Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

October 19, 2019

Hon. Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

M E M O R A N D U M

TO: Criminal Justice Stakeholders
FROM: Keisa Williams, keisaw@utcourts.gov
RE: Pretrial Caselaw: Ability to Pay Analysis and Procedural Due Process

Criminal Justice System Partners,

Over the last several years, in both state and federal cases across the country, courts are consistently holding that it may be an unconstitutional deprivation of due process and equal protection rights under the 14th Amendment to set monetary conditions of pretrial release without first considering, among other things, an arrestee's ability to pay the amount set.

Most of the cases are requiring that courts hold a hearing with full due process protections, including a 6th Amendment right to counsel, to make those determinations within 24-48 hrs of arrest. While none of the cases discussed below are precedential, there is a concern that the courts' (and other criminal justice stakeholders') application of the state's pretrial release laws and court rules may not be constitutionally upheld if challenged in court.

The Judicial Council's Standing Committee on Pretrial Release and Supervision has identified this issue as critical and is working to identify necessary changes to court policies and procedures, and to develop statewide reform proposals. Standing Committee members include legislators, law enforcement, prosecutors, defense counsel, judges, the commercial surety industry, the Utah Association of Counties, the Commission on Criminal and Juvenile Justice, the Indigent Defense Commission, and the Utah Insurance Department. The Committee understands that any such large-scale reforms would significantly impact, not only court operations and resources, but resources for prosecutors, public defenders, counties, and law enforcement agencies.

The purpose of this memo is to inform partners that the Committee is engaging in this work, and to open a dialogue and invite feedback about potential reforms. I encourage you to reach out to me with your thoughts and suggestions, and I would welcome the opportunity to meet with your organizations to explore these issues further.

Sincerely,
Keisa Williams
385-227-1426

Below are some, but not all, of the cases I have identified which address ability to pay analyses in bail sets. **Some citations may be outdated.*

State:

- *In re Kenneth Humphrey*, 19 Cal. App. 55th 1006 (2018) (Court of Appeal of the State of California, First Appellate Division, Division Two)
- *Robinson et al., v. Martin, et al.*, Case no. 2016 CH 13587 (Circuit Court of Cook County, IL, County Department, Chancery Division)
- *Brangan v. Commonwealth*, 80 N.E.3d 949 (Mass. 2017)(Supreme Judicial Court of Massachusetts)
- *Scione v. Commonwealth*, Case no. SJC-12536 and *Commonwealth, v. David W. Barnes*, Case no: SJC-12540 (Supreme Judicial Court of Massachusetts)
- *State v. Brown*, 338 P.3d 1276 (2014)(Supreme Court of New Mexico)
- *People ex rel. Desgranges, Esq. on behalf of Kunkeli v. Anderson*, Case no. 90/2018 (Supreme Court of the State of New York, County of Dutchess)
- *Philadelphia Community Bail Fund v. Magistrate Bernard, et al.*, Case no. 21 EM 2019 (Supreme Court of Pennsylvania, Eastern District)

Federal:

- *Buffin v. City and County of San Francisco, et al.*, Case no. 4:15-cv-04959-YGR (U.S. District Court for the Northern District of California)
- *Kandace Kay Edwards v. David Cofield, et al.*, Case no. 3:17-cv-321-WKW (U.S. District Court for Middle District of Alabama, Eastern Division)
- *Schultz, et al. v. State of Alabama, et al.*, Case no. 5:17-cv-00270-MHH (U.S. District Court for the Northern District of Alabama, Northeastern Division)
- *Walker v. City of Calhoun, GA* (*"Walker I"*), 2016 WL 361612 (N.D. Ga. Jan. 28, 2016)
- *Walker v. City of Calhoun, GA* (*"Walker II"*), 682 F. App'x 721, 724-25 (11th Cir. 2017)
- *Walker v. City of Calhoun, GA* (*"Walker III"*), 2017 WL 2794064) (N.D. Ga. June 16, 2017)
- *Walker v. City of Calhoun, GA ("Walker IV")*, 901 F.3d 1245 (11th Cir. 2018)
- *Caliste v. Cantrell*, Case no. 2:17-cv-06197-EEF-MBN (U.S. District Court, Eastern District of Louisiana)
- *United States v. Mantecon-Zayas*, 949 F.2d 548 (1st Cir. 1991)
- *Ross v. Blount*, Case no. 2:19-cv-11076-LJM-EAS (U.S. District Court for the Eastern District of Michigan, Southern Division)
- *Dixon v. St. Louis*, Case no. 4:19-cv-00112-AGF (U.S. District Court, Eastern District of Missouri, Eastern Division)
- *Collins v. Daniels*, Case no. 1:17-cv-00776-RJ-KK (U.S. District Court for the District of New Mexico)
- *Collins v. Daniels*, Case no. 17-2217 and 18-2045 (U.S. Court of Appeals for the 10th Circuit)
- *ODonnell v. Harris County, Texas, et al.*, Case no. 4:16-cv-01414 (U.S. District Court for the Southern District of Texas, Houston Division)
- *ODonnell v. Harris County, Texas, et al. (ODonnell I)*, 892 F.3d 147 (5th Cir. 2018)
- *ODonnell v. Goodhart. (ODonnell II)*, 900 F.3d 220 (5th Cir. 2018)
- *Daves, et al., v. Dallas County, Texas, et al.*, Case no. 3:18-CV-0154-N (U.S. District Court for the Norther District of Texas, Dallas Division)
- *Booth v. Galveston County, et al.*, Case no: 3:18-CV-00104 (U.S. District Court, Southern District of Texas, Galveston Division)(September 11, 2019)

The following is a brief overview of a few of the cases I believe to be most representative of the overarching legal analysis and findings in the majority of the cases I identified above.

Buffin, et al., v. City and County of San Francisco, et al., 2018 WL 424362 (U.S. District Court, N.D. California)

Issues: *(*Excluded issue related to CBAA's intervenor status)*

1. Whether the use of San Francisco's Felony and Misdemeanor Bail Schedule as a basis for defendant Sheriff to release detainees prior to arraignment, where those detainees do not have the means to afford the amounts set forth therein, significantly deprives detainees of their fundamental right to liberty?
2. Whether plausible alternatives exist which would allow for their release?
3. Whether the continued use of such a schedule violates the Due Process and Equal Protection clauses of the United States Constitution?

Holding: "Plaintiff's motion for summary judgement is granted…" "The evidence demonstrates that the Sheriff's use of the Bail Schedule significantly deprives plaintiffs of their fundamental right to liberty, and a plausible alternative exists which is at least as effective and less restrictive for achieving the government's compelling interests in protecting public safety and assuring future court appearances. Operational efficiency based upon a bail schedule which arbitrarily assigns bail amounts to a list of offenses without regard to any risk factors or the governmental goal of ensuring future court appearances is insufficient to justify a significant deprivation of liberty."

"…the Court will issue an injunction enjoining the Sheriff from using the Bail Schedule as a means of releasing a detainee who cannot afford the amount but will delay issuing the injunction pending briefing."

Certified Class: All pre-arraignment arrestees (1) who are, or will be, in the custody of the sheriff, (2) whose bail amount was set by the bail schedule, (3) whose terms of pretrial release have not received an individualized determination by a judicial officer, and (4) who remain in custody for any amount of time because they can't afford to pay.

Facts: Plaintiff #1 was 19 yrs old and was arrested for grand theft of personal property. Bail amount set at $30,000 ($15,000 for each booking charge) pursuant to the bail schedule. She couldn't afford to pay. DA's office decided not to file charges and she was released. Despite having been detained on a Mon. night, she was never taken to court on Tues. or Wed. for an initial appearance. She was released Wed. night after spending 46 hrs in custody. She lost her job.

