STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE XXXXXXX COUNTY SUPERIOR COURT DIVISION

 XX CR(S) XXXXXX

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XXXXXXXXXXXXXX, )

 )

Petitioner. )

 ) **PETITION FOR WRIT**

 v. ) **OF HABEAS CORPUS**

 )

Sheriff, )

XXXXX County Jail; )

 )

Respondent. )

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TO THE HONORABLE XXXXXXXX, SUPERIOR COURT JUDGE:

Pursuant to N.C. Const. art. I, § 21 and N.C. Gen. Stat. § 17.1 *et seq*., Petitioner XXXXXX, through undersigned counsel, respectfully applies to the Court for its writ of habeas corpus and release from jail. Petitioner is currently being held in the XXXXXX County Jail under a secured bond. However, as there has been no showing that XXXXXX poses a flight risk or danger to any person, the secured bond is unauthorized. *See* N.C. Gen. Stat. § 15A-534(b). The imposition of a secured bond in the present case further violates XXXXX’s fundamental constitutional rights to Due Process and Equal Protection. The legality of Petitioner’s imprisonment and restraint has not already been adjudged upon a prior Writ of Habeas Corpus. XXXXX is accordingly entitled to immediate release.

In support of this Petition, XXXXXX shows the following:

**STATEMENT OF THE GROUNDS FOR REVIEW**

In North Carolina “[e]very person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed.” N.C. Const. art. 1, § 21; N.C. Gen. Stat. § 17-1. The Court must give a person restricted of his liberty “. . . an immediatehearing so that the legality of his detention may be inquired into and determined.” *State v. Lewis*, 274 N.C. 438, 441 (1968). Habeas corpus enables the review of restraints on liberty “for any criminal or supposed criminal matter, or on any pretense whatsoever.” N.C. Gen. Stat. §17–3; N.C. Const. art. I, § 21.1. “The sole question for determination at habeas corpus hearing . . . is whether petitioner is then being unlawfully restrained of his liberty.” *State v. Burton*, 257 N.C. 534, 541 (1962).

In *State v. Herndon*, 107 N.C. 934 (1890), the petitioner sought the writ of habeas corpus to challenge his pretrial detention. Our Supreme Court held that the court’s refusal to hold a hearing in which the petitioner could challenge the grand jury’s finding of probable cause was reversible error. Pursuant to *Herndon*, XXXXX now requests an immediate hearing to inquire into the lawfulness of XXXXXX’s detention. *See also State v. Harrington*, 283 N.C. 527, 530–31 (1973) (“If the accused desires to challenge the . . . amount of bail fixed, he may apply to the court for the prerogative writ of habeas corpus”).

**Factual and Procedural Background**

1. Petitioner XXXXXX is a XX-year-old (humanizing facts).
2. Petitioner is presently charged with XXXXX under N.C. Gen. Stat. § XXXXXX). The warrant/indictment is attached. (Exhibit A)
3. As of XXXXXX date, Petitioner has been incarcerated in X jail for X days.
4. On X date, magistrate set a secured bond of $ [at the recommendation of Officer X/without the defendant present]. (Exhibit B)
5. On X date, XXXXX appeared via video before District Court Judge X. The Court appointed Petitioner counsel pursuant to N.C. Gen. Stat. § 7A-45. Upon information and belief, Judge X did not state how much bond Petitioner was being held on, review the bond amount or make findings of dangerousness or flight risk. [Insert facts “upon information and belief” if defendant asked for an unsecured bond or bond reduction.]
6. [Include this fact if you filed a bond motion or argued bond at a later appearance] [On X date, counsel for Petitioner argued for release on a written promise to appear or an unsecured bond based on [factors relating to lack of flight risk and/or dangerousness]. The State requested bail be set at $ based on [factors]. Judge X [refused Petitioner’s request/increased the bond to $XX] without making oral or written findings on flight risk/dangerousness or ability to pay.
7. The secured bond had the effect of detaining Petitioner solely because he did not have enough money to pay the amount required for his release.
8. **As the court heard no evidence justifying a secured bond, the bond was imposed in violation of N.C. Gen. Stat. § 15A-534.**

A defendant charged with a noncapital offense in North Carolina has a right to have conditions of pretrial release set in accordance with law.  See N.C. Gen. Stat. § 15A-533. Aside from those cases outlined in § 15A-533(a), (d)-(g), such conditions must be determined as set forth in N.C. Gen. Stat. § 15A-534.

Under N.C. Gen. Stat. § 15A-534(b), a judicial official must release the defendant upon (1) written promise to appear, (2) an unsecured bond, or (3) a custody order, unless certain specific findings are made. Only where the judicial official determines that such conditions will not reasonably assure the appearance of the defendant, would pose a danger of injury to any person, or are likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses can (4) an ankle monitor or (5) a secured bond be imposed.  The pretrial release statute “expressly favor[s] the policy that pretrial release of the defendant should be effected under the three conditions that do not depend upon the defendant’s financial condition.” Official Commentary to N.C. Gen. Stat. § 15A-534.

In the present case, no evidence was presented to support a finding that a secured bond was authorized by N.C. Gen. Stat. § 15A-534(b), and the District Court was therefore statutorily required to impose one of the three non-financial conditions of release.  Thus, the writ must be granted and XXXX must be immediately released or a hearing must be immediately held to determine why XXX is not entitled to non-financial conditions of release.

1. **The secured bond was also unauthorized because its imposition violated XXXX’s rights to Due Process and Equal Protection under the Fourteenth Amendment of the United States Constitution.**

The court’s decision (A) violates Petitioner’s fundamental right to pretrial liberty, and (B) subjects Petitioner to wealth-based detention, in violation of equal protection and due process guarantees.

