IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE, **PROSECUTION,** **v.** **DELCHON WEATHERSPOON,** **DEFENDANT.**	**NO. W2017-00779-SC-R8-CO** **SHELBY COUNTY CRIMINAL NO. P-43279**

BRIEF OF *AMICI CURIAE* CIVIL RIGHTS CORPS AND ACLU OF TENNESSEE

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I. INTRODUCTION

The lower courts in this case badly misapplied Tennessee and federal law. The errors below are pervasive in certain lower courts in the State, and they call for immediate correction by this Court. For example, thirty years after Chief Justice Rehnquist announced due process procedures in serious felony prosecutions to ensure that "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," *United States v. Salerno*, 481 U.S. 739, 750 (1987), Davidson County jails 60% of all misdemeanor arrestees for the entire duration of their cases because they cannot afford secured money bail amounts set without any inquiry into their ability to pay or, as in this case, without following the basic procures that the Supreme Court has mandated if the government is to detain a presumptively innocent person prior to trial.

The procedural and substantive deficiencies in the lower court proceedings endanger public safety, ignore basic constitutional rights, and compromise the transparency and integrity of the Tennessee judicial system. *Amici Curiae* submit this brief explaining the fundamental constitutional procedures that this Court should ensure in every bail-setting proceeding.

II. INTEREST OF *AMICI CURIAE*

Amicus curiae Civil Rights Corps is a non-profit civil rights organization that has worked extensively in Tennessee and around the country. Civil Rights Corps lawyers have worked with prosecutors, state court judges, local government officials, academic researchers, law enforcement officers, public defenders, state Attorneys General, and federal officials to reform approaches to pretrial release and detention practices. Civil Rights Corps lawyers have also challenged the improper use of secured money bail in federal and state courts in Alabama, California, Georgia, Illinois, Kansas, Louisiana, Massachusetts, Mississippi, Missouri,

Tennessee, and Texas.[1] Civil Rights Corps lawyers have developed extensive expertise on bail systems throughout the Country and on the proper and improper uses of secured money bail.

Amicus curiae the American Civil Liberties Union of Tennessee (ACLU-TN) is the state affiliate of the American Civil Liberties Union (ACLU) with over eleven thousand members throughout Tennessee. ACLU is a nationwide, nonprofit, nonpartisan organization with over one million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has long been committed to protecting the rights of persons held in jail while awaiting trial. ACLU-TN is dedicated to the principles of liberty and equality embodied in the United States Constitution and the Tennessee Constitution. The above-styled case and controversy squarely implicates the ACLU-TN's efforts to institute smart justice reforms in Tennessee, including battling against the institution of debtors' prisons and addressing a system of money bail that unfairly discriminates against those living in poverty. ACLU-TN regularly participates in cases in state and federal court involving constitutional and civil rights questions, as counsel and *amicus curiae*.

Amici respectfully hope that this brief will assist the Court in evaluating the Defendant's important constitutional claims.

III. SUMMARY OF ARGUMENT

The Defendant in this case has been declared eligible for release but remains detained in the Shelby County Jail because he does not have enough money to pay a secured money bail amount. That amount of money was required without an inquiry into the Defendant's ability to

[1] *See, e.g., ODonnell v. Harris Cty., Texas*, No. CV H-16-1414, 2017 WL 1735456, at *2 (S.D. Tex. Apr. 28, 2017); *Rodriguez v. Providence Community Corrections*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015); *Jones on behalf of Varden v. City of Clanton*, 2015 WL 5387219 (M.D. Ala. 2015); *Thompson v. City of Moss Point*, 2015 WL 10322003 (S.D. Miss. 2015); *Pierce et al. v. City of Velda City*, 2015 WL 10013006 (E.D. Mo. 2015); *Robinson v. Martin*, No. 2016-CH-13587 (Ill. Cir. Ct. Cook County 2016); *Commonwealth v. Wagle*, No. SJ-2016-334 (Mass 2016).

pay it. No court has found that the Defendant is a danger to the public or likely to flee before his trial. And no court has applied legal standards or made findings concerning whether there are any alternative conditions of release that could mitigate any specifically identified risks.

This violates the Fourteenth Amendment to the United States Constitution in two related ways: (1) By jailing the Defendant solely because of his inability to pay a sum of money set without an inquiry into his ability to pay it, the trial court's order infringes a fundamental right solely on the basis of wealth in violation of the Equal Protection and Due Process Clauses; and (2) The trial court's order violates the Constitution because it deprives a presumptively innocent Defendant of the fundamental right to liberty prior to trial without complying with the substantive and procedural requirements of a valid order of detention under the Due Process Clause.

First, the state may not jail someone simply because she cannot pay a sum of money set without an inquiry into her ability to pay it. In *Bearden v. Georgia,* 461 U.S. 660, 672–73 (1983), the Supreme Court explained that to "deprive [a convicted defendant] of his conditional freedom simply because, through no fault of his own he cannot pay [a] fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment." *See also State v. Dye*, 715 S.W.2d 36, 40 (Tenn. 1986) (quoting *State v. Walding*, 477 S.W.2d 251 (Tenn. Crim. App. 1972) ("We do not believe that the fact that Walding bargained for his punishment permits the State to keep him in jail when he, despite his earlier hopes, was unable to pay his fines in toto instanter because of his indigency."). The principles that forbid jailing a *convicted* defendant because he is unable to make a payment apply with even greater force to an arrestee who is presumed innocent. *See Pugh v. Rainwater*, 557 F.2d 1189, 1190 (5th Cir. 1977) (striking down the use of secured money bail without inquiry into ability to pay because it invidiously discriminates

against the poor); *ODonnell v. Harris Cty., Texas*, 2017 WL 1735456, at *2 (S.D. Tex. Apr. 28, 2017) (same); *see also* Brief of Amicus Curiae United States Department of Justice, *Walker v. City of Calhoun, Ga.*, No. 16-10521, at 13 (11th Cir. 2016).[2]

Second, if the state sets a secured money bail amount that a person cannot afford to pay, it has entered the functional equivalent of an order of pretrial detention. As a matter of well-settled Supreme Court law, an order resulting in pretrial detention must meet exacting procedural and substantive Constitutional restrictions. *Compare United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) ("[O]nce a court finds itself in this situation—insisting on terms in a 'release' order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid detention order."), *with United States v. Salerno*, 481 U.S. 739 (1987) (describing procedural requirements for a valid detention order, including: a hearing with counsel, legal standards requiring proof of dangerousness by clear and convincing evidence, opportunity to present evidence, consideration of less restrictive alternative conditions, and reviewable findings). As the New Mexico Supreme Court comprehensively explained in *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014), "setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether" and, therefore, a court must meet the due process clause's requirements for pretrial detention when it does so. Federal Constitutional law allows the state to detain a person prior to trial only if, after robust procedures, it finds that he poses a severe risk to the public or an immitigable risk of flight. But the Constitutional does not allow the state to use money to detain him without those procedures.

Because the Defendant in this case is in jail simply because he cannot meet a secured financial condition of release that was set without an inquiry into his ability to pay it, and

[2] *Available at* https://www.justice.gov/crt/file/887436/download.

because that condition was set without meeting the substantive and procedural requirements for a valid order of detention, the Defendant is in jail in violation of the United States Constitution.

IV. BACKGROUND

A growing movement—led by State Supreme Court Justices, Sheriffs, public defenders, prosecutors, and local jurisdictions who bear the financial costs of pretrial incarceration—is drawing attention to widespread impropriety in the use of money bail. *Amici* respectfully urge this Court to join courts across the country in articulating the procedural and substantive standards that must be employed when using secured money bail as a condition of release.

1. History of Bail

"Bail" is not equivalent to "money bail." "Bail" means *release* before trial. Although common in recent years, the sentence "the Defendant is held on $10,000 bail" is a contradiction: as a historical matter, being "held on bail" was impossible. Timothy R. Schnacke, U.S. Department of Justice—National Institute for Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 13 (August 2014).[3] As the CATO institute has explained, since well before the Magna Carta, bail has been understood as a device to *free* defendants pretrial. *See* Brief for Amicus Curiae CATO Institute, *Walker v. City of Calhoun, Ga.*, No. 16-10521, at 3 (11th Cir. 2016).[4]

"Money bail" is the practice of requiring a person to forfeit money if the defendant violates conditions of release. Money bail can be either secured or unsecured. A secured money bail system requires the defendant to deposit money before she is released; an unsecured money bail system allows the defendant to be released without depositing any money so long as she

[3] *Available at* http://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf.

