

# CASE COMPENDIUM

**To:** Alternatives to Bail Drafting Committee  
**From:** Josh Bowers and Sandy Mayson<sup>1</sup>  
**CC:** Lucy Grelle  
**Date:** November 9, 2018  
**Re:** Judicial Opinions Relevant to Pretrial Detention & Release

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## OVERVIEW

This compendium summarizes important judicial opinions addressing constitutional challenges to aspects of bail and pretrial detention systems, particularly the common practice of assigning money-bail amounts that result in detention of the poor. Claimants have recently brought challenges pursuant to equal protection, substantive due process, procedural due process, and the Excessive Bail Clause of the Eighth Amendment.

Part I offers a brief synthesis of the federal constitutional principles that the cases collectively establish. It also identifies a set of open constitutional questions on which the Supreme Court has not clearly spoken and no consensus has emerged. We recommend reading Part I first.

Part II contains the individual opinion summaries, with emphasis on the most relevant Supreme Court and federal Circuit Court opinions. The summaries strive to present the opinions objectively, without editorial analysis. Our hope is that these summaries will both provide a helpful introduction to the current litigation landscape and serve as a continuing resource as our project progresses.

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## PART I. EMERGING PRINCIPLES AND OPEN QUESTIONS

### A. Emerging Principles

The following principles are robustly supported by Supreme Court precedent—if not explicit Supreme Court pronouncements—and an emerging body of caselaw from federal and state courts. This is not to say that they each represent a universal consensus; where there is some dissensus among the courts we have noted that fact.

#### General: Pretrial Liberty Must be the Norm

- “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987).
- The term “bail” has historically referred to a process of conditional release after arrest, not a monetary bond. *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (defining a right to bail as a “right to freedom before conviction”).
- “Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Id.* (internal citation omitted).

#### Equal Protection / Due Process (*Bearden* Analysis)

- The Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit the state from conditioning a defendant’s liberty on a monetary payment she cannot make unless no less restrictive alternative can meet its interests. In other words, a court cannot impose unaffordable bail unless there is no alternative method of eliminating serious risks of flight or of harm to public safety.
- In order to avoid needlessly imposing unaffordable bail, courts must conduct individualized evaluations of whether an accused person presents any pretrial risk; what conditions of release are necessary to manage the risk; and, if a secured financial bond is contemplated, what the defendant is able to pay.
- The use of bail schedules as the sole mechanism for bail-setting violates the Fourteenth Amendment, because it results in the detention of those who cannot pay the pre-determined bond amount without individualized consideration of whether that bond amount is necessary. The Fourteenth Amendment may permit the use of bail schedules as a *preliminary* mechanism of release, so long as defendants who cannot pay are afforded an individualized hearing within 48 hours of arrest for the court to consider alternatives.

#### Substantive Due Process

- All accused persons have a fundamental right to liberty pending trial. Deprivation of that right triggers heightened scrutiny. Pretrial detention thus violates due process unless carefully tailored to a compelling state interest. [Note: The Ninth Circuit has endorsed this

view unequivocally, but the Fifth and Eleventh Circuits have thus far declined to consider a fundamental right to pretrial liberty.]

- The imposition of unaffordable bail constitutes a *de facto* order of detention, which should be subject to the same analysis as a direct order of detention.
- Pretrial detention is rarely a carefully tailored approach to managing pretrial risk. In all but extreme cases, conditions of release should be adequate to eliminate serious threats to public safety and the administration of justice.

### Procedural Due Process

- The state may not deprive a person of pretrial liberty without robust procedural protections to ensure against erroneous deprivations. At the very least, the court must hold a hearing to determine whether detention is necessary; the accused must have advance notice of the key issues to be evaluated at that hearing, as well as the opportunity to present evidence; and, if the court determines that detention is necessary, it must articulate the reasons on the record. Some courts have held that due process requires an adversarial hearing at which the accused is represented; that the state bear the burden to prove the necessity of detention by clear and convincing evidence; and that the accused have an immediate right to appeal of any detention order. [Note that these protections are not necessarily required for all bail hearings, just hearings that may result in detention.]
- Whatever procedural protections must attend an explicit detention order must also attend an order imposing unaffordable bail, which constitutes a *de facto* order of detention.

### Excessive Bail Clause

- The Excessive Bail Clause does not guarantee a right to bail. Rather, when a defendant is entitled to bail, it prohibits the setting of bail in an amount higher than reasonably calculated to ensure a defendant's appearance in court.
- Bail-setting courts must conduct an individualized assessment of what bond amount is necessary in each case, including consideration of an accused's financial circumstances.
- The Supreme Court has not decided whether a money bond the defendant cannot afford is *per se* excessive. Lower courts are split on this question.
- The Supreme Court has not decided whether the Excessive Bail Clause has any application when a defendant challenges non-financial conditions of release, or pretrial detention. The Court has opined that "[t]he only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil" they are designed to address. *Salerno*, 481 U.S. at 754.

## B. Open Questions of Constitutional Law

Notwithstanding the above principles and emerging caselaw, a number of constitutional questions remain wholly open: Supreme Court precedent provides minimal or no guidance, and no clear consensus has emerged in the lower courts.

- How long may the state detain an arrestee without an individualized bail hearing?
- Does the use of a money-bond schedule as a preliminary mechanism release violate *Bearden* if arrestees who cannot post bond are afforded an individualized hearing within 48 hours?
- Does the Excessive Bail Clause prohibit unaffordable bail?
- Which governs a pretrial detainee's challenge to detention on unaffordable bail, substantive due process or the Excessive Bail Clause (or can claims be raised pursuant to either)? *See, e.g. Walker v. City of Calhoun*, 901 F.3d 1245, 1258 n.11 (11th Cir. 2018) (“[I]t will be for a future court to decide whether *Salerno*'s framework or an Eighth Amendment analysis applies when a defendant is eligible for bail but is detained because he cannot provide adequate assurance of his future appearance.”).
- Whichever framework governs, what kind and degree of risk is sufficient to justify pretrial detention?
- What procedures must attend a detention order to satisfy procedural due process? Who bears the burden to prove/disprove the relevant risk, and by what standard of proof?

