

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-02656-KLM

Jasmine Still,

Plaintiff,

v.

El Paso County, Colorado,

Defendant.

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiff Jasmine Still, by and through her counsel, Rebecca Wallace and Mark Silverstein of the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO, respectfully alleges for her Complaint and Jury Demand as follows:

INTRODUCTION

1. At all times relevant to this Complaint, El Paso County's official policy required that pretrial detainees granted release on personal recognizance be held in jail when they were unable to pay a county-imposed fee of \$55. Those who could pay this fee were released promptly, and those who could not pay the fee were required to sit in jail until they either came up with the money or resolved their pending case. For many individuals, this policy resulted in weeks or even months of senseless and illegal pretrial incarceration due only to poverty.

2. The El Paso County Court granted Plaintiff Jasmine Still a personal recognizance bond ("PR bond") on January 11, 2017. In granting her a PR bond, the court made an implicit

finding that Ms. Still should be released pre-trial because she was not a flight risk and posed no threat of harm to others. Yet, following its official policy, El Paso County held Ms. Still in jail for 27 more days solely because she was unable to pay the \$55 county fee. While incarcerated, Ms. Still was separated from her newborn child, and child custody proceedings were initiated against her that she was unable to competently contest while she was in jail.

3. Ms. Still is one of hundreds of individuals who have been granted a PR bond by the court, but whom El Paso County nonetheless has held in jail solely because they were unable to pay the \$55 fee. Indeed, on November 3, as the initial Complaint in this case was being prepared, the El Paso County Jail was holding at least six people who had been granted a PR bond but who remained incarcerated solely because they could not pay the county-imposed fee. Two had been held for three days after being granted a PR bond; one for eight days; one for ten days; one for fifteen days; and one for 119 days after the court had ordered release on personal recognizance.

4. As a result of El Paso County's policy, Ms. Still endured several weeks of unjustified incarceration solely because of her poverty, in violation of the Due Process and Equal Clauses of the Constitution. In this action, she seeks to vindicate her constitutional rights.

JURISDICTION AND VENUE

5. This civil rights action is authorized and instituted pursuant to 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. § 1331.

6. The events or omissions giving rise to the claims herein occurred in the District of Colorado, and at all relevant times the parties lived in the District. Venue is therefore proper under 28 U.S.C. § 1391(b).

PARTIES

7. Plaintiff Jasmine Still is a resident of, and domiciled in, the State of Colorado.

8. Defendant, El Paso County, Colorado, is a political subdivision of the State of Colorado.

FACTUAL ALLEGATIONS

9. The El Paso County Combined Court is in session five days every week.

10. On each of these days, new arrestees who have been charged with a crime, but are innocent in the eyes of the law, appear before a judicial officer for a bond determination.

11. On every day or almost every day court is in session, a judicial officer grants a number of newly arrested individuals a supervised personal recognizance bond.

12. When a court orders a personal recognizance bond, it orders that the defendant shall be released from jail, pending trial, without any obligation to post money. A PR bond signifies a judicial determination that the defendant is neither a flight risk nor likely to cause serious harm to another. Instead of posting a sum of money, a defendant who is granted a personal recognizance bond signs an agreement to appear in court as required in the future and, if applicable, to comply with certain release conditions (*e.g.* refraining from illegal drug use).

13. A “supervised” personal recognizance bond is a personal recognizance bond, as described above, that ostensibly requires the services of El Paso County Pretrial Services (ECPS). ECPS is a county-operated program. To aid in decisions about pre-trial release, ECPS provides information regarding pretrial detainees to the judges of the state courts located in El Paso County. ECPS also provides supervision of certain pretrial defendants who are released to the community. Services that courts have ordered ECPS to provide pursuant to a supervised

personal recognizance bond have included providing reminders of court dates or monitoring for use of alcohol or illegal drugs.