Plaintiff #2 was 29 yrs old and was arrested for assault with force likely to cause great bodily injury. Bail was set at $150,000 ($75,000 each for 2 counts). She couldn't afford to pay. After 29 hrs in jail and prior to her initial appearance, she was released after her uncle paid an initial down payment to a bondsman of $1,500 on a $15,000 non-refundable premium. Her sister and grandmother co-signed. DA's office did not file formal charges. Her family members were still obligated to pay the $15,000 premium.

The San Francisco superior court established the bail schedule, which is comprised principally of a three-columned table that identifies an "offense" or penal code section, a short "description" thereof, and a fixed "bail" amount. The Sheriff consults the bail schedule to determine an arrestee's bail amount.

The Sheriff locates each "booking charge," tabulates the amounts designated per charge, and releases the detainee upon payment of that sum. "The Sheriff applies the process mechanically, making no individualized assessment regarding public safety, flight risk, ability to pay, or strength of evidence."

"Under state law, some arrestees may apply to a magistrate for pre-arraignment release on lower bail or on his or her own recognizance (OR). The application can be made without a hearing. Ironically, individuals charged with certain offenses are ineligible to apply pre-arraignment for either OR release or a reduction in bail, but if they pay the applicable amount under the Bail Schedule, the Sheriff may release them."

In setting bail, a judge or magistrate may consider the information included in a report prepared by investigative staff (pretrial staff) employed by the court for the purpose of recommending whether a detainee should be released on his/her OR. For arrestees eligible for OR release, pretrial staff prepare a packet including the PSA, summary of criminal history, and police report. The packet is presented to the duty judge at arraignment.

"In terms of timing, the evidence unequivocally demonstrates that arrestees who post the full amount of bail listed on the Bail Schedule can secure release more quickly than any other category of arrestees. This is true even when an arrestee who posts the full bail amount has been charged with a more serious offense than the indigent arrestee." "…a wealthy arrestee who is charged with a violent offense can be released from custody within a matter of hours, while an indigent arrestee can remain incarcerated for as many as five days before seeing a judicial officer or the case is discharged for 'lack of evidence.'"

Analysis:

<u>Strict Scrutiny</u> review applies to plaintiffs' Due Process and Equal Protection claims.

- Heightened scrutiny is required by the U.S. Supreme Court's *Bearden-Tate-Williams* line of cases,[1] particularly "where fundamental deprivations are at issue and arrestees are presumed innocent."
- Because the Sheriff's use of the Bail Schedule implicates plaintiffs' fundamental right to liberty, "any infringement on such rights requires a strict scrutiny analysis."
- Distinguished *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) and *ODonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018)*("ODonnell II")*, and aligned with the dissenting opinions in those two cases.
- *ODonnell II* is a split decision of the 5th Circuit arising from *procedural* due process claims. That case's passing reference to the appropriateness of "rational basis review" ignores its own decision in *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018)("*ODonnell I*") calling for "heightened scrutiny."
- Indigent arrestees detained prior to their individualized hearings solely because they cannot afford secured money bail do not receive any "meaningful consideration of other possible alternatives" that would enable their pre-hearing release.
- Rather, they "share two distinguishing characteristics" which trigger heightened scrutiny: (1) "because of their impecunity they [are] completely unable to pay for some desired benefit"; and

[1] *Bearden v. Georgia*, 461 U.S. 660 (1983); *Tate v. Short*, 401 U.S. 395 (1971); and *Williams v. Illinois*, 399 U.S. 235 (1970)

(2) "as a consequence, they sustain an absolute deprivation of a meaningful opportunity to enjoy a benefit."[2]

- In *Walker*, a split 11th Circuit court vacated a preliminary injunction based on *procedural* due process arguments. This court finds that *Walker's* reasoning regarding *procedural* due process does not bear on the analysis of plaintiffs' equal protection and *substantive* due process claims here. Walker didn't challenge the amount and conditions of bail *per se*, but the process by which those terms are set.
- This court does not share the same view on the principle of liberty as the *Walker* court.
- In cases involving the fair treatment of indigents in the criminal justice system, "[d]ue process and equal protection principles converge."[3] Constitutional questions in that context require "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…" Those means are not hard and fast but must be tested. The question is under what standard.