## PART II. OPINION SUMMARIES

### U.S. Supreme Court

#### *Stack v. Boyle*, 342 U.S. 1 (1951)

Twelve members of the Communist Party were charged with sedition pursuant to the Smith Act (the Alien Registration Act of 1940, which imposed criminal penalties for advocating the overthrow of the U.S. government and required every adult non-citizen to register with the government). After bail was initially set in varying amounts for the defendants, it was modified to \$50,000 for each one. The defendants challenged their bail amounts as a violation of the Eighth Amendment Excessive Bail Clause, ultimately filing applications for habeas corpus that reached the Supreme Court.

The Court began by acknowledging the importance of bail to the U.S. legal order: From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. *This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.*

342 U.S. at 4 (emphasis added; internal citations omitted).

The Court held that a bond amount is “excessive” if higher than “reasonably calculated” to provide “adequate assurance” that the accused will reappear for trial. *Id.* at 4-5. Bail-setting thus requires an individualized determination: “Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of *that* defendant.” *Id.* at 5 (emphasis added). Bail-setting courts must consider, “in each case,” “the nature and circumstances of the offense charged, the weight of the evidence against [the defendant], the financial ability of the defendant to give bail and the character of the defendant.” *Id.* at 5 n.3. The Court concluded that bail had not been set “by proper methods” for the *Stack* petitioners, but that the appropriate remedy was for them to file a motion to reduce their bond amounts in the District court. *Id.* at 6.

In concurrence, Justice Jackson (joined by Justice Frankfurter) explained that “[t]he 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. He noted that “[a]dmission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice.” *Id.* at 7. And he clarified that “the duty of the judge is to reduce the risk by fixing an amount reasonably calculated to hold the accused available for trial and its consequence. But the judge is not free to make the sky the limit . . .” *Id.* at 7-8. Justice Jackson agreed that bail had been set for the *Stack* petitioners without sufficient individualized consideration, and possibly with the intention of keeping the defendants in jail, which would be “contrary to the whole policy and philosophy of bail.” *Id.* at 10. The rest of Justice Jackson’s concurrence sought to clarify the procedure by which defendants in future cases could challenge and appeal bond amounts.

***Bearden v. Georgia*, 461 U.S. 660 (1983)<sup>2</sup>**

*Bearden* did not concern bail, but it has direct application in the pretrial context. The question in *Bearden* was “whether a sentencing court can revoke a defendant’s probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate.” *Id.* at 665. To frame the Court’s reasoning, Justice O’Connor explained that “[d]ue process and equal protection principles converge in the Court’s analysis” of cases where the state treats criminal defendants differently on the basis of wealth: “[W]e generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.” *Id.* at 665. The parties had argued over which tier of scrutiny should apply, but the Court rejected the tier-of-scrutiny framework altogether. “Whether analyzed in terms of equal protection or due process,” Justice O’Connor wrote, “the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as ‘the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.’” (quoting and citing *Williams*, 399 U.S. at 260 (Harlan, J., concurring)).

Considering the relevant factors, the *Bearden* Court concluded that the Fourteenth Amendment prohibits revocation of probation solely on the basis of nonpayment, when alternate measures may suffice to meet the state’s interests. 416 U.S. at 672-73. “Only if alternate measures are not adequate to meet the State’s interests . . . may the court imprison a probationer who has made sufficient bona fide efforts to pay.” *Id.* at 672. To hold otherwise, the Court reasoned, “would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine.” And an unnecessary deprivation of liberty on the basis of indigence “would be contrary to the fundamental fairness required by the Fourteenth Amendment.” *Id.* at 673.

***United States v. Salerno*, 481 U.S. 739 (1987)**

*Salerno* concerned a facial constitutional challenge to the preventive detention provisions of the federal Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.* The two defendants in the underlying criminal proceeding, Anthony Salerno and Vincent Cafaro, were an alleged boss and captain for the Genovese family of La Casa Nostra. They had been charged with RICO violations (“35 acts of racketeering activity, including fraud, extortion, gambling, and conspiracy to commit murder”) as well as “mail and wire fraud offenses, extortion, and various criminal gambling violations,” and the district court had ordered them detained without bail pursuant to 18 U.S.C. § 3142(e). The Second Circuit vacated the detention order, holding that substantive due process “prohibits the total deprivation of liberty simply as a means of preventing future crimes.” *United States v. Salerno*, 794 F.2d 64, 71-72 (2d Cir. 1986). Defending that opinion before the Supreme Court, Salerno and Cafaro argued that the Bail Reform Act’s detention regime, on its face, violated substantive due process, procedural due process, and the Eighth Amendment prohibition on excessive bail.

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<sup>2</sup> The following synopsis is borrowed from an amicus brief that I co-authored on behalf of a group of law professors, and which was filed on October 9, 2018 in *In re Humphrey*, Case No. S247278, pending before the California Supreme Court.

The Supreme Court rejected the facial challenge. It concluded that neither the Excessive Bail Clause nor substantive due process categorically prohibits preventive detention. It found the procedures mandated by the Bail Reform Act sufficient to satisfy procedural due process, at least as a facial matter.

Importantly, though, the *Salerno* Court also emphasized constitutional limits on pretrial detention. Justice Rehnquist—writing for the majority—acknowledged the “general rule” of substantive due process that “the government may not detain a person prior to a judgment of guilt in a criminal trial.” 481 U.S. at 749. “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *Id.* at 755.

The Court’s opinion suggested how substantive due process, the Excessive Bail Clause, and procedural due process each limit deprivations of pretrial liberty. Substantive due process imposes two distinct limits. First, it prohibits punishment before trial. *Id.* at 746. According to the Court’s test, pretrial deprivation constitutes punishment if it is inflicted with punitive intent, or is irrational or “excessive” in relation to its regulatory goal. *Id.* Secondly, because the right to liberty is “fundamental,” deprivations of pretrial liberty will violate substantive due process unless they are thoroughly justified. The Court upheld the federal detention regime against the facial challenge on the ground that it was “carefully tailored” to the “legitimate and compelling” state interest of preventing crime by defendants charged with “a specific category of extremely serious offenses” whom the government had shown, by clear and convincing evidence, to present “a demonstrable danger to the community” that no conditions of release could manage. *Id.* at 750-51. Along similar lines, the Court suggested that the Excessive Bail Clause might prohibit any pretrial intervention that is excessive “in light of the perceived evil” it is designed to address. *Id.* at 754. Finally, the Court found the procedures mandated by the Bail Reform Act to survive a facial procedural due process challenge, resting its conclusion on the Act’s requirement of a full-fledged adversary hearing in which the state was required to prove, by clear and convincing evidence, that no conditions of release could adequately protect the community; if ordered detained, the defendant also had the right to immediate appeal. *Id.* at 751. Although the Court did not explicitly hold that such procedures are necessary to satisfy procedural due process, its analysis suggested that they might be.

