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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

RAY CHARLES SCHULTZ, et al., **Plaintiffs,** **v.** **STATE OF ALABAMA, et al.,** **Defendants.**	**Case No. 5:17-cv-00270-MHH**
RANDALL PARRIS, on behalf of himself and those similarly situated, et al., **Plaintiff-Intervenor,** **v.** **MARTHA WILLIAMS, et al.,** **Defendants.**	
BRADLEY HESTER, on behalf of himself and those similarly situated, **Plaintiff-Intervenor,** **v.** **MATT GENTRY, et al.,** **Defendants.**	

MEMORANDUM OPINION AND ORDER

Bradley Hester was arrested and jailed in Cullman County. He was, and

Wells R. Turner III. (Doc. 95). In his first claim for relief, citing the Fourteenth Amendment, Mr. Hester alleges that the defendants violate the "fundamental rights" of indigent criminal defendants arrested in Cullman County "by enforcing against them a post-arrest system of wealth-based detention" pursuant to which indigent defendants "are kept in jail because they cannot afford a monetary amount of bail." (Doc. 95, p. 18, ¶ 80). In his second claim for relief, Mr. Hester alleges that the defendants do not provide counsel for bail hearings, give arrestees an adequate opportunity to testify or present evidence at bail hearings, apply a uniform evidentiary standard to determine whether a person should be detained prior to trial, or "require a

in Cullman County who are unable to pay the secured monetary bail amount required for their release." (Doc. 101, p. 2). The defendants do not oppose class certification should this case proceed. (Doc. 144, p. 8; Doc. 145, p. 1). Mr. Hester also has asked the Court to preliminarily enjoin Sheriff Gentry "from prospectively jailing arrestees unable to pay secured monetary bail." (Doc. 102, p. 2).

The judicial defendants filed opposition to Mr. Hester's motion for preliminary injunction. (Doc. 122). In addition to arguing that Mr. Hester has not satisfied the standard for a preliminary injunction, the judicial defendants contend that Cullman County's recent adoption of new bail procedures moots Mr. Hester's claims for injunctive relief. (Doc. 122, p. 32). Sheriff Gentry has asked the Court to dismiss Mr. Hester's claims for injunctive relief. (Doc. 123).[3]

On April 12 and 13, 2018, the Court held a hearing on the motion for preliminary injunction. (Docs. 136, 143). Dr. Stephen Demuth, whom the Court admitted as an expert in statistical analysis and quantitative research methods related to pretrial detention and release processes, testified for Mr. Hester. (Doc. 136, pp. 36-40). Judge Truman Morrison of the Superior Court of the District of Columbia, whom the Court admitted as an expert in bail setting procedures, also testified for Mr. Hester. (Doc. 136, pp. 118-21). Sheriff Gentry and Judge Turner testified for the defendants. (Doc. 136, pp. 187, 268). The parties provided

[3] The Court will resolve Sheriff Gentry's motion to dismiss by separate order.

additional evidence via affidavit and stipulated to certain facts relevant to Mr. Hester's motion for preliminary injunction. (Docs. 132

magistrates select the initial bail amount in arrest warrants. (Doc. 136, pp. 206, 275).[6] Because most of the arrests in Cullman County are warrantless arrests, the Sheriff's Office sets most of the initial bail amounts in the county. Both the sheriff and the magistrates use a bail schedule to determine the bail amount. On an average day, there are ten arrests in Cullman County, and six of those arrestees are immediately bail eligible. (Doc. 136, p. 193).[7]

Cullman County primarily uses property bonds and surety bonds to meet the bail condition for pretrial release of arrestees. In the case of a property bond, a criminal defendant's relative or neighbor may post property (typically real property, but occasionally a vehicle) to secure the defendant's release. (Doc. 136, pp. 190-92, 224). By state statute, Cullman County must assess a $35 bond fee for property bonds. (Doc. 136, p. 192).[8] Bonding companies provide surety bonds.

[6] In Cullman County, magistrates are court specialists, but they are not lawyers. They are not members of the Alabama State Bar. (Doc. 136, p. 270). Magistrates make probable cause determinations on warrantless arrests within 48 hours of arrest. A criminal defendant typically does not attend a probable cause determination; only the arresting officer attends that proceeding. (Doc. 136, pp. 269-71).

