

Eleventh Circuit Weighs in on the Constitutional Parameters for Bail Systems

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Interest in bail reform is heating up in North Carolina. The Chief Justice's North Carolina Commission on the Administration of Law and Justice [recommended](#) implementing evidence-based pretrial justice reform, and reform already is happening in several counties. The [North Carolina Courts Commission](#) took up the issue at its September 2018 meeting and Attorney General Josh Stein recently announced a stakeholder Roundtable on the topic. Among the reasons for the interest is this: Litigation risk. Advocates of bail reform have racked up wins in other jurisdictions. In March, I wrote ([here](#)) about a recent Fifth Circuit decision holding that the bail system in Harris County Texas violated due process and equal protection. (That opinion was superseded after rehearing but the court's holding remains essentially the same). In August, the Eleventh Circuit decided *Walker v. City of Calhoun, GA*, ___ F.3d ___, 2018 WL 4000252 (11th Cir. Aug. 22, 2018). Here's what happened there:

In September 2015, Maurice Walker, a 54-year-old unemployed man whose sole income was \$530 per month in Social Security disability payments, was arrested in Calhoun, Georgia for being a pedestrian under the influence of alcohol. That offense is a misdemeanor, punishable by a fine of not more than \$500; no jail sentence is permitted. Walker was told that he had to pay a \$160 cash bond to be released pretrial. Neither he nor his family had the money to post bond. Five days after his arrest, Walker sued alleging that by "jailing the poor because they cannot pay a small amount of money" the City's bail policy was unconstitutional. A day later he was released on a personal recognizance bond. Slip Op. at 2.

The City's bail policy used a secured money bail schedule that set bond amounts based on the fine an arrestee would pay if found guilty, plus fees. Arrestees who could afford bail were immediately released; those who could not pay were held until the next session of court on the following non-holiday Monday. Because the Monday after Walker's arrest was Labor Day, the policy would have required him to wait 11 days for his hearing. Shortly after Walker filed his lawsuit, the Municipal Court altered its bail policy, issuing a Standing Bail Order for cases within that court's jurisdiction. The Standing Order adopted a bail schedule and provided that arrestees will be released immediately on secured bond if they deposit an amount set by the schedule. The Order allowed arrestees to post cash bail themselves or use a commercial surety at twice the amount set in the schedule. It provided that those who do not post bail must wait for a bail hearing with court-appointed counsel, to be held within 48 hours of arrest. Release on recognizance is required for those who prove indigence at the hearing and for those who don't get their hearings within 48 hours. Slip Op. at 3-5.

The federal district court held that the Standing Order was unconstitutional and enjoined the City from detaining indigent arrestees who are otherwise eligible for release but are unable to pay bail because of poverty. Its preliminary injunction prescribed an affidavit-based process for making indigency determinations: certain information was required on the affidavit and an official must evaluate the affidavit within 24 hours of arrest and release those found to be indigent on recognizance or on unsecured bond. The City appealed. Slip Op. at 7-8.

Because the City conceded that its original bail policy was unconstitutional, the Eleventh Circuit found that the district court was right to enjoin that practice. However, it concluded that the Standing Order satisfied the Constitution. The court began by rejecting the City's contention that the claim should be evaluated under the Eighth Amendment. It

agreed with the district court that because Walker's claim rests on an allegation of categorically worse treatment of indigent defendants, it should be analyzed under "due process and equal protection rubrics." Slip Op. at 19. It further determined that the district court incorrectly applied a heightened scrutiny standard. Slip Op. at 34. The court noted that the case did not involve a total deprivation of a benefit because of poverty; under the Standing Order, indigent arrestees suffer no absolute deprivation of pretrial release. Rather, the court explained, "they must merely wait some appropriate amount of time to receive the same benefit as the more affluent." Slip Op. at 27. According to the court, the appropriate standard was "something akin to a traditional due process rubric." Slip Op. at 35. In such an analysis, the fundamental requirement is the opportunity to be heard in a meaningful time and manner.

Turning to the preliminary injunction, the court first held that the lower court was wrong to require an indigency determination within 24 hours. It held that indigency determinations for purposes of bail "are presumptively constitutional if made within 48 hours of arrest," and that the district court abused its discretion by requiring a determination within 24 hours. Slip Op. at 39. Next, the court held that the district court abused its discretion by requiring an affidavit-based process for determining indigency in place of the Standing Order's judicial bail hearing procedure. It concluded: "[w]hatever limits may exist on a jurisdiction's flexibility to craft procedures for setting bail, it is clear that a judicial hearing with court-appointed counsel is well within the range of constitutionally permissible options." Slip Op. at 43. In the end, the court concluded that the district court may enjoin a return to the original policy but that it abused its discretion by enjoining the Standing Order. The court vacated and remanded for further proceedings.

Although the decision doesn't fully define the parameters of a constitutional bail system, it holds that the Standing Order complies with the constitution. Again, that Order requires a court hearing on bail, with counsel, within 48 hours of arrest. If the arrestee establishes indigency at the hearing or if the hearing does not occur on time, release is required. I know that folks in North Carolina are thinking hard about best practices for this state; as they do so, *Walker* provides some helpful guideposts on the constitutional requirements of a pretrial release system.