In sum, the preventive detention provisions of the Bail Reform Act survived a facial challenge pursuant to substantive due process, procedural due process and the Excessive Bail Clause because they were narrowly tailored to a compelling state interest: The Act included careful substantive limits on detention eligibility and the requisite showing of dangerousness, as well as robust procedural protections for accused individuals at risk of detention.

### **Federal Circuit Courts**

#### ***Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc)**

*Pugh* involved a class action suit challenging the constitutionality of Florida’s practice of pretrial detention of indigent defendants unable to post money bail. While the case was pending on appeal, the Supreme Court of Florida enacted a new pretrial release rule providing for non-monetary release for those unable to pay. A Fifth Circuit panel initially held that even the new rule failed to pass constitutional muster, because “equal protection standards require a *presumption against* money bail,” which the new rule did not include. *Pugh v. Rainwater*, 557 F.2d 1189, 1194 (5th Cir. 1977) (emphasis added). On rehearing en banc, the full court vacated the panel’s



judgment. It held that the new Florida rule was “not constitutionally defective by reason of its failure to express a presumption against money bail and in favor of other enumerated forms of release.” 572 F.2d at 1056, 1058-59.

Nonetheless, the en banc court affirmed much of the panel’s interpretation of equal protection law. The court began its analysis by establishing that “imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.” *Id.* at 1056-57. The court further clarified that “[t]he demands of equal protection of the laws and of due process prohibit depriving [pretrial defendants] of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail.” *Id.* at 1057 (quoting *Rhem v. Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974)) (internal quotation marks omitted). It noted that the impact of a monetary bond varies depending on the defendant’s circumstances. A money-bail schedule, for instance, provides “speedy and convenient release for those who have no difficulty in meeting its requirements,” but “[t]he incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.” *Id.* “The ultimate inquiry in each instance is what is necessary to reasonably assure defendant’s presence at trial.” *Id.*

***United States v. McConnell*, 842 F.2d 105 (5th Cir. 1988)**

McConnell, charged with bank fraud and conspiracy in federal court, could not satisfy the \$750,000 bail amount set by the trial court because his assets were frozen in bankruptcy. He challenged the unaffordable bail amount as a violation of the Excessive Bail Clause and the Bail Reform Act of 1984, which provides that “[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person.” 18 U.S.C. § 3142(c)(2). The court rejected the Eighth Amendment claim, holding that “a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement,” and that McConnell’s high bail was justified by serious flight concerns. *Id.* at 107-08. The court likewise concluded that the Bail Reform Act does not preclude unaffordable bail. Rather, drawing from the Act’s legislative history, the panel explained that when a bail-setting court concludes that unaffordable bail is necessary, it must explain its reasoning on the record and proceed with the full process that the Act mandates for an order of detention (including an adversary hearing in which the court must release the defendant unless it finds, by clear and convincing evidence, that no method of release will provide adequate assurance of the defendant’s future appearance and of public safety). *Id.* at 108-110 & n.5.

***Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc)**

A class of plaintiffs challenged Proposition 100, an amendment to the Arizona state constitution categorically denying bail to undocumented immigrants charged with “serious felony offenses,” as defined by statute. The Ninth Circuit, en banc, held that the categorical bar to pretrial release violated substantive due process. Because the right to liberty is fundamental, deprivations of pretrial liberty must meet heightened scrutiny to survive. The court concluded that Proposition 100 did not. It acknowledged “that Arizona has a compelling interest in ensuring that persons accused of serious crimes, including undocumented immigrants, are available for trial.” 779 F.3d at 782. But it rejected “the proposition that the Proposition 100 laws are carefully limited, as *Salerno* requires,” because they did not address a “particularly acute problem,” did not limit the

denial of bail to “a specific category of extremely serious offenses,” and did not “afford the individualized determination of flight risk or dangerousness that *Salerno* deemed essential.” *Id.* at 782-88, 91-92 (quoting *Salerno*, 481 U.S. at 750). Additionally, the en banc court found that Proposition 100 was so “excessive in relation to the state’s legitimate interest in assuring arrestees’ presence for trial” that it amounted to impermissible punishment before trial. *Id.* at 791. Proposition 100 thus violated substantive due process on two independent grounds.

***ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018) (ODonnell I)**

*(Defendants’ appeal of preliminary injunction of misdemeanor money-bail schedule; affirming in part, vacating in part, and remanding to the district court for revisions to the injunction.)*

A class of misdemeanor arrestees filed a § 1983 action against Harris County, the Harris County Sheriff, and Harris County magistrate judges, alleging that the County’s use of a money-bail schedule violated equal protection and due process. After an eight-day hearing, the district court granted the plaintiffs’ motion for a preliminary injunction in a sweeping opinion that closely analyzed the voluminous evidentiary record and the history of bail. *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052 (S.D. Tex. Apr. 28, 2017). The injunction required individualized consideration of arrestees’ ability to post money bail within 24 hours of arrest and provided for alternative, non-financial methods of release. Since the summer of 2017, it has resulted in the release of thousands of misdemeanor defendants who would otherwise have remained jailed.

The Harris County defendants appealed the preliminary injunction. A Fifth Circuit panel largely affirmed it, *ODonnell v. Harris Cty.*, 882 F.3d 528 (Feb. 14, 2018), then granted rehearing. On rehearing, two members of the same panel—the third having retired—affirmed the injunction in part, vacated it in part and required modifications.

