without a decision justifying the deprivation. *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996). It is "the instrument by which due process could be insisted upon" and "compel the crown to explain its actions—and, if necessary, ensure adequate process, such as a trial, before allowing any further detention." *Brown v. Davenport*, 142 S. Ct. 1510, 1520 (2022). The foundational purpose of a court is to adjudicate disputes. *Cohens v. State of Virginia*, 19 U.S. 264, 404 (1821) ("With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us.") Kellow has been deprived of liberty without the lower court determining that it is justified and does not violate the Fourteenth Amendment. She is entitled to a decision on her due process claims. Absent a prompt determination, Kellow is entitled to release.

IV. CONCLUSION

This Court should reject the circumvention and deprivation of due process. The lower court did not determine the State had proven by clear and convincing proof nothing other or less than the unaffordable bail would suffice—and thus the predicate determination for detention is missing. *See*

Gerstein, 420 U.S. at 124, 125 (ruling a *court* must determine probable cause for arrest to justify continued detention); *Bearden*, 461 U.S. at 672 (court must "*determine*[] that alternatives to imprisonment are not adequate" (emphasis added)). As a result of the due process shortfalls, Kellow awaits trial in jail because the lower court imposed de facto pretrial detention in violation of the Fourteenth Amendment to the U.S. Constitution.

V. RELIEF REQUESTED

Based on the foregoing arguments and authorities, Kellow respectfully requests the following relief:

A. Issue a writ of habeas corpus requiring the Respondents to justify the pretrial detention pursuant to the current terms of pretrial release.

B. Declare the following:

(1) An unaffordable monetary bail constitutes pretrial detention.

(2) The Due Process Clause mandates that an accused's pretrial release may only be conditioned on an unaffordable bail after the State establishes and the lower court determines no nonmonetary

conditions of release alone or in conjunction with an affordable monetary bail would both facilitate release and reasonably assure the government's legitimate bail interests.

(3) The Due Process Clause requires the State to establish and the lower court to find the State established this need for an unaffordable monetary bail that results in pretrial detention by clear and convincing proof.

C. Remand the case to the lower court to do one of the following within five days:

(1) Order the accused be released on nonmonetary conditions;

(2) Order the accused be released on nonmonetary conditions, a monetary bail in amount no greater than what the accused said was affordable, or both; or

(3) Order the accused be released on nonmonetary conditions, any nonexcessive monetary bail, or both, but only if the lower court conducts a new bail hearing and makes these explicit finding(s):

(a) The accused can afford the monetary bail;

or

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

and

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

D. Certify that the issues raised in this petition are of great public importance. Fla.R.App.P. 9.030(a)(2)(A)(v) (district court decision).

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to the following person(s) on the e-filed date of this document by filing the document with service through the e-Service system (Fla.R.Jud.Admin. 2.516(b)(1)) and by U.S. Mail (Fla.R.App.P. 9.420(c)):

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Lower Court
Served per Rule 9.100(b)(3)
Hon. Stephen Everett
Leon County Courthouse
301 S. Monroe St., Ste. 265-I
Tallahassee, FL 32301
everetts@leoncountyfl.gov

CERTIFICATE OF COMPLIANCE WITH RULE 9.045

I certify that this petition complies with the font (Arial 14-point) and word-count requirements. This filing contains 10,303 words (including sections permitted to be excluded), which is within the 13,000 word-limit prescribed in Fla.R.App.P. 9.100(g).

Respectfully Submitted,

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