

Federal Lawsuit Challenges Alamance County NC's Bail System

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In late 2019, bail litigation came to North Carolina. I have written [before](#) about successful federal bail litigation in other jurisdictions, including a decision holding that the bail system in Harris County, Texas was unconstitutional. Similar litigation is now underway in our state, and appears to be headed towards a consent preliminary injunction.

On November 12, 2019, a [class action complaint](#) was filed in the United States District Court for the Middle District of North Carolina alleging that Alamance County's bail system violates the plaintiffs' constitutional rights to equal protection, substantive due process, procedural due process, and counsel. Complaint at 4-5. Three plaintiffs sued in their individual capacities and as representatives of a class including all who are arrested and charged with non-domestic violence offenses and are or will be detained in the county jail because of inability to pay money bonds imposed in their cases. *Id.* at 4.

Plaintiff Allison is alleged to be an indigent 30-year old mother of a young child, charged with felony drug possession and several misdemeanors and detained on a \$3,500 secured bond. *Id.* at 8; Brief in Support of Plaintiffs' Motion for Preliminary Injunction at 3. Rather than being brought to a magistrate, the complaint asserts that a sheriff's deputy handed Allison a form setting her bail. Complaint at 8-9. Plaintiff Harrell is alleged to have mental health and substance abuse challenges and only \$2 to his name. *Id.* at 9. The complaint asserts that after being arrested for misdemeanor trespassing and larceny, Harrell received a \$1,500 secured bond. *Id.* at 9-10. It alleges that at an initial appearance that lasted one or two minutes, no inquiry was made into Harrell's ability to pay, expenses, or connections to the community; no counsel services were provided; and that his first court date was set more than three weeks away. *Id.* at 10. Plaintiff Guill is alleged to be a 42-year-old female charged with several misdemeanor offenses and detained on a \$2,500 secured bond, in a proceeding where she had no representation and no inquiry was made into her ability to pay or ties to the community. *Id.* at 11. Her first appearance in district court was scheduled nearly one month from the date of her arrest. *Id.* at 12.

Named defendants include the Senior Resident Superior Court Judge, the Chief District Court Judge, twelve county magistrates, and the Sheriff. *Id.* at 6-7.

The complaint alleges that the defendants impose money bonds on almost all people arrested in the county. *Id.* at 12. It alleges that although the written local bail policy indicates that state law is designed to impose the least restrictive non-monetary form of release, the policy does not establish procedures to protect individuals' rights. *Id.* at 13. Specifically, it does not require inquiry or findings regarding ability to pay; in many cases, it requires imposition of money bail absent extraordinary circumstances; it fails to provide procedures for addressing unaffordable money bond; and does not provide for access to counsel during bail proceedings. *Id.* at 13-14. As to local practices, the complaint alleges that magistrates set conditions without inquiring about ability to pay, ties to the community, or other relevant factors. *Id.* at 14. The complaint asserts that in some cases magistrates set conditions without even seeing arrestees, instead using preprinted release order forms. *Id.* For those who are brought before a magistrate, the complaint asserts that bail is set without the magistrate asking relevant questions. *Id.* at 15. It further alleges that magistrates routinely set de facto detention orders without individualized assessments of pretrial risk or consideration regarding whether or not non-monetary conditions might sufficiently mitigate those risks. *Id.* It asserts that orders are entered without giving individuals notice of

the issues to be decided, assistance of counsel, or affording them the right to present evidence, nor is there a requirement that findings be made by clear and convincing evidence or that reasons for detention be recorded. *Id.* After the magistrate imposes money bond, those who can pay immediately are released while those without resources remain jailed. *Id.* The complaint asserts that no mechanism exists for individuals detained pretrial to request review of conditions of release until the judge appoints counsel or the right to counsel is waived at the first appearances. *Id.* at 16. It alleges that magistrates typically schedule first appearances for in-custody misdemeanor cases on the officer's next court date, with the result that misdemeanor defendants who cannot pay their bonds can be jailed for lengthy periods before ever seeing a judge, being appointed counsel, or having an opportunity to request alternative release conditions. *Id.* It further alleges that there is no opportunity at the first appearance to request a review of conditions. *Id.* Individuals are not represented at first appearances, and even when they are determined to be indigent and entitled to court-appointed counsel, money bail conditions are not addressed. The first appearance typically lasts no more than a few minutes and is not on the record. *Id.* at 16-17. When counsel is appointed at the first appearance, additional procedures further delay counsel's first opportunity to move for a bond reduction. *Id.* at 18.

