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Notes on Key Decisions for the Pretrial Decision

I prepared the below notes as part of my literature review in preparation for a presentation to the Michigan Joint Task Force on Jail and Pretrial Incarceration in August, 2019. While much of the content that follows is informal (don't hold me to typos or citation formats!), I wanted to make these notes available to members of the task force in case they are helpful, and in the interest of transparency. I'll note that this, while long, is still not a comprehensive overview: for instance, the "state court litigation" section is thin as it currently stands.

This legal landscape continues to come into sharper focus, but many of the principles animating ongoing litigation stem from decisions below decided in the 1950's through the 1980's.

1951: *Stack v. Boyle*, 342 U.S. 1

- Twelve habeas petitions of people incarcerated on bail amounts ranging from $2,500 to $100,000. Requests for bail modifications on 8th Amendment grounds were denied, habeas petition dismissed, 9th affirmed, and cert granted.
- "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." at 4.
- Court finds bail was unconstitutionally excessive, emphasizing the lack of individualization and evidence to support each individual person's bail conditions

1962: *Cohen v. United States*, 82 S.Ct. 526 (1962)

- Justice Douglas previously signed an order admitting Cohen to bail upon posting a $100,000 bond, *see* 82 S.Ct. 518. Upon remand ,however, the district court ordered that $30,000 of that bond "be applicable to the payment of the fine" issued in Cohen's case. 82 S.Ct. at 527.
- Justice Douglas determines that "a requirement… that the bail bond should contain a condition that the bond should also operate as a supersedeas to a judgment for the payment of a fine made the bail required excessive." *Id.* at 528 (citing *Cain v. United States*, 148 F.2d 182 (9th Cir. 1945)).
- Bail deposits cannot be used to collect fines or fees – to do so renders the bail excessive "because it would be used to serve a purpose for which bail was not intended." *Id.*
- "The granting or withholding of bail is not a matter of mere grace or favor" and writs of error brought before the Supreme Court made in good faith begin with the general principle that "petitioners should be admitted to bail." *Id.*
- Justice Douglas orders that the district court eliminate the condition that bail be used for payment of fines. *Id.*

1968: *Sellers v. United States*, 89 S. Ct. 36 (1968)

- Justice Black evaluates appellant's post-conviction application for bail, grants it.
- "The idea that it would be 'dangerous' in general to allow the applicant to be at large must… relate to some kind of danger that so jeopardizes the public that the only way to protect against it would be to keep the applicant in jail." *Id.* at 38. (Black, J., in chambers)

1969: *United States v. Leathers*, 412 F.2d 169 (D.C. Cir. 1969) (per curiam)

- Three D.C. Circuit judges issue a per curiam opinion from chambers, responding to "a dramatic increase in appeals by persons detained pretrial" that the judges attribute to shifting winds after passage of the Bail Reform Act of 1966. *Id.* at 170.
- "We can appreciate the disquiet a trial judge may feel on occasion in releasing a person charged with a dangerous crime because [the law] requires it, a feeling we have at time shared. We can also understand the pressures placed on a judge who sincerely believes that pretrial release in a particular case is incompatible with the public safety…" *Id.* However, to release large swaths of those people is in fact what the law required: "none of us on the bench has any serious alternative but to put aside his personal doubts and apply the Act as Congress has written it." *Id.* at 170.
- The 1966 Bail Reform Act "was an effort of Congress to give meaning to some of our highest ideals of justice." *Id.* at 170. It mandated "that conditions of pretrial release be set for defendants accused of noncapital offenses." *Id.* Its drafters were "fully aware that the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all." *Id.* at 171.
- Rejects lower court bond orders, which did not evaluate the likely effect of other non-financial conditions before setting bond. "Nonfinancial conditions, our decisions have made clear, should be used flexibly, varying with the needs of the individual defendant." *Id.* at 172.

1970: *Coleman v. Alabama*, 399 U.S. 1

- Court finds Alabama's preliminary hearings are a "critical stage" for RTC purposes in part because of the need for assistance making bail arguments.
- "Plainly the guiding hand of counsel at the preliminary hearing is essential" because, *inter alia*, "counsel can… mak[e] effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail."399 U.S. at 9–10.

1970: *Williams v. Illinois*, 299 U.S. 235 (1970)

- Landmark case in which the Supreme Court holds that imprisonment due to inability to pay a fine—where that imprisonment extends beyond the statutory maximum—is discrimination based on wealth barred by the Equal Protection Clause.
- Williams was convicted of petty theft and received the maximum sentence imposed by statute: 1 year imprisonment and a $500 fine (plus $5 court costs). *Id.* at 236. Those who could not afford the fine, like Williams, had to "work off" the unpaid fine at a rate of $5 per day (creating a possibility of 101 extra days in jail beyond the statutory maximum term of incarceration). *Id.* at 236-37.

- Though the statutory maximums apply to everyone regardless of circumstances, "'a law nondiscriminatory on its face may be grossly discriminatory in its operation.'" *Id.* at 242 (citing *Griffin v. Illinois*).
- "We hold… that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly." *Id.* at 243

1971: *Tate v. Short*, 401 U.S. 395 (1971)

- Petitioner convicted of traffic offenses and fined $425. *Id.* at 396 Under Texas practice, people unable to pay their fines are incarcerated at the rate of $5 per day. *Id.* at 397. Tate petitions for a writ of habeas corpus, which is denied, though cert is granted and the Court reverses based on *Williams. Id.*
- Notes that even in cases that don't involve punishment of jail + fine, incarceration based "solely because of… indigency" "constitutes precisely the same unconstitutional discrimination" as that identified in *Williams*. *Id.* at 671 (adopting language from *Morris v. Schonfield*, 399 U.S. 508).
- Reiterates a caveat also provided in *Williams:* imprisonment of people who are able to pay a sum of money but opt not to do so is not constitutionally infirm. *Id.* at 400-401.

1971: *United States v. Smith*, 444 F.2d 61 (8th Cir. 1971) (per curiam)

- Swiftly denies constitutional challenge on excessive bail grounds
- Notes, however, that "The primary purpose of bail is to allow an accused person not yet tried to be free of restraint while at the same time insuring that person's presence at the pending court proceedings." *Id.* at 62. "[B]ail is favored and is granted in the ordinary course of events" but "may be denied in the exceptional case." *Id.*

1972: *Frazier v. Jordan*, 457 F. 2d 726 (5th Cir. 1972)

- Frazier (and others) incarcerated pursuant to a municipal conviction under the Atlanta Noise Ordinance and Atlanta Fire Ordinance. The sentence handed down for these municipal convictions were a $17 fine or 13 days in jail. Because Frazier and other petitioners could not pay the fine, they were incarcerated. They bring a habeas petition alleging unconstitutional wealth-based discrimination, the District Court granted the writ and 5th Circuit affirms, relying on *Williams*, *Tate*, and *Morris v. Scoonfield*, 399 U.S. 508 (1970).
- "The alternative fine [imposed in this case] creates two disparately treated classes: those who can satisfy a fine immediately upon its levy, and those who can pay only over a period of time, if then. Those with means avoid imprisonment; the indigent cannot escape imprisonment. Since the difference in treatment is one defined by wealth, the alternative fine creates a 'suspect' classification which must be tested by the compelling state interest test." *Id.* at 728.