[4] *Available at* https://object.cato.org/sites/cato.org/files/pubs/pdf/walker-v-city-of-calhoun.pdf.

promises to pay if she violates conditions of release. *Amici* do not oppose the "bail" system; *amici* oppose the use of secured money bail to detain arrestees without inquiry into and findings concerning ability to pay and without the constitutionally required consideration of alternative conditions of release at an adequate legal proceeding.

As Chief Judge Rosenthal of the United States District Court for the Southern District of Texas recently summarized in her comprehensive discussion of the history of the American bail system, *ODonnell*, 2017 WL 1735456, bail originated in medieval England "as a device to free untried prisoners." DANIEL J. FREED & PATRICIA M. WALD, BAIL IN THE UNITED STATES: 1964 1 (1964). The Statute of Westminster, enacted by the English Parliament in 1275, listed the offenses that would be bailable and provided criteria for determining whether someone should be released. These criteria included the strength of the evidence against the accused and the severity of the accused's criminal history. *See* June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 523–26 (1983); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966 (1961). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing. And the English Bill of Rights, which was enacted in 1679, prohibited excessive bail. *See* Carbone, *supra*, at 528.

The American States continued this tradition. Beginning with the Pennsylvania Constitution of 1682, 48 states, including Tennessee, have protected, by constitution or statute, a right to bail "by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 916 (2013). As the United States District Court for the Southern District of Texas recently explained in a detailed opinion striking down Harris County, Texas's money bail

practices, "[h]istorians and jurists confirm that from the medieval period until the early American republic, a bail bond was typically based on an individualized assessment of what the arrestee or his surety could pay to assure appearance and secure release." *ODonnell*, 2017 WL 1735456, at *12. The court explained the English practice at the time of the ratification of the United States Constitution: "'The rule is, where the offence is prima facie great, to require good bail; moderation nevertheless is to be observed, and such bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge.'" *Id.* (quoting 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 88–89 (Philadelphia ed. 1819)).

Jurisdictions across America began to depart from the original understanding of bail in the middle of the 20th Century. And in the last two decades, the use of unaffordable secured money bail has increased in scope and severity. In 1996, 59% of felony defendants had to meet a financial condition to regain their liberty pretrial. Timothy C. Hart & Brian A. Reaves, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 1996*, at 17 (1999).[5] By 2009, that percentage had climbed to 72%. Brian A. Reaves, *U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2009-Statistical Tables*, at 15, 20 (2013).[6] In 1990, the majority of felony defendants who were not detained while their cases were pending were released without financial conditions. In 2009, only 23% of felony defendants who were not detained while their cases were pending were released without financial conditions. And the average amount of money required to be paid as a condition of release has increased. Vera Institute of Justice,

[5] *Available at* https://www.bjs.gov/content/pub/pdf/fdluc96.pdf.

[6] *Available at* https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

Incarceration's Front Door: The Misuse of Jails in America 29 (Feb. 2015).[7] By 2009, about half of felony defendants subject to financial conditions of release could not meet them and remained in custody until the disposition of their cases. *Felony Defendants, 2009*, at 17.

b. Federal Reform

The routine use of unaffordable secured money bail resulted in a "crisis." *See United States v. Salerno*, 481 U.S. 739, 742 (1987) (describing "a bail crisis in the federal courts"); Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 971 (1965). Two distinct evils of the secured money bail system provoked the crisis: It imperiled public safety by allowing potentially dangerous defendants to be released without any consideration of their dangerousness, and it worked an "invidious discrimination" against those who could not pay. *See, e.g., Williams v. Illinois*, 399 U.S. 235, 242 (1970).

Attorney General Robert Kennedy led a successful movement to reform bail in the federal courts. Over 50 years ago, Kennedy testified:

> Bail has become a vehicle for systematic injustice. Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest. They are not yet proven guilty. They may be no more likely to flee than you or I. But, nonetheless, most of them must stay in jail because, to be blunt, they cannot afford to pay for their freedom . . . . Plainly our bail system has changed what is a constitutional right into an expensive privilege.

Aug. 4 1964, Testimony on Bail Legislation before the Senate Judiciary Committee.[8] *See also* Justice Arthur J. Goldberg, *Foreward, in* RONALD GOLDFARB, RANSOM ix (1965).[9]

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[7] *Available at* https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf.

[8] *Available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf

[9] RANSOM is out of print. A copy of the cited portion of the book is attached to this Brief as Exhibit A.

In the 1960s, the Vera Foundation in New York City ("Vera") conducted the Manhattan Bail Project. *See* WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 3, 20–27 (1976); RONALD GOLDFARB, RANSOM 150–72 (1965). Vera interviewed defendants before their first court appearance "to evaluate whether they were good candidates for pretrial release on recognizance; that is, release 'on one's honor pending trial.'" *ODonnell*, 2017 WL 1735456, at *12 (quoting GOLDFARB, *supra*, at 153–54). During the first three years of the Project, defendants released on nonfinancial conditions at Vera's recommendation were about three times more likely to appear for trial than defendants in control groups who were found eligible for release on nonfinancial conditions but who were instead released on secured money bail. *Id.* at 155, 157. The success of the Manhattan Bail Project strengthened the conclusion that pretrial systems based on secured money bail alone were counterproductive and unfair. *See id.* (citing TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 10 (2010)[10]).

One of the results of the movement to reform the bail system in the 1960's was the virtual elimination of cash bonds in the District of Columbia and in all Federal courts. The Bail Reform Act "assure[d] that all persons, regardless of their financial status, [would] not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest." The Bail Reform Act of 1966, 80 STAT. 214 (repealed 1984). In 1984, Congress updated the Bail Reform Act as part of the Comprehensive Crime Control Act. *See* 18 U.S.C. §§ 3141–3150. Federal courts and the courts of the District of Columbia transitioned to a rigorous, evidence-based system of non-financial conditions that remains in place today. If the government believes that a defendant cannot be released pre-trial because she is too dangerous or too likely to flee, the government may seek an order of detention, but only

[10] *Available at* https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf.

after it has satisfied the court, at a "full-blown adversary hearing," that no condition or combination of conditions could assure the defendant's appearance at trial and the safety of the community. *Salerno*, 481 U.S. at 750. The government may not detain someone just because she does not have enough money, nor may the government use money to detain *sub rosa* people it believes to be dangerous. 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").

Although federal courts may detain defendants pending trial, they may not use money to do so, and they may not do so without rigorous process. As the Chief Judge for the Southern District of Texas recently concluded, "[t]he federal history of bail reform confirms that bail is a mechanism of pretrial release, not of preventive detention." *ODonnell*, 2017 WL 1735456, at *16.

c. Recent State and Local Reforms

State and local governments across the country have responded to the inefficiency and inequality of routine secured money bail by instituting sweeping reforms to bring their systems more in line with the constitutionally sound systems used in the District of Columbia and the federal courts. These reforms demonstrate the breadth and depth of the consensus against unaffordable secured money bail abuses. In general, these jurisdictions presumptively release arrestees pending trial. They detain only the most dangerous arrestees and only after rigorous procedures are applied. The following is a brief sample of some of those efforts:

- New Mexico

In 2014, the New Mexico Supreme Court ruled that "[n]either the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release." *Brown*, 338 P.3d at 1292. "Intentionally setting bail so high as to be unattainable," the court explained, "is simply a less honest method of unlawfully

denying bail altogether." *Id.* The New Mexico Supreme Court held that the trial court had abused its discretion by requiring secured money bail "solely on the basis of an accusation of a serious crime," and that it violated the New Mexico Constitution by detaining the defendant on this basis. *Id.* at 1291–92. In *Brown*, as in this case, the defendant was charged with a very serious crime and the trial court set a high secured money bail amount for the purpose of detaining him. The New Mexico Supreme Court ruled that this is illegal and unconstitutional.

