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Overview of the Recommended Shelby County Pretrial Reforms

People in pretrial detention make up more than two-thirds of America’s jail population,¹ a number that is astonishing, but that can be drastically reduced if precipitated by higher release rates and a corresponding commitment to developing viable alternatives. This document outlines proposed ways to reform Shelby County’s pretrial practices that would decrease the number of people in jail custody, reduce harm, prevent re-arrests, and promote overall pretrial success. This document is a companion to the proposed General Sessions Standing Bail Order and County Resolution, which set out a framework for constitutional and adequate hearings and data collection/accountability for an improved program, respectively. The focus of this document is on improvements that the County, its Board of Commissioners, and its Pretrial Services Department can make to ensure an equitable and successful pretrial system.

Shelby County already offers some services for pretrial releasees: including drug court; classes (such as anger management, substance use, and parenting classes); and mental health services. However, the County consistently detains a high number of people pretrial, the vast majority of whom are incarcerated simply because they cannot afford bail or other conditions of release. As has already been recognized by organizations such as the MacArthur Foundation, Justice Management Institute, and the Vera Institute, more can and must be done to create and scale a truly effective pretrial system.

This Pretrial Reform document builds on the County’s current practices and identifies improvements along with potential funding sources that will support the proposed changes. We argue that: (1) Pretrial Services should replicate exemplary models and provide effective pretrial supports and services to more people; (2) Pretrial Services should reform its practices in key areas to comply with both the National Institute of Corrections’ (NIC) list of essential elements and the National Association for Pretrial Services Agencies’ (NAPSA) standards; (3) Pretrial Services should reform its conditional release and supervision practices; and (4) the County should draw funding from a wide array of sources in order to expand Pretrial Services programming and increase its staff size.

¹ Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2020,” Prison Policy Initiative (March. 2020), <https://www.prisonpolicy.org/reports/pie2020.html> (on any given day, 470,000 of the 746,000 people in local jails, approximately 63 percent, are unconvicted).

I. Implementing Recognized Best Practices

National research shows that pretrial services agencies that offer pretrial releases a robust range of supports, conditions, and programming are best positioned to enhance people’s chances of pretrial success. Shelby County should adopt methods used by model pretrial services agencies across the country. The County should also replicate best practices established by authoritative independent bodies like NAPSA and NIC.

(1) Pretrial Services Should Replicate Exemplary Models and Provide Effective Pretrial Supports and Services to Many More People in Shelby County

(a) Promote Release on Recognizance

To encourage pretrial release in larger numbers, which is consistent with best practices, Shelby County Pretrial Services should recommend that judicial commissioners and judges release people on recognizance when staff believe those persons are likely to appear for future court dates without requiring additional conditions. Several jurisdictions have already successfully implemented high-yielding release frameworks: For example, Kentucky recently expanded its use of pretrial cite and release to great success in 2020, citing and releasing 31,000 people rather than booking them into jail. Kentucky’s increased use of citation and release did not compromise public safety, as nearly 90 percent of those cited and released were not rearrested for any charge,² and more than 99 percent were not charged with a new violent crime.³ As a result of Kentucky’s expansive automatic release policy, the state’s jail population was reduced by almost 30 percent.⁴

Washington D.C.’s Pretrial Services Agency, similarly emphasizes recommending most people for release—resulting in approximately 92% of arrested persons being released.⁵ The D.C. Pretrial Services Agency provides non-financial supports and, where necessary, supervision to approximately half of the released population.⁶ Another state, New Jersey, has achieved an

² Kentucky Center for Economic Policy, “New Data Helps Pave the Way for Bail Reform in Kentucky,” <https://kypolicy.org/new-data-helps-pave-way-for-bail-reform-in-kentucky/>.

³ Christy May, KENTUCKY PRETRIAL POPULATION: One Day Snapshot Findings, [Frankfort: Kentucky Administrative Office of the Courts, 2019.

⁴ Vera Institute of Justice, “COVID-19 and Criminal Justice: City and State Spotlights: Kentucky,” <https://www.vera.org/covid-19/criminal-justice-city-and-state-spotlights/kentucky>; Supreme Court of Kentucky Order 2017-19, authorizing cite and release for most misdemeanors; Supreme Court of Kentucky Order 2020-25, expanding Order 2017-19 to release certain low-level felonies in response to COVID.

⁵ “FY 2020 Release Rates for Pretrial Defendants In Washington,” “Pretrial Services Agency for the District of Columbia,” <https://www.psa.gov/sites/default/files/Fact%20Sheet-Release%20Rates%20for%20DC%20Pretrial%20Defendants-FY2020.pdf> (explaining that 82% of arrested persons in D.C. Superior Court are released at first appearance and an additional 10% are released at subsequent hearings, bringing the total to approximately 92% released on pretrial status).