- 5th Circuit finds that imprisonment, either as a threat to promote the payment of fees, or as its own form of punishment and rehabilitation, are not necessary and not narrowly tailored to a compelling state interest: alternative means such as a payment plan would suffice. *Id.* at 728-29.

1974: *Rhem v. Malcolm*, 507 F.2d 333, 336 (2nd Cir. 1974)

- § 1983 lawsuit by persons detained pretrial at the "Tombs" (Manhattan House of Detention for Men) raising arguments about abhorrent conditions worse than those in which convicted prisoners were housed. Plaintiffs were "imprisoned only for failure to make bail." 507 F.2d at 336.
- District Judge found, after lengthy trial, that the conditions at the Tombs "shocked the conscience." Second Circuit agrees with principle announced by the district judge below, and other district courts, that: "[t]he 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; and the same constitutional provisions prevent unjustifiable confinement of detainees under worse conditions than convicted prisoners." at 336. (deals with conditions of confinement, not the legality of confinement itself)
- Also provides language about the importance of any condition/detention being the least restrictive means of carrying out gov't purpose: "it is manifestly obvious that the conditions of incarceration for detainees must, cumulatively, add up to the least restrictive means of achieving the purpose requiring and justifying the deprivation of liberty."
- And the presumption of innocence: "For it must always be remembered that detainees are not, as yet, guilty of anything." 507 F.2d at 338.
- Note that the principles in *Rhem* extending to the conditions question are rejected by the Supreme Court in *Bell v. Wolfish* which concluded there is not constitutional authority for requiring gov't to show a "compelling necessity" for a given condition of confinement in the pretrial context. The notion that conditions of confinement need to be more stringently justified for pretrial detainees based on the presumption of innocence is no longer good law, though the *Bell* opinion is clear that this does limit the extension of these constitutional principles to the decision *whether* to detain.

1975: *Gerstein v. Pugh*, 420 U.S. 103

- Two people detained pretrial brought a class action lawsuit challenging lack of probable cause hearings on 4th and 14th Amendment grounds.
- Court holds that a probable cause determination by a judge under the Fourth Amendment is a "necessary prerequisite" to any more prolonged pretrial detention, discusses the significant individual liberty interests as part of the balance between government and individual interests. Cannot rely solely on a prosecutor's assessment that there is probable cause to *charge* a crime as justification to detain. 114–119.

- In dictum, acknowledges the serious intrusion that conditions of pretrial release can represent. 420 U.S. at 114.

1978: *United States v. Abrahams*, 575 F.2d 3 (1st Cir. 1978)

- Mr. Abrahams was detained pretrial after an evidentiary hearing involving considerable facts: Abrahams was an escaped prisoner, gave false information in a prior bail hearing, failed to appear recently, used a false name in a proceeding in California and was considered a "fugitive", and had transferred $1.5 million to Bermuda between 1976 and 1977. *Id.* at 4. The district court found that no combination of conditions would reasonably assure his presence at trial. *Id.* Abrahams appealed his detention order to the 1st Circuit.
- Court impresses that, while the right to release on bail is not "absolute," it is generally true that "bail may be denied" only "in the exceptional case." *Id.* at 8 (adopting reasoning of *Smith*, 444 F.2d 61 (8th Cir. 1971)).
- Ultimately upholds detention based on the extreme circumstances of Mr. Abrahams' case. *Id.* at 8.

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

- The same lawsuit originally filed in 1971 and addressed in *Gerstein v. Pugh*, but now the 5th Circuit takes up the issue of pretrial detention of "indigent defendants" rather than the sufficiency of hearings to evaluate probable cause. Evaluating whether a rule adopted mid-litigation by the Florida Supreme Court w/r/t bail is constitutional.
- "At the outset we accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." (citing *Williams*, 399 U.S. 235; *Tate*, 401 U.S. 395) 572 F.2d at 1056.
- Because the Florida court rule changed mid-litigation, challenges to Florida pretrial procedures under the former rule are considered moot. *Id.* at 1058. (The Florida rule ultimately adopted didn't take into account all of the Plaintiffs' concerns, though there were continued negotiations).
- En banc 5th Circuit declines to find Florida court rule facially unconstitutional, though articulates the constitutional concerns around detention on money bail: the detention of people on bail requirements set via a bond schedule, without meaningful consideration of alternatives, infringes on equal protection and due process. *Id.* at 1057.

1979: *Bell v. Wolfish*, 441 U.S. 520 (1979)

- Class action lawsuit challenging the conditions of the MCC in Manhattan, which primarily houses pretrial detainees. The parties concedes the permissibility of their pretrial detention. *Id.* at 533-34, *see* especially 534 n. 15.
- At issue was the constitutionality of *conditions* of pretrial detention and how those impacted the liberty interest of people presumed innocent. The parties conceded that some federal arrestees may be detained due to their risk of flight. *Id.* at 523.

- Under the then-operative federal bail reform act "a person in the federal system is committed to a detention facility only because no other less drastic means can reasonably ensure his presence at trial." *Id.* at 524.
- S. Ct. disagrees with COA and other lower courts that, with respect specifically to conditions of confinement of persons already detained pretrial jails must establish that any conditions of jailing either be inherent to confinement itself or "justified by compelling necessities of jail administration." *Id.* at 531-32. The Court makes very clear it is not dealing with the initial question whether to detain or not, which it acknowledges "necessarily entails" a "curtailment of liberty." *Id.* at 533-34.
- Ultimately reverses D.Ct. and COA on the issue of double-bunking in cells designed for one, finding it does not violate due process. *Id.* at 542-43. Also rejects a First Amendment challenge to a rule requiring books be mailed only from the publisher (which, while litigation was pending, was relaxed), *id.* at 550-51, and a Fourth Amendment challenge to random room searches, *id.* at 557, and body cavity searches in the jail, *id.* at 558-59.
- Sets out that the "proper inquiry" w/r/t whether conditions of detention violate due process is "whether those conditions amount to punishment of the detainee" which would be impermissible. *Id.* at 535. (Likely why the *Salerno* Court picks up its evaluation with the regulatory/punitive divide, though as set forth in *Salerno*, the DP inquiry regarding stripping a person of their pretrial liberty does not end there).
- Plants the seeds for *Salerno*: "While [the interest in assuring an arrestee's presence at trial] undoubtedy justifies the original decision to confine an individual in some manner, we do not accept [the] argument that the Government's interest in ensuring a detainee's presence at trial is the *only* objective that may justify restraints and conditions once the decision is lawfully made to confine a person." *Id.* at 539-540.
- Justice Marshall's dissent emphasizes the amount of deference yielded to jail adminstrators in the majority opinion, pointing out that "many" pretrial detainees "are confined solely because they cannot afford bail." *Id.* at 563, n. 1 (Marshall, J., dissenting).