[7] Even if they can afford to post bond, the sheriff cannot immediately release the following categories of defendants: defendants arrested for failure to appear or on charges that, by statute, require detention for a period of time; defendants who are intoxicated; defendants who are in need of medical attention; or defendants who have holds on their detention from other jurisdictions. (Doc. 129-36, p. 3; Doc. 136, p. 276).

[8] Sheriff Gentry testified that he encourages family members of arrestees to post property bonds because his office can quickly assess the value of the property using the county's tax records, and a property bond can be obtained with the payment of a $35 fee. (Doc. 136, pp. 224-226). Sheriff Gentry explained that his office can use the contact information provided with a property bond to contact family members if a defendant fails to appear for a hearing. He acknowledged

Cullman County advertises the telephone numbers for bonding companies in its jail cells. An arrestee may call a bonding company, "work out an agreement . . . on a set price for that bonding company" to post bond, and secure her release from jail. (Doc. 136, p. 191).[9]

Sheriff Gentry testified that he has two primary interests in the pretrial process: getting defendants to appear for court proceedings and ensuring the safety of the community. (Doc. 136, pp. 235-36). Those interests are consistent with Alabama law. Pursuant to Rule 7.2(a) of the Alabama Rules of Criminal Procedure, conditions of pretrial release are imposed to "reasonably assure the defendant's appearance" at court proceedings and to protect "the public at large" from "real and present danger." Ala. R. Crim. P. 7.2.

1. Pre-March 26, 2018

Until March 26, 2018, Cullman County used a bail schedule that identified a range of bail for various state criminal offenses. (Doc. 129-34; Doc. 132, p.1, ¶ 1). For each individual arrested, Sheriff Gentry set bail based on the crime charged and then released crimi

amount and detained criminal defendants who could not afford to post bond. (Doc. 132, p. 2, ¶¶ 7-8).

Cullman County magistrates conducted initial appearances for arrestees who could not afford to post bond. (Doc. 132, pp. 2-3, ¶¶ 10, 12). The initial

arrestees received an initial appearance more than 72 hours after arrest. (Doc. 129-9, p. 4, ¶ 5). The remaining 47 arrestees received an initial appearance within 72 hours of arrest. (Doc. 129-9, p. 3, ¶ 5).

The defendants contend that Alacourt records are not necessarily reliable because the records do not contain all relevant information, and the Alacourt system experiences lag time between entering and displaying data. (Doc. 136, p. 262; Doc. 143, p. 65). According to a Cullman County detention data sheet that Sheriff Gentry submitted, of the 220 new arrests made in February 2018, 167 arrestees (i.e. 76%) were released without need for an initial appearance within 72 hours of arrest. (Doc. 139-2; *see* Doc. 143, pp. 190-93; 210-13). Of those 220 new arrests, 159 arrests were made without a warrant, all but 14 of which (i.e. 91%) posted bond within 48 hours after arrest without having to wait for an initial appearance. (Doc. 139-2; *see* Doc. 143, pp. 194-95). Sheriff Gentry testified that the 14 arrestees who did not post bond may have been detained because they had a new probable cause arrest or a warrant for failure to appear during the month. (Doc. 143, pp. 194-95).

2. March 26, 2018 Revisions to Bail Procedures

On March 26, 2018, the presiding circuit judge in Cullman County signed a "Standing Order Regarding Pre-Trial Appearance and the Setting of Bond" which established new pretrial detention and bail policies for the Cullman County. (Doc.

129-36). The Court first describes the procedures that the new Standing Order dictates. The Court then describes the evidence concerning the way in which Cullman County has implemented the new Standing Order.

a. March 26, 2018 Standing Order and Initial Appearance Procedures

Pursuant to the March 26, 2018 Standing Order, the Cullman County Sheriff still uses a bail schedule, but the new bail schedule provides specific amounts of bail for specific criminal charges. (Doc. 129-36, p. 3; Doc. 129-37; *compare* Doc. 129-34, p. 2). Some of the bail amounts listed in the new schedule are lower than the bail amounts in the previous schedule. (*Compare* Doc. 129-34 *with* Doc. 129-37). As with the former bail procedures, absent a capital murder charge, eligible defendants arrested without a warrant are released when they post a secured bond in the amount that Sheriff Gentry's sta8.2 (a)3.5 (rst)8.5 (il)8.5 (l04 Tc 0.008 Tw 19.881 (d)]c9

judicial determination of conditions for release takes place at an initial appearance. If a defendant

prior failures to appear.

determination of the conditions of bond. (Doc. 136, p. 289).

