

RESOLUTION OF THE SHELBY COUNTY BOARD OF COMMISSIONERS

WHEREAS, the Shelby County Board of Commissioners seeks to increase public safety, reduce County costs, and promote equitable treatment among arrested individuals regardless of financial status;

WHEREAS, the Shelby County Board of Commissioners seeks to collaborate with Shelby County Judges, Judicial Commissioners, and other Criminal Justice partners to effectuate the above-stated goals;

WHEREAS, pretrial detention should be based on whether the arrested individual is likely to fail to appear in court or poses a threat to public safety, not the ability to pay money as a condition of pretrial release;

WHEREAS, data from diverse jurisdictions around the country shows that interventions such as court reminders, transportation assistance, housing, treatment, and—where necessary—supervision and monitoring are highly effective at assuring future court appearance and public safety;

WHEREAS, the Tennessee constitution affirmatively grants an arrestee the right to pretrial release on bail pending adjudication of criminal charges, see *Burgins*, 464 S.W. 3d at 304; *Swain v. State*, 527 S.W.2d 119, 120 (Tenn. 1975; *Goins v. State*, 192 Tenn. 32, 237 S.W.2d 8 (1950); *Hicks v. State*, 179 Tenn. 601, 168 S.W.2d 781 (1943); *Butt v. State*, 131 Tenn. 415, 175 S.W. 529 (1914)), and “[a]lthough this right may be forfeited by a defendant’s conduct, every non-capital defendant that enters the Tennessee criminal justice system at least begins with a right to establish some conditions pursuant to which he can obtain his freedom until he is, if ever, convicted.” *Nashville Cmty. Bail Fund v. Gentry*, 496 F. Supp. 3d 1112, 1118 (M.D. Tenn. 2020);

WHEREAS, Tennessee law further requires that judicial officers setting conditions of pretrial release first consider whether to release a non-capital arrestee on their own recognizance or an unsecured bond, Tenn. Code Ann. § 40-11-115(b); *Graham v. Gen. Sessions Court*, 157 S.W.3d 790, 793 (Tenn. Ct. App. 2004), and proceed to imposing a secured money bail requirement “[o]nly if the court determines that ‘conditions on a release on recognizance’ have not been shown to reasonably ensure the defendant’s appearance[.]” *Nashville Cmty. Bail Fund*, 496 F. Supp. 3d at 1119; Tenn. Code Ann. § 40-11-117; *Graham*, 157 S.W.3d at 793;

WHEREAS, numerous courts across the country, including in Tennessee,¹ have determined that unaffordable bail may only be set upon a finding that detention is necessary and

¹ See *McNeil v. Cmty. Prob. Servs., LLC*, 2019 WL 633012, at *13 (M.D. Tenn. Feb. 14, 2019), *aff’d*, 945 F.3d 991 (6th Cir. 2019) (enjoining Giles County from detaining individuals on money bail for probation violations without adequate findings); *Torres v. Collins*, 2020 WL 7706883, at*8 (E.D. Tenn. Nov. 30, 2020) (bail system in Hamblen County enjoyed for violating due process rights); “detention infringes upon the fundamental right of an individual’s personal liberty.” *Id.* at *8; *Rodriguez v. Providence Community Corrections, Inc.*, 155 F. Supp. 3d 758

after considering less restrictive alternatives at an adversarial bail hearing, and that wealth-based detention otherwise violates the Fourteenth Amendment to the United States Constitution;

WHEREAS, based on these legal precedents, both state and federal law disfavor the use of money bail, favor the release of arrested individuals on the least restrictive conditions, and mandate that pretrial detention be the rare and carefully limited exception;

WHEREAS, the Shelby County Board of Commissioners is responsible for appointing judicial magistrates, annually reviewing the judicial magistrate program, creating an annual report regarding the “overall evaluation” of the judicial magistrate program, and for setting the salaries of magistrates, Tenn. Code Ann. § 40-1-111;

WHEREAS, this body has a legal and fiscal interest in ensuring that the judicial magistrates, who are appointed and annually reviewed by this body, comply with Tennessee and federal law in pretrial detention issues;

WHEREAS, the Shelby County Board of Commissioners is responsible for approving the County’s annual fiscal budget, including the annual costs allocated to the Shelby County Sheriff Office’s for the provision and maintenance of detention facilities for juveniles and adults held pretrial;