1983: *Bearden v. Georgia*, 461 U.S. 660

- Bearden plead guilty to a first offense of burglary and theft, but received a deferred sentence. *Id.* at 662. Under the terms of his sentence, so long as he paid fines and restitution, he would not receive a conviction or a term of incarceration. *Id.* After borrowing money to pay the first installments of his fees, Mr. Bearden loses his job, is unsuccessful finding other sources of income, and is late in making a payment. *Id.* at 662-63. His probation was revoked, he was convicted, and sentenced to prison. *Id.* at 663. Supreme Court hears his direct appeal of the sentencing decision, and reverses.
- "This Court has long been sensitive to the treatment of indigents in our criminal justice system." *Id.* at 664. The Court proceeds to discuss its numerous holdings evaluating the criminal justice system's operation w/r/t indigents: granting the right to a free transcript for appeal, *Griffin*, and providing counsel on first direct appeals, *Douglas*.

- In cases evaluating the intersection of fair administration of criminal process and wealth-based disparities, "[d]ue process and equal protection principles converge" because the inquiry involves both "the fairness of relations between the criminal defendant and the State" as well as "whether the State has invidiously denied one class of defendants a substantial benefit available to another class…" *Id.* at 665.
    - This hybrid EPC/DP analysis "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 that purpose.'" *Id.* at 666-67 (citing *Williams*).
- Rejects arguments that imprisonment for unpaid fines could be justified on the basis of (1) ensuring restitution paid to victims, (2) as a method of rehabilitation, or (3) to deter future crime.
    - Re: 1 – promoting payment of restitution is "fully served" by revoking probation only w/r/t people who do not make "sufficient bona fide efforts to pay." *Id.* at 670. Impermissible to revoke the probation of "someone who through no fault of his own is unable to make restitution," and doesn't even serve the purpose: "such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation." *Id.* at 670-71.
    - Re: 2 - "[T]he State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together eith other poor persons and thereby classifying him as dangerous." *Id.* at 671. Where the only reason provided for incarceration is failure to pay, this is a no-no.
    - Re: 3 – "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine." For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine." *Id.* at 672.
- Ultimately, consistent with the Fourteenth Amendment, courts "must consider alternate measures of punishment other than imprisonment" for people facing imprisonment solely due to inability to pay upon making bona fide efforts to acquire the resources. "Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." *Id.* at 672.
- As an aside, in striking the balance in its four-part test articulated in *Bearden*, the Court references the "significant interest of the individual in remaining on probation." *Id.* at 671 (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Morrissey v. Brewer*, 408 U.S. 471 (1972)).

1985: *United States v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985)

- Defendant was detained pretrial, appealed to the 9th Circuit, which reversed his detention order. The Government moved for reconsideration, and in the opinion referenced here, the Court denies the motion for reconsideration.

- Motamedi was previously released on a $400,000 appearance bond and numerous conditions. *Id.* at 1404. After over a month, he was indicted on additional charges, appeared for his arraignment on those new charges, and the gov't moved for detention. *Id.* Gov't argued that he was a flight risk based on Iranian citizenship, ties to Iran, and significant resources in foreign bank accounts. *Id.*
- The district court detained Motamedi and the 9th Circuit reversed, instructing that the district court could increase the bail but the amount needed to be "an amount Motamedi could post." *Id.* at 1405. Upon bail being set at $750,000, the Ninth Circuit granted oral argument and issued opinion in support of that order.
- "In determining the applicable standard of review, we bear in mind that federal law has traditionally provided that a person arrested for a noncapital offense shall be admitted to bail… Only in rare circumstances should release be denied." *Id.* at 1405.
- In a question of first impression, Ninth Circuit decides the standard of review of pretrial detention orders is one of deference to the district court's factual findings, but the bail determination involves both factual and legal questions. *Id.* at 1406 ("We hold that the applicable standard of review for pretrial detention orders is one of deference to the district court's factual findings, absent a showing that they are clearly erroneous, coupled with our right of independent examination of the facts, the findings, and the record to determine whether an order of pretrial detention may be upheld.")
- Interpreting the 1984 BRA, Court notes its silence w/r/t the evidentiary burden to prove a risk of flight where statute provides the clear and convincing evidence standard for risk of danger. *Id.* at 1406.
- "[W]e are not unmindful of the presumption of innocence and its corollary that the right to bail should be denied only for the strongest of reasons." *Id.* at 1407 (citing See Truong Dinh Hung, 439 U.S. at 1329; Harris, 404 U.S. at 1232; Sellers, 89 S.Ct. at 38).
- Though concludes that the appropriate evidentiary standard for the gov't to establish a risk of flight is preponderance of the evidence, the court concludes that there was not sufficient evidence to find Motamedi a risk of flight.
    - In so finding, is particularly concerned with inferences drawn from the nature of the charge itself: "Our court has stated… that the weight of the evidence is the least important of the various factors [to determine pretrial release.] *Honeyman,* 470 F.2d at 474. Although the statute permits the court to consider the nature of the offense and the evidence of guilt, the statute neither requires nor permits a pretrial determination that the person is guilty." *Id.* at 1408

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

- Facial constitutional challenge to the 1984 Bail Reform Act which, for the first time in the administration of bail in the United States, authorized pretrial detention explicitly based on a risk to public safety. (Note: it was already accepted that a person could be incarcerated pretrial if they presented an unmitigable risk of flight or a danger to prospective witnesses. *See Bell v. Wolfish*, 441 U.S. at 534.)