There is <u>no 48-hour safe harbor window</u> for making indigency determinations.

- In *Gerstein*, the Supreme Court held that the 4th Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. 420 U.S. at 124-25. The Court did not specify what would meet the promptness standard, instead noting that "the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." *Id.* At 123.
- The Supreme Court noted a *presumption*, not a safe harbor.
- The *McLaughlin* Court made clear that the 48-hour presumption was rebuttable. A probable cause hearing held within 48 hours may nonetheless be unconstitutional "if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." 500 U.S. 44, at 56 (1991). In the dissent, Scalia said 48 hours was arbitrary and argued that given the data available, law enforcement needed only 24 hours to obtain probable cause review.
- The 48 hour presumption must be viewed in context. Nothing stopped the lower court from taking Plaintiff #1 to court on Tuesday morning, 10 hrs after she was booked, or even on Wednesday. Had it done so, Plaintiff would have seen a judge who could have made a release determination. Holding her 4 ½ times longer and well after the court closed on Wednesday suggests that the gov't is unjustifiably taking advantage of the 48-hr window. Such delay for delay's sake has been condemned by the Supreme Court (referencing *McLaughlin*).

A <u>significant deprivation of liberty</u> has occurred.

- The existence of a significant deprivation is not a threshold requirement *triggering* strict scrutiny, but rather the first inquiry in a strict scrutiny analysis.
- All parties agree that cash and the posting of a surety bond are the fastest ways to be released. The use of the bail schedule results in longer statutory detention of the plaintiff class.
- In determining significance, the time differential is but one component of the analysis. "Significance" is measured by more than just a difference in hours. The real world consequences of such a deprivation can include loss of employment, housing, public benefits, child custody, and the burden of significant long-term debt due to a short period of detention. Many detainees plead guilty (or no contest) at an early stage in the proceedings to secure their release.

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[2] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973)

[3] Referring to the rule of law established by the *Bearden-Tate-Williams* cases

- Given the consequences which flow from extended pre-arraignment detention, the court finds the deprivation significant.

Plausible alternatives exist which are consistent with the government's compelling interests.

- Plaintiffs bear the burden of identifying a plausible alternative that is less restrictive and at least as effective at serving the government's compelling interests: protecting public safety and assuring future court appearance.
- The burden is not high, and it need not rise to the level of scientific precision.[4]
- Plaintiffs' proposed alternative is to rely solely on the PSA. In enacting S.B. 10,[5] the government *itself* concurs that the alternative is plausible. Unlike current reliance on the bail schedule, S.B. 10 requires all jurisdictions to generate a PSA for each arrestee, *prior to arraignment*, to determine eligibility for release, with low- and medium-risk individuals to be released OR prior to arraignment *without review by the court*.
- The court declined to address the constitutionality of S.B. 10. "The wholesale elimination of bail is outside the scope of this action."
- The argument that the plaintiffs' proposed alternative would pose "insurmountable administrative" problems for the Sheriff in determining which arrestees can "afford" bail is unfounded. Other jurisdictions have detainees execute affidavits for determining ability to pay.[6]
- The court referenced a study report conducted by the California Chief Justice's Pretrial Detention Reform Workgroup as additional evidence that a plausible alternative to the current system exists.

The proposed alternative is less restrictive than and at least as effective as the Bail Schedule in serving the government's compelling interests, and does not perpetuate the deprivation of one's liberty.