⁶ “Defendant Supervision,” Pretrial Services Agency for the District of Columbia, https://www.psa.gov/?q=programs/defendent_supervision (explaining that “Over 50 percent of defendants are released to PSA’s general supervision and community court programs”); *see also* “Court Support,”

effective pretrial release rate of 94% without a correlated increase in violent crime or pretrial flight.⁷ New Jersey Pretrial Services staff recommend release and provide support and supervision without passing a financial cost onto the arrested person.⁸

Empirical evidence supports making pretrial release the norm. Instances of pretrial flight or violence are very rare: even among those accused of felonies, fewer than 2 percent of those released pretrial are arrested for allegedly committing a violent felony,⁹ and fewer than 3 percent enter and remain in fugitive status.¹⁰ A 2009 NAPSA report found that nationally, rates of re-arrest are low for pretrial releasees: of the 23 pretrial services agencies that reported on recidivism, the median recidivism rates were 5 percent for new felonies, 12 percent for new misdemeanors, and 1 percent for new serious traffic offenses.¹¹

Shelby County should adopt practices that ensure speedy and widespread pretrial release and can do so while saving money and improving system outcomes. These practices can include: Pretrial Services representatives advocating for recognizance release in appropriate cases, the Shelby

Pretrial Services Agency for the District of Columbia, https://www.psa.gov/?q=programs/court_support (explaining that in Washington, DC’s Pretrial Services Agency often “recommends the least restrictive non-financial release conditions needed to protect the community and reasonably assure the defendant’s return to court.”); *see also* “Treatment and Related Services,” Pretrial Services Agency for the District of Columbia, https://www.psa.gov/?q=programs/treatment_services (explaining that D.C.’s Pretrial Services Agency also assesses individuals under pretrial release for substance use disorders and/or mental health needs, and connects people with employment, housing, and/or other social services through the Social Services and Assessment Center (SSAC)).

⁷ Pretrial Justice Reform: A Pathway for A Safer New York,” New Yorkers United for Justice (Mar. 12, 2020), <https://nyuj.org/resources/pretrial-justice-reform-a-pathway-for-a-safer-new-york/> (“As of February 2019, New Jersey had a 94 percent pretrial release rate since the enactment of bail reform and a 20 percent reduction in their jail population.”); *see also* Glenn A. Grant, “Criminal Justice Reform Report,” New Jersey Courts, 5-8 (Jan. 1 2019 – Dec. 31 2019) <https://www.njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf> (explaining that the rate of alleged new criminal activity for persons released pretrial has remained consistently low and that persons released pretrial continued to appear for court at high rates).

⁸ Pretrial Justice Reform: A Pathway for A Safer New York,” New Yorkers United for Justice (Mar. 12, 2020), <https://nyuj.org/resources/pretrial-justice-reform-a-pathway-for-a-safer-new-york/> (“New Jersey Courts released their annual report on bail reform outcomes to the governor and New Jersey legislature. The report found that *the percentage of pre-release defendants charged with a new indictable crime remained “consistently” low in 2017 at only 13.7 percent.* Furthermore, appearance rates in New Jersey post-bail reform remained high with *an appearance rate of 89.4 percent.* While both data points did experience a slight drop between 2014 and 2017, the authors of the report state, “*concerns about a possible spike in crime and failures to appear did not materialize.*”).

⁹ Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 Tex. L. Rev. 497, 527 (2012) (analyzing over two decades’ worth of data from the 75 largest counties in the United States, and noting that of felony arrestees released “16% are rearrested for any reason, 11% are rearrested for a felony, and only 1.9% are rearrested for a violent felony).

¹⁰ Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 689 (2018) (defining “fugitive” as failing to appear in court and not appearing within one year).

¹¹ “Pretrial Diversion in the 21st Century: A National Survey of Pretrial Diversion Programs and Practices,” NAPSA 19 (2009), http://www.pacenterofexcellence.pitt.edu/documents/Pretrial_Diversion_in_the_21st_Century.pdf.

County Sheriff exercising his citation authority¹² to release persons accused of misdemeanors as well as advocate for the release of other persons who do not need to be incarcerated¹³, and the Shelby County District Attorney identifying a list of charges and/or PSA scores for which they will not seek conditions beyond recognizance release.

(b) Provide Community Services and Supports

In addition to recommending more individuals for recognizance release, the County should provide a range of effective supports, which judicial officials should consider before imposing more invasive pretrial conditions or costly supervision, let alone detention on unaffordable bail. Offering supports, rather than imposing onerous conditions, supervision or detention, can simultaneously maximize public safety, ensure court appearance, and facilitate pretrial release. For instance, offering supports such as court date reminders,¹⁴ court transportation services,¹⁵ and court videoconferencing options¹⁶ are less costly than pretrial incarceration or supervision, and demonstrably curb failure to appear rates. In one report, the NIC found that providing people with notification of upcoming court appearances (including phone calls, recorded phone messages, mail notification, text messaging, and e-mails) was highly effective at reducing people's risk of failure

¹² See Tenn. Code Ann. § 40-7-120.

¹³ See Tenn. Code Ann. § 8-8-221.