- Federal Bail Reform Act of 1984 enacted in response to an "alarming problem of crimes committed by persons on release." *Id.* at 742 (citing S. Rep. 98-225 which notes a study of pretrial release in eight jurisdictions in which one of six defendants was arrested for any reason, in the District of Columbia 13% of felony defendants were rearrested, and of defendants released on surety bond, pretrial rearrest occurred 25% of the time).[1]
- Two criminal defendants, Anthony Salerno and Vincent Cafaro (crime boss of La Cosa Nostra and "captain" in the Genovese family), detained pretrial on multi-count indictments including RICO. District court found the gov't provided clear and convincing evidence that "no condition or combination of conditions of release would ensure the safety of the community or any person."
- Court rejects both due process (5th Amendment) and excessive bail (8th Amendment) facial challenges to the federal scheme's detention authority based on perceived future dangerousness.
- Relies on the principle that detention under fed BRA is regulatory, enacted to address a societal problem, not penal (not punishing prospective future behavior). *Id.* at 747–48. Notes that there are a number of contexts in which (limited) detention is constitutionally authorized to address compelling government interests, for instance during times of war (citing *Ludecke v. Watkins*, 335 U.S. 160 (1948) and *Moyer v. Peabody*, 212 U.S. 78 (1909)); in the case of undocumented non-citizens deemed potentially dangerous (citing *Carlson v. Landon*, 342 U.S. 524 (1952); *Wong Wing v. United States*, 163 U.S. 228 (1896)); or civil commitment of persons determined to be mentally unstable and dangerous (citing *Addington v. Texas*, 441 U.s. 418 (1979)).
- In doing so, however, emphasizes the rigorous processes afforded individuals in the federal system, and the narrow application of detention authority:
    - Detention only authorized if the individual has been arrested for "a specific category of extremely serious offenses" and based on Congressional findings that persons arrested for those particular offenses are more likely to engage in dangerous behavior on pretrial release. *Id.* at 750
    - A pretrial detention scheme cannot be a "scattershot attempt to incapacitate those who are merely suspected of these serious crimes." *Id.* at 750.
    - BRA provides a "full-blown adversary hearing" in which the prosecution bears a burden to establish by clear and convincing evidence "that no conditions of release can reasonably assure the safety of the community or any person." *Id.* at 750.
    - Hearings carry a right to counsel. *Id.* at 751.

[1] Note that the overall arrest rate of 1 in 6 for felony releases holds true in more recent studies using much larger data sets, but of those rearrests only 1.9% are for a violent felony. *Predicting Violence* at 527. Information compiled in the service of building pretrial risk assessment suggests that even people deemed higher risk for arrest for a violence crime remain arrest free roughly 90% of the time. *LJAF* data on NVCA flag.

  - People facing pretrial detention have a right to testify, present information, and cross-examine witnesses. *Id.* at 751.
  - Hearing culminates in "written findings of fact and a written statement of reasons for a decision to detain." *Id.* at 752.
  - Maximum length of detention limited by "the stringent time limitations of the Speedy Trial Act" (noting that there may be "a point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal" but does not opine as to where that point might be). *Id.* at 747.
  - People subjected to pretrial detention have the right to "immediate appellate review of the detention decision." *Id.* at 752.
- Also articulates key principles animating the right to pretrial liberty: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception." (note that the Court has not weighed in since, so less carefully limited detention schemes present in modern practice are essentially untested).
- Reserves the "nets" question: "[W]e need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail… even if we were to conclude that the Eighth Amendment imposes some substantive limitations on [legislative] powers in this area, we would still hold that the Bail Reform Act is valid." *Id.* at 754.

1992: *Foucha v. Louisiana*, 504 U.S. 71 (1992)

- Case outside of the bail context dealing with a person's confinement in a psychiatric hospital after being found not guilty by reason of insanity. The Louisiana scheme involved placed the burden on the acquittee to establish their eligibility for release from psychiatric institution. *Id.* at 73.
- Supreme Court reverses decisions below, finding that the Louisiana statute violates due process and equal protection. *Id.* at 83-84.
- Notes its decision in *Addington*, 441 U.S. 418, that civil commitment based on mental illness requires proof of two requisite conditions by clear and convincing evidence to comply with due process: (1) the person is mentally ill and (2) the person requires hospitalization for their own welfare and the protection of others. *Id.* at 75-76.
- Though *Jones*, 463 U.S. at 363, provides that acquittals by reason of insanity allow the state to fast-forward the *Addington* requirements, such commitment pursuant to a criminal acquittal can only endure "so long as he is both mentally ill and dangerous, but no longer." *Foucha*, 504 U.S. at 77.
- Cites *Salerno* for the proposition that "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" 504 U.S. at 80.

- "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Id.* at 80.
- "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward, for such discrimination against insanity acquittees who are no longer mentally ill." *Id.* at 86.
- Discusses the sharp and narrow focus of the 1984 BRA upheld in *Salerno*.

2006: *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006)

- Challenge to the constitutionality of mandatory pretrial drug testing as a condition of release. Mr. Scott was arrested on charges of drug possession, and released on his own recognizance. *Id.* at 865. As a condition of his release, he was required to sign a form stating he consented to random, warrantless drug testing and random, warrantless home searches. *Id.*
    - Pursuant to one of those random drug tests, Scott tested positive for methamphetamine, and officers searched his house and found an unregistered shotgun. He was indicted federally for possession of an unregistered shotgun, and moved to suppress the evidence arguing the searches that led to his federal charges were unconstitutional. *Id.* at 865.
- As an issue of first impression, the Ninth Circuit considers whether the warrantless searches were constitutional, and concludes they were not.
- Evaluating whether Scott can be considered to have validly consented to the searches, the Court finds that the unconstitutional conditions doctrine—which "limits the government's ability to exact waivers of rights as a condition of benefits"—bars such consent unless the search was reasonable. *Id.* at 866 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).
    - "Pervasively imposing an intrusive search regime as a price of pretrial release, just like imposing such a regime outright, can contribute to the downward ratchet of privacy expectations." *Id.* at 867.
    - ""[O]ne who has been released on pretrial bail does not lose his or her Fourth Amendment right to be free of unreasonable seizures," *Cruz v. Kauai County,* 279 F.3d 1064, 1068 (9th Cir.2002), and we have previously held that probationers (a group more readily subject to restrictions than pretrial releasees, *see* pages 871–74 *infra*) do not waive their Fourth Amendment rights by agreeing, as a condition of probation, to "submit [their] person and property to search at any time upon request by a law enforcement officer." *United States v. Consuelo–Gonzalez,* 521 F.2d 259, 261 (9th Cir.1975) (en banc)."
- The Court then evaluates whether the search was reasonable, and since it was warrantless, evaluates whether pretrial drug testing and searches can be considered a "special needs search." *Id.* at 869.
    - Analyzing whether a search is valid under the special needs doctrine requires "an inquiry into 'programmatic purposes,'" not subjective intent. *Id.* at 869 (citing *Edmond*, 531 U.S. at 45).