- The record is devoid of *any* evidence showing that the Bail Schedule considers either of the government's articulated goals: public safety and appearance.
- There is no requirement for any input, data collection, deviation reports, or comparative data in putting together the bail schedule.
- Defendants admit that there are no peer-reviewed studies that have empirically addressed questions specifically regarding the effectiveness of bail schedules, and that such schedules are simply used for "operational efficiency."
- Absent any evidence justifying the bail schedule as a means for accomplishing the government's compelling interests, the court finds that "operational efficiency" does not trump a significant deprivation of liberty. Delay until the end of the 48 hours appears to have become operational protocol.
- Merely assigning a random dollar amount to a code section does not address an actual person's ability or willingness to appear in court or the public safety risk a person poses. At most, all that can be discerned is that the amounts are so high as to keep all arrestees detained except for those who can afford to be released.
- This practice replaces the presumption of innocence with the presumption of detention.
- Accordingly, the Bail Schedule, which merely associates an amount of money with a specific crime, without any connection to public safety or future court appearance, cannot be deemed

[4] *See, e.g., Ashcroft*, 542 U.S. at 666-68 and *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009)

[5] August 20, 2018, Governor Brown signed the California Money Bail Reform Act (S.B. 10) into law, which was originally set to go into effect on October 1, 2019. However, a referendum to overturn S.B. 10 qualified for the November 3, 2020 statewide ballot. Approval by a majority of voters will be required before S.B. 10 can take effect.

[6] *See, e.g., Walker*, 901 F.3d at 1253 and *ODonnell II*, 900 F.3d at 222.

necessary. In fact, the use of such an arbitrary schedule may not even satisfy an analysis under a rational basis review. The presumption of detention is not rationally related to a legitimate government purpose.[7]

Walker v. City of Calhoun, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016)(*"Walker I"*) and *Walker v. City of Calhoun, GA* (*"Walker III"*), 2017 WL 2794064) (N.D. Ga. June 16, 2017)(incorporating its findings in *Walker I* and issuing another preliminary injunction with more specificity pursuant to the 11th Circuit in *Walker v. City of Calhoun, GA* (*"Walker II"*), 682 F. App'x 721, 724-25 (11th Cir. 2017)(vacating on grounds that the district court's order in *Walker I* was insufficiently specific).

Issue:

1. Whether Defendant violated the Plaintiff class's 14th Amendment rights by jailing them because of their inability to pay fixed amounts of secured money bail?
2. Whether Plaintiff is entitled to an order preliminarily and permanently enjoining Defendant from enforcing its post-arrest money-based detention policies against Plaintiff and the class?

Holding:

1. Plaintiff's Motion for Preliminary Injunction is granted.
2. Defendant is ordered to implement post-arrest procedures that comply with the Constitution, and further orders that, unless and until Defendant implements lawful post-arrest procedures, Defendant must release any other misdemeanor arrestees in its custody, or who come into its custody, on their own recognizance or on an unsecured bond in a manner otherwise consistent with state and federal law and with standard booking procedures.
3. Arresting officers, jail staff, or the court – as soon as practicable after booking – must verify that an arrestee is unable to pay secured or money bail via a sworn affidavit of indigency. The affidavit of indigency must be evaluated within 24 hrs after arrest.
4. The affidavit must include information about the arrestee's finances and the opportunity for the arrestee to attest indigency, defined as "less than 100 percent of the applicable federal poverty guidelines."
5. Defendant may not continue to keep arrestees in its custody for any amount of time solely because the arrestees cannot afford a secured monetary bond.

Certified Class: All arrestees unable to pay for their release who are or will be in the custody of the City of Calhoun as a result of an arrest involving a misdemeanor, traffic offense, or ordinance violation.

Facts: Plaintiff is a 54-yr-old unemployed man with a mental health disability and income of $530/mo. in Social Security disability payments. Plaintiff has a prescription for medication for his mental disorder and must take the medication every day. He was arrested for being a pedestrian under the influence of alcohol, a misdemeanor with no possible jail sentence and a fine not to exceed $500. He was held in jail on $160 cash bond for 5 days before filing suit.

At the time the case was filed, Defendant rarely, if ever, deviated from the scheduled secured money bail amounts. Defendant did not allow post-arrest release on recognizance or with an unsecured bond prior to initial appearance. Defendant held weekly court sessions on Mondays, and new arrestees who could not post bond had to wait until the following Monday to see the judge. Defendant did not hold court on the Monday following Plaintiff's arrest, due to the Labor Day holiday. Plaintiff was not scheduled to

[7] *See* Chemerinsky, Erwin, Constitutional Law Principles and Policies, 5th Edition, at 706.

appear in court until 11 days post-arrest. Plaintiff was released 6 days following arrest (1 day after the filing of this suit) by stipulation of the parties.

