Judge Bill Anderson, Jr.
Judge Tim J. Dwyer
Judge Gerald Skahan
Judge William C. Turner
Judge Karen Massey
Judge Ronald S. Lucchesi
Judge Louis J. Montesi, Jr.
Judge Patrick Dandridge
Judge L. Lambert Ryan
Shelby County General Sessions Criminal Court
201 Poplar Ave, Suite LL-81
Memphis, TN 38103

The Hon. Floyd Bonner, Jr.
Shelby County Sheriff's Office
201 Poplar Ave, 9th Floor
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The Hon. Amy Weirich
Shelby County District Attorney's Office
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The Hon. Phyllis Aluko
Shelby County Public Defender's Office
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Ms. Llana L. Greer
Shelby County Pretrial Services Office
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The Hon. Willie F. Brooks
Chairman, Shelby County Board of Commissioners
160 N. Main Street, Suite 600
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The Hon. Lee Harris
Shelby County Mayor
160 N. Main St
Memphis, TN 38103

The Hon. Lee Wilson
Chief Judicial Commissioner
201 Poplar Ave, Suite LL-81
Memphis, TN 38103

Sent via electronic mail to DA Weirich and the Shelby County Attorney's Office

March 14, 2022

Re: ACLU, ACLU-TN, Just City, and the Wharton Firm's Response to County Redlines of Pretrial Proposals:

As you may be aware, in December of last year, our organizations issued a letter outlining legal deficiencies with Shelby County's practices for determining pretrial release and detention. In anticipation of further conversation amongst all relevant parties, we have in the intervening months communicated with DA Weirich and the Shelby County Attorney's office with proposed solutions to avoid litigation.

To that end, on February 8, we shared draft versions of: (1) a "Standing Bail Order," the likes of which the General Sessions bench could enact to create legally-sufficient and equitable processes by which judicial officers can evaluate one's suitability for recognizance release, impose bail and/or other release conditions, or—in appropriate circumstances—to effectuate a detention order;[1] (2) a resolution for the County Board of

[1] This proposal specifically contemplates that orders that effectuate detention, which are permissible under due process so long as they are rigorously justified and accompanied by

Commissioners to consider, expressing goals for the pretrial process and exercising the Board's supervisory authority of the judicial commissioners program to ensure Shelby County's post-arrest practices are equitable, transparent, and comply with the law; (3) a document outlining proposed accompanying pretrial reforms to ensure the Pretrial Services Agency has sufficient resources and supports and that all persons eligible for release have the means to be successful; and (4) a handful of other supportive materials, including a letter of support from the Vera Institute and samples of reforms adopted by other jurisdictions. On March 3, the County Attorney shared redlined versions of the first two documents (Standing Bail Order and Resolution), to which we now respond. We have not heard from DA Weirich and assume, because the County Attorney does not represent the DA's office, that her office's position has not yet been expressed.

After reviewing the comments and redlines we received, our team has serious concerns that further conversation will not be productive. We were hopeful, given various public comments made by local officials that they are ready for a discussion about bail reform, that Shelby County officials were prepared to work together to build a constitutionally sufficient and successful pretrial justice system. Unfortunately, the responses we have received to date do not embody a willingness to meaningfully change current practices or to set goals to ensure the system is successful.

In the hope that we may yet come to ground about the kinds of reforms our team will need to see in order to hold off from filing litigation, we offer the following high-level principles and responses. We trust that this response will be shared by all addressees of this letter.

While we remain willing to negotiate with respect to the specific details of our original proposals, the principles emphasized below are non-negotiable for us. If we cannot reach agreement on these key principles, we do not see any utility in continuing to prepare for meetings in late April.

We suggest finding time to meet via Zoom conference on April 6th, 8th, or the week of April 11, with counsel for all parties, representatives from the General Sessions Court, Public Defender's Office, and DA's office, and facilitation from the Justice Management Institute. The purpose of this meeting would be to determine whether there is agreement on these core principles such that further discussions and negotiations should proceed. We request that the County cover the cost of JMI's time for such a meeting, which we anticipate requiring approximately three (3) hours.

A. The United States Constitution, and Not Simply Tennessee Statute, Governs the Decision to Incarcerate Someone Prior to Trial

A number of the County Attorney's comments take issue with our proposal because in their view it goes beyond the scheme outlined in the Tennessee Code. However, our proposals are based not solely on Tennessee law, but also on the United States

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sufficient procedural protections, would be achieved by setting an *unaffordable* bail, in order to be consistent with both federal law principles and the scope of the Tennessee right to bail.