  - Court notes that an interest in deterring crime pretrial, while legitimate and compelling, is "a quintessential general law enforcement purpose and therefore is the exact opposite of a special need." *Id.* at 870.
  - Pretrial searches such as that at issue in *Scott* is therefore best evaluated for whether ensuring court appearance is a valid special need. The Ninth Circuit finds the connection between the object of the test (drug use) and the harm sought to be prevented (failures to appear) "tenuous." *Id.* at 870. Absent empirical evidence that drug use during pretrial release results in an increased likelihood of failure to appear, the "special need" offered was too "hypothetical" a "hazard" to satisfy constitutional muster. *Id.* at 870.
- Court flatly rejects any "assumption that Scott was more likely to commit crimes than other members of the public," noting, "without an individualized determination to that effect," this assumption "is contradicted by the presumption of innocence." *Id.* at 874. "That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody. Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt."

2008: *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191

- §1983 lawsuit alleging 6th and 14th Amendment right to counsel violations based on initial proceeding hearings in Texas. Rothgery was wrongfully arrested without a warrant and promptly brought before a magistrate for an initial appearance. *Id.* at 195. At that initial appearance, probable cause determination was entered, bail was set, and Rothgery was informed of the charges against him. *Id.*
- Rothgery requested counsel but was not provided it, was later indicted and held on unaffordable $15,000 bail. *Id.* at 196. Six months after his initial appearance, he got a lawyer who got his bail reduced and identified that he had never been convicted of a felony, and this error meant the pending charge for felon in possession of a firearm was wrongful. *Id.* at 196-97. Upon this coming to light, the prosecutor moved to dismiss the charges, Rothgery was free to go, and he sued.
- Supreme Court holds that the right to counsel's attachment upon the commencement of prosecution does not require a prosecutor to attend the hearing where the right attaches – in this case, the initial appearance. *Id.* at 213. The right to counsel attaches at initial appearance. *See Brewer*, 430 U.S. at 399; *Jackson*, 475 U.S. at 629 n. 3.
- Notes that 43 states "take the first step towards appointing counsel before, at, or just after initial appearance" but this is based on survey conducted by NACDL and may not be accurate. *Id.* at 203. Court concludes that there is no "acceptable" justification for not being in this club of jurisdictions that immediately provides for the appointment of counsel. *Id.* at 205.
- Court explicitly notes that the significance of "prejudice to a defendant's pretrial liberty" is an appropriate part of the right to counsel attachment calculus. *Id.* at 208.

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

- Appeal of district court order granting a preliminary injunction w/r/t incarceration on unaffordable money bail. 5th Circuit originally largely upheld the injunction, and upon rehearing, substitutes a later opinion for the first (the substitution clarifies that the sheriff is a proper defendant, though not a municipal policymaker) while continuing to "affirm most of the district court's rulings." *Id.* at 152.
- 5th Circuit upholds injunction and district court's ruling that the county's bail system "violates both due process and equal protection" but modifies the contours of the due process ruling. *Id.* at 157.
- Procedural due Process:
    - Identifies a liberty interest under Texas state law:
        - "liberty interests protected by the due process clause can arise from two sources, [the clause] itself and the laws of the States." (internal citation omitted). Fifth Circuit focuses on Texas law and its scheme for the purposes of bail and interests at hand. *Id.* at 157.
        - Though notes that, under the bail framework presented under Texas law, there is not "an automatic right to pretrial release," either. *Id.* at 158.
        - Ultimately, a secured bail requirement cannot be imposed "solely for the purpose of detaining the accused." *Id.* at 158.
    - Having defined the state interest, turns to the three party *Mathews* test: (1) private interest affected, (2) risk of erroneous deprivation, and (3) probable value of additional procedural safeguards.
        - Fifth Circuit upholds district court's conclusion that the challenged procedures are inadequate "even when applied to our narrower understanding of the liberty interest at stake." *Id.* at 159.
        - But modifies the corrections provided via the injunction in two ways:
            - Removes the requirement of a *written* statement of reasons for a bail determination. *Id.* at 160. ("We decline to hold that the Constitution requires the County to produce 50,000 written opinions per year to satisfy due process." Though the court quotes a case discussing the contours of the Bail Reform Act as requiring a court to "[merely] explain its reasons for concluding that the particular financial requirement is a necessary part of the conditions for release…")
            - Finds a requirement that a hearing commence within 24 hours of arrest "is too strict under federal constitutional standards." *Id.* at 160. "We conclude that the federal due process right entitles detainees to a hearing within 48 hours." *Id.* at 160.

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

- Split 5th Circuit panel grants a stay of the district court's revised preliminary injunction in same *ODonnell* case discussed above.

- Not a decision on the merits, but majority of the panel concludes that rational basis review appropriate where an arrestee claims "only an inability to afford bail" as compared to circumstances in which an arrestee claims inability to afford + an absence of meaningful consideration of other possible alternatives. *Id.* at 226–27.

2018: *Daves v. Dallas*, 341 F.Supp. 3d 688 (N.D. Tex. 2018)

- Similar challenge to Dallas's bail system as discussed in *ODonnell* above.
- Court issues a preliminary injunction, largely mapping onto the injunction issued in *ODonnell*.
- Like *ODonnell*, Court does not recognize the federal right to pretrial liberty, but rests its decision on the Texas right to "bail by sufficient sureties"
- Does not find substantive due process right to pretrial liberty in the terms of other courts: "There is a difference between requiring that arrestees be granted *some* condition of release absent a showing that they are a flight risk, and requiring that arrestees be granted a condition of release they can afford absent a showing that no other condition of release is feasible. The Court accepts that due process requires the former, but declines to extend it to cover the latter." *Id.* at 696
- Note: decision has been subject of cross-appeals: Defendants appeal PI ruling, Plaintiffs appeal the fact that relief not granted w/r/t requiring court enter findings regarding ability to pay

2018: *Caliste v. Cantrell*, 329 F.Supp.3d 296 (E.D. Louisiana 2018)

- Note: pre-dates the *Walker* decision by only a couple of weeks (August 6, 2018 and *Walker* decided August 22, 2018).
- Order granting summary judgment for plaintiffs in similar § 1983 lawsuit challenging pretrial detention on money bail. The parties agreed that, as a factual matter, bail was set without requesting much financial information from defendants, nor findings that detention is necessary prior to setting bail requirements that result in detention. *Id.* at 309.
- Court evaluates via a due process analysis (the three *Mathews* factors) in light of the core principles announced in *Salerno*, *Bearden*, and *Turner*. *Id.* at 312. Applying that analysis, the Court concludes:
    - Bail-setting courts must inquire into ability to pay. *Id.* at 312.
    - Clear and convincing evidence standard required at bail hearings. *Id.* at 313
    - Counsel required at bail hearings. *Id.* at 313-14. ("the Court finds that without representative counsel the risk of erroneous pretrial detention is high. Preliminary hearings can be complex and difficult to navigate for lay individuals and many, following arrest, lack access to other resources that would allow them to present their best case. Considering the already established vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing.")