The complaint goes on to allege that the county's policies and practices harm both individuals and communities. *Id.* at 19. In addition to the loss of liberty and negative impacts of jail conditions on health and safety, it asserts that individuals experience loss of employment, housing, and legal custody of children; an increase in mental illness symptoms; and increased risk of assault during incarceration. *Id.* 19-20. The complaint alleges that pretrial detention increases the likelihood that individuals will be found guilty, sentenced to jail, and get longer sentences. *Id.* at 20. It continues, noting the empirical evidence that many people who are detained pretrial are, once released, more likely to be re-arrested and miss court dates, because of the destabilizing effects of even short periods of detention. *Id.* at 21.

In terms of specific legal allegations, Count I asserts that the Fourteenth Amendment's Equal Protection and Due Process Clauses prohibit jailing people because of their inability to make monetary payments. *Id.* at 28. It asserts that because plaintiffs have a fundamental substantive right to liberty before trial, the county's wealth-based bail system is subject to heightened scrutiny. *Id.* The complaint claims that the defendants are violating the plaintiffs' substantive rights "by enforcing against them a system of wealth-based detention" keeping them incarcerated "solely because they cannot afford to make a monetary payment." *Id.* It asserts that the county's policies and practices violate equal protection and due process "because they result in poor arrestees being detained when similarly situated but wealthier arrestees are allowed to go free." *Id.*

Count II alleges a violation of plaintiff's substantive due process right to liberty. *Id.* at 29. It asserts that the defendants "deny pretrial detainees their fundamental liberty interest in a manner that is not narrowly tailored to serve the state's compelling interests in releasing individuals prior to trial, ensuring that released individuals appear for trial, and protecting the public from danger." *Id.* It further alleges that the defendants "violate substantive due process by failing to consider any detainee's likelihood to appear or whether that individual poses any danger to the community, and by making no findings regarding the necessity of detention before requiring unaffordable monetary conditions of release that function as de facto detention orders." *Id.*

Count III asserts that "procedural due process requires an individual be given a prompt opportunity to be heard in a meaningful manner before being deprived of liberty" and that the defendants' system violates the Fourteenth Amendment. *Id.* at 29-30. Specifically, it asserts that defendants provide no notice that a proceeding will occur or about the issues to be addressed at the proceeding; no

opportunity present evidence and cross-examine witnesses; no findings on the record, made by a clear and convincing evidence standard; and no representation at bail proceedings. *Id.* at 30.

Count IV asserts that the defendants violate the plaintiffs' Sixth Amendment right to counsel by not providing them with representation for bail determinations. *Id.* at 30. It asserts that bail determinations are post-attachment critical stages for which counsel must be provided. *Id.*

The complaint seeks declaratory relief, requesting that the court find that the county's current policies and practices violate individuals' rights. *Id.* at 26, 31-32. It also seeks injunctive relief "to institute a constitutional pretrial system" and prevent pretrial detention of people who cannot afford money bail and for whom decision-makers have failed to consider ability to pay or the availability of less restrictive pretrial conditions. *Id.* at 27, 31-32.

So where do things stand? Significantly, on March 2, 2020 the parties filed a joint report and motion to stay, which was granted by the court. That filing informed the court "that a preliminary injunction hearing is no longer needed" and asked for a stay of upcoming filing deadlines while the parties "finalize their interim agreement and prepare a consent preliminary injunction to be filed with the Court." Joint Status Report and Motion to Stay at 1. The filing reported that since November

the parties have worked diligently and in good faith on an interim agreement to obviate the need for a preliminary injunction hearing. After multiple exchanges of written drafts, phone calls, and four all-day, in-person meetings, the parties are close to finishing their interim agreement. The agreement will include the adoption and implementation of revised pretrial release policies in Alamance County, as well as provisions for and the parameters of data collection and monitoring following implementation of the revised policies. Once the agreement is final, the parties intend to jointly move the Court for entry of a consent preliminary injunction no later than April 30, 2020.

Id. at 1-2. The last docket entry in the case is the judge's order granting the motion, suggesting that as of now, the case is moving towards resolution by the parties.

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