The panel first addressed procedural and jurisdictional issues. It held that the judges were appropriate defendants in the § 1983 action but that the Sheriff was not. It rejected the defendants’ argument that *Younger v. Harris*, 401 U.S. 37 (1971), compels federal court abstention in disputes concerning state-court bail procedures. It also rejected the proposition that the Excessive Bail Clause provides the exclusive vehicle for constitutional challenges to bail systems, noting that *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc), forecloses that argument.

On the merits, the panel affirmed the district court’s findings of fact and its core holding that Harris County’s reliance on a money-bail schedule to regulate misdemeanor pretrial release violated both due process and equal protection. With respect to due process, the panel identified the individual interest at stake as the state constitutional right to be “bailable by sufficient sureties.” 892 F.3d at 158 (quoting TEX. CONST. art. 1, § 11). Applying the *Mathews v. Eldridge* balancing test, the panel concluded that bail-setting by schedule failed to provide adequate procedural safeguards to protect that individual right. With respect to equal protection, the panel affirmed the district court’s holding that use of the money-bail schedule resulted in pretrial detention “because of” indigent status and without “meaningful consideration of other possible alternatives,” and was therefore unconstitutional pursuant to *Rainwater*. *Id.* at 161. The panel further agreed that any detention of criminal defendants on the basis of indigence triggers heightened scrutiny, and that reliance on a money-bail schedule was not a narrowly tailored means of promoting the state’s interests in the pretrial phase. *Id.* at 161-62.

The panel nonetheless found the injunction crafted by the district court to be overbroad. It agreed that misdemeanor defendants must have notice of the critical issues to be determined at the bail hearing, the opportunity to be heard and present evidence, and an individualized determination

by an impartial decision-maker about what conditions of release would provide adequate assurance of a defendant's future appearance, including consideration of each arrestee's financial circumstances. But the panel rejected the district court's conclusions that (1) bail-setting courts must provide a written statement of reasons for imposing any financial bond, and (2) bail hearings must be held within 24 hours of arrest. The panel held that a hearing within 48 hours and a verbal statement of reasons are sufficient to satisfy due process. *Id.* at 160, 163. It therefore remanded the case to the district court to revise the injunction in compliance with its opinion. The panel provided a set of example modifications that "would be appropriate," but left "the details to the district court's discretion." *Id.* at 164.

***ODonnell v. Goodhart*, 900 F.3d 220, 225 (5th Cir. 2018) (ODonnell II)**

*(Defendants' motion for partial stay of the revised injunction pending appeal; granted.)*

After remand by *ODonnell I*, the district court adopted the Fifth Circuit's proposed injunction but added four provisions: Sections 7, 8, 9 and 16. Section 7 prohibited wealth-based detention within the 48-hour window for individualized hearings. It provided that, if Harris County offered immediate release to arrestees who could post bond pursuant to a bail schedule, it had to offer equivalent release on an *unsecured* basis to similarly situated arrestees unable to pay the money up front. Sections 8 and 9 established a remedy if Harris County failed to hold an individualized hearing for a detained defendant within 48 hours of arrest: immediate release, with the possibility of a future hearing and bail-setting. Section 16 stipulated that people arrested on warrants for failure to appear were entitled to the same procedural safeguards in bail-setting as those arrested on other charges.

The defendants applied to the Fifth Circuit for a stay of these four provisions pending appeal of the revised injunction. A Fifth Circuit motions panel granted the stay. The *ODonnell II* panel majority held that the four provisions at issue exceeded the scope of the *ODonnell I* mandate and once again rendered the injunction overbroad. The panel held that Section 7 was unnecessary and inappropriate because "[s]ome wealth-based detention is permissible and was contemplated by the [*ODonnell I*] panel." 900 F.3d at 225. Sections 8 and 9 likewise exceeded the mandate, the panel held, because the due-process right to an individualized hearing within 48 hours does not entail a remedy of release for violations. Rather: "The district court was to monitor the situation for a pattern of violations and only then take possible corrective action." *Id.* at 226. And Section 16 exceeded the *ODonnell I* mandate because it "grant[ed] the relief ordered in Sections 7, 8, and 9 to a particular category of arrestees." *Id.* n.13. The panel rejected the plaintiffs' contention that equal protection or due process required any of the provisions at issue.

Judge Graves, Jr., dissented, arguing that the challenged provisions fell within the scope of the *ODonnell I* mandate and were narrowly tailored to ensuring compliance with equal protection and due process. In particular, he concluded that wealth-based detention violates equal protection even if limited to 48 hours.

***Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018)**

*(Defendant's appeal of preliminary injunction modifying its Standing Bail Order; vacating that injunction but inviting district court to enjoin a return to the City's original bail practices.)*

A class of misdemeanor arrestees detained for inability to post money bond filed a § 1983 action against the City of Calhoun, alleging that the City's use of a bail schedule to regulate pretrial

release in misdemeanor cases violated equal protection and due process. Shortly thereafter, the Calhoun Municipal Court adopted a Standing Bail Order that significantly altered its bail practice. The Standing Order provided that arrestees charged only with ordinance violations would be released immediately on *unsecured* bond in the amount provided for by the schedule; arrestees charged with state offenses would be released immediately if they could post bail pursuant to the schedule, including by property or surety; and arrestees charged with state offenses who could not post security for the preset bond amount would be afforded an individualized hearing within 48 hours of arrest, at which any arrestee who demonstrated indigence would be released on a recognizance bond. *Id.* at 1245-53.

Notwithstanding the changes, the district court found that the Standing Order was still inadequate to satisfy equal protection and due process and issued a broadly worded preliminary injunction. *Walker v. City of Calhoun*, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016). On appeal, an Eleventh Circuit panel vacated the injunction as insufficiently specific. *Walker v. City of Calhoun*, 682 F. App'x 721, 725 (11th Cir. 2017). The district court then entered a new injunction, holding that the Standing Bail Order “violates the Constitution insofar as it permits individuals who have sufficient resources to post a bond ... to be released immediately, while individuals who do not have those resources must wait forty-eight hours for a hearing.” *Walker v. City of Calhoun*, 2017 WL 2794064, at \*2–3 (N.D. Ga. June 16, 2017). The injunction modified the Standing Order by requiring the City to determine indigence by affidavit within 24 hours of arrest and release indigent defendants on recognizance. *Id.* at \*4.