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

- Misdemeanor pretrial detainee brings § 1983 class action lawsuit based on his incarceration on an unaffordable bail bond set pursuant to a master bail schedule. *Id.* at 1251-52.
- After lawsuit commences, the city altered its bail policy through a Standing Bail Order which, *inter alia*, provided that individuals incarcerated under the bail schedule be brought before a judge within 48 hours of arrest, be presented by counsel, and released if found indigent. *Id.* at 1252
- District Court entered a preliminary injunction over the system in Calhoun even post-SBO. *See* 2016 WL 361612 (N.D. Ga. Jan. 28, 2016). This original injunction was vacated for lack of specificity *see* 682 Fed. App'x 721, 724 (11th Cir. 2017) (per curiam). On remand, the district court entered another preliminary injunction, finding the system "still 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." 2017 WL 2794064, at *2–3 (N.D. Ga. June 16, 2017). The district court requires that determination to be made instead within 24 hours of arrest.
- Upon second appeal, 11th Circuit reverses the preliminary injunction because it concludes as a matter of equal protection, a system like Calhoun's which guaranteed release within 48 hours of arrest is "presumptively constitutional." *Id.* at 1266.
    - In reaching this conclusion, agrees that *Pugh* controls and the 14th Amendment appropriate lens under which to view Walker's arguments. *Id.* at 1258.
    - Rejects heightened scrutiny review under the equal protection framework because *San Antonio Ind. Sch. Dist. v. Rodriguez* only triggered heightened scrutiny where a wealth-based distinction creates "an absolute deprivation" of a benefit. *Id.* at 1261. Instead indicates that, absent an "absolute deprivation," the analysis is more of a traditional procedural due process analysis. *Id.* at 1262 (reading *Salerno* to require due process balancing, not heightened scrutiny).
    - Compares waiting additional time in jail to receive an opportunity for release (due to lack of ability to pay for a benefit) to waiting additional time for mail to get to delivered (due to inability to pay for express shipping). *Id.* at 1262. (Note that at least one district court has outright rejected this framework, *Buffin v. City and Cnty. of San Francisco*, 2019 WL 1017537 (N.D. Cal. March 4, 2019) but was free to do so as not in the 11th Circuit).
    - Notes, however, the fact that Calhoun "is not seeking to impose any form of preventative detention" such that heightened scrutiny would apply "if *Salerno* did embrace a form of heightened scrutiny." *Id.* at 1263. And a substantive due process claim was not at stake in *Walker*. *Id.* at 1264-65.
- Note *Schultz*, decided in light of *Walker* and discussed below: courts must look at the specific practices in the jurisdiction challenge and evaluate whether the jurisdiction "guarantees release" within 48 hours of arrest. *Schultz*, 300 F.Supp. 3d 1344, 1360-61 (N.D. Ala. 2018)

2018: *Edwards v. Cofield*, 301 F.Supp.3d 1136 (M.D. Ala. 2018)

- Pretrial detainee brought § 1983 complaint challenging constitutionality of incarceration on unaffordable bail. District Court denied plaintiffs' request for a preliminary injunction. Upon a motion for reconsideration, the court upheld its denial. *See* 2018 WL 4101511.
- In initial denial order:
    - Court anticipates possible guidance coming from the 11th Circuit in *Walker*. *Id.* at 1139.
    - Addresses both 14th Amendment arguments (wealth-based incarceration/*Bearden* and pretrial liberty interest/*Salerno*) by offering (without authority) that "the violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment she alleges in those claims would presumably be remedied by the procedures she seeks in her motion for a preliminary injunction." *Id.* at 1144. And "those procedures arguably match the procedures established by" post litigation changes adopted to bail procedures by the jurisdiction. *Id.*
    - Rejects reliance on *Salerno*, emphasizes that in that decision the Supreme Court found those procedures "constitutionally sufficient" but not necessarily "constitutionally required." *Id.* at 1145.
    - Notes that the procedures required by the 1984 Bail Reform Act "more exacting" than the juvenile context explored in *Schall* and "far exceed" the post-arrest procedures required for a probable cause determination in *Gerstein*. *Id.* at 1146.
    - Rejects plaintiffs' request for additional procedural protections of counsel and clear/convincing evidence standard (though notes the 6th Amendment right to counsel was not pled and that there may be a colorable claim under 6A. *Id.* at 1147.
    - Rejects notion that increased notice or a clear/convincing evidentiary standard required. *Id.* at 1148 (court repeatedly indicates its disagreement with relying on *Salerno*).
    - Rejects timing request for bail hearings faster than 72 hours (noting that the BRA allows upwards of three to five days) (though note that is a pure release/detention scheme not infused with the EPC argument). *Id.* at 1149.
- Upon reconsideration
    - States that under *Walker* (since decided) "rational basis review is the appropriate level of scrutiny." *Id.* at *1. (Note, *Walker* never uses the phrase "rational basis review")
    - Contends that under the Randolph County scheme, like Calhoun's, arrestees are not experiencing an "absolute deprivation" of the benefit of pretrial release based on wealth. *Id.* at *2.
    - Distinguishes from an Alabama case finding wealth-based incarceration for three days unconstitutional b/c that scheme provided for detention for three days or more, and the practices at issue in *Edwards* involved incarceration for *up to* three days. *Id.*
    - Acknowledges that did not apply the *Mathews* balancing test in its last order, reframes its findings under that framework. *Id.* at *3

2018: *Schultz v. State*, 300 F.Supp.3d 1344 (N.D. Alabama) (preliminary injunction order)