In 2016, New Mexico amended its constitution by popular referendum to codify the holding of *State v. Brown*. The referendum passed with 87.2% of the vote. *See* Official Results of the November 8, 2016 General Election, New Mexico Secretary of State.[11] Under the New Mexico constitution as amended, "bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community." Constitutional Amendment 1, New Mexico Senate Joint Resolution 1, March 1, 2016.[12] The amendment also required that "[a] person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond." *Id.*

- Maryland

This year the Maryland Court of Appeals adopted detailed changes to its court rules, which are the main source of criminal-procedure law in Maryland. Court of Appeals of

[11] *Available at* http://electionresults.sos.state.nm.us/resultsSW.aspx?type=SW&map=CTY.

[12] *Available at* http://www.sos.state.nm.us/uploads/files/CA1-SJM1-2016.pdf.

Maryland, Rules Order, Feb. 17, 2017, at 3.[13] The rule changes are "designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond" by establishing a "[p]reference" for "additional conditions [of release] without financial terms." *Id.* at 33. All defendants—both felony and misdemeanor—must be released on personal recognizance or unsecured bond unless a judicial officer makes written findings on the record "that no permissible non-financial condition attached to a release will reasonably ensure (A) the appearance of the defendant, and (B) the safety of each alleged victim, other persons, or the community." *Id.* at 35. Even in those circumstances, the new rules require that "[a] judicial officer may not impose a special condition of release with financial terms in form or amount that results in the pretrial detention of the defendant solely because the defendant is financially incapable of meeting that condition." *Id.* at 39. Courts may not use secured money bail intentionally to jail pretrial arrestees, nor may courts set secured money bail amounts that result in the jailing of pretrial arrestees.

- New Jersey

At the beginning of 2017, a New Jersey constitutional amendment championed by Governor Christopher J. Christie overhauled the state's pretrial detention practices to eliminate the use of money to keep people in pretrial detention. New Jersey's Attorney General had concluded that under the state courts' earlier practice, "in most cases the critical determination whether a defendant [was] released pending trial or instead incarcerated in a county jail [was] not made by a judge issuing a well-reasoned court order. Rather, for all practical purposes,

[13]http://www.courts.state.md.us/rules/reports/192ndsupplement2.pdf.

defendants [were] released or detained based on whether they happen[ed] to have the financial means to post bail." N.J. Attorney General Law Enforcement Directive No. 2016-6, at 9.[14]

In response, the current system creates a presumption against the use of secured money bail unless the prosecutor can show that "no non-monetary release condition or combination of conditions would be sufficient to reasonably assure the defendant's appearance in court when required"; "the defendant is reasonably believed to have financial assets that will allow him or her to post monetary bail in the amount requested by the prosecutor without having to purchase a bond from a surety company or to obtain a loan"; and "imposition of monetary bail set at the amount requested would . . . make it unnecessary for the prosecutor to seek pretrial detention." *Id.* at 56. Courts may not use secured money bail intentionally to detain defendants prior to trial.

- Arizona

In 2016, the Arizona Supreme Court convened a task force to study the state's pretrial detention system. *See* SUPREME COURT OF ARIZONA, JUSTICE FOR ALL (2016).[15] The task force concluded that Arizona's cash-bail system was fundamentally flawed. The Chair of the Task Force highlighted the dual problems with Arizona's automatic secured money bail system. On the one hand, the Chair noted, it imprisoned people solely because they did not have enough money to meet a secured financial condition of release. And, on the other hand, it released people, even if they might be dangerous or likely to flee, simply because they could meet a secured financial condition of release. "Let's make it baseball cards," he told the Arizona Republic newspaper recently. "[Y]ou get to post them [and] you get out. Frankly, baseball cards

[14]http://www.nj.gov/oag/dcj/agguide/directives/2016-6_Law-Enforcement.pdf.

[15]*Available at* http://www.azcourts.gov/Portals/0/FairJusticeArizonaReport2016.pdf.

would be just as predictive as money." Megan Cassidy, *Panel Recommends Arizona Courts Toss 'Cash Bail' System*, THE ARIZONA REPUBLIC, September 5, 2016.[16]

The Task Force recommended that Arizona "Eliminate the requirement for cash surety to the greatest extent possible and instead impose reasonable conditions based on the individual's risk." JUSTICE FOR ALL, *supra*, at 33. "When using the risk assessment to make pretrial release decisions, generally judges should release low-risk defendants with minimal or no conditions, release moderate-risk defendants with interventions and services targeted to mitigate the risk, and should detain the highest-risk defendants in custody." *Id.* at 34. Under no circumstances, the Task Force concluded, should a court require "money for freedom" and thereby jail the poor. *Id.* at 27.

In 2017, the Arizona Supreme Court reaffirmed the fundamental right to pretrial liberty when it struck down, in *Simpson v. Miller*, 387 P.3d 1270, 1276 (Ariz. 2017), an Arizona statute categorically denying pretrial release to a subset of non-capital defendants based solely on the crimes with which they were charged.

d. The Bail System Today

Hundreds of thousands of people are detained throughout the United States simply because they do not have enough money to purchase their liberty. In May 2015, there were 735,601 pre-trial inmates in US jails. This jailing cost state and local governments an accounted $22.2 billion. Factoring in money spent by other local government entities, the actual cost is much more. *See* VERA INSTITUTE OF JUSTICE, THE PRICE OF JAILS (2015).[17]

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[16] *Available at* http://www.azcentral.com/story/news/local/phoenix/2016/09/05/arizona-courts-cash-bail-release-pretrial-detention/88996454/

[17] https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration/legacy_downloads/price-of-jails.pdf.

Secured money bail is an insurmountable barrier to release for a substantial percentage of the population. Sums of money that may seem small to some are impossible for many. In its annual survey of the economic wellbeing of US households, the United States Federal Reserve conducted a large-scale survey.

> To determine individuals' preparedness for a smaller scale financial disruption, respondents are also asked how they would pay for a hypothetical emergency expense that would cost $400. Just over half (53 percent) report that they could fairly easily handle such an expense, paying for it entirely using cash, money currently in their checking/savings account, or on a credit card that they would pay in full at their next statement. . . . The remaining 47 percent indicate that such an expense would be more challenging to handle. Specifically, respondents indicate that they simply could not cover the expense (14 percent); would sell something (10 percent); or would rely on one or more means of borrowing to pay for at least part of the expense, including paying with a credit card that they pay off over time (18 percent), borrowing from friends or family (13 percent), or using a payday loan (2 percent).

U.S. FEDERAL RESERVE REPORT ON ECONOMIC WELLBEING OF US HOUSEHOLDS at 18.[18]

The regular and automatic use of money bail to detain people *increases* crime. Even two to three days in jail after an arrest makes a person more likely to commit new crimes both prior to trial and for years in the future. *See* DOJ, National Institute of Corrections, at 24–29[19]; *see also, e.g.*, International Association of Chiefs of Police, Resolution (October 2014), 121st

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[18] *Available at* https://www.federalreserve.gov/econresdata/2014-report-economic-well-being-us-households-201505.pdf

[19] A*vailable at*, http://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf. Summarizing the current state of research, the DOJ report, *id.* at 29, concluded:

> [R]esearchers found that low- and moderate-risk defendants held only 2 to 3 days were more likely to commit crimes and fail to appear for court before trial than similar defendants held 24 hours or less. As the time in jail increased, the researchers found, the likelihood of defendant misbehavior also increased. The study also found similar correlations between pretrial detention and long-term recidivism, especially for lower risk defendants. In a field of paradoxes, the idea that a judge setting a condition of bail intending to protect public safety might be unwittingly increasing the danger to the public—both short and long-term—is cause for radically rethinking the way we administer bail.

Annual Congress at 15–16 ("[D]efendants rated low risk and detained pretrial for longer than one day before their pretrial release are more likely to commit a new crime once they are released, demonstrating that length of time until pretrial release has a direct impact on public safety.")[20]; Marie VanNostrand, U.S. Department of Justice, Pretrial Risk Assessment in the Federal Court 5 (2009)[21]. After a rigorous empirical analysis of pretrial detention practices in Harris County, Texas, researchers at Stanford University concluded that pretrial detention leads to significant increases in crime. *See* Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017). "The Heaton Study," the U.S. District Court for the Southern District of Texas explained, "found that if, during the six years between 2008 to 2013, Harris County had given early release on unsecured personal bonds to the lowest-risk misdemeanor defendants—those receiving secured bail amounts of $500 or less—40,000 more people would have been released pretrial; nearly 6,000 convictions and 400,000 days in jail at County expense would have been avoided; those released would have committed 1,600 fewer felonies and 2,400 fewer misdemeanors in the eighteen months following pretrial release; and the County would have saved $20 million in supervision costs alone." *ODonnell*, 2017 WL 1735456, at *53.