On appeal of the revised injunction, the Eleventh Circuit panel rejected the City's arguments (1) that *Younger* compelled abstention; (2) that the City was not liable for the Municipal Court's bail policy; and (3) that the Excessive Bail Clause provides the exclusive vehicle for constitutional challenges to bail systems: “Because Walker's claim . . . rests on an allegation of categorically worse treatment of the indigent, it falls within the *Bearden* and *Rainwater* framework, and the district court was correct to apply those cases' hybrid analysis of equal protection and due process principles.” *Id.* at 1254-60.

The panel agreed with the City, however, that the district court had erred in enjoining the Standing Order, because the plaintiffs' challenge to it was unlikely to succeed. First, the Eleventh Circuit held that the Standing Order did not trigger heightened scrutiny. It did not trigger heightened scrutiny pursuant to *Bearden* because a 48-hour detention does not constitute an “absolute deprivation” of pretrial liberty.<sup>3</sup> *Id.* at 1260-62. And it did not trigger heightened scrutiny pursuant to *Salerno*'s substantive due process framework because *Salerno* itself had not applied heightened scrutiny. Even if it had, the panel held, the *Salerno* framework does not apply to a 48-hour detention. *Id.* at 1262-63. Having rejected heightened scrutiny, the panel noted that *Bearden* commands more of a “traditional due process” analysis. *Id.* at 1265. The panel proceeded to consider whether procedural due process requires a determination of indigency by affidavit within 24 hours of arrest (rather than by hearing within 48 hours, as the Standing Order required). It answered this question in the negative: “[I]ndigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest,” *id.* at 1266, and due process permits a requirement that they be made by judicial hearing, *id.* at 1266-69. The panel thus vacated the preliminary injunction modifying the Standing Bail Order.

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<sup>3</sup> The notion of an “absolute deprivation” derives from *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which held that differential treatment on the basis of wealth triggers heightened scrutiny only if it results in an “absolute deprivation” of some right or benefit to those without resources.

Lastly, the panel opinion established that the plaintiffs’ challenge to Calhoun City’s *original* bail policy remains live—the City’s voluntary changes did not moot the initial claims—and that the City “has effectively conceded that its original bail policy was unconstitutional.” *Id.* at 1272. The district court could therefore “enjoin a return to that original policy.” *Id.*

Judge Martin dissented from the majority’s central holding, arguing that a 48-hour detention does constitute an “absolute deprivation” of liberty: “In my view, an incarcerated person suffers a complete deprivation of liberty within the meaning of *Rodriguez*, whether their jail time lasts two days or two years.” *Id.* at 1276. On that basis, she reasoned that the use of a money-bail schedule as a preliminary mechanism of release triggers heightened scrutiny. *Id.* at 1276-78. Given the record in the case to date, she concluded that the state had not provided adequate justification for the policy. *Id.* at 1278-81.

### **Federal District Courts - Finding Challenged Bail Procedures Unconstitutional**

#### ***Pierce v. Velda City*, 2015 WL 10013006 (E.D. Mo. June 3, 2015)**

Pursuant to a settlement agreement in a § 1983 action, the district court issued a declaratory judgment stating, in part, that “[n]o person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.” Pursuant to the settlement, the court also ordered injunctive relief providing for the use of alternatives to monetary bond to assure the pretrial release of indigent arrestees, and establishing procedures in the case of failure to appear.

#### ***Cooper v. City of Dothan*, 2015 WL 10013003 (M.D. Ala. June 18, 2015)**

In a § 1983 suit filed on behalf of a class of indigent arrestees, the district court granted a temporary restraining order directing the City to immediately release the named plaintiff, “either on his own recognizance or subject to an unsecured bond or other reasonable and lawful non-financial conditions.” The court recognized “the unconstitutionality of a pretrial detention scheme whereby indigent detainees are confined . . . solely due to their inability to tender monetary amounts in accordance with a master bond schedule.”

#### ***Jones v. City of Clanton*, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015)**

Pursuant to a settlement agreement in a § 1983 action, the district court entered a final judgment approving the agreement and finding the City’s revised bail procedures to be constitutional. In the course of its analysis, the district court held that “[t]he Fourteenth Amendment prohibits ‘punishing a person for his poverty,’ and this includes deprivations of liberty based on the inability to pay fixed-sum bail amounts. Indeed, this principle applies with special force to criminal defendants awaiting trial, who have not been found guilty of any crime.” *Id.* at \*2 (quoting *Bearden*, 461 U.S. at 671). Therefore, “the use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person’s indigence and the

need for bail or alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment.” *Id.*

***Thompson v. Moss Point*, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015)**

The district court entered a declaratory judgment stating, in part: “No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.”

***ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052 (S.D. Tex. Apr. 28, 2017), aff’d as modified, *ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018) (*ODonnell I*); *ODonnell v. Goodhart*, 900 F.3d 220, 225 (5th Cir. 2018) (*ODonnell II*)**

[See Federal Circuit Courts, *supra*.]

***Walker v. City of Calhoun*, 2017 WL 2794064 (N.D. Ga. June 16, 2017), vacated by *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018)**

[See Federal Circuit Courts, *supra*.]

***Buffin v. City & Cty. of San Francisco*, 2018 WL 424362 (N.D. Cal. Jan. 16, 2018)**

The plaintiff class and a defendant-intervenor, the California Bail Agents Association’s (“CBAA”), filed cross-motions for summary judgment on the plaintiffs’ § 1983 claims that San Francisco’s use of a money-bail schedule—as one component of a complex process governing pretrial release—violated equal protection and due process.