- Pretrial detainee brought § 1983 complaint challenging constitutionality of incarceration on unaffordable bail. Intervenor class action complaint filed. District Court granted plaintiffs' request for a preliminary injunction, though note that that order is pending appeal in the Eleventh Circuit.
- Practice in Cullman County, AL at the time of complaint and intervenor complaint was to employ a fixed bail schedule immediately after arrest. *Id.* at 1351. Arrestees who couldn't pay their bond would proceed to an initial appearance, usually via video conference, without counsel. *Id.* At the time defendants responded to the preliminary injunction motion in the litigation, they issued new bail practices via a "standing bail order." *Id.* at 1352.
- District Court determines that the post-litigation changes to bail practices did not moot the civil rights lawsuit. *Id.* at 1357.
- "Criminal defendants have a constitutional right to pretrial liberty. Absent extenuating circumstances like flight risks or dangerous to the community, the State may not incarcerate a defendant pretrial." *Id.* at 1358.
- Court concludes that Plaintiff is substantially likely to succeed on equal protection claim because the challenged bail system "does not rationally further a legitimate state purpose… Instead [the county's] stated interests are illusory and conspicuously arbitrary." *Id.* at 1361.
    - "When a jurisdiction like Cullman County creates a criminal process pursuant to which "those with means avoid imprisonment" and "the indigent cannot escape imprisonment," the jurisdiction violates the Fourteenth Amendment." (citing *Frazier*). *Id.* at 1358.
    - Compares Cullman to the practices in Calhoun, Georgia, which were evaluated in the *Walker* case. *Id.* at 1359. Significantly, the City of Calhoun guaranteed release of *all* indigent defendants, and Cullman County did not. *Id.* at 1360, 1374.
    - Synthesizes empirical and expert evidence and concludes that secured money bail, and short term incarceration, actually *undermines* the government's interests. Notes that alternatives systems as demonstrated in New Jersey, Kentucky, and D.C. are possible. *Id.* at 1362-64.
    - The record established that "deprivation of pretrial liberty takes a high toll on a criminal defendant, and the negative effects of pretrial incarceration compound each day that a defendant is detained… detention for even 24 hours can cause a defendant to lose a job…" *Id.* at 1361
- On substantive due process, court also finds substantial likelihood of success favoring issuance of a preliminary injunction: "[T]he substantive right to pretrial liberty may not be infringed without constitutionally adequate procedures." *Id.* at 1366 (internal quotation marks and citations omitted). The court notes a number of procedural deficiencies in the bail system challenged:

  - Does not provide sufficient notice "of what is at stake at an initial appearance." *Id.* at 1370
  - Absence of an opportunity to be heard: it must be a given, not a matter of discretion, that an arrestee can speak to their circumstances at a hearing determining bail. *Id.* at 1371 (citing *Mathews*, 424 U.S. at 333; *Turner v. Rogers*, 564 U.S. 431; and *Bearden*, 461 U.S. at 672).
  - Did not provide an evidentiary standard, which the district court notes should be "clear and convincing evidence" "when the individual interests at stake… are both particularly important and more substantial than mere loss of money." (citing *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). "The level of certainty that the clear and convincing evidence standard provides is necessary to ensure fundamental fairness in bail proceedings." *Id.* at 1372.
  - Did not provide factual findings: "at a minimum, a judge must state on the record why the court determined that setting secured money bond above a defendant's financial means was necessary to secure the defendant's appearance at trial or protect the community." *Id.* at 1373 (citing *Goldberg*, 397 U.S. at 271).
- Remaining PI factors met – discussion of irreparable harm caused by even short term jail is instructive. *Id.* at 1374-75.
- Note this order is currently pending appeal in the 11th Circuit and so may be modified or overturned.

2018: *Weatherspoon v. Oldham*, 2018 WL 1053548 (W.D. Tenn. Feb. 26, 2018)

- Habeas petition bringing 14th Amendment equal protection and 5th Amendment due process challenges to incarceration on $200,000 bail
- Calls the liberty interest at stake "substantial" *Id.* at *6
- Rejects clear and convincing evidence standard as well as requirement of written findings. *Id.* at *8
- Court finds that the process afforded the petitioner was inadequate under due process, so grants the writ for release or an adequate bail hearing. Does not reach the equal protection claim. *Id.* at *8.

2019: *Buffin v. City and Cnty of San Francisco*, 2019 WL 1017537 (N.D. Cal. March 4, 2019)

- Order granting summary judgment for plaintiffs in § 1983 complaint challenging constitutionality of incarceration on unaffordable bail.
- Applies strict scrutiny on the merits of plaintiffs' 14th Amendment claim because detention on a bail schedule "implicates plaintiffs' fundamental right to liberty. *Id.* at *13
  - Distinguishes from *Walker* and *ODonnell* (and rejects reasoning in *Walker*), neither of which are binding.
    - Finds that pretrial detainees in San Francisco "sustain an absolute deprivation" of a meaningful opportunity to enjoy a desired benefit because "they do not receive any 'meaningful consideration of other

possible alternatives[.]'" *Id.* at *14 (citing *San Antonio Ind. Sch. Dist.*, 411 U.S. at 20).

- Applying strict scrutiny, court finds that the use of a secured bail schedule to immediately determine pretrial release significantly deprives plaintiffs of their fundamental right to pretrial liberty. *Id.* at *16-18.
- Considers the administrability of alternatives to a secured bail schedule, including implementation of a risk assessment. Notes the existence of alternatives found in California's SB 10, passed while the litigation was pending (and, as an aside, subject of considerable controversy). *Id.* at *20-21.
  - "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." *Id.* at *21.
- Court emphasizes the seriousness of 46 hours of detention in Ms. Buffin's case, noting that even with a presumption that 48 hours of incarceration is constitutional, jurisdictions may not engage in "delay for delay's sake." *Id.* at *18.

2019: *Dixon v. City of St. Louis*, 2019 WL 2437026 (E.D. Mo. June 11, 2019)

- § 1983 lawsuit on equal protection, due process grounds.
- Practices in St. Louis being challenged involve initial bail set by a bond commissioner by considering charges and prior convictions, but not other factors incl. ability to pay
- Arrestees couldn't request a bond reduction until having counsel appear; for those waiting for the public defender, could take approximately five weeks. *Id.* at *1.
- At the PI stage, parties agreed that "a person cannot be imprisoned solely due to indigence" and that "federal and state law require a prompt and individualized determination of pre-trial release conditions." *Id.* at *12.
- Defendants argued, though, that any constitutional infirmity is fixed by Missouri Rule 33.01, which provided for individualized considerations and a default of recognizance release. *Id.* at *12–13.
  - Moreover, that court rule had been amended to require (1) explicit consideration of non-monetary conditions before financial, (2) clear and convincing evidence standard required, (3) release hearings for anyone who has been detained for seven days to re-review conditions of release, and (4) recorded findings required at the bail hearing. *Id.* at *13.
- However, the Court enters a PI finding a high likelihood of success for Plaintiffs anyway, stating: "the gravamen of Plaintiffs' complaint is that Defendants do not actually apply those principles or rules in practice. Ample evidence in the record shows that the duty judge presiding over initial appearances rarely considers information about an arrestees' financial circumstances because the bond commissioner rarely provides it, and arrestees are instructed not to speak." *Id.* at *13.
- Practices on the ground did "not comport with applicable Supreme Court and Circuit precedent" (*id.* at *13), including:

  - Hearings lasting 45-60 seconds
  - Judges not inquiring into ability to pay
  - Not permitting arrestees to ask questions or speak
  - Requiring people to wait for an attorney to request a reduction
- Court applies heightened scrutiny to the practices, but notes they would fail even under rational basis review. *Id.* at *14.
- Does not hold that counsel is required at initial appearance for the purposes of a PI. *Id.* at *14. Requires that hearings be held w/in 48 hours of arrest. *Id.* at *16.