After the case was filed, and while this case was pending, the Municipal Court issued a standing order altering its bail policy as follows:

- Re-adopted the bail schedule for state offenses, with cash bail set at an amount no more than the expected fine with applicable surcharges should the accused later enter a plea or be found guilty.
- As an alternative to cash bail, arrestees can use their driver's license as collateral, or "make secured bail by property or surety" at an amount "twice that set forth in the schedule."
- If they can't meet those conditions, they shall be brought before a judge within 48 hrs of arrest for an initial appearance. They shall be represented by court-appointed counsel, and will be given the opportunity to object to the bail amount, including on the basis of indigency.
- The court shall determine whether the accused is unable to post a secured bail because he/she is indigent, making an individualized determination based upon the evidence provided.
- If the court finds the person indigent, he shall be subject to release on recognizance without making secured bail, with notice of the date for the next proceeding or trial.
- If no hearing is held within 48 hrs, the accused shall be released on a recognizance bond.
- On charges of a violation of city code (vs. state law), arrestees shall be release on an unsecured bond in the amount established by the bail schedule.

Analysis:

Plaintiff has a <u>substantial likelihood of succeeding</u> on the merits of his claims.

- Keeping individuals in jail solely because they cannot pay for their release, whether via fines, fees, or cash bond, is impermissible.[8]
- Any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause.
- The Equal Protection Clause generally prohibits "punishing a person for his poverty."[9] This provision has special implications as it relates to depriving a person of his liberty.
- This is especially true where the individual being detained is a pretrial detainee who has not yet been found guilty of a crime.[10] In *Pugh*, the 5th Circuit observed that a bond schedule that did not take into account indigency would fail to pass constitutional muster.
- Although the standing order attempts to remedy the deficiencies of the earlier bail policy, it simply shortens the amount of time that indigent arrestees are held in jail to 48 hours. However, any detention based solely on financial status or ability to pay is impermissible.
- Generally, an individual's indigence does not make them a member of a suspect class. However, detention based on wealth is an exception to the general rule that rational basis review applies to wealth-based classification.
- Because the new bail order treats those who can afford to pay the bail schedule amount differently than those who can't, it was subject to heightened scrutiny.

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[8] *Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)

[9] *Bearden v. Georgia*, 461 U.S. 660, 671 (1983)

[10] *See Pugh*, 572 F.2d at 1056 ("We view such deprivation of liberty of one who is accused but not convicted of crime as presenting a question having broader effects and constitutional implications than would appear from a rule stated solely for the protection of litigants.").

The amended bail policy does not deprive Plaintiff of his standing.

- There is no guarantee that Defendant will not revert back to its previous bail policy at some point. Further, the Standing Order gives rise to some of the same concerns as the previous bail policy. For the same reason, the standing order does not render this case moot.
- Given Plaintiff's evidence that he is indigent, it is entirely foreseeable that Plaintiff might be subject to arrest and detention in violation of his rights even under the new Standing Order.
- The Plaintiff is not challenging the requirements or provisions of a state statute or bail schedule *per se*.

Plaintiff has suffered irreparable harm.

- Plaintiff has suffered an improper loss of liberty by being jailed simply because he could not afford to post money bail. This constitutes irreparable harm.[11]

The balance of harms favors Plaintiff.

- Defendant's contention that modifying its bail system will create significant administrative and procedural problems and will result in the release of individuals who pose a risk or danger to the community is unpersuasive.
- Defendant fails to acknowledge that its current system of releasing arrestees as soon as they post bond does nothing to address either of those concerns.
- Any difficulties Defendant may suffer if the Court grants injunctive relief are not so significant as to outweigh the important constitutional rights at issue.