The district court denied both motions, but ruled on several legal issues along the way. First, the court rejected CBAA’s argument that the Excessive Bail Clause provided the exclusive vehicle for challenging aspects of money-bail systems. The court explained that the plaintiffs “do not challenge the specific amounts set out in the Bail Schedule;” “[r]ather, their claims concern the *effect* the Sheriff’s use of the Bail Schedule has on those who cannot afford to pay the set amounts in relation to those who can.” *Id.* at \*4. Secondly, on the basis of *Salerno* and *Lopez-Valenzuela*, the district court concluded that “the Sheriff’s use of the Bail Schedule implicates plaintiffs’ fundamental right to liberty, and any infringement on such right requires a strict scrutiny analysis.” *Id.* at \*6. Third, the court concluded that strict scrutiny of the Sheriff’s bail process was also appropriate pursuant to equal protection, on two separate grounds: (a) because the challenged procedure implicated a fundamental right, and (b) because “the [*Bearden* and predecessor] cases appear to require the Court to consider the instant challenge with heightened review.” *Id.* at \*9. Furthermore, the court noted that “[t]he Supreme Court’s holdings and analyses [in *Bearden* and predecessor cases] apply with special force in the bail context, where fundamental deprivations are at issue and arrestees are presumed innocent.” *Id.* The relevant constitutional question was thus whether “the Sheriff’s use of the Bail Schedule is the least restrictive alternative for achieving the government’s compelling interests” in the pretrial phase. *Id.* at \*10. Because that question turned on still-disputed questions of fact, summary judgment was not appropriate. *Id.* at \*12.

***Caliste v. Cantrell*, 2018 WL 3727768, --- F.Supp.3d ---- (E.D. La. Aug. 6, 2018)**

A class of arrestees filed a § 1983 action against a state magistrate judge, alleging that he routinely set secured money bond without individualized consideration and required the use of a commercial surety rather than allowing arrestees to post cash bail. *Id.* at 1. The plaintiffs also argued that the judge had a conflict of interest because, under Louisiana law, a percentage of the amount collected from a commercial surety is allocated to the court for its discretionary use. *Id.* The plaintiffs sought a declaratory judgment that the judge’s bond policy and conflict of interest violated due process and equal protection. *Id.*

The court began its analysis by rejecting the judge’s arguments regarding mootness and abstention. *Id.* at 4-6. Proceeding to the merits, the court held that procedural due process provided the applicable framework for the plaintiffs’ claims, informed by the principles of *Salerno*, *Bearden*, and *Turner v. Rogers*, 564 U.S. 431 (2011). Applying *Mathews v. Eldridge*, it found that the plaintiffs’ liberty interest “weighs heavily in favor of procedural safeguards provided before imprisonment,” that there is a high risk of erroneous deprivation without an inquiry into the ability to pay, and that the judge “ha[d] not suggested any government interest that would prevent or discourage an inquiry into the ability to pay.” *Id.* at 9-10. The court concluded that the judge’s procedures failed to provide due process. *Id.* It held that in the context of pretrial detention hearings, due process requires: “1) an inquiry into the arrestee’s ability to pay, including notice of the importance of this issue and the ability to be heard on this issue; 2) consideration of alternative conditions of release, including findings on the record applying the clear and convincing standard and explaining why an arrestee does not qualify for alternative conditions of release; and 3) representative counsel.” *Id.* at 12. Lastly, the court found that the judge’s participation in the management of bond fee revenue created a conflict of interest that amounted to a separate violation of due process. *Id.* at 11. The Court thus held that the arrestees were entitled to summary judgment on both counts, and granted their motion for declaratory judgment. *Id.* at 11, 12.

***Shultz v. State*, 2018 WL 4219541, --- F.Supp.3d ---- (N.D. Al. Sept. 4, 2018)**

A class of arrestees filed a § 1983 action challenging Cullman County’s reliance on money-bail schedules to regulate pretrial release, then moved for a preliminary injunction. Shortly after the filing of the suit, Cullman County adopted a new “Standing Order Regarding Pre-Trial Appearance and the Setting of Bond” (“the Standing Order”). The plaintiffs alleged that the Sheriff’s office, primarily responsible for bail-setting, did not fully comply with the Standing Order in practice, and that in any case the Standing Order remained constitutionally deficient.

The district court granted the motion for a preliminary injunction. It held that Cullman County’s Standing Order was constitutionally deficient because, unlike the Standing Order in Calhoun City, it did not guarantee release to indigent defendants. *Id.* at \*10-11. It only guaranteed a hearing for those unable to post bond pursuant to the bail schedule, at which the judicial officer was free to impose an unaffordable bail amount unless the indigent defendant proved that s/he presented no risk of flight or to public safety. *Id.* at \*11. Thus an indigent defendant who posed some risk was likely to be detained until adjudication, whereas an equally risky defendant with resources could obtain immediate release by posting the preset bond amount. The district court found that the plaintiff class was “substantially likely” to prove that this system violated equal protection “because the challenged distinction does not rationally further a legitimate state purpose.” *Id.* at \*12. The court noted the existence of alternatives to secured money bonds, like

unsecured bonds and personal sureties, and cited the plaintiffs’ un rebutted evidence that such alternatives would be equally effective at managing pretrial risk. The court further noted that detention can *increase* the risk to public safety. *Id.* at \*14. Finally, the district court held that Cullman County’s bail-setting procedures violated procedural due process. To satisfy procedural due process, the court held, Cullman County must (1) provide arrestees adequate notice of the critical issues at stake in an initial appearance; (2) provide arrestees a meaningful opportunity to be heard on those issues; (3) prohibit pretrial detention, including via unaffordable bail, absent a judicial determination—by clear and convincing evidence—that detention is necessary to ensure appearance or protect the public; and (4) require a judicial officer who sets an unaffordable bond to state the reasons for her necessity determination on the record. *Id.* at \*19-22.

Notably, the district court acknowledged a fundamental right to pretrial liberty, but was constrained in its analysis by the somewhat contrary language in *Walker v. Calhoun*. *See, e.g., id.* at \*15, n.23 (“Because pretrial liberty is a fundamental right to which heightened scrutiny applies, were this Court writing on a clean slate, it would apply heightened scrutiny to assess Cullman County’s bail system under the equal protection/due process rubric for wealth-based classifications.”).