2019: *McNeil v. Community Probation Services*, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019)

- Case involving arrests on violation of probation warrants with preset money bond conditions, brings the same equal protection and due process arguments as in the cases dealing with bail setting in the first instance. Plaintiff was arrested in July 2018 for an out-of-county warrant from an incident from a year prior. *Id.* at *2, and upon notifying her probation officer in Giles County, a probation violation warrant is triggered. *Id.* The violation of probation ("VOP") warrant comes with a $2,500 bond condition.
- Reviews other cases involving wealth-based discrimination, including *ODonnell*, *Walker*, and *Jones v. City of Clanton*.
- Concludes that the secured bail system (including VOP warrants) properly evaluated under heightened scrutiny. *Id.* at *13: "narrowly tailored to meet a compelling gov't interest"
- Notes the detrimental outcomes and harms suffered to people who will sit in jail absent injunctive relief, *id.* at *16.
- Requires notice + opp to be heard on the amount of bond in a VOP warrant and findings that explore less restrictive means and still conclude that detention necessary to meet compelling gov't interest. *Id.* iat *16.

2019: *Booth v. Galveston County*, 2019 WL 3714455 (S.D. Tex. Aug. 7, 2019)

- 1983 lawsuit challenging pretrial practice and wealth-based incarceration on bail, brought two separate requests for a preliminary injunction: one tracks the traditional requests brought in other cases (*ODonnell, Schultz, Daves, Edwards, Dixon*) regarding bail-setting practices. Another seeks an injunction requiring specifically that counsel be provided at bail hearings.
- Court denies the first PI on bail-setting practices because post-litigation changes to the Galveston system remedied the issues at the time of filing, but grants the PI w/r/t counsel.
- Court accepts the legal rules regarding wealth-based incarceration and the right to pretrial liberty, but finds facts do not show a violation in this case.
- On the question of whether bail hearing is a "critical stage" such that counsel needs to be provided, calls it a "no-brainer." that it should be. *Id.* at *11.

State Court Litigation

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

- Habeas petition by Kenneth Humphrey, who was incarcerated on bail he could not afford for an alleged burglary within his assisted living facility. Bail was originally set – per a schedule policy—at $600,000. Upon his request for a bail reduction, the trial court still indicated its concerns with the seriousness of the crime, and reduced bail to $350,000—which Mr. Humphrey, an unemployed senior citizen—still could not afford.
- California Court of Appeals grants the writ, adopting reasoning largely agreed upon by the parties under the 14th Amendment.
- "[A] court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and the community." *Id.* at 1026.
- Court adopts *Bearden* framework w/r/t wealth-based jailing, and notes that, compared to Bearden who had already entered a guilty plea, "[t]he liberty interest of the defendant, who is presumed innocent, is even greater; consequently, as will be further explained, it is particularly important that his or her liberty be abridged only to the degree necessary to serve a compelling governmental interest." *Id.* at 1028.
- W/r/t substantive due process, identifies pretrial liberty as a fundamental interest, noting that subsequent Supreme Court decisions indicated that *Salerno* was meant to be read as applying heightened scrutiny. *Id.* at 1034 (citing *Lopez-Valenzuela*, *Reno v. Flores*, *Foucha*).
- Identifies safeguards to this determination the court identifies as critical:
    - Finds that clear and convincing evidentiary standard required for determinations around secured bail and pretrial detention: "We believe the clear and convincing standard of proof is the appropriate standard because an arrestee's pretrial liberty interest, protected under the due process clause, is "a fundamental interest second only to life itself in terms of constitutional importance." *Id.* at 1035.
    - Express findings and a statement of reasons for the bail determination. *Id.* at 1037
    - Stresses the significance of individualization. *Id.* at 1041.

<u>2017 & 2018: *Simpson v. Miller* (*Simpson II*), 241 Ariz. 341 (Ariz. 2017), *State v. Wein*, 244 Arix. 22 (2018)</u>

- Two separate challenges to provisions added to the Arizona Constitution via ballot initiative in 2002. These Proposition 103 laws created categorical detention for a handful of charges and circumstances including sexual conduct with a minor and sexual assault.
- *Simpson II* struck down the provision applying to sexual contact with a minor, *Wein* with sexual assault. The principles in the two decisions largely track each other.
    - Both prohibitions are considered regulatory, not punitive (if punitive, due process would have forbidden); *Simpson II,* 241 Ariz. at 347; *Wein*, 244 Ariz. at 27.
    - While public safety and court appearance are legitimate and compelling government purposes, the categorical nature of the detention means the provisions

are not "narrowly focused." *Simpson II*, 241 Ariz. at 348-49; *Wein*, 244 Ariz. at 27-28. Whether the provisions are narrowly focused requires that the charge at issue "presents an inherent flight risk or inherently demonstrates that the accused will likely commit a new dangerous crime while awaiting trail even with release conditions." *Wein*, 244 Ariz. at 27 (citing *Simpson II*, 241 Ariz. at 348-49).

- Neither sexual conduct with a minor nor sexual assault presents an inherent risk of flight. *Wein*, 244 Ariz. at 28; *Simpson II*, 241 Ariz. at 349.
- Turning to inherent risk of dangerousness, the Arizona Supreme Court takes care to note that "the question here isnot whether sexual assault is a deplorable crime that endangers and dehumanizes victims—it is, and it does." Rather, "[t]he pertinent inquiry is whether a sexual assault charge alone… inherently demonstrates that the accused will pose an unmanageable risk of danger if released pending trial." *Wein*, 244 Ariz. at 28 (citing *Simpson II*, 241 Ariz. at 349).
- Court concludes that neither charge presents that inherent truth such that individualizes processes can be short-changed. The Court notes inadequate procedures, a lack of evidence, and the availability of alternate methods to serve the government's purpose—pointing out that Arizona separately tolerates preventive pretrial detention where a felony arreste "poses a substantial danger to any other person or the community" and "no conditions of release… will reasonably assure the safety of the other person or the community." *Wein*, 244 Ariz. at 29-30 (citing, *inter alia*, *Simpson II*, 241 Ariz. at 349, and Ariz. Const. art. 2 § 22(A)(3)).