The initial appearance typically is held remotely by video conference. (Doc. 136, pp. 272-73). At the initial appearance, the judge ensures that the defendant is aware of the charges against her, the right to be represented by counsel, and the right to remain silent. (Doc. 129-40, p. 2; Doc. 136, p. 282). The judge reviews the affidavit of substantial hardship, if the defendant has submitted one, to determine whether the defendant is indigent. (Doc. 136, pp. 277-78). If the judge determines that the defendant is indigent, then the court appoints counsel for the defendant, but under the Standing Order, appointed counsel is not available to a

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difficult at times." (Doc. 136, p. 281). Judge Turner also considers "the circumstances" of "the most recent arrest." (Doc. 136, p. 285). For example, in setting the conditions for a 26-year-old male defendant charged with unlawful possession of a controlled substance, Judge Turner considered the fact that the defendant previously served time in prison, and he considered the fact that the defendant was found hiding in a closet with a 14-year-old girl, "a factor to go with contributing to the delinquency of a minor." (Doc. 136, p. 287). Had that 26-year-old arrestee been able to afford bond, he would have been released as soon as he posted bond without regard to his criminal history or his association with a 14-year-old girl.

The Standing Order provides that after considering the fourteen factors, the defendant's ability to post a secured bond, testimony from the defendant, and forms submitted to the Court, the Court "may release a defendant on his or her own recognizance, require the defendant to post an unsecured appearance bond, or require the posting of a secured appearance bond if that is the least onerous condition that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or the public at large." (Doc. 129-36, p. 7). If there is "no less onerous condition for securing the defendant's appearance or protecting the public, then the Court may require a secured appearance bond in an amount less than, equal to, or greater than that contained in the bond schedule," even if the defendant cannot afford to post bond. (Doc. 129-36, p. 7). If the Court requires a secured bond, then the Standing Order states that "[t]he Court will make a written finding as to why the posting of a bond is reasonably necessary to assure the defendant's presence at trial in such a case" in "Section 6 of Form C-80 (Local), Order on Initial Appearance and Bond Hearing, and in Form C-52(g), Release Order." (Doc. 129-36, pp. 7-8).

Under the Standing Order, if a judge appoints counsel for an arrestee at an initial appearance, appointed counsel must meet with a defendant within seven days. (Doc. 136, pp. 290-91). It is not uncommon for a judge to set a bond in an amount he knows the defendant cannot afford. (Doc. 136, pp. 291-294).

Following her initial appearance, if a defendant still cannot afford to post bond, then the defendant may file a motion for bond reduction, and her appointed attorney may assist her. (Doc. 122-1, p. 5, ¶ 11; Doc. 136, pp. 293, 295). A judge typically hears the motion within a month. (Doc. 136, pp. 297-98; Doc. 143, p. 97).

b. Implementation of the March 26, 2018 Standing Order

The presiding judge of the Cullman County Circuit Court entered the new Standing Order two weeks after Mr. Hester filed his motion for preliminary injunction in this case. (Docs. 102, 129-36). Therefore, at the hearing on Mr. Hester's motion, the defendants were able to offer little evidence concerning the implementation of the new policy, but the limited evidence that the defendants did offer indicates that officials in Cullman County do not always comply with the written requirements in the new Standing Order.

For example, officials in Cullman County do not handle bail requests in a manner consistent with the new standing order.[12] Law enforcement officers rarely use this tool.

judge must make "a written finding as to why the posting of a bond is reasonably necessary," but neither the Order on Initial Appearance and Bond Hearing nor the Release Order provides space for a written finding with respect to secured bond. (*See* Doc. 129-40, p. 3; Doc. 129-42, p. 2). Instead, the Order on Initial Appearance and Bond Hearing requires a judge to check boxes beside 15 factors to identify the factors the judge took into "consideration" in requiring a secured bond. (Doc. 129-40, p. 3). Fourteen of the factors listed come from Rule 7.2(a) of the Alabama Rules of Criminal Procedure, and the fifteenth factor is "Other," which the judge may specify in writing. (Doc. 129-40, p. 3).[14] The Release Order simply requires the judge to check a box if the court requires a secured bond. (Doc. 129-40, p. 2).