Constitution, which requires that all persons be afforded due process and equal protection under the law. Our letter from December 1st of last year and our materials point to a number of authorities for the constitutional principles that apply to the pretrial release or detention decision. *See, inter alia, Weatherspoon v. Oldham*, 2018 WL 1053548, at *7 (W.D. Tenn. Feb. 2, 2018) (concluding Shelby County trial court erred by "focus[ing] solely on the statutory bail-amount factors at Tenn. Code. Ann. §40-11-118."). Local officials are required to uphold both state and federal law in the execution of their duties and are liable for violations of federal law.

B. A Money Bail Amount that an Individual Cannot Afford is the Equivalent of a Detention Order

Some of the comments we received suggest a misunderstanding of a critical and central concept: imposing a secured bail requirement that an individual cannot afford to pay is the functional equivalent of detaining them pretrial. *See Hill v. Hall*, 2019 WL 4928915, at *19 (M.D. Tenn. Oct. 7, 2019) ("[T]he setting of bail . . . that the defendant would be unable to post . . . clearly amounted to a de facto detention order…"); *Weatherspoon v. Oldham,* 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018) (expressing the "general proposition" that "requiring money bail as a condition of release at an amount impossible for the defendant to pay is equivalent to a detention order, which is only appropriate when the state shows and the court finds that no condition or combination of conditions of release could satisfy the purposes of bail, to assure the defendant's appearance at trial or hearing and the safety of the public."); *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."); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) (unattainable money bail is simply a "less honest method of unlawfully denying bail altogether"); *Brangan*, 80 N.E.3d at 963 (Unattainable money bail "is the functional equivalent of an order for pretrial detention."); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (safeguards required for *de facto* detention order same as transparent detention order); *Schultz v. State*, 330 F. Supp. 3d 1344, 1358 (N.D. Ala. 2018) ("unattainable bond amounts . . . serve as *de facto* detention orders for the indigent).

While, as discussed further below, pretrial detention can be justified in certain cases consistent with due process, to do so requires adequate procedural protections, an exploration of less-restrictive alternatives, and findings that detention is necessary. The U.S. Supreme Court has made clear that pretrial detention should be the "carefully limited exception" to the "norm" of release. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

This straightforward principle is the basis for our proposals requiring a determination of each individual's ability to pay a sum of bail. This is also why we delineated between orders of affordable and unaffordable bail: one functions to release the individual, the other to detain. Contrary to the County's indication, we do not suggest that judicial officers evaluating appropriate conditions of release (including bail) ignore other factors in calibrating appropriate release orders. Rather, we suggest the County acknowledge the reality that an order that functions to release and an order that functions to detain are

meaningfully different and require different justifications and protections in order to be constitutionally sound.

C. It is Unconstitutional to Detain Someone Simply Because They Cannot Afford a Sum of Money

This is not controversial and is outlined in a number of the materials we have produced to date. Because it is unconstitutional to detain someone due only to their inability to pay, and because—as discussed below—orders that serve to detain require sufficient justification to be legal, it is essential that judicial officers actually *know* whether or not they are detaining someone. The most common way to achieve this safeguard is through an ability to pay determination, which we have suggested and which should not be especially burdensome in Shelby County, given Pretrial Services officers already interview nearly all arrestees coming into the jail. A number of jurisdictions have incorporated models to assess a person's real ability to pay a sum of money, and we have recommended that Shelby County work with the Vera Institute to implement a version of their Ability to Pay Calculator, which Vera is willing to offer and assist with at no cost.

D. Due Process Requires that Pretrial Liberty be Determined at a Real Hearing with a Robust Evidentiary Standard

Consistent with the Fourteenth Amendment, Shelby County may not continue to detain people on money bail amounts they cannot afford without a true hearing. It is a core tenant of due process that the government cannot deprive someone of their bodily liberty without adequate justification.[2] Procedural safeguards are required to protect against systemic deprivations of this right.

[2] The Supreme Court has long recognized that "[f]reedom from bodily restraint has *always* been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (emphasis added) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)); *accord Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Consistent with these foundational cases, the Court reaffirmed the importance of what it identified as the "fundamental" interest in pretrial liberty in *Salerno*, holding that, as a "general rule," "substantive due process" prohibits "detain[ing] a person prior to a judgment of guilt in a criminal trial." 481 U.S. at 749–50; *see also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780– 81 (9th Cir. 2014) (en banc) (collecting cases finding that *Salerno* "involved a fundamental liberty interest and applied heightened scrutiny"); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 310 (E.D. La. 2018) (Arrestees have "fundamental right to pretrial liberty."); *State v. Wein*, 417 P.3d 787, 791 (Ariz. 2018) (Pretrial liberty is "fundamental right" that may only be infringed "in appropriate and exceptional circumstances," where the "government's interest" "outweigh[s] an individual's strong interest in liberty.") (citation and quotation marks omitted); *Brangan v. Commonwealth*, 80 N.E.3d 949, 961 (Mass. 2017) ("The Fourteenth Amendment . . . establish[es] a fundamental right to liberty and freedom from physical restraint that cannot be curtailed without due process of law.").