Public interest supports preventing the violation of a party's constitutional rights.

- "It is always in the public interest to prevent the violation of a party's constitutional rights."[12]
- "Upholding constitutional rights surely serves the public interest."[13]

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

Issue: What process does the Constitution require in setting bail for indigent arrestees?

Holding:

1. *Younger* abstention was not warranted;
2. City was not immune from § 1983 liability;
3. Due process and equal protection, rather than the Eighth Amendment, applied to indigent arrestee's claims;
4. Bail schedule order was not subject to heightened scrutiny *(Dissenting opinion would have imposed strict scrutiny)*;
5. District court abused its discretion in granting preliminary injunction requiring municipal court to make indigency determination with respect to arrestees within 24 hours;
6. District court abused its discretion in issuing preliminary injunction requiring municipal court to adopt affidavit-based process for determining indigency;

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[11] *See Rodriguez v. Providence Cmty. Corrs., Inc.*,Case No. 3:15–CV–01048, —— F.Supp.3d ——, ——, 2015 WL 9239821, at 9 (M.D.Tenn. Dec. 17, 2015) (finding that irreparable harm requirement was satisfied based on "the unconstitutional liberty deprivation which stems from Defendants' practice of jailing probationers on secured money bonds with[out] an indigency inquiry").

[12] *See Simms*, 872 F.Supp.2d at 105

[13] *See also Giovani Carandola, Ltd.*, 303 F.3d at 521

7. Arrestee failed to establish that he was likely to succeed on the merits of his claim that municipal court's standing bail order violated equal protection and due process; but
8. Arrestee's claim challenging original bail policy was not moot.
9. The district court may enjoin a return to the City's original bail policy, but the district court erred in also enjoining the entirely constitutional standing bail order. The preliminary injunction is vacated and the case is remanded to the district court for further proceedings.

Analysis:

Younger does not apply.

- Younger doesn't readily apply because Walker is not asking to enjoin any prosecution.[14]
- Walker does not ask for pervasive federal court supervision of State criminal proceedings, but merely asks for a prompt pretrial determination of a distinct issue which will not interfere with subsequent prosecution.
- At the very least, the district court could reasonably find the relief Walker seeks is not sufficiently intrusive to implicate *Younger*. The district court did not abuse its discretion and was not required to abstain.

City is not immune from §1983 liability.

- Georgia law indicates that the City has the authority to set bail policy. The State's broad grant of authority enables the City to regulate bail and the City already does so.
- Georgia's Uniform Municipal Court Rules, as promulgated by the Supreme Court of Georgia, recognize that "[b]ail in misdemeanor cases shall be set as provided in [State statutes], *and as provided by applicable municipal charter or ordinance.*"
- The district court did not err in finding that the City could directly regulate bail if it wished to and so may be held responsible for acquiescing in an unconstitutional policy and practice by its Municipal Court and its police.

The 14th Amendment, rather than the 8th Amendment, applies to Plaintiff's claims.

- The 8th Amendment doesn't apply because the right at issue here is equal protection, not the protection against excessive bail.
- If the 8th Amendment did apply, the Plaintiffs would lose because the 8th Amendment says nothing about whether bail shall be available at all, but is meant merely to provide that bail shall not be excessive in those cases where it is proper to grant bail.[15]
- Bail is not excessive under the 8th amendment merely because it is unaffordable. The basic test for excessive bail is whether the amount is higher than reasonably necessary to assure the accused's presence at trial. As long as that's the reason for setting the bond, the final amount, type, and other conditions of release are within the discretion of the releasing authority.
- The district court correctly evaluated this case under due process and equal protection of the 14th Amendment.
- The decisive case is *Pugh v. Rainwater*. The court weighed the State's compelling interest in assuring appearance at trial with an individual's presumption of innocence and constitutional guarantees. 572 F.2d 1053, 1056 (5th Cir. 1978).