II. ANALYSIS

A. The March 26, 2018 Standing Order does not moot Mr. Hester's motion for preliminary injunction.

The defendants argue that the March 26, 2018 Standing Order ends the procedures that Mr. Hester challenges and therefore moots his claims. (Doc. 122, p. 32). The Court disagrees.

The legal principle on which the defendants' mootness argument rests is sound: events that occur after a plaintiff files a lawsuit may "deprive the court of

[14] The bottom of the Order on Initial Appearance and Bond Hearing contains a few blank lines beside the statement "9. Other:". (Doc. 129-40, p. 3). If he chose, a judge presumably could write findings concerning a secured bond in that section of the order.

the ability to give the plaintiff . . . meaningful relief," so that the plaintiff's claims become moot and the case "must be dismissed." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (citation omitted). "When government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the suit." *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1283 (11th Cir. 2004) (citations omitted).

Here, the mootness doctrine does not foreclose Mr. Hester's efforts to obtain relief because although the Cullman County Circuit Court has revised its written criminal pretrial procedures, the record demonstrates that the defendants do not fully comply with the new written procedures. And even if the defendants did comply, as discussed in greater detail below, the new procedures, though an improvement over the old, still are constitutionally deficient.

On the record before the Court at this early stage of the proceedings, there is a substantial likelihood that Mr. Hester will be able to prove that Cullman County's new criminal pretrial procedures violate putative class members' constitutional rights. Therefore, this case remains a live controversy in which the Court may give meaningful relief.

B. **Preliminary Injunction**

"A party seeking a preliminary injunction bears the burden of establishing

entitlement to relief." *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th Cir. 2010). "To

Criminal defendants have a constitutional right to pretrial liberty. The law presumes that defendants are innocent until the State proves otherwise. Absent extenuating circumstances like flight risks or dangers to the community, the State may not incarcerate a defendant pretrial. As the United States Supreme Court held in *United States v. Salerno*, 481 U.S. 739 (1987), the "interest in liberty" is "fundamental." 481 U.S. at 749-50.

Liberty is prohibitively expensive for indigent criminal defendants in a jurisdiction where secured bond is a condition of liberty, and judges set unattainable bond amounts that serve as *de facto* etni38 Tw 17..2 (e)12.1 (nd9(o)3S Td [(de7

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(5th Cir. 1972).[15]

The majority in

make out" a claim of a violation of the Fourteenth Amendment. *Walker*, 2018 WL 4000252 at *8 (quoting *Bearden*, 461 U.S. at 661).[16]

The majority in *Walker* held that the plaintiff in that case did not demonstrate a substantial likelihood of success on his claim of wealth-based discrimination in the setting of municipal bail because the Standing Bail Order that the City of Houston adopted delayed but did not deprive indigent criminal defendants of pretrial release. In fact, as the *Walker* majority held, the City of Calhoun's Standing Bail Order "guarantees release to indigents within 48 hours." 2018 WL 4000252 at *14, n. 12. Indigent defendants in Cullman County receivendigentntt7d0

have to pay if she were adjudged guilty of the crime charged. The

does not offend the Constitution.

would have to participate in an initial appearance before a district judge, and the judge would consider the conditions for release including the bond amount. (Doc. 143, p. 144). The bail order that a judge would enter likely would include a bond amount that the indigent defendant could not satisfy, completely depriving the defendant of the benefit of pretrial liberty that would have been available to him hours after his arrest, had he been able to afford a bond immediately

Those harmful consequences are significant. Mr. Hester's unrebutted evidence shows 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. Dr. Demuth explained that research literature increasingly "shows quite robustly that pretrial detention has deleterious consequences for the detained, the community at large, and the criminal justice system itself." (Doc. 129-1, pp. 9-10). As discussed in greater detail below, pretrial detention hampers a defendant's ability to participate in his defense. Prolonged pretrial detention increases the likelihood that the pretrial detainee will enter a guilty plea, receive a harsher sentence, and recidivate. (Doc. 129-1, pp. 11-12; Doc. 129-19, p. 8; Doc. 129-20, pp. 2, 4; Doc. 136, pp. 73-74). And detention for even 24 hours can cause a defendant to lose a job, a consequence an indigent defendant cannot afford. In Cullman County, these harmful consequences appear to be unacceptable for all but the indigent.