In Davidson County, for example, the routine use of secured money bonds in misdemeanor cases is far worse than even Harris County, Texas. A recent statistical analysis shows that while Harris County detains roughly 40% of misdemeanor defendants for an average

[20] *Available at* http://www.theiacp.org/Portals/0/documents/pdfs/2014Resolutions.pdf.

[21] https://www.pretrial.org/download/risk-assessment/Pretrial%20Risk%20Assessment%20in%20the%20Federal%20Court%20Final%20Report%20(2009).pdf.

of 3.2 days, Davidson County detains 59% of misdemeanor defendants for an average of 5.7 days. *See* Exhibit B.

The other consequences of this widespread wealth-based pretrial detention are devastating. People incarcerated prior to trial often lose their jobs, their homes, and their children as a result of their inability to pay. And many of them plead guilty just to get out of jail. *ODonnell*, 2017 WL 1735456, at *36 ("The only way to gain release earlier was to pay the bail or to plead guilty."); TIMOTHY R. SCHNACKE, NATIONAL INSTITUTE OF CORRECTIONS, MONEY AS A CRIMINAL JUSTICE STAKEHOLDER 50 (2014)[22]; Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1162 (2008). Pretrial detention also leads to worse outcomes at every stage of the criminal process, including higher rates of conviction and longer sentences. This makes sense because, as the Supreme Court has explained, detention prior to trial compromises a person's ability to participate in her defense. *E.g.*, *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (Douglas, J., in chambers).

There is a growing, politically diverse consensus that the consequences of the unthinking application of secured money bail are destructive and unlawful. *See, e.g.*, Nicole Hong & Shibani Mahtani, *Cash Bail, Staple of Courts, is Fading*, THE WALL STREET JOURNAL, May 23, 2017, at A1, A12. According to the CATO Institute, the prohibition on using unaffordable secured money bail that is set without an individualized inquiry into the arrestee's ability to pay it is "supported by nearly a *millennium* of Anglo-American constitutional and common law." Brief for Amicus Curiae CATO Institute, *Walker v. City of Calhoun, Ga.*, No. 16-10521 (11th Cir. 2016)

[22]https://www.pretrial.org/download/research/Money%20as%20a%20Criminal%20Justice%20Stakeholder.pdf.

(emphasis in original).[23] As a result, practices like those employed by the trial court in this case endanger the fundamental libertarian values on which the country was founded.

This view is shared by law enforcement. The National Sheriff's Association has condemned pretrial detention practices in much of this country because "inmates are incarcerated not because of their risk to public safety or of not appearing in court, but because of their inability to afford the amount of their bail bond." National Sheriffs' Association, Resolution 2012-6.[24] And Sheriffs in Houston, Chicago, and San Francisco have publicly condemned the use of unaffordable secured money bail. *See* Michael Hardy, *In Fight Over Bail's Fairness, A Sheriff Joins the Critics*, N.Y. TIMES, March 9, 2017, at A14; Fiona Ortiz, *Poor, Nonviolent Inmates Benefit from U.S. Bail Reform Push*, REUTERS, July 16, 2015[25]; Paul Elias, Associated Press, *San Francisco Lawsuit Latest Legal Assault on Cash Bail Requirements for Pre-trial Release*, U.S. NEWS & WORLD REPORT, Dec. 27, 2015.[26]

As explained below, *Amici* urge this Court to join that diverse consensus, and hold—as courts across the country have—that it is unconstitutional to jail someone on a secured money bail amount that she cannot afford without an individualized inquiry into her ability to pay it and robust consideration of non-financial alternative conditions of release.

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[23] *Available at* https://object.cato.org/sites/cato.org/files/pubs/pdf/walker-v-city-of-calhoun.pdf.

[24] *Available at* https://www.pretrial.org/download/policy-statements/NSA%20Pretrial%20Resolution.pdf

[25] *Available at* http://www.reuters.com/article/us-usa-chicago-bail-idUSKCN0PQ1UN20150716.

[26] *Available at* https://www.usnews.com/news/us/articles/2015-12-26/lawsuits-seek-to-abolish-countys-bail-bond-system.

V. THE 14TH AMENDMENT TO THE US CONSTITUTION FORBIDS JAILING SOMEONE SOLELY BECAUSE SHE IS UNABLE TO PAY A SECURED MONEY BAIL AMOUNT

The order of detention in this case violates the 14th Amendment to the United States Constitution in two related ways. First, the order of detention violates the Constitution because it jails the Defendant solely because of his inability to pay a sum of money set without an inquiry into his ability to pay it. Second, the order of detention violates the constitution because it detains the presumptively innocent Defendant prior to trial without complying with the substantive and procedural requirements of the Due Process Clause.

a. Using Secured Money Bail Set Without an Inquiry Into Ability to Pay Violates the Fourteenth Amendment when it Results in Jailing the Poor

The principle that jailing the poor because they cannot pay a sum of money is unconstitutional has deep roots in American constitutional law. *See Williams v. Illinois*, 399 U.S. 235, 241 (1970) ("[T]he Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons."); *Douglas v. California*, 372 U.S. 353, 355 (1963) (condemning the "evil" of "discrimination against the indigent"); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."); *see also Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971).

These principles have been applied in a variety of contexts in which a government jailed someone because of her inability to make a monetary payment. In *Tate v. Short*, 401 U.S. 395, 398 (1971), the United States Supreme Court held that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." In *Bearden v. Georgia,* 461 U.S. 660, 672–73 (1983), the Court explained that to "deprive [a] probationer of his conditional

freedom simply because, through no fault of his own he cannot pay [a] fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment."

Relying on this Supreme Court precedent, federal and state courts have long held that any kind of pay-or-jail scheme is unconstitutional when it operates to jail the poor. In *Frazier v. Jordan,* 457 F.2d 726, 728–29 (5th Cir. 1972), for example, the court found that an alternative sentencing scheme of $17 dollars or 13 days in jail was unconstitutional as applied to those who could not immediately afford the payment and, therefore, were imprisoned. *Id.* at 728. *Frazier* condemned a system in which "[t]hose with means avoid imprisonment [but] the indigent cannot escape imprisonment." *Id.*; *see also Alkire v. Irving*, 330 F.3d 802 (6th Cir. 2003) (holding that the Constitution forbids the incarceration of "an indigent defendant for his failure to pay a debt"); *Barnett v. Hopper*, 548 F.2d 550, 554 (5th Cir. 1977) ("To imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws."), *vacated as moot*, 439 U.S. 1041 (1978).

For pretrial arrestees, the rights at stake are even more significant because the arrestees' liberty is not diminished by a criminal conviction; they are presumed innocent. Justice Douglas framed the basic question that applies to pre-trial detainees:

> To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?

Bandy v. United States, 81 S. Ct. 197, 197–98 (1960) (Douglas, J., in chambers).

The Fifth Circuit answered that question in *Rainwater*. The panel opinion, *Pugh v. Rainwater*, 557 F.2d 1189, 1190 (5th Cir. 1977), had struck down a Florida Rule of Criminal Procedure dealing with money bail because it unconstitutionally jailed indigent pre-trial arrestees solely because they could not make a monetary payment. The *en banc* court agreed with the

constitutional holding of the panel opinion but reversed the panel's facial invalidation of the *entire* Florida Rule. The *en banc* court held that the Florida Rule did not on its face require Florida courts to set secured monetary bail for arrestees. But the court explained that if such a thing were to happen to an indigent person it would be unconstitutional. The *en banc* court reversed the panel opinion only because Florida courts could not be expected to enforce a new Rule—the Rule had been amended during the litigation in that case—in a manner that violated the Constitution by requiring monetary payments to secure the release of an indigent person. The court wrote

> We have no doubt that in 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. We do not read the State of Florida's new rule to require such a result.