Most courts to examine the question have held that the judicial decision to release or detain[3] (which a bail decision entails, because those who cannot afford the bail amount set will be detained) must be accompanied by the following procedural protections:

- A robust bail hearing held within a reasonable period of time of arrest, which is presumptively within 48 hours[4];
- Notice of one's bail hearing, including the stakes of the hearing and what will be considered;[5]
- An opportunity to be heard at a hearing, including to present evidence and cross-examine any government witnesses;[6]

[3] As noted below, our original proposal is to create two-hearing model. Under our model, we are open to discussing the possibility that defense counsel need not be present at initial hearings where a judicial commissioner either orders an individual's release or sets the case on for a further determination with respect to bail. This would reduce the administrative burden of the actual release/detention hearings, where it is essential that counsel be made available.

[4] *See Torres v. Collins*, No. 2:20-CV-00026-DCLC, 2020 WL 7706883, at *12 (E.D. Tenn. Nov. 30, 2020); *Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 460 P.3d 976, 987 (Nev. 2020); *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1360 (N.D. Ala. 2018); *Walker v. Calhoun*, 901 F.3d 1245, 1266–67 n. 11 (finding that ability to pay determinations as part of bail setting are "presumptively constitutional" if made within 48 hours of arrest.").

[5] "[N]otice is essential to afford the prisoner an opportunity to challenge the contemplated action and to understand the nature of what is happening to him." *Vitek v. Jones*, 445 U.S. 480, 496, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (citing *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)). Notice must be tailored, "in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." *Mathews v. Eldridge*, 424 U.S. 319, 349, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)). *See also Torres* at *11; *Schultz v. Alabama*, 330 F. Supp. 3d 1344,1368 (N.D. Ala. 2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 312 (E.D. La. 2018).

[6] A criminal defendant's opportunity to be heard is a "fundamental requirement of due process[.]" *Mathews*, 424 U.S. at 333. *See also Torres* at *11; *Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 460 P.3d 976, 987 (Nev. 2020); *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1374 (N.D. Ala. 2018); *In re Kenneth Humphrey*, 482 P.3d 1008 (Cal. 2021); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 311 (E.D. La. 2018), *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), and *Cain v. City of New Orleans*, 281 F.Supp.3d 624, 652 (E.D. La. 2017)).

- An evidentiary standard[7] by which the government must justify detention[8] (including on an unaffordable bail), generally "clear and convincing evidence";[9]
- Counsel available for the arrested person;[10]
- An inquiry into, and factual findings that address, the arrestee's ability to pay;[11]

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[7] "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (internal quotation marks and citation omitted).

[8] A number of comments from the County Attorney seem to object to the state carrying this burden, but it is our understanding that the County Attorney does not represent the DA's office. We will await a position from the DA on this issue. Further, while it is our position that the correct burden is clear and convincing evidence, even the *Weatherspoon* case accepting a lower preponderance standard agreed that the burden to justify detention rests with the government.

[9] The County's comments question the legal support for this standard, which we have provided and emphasize here, but also notably do not express any objection to the standard in terms of its administrability. Elsewhere, the County seems to confuse the proposed standard as though it imposes an obligation that arrested persons produce evidence. This is not the case: any infringement of a fundamental right such as the right to pretrial liberty must be justified by the government. The originally-drafted proposed Standing Bail Order encompassed the appropriate placement of the burden by emphasizing that arrestees and their counsel carry no burden to produce evidence in the absence of a showing by the government. Notably, *Weatherspoon* failed to consider binding and consistent U.S. Supreme Court precedent holding that clear and convincing is the appropriate standard whenever the personal interest at stake is "particularly important" and "more substantial than mere loss of money." *Santosky v. Kramer*,455 U.S. 745, 756 (1982). Further, the only pretrial detention scheme to be evaluated by the U.S. Supreme Court was considered adequate in part because under federal practice "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Salerno*, 481 U.S. at 750. Decisions since *Weatherspoon* have rightly found that clear and convincing evidence is the required standard, *see, e.g. Schultz*, 330 F. Supp. 3d at 1372; *Caliste,* 329 F. Supp. 3d at 315.

[10] *Torres* at *13 ("Simply put, an arrestee has a right to representation at a bail hearing or at an initial appearance hearing that also constitutes a bail hearing."); *Booth v. Galveston*, 352 F. Supp. 3d 718, 738 (S. D. Tex. 2019) ("There can really be no question that an initial bail hearing should be considered a critical stage of trial" such that counsel must be provided.); *Caliste*, 329 F. Supp. 3d at 315 (E.D. La. 2018).