Mr. Hester is substantially likely to prove that Cullman County's discriminatory bail practices deprive indigent criminal defendants in Cullman County of equal protection of the law because the challenged distinction does not rationally further a legitimate state purpose. *McGinnis v. Royster*, 410 U.S. 263, 270 (1973). Instead, Cullman County's stated interests are illusory and conspicuously arbitrary.

The defendants argue that three compelling interests warrant secured bonds

returning all defendants, not just the wealthy, to their families as quickly as possible. Cullman County has not examined or tested an unsecured bond system. (Doc. 136, p. 210).

With respect to the issue of pretrial appearance, the plaintiffs' evidence demonstrates that Cullman County likely would not see an increase in failures to appear with unsecured bonds. Mr. Hester offered expert testimony and empirical studies to demonstrate that secured money bail is not more effective than unsecured bail or non-monetary conditions of release in reducing the risk of flight from prosecution. For example, Dr. Demuth testified that "several recent empirical studies that compare the effectiveness of different kinds of bonds in assuring appearance in court . . . [found] no difference in the effectiveness of secured and unsecured bonds." (Doc. 129-1, p. 5, ¶ 11).[18] One of those studies concluded that regardless of a criminal defendant's pretrial risk category, "unsecured bonds offer decision-makers the same likelihood of court appearance as do secured bonds."

[18] Dr. Demuth testified that another study "provides mixed findings" and another "problematic study finds that secured bonds are more effective." (Doc. 129-1, p. 5, ¶ 11). According to Dr. Demuth, the "mixed findings" study did not consider unsecured money bail or non-financial release with restrictions and therefore does not provide a meaningful analysis of whether non-financial conditions or unsecured money bail are as effective as secured money bail. (Doc. 129-1, p. 6). According to Dr. Demuth, the "problematic study" analyzed "insufficient underlying data," used questionable and unreliable shortcuts to approximate data, and employed a statistical technique that did not overcome bias in the dataset. Therefore, the problematic study fails "to inform our understanding of the relative effectiveness of secured and unsecured bonds." (Doc. 129-1, pp. 6-7).

(Doc. 129-10, p. 13).[19] Dr. Michael Jones, the study's author, considers this finding unsurprising "given that both bond types carry the potential for the defendant to lose money for failing to appear." (Doc. 129-10, p. 13). A study conducted by Claire M. B. Brooker, Dr. Jones, and Timothy R. Schnacke found that the average court appearance rate for criminal defendants in Jefferson County, Colorado did not differ significantly between judges who set more secured bonds and judges who set more unsecured bonds. (Doc. 129-11, p. 9).[20]

Mr. Hester's evidence shows that Herr'rlyailws a.4 (se)3.5 (c)8.3 (tu.3 (ina)8

pretrial. (Doc. 129-12, pp. 11-12).[21]

And evidence suggests that most defendants released without financial incentives to a

the community or a flight risk. With respect to those 167 individuals, Cullman

procedural due process. The substantive right to pretrial liberty may not be infringed without "constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). A state's rule of criminal procedure violates the Due Process Clause when "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445 (1992) (citations and internal quotation marks omitted); s*ee Nelson v. Colorado*, 581 U.S. ---, 137 S. Ct. 1249, 1255 (2017) ("*Medina* provides the appropriate framework for assessing the validity of state procedural rules that are part of the criminal process.") (internal quotation marks and alteration omitted).

Mr. Hester's substantive and procedural due process claims are related. (Doc. 108, p. 19). Mr. Hester contends that the defendants do not employ constitutionally adequate procedures at the initial appearance to protect putative class members' substantive right to pretrial liberty in violation of substantive and

evidence; require express findings and a statement of reasons for detention; or follow an evidentiary standard for detention. (Doc. 108, pp. 22-26; Doc. 131, pp. 17-23).e9 T 64-9(Td [(9(Td 1.333 0>BDC 0EMC 240.T j Ei(23)-8,)1642.84 /H5 (-)Tj

According to the “Harris County Criminal Courts a

> The [district] court found that the results of this flawed procedural framework demonstrate the lack of individualized assessments when officials set bail. County officials "impose the scheduled bail amounts on a secured basis about 90 percent of the time. When [they] do change the bail amount, it is often to conform the amount to what is in the bail schedule." The court further found that, when Pretrial Services recommends release on personal bond, Hearing Officers reject the suggestion 66% of the time. Because less than 10% of misdemeanor arrestees are assigned an unsecured personal bond, some amount of upfront payment is required for release in the vast majority of cases.