Id. at 1058.[27] The *en banc* court held that "[t]he incarceration of those who cannot [afford a cash payment], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id.* at 1057 (emphasis added);[28] *see also Williams v. Farrior*, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("For the purposes of the Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows only monetary

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[27] *Rainwater* further explained that it refused to require a priority to be given in all cases—including those of the non-indigent—to non-monetary conditions of release. The court noted that, at least for wealthier people, some might actually prefer monetary bail over release with certain other conditions, and that the court would not invalidate a state Rule that allowed for those other conditions in appropriate cases. *Id.* at 1057.

[28] Four circuit judges dissented in *Rainwater*. Although they agreed with the constitutional principles announced by the majority that the Constitution forbids jailing the poor when they cannot afford monetary bail, they were concerned about the majority's faith in the Florida courts not to apply the new state Rule in unconstitutional ways to detain the indigent. *Id.* at 1067 ("I cannot escape the conclusion that the majority has chosen too frail a vessel for such a ponderous cargo of human rights.") (Simpson, J., Dissenting).

bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements.").

Orders like the trial court's in this case do exactly what *Rainwater* forbids: they jail those who cannot pay and release those who can. Arrestees in Tennessee who are not charged with capital crimes are all eligible for immediate release if they can post an immediate payment. But they are all detained if they cannot. The State may not do this. It is unconstitutional to jail people for no reason other than their inability to pay. *See Bearden*, 461 U.S. at 667–68 (holding that "if [a] State determines a fine or restitution to be the appropriate and adequate penalty for [a] crime, it may not thereafter imprison a person solely because he lacked the resources to pay it").

The Supreme Court's most recent case on wealth-based detention provides further guidance for this Court by emphasizing the importance of a rigorous inquiry into ability to pay before jailing a person for failing to meet a financial condition. In *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011), the Supreme Court described the procedural requirements that must be followed when a state attempts to jail a person for non-payment of a financial obligation. *Turner* held that South Carolina violated the Due Process clause when it jailed a man for unpaid child support payments without an inquiry into whether he could pay them. *Id.* Whether the jailing is pursuant to probation revocation proceedings as in *Bearden*, pursuant to formal contempt proceedings as in *Turner*, or pursuant to pretrial detention proceedings as here, the Court explained the basic protections that a state must provide before jailing a person for non-payment of a monetary sum:

> Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the . . . proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

Id. at 2519. The Court held that Turner's imprisonment was unconstitutional because the South Carolina court did not comply with the procedures that were essential to "fundamental fairness."

For the same reasons, if a court determines that a pretrial arrestee is eligible for release—which a court, by definition, does when it sets a monetary bail amount—and conditions that release on a monetary payment, the judge must make "an express finding" that "the defendant has the ability to pay." *Id.* at 2519. Otherwise, the order of release would be automatically converted into an order of detention for an indigent person and, therefore, must meet the requirements of the due process clause—namely the procedures upheld in *Salerno*.

Federal district courts throughout the country, including in the Middle District of Tennessee, have recently held that secured money bail is unconstitutional when it is set without inquiry into ability to pay. *See Rodriguez v. Providence Community Corrections, Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015) (granting class-wide preliminary injunction to stop the use of money bond to detain misdemeanor probationers without an inquiry into the arrestee's ability to pay); *Cooper v. City of Dothan*, 2015 WL 10013003 (M.D. Ala. 2015) (issuing Temporary Restraining Order and holding that the practice of requiring secured money bond without an inquiry into ability to pay violates the Fourteenth Amendment); *Jones on behalf of Varden v. City of Clanton*, 2015 WL 5387219 (M.D. Ala. 2015) (declaring secured money bond unconstitutional without an inquiry into ability to pay); *Thompson v. City of Moss Point*, 2015 WL 10322003 (S.D. Miss. 2015) (same); *Pierce et al. v. City of Velda City,* 2015 WL 10013006 (E.D. Mo. 2015) (issuing a declaratory judgment that the use of a secured bail schedule is unconstitutional as applied to the indigent and enjoining its operation).

State Courts have also held that secured money bail systems violate the United States Constitution when they operate to detain the poor. The New Mexico Supreme Court recently

addressed these issues at length in *State v. Brown*, 338 P.3d 1276 (N.M. 2014). In *Brown*, as here, a trial court set a secured money bail amount that the defendant could not pay without finding that the defendant posed a public safety risk or flight risk. The court concluded:

> Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release . . . . If a defendant should be detained pending trial under the New Mexico Constitution, then that defendant should not be permitted any bail at all. Otherwise the defendant is entitled to release on bail, and excessive bail cannot be required.

Id. at 1292 (citations and internal quotation marks omitted). "Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether," *id.*, the court wrote. "If a defendant should be detained pending trial . . ., then that defendant should not be permitted any bail at all. Otherwise the defendant is entitled to release on bail, and excessive bail cannot be required." *Id.*

In *Lee v. Lawson*, 375 So. 2d 1019, 1023 (Miss. 1979), the Supreme Court of Mississippi explained that Mississippi law provided for release without payment of money and that, following the American Bar Association Standards, Mississippi courts should adopt a presumption of release on recognizance (at least in cases not involving "violent or heinous crimes"). *Id.* ("There is incorporated in these standards a presumption that a defendant is entitled to be released on order to appear or on his own recognizance."). "A consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional." *Id.* The court declared that this presumption of non-monetary release "will go far toward the goal of equal justice under law." *Id.* at 1024.

In *State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994), the Alabama Supreme Court struck down a state statute that allowed for indigent arrestees to be held for 72 hours when they could

not afford monetary payments to secure their release prior to a first appearance. The Court held that

> [A]n indigent defendant charged with a relatively minor misdemeanor who cannot obtain release by cash bail, a bail bond, or property bail, must remain incarcerated for a minimum of three days, and perhaps longer, before being able to obtain [recognizance release]. We conclude that, as written, article VII of the Act violates an indigent defendant's equal protection rights guaranteed by the United States Constitution, because the classification system it imposes is not rationally related to a legitimate governmental objective.

Id. (quotations removed). In *Blake*, the lower court had expressed outrage at the system of detention based on poverty that prevailed in Alabama at the time:

> The pretrial detention of this defendant accused of a misdemeanor for possibly five or six days because of defendant's lack of resources interferes with the right of liberty, the premise of innocent until proven guilty, and shocks the conscience of this court. If this defendant has $60 cash to pay a bondsman, he walks out of the jail as soon as he is printed and photographed . . . . Absent property or money, the defendant must wait 72 hours . . . . Putting liberty on a cash basis was never intended by the founding fathers as the basis for release pending trial.

Id. at 966 (emphases added). *See also Robertson v. Goldman*, 369 S.E.2d 888, 891 (W. Va. 1988) ("[W]e have previously observed in a case involving a "peace bond," which we said was analogous to a bail bond, that if the appellant was placed in jail because he was an indigent and could not furnish [bond] while a person who is not an indigent can avoid being placed in jail by merely furnishing the bond required, he has been denied equal protection of the law." (internal quotation marks omitted)).

In two landmark legal filings, the Department of Justice announced its position that secured money bail without an inquiry into ability to pay "not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy." United States Department of Justice, Statement of Interest, *Varden et al. v. City of Clanton,* 15-cv-34 (M.D.

Ala. 2015)[29]; Brief of Amicus Curiae United States Department of Justice, *Walker v. City of Calhoun, Ga.*, No. 16-10521, at 13 (11th Cir. 2016).[30] The Department cited its long commitment to the issue, which began when Attorney General Robert Kennedy led a coalition of scholars, academics, judges, and elected representatives to abolish wealth-based detention in Federal courts.

Like the Federal courts and the Department of Justice, the American Bar Association's Standards for Criminal Justice condemn the inappropriate use of money bail. *American Bar Association Standards for Criminal Justice – Pretrial Release* (3rd ed. 2007) ("ABA Standards").[31] The ABA Standards, which the Supreme Court has looked to for guidance in many cases, first began addressing post-arrest release procedures in 1968. The latest revision of the ABA Standards constitutes one of the most comprehensive statements available on the issue of post-arrest release, setting forth clear, reasonable alternatives to detention based on money.