***Daves v. Dallas Cty.*, 2018 WL 4510136, --- F.Supp.3d ---- (N.D. Tex. Sept. 20, 2018)**

A class of arrestees filed a § 1983 action challenging Dallas County’s reliance on a money-bail schedule to regulate pretrial release for misdemeanor and felony arrestees, then moved for class certification and for the issuance of a preliminary injunction. The district court granted both motions. With respect to the injunction, the court found that the plaintiffs were likely to succeed on their constitutional claims, hewing closely to the analysis in *ODonnell I*. The court found, as a factual matter, that Dallas County bail courts did rely on the money-bail schedule and did not routinely consider arrestees’ financial circumstances, despite instructions to do so. As a result, “the County’s post-arrest system automatically detains those who cannot afford the secured bond amounts recommended by the schedules,” and “detention can last for days, weeks, and, in some cases, even months.” *Id.* at \*3. The court concluded that the County’s post-arrest system violated equal protection and due process pursuant to *ODonnell I*. It issued a preliminary injunction, borrowing the model provisions provided by the *ODonnell I* panel.

The district court did not, however, endorse the plaintiffs’ substantive due process claim. It found *Salerno* inapplicable to claims relating to detention on unaffordable bail, suggesting that the Excessive Bail Clause preempts substantive due process analysis when money bail is at issue. *Id.* at \*6.

**Federal District Courts - Rejecting Constitutional Challenge**

***Edwards v. Cofield*, 2018 WL 4101511 (M.D. Ala. Aug. 28, 2018)**

On behalf of a class of similarly situated arrestees, the plaintiff filed a § 1983 action alleging that the bail-setting practices of Randolph County, Alabama, violated equal protection and due process. Shortly thereafter, Randolph County adopted a new “standing bond order” substantially altering its pretrial practice. The plaintiff argued that the standing order remained constitutionally deficient and moved to preliminarily enjoin it; the motion was denied. The plaintiff moved for reconsideration. *Id.* at 1. She argued that the standing order violated equal protection



by offering immediate release to arrestees who could post money bail pursuant to a schedule, whereas those who could not were forced to remain in custody until a bond hearing. *Id.*

The court denied the motion. It found that rational basis, rather than heightened scrutiny, was the appropriate standard of review because “as the Eleventh Circuit explained in *Walker*, indigent arrestees (such as Plaintiff) do not suffer an ‘absolute deprivation’ of pretrial release,” and “must merely wait some appropriate amount of time to receive the same [pretrial release] as the more affluent.” *Id.* at 2. Because the state had “offered sufficient justifications for the new standing bond order,” it passed rational basis review. *Id.* The court also rejected the plaintiff’s due process argument, finding that she had not shown that the “probable value” of the requested “additional or substitute procedural safeguards” would sufficiently decrease “the risk of an erroneous deprivation” to justify the additional “fiscal and administrative burdens” they would create. *Id.* at 3.

### **State Supreme Courts**

#### ***Lee v. Lawson*, 375 So. 2d 1019 (Miss. 1979)**

A detained criminal defendant filed a habeas corpus petition challenging her unaffordable bail pursuant to equal protection and due process. The Mississippi Supreme Court reviewed applicable precedent and concluded: “A consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional.” *Id.* at 1023. The Court noted, however, that Mississippi law allowed release on recognizance and on non-financial conditions. It therefore remanded the petition “with instructions for the court to consider whether a form of pretrial release other than money bail would adequately assure the defendant’s presence at trial.” *Id.* at 24.

#### ***State v. Blake*, 642 So. 2d 959 (Ala. 1994)**

A criminal defendant filed a habeas corpus petition challenging various aspects of Alabama’s recently revised bail statute. The trial court found many of the challenged provisions to be unconstitutionally vague and overbroad, but the Alabama Supreme Court reversed most of its conclusions. The Supreme Court agreed with the trial court, however, that the bail statute violated due process and equal protection by requiring 72 hours’ notice to the prosecuting attorney before a defendant could be released on recognizance (which resulted in delays of more than 72 hours before release, whereas a person with resources could obtain immediate release by posting money bail). The Court also found that a provision of the statute prohibiting release on recognizance for any defendant with a past felony conviction or currently on misdemeanor supervision was unconstitutionally overbroad, because the prohibition encompassed “categories of defendants not reasonably related to the State’s interest in community safety.” *Id.* at 968.

#### ***State v. Brown*, 338 P.3d 1276 (N.M. 2014)**

A defendant charged with first-degree murder moved for modification of his monetary bail, which he could not afford, and provided evidence and argument supporting his release on non-financial conditions. The trial court denied the motion, and he ultimately appealed the denial to the New Mexico Supreme Court. That Court explained that New Mexico’s Constitution guaranteed

a right to bail for most criminal defendants, including the petitioner; and that, for bailable defendants, New Mexico's statutory law required trial courts to impose the least restrictive conditions of release that would reasonably assure appearance and public safety. Having reviewed the history of bail and established the importance of pretrial liberty, the Court further clarified that "[n]either the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release." *Id.* at 1292. In the case at bar, the Court found that the defendant had "presented the district court with uncontroverted evidence demonstrating that nonmonetary conditions of pretrial release were sufficient to reasonably assure that Defendant was not likely to pose a flight or safety risk." *Id.* at 1278. It concluded "that the district court erred by requiring a \$250,000 bond when the evidence demonstrated that less restrictive conditions of pretrial release would be sufficient." *Id.* at 1278. The Supreme Court reversed the trial court's bond order, instructed it to release the defendant on appropriate nonmonetary conditions, and issued a "precedential opinion to explain the basis for [its] decision, to clarify the purposes and controlling legal principles for setting bail, and to provide guidance for future pretrial release decisions." *Id.*

***Brangan v. Commonwealth*, 80 N.E.3d 949 (Mass. 2017)**

*Brangan* concerned a petition to the Massachusetts Supreme Court by a defendant who had been detained pretrial for three and a half years on a monetary bond amount he could not pay. He alleged that his unaffordable bond violated due process. *Id.* at 954.

To frame its reasoning, the Court noted that "[p]retrial detention encroaches on [the] fundamental right" to "liberty and freedom from physical restraint" *Id.* at 961. Unaffordable bail, the Court explained, "is the functional equivalent of an order for pretrial detention," and therefore "must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty." *Id.* at 963.