[14] *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975),
[15] *Carlson v. Landon*, 342 U.S. 524 (1952)

- *Pugh* held that the "demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail."
- Therefore, the "incarceration of those who cannot" meet a master bond schedule's requirements, "without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."
- Walker's claim, like the plaintiffs' in *Rainwater*, doesn't challenge the amount and conditions of bail *per se*, but the process by which those terms are set.
- In *Bearden v. Georgia*, the court explained that "[d]ue process and equal protection principles converge in the Court's analysis" of cases where defendants are treated differently by wealth. Under Due Process, "we generally analyze the fairness of relations between the criminal defendant and the State." Under Equal Protection, we address "whether the State has invidiously denied one class of defendants a substantial benefit available to another class."[16]

Bail Schedule order was not subject to <u>heightened scrutiny</u>.

- In *Rainwater*, the court approved the "[u]tilization of a master bond schedule" without applying any heightened form of scrutiny. It upheld the scheme because it gave indigent defendants who could not satisfy the master bond schedule a constitutionally permissible secondary option: a bail hearing at which the judge could consider "all relevant factors" when deciding the conditions of release.
- In *Bearden*, mere diminishment of a benefit (as opposed to an absolute deprivation of a meaningful opportunity to enjoy that benefit) was insufficient to make out an equal protection claim: "[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."
- Under the new bail order, indigent defendants suffer no absolute deprivation of pretrial release, rather they must merely wait some appropriate amount of time to receive the same benefit as the more affluent.
- After such a delay, they arguably receive preferential treatment by being released on recognizance without having to provide any security. Such a scheme does not trigger heightened scrutiny under the Supreme Court's equal protection jurisprudence.
- Similarly, in *Salerno*, the Supreme Court's analysis was much closer to a relatively lenient procedural due process analysis than any form of heightened scrutiny.[17] Rather than asking if preventative detention of dangerous defendants served a compelling or important State interest and then demanding narrow tailoring, the Court employed a general due process balancing test between the State's interest and the detainee's.
- Even if *Salerno* did embrace a form of heightened scrutiny, we do not believe it applies in this case because the City is not seeking to impose any form of preventative detention. Walker was released, and the standing bail order guarantees release within 48 hours of arrest to all indigent defendants.

Indigency determinations for purposes of setting bail are presumptively constitutional if made within <u>48 hours</u> of arrest.

- Relying on *County of Riverside v. McLaughlin* (500 U.S. 44, 55 (1991)) – making probable cause determinations within 48 hours of arrest complies with the promptness requirement.
- This court expressly rejects a 24 hour bright-line limitation.

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[16] 461 U.S. 660, 661, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)
[17] 481 U.S. at 741, 107 S.Ct. 2095.

- *McLaughlin* allows detention for 48 hours before even establishing probable cause. The Court expressly envisioned that one reason is so that PC hearings could be combined with bail hearings and arraignments. The city can take 48 hours to set bail for someone held *with* probable cause.
- The 5th Circuit in *ODonnell* recently imported the *McLaughlin* 48-hour rule to the bail determination context. They held that a 24-hour limit was a heavy administrative burden and therefore too strict.
- The court expressly did not decide whether a jurisdiction could adopt a system allowing for longer than 48 hours to make a bail determination because the city's system sets 48 hours.

An <u>affidavit-based procedure</u> for indigency determinations is not required.

- Federal courts should give States wide latitude to fashion procedures for setting bail.
- Directly on point, the bail rule upheld in *Rainwater* was based on formal hearings at which judges would consider the arrestee's financial resources, just as the Standing Bail Order provides.
- Even if *Rainwater* were not dispositive, however, there is no constitutional basis for the district court's imposition of its preferred method of setting bail.
- The City may have had good reasons for preferring a judicial hearing to a purely paper-based process for evaluating indigency. It may reasonably prefer that a judge have the opportunity to probe arrestees' claims of indigency in open court.
- Whatever limits may exist on a jurisdiction's flexibility to craft procedures for setting bail, it is clear that a judicial hearing with court-appointed counsel is well within the range of constitutionally permissible options.