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[29]The Clanton case involved the use of a "bail schedule" that set monetary bail without an inquiry into ability to pay. The equal protection and due process problem with the use of a bail schedule and the use of discretionary amounts of money is the same: it violates equal protection and due process to set a money bail amount without a hearing into the person's ability to pay and a finding that the person can pay that amount. The Department of Justice has emphasized that the problems with money bail extend beyond bail schedules: "[T]he same constitutional violations [as in Clanton] arise in other money bail systems, including those in which judges set cash bail amounts in one case after another without due consideration of a person's ability to pay. However the system is designed or administered, if the end result is that poor people are held in jail as a result of their inability to pay while similarly situated wealthy people are able to pay for their release, the system is unconstitutional." Lisa Foster, Director, Office for Access to Justice, *Remarks at ABA's 11th Annual Summit on Public Defense*, (Feb. 6, 2016) https://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit. In a letter to courts nationwide, the Department of Justice again emphasized that these "basic constitutional principles" require that "[c]ourts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release." Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Division, and Lisa Foster, Director, Office for Access to Justice, *Joint "Dear Colleague" Letter* (March 14, 2016), https://www.justice.gov/crt/file/832461/download.

[30]*Available at* https://www.justice.gov/crt/file/887436/download.

[31]Available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

The ABA Standards condemn the use of money bail set in an amount greater than a person can afford. ABA Standards at § 10-1.4(e) ("The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay."); ABA Standards at § 10-5.3(a) ("Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court."). The ABA commentary to § 10-1.4(c) explains: "If the court finds that unsecured bond is not sufficient, it may require the defendant to post bail; *however, the bail amount must be within the financial reach of the defendant* and should not be at an amount greater than necessary to assure the defendant's appearance in court." *Id.* at 44 (emphasis added).[32]

Courts across the country, the United States Department of Justice, and the ABA all agree that detaining people on secured money bail amounts that they cannot afford violates the United States Constitution. *Amici* respectfully urge the Court to join this growing consensus.

b. Jailing People Pretrial Without a Robust Hearing on their Dangerousness and Risk of Flight Simply Because They Cannot Pay Secured Money Bail Violates the Due Process Clause

The right to pretrial liberty is a "fundamental" right. *United States v. Salerno*, 481 U.S. 739, 750 (1987); *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990) (holding that release prior to trial is a "vital liberty interest"); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *Zadvydas v. Davis*, 533 U.S. 678, 690

[32]The ABA standards in general strongly emphasize the principle that no condition infringing on pretrial liberty should be imposed unless it is the least restrictive condition necessary: "Consistent with these Standards, each jurisdiction should adopt procedures designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond. Additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case . . . ." ABA Standards § 10-1.4(a); § 10-1.4(c) (commentary) at 43-44.

(2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

Because "[f]reedom from bodily restraint is a fundamental liberty interest," any deprivation of that liberty must withstand heightened constitutional scrutiny, which generally requires that the deprivation be narrowly tailored to further a compelling government interest. *See, e.g.*, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (*en banc*) (applying strict scrutiny to strike down Arizona bail law that required detention after arrest for undocumented immigrants accused of certain offenses). For that reason, the Supreme Court in *Salerno* applied exacting scrutiny to a presumptively innocent person's loss of pretrial liberty.

The procedures challenged in this case violate the due process clause. An order setting unaffordable conditions of release without an inquiry into whether a person can meet them is equivalent to an order of detention. *State v. Brown*, 338 P.3d 1276 (N.M. 2014); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) ("[O]nce a court finds itself in this situation—insisting on terms in a 'release' order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid detention order"); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."); *ODonnell v. Harris Cty., Texas*, No. CV H-16-61414, 2017 WL 1735456, at *72 (S.D. Tex. Apr. 28, 2017) (holding that secured money bail set in amount that an arrestee cannot afford is constitutionally equivalent to an order of detention). It must, therefore, at least survive heightened constitutional scrutiny and, therefore, be narrowly tailored to forward a compelling state interest. *See Brown*, 338 P.3d at 1292 ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether . . . . If a defendant should be detained pending trial . . ., then

that defendant should not be permitted any bail at all. Otherwise the defendant is entitled to release on bail, and excessive bail cannot be required."). Because Tennessee's secured money bail system is not narrowly tailored to forward a compelling state interest, it is unconstitutional.

1. Salerno *and its Progeny Require Rigorous Procedures Prior to Pretrial Detention*

In *Salerno*, the United States Supreme Court considered a facial challenge the federal Bail Reform Act. That Act permits the government to detain people found to be highly dangerous, after an individualized "full blown adversary hearing," *id.* at 740, only where the "Government . . . convince[s] a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community . . . ." *Id.* The Supreme Court subjected the Bail Reform Act to heightened judicial scrutiny, holding that the government may detain individuals before trial only where that detention is carefully limited to serve a "compelling" government interest, *id.* at 746 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

In *Salerno*, the due process inquiry produced three basic requirements. First, pretrial detention of a presumptively innocent person should be allowed only in cases of "the most serious of crimes." *Id.* at 747. A critical component of *Salerno* is that the balance of interests allowing deprivation of an individual's "fundamental" right begins to tilt in the government's favor only in "extremely serious" criminal cases.

Second, an order of detention may be entered only after a rigorous adversarial hearing with counsel and heightened evidentiary burdens. The harms are too great, both to the individual's core right to bodily freedom and to the future of the person's criminal case, to permit detention without rigorous protections.

Third, there must be detailed findings explaining the reasons that the person must be fully incapacitated prior to being found guilty of a crime. These specific findings must include an

explanation why no other condition or combination of conditions can protect against specifically identified risks that the individual has been found to pose.

Following *Salerno*, courts across the country have made clear that pre-trial detention regimes must be consistent with both procedural and substantive due process. *See Simpson v. Miller*, 387 P.3d 1270, 1276 (Ariz. 2017) ("[I]t is clear from *Salerno* and other decisions that the constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy substantive due process standards."); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (*en banc*) (applying strict scrutiny to strike down an Arizona law that required detention after arrest without individualized consideration of an arrestee's circumstances); *Carlisle v. Desoto Cnty., Miss.*, 2010 WL 3894114, at *5 (N.D. Miss. Sept. 30, 2010) (holding that because a "compelling state interest" was required for pretrial detention, the plaintiff's rights were violated if he was jailed without a consideration of non-financial alternatives); *Williams v. Farrior*, 626 F. Supp. 983, 986 (S.D. Miss. 1986) (holding that a state's pretrial detention scheme must meet "strict judicial scrutiny" because of the fundamental rights at issue).

In *Simpson*, the Arizona Supreme Court considered a State constitutional amendment that required the pretrial detention of people charged with "sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great." *Simpson*, 387 P.3d at 1273. Arizona procedures required a "full-blown adversary hearing" before someone was detained pretrial under this provision, but the hearing was to determine only whether the proof was evident that the defendant committed the alleged offense; trial courts did not inquire into dangerousness or risk of flight separately. The Arizona Supreme Court subjected this provision to "heightened scrutiny" under the Due Process Clause of the United States Constitution. *Id.* at 1277. Although

it concluded that "heightened scrutiny" and "strict scrutiny" are not necessarily identical, and that *Salerno* applied the former rather than the latter, the court nonetheless concluded that Arizona's preventative detention regime failed the constitutional test. *Id.* at 1278. The court concluded that the state must either provide individualized determinations of dangerousness for every person detained pretrial or "if the state chooses not to provide such determinations, its procedure would have to serve as a convincing proxy for unmanageable flight risk or dangerousness." *Id.* at 1277 (quotation marks and citation omitted). The court held that Arizona's procedures were insufficient because nothing about the crimes with which the defendant was charged served as a convincing proxy for unmanageable flight or risk of dangerousness.

In *Lopez-Valenzuela*, the United States Court of Appeals for the Ninth Circuit considered an Arizona law that categorically denied pretrial release to any arrestee who was an undocumented immigrant to the United States. The Court applied "strict scrutiny" to the Arizona law, relying on *Salerno*. 770 F.3d at 786. Under strict scrutiny, the court concluded, the law could not survive. "Whether a categorical denial of bail for noncapital offenses could *ever* withstand heightened scrutiny is an open question," the court noted. *Id.* at 785. But the court concluded that a blanket prohibition on pretrial release for undocumented immigrants clearly could not survive heightened scrutiny. *Id.* To detain someone pretrial, the court reasoned, the state must offer convincing—and almost always individualized—rationales. *Id.* at 786.