14. In courts across the state, individuals granted a personal recognizance bond, whether supervised or unsupervised, are promptly released from jail, without paying money, upon signing an agreement to appear in court as required in the future and to comply with any court-ordered conditions of release.

15. However, in El Paso County, at all times relevant to this Complaint, it was only those detainees with the means to pay a county-imposed fee of \$55 who had the opportunity to gain prompt release upon the court's grant of a supervised personal recognizance bond.

16. Pursuant to its own policy, the county continued to jail individuals who could not pay the fee despite the court's order that they be released on their own recognizance.

El Paso County's unconstitutional and cruel policy

17. For pre-trial detainees granted a supervised personal recognizance bond, El Paso County charges a \$55 fee, which it calls a "pre-trial services fee." This fee serves as the primary funding source for ECPS.

18. ECPS is a county program. It is funded entirely by the county. Prior to 2016, it was housed in the El Paso County Sheriff's Office. In 2016, ECPS was transferred to El Paso County's Community Services Department, which has a primary focus of providing external community services for El Paso County residents. The Community Services Department consists of Park Operations, Planning, Recreation / Cultural Services, Environmental Services, Veteran Services, and Community Outreach. ECPS is administered by the Community Outreach Division of El Paso County's Community Services Department. ECPS staff are employed by

and paid by El Paso County. Their line of supervision is entirely within El Paso County: they report to the El Paso County Community Outreach Division Manager, who reports to the El Paso County Director of Community Services, who ultimately reports to the County Administrator.

19. At all times relevant to this Complaint, it was the official policy and actual practice of El Paso County that individuals granted a supervised personal recognizance bond who did not pay the \$55 pre-trial services fee were not to be released from jail.

20. Indeed, pursuant to this official policy and consistent practice, the Sheriff of El Paso County was required to continue imprisoning individuals who were granted a supervised personal recognizance bond if they could not first pay the county-imposed fee of \$55.

21. According to El Paso County's official policy, judicial officers did not have independent authority to waive the pretrial services fee or to mandate release of detainees held on the fee.

22. Pursuant to ECPS written policy and actual practice, judges had authority to waive the pretrial services fee only upon recommendation of an ECPS PR Bond Commissioner.

23. El Paso County, through ECPS's written policies and official communications, instructed judicial officers of El Paso County Combined Courts that they did not have the independent authority to waive the pretrial services fee and that a judge could waive the fee only if an ECPS PR Bond Commissioner has first recommended waiver.

24. Judicial officers of El Paso County Combined Courts, in turn, have commonly stated in court that they do not have the authority to waive the pretrial services fee. They have professed this lack of authority even when considering a motion to waive the fee that was made

on behalf of a defendant already granted a PR bond who remained incarcerated solely because of inability to pay the fee.

25. In at least one case, when a judicial officer issued an order to waive the pretrial services fee for a defendant unable to pay it, the El Paso County Sheriff's Office refused to release the defendant, citing ECPS's policy that a judge cannot waive the fee.

26. At all times relevant to this Complaint, there was no procedure or mechanism for defendants or their lawyers to request a PR Bond Commissioner to waive the pretrial services fee.

27. At all times relevant to this Amended Complaint, Dawn Montoya and Audra Boileau were the ECPS's PR Bond Commissioners and are the only two staff members of ECPS. They were the sole individuals granted, by El Paso County policy, the authority to recommend waiver of the pre-trial services fee, thereby clearing the way for judicial waiver. Upon information and belief, the ECPS bond commissioners' decisions on waiver were not subject to any meaningful review. They are final policy makers for El Paso County with respect to waivers of the pre-trial services fee.