ODonnell, 892 F.3d at 153-54. Moreover, criminal defendants almost never had counsel at the probable cause hearings, and the county did not provide counsel to indigent defendants.

hour window that the district court required in its injunction. *Id.*

The Fifth Circuit provided the district court with a draft injunction that "represent[ed] the sort of modification that would be appropriate" and left the details to the district court's discretion. *ODonnell*, 892 F.3d at 164. Provisions in the draft injunction most relevant to this case are:

> x Harris County is enjoined from imposing prescheduled bail amounts as a condition of release on arrestees who attest that they cannot afford such amounts without providing an adequate process for ensuring that there is individual consideration for each arrestee of whether another amount or condition provides sufficient sureties.
>
> x Pretrial Services officers, as County employees and subject to its policies, must verify an arrestee's ability to pay a prescheduled financial condition of release by an affidavit, and must explain to arrestees the nature and significance of the verification process.
>
> x The purpose of the explanation is to provide the notice due process requires that a misdemeanor defendant's state constitutional right to be bailable by sufficient sureties is at stake in the proceedings. . .
>
> x The affidavit must give the misdemeanor arrestee sufficient opportunity to declare under penalty of perjury, after the significance of the information has been explained, the maximum amount of financial security the arrestee would be able to post or pay up front within 24 hours of arrest. The affidavit should ask the arrestee to provide details about their financial situation . . . . The question is neither the arrestee's immediate ability to pay with cash on hand, nor what assets the arrestee could eventually produce after a period of pretrial detention. The question is what amount the arrestee could re

x

requires.[26]

The following procedural deficiencies in Cullman County's bail procedures create a substantial likelihood of success for the plaintiffs on their due process claim.

x **Absence of adequate notice**

The defendants do not provide constitutionally adequate notice to indigent criminal defendants before an initial appearance. "[N]otice is essential to afford the prisoner an opportunity to challenge the contemplated action and to understand

[26] Recent developments in other jurisdictions support Mr. Hester's due process claim. Notably, the U.S. District Court for the Eastern District of Louisiana recently found that each of the procedural deficiencies alleged by Mr. Hester violates due process at an initial appearance where a defendant is at risk of a *de facto* detention order because of her indigency. *Caliste v. Cantrell*, --- F. Supp. 3d ---, 2018 WL 3727768, at *12 (E.D. La. Aug. 6, 2018). In addition, the governor of California recently signed into law the California Money Bail Reform Act, 2018 Cal. Legis. Serv. Ch. 244 (S.B. 10) (effective date October 1, 2019). The Act appears to eliminate money bail and provide all of the procedural safeguards that Mr. Hester argues the Due Process Clause demands Cullman County to provide at an initial appearance.

Generally, pursuant to the California Money Bail Reform Act, pretrial risk assessment services determine whether an individual booked on a charge other than a misdemeanor is "low risk," "medium risk," or "high risk" of failure to appear or danger to the public. S.B. 10, §§ 1320.7(a)-(c), 1320.9. Pretrial risk assessment services release low risk defendants on their own recognizance without a hearing. S.B. 10, § 1320.10(b). Pretrial risk assessment services may release medium risk defendants on their own recognizance without a hearing or recommend an arraignment hearing. S.B. 10, § 1320.10(c). The court conducts an arraignment hearing for any detained defendant. S.B. 10, § 1320.15. "At arraignment, the court shall order a defendant released on his or her own recognizance or supervised own recognizance with the least restrictive nonmonetary condition . . . that will reasonably assure public safety and the defendant's return to court unless the prosecution files a motion for preventive detention." S.B. 10, § 1320.17. The court must conduct a hearing on the motion for preventive detention at which the defendant has the right to court-appointed counsel. S.B. 10, § 1320.19(d). The defendant must have the opportunity to be heard and present evidence. S.B. 10, § 1320.20(c). The court may order detention only if the court determines by clear and convincing evidence that no nonmonetary condition of release will reasonably assure public safety and court appearance and must state its reasons on the record. S.B. 10, § 1320.20(d)(1). Otherwise, the court must release the defendant on her own or supervised recognizance. S.B. 10, § 1320.20(e)(1).