2. *A De Facto Order of Detention Based on Money Does Not Forward a Compelling State Interest*

Jailing someone simply because she cannot pay a sum of money set without an inquiry into her ability to pay, and without consideration of non-financial alternative conditions of release, cannot forward a compelling state interest. The State's only legitimate interest in requiring a defendant to post money bail is to achieve the societal benefits of pretrial release

while also giving the defendant a supposed incentive to return to court. *E.g.*, *State v. Larson*, 374 N.W.2d 329, 331 (Minn. Ct. App. 1985) ("The purpose of bail is to permit the release of a defendant by providing an incentive for him to appear at trial or forfeit the bail"). But if the bail amount is more than the person could ever pay and results in the person's detention, how can it further this governmental interest? For a destitute person, bail set in the amount of $15,000 is the same as bail set in the amount of $150. In what meaningful way is a larger number a greater incentive to the person who cannot pay either? Setting a condition of release that is impossible for the arrestee to meet furthers no incentivizing interest, let alone a compelling one.

In *Bearden*, the Supreme Court made clear that it would be difficult ever to find a legitimate state reason for jailing an indigent person for non-payment of money. In the post-conviction context, it explained that the State's interest in "ensuring that restitution be paid to the victims" is insufficient because "[r]evoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming." *Bearden,* 461 U.S. at 670. Similarly, the state's interest in removing the defendant "from the temptation of committing other crimes" in order to protect society and rehabilitate him is also insufficient, as this would amount to "little more than punishing a person for his poverty." *Id.* at 671. Finally, although the state's interest in punishment and deterrence of others is a valid interest, it can be "served fully by alternative means," including extending the time for making payments, reducing the fine, or directing that the probationer perform public service in lieu of the fine. *Id.* at 671–72. Under Tennessee law, the only valid state interest in a *monetary* bail is incentivizing future appearance after release. But, by definition, that interest cannot be served by a monetary amount greater than the person can afford.

There is nothing wrong with giving a defendant an additional financial incentive to appear. When a person can afford to pay a sum, the risk of later losing that money for nonappearance might create an incentive to appear. But setting a secured money bail amount that a person cannot meet cannot create a financial incentive to appear again after release.

3. A De Facto Order of Detention Based on Money is Not Narrowly Tailored

The only way in which the order of money bail in this case could serve a compelling interest is to the extent that it intentionally detains the Defendant. Indeed, that is exactly what the trial court appears to have intended. But the Defendant was ordered detained without any findings that he is dangerous or a risk of flight. Nor did the court undertake to make a finding that pre-trial detention is the least restrictive available means to forward a compelling government purpose.

The de facto detention order was entered despite the existence of ample constitutionally permissible and practically sound alternatives that do not infringe on fundamental liberties. Ironically, the result of the trial court's failure to scrutinize alternative conditions is that, if the Defendant were wealthier, he would have been released immediately without the imposition of effective non-financial conditions, such as GPS monitoring, reporting requirements, counseling, stay-away orders, and the like. Because the trial court did not provide any of that process or make any findings concerning why an order of detention was necessary, the trial court's order is clearly unconstitutional, and this Court should remand for the application of further proceedings compatible with the process required for a valid order of pretrial detention.

For more than fifty years, the federal and state courts have made clear that there are numerous non-financial alternatives that can mitigate particular risks in all but the most serious cases. As far back as 1963, Chief Judge Bazelon's famous opinion concerning Congress' new alternatives to monetary bail in *United States v. Leathers*, 412 F.2d 169, 172 (D.C. Cir. 1969),

makes clear just how rigorous the consideration of non-financial alternatives can be. The available options, including electronic monitoring in very serious cases and algorithms that can identify particular supervision needs, have dramatically increased in the 54 years since the federal courts began to demand evidence-based and intellectually rigorous findings on non-financial alternatives when fundamental pretrial liberty is at stake.

Trial courts in Tennessee may consider many less-restrictive alternatives that have proven effective in other jurisdictions. *See Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (due process requires consideration of "less intrusive alternatives" before criminal defendant can be deprived of liberty interest). These include protective orders, alcohol monitors, text message and phone call reminders of court dates, substance abuse counseling and testing, anger management counseling, curfew, regular meetings with a supervising officer, and, as a last resort, home confinement or GPS monitoring.[33] Some jurisdictions also use unsecured bond, which a rigorous study found to be *at least as effective* at ensuring court appearance as secured money bail.[34] These alternatives are cheaper, more effective, and far less intrusive than pretrial

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[33]It is also the case that our society has seen enormous changes that dramatically alter the landscape in which money bail used to be an incentive for people not to flee. *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) ("Today Fugitives do not go very far or maintain their status as such very long, so no money guarantee is required to insure their appearance when ordered."). This is even truer 50 years later. The vast majority of criminal defendants are impoverished people who do not have the resources to take flight, and the vast majority of people who miss a court date voluntarily return to court or are re-arrested promptly. *See* CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 16 (2016), *available at* http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf; Lisa Schreibersdorf & Andrea Nieves, *The State of Criminal Justice 2016: Pretrial Detention and Bail*, *in* NEW YORK STATE BAR ASSOCIATION, BAIL REFORM COURSEBOOK (2016), https://www.nysba.org/BailReformCourseBook/ (describing lack of failure-to-appear problem in New York City);

[34]*See* Michael Jones, PRETRIAL JUSTICE INSTITUTE, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (2013), available at http://www.pretrial.org/download/research/Unsecured%20Bonds,%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf (discussing results of large study in Colorado finding that unsecured bonds were just as effective as secured bonds in assuring public safety and appearance in court).

detention.[35]Before a court issues an order of detention, it must conduct a hearing, consider these and any other available alternatives, take evidence on the question, and make findings concerning why none of these and other available alternatives are, alone or in combination, sufficient.

The trial courts of Tennessee are also free, as a matter of federal constitutional law, to detain especially dangerous criminal defendants prior to trial. But *Salerno* makes clear that they may not use money to determine freedom or detention without ensuring that no other alternative is sufficient and without making that detention decision in rigorous proceedings.

The order of detention in this case cannot survive the heightened judicial scrutiny to which orders of pretrial detention must be subjected. It is unconstitutional.

VI. CONCLUSION

"In our society," the Supreme Court has held, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 750. The trial court's decision-making process in this case — widespread in the lower courts of Tennessee — ignores Chief Justice Rehnquist's seminal articulation of the applicable constitutional law. For

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[35]Empirical studies show that there is no relationship between requiring money bail as a condition of release and defendants' rates of appearance in court. Arpit Gupta, Christopher Hansman, & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 4 J. LEGAL STUDS. 471 (2016); GERALD R. WHEELER & GERALD FRY, PROJECT ORANGE JUMPSUIT: THE MISDEMEANOR REPORT #1 (Jan. 22, 2016), *available at* *https://www.prisonlegalnews.org/media/publications/Project%20ORANGE%20JUMPSUIT%20Report%20on%20Effects%20of%20Pretrial%20Detention%20on%20Case%20Outcomes%20Gerald%20Wheeler%202014.pdf*. Abundant evidence shows that small interventions like a phone call reminder can dramatically decrease failures to appear without any infringement on liberty. Timothy R. Schnacke, *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders* 48 CT. REV. 86 (2011), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1396&context=ajacourtreview. And there is no connection between forwarding public safety and upfront monetary payments. E.g., PRETRIAL JUSTICE INSTITUTE, supra.

the foregoing reasons, *amici* respectfully urge this Court to reverse the de facto detention order of the trial court and to remand for proceedings consistent with the Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2017, a copy of the foregoing Brief of Amici Curiae was sent by U.S. Mail, postage prepaid, to the following counsel:

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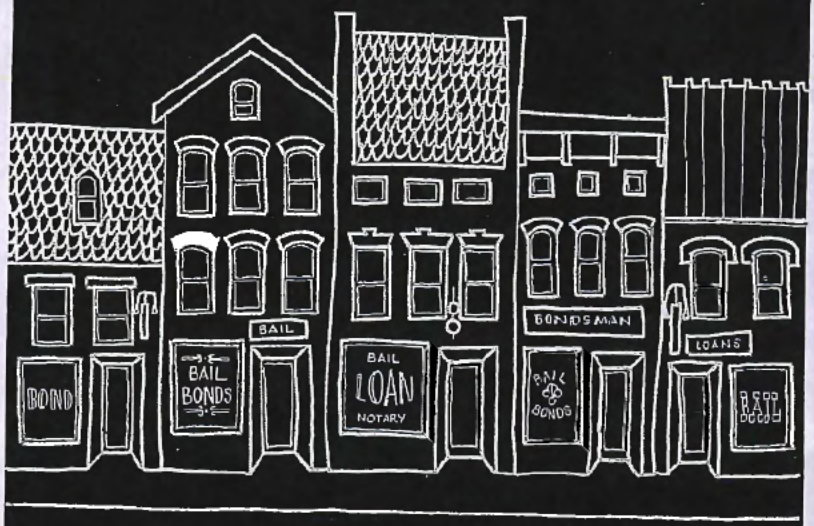
RANSOM

A CRITIQUE OF THE AMERICAN BAIL SYSTEM



BY RONALD GOLDFARB

Foreword by Justice Arthur J. Goldberg

RANSOM

A Critique of the American Bail System

by

Ronald Goldfarb

Foreword by Justice Arthur J. Goldberg

HARPER & ROW, PUBLISHERS, NEW YORK

Foreword

BY ARTHUR J. GOLDBERG
Associate Justice
Supreme Court of the United States

If it is true that "the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law," then the American bail system as it now operates can no longer be tolerated. At best, it is a system of checkbook justice; at worst, a highly commercialized racket. These are strong words, but that they are accurate is confirmed by the overwhelming evidence detailed in Ronald Goldfarb's timely and valuable study. His book demonstrates the inadequacies and unfairness of the American bail system and also makes valuable suggestions for overdue and much needed reform.

A basic defect of the present bail system is that it operates to the prejudice of the poor. Yet it is the central aim of our entire judicial system that, "all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" The simple truth is that, despite this most basic concept that equal justice be afforded to the poor and to the rich alike, the bail system operates to discriminate on account of poverty. After arrest, the accused who is poor must often await the disposition of his case in jail because of his inability to raise bail,

while the accused who can afford bail is free to return to his family and job. Equally important, he is free during the critical period between arrest and trial to help his attorney with the investigation and preparation of his defense. In a recent case a defendant was imprisoned well over two years between the time he was arrested and the time he was ultimately acquitted on appeal, solely because he could not raise the small amount of money necessary for bail. This is an example, too often repeated, of justice denied or a man imprisoned for no other reason than his poverty.

Recent studies in the area of bail which are reviewed in this book establish that if carefully screened defendants are released pending trial on their own recognizance and treated with dignity they will appear at trial. Mr. Goldfarb properly reminds us of the appalling and needless waste—to the government, the family, and the community—every time a responsible person presumed by law to be innocent is kept in jail awaiting trial solely because he is unable to raise bail money. It is becoming more and more apparent that careful screening and release without bail should be made the rule rather than the exception throughout the country. This does not mean that release without bail should be allowed in every case. It does mean that it is feasible in a great many cases.

It is said, in defense of the present American bail system, that the government cannot be expected to equalize all economic disparities. Of course it cannot, but this does not mean that it should not try to minimize inequities in this critical area of administration of criminal justice. The real question, as put by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice is: "Has government done all that can be reasonably required of it . . . to render the poverty of the litigant an irrelevancy?" Mr. Goldfarb's book demonstrates that government in this coun-

try, both state and federal, has not done all that can reasonably be required of it to render the poverty of the litigant an irrelevancy in the operation of the bail system.

Another valuable contribution of this book is its discussion of the programs underway to eliminate these inequities. The Manhattan Bail Project, under the auspices of the Vera Foundation, has served to awaken the country to the archaic and unjust nature of the bail system. The first National Bail Conference in May, 1964, cosponsored by the United States Department of Justice and the Vera Foundation, was a milestone in stimulating interest and study, the first steps in reform. The Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice deservedly promises to have a constructive influence in this and related areas. The proposals by Senator Ervin for federal legislation, and the program under consideration or adopted in the various states, represent welcome recognition that we need not and cannot continue under the present system.

Mr. Goldfarb's book contributes to this re-evaluation of the bail system by offering important suggestions for fundamental reform. I am sure that the author would agree with me that it is not important whether his specific suggestions be followed; what is important is that the abuses of the present bail system be corrected, here and now.

In reading this scholarly book, with its appeal to our conscience on behalf of those charged with crime, we are again reminded of the words uttered by Sir Winston Churchill more than a half-century ago, speaking in the House of Commons as Home Secretary:

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country. A calm, dispassionate recognition of the rights of the

accused, and even of the convicted criminal, against the State—a constant heart-searching by all charged with the duty of punishment—a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment: tireless efforts towards the discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the stored up strength of a nation, and are sign and proof of the living virtue within it.

Megan Barry
Mayor

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

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4/20/2017

DAVIDSON COUNTY BOND INFORMATION FOR MISDEMEANORS CASES FILED IN 2016

AVERAGE BOND SET AMOUNT

NUMBER OF DEFENDANTS	AVERAGE BOND AMOUNT SET
20,883	$5,244.28

AVERAGE BOND POSTED AMOUNT

NUMBER OF DEFENDANTS THAT POSTED BOND	PERCENT OF TOTAL DEFENDANTS THAT POSTED BOND	AVERAGE BOND AMOUNT POSTED
8,565	41.0%	$4,688.61

AVERAGE BOND POSTED AMOUNTS BY BOND TYPE

NUMBER OF DEFENDANTS POSTED BOND BY BOND TYPE	PERCENT OF DEFENDANTS POSTED BOND BY BOND TYPE	AVERAGE BOND AMOUNT POSTED	BOND TYPE
172	2.0%	$2,989.24	Cash/Credit Bond
1,753	20.5%	$3,800.77	Pre-Trial Bond
83	1.0%	$4,530.12	ROR Bond
6,557	76.6%	$4,972.56	Surety Bond
8,565	**100.0%**	**$4,688.61**	**TOTAL ALL BOND TYPES**

AVERAGE BOND AMOUNT AND AVERAGE LENGTH OF STAY IN JAIL FOR DEFENDANTS THAT DID NOT POST BOND

NUMBER OF DEFENDANTS DID NOT POST BOND	PERCENT OF DEFENDANTS DID NOT POST BOND	AVERAGE BOND AMOUNT SET	AVERAGE NUMBER OF DAYS IN JAIL
12,318	59.0%	$5,639.16	5.7

Notes:

1) Data includes all defendants and warrants filed in General Sessions Court between 1/1/2016 and 12/31/2016 with a misdemeanor arrested charge.

2) Bond Information was determined using Bond Set and Bond Post events and bond payment tables in CJIS.

3) Bonds Set: In Davidson County, after a defendant is arrested a night court commissioner sets a bail bond amount. Once the bond is set, the accused can pay the cash amount, obtain a property bond, get pretrial release, get released on their own recognizance, or hire a professional bail bondsman (surety bond). The bond amount set is the amount that is forfeited if the defendant fails to appear in court or to comply with the conditions of the bond.
Bond data in this report is at the defendant level. Bond set amounts are the sum of all bonds set for all charges filed for each defendant on each case filing date.

4) Bonds Posted: The CJIS database contains data on the bond amount posted and the method of payment (cash, pretrial, ROR, surety, property). It does not contain data on the actual monetary amount paid out-of-pocket by the defendant or defendant's family. For example, ROR bonds require no money paid, pretrial release requires only fees, and surety bonds require fees and a percentage of the bond paid to the bond company. In all of these examples the bond posted amount reflects the amount that would be forfeited if the defendant fails to show up for court, and not the actual amount paid by the defendant.
Bond data in this report is at the defendant level. Bond posted amounts are the sum of all bonds posted for all charges for each defendant on each bond posting date.

5) Average time in jail was calculated using days from case filing date to the Jail Release event date.

6) Averages are statistical means and can be skewed by extreme values.

Source: Data was pulled from CJIS on 4/19/2017.

EXHIBIT
B
tabbies