28. Upon information and belief, ECPS PR Bond Commissioners personally prepared a daily list of individuals who had been granted a PR bond, but who nonetheless remained incarcerated in the El Paso County Jail for failure to pay the \$55 pretrial services fee (hereinafter "Daily List"). Thus, the ECPS PR Bond Commissioners had personal knowledge of each individual who was incarcerated solely due to failure to pay this \$55 fee. The PR Bond Commissioners also knew that, pursuant to ECPS policy – to which ECPS had secured judicial compliance – judges would not waive the \$55 fee absent a recommendation by a PR Bond

Commissioner to waive the fee. The PR Bond Commissioners also knew that, absent a waiver of the fee, pursuant to El Paso County policy, individuals granted a PR bond who were unable to pay the fee would remain incarcerated.

29. Even with this knowledge, at all times relevant to this Complaint, ECPS PR Bond Commissioners seldom exercised their authority to recommend waiver of the fee and thereby clear the way for the release of individuals unable to pay it. In those few cases in which a PR Bond Commissioner did ultimately recommend waiver of the fee, it was only after the defendants had already spent significant periods of time incarcerated as a result of their inability to pay.

30. Waiver of the pretrial services fee has the potential to negatively impact the PR Bond Commissioners, because their salaries are funded in significant part by this fee. Thus, the PR Bond Commissioners have a personal financial interest in ensuring that waivers of the fee be as infrequent as possible.

31. In considering county resources, however, waiver of the \$55 fee for an indigent defendant is much more cost-effective than holding that person in jail. The El Paso County Sheriff's Office reports that it costs \$88.72 per day to house a prisoner in the jail. Thus, keeping a defendant in jail for even one day costs the County more than waiving the \$55 pre-trial services fee.

32. Importantly, waiver of the pretrial services fee was not the only avenue by which indigent defendants granted a PR bond could have and should have been released from incarceration. Regardless of fee waiver, El Paso County had the authority and duty to release

defendants from the El Paso County Jail, without payment of money, once the court granted those defendants a PR bond.

33. El Paso County, through its Sheriff's Office, was the sole entity with the keys to Plaintiffs' jail cells. El Paso County had the authority and the duty to open the jail cell of any individual granted a PR bond, without regard to whether than individual could pay any county fee.

34. It is only because El Paso County had a policy or practice of treating the fee as a bar to a defendant's release that Plaintiff, and hundreds of others, remained incarcerated for inability to pay a mere \$55. Upon information and belief, every other county fee charged to El Paso County inmates is and has always been chargeable *after* the release of defendants who are unable to pay up front. If left unpaid, the fee can be added to the defendant's total debt at the end of the case. El Paso County selected only one fee – the pre-trial services fee – for mandatory payment as a precondition to release. At any time, El Paso County could have (and should have) altered its policy or practice to allow payment of the fee after the defendant's release, rather than require payment as a precondition to release.

As El Paso County knows, its policy has resulted in hundreds of people remaining in jail solely because of their poverty.

35. El Paso County, including ECPS and the El Paso County Sheriff's Office, have long been aware that the policy at issue has caused a significant number of pretrial defendants who have been granted a PR bond to remain incarcerated solely because they are unable to pay the pretrial services fee.

36. As noted above, every weekday, ECPS produces a Daily List of inmates who have been granted a supervised PR bond, but who remain in custody in the El Paso County Jail

because they have not paid the pretrial services fee. ECPS provides this list to the El Paso County Sheriff's Office.

37. Daily Lists produced by ECPS during the two-month period between August 21, 2017, and October 20, 2017, reflect the regularity with which defendants are incarcerated due to their inability to pay the fee. The lists show that **during this two month period:**

- a. A total of **51 defendants** who had been granted a PR bond by the court were imprisoned in the El Paso County Jail for failure to pay the pretrial services fee;
- b. On any given day, between 4 and 12 defendants who had been granted a PR bond were held in the El Paso County Jail for failure to pay the pretrial services fee;
- c. These pretrial detainees spent an **average of 10.6 days in jail** for failure to pay the pretrial services fee, with several defendants spending more than a month behind bars and one defendant locked up more than 100 days.
- d. In total, these legally innocent defendants spent **a total of 541 days in jail** due solely to their failure to pay the pretrial services fee.