The language in the release questionnaire suggests to a defendant that she is entitled to some form of "release," when she really is not because the court may exercise its discretion to enter what amounts to an order of detention. Judge Turner acknowledged that at an initial appearance, a stage at which indigent defendants do not have counsel, he does not inform criminal defendants of the fourteen factors he considers when setting secured bail, so a defendant cannot know what information may be important to share for an assessment of conditions of release. (Doc. 143, p. 91). Judge Turner stated that he asks few questions during an initial appearance, most of the defendants who appear before him lack formal education, and many defendants are illiterate or have learning disabilities. (Doc. 136, p. 289). Having these defendants rely on the information in the release questionnaire for notice is tantamount to no notice at all. These defendants do not receive adequate notice of their constitutional right to pretrial liberty or the evidence they must provide to prove that there are non-monetary conditions of pretrial release that will satisfy the purposes of bail. (Doc. 143, pp. 92-93).

x **Absence of an opportunity to be heard**

Under the March 2018 Standing Order, at an initial appearance, a Cullman County judge does not have to give a criminal defendant an opportunity to be heard or present evidence. According to the Standing Order, the judge "may" give the defendant an opportunity to speak. (Doc. 129-36, p. 7) ("The Court . . . *may*

Santosky, 455 U.S. at 768-69. *See Caliste*, 2018 WL 3727768, at *10 (“[T]he Court agrees . . . ‘the government must prove the facts supporting a finding of flight risk by clear and convincing evidence.’”) (quoting *United States v. Motamedi*, 767 F.2d 1403, 1409 (9th Cir. 1985) (Boochever, J., concurring in part and dissenting in part)).

The level of certainty that the clear and convincing evidence standard provides is necessary to ensure fundamental fairness in bail proceedings. The detention of a criminal defendant in Cullman County without a specific degree of confidence that detention is necessary offends a fundamental principle of justice. At an initial appearance, an indigent defendant faces a substantial “loss of personal liberty through imprisonment,” a penalty which “lies at the core of the liberty protected by the Due Process Clause.” *Turner*, 564 U( )8.897 0 T36 In564 U.1 (n)8.3 da s Cary tocedurc deem12.2 ( )]TJ(li)8.5 (be)3.6 5e de

pp. 6-7; Doc. 129-40, p. 3). This is insufficient.

the bail amount unreasonably -- and potentially insurmountably -- difficult. Checking boxes for factors "considered" is tantamount to providing counsel with a copy of Rule 7.2(a) of the Alabama Rules of Criminal Procedure; checkboxes for factors "considered" provide no meaningful information to indigent defendants or their appointed counsel.

To cure these deficiencies, 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. *See Goldberg*, 397 U.S. at 271 (due process generally requires the decision maker to "state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law"); *Holley v. Seminole Cty. Sch. Dist.*, 755 F.2d 1492, 1499 (11th Cir. 1985) ("It serves as a bulwowrve f ndw

In all of these areas -- absence of notice, absence of an opportunity to be heard, absence of an evidentiary standard, and absence of factual findings --

example, if a judge did not give a defendant an opportunity to be heard, counsel could request such an opportunity. If a judge did not inform a defendant of the importance of her ability to post bond, counsel could do so. In contrast, the lack of counsel in Cullman County exacerbates each procedural defect in Cullman's bail system. Lack of adequate notice, an opportunity to be heard, findings on the record, and an evidentiary standard raise significantly more concern when an indigent defendant must confront those obstacles by herself. And at the end of the day, in Calhoun, a detainee simply had to prove that she was indigent to secure release within 48 hours. *Walker*, 2018 WL 4000252, at *14 n.12 ("[T]he Standing Bail Order guarantees release to indigents within 48 hours. It therefore accords entirely with *ODonnell*'s holding that what the Constitution requires is 'an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker.' [*ODonnell*, 892 F.3d] at 163."). Cullman County detainees must satisfy fourteen factors for release, all without the assistance of counsel.