WHEREAS, this body has a fiscal interest in reducing the costs of unnecessary pretrial detention;

NOW, THEREFORE, BE IT RESOLVED that the following requirements are imposed on the Judicial Commissioners for Shelby County:

1. Judicial Magistrates may only impose a secured money bail requirement after finding on the record that in a given individual’s case, release on recognizance or an unsecured bond, with or without other conditions, will not reasonably assure their future court appearance, based on all factors articulated in Tenn. Code Ann. § 40-11-115(b);
2. Judicial Magistrates may only impose a secured money bail requirement after inquiring into an individual’s ability to pay the amount of money imposed as bail, considering all income, assets, expenses, debts, and dependents, and determining that the bail amount is affordable to the individual, meaning the individual could pay the amount within a period of 24 hours without borrowing money;
3. If a Judicial Magistrate intends to set an unaffordable bail amount, they may only do so upon a finding that pretrial detention is necessary to reasonably assure future court appearance and the safety of the community; that detention is the “least restrictive condition” available to reasonably assure the individual’s future court appearance and the safety of the community. Any such finding must be entered in a meaningful bail hearing, with appointed counsel, that is open to the public, and that occurs within

(M.D. Tenn. 2015) (enjoining Rutherford County’s practice of jailing individuals on unaffordable bail).

- twenty-four (24) hours of an individual's arrest. Clear and convincing evidence that detention is necessary cannot be found solely due to the nature of the pending charge or the individuals' risk score on the Public Safety Assessment;
4. In rendering bail decisions pursuant to this resolution, Judicial Magistrates must evaluate the individual circumstances of the case before them, any resources available through Pretrial Services and any other persons or agencies, and the presumption of innocence; and
 5. Judicial Magistrates must treat pretrial detention, including pursuant to an unaffordable bail requirement, as the "carefully limited exception" to the norm of pretrial release.

BE IT RESOLVED THAT Judicial Magistrates may work with the General Sessions Criminal Court to devise a system that meets these criteria;

BE IT RESOLVED THAT this body aims to increase the pretrial release rate and maintain high numbers of release in order to comply with best policy practices and Tennessee and federal law;

BE IT RESOLVED THAT this body will review the Judicial Commissioners' program for its compliance with this resolution in making its annual decision whether to renew the program; and

BE IT RESOLVED THAT in order to facilitate this body's review of the Judicial Magistrates program, the Judicial Magistrates, Clerk of Court, and/or the Shelby County Pretrial Services Division are to report to this body the following metrics every six months for the first two years after the entry of this Order and annually thereafter:

1. The total number of arrests for the period, disaggregated by (1) whether the highest charged offense is a misdemeanor or a felony and (2) the race of the arrestee;
2. The total number of persons released on their own recognizance for the period, disaggregated by (1) whether the highest charged offense is a misdemeanor or a felony and (2) the race of the arrestee;
 - a. For persons released on their own recognizance, a list of any further conditions imposed on their release;
3. The total number of persons released pursuant to an unsecured bond for the period, disaggregated by (1) whether the highest charged offense is a misdemeanor or a felony and (2) the race of the arrestee;
 - a. For persons released on an unsecured bond, a list of any further conditions imposed on their release;
4. The total number of persons released after a secured money bail was imposed, disaggregated by (1) whether the highest charged offense is a misdemeanor or a felony and (2) the race of the arrestee, as well as the mean and median total bail amounts for misdemeanor and felony cases;
5. The total number of persons detained pursuant to a secured money bail requirement they could not afford, disaggregated by (1) whether the highest charged offense is a misdemeanor or a felony and (2) the race of the arrestee;

- a. For persons detained, the mean and median length of their pretrial incarceration, disaggregated by (1) whether the highest charged offense is a misdemeanor or a felony, and (2) race;
6. Of persons released, the total number of persons who later failed to appear for a required court appearance, disaggregated by (1) the nature of their release, i.e. on recognizance, unsecured bond, or an affordable bond; (2) whether the highest charged offense was a misdemeanor or felony; (3) race of the arrestee;
7. Of persons released, the total number of persons who were later arrested during the pretrial period, disaggregated by (1) the nature of their release, i.e. on recognizance, unsecured bond, or an affordable bond; (2) whether the highest charged offense was a misdemeanor or felony; and (3) race of the arrestee.

PASSED this _____ date of _____, 2022.