38. Extrapolated out, this data creates a strong inference that, in the year preceding the initial filing of this case, El Paso County continued to incarcerate more than **300 inmates** who had been granted a PR bond for a total of **more than 3000 days in jail** solely due to inability to pay a pretrial services fee.

39. For 300 inmates, a waiver of the pretrial services fee would have cost the county only \$16,500, a tiny sum compared to the \$266,160 cost to the county of housing those indigent inmates for 3,000 days (calculated at \$88.72/jail day).

40. In June 2017, the National Institute of Corrections (NIC) provided El Paso County with a written evaluation of the El Paso County Pretrial Release System. The assessment included a close analysis of ECPS's policies as they relate to PR bonds. The report was directly critical of El Paso County's policy of requiring defendants granted a supervised PR bond to pay a fee in order to gain their release, and it underscored that the result of the policy was incarceration solely due to inability to pay the fee. The NIC report recommended a simple fix to avoid the kind of illegal incarceration to which Ms. Still was subjected: "To prevent a delay in release, **a process should be established that allows for the defendant to pay the fee after being released from jail**" (emphasis added).

Plaintiff Jasmine Still

41. Ms. Still is a 26-year-old mother of three. She has struggled with substance abuse and is currently in intensive treatment. On January 9, 2017, she was arrested for possession of a very small amount of methamphetamine (three-tenths of a gram).

42. Following is a recent photo of Ms. Still.



43. On January 11, 2017, ECPS assessed Ms. Still for release on her personal recognizance. Based on ECPS’s review of Ms. Still’s background – which reflected no prior criminal convictions – PR Bond Commissioner Dawn Montoya recommended that Ms. Still be released on a supervised personal recognizance bond.

44. That ECPS chose to assess Ms. Still and then recommended her for release on a personal recognizance bond places Ms. Still among a very small percentage of the defendants who enter the El Paso County Jail. According to the 2017 National Institute of Corrections study and ECPS’s current operations manual, ECPS has established an extremely narrow set of eligibility criteria for consideration of release on a personal bond. As a result, ECPS assesses only 15% of the recent arrestees who arrive at the county jail. Of those assessed, the NIC found that ECPS recommends only 8% be released on a PR bond.

45. On January 11, 2017, the El Paso County Court accepted ECPS's recommendation and ordered that Ms. Still be released on a supervised PR bond.

46. Yet, El Paso County did not release Ms. Still on the PR bond that day, because she did not pay the \$55 pretrial services fee.

47. Ms. Still was unable to pay the \$55 fee. She had no way to access money and no one on the outside who was willing and able to pay the fee. El Paso County continued to imprison Ms. Still for failure to pay that fee for an additional 27 days.

48. El Paso County was well aware that Ms. Still was stuck in jail solely because she was unable to pay the pretrial services fee.

49. As an initial matter, during her incarceration, Ms. Still had no money in her inmate account. The El Paso County Jail designated Ms. Still as indigent, which entitled her to such necessities as free hygiene supplies and postage.

50. Additionally, upon information and belief, on January 12, Ms. Still first appeared on the Daily List produced by ECPS. The list indicated that she remained in jail after having been ordered released on a PR bond the previous day because she had not paid the pre-trial services fee.

51. Upon information and belief, Ms. Still appeared on every Daily List produced by ECPS and provided to the El Paso County Sheriff from January 12 until her release, which was likely a total of 18 lists. Each list reflected the number of days she had been incarcerated to date for failure to pay the pre-trial services fee.

52. Despite actual knowledge of Ms. Still's incarceration for poverty as evidenced by the Daily List, El Paso County chose to continue to incarcerate Ms. Still rather than releasing her on the PR bond and leaving the fee as a debt to be paid by Ms. Still after her release from jail.

53. Despite actual knowledge of Ms. Still's continued incarceration, as evidenced by the Daily List created by ECPS, neither PR Bond Commissioner exercised her authority to recommend waiver of the pretrial services fee in Ms. Still's case.