Because the Eleventh Circuit in *Walker* "decide[d] what process the Constitution requires in setting bail for indigent arrestees," 2018 WL 4000252, at *1, the *Walker* opinion is undoubtedly relevant to this case, but based on the considerable differences between Calhoun's Standing Bail Order and Cullman County's procedures, *Walker* does not change the fact that Mr. Hester has

demonstrated a substantial likelihood of success on the merits of his due process claim.

2. Irreparable Injury to the Putative Class

The Supreme Court has recognized that the

misdemeanor charge are much more likely than similarly situated [defendants who are released pretrial] to plead guilty and serve jail time. Compared to similarly situated [ted3d(a)3.5 (r)3.7 ased defendants]ed, detained defendants are 25% more likely convicted . . . ." (Doc. 129-19, p. 8). A study from Pittsbutedgh fdound that "pretrial detention leads to a 13% increse in the likelihood of being convicted, an effect largely explained by an increase in guilty pl (r)3.7 as among defendants who otherwise would have been acquitted or had their charges dropped." (Doc. 129-20, p. 2). A study from Philadelphia and Pittsburg fdound that "criminal defendants who are 153 (o)-191 9 Tw -32.2Tc 0.02 T..66fd 0.18.3 Tc 0..735itts Pid -a".99 Tw4 769-6.3 ()n (a)3.5

In addition, detention for more than 24 hours

3. Injury to the Defendants

The threatened harms to the putative class outweigh the harms the preliminary injunction may cause to the defendants. The defendants argue that no alternative systems are workable in Cullman County. The defendants contend that detaining every arrestee until an initial appearance would put considerable strain on the county's resources. (Doc. 136, pp. 230-31; Doc. 143, pp. 66-68).[27] Judge Turner stated that the circuit court's resources already are taxed to handle the 72-hour initial appearances, the county has no government-funded pretrial services staff, and the county needs one more judge just to keep up with the circuit court's current case load. (Doc. 143, pp. 51-53). According to Sheriff Gentry, funding for the sheriff's department has not increased since 2009. (Doc. 136, p. 254).

But alternative pretrial detention policies are cost effective. Three options are readily available to Cullman County at little or no cost. First, Cullman County could release all defendants on unsecured bond. In a case in which a defendant may pose a significant flight risk or a danger to the community, a judge could hold an initial hearing within 48 hours of arrest and, if necessary based on the evidence collected at the hearing, impose additional conditions for release such as a court-

appointed third-party custodian or a requirement that the defendant periodically call one of the sheriff's court liaisons. The defendants acknowledge that an unsecured bail schedule would serve their interests. (Doc. 136, p. 211; Doc. 143, pp. 69-70, 133-34).

Alternatively, Cullman County could adopt the Calhoun model and, within 48 hours of arrest, release on recognizance bonds all indigent defendants who prove their indigency on the basis of an objective standard.

Finally, Cullman County could have all arrestees complete a release questionnaire, updated to conform to the procedural requirements discussed above. The Sheriff's Office could review those questionnaires and release on unsecured bond all low-risk arrestees. The Sheriff's Office would detain all high risk arrestees, wealthy and indigent alike, for an initial appearance at which a judge would assess the necessary conditions for pretrial release.

Holding procedurally sufficient initial appearances consistent with this memorandum opinion would not be overly burdensome. The defendants may be able to provide sufficient notice to arrestees by, for example, editing the affidavit of substantial hardship and release questionnaire and making sure that arrestees who have difficulty understanding the forms receive assistance. Satisfying an evidentiary standard before setting bail should add no extra cost, and making actual findings when requiring a bond may require very little extra time, if any.

4. Public Interest

A preliminary injunction would prevent continuing deprivation of core constitutional rights by prohibiting detention based solely on predetermined secured money bail amounts without sufficient substantive findings and adequate procedural protections. It would not impair the efficacy of the justice system or endanger the public. Therefore, a preliminary injunction would not disserve the public interest.

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5. Security

Because Mr. Hester and members of the putative class are, by definition, indigent, the Court exercises its discretion to waive the security required by Rule 65(c) of the Federal Rules of Civil Procedure. *See Sanders v. Sellers-Earnest*, 768 F. Supp. 2d 1180, 1188 (M.D. Fla. 2010).

III. CONCLUSION

For the reasons stated above, Mr. Hester has demonstrated that he is entitled to a preliminary injunction consistent with the analysis in this opinion. The Court will set a telephone conference to discuss the te