* 1. **The imposition of an unattainable secured bond is equivalent to an order of detention. As the bond was imposed without following the procedures necessary for such an order, XXXXX’s right to pretrial liberty arising under the Due Process Clause was violated.**

The right to pretrial liberty is “fundamental.” *Salerno*, 481 U.S. at 750; *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Any deprivation of a “fundamental” liberty interest must withstand heightened constitutional scrutiny, which requires it to be narrowly tailored to advance a compelling government interest. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

Therefore, a legally innocent person may be deprived of her pretrial liberty only when the deprivation is carefully tailored to advance a compelling interest. A court must consider alternatives and order detention only if there are no less restrictive alternatives available. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780-81 (9th Cir. 2014) (noting that *Salerno* “involved a fundamental liberty interest and applied heightened strict scrutiny”).

An unattainable financial condition of release is the functional equivalent of an order for pretrial detention. *See* *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969). Consequently, a court imposing a secured bond that the person cannot meet must find that no less restrictive alternative can satisfy the government’s compelling interest. *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017); *In re Humphrey*, 19 Cal. App. 5th 1006, 1037.

In this case, the court ordered secured bond without finding that Petitioner could pay it. The court knew/should have known that that amount was unattainable for Petitioner because [explanation of how judge knew or should have known client couldn’t pay (e.g. proffer by PD, info on low-paying job, was found to qualify for public defender, etc.)]. As the lower court made no findings why the state’s interests could not be satisfied through attainable conditions of release, the detention order is unconstitutional.

* 1. **The secured bond violates XXXXX’s right to be free from wealth-based incarceration, arising under both the Equal Protection and Due Process Clauses of the United States** **Constitution.**

Together, the Equal Protection Clause and the Due Process Clause of the United States Constitution establish a right against wealth-based jailing. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (“[i]n criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color.”). The Court has repeatedly held that the amount of justice one enjoys cannot be determined by the amount of money one has. *See* *Douglas v. California*, 372 U.S. 353, 355 (1963); *Williams v. Illinois*, 399 U.S. 235, 241 (1970). The Court has applied these principles in concluding that a defendant’s poverty cannot determine whether she is detained. *See Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983); *Tate v. Short*, 401 U.S. 395, 398 (1971); *see also* N.C. Const. art. I, § 19 (guaranteeing equal protection of the laws).

This right against wealth-based jailing means that the court cannot impose a financial condition of release that an arrestee cannot pay unless it has undertaken the proceedings required for a valid detention order. *See Humphrey*, 19 Cal. App. 5th at 1037 (“[A] court which has not followed the procedures and made the findings required for an order of detention must, in setting money bail, consider the defendant’s ability to pay and refrain from setting an amount so beyond defendant’s means as to result in detention.”). Therefore, the court cannot impose an unattainable secured bond unless it finds that no alternative method could satisfy the government’s interest. *See* *Pugh v. Rainwater*, 572 F.2d 1053, 1057-58 (5th Cir. 1978) (en banc) (“[I]n the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint.”).

In the present case, the court did not consider ability to pay or alternative conditions of release prior to imposing a secured bond. Where a wealthier individual would be able to buy her freedom, XXXXX’s loss of liberty constitutes a violation of the Equal Protection and Due Process clauses.

**PRAYER FOR RELIEF**

 For all the foregoing reasons, the imposition of a secured bond in the present case is unauthorized under state and federal law. XXXX respectfully requests that this Court grant this Petition, issue a writ of habeas corpus, and:

1. Order XXXXX’s immediate release; or
2. Order a hearing to be held immediately in to inquire into the lawfulness of XXXXXX’s detention; or
3. Grant such other relief as this Court deems appropriate.

Refusal to grant the writ where it is lawfully applied is subject to a penalty in the form of forfeiture of $2500 to the aggrieved party. See N.C. Gen. Stat. § 17-10.

 Respectfully submitted, this XXX day of XXXX, 2018.

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 XXXXXXXX

 Attorney for Petitioner-Defendant

**CERTIFICATE OF COMPLIANCE WITH N.C. GEN. STAT. §17-**7

 I hereby certify the following in compliance with N.C. Gen. Stat. §17-7:

1. XXXXX is currently imprisoned in the XXXXXXX, which is administered by XXXXXXX.
2. XXXXX is incarcerated pursuant to the XXXXX secured bond imposed on XXXXX date.
3. A copy of [RELEVANT BOND DOCS-Conditions of Release AOC form, Warrant, other], are attached to this petition.
4. XXXXX’s imprisonment is illegal because [the trial judge lacked authority to impose a secured bond/short description of other constitutional reasons].
5. XXXXXX has not previously challenged the deprivation of his/her liberty in a prior petition for writ of habeas corpus.
6. The facts set forth in this writ are verified by undersigned counsel.

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 XXXXXXXX

 Attorney for Petitioner

# VERIFICATION

STATE OF NORTH CAROLINA )

 )

COUNTY OF XXXXX )

 XXXXXXX, being duly sworn, deposes and says that he is an attorney for XXXXXXXX, that he has read the foregoing Petition for Writ of Habeas Corpus, and undersigned counsel is informed and believes the allegations herein to be true and accurate.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 XXXXXXXX

Sworn to and subscribed before me,

This the XX day of XXXX 201X.

Notary Public: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public Signature:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ County, North Carolina

My commission expires: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of the foregoing Petition for Writ of Habeas Corpus, exhibits, and certification have this day been served by first-class U.S. Mail upon:

  **XXXXXX Judge**

**XXXXXX Sheriff**

**XXXXXXX DA**

Respectfully submitted, this XXXday of XXXX, 201X.

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 XXXXXXXXXXX

 Attorney for Petitioner

**EXHIBITS**

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