54. On or about January 22, 2017, Ms. Still received notice that her children – who had been in the care of her mother since her arrest – were being considered for placement in foster care because of her incarceration.

55. The next day, through her public defender, Ms. Still filed a motion with the court requesting waiver of the pretrial services fee that was preventing her release from custody. The motion explained that she was unable to pay the fee and that her incarceration was causing her children to be placed in foster care.

56. The court denied Ms. Still's motion with a single sentence: "The \$55 pretrial services fee cannot be waived per policy." At a later hearing, the clerk explained that pretrial services had told the court that the PR bond fee is not waivable.

57. The Public Defender's Office followed up with an email to judicial leadership about Ms. Still's plight. Judicial leadership confirmed that, pursuant to ECPS Policy, the PR Bond Commissioner must first recommend waiver of the fee before a judge would be permitted to grant waiver.

58. Upon information and belief, PR Bond Commissioners Montoya and Boileau were both aware of Ms. Still's plight and request for waiver but did not recommend waiver of the

fee. Indeed, no county policy required the PR Bond Commissioners to recommend waiver of the fee for an indigent defendant held in jail for inability to pay the fee.

59. Because Ms. Still was unable to secure prompt release from jail, she felt she had no choice but to relinquish temporary custody of her children.

60. As the days passed, Ms. Still remained incarcerated while her children slipped farther from her grasp. She decided that, rather than wait in jail while she fought her case, she had no choice but to plead guilty so that she could get out of jail quickly and fight for custody of her children.

61. On February 6, Ms. Still pleaded guilty to felony possession and was promptly released from custody. It was Ms. Still's first criminal conviction.

62. Given that this was her first offense, the court sentenced Ms. Still to probation.

63. The plea was particularly painful for Ms. Still, because – had she not been incarcerated pre-trial for inability to pay the county fee, she would have had the opportunity to plead to a misdemeanor.

64. During Ms. Still's incarceration, her public defender received an offer from the prosecutor that would have allowed Ms. Still to resolve her case by pleading guilty to a misdemeanor. The offer required Ms. Still to either have a residence, be working, or be going to school. Had Ms. Still been released at the time she was granted a PR bond, she could have established a residence – as she has done now – and would have been eligible to accept the deal to plead to a misdemeanor. Ms. Still's public defender made a record at sentencing that Ms. Still's incarceration for poverty caused her to lose out on a misdemeanor plea deal and ultimately accept a felony plea.

65. At all times during Ms. Still's incarceration, El Paso County retained the authority and duty to release her from custody, without payment of the county fee, on the personal recognizance bond granted by the court. Whether the PR Bond Commissioners recommended waiver of the fee and the court granted it was immaterial to El Paso County's duty. At any time during Ms. Still's incarceration, El Paso County could have simply adjusted its policy – as the NIC recommended – to require payment of the fee *after* release in the case of an indigent defendant unable to pay prior to release.

FIRST CLAIM FOR RELIEF
42 U.S.C. § 1983 –14th Amendment
(Due Process and Equal Protection)

66. Plaintiff hereby incorporates all other paragraphs of this First Amended Complaint as if fully set forth herein.

67. The Fourteenth Amendment to the U.S. Constitution prohibits jailing a person solely because of her inability to make a monetary payment.

68. At all times relevant to this Complaint, pursuant to El Paso County official policy and actual practice, individuals granted a supervised PR bond who could afford to pay a \$55 fee were released from jail promptly, while those without the means to pay the fee were held in jail.

69. Ms. Still has a fundamental interest in her pretrial liberty. That liberty interest becomes even stronger once bail is set, especially when the court orders release on personal recognizance.

70. Defendant denied Ms. Still her pretrial liberty after bail was set solely because Ms. Still was unable to pay a fee.

71. The only legitimate governmental interests in restricting pretrial release are ensuring the defendant does not flee prosecution and does not pose a risk to the safety of members of the public.