[11] *Torres* at *13; *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 2015 WL 9239821, at *6-*9 & n.10 (M.D. Tenn. 2015) (enjoining state policy requiring monetary payment for probationers to obtain release pending a revocation hearing "without an inquiry into the individual's ability to pay the bond and whether alternative methods of ensuring attendance at revocation hearings would be adequate"); *Jones v. The City of Clanton*, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) (holding that the "use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment"); *Williams v. Farrior*, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("[I]t is clear that a bail system which allows only monetary 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."); *Buffin v. City & Cty. of San Francisco*, 2018 WL 424362, at *7 (N.D.

- Meaningful consideration of alternative conditions of release;[12]
- Oral or written explanation of the bail decision, including the rationale for the decision and factual findings;[13] and
- An opportunity to appeal

While some of the specifics of a hearing system such as scheduling, recording, and which judicial officers preside can be negotiated, in our view Shelby County officials must be willing to adopt true bail hearings to bring the current system into compliance with federal law.[14]

E. Shelby County Officials Should Commit to Practices That Comply with Federal Law and Promote Fairness, Efficiency, and Success

We remain hopeful that local officials will see our invitation to engage as an opportunity, not simply to remedy the legal deficiencies in the existing system, but also to incorporate practices that will make the system work better for all and save the County millions in taxpayer dollars. Numerous jurisdictions have undertaken the kinds of reforms we hope Shelby County will embrace: decreasing detention and increasing the kinds of effective,

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Cal. Jan. 16, 2018); *In re Kenneth Humphrey*, 482 P.3d 1008 (Cal. 2021); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 313 (E.D. La. 2018).

[12] *See supra* note 11; *see also Weatherspoon* (Shelby County trial court violated due process by failing to consider non-monetary release options before imposing unaffordable bail, and by imposing unaffordable bail without determining that no other combination of conditions would be adequate).

[13] *Torres* at *13; *Goldberg*, 397 U.S. at 271, 90 S.Ct. 1011 (due process generally requires the decision maker to "state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law"); *Holley v. Seminole Cty. Sch. Dist.*, 755 F.2d 1492, 1499 (11th Cir. 1985) ("It serves as a bulwark to our procedural due process review, in that a decision without basis in fact would tend to indicate that the procedures, no matter how scrupulously followed, had been a mockery of their intended purpose—rational decisionmaking."); *Caliste*, 329 F.Supp.3d at 311, 2018 WL 3727768, at *9 (finding that *Salerno*, *Bearden*, and *Turner* demonstrate "the Supreme Court's emphasis on the due process requirements of an informed inquiry into the ability to pay and findings on the record regarding that ability prior to detention based on failure to pay").

[14] Our original proposal suggested a two-hearing model, as recommended by the Uniform Law Commission. Essentially, arrestees would appear first before a judicial commissioner, who would evaluate the individual for (1) recognizance release, and then (2) conditions of release. Those ordered released would be done with the process at this stage. However, at the initial hearing, the government would be empowered to bring a motion to set unaffordable bail (functionally to detain), if the government has a good faith basis to believe the individual poses an unmanageable risk of danger or flight if released. If granting such a motion, the judicial commissioner would then set an individual on for a further proceeding to evaluate whether unaffordable bail, i.e. detention, is necessary (we suggested having General Sessions Judges preside over this more fulsome hearing, but this can be the subject of further discussion). This model has the benefit of enabling the County to streamline hearing resources, i.e. because only a limited class of persons identified as particularly risky would require a full-blown bail hearing with evidence. We sense that this two-step model was not well understood by the County Attorneys.

practical supports available to facilitate successful pretrial release, increasing transparency and equity while saving on ballooning incarceration budgets. Our proposals did not come from a vacuum, but from years of experience working with and learning from empirical researchers, practitioners, and policymakers across the country who have embraced meaningful pretrial reform.

We suggest that you speak with judges and pretrial service practitioners from jurisdictions that have undergone reforms in order to better understand the feasibility of our proposals and the benefits they are likely to reap, including but not limited to lower incarceration costs, increased public confidence in the equity and fairness of the criminal justice system, along with improved or consistent court appearance and arrest rates. We have contact information for judges in Harris County, Texas who we believe could be helpful. Our colleagues at JMI likely have other contacts they could suggest.

Investing time and resources on fixing the system is far preferable to prolonged litigation. We hope you will agree.

Sincerely,

/s/ Alexander C. Wharton
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On behalf of all counsel listed below

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