The Court articulated three new due process standards for the state of Massachusetts. First, the Court found that a judge may not consider a defendant's dangerousness in setting the amount of bail, and if the Commonwealth seeks to have a defendant held pretrial because he is dangerous, it must proceed under the state statute governing conditions of pretrial release for defendants accused of certain crimes involving physical force. *Id.* at 963-64. Second, the Court found that when the defendant's inability to post bail will likely result in the defendant's long-term pretrial detention, "the judge must provide findings of fact and a statement of reasons for the bail decision, either in writing or orally on the record." *Id.* at 964-65. The statement must confirm that the judge considered the defendant's financial resources, explain how the bail amount was calculated, and state why the "risk of flight is so great that no alternative, less restrictive financial or nonfinancial conditions will suffice to assure [the defendant's] presence at future court proceedings." *Id.* at 965. Finally, "when a bail order comes before a judge for reconsideration or review and a defendant has been detained due to his inability to post bail, the judge must consider the length of the defendant's pretrial detention and the equities of the case." *Id.* at 966.

***Simpson v. Miller*, 387 P.3d 1270, cert. denied sub nom. *Arizona v. Martinez*, 138 S. Ct. 146 (Az. 2017)**

*Simpson* addressed a substantive due process challenge to Arizona constitutional and statutory provisions categorically denying pretrial bail for defendants charged with sexual

misconduct with a minor. Pursuant to *Salerno*, 481 U.S. 739 (1987), the court found that the challenged provisions were regulatory rather punitive because they were designed to protect public safety. The court further interpreted *Salerno*, however, to subject any pretrial detention scheme to heightened scrutiny. Applying heightened scrutiny, the *Simpson* court acknowledged that the challenged provisions served compelling government objectives, but concluded that they were not narrowly tailored to those objectives because (1) a charge of sexual misconduct with a child is not a “convincing proxy for unmanageable flight risk or dangerousness,” *id.* at 348-49 (quoting *Lopez–Valenzuela*, 770 F.3d at 786); and (2) there existed “alternatives that would serve the state’s objective[s] equally well at less cost to individual liberty.” *Id.* at 349. The court therefore held the provisions to be facially unconstitutional. *Id.* at 349-50.

### ***State v. Wein*, 417 P.3d 787, 789 (Az. 2018)**

*Wein* addressed a substantive due process challenge to Arizona constitutional and statutory provisions categorically denying pretrial bail for defendants charged with sexual assault. Because the provisions were very similar to those at issue in *Simpson*, the Court used the same mode of analysis. It found that because the provisions were enacted to ensure a defendant’s presence at trial and protect the public, they were regulatory rather than punitive, and thus did not constitute *per se* due process violations. *Id.* at 792. As in *Simpson*, however, the *Wein* court found that the challenged provisions failed *Salerno*’s heightened scrutiny because they were not narrowly tailored to the state’s interests. *Id.* at 796. The court cited the state’s lack of evidence that defendants charged with sexual assault present a categorical danger, as well as the existence of less restrictive, equally effective alternatives to detention. *Id.* at 793-96. The court held that the provisions were facially unconstitutional because they “deprive[d] arrestees of their substantive-due-process right to either an individualized determination of future dangerousness or a valid proxy for it.” *Id.* at 796.

### **State Courts of Appeal**

#### ***In re Humphrey*, 19 Cal. App. 5th 1006 (Ct. App. 2018)**

A defendant charged with robbery and burglary (for an alleged theft of \$5 and a bottle of cologne from his neighbor in a senior-care facility) filed a petition for habeas corpus, challenging his monetary bail as a violation of equal protection and due process. The bail had initially been set at \$600,000; it was reduced to \$350,000 after Humphrey moved for a bail modification, but he could not procure that amount. The trial court engaged in some individualized analysis in Humphrey’s two bail hearings, but relied heavily on a presumptive bail schedule and the recommendation against release produced by San Francisco’s risk assessment tool. The trial court did not consider Humphrey’s financial circumstances and did not explicitly consider whether less restrictive conditions of release were adequate to ensure Humphrey’s future appearance and protect the community. Humphrey argued that both substantive due process and *Bearden v. Georgia* prohibited the court from imposing a monetary bail that constituted a *de facto* detention order in the absence of a determination that detention was necessary (*i.e.* that less restrictive alternatives were inadequate), and that procedural due process prohibited pretrial detention without a meaningful hearing on the question of necessity. The Attorney General initially opposed the petition but then withdrew his opposition. 19 Cal. App. 5th at 1016.

The Court of Appeal began by noting that the California Constitution establishes a right to release on bail except when the charge involves violence and the state demonstrates by “clear and convincing evidence” that there is “a substantial likelihood the defendant’s release would result in great bodily harm to others.” *Id.* at 1023 (quoting CAL. CONST. § 12). The parties agreed that the Section 12 carveout did not apply to Humphrey. They further agreed that the Fourteenth Amendment requires a bail-setting court “to make two additional inquiries and findings before ordering release conditioned on the posting of money bail—whether the defendant has the financial ability to pay the amount of bail ordered and, if not, whether less restrictive conditions of bail are adequate to serve the government’s interests.” *Id.*

The Court of Appeal agreed with the parties. It explained that “two related lines” of Supreme Court caselaw prohibit detention on unaffordable bail unless no less restrictive means can adequately protect the state’s interest. *Id.* at 1025. The first is the line of caselaw culminating in *Bearden*, which prohibit detention for inability to pay a monetary sum unless there is no alternative means of achieving the state’s legitimate goals. *Id.* at 1026-31. The second is the sequence of cases, beginning with *Salerno*, recognizing that physical liberty is a fundamental right, the deprivation of which triggers strict scrutiny for purposes of substantive due process. *Id.* at 1031-35. Given the importance of the individual interest at stake, procedural due process also requires robust procedural protections for any deprivation of liberty. The Court held: “If the [bail-setting] court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose.” *Id.* at 1037. In Humphrey’s case, “the court’s order, by setting bail in an amount it was impossible for petitioner to pay, effectively constituted a *sub rosa* detention order lacking the due process protections constitutionally required to attend such an order.” *Id.* at 1014. Humphrey was thus “entitled to a new bail hearing at which the court inquires into and determines his ability to pay, considers nonmonetary alternatives to money bail, and, if it determines petitioner is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention.” *Id.*