72. El Paso County's policy of requiring a person granted a personal recognizance bond by the court to pay a fee in order to gain release is not rationally related, much less narrowly tailored, to achieve either of these governmental interests.

73. El Paso County's official policy and actual practice of refusing to promptly release defendants granted a PR bond who are unable to pay a county fee foreseeably caused the constitutional violations in this case and caused injury to Ms. Still.

74. Wherefore, Plaintiff is entitled to damages, attorney's fees, and any additional relief the Court deems just.

SECOND CLAIM FOR RELIEF
42 U.S.C. § 1983 – Fourteenth Amendment
(Substantive and Procedural Due Process)

75. Plaintiff hereby incorporates all other paragraphs of this First Amended Complaint as if fully set forth herein.

76. The Fourteenth Amendment to the U.S. Constitution prohibits Defendant from depriving a person of liberty without due process of law.

77. Ms. Still has a fundamental interest in her pretrial liberty. That liberty interest becomes even stronger once bail is set, especially when the court orders release on personal recognizance.

78. Defendant denied Ms. Still her pretrial liberty after bail was set solely because Ms. Still was unable to pay a fee.

79. The procedural arm of the Fourteenth Amendment requires Defendant to provide individualized hearings with adequate procedural safeguards to justify a deprivation of liberty.

80. Defendant deprived Ms. Still of her liberty without meaningful or prompt consideration of her ability to pay the fee. Defendant held no hearing on ability to pay and put no meaningful procedural safeguards in place to protect against the erroneous deprivation of liberty that occurred in this case. Defendant had no process by which Ms. Still could even request from ECPS a recommendation to waive the pretrial service fee.

81. Had Defendant provided Ms. Still with a prompt individualized hearing on ability to pay with adequate procedural safeguards, she would have been released from jail shortly after having been granted a PR bond.

82. The procedural arm of the Fourteenth Amendment requires Defendant to provide a fair decisionmaking process in a fair tribunal to justify a deprivation of liberty.

83. El Paso County policy and actual practice utilized PR Bond Commissioners as the decisionmakers with authority to recommend waiver of the pretrial services fee. By county policy, recommendation for waiver by a PR Bond Commissioner was a prerequisite to judicial waiver of the fee.

84. The PR Bond Commissioners' salaries are funded, in significant part, through payment of pretrial services fees. Thus, the PR Bond Commissioners have a significant financial stake in ensuring consistent payment of pretrial services fee and keeping waivers of the fee to a minimum. Such an interest gives rise to a strong probability of bias.

85. Indeed, "under a realistic appraisal of psychological tendencies and human weaknesses, [the PR Bond Commissioners' financial] interest[s] pose[] such a risk of actual bias

or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 883-84 (2009) (internal quotation marks omitted).

86. The substantive arm of the Fourteenth Amendment prohibits arbitrary and oppressive government action. Ms. Still’s lengthy pretrial detention for inability to pay a fee after having been granted a PR bond, and the El Paso County policy that predictably operated to cause that detention, reflects arbitrary and oppressive government action that furthered no legitimate government objective. The constitutional violations in this case reflect an exercise of governmental power that truly shocks the conscience.

87. Wherefore, Plaintiff is entitled to damages, attorney’s fees, and any additional relief the Court deems just.

Relief Requested

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in his favor and against Defendant, and grant:

- (a) Compensatory damages on all claims allowed by law in an amount to be determined at trial;
- (b) Attorneys’ fees and the costs associated with this action on all claims allowed by law;
- (c) Pre- and post-judgment interest at the lawful rate; and
- (d) Any further relief that this Court deems just and proper, and any other relief as allowed by law.

PLAINTIFF REQUESTS A TRIAL TO A JURY ON ALL ISSUES SO TRIABLE.

Respectfully submitted this 28th day of December 2017.

/s/ Rebecca Wallace
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