¹⁴ See Ross Hatton, "Research on the Effectiveness of Pretrial Court Date Reminder Systems," UNC School of Government Criminal Justice Innovation Lab (Mar. 2020), <https://cjl.sog.unc.edu/wp-content/uploads/sites/19452/2020/03/Court-Date-Notifications-Briefing-Paper.pdf> (providing an analysis of available data on pretrial court date reminder systems finding that most state's programs resulted in statistically significant improvements for failure to appear rates).

¹⁵ Brice Cook et al., "Using Behavioral Science to Improve Criminal Justice Outcomes," UChicago Urban Labs: Crime Lab (Jan. 2018), <https://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf> (explaining that simple supportive interventions like text message reminders for court dates and transportation assistance were effective compared to punitive and surveillance tools. "Using a randomized controlled trial, we found that the most effective reminder messaging reduced FTA by 26% relative to receiving no messages."); see also Adam Uren, "Low-income Suspects to Get Free Rides to Court under Minneapolis Pilot," Bring Me The News (Jan. 4, 2019), <https://bringmethenews.com/minnesota-news/low-income-suspects-to-get-free-rides-to-court-under-minneapolis-pilot>; see also Mukhtar M. Ibrahim, "Minneapolis will Offer Free Rides to Court for those Charged with Low-level Offenses," StarTribune (Jan. 16, 2019), <https://www.startribune.com/minneapolis-will-offer-free-rides-to-court-for-those-charged-with-low-level-offenses/504458952/>; but see Rebecca Brough et. al, "Can Transportation Subsidies Reduce Failure to Appear in Criminal Court" (Apr. 2021) https://leo.nd.edu/assets/429962/can_transportation_subsidies_reduce_failure_to_appear_in_criminal_court_brough_phillips.pdf (finding that "while transportation subsidies might be more effective in reducing FTAs if combined with other supportive services or outreach, transportation subsidies alone have limited benefits for this aspect of criminal justice").

¹⁶ Alicia Bannon and Janna Adelstein, "The Impact of Video Proceedings on Fairness and Access to Justice in Court," Brennan Center (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>.

to appear.¹⁷ Real-world evidence from other jurisdictions confirms that this is a best practice: for example, Bail Project clients who are functionally released on recognizance with court reminders consistently return for their court dates, appearing for over 90% of their criminal legal proceedings.¹⁸ Locally, Just City can show similar positive appearance rates for its bail fund recipients.

In the past, Shelby County provided automatic court reminders via text message.¹⁹ But, the County terminated its court reminder program after six months. Just City continues to send automated text messages and has noted a statistically significant increase in appearance rates. Pretrial Services should prioritize rebuilding a court reminder program that incorporates text messages and e-mails. In addition to the bus passes it currently provides, the County should collaborate with ridesharing services to get people to and from court. Places like Minneapolis have developed model court transportation programs that can and should be replicated.²⁰

Ultimately, the County should embrace a model of community release with support, which promotes release on recognizance for most individuals and implements a referral-based supports structure. As a basic principle, people released on recognizance should be referred to community services that are offered rather than required. Moreover, a person's participation in services or programs should be independent from their underlying criminal case.²¹ Other context-specific community supports should include: incentives for employment or for seeking employment,²²

¹⁷ Lisa Pilnik et. al, "A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency," National Institute of Corrections, 47 (Feb. 2017)

<https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf> (citations omitted).

¹⁸ "After Cash Bail," The Bail Project, n.15, <https://bailproject.org/after-cash-bail/-easy-footnote-bottom-4-39386> ("Similar results are bearing out across the country. In 2018, the Philadelphia District Attorney announced his office would no longer request cash bail for numerous offenses. The number of people released without monetary conditions increased with no discernible change in failure to appear (or rearrest) rates. Aurelie Ouss & Megan Stevenson, 'Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail,' George Mason Legal Studies Research Paper No. LS 19-08, February 25, 2019, p. 3, ('These results demonstrate that monetary bail can be replaced by release on recognizance for a sizeable number of defendants with no detectable impacts on nonappearance or pretrial crime.')).

¹⁹ "How It Works," Uptrust (May 21, 2021) <https://uptrust.co/how-it-works/> (explaining its court reminder program that was developed to help people return to court without surveillance or incarceration); Jonathan Scheiber, "Uptrust Raises New Money to Fight Mass Incarceration with Technology," TechCrunch (Mar. 9, 2020), <https://techcrunch.com/2020/03/09/uptrust-raises-new-money-to-fight-mass-incarceration-with-technology/?guccounter=1> ("So far, the company has reduced by more than 50% failure to appear penalties in the 50 state and county governments where it works. That's up to \$5 billion in potential savings for cash-strapped municipalities and state governments.").

²⁰ Adam Uren, "Low-income Suspects to Get Free Rides to Court under Minneapolis Pilot," Bring Me The News (Jan. 4, 2019), <https://bringmethenews.com/minnesota-news/low-income-suspects-to-get-free-rides-to-court-under-minneapolis-pilot>; see also Mukhtar M. Ibrahim, "Minneapolis will Offer Free Rides to Court for Those Charged with Low-level Offenses," Star Tribune (Jan. 16, 2019), <https://www.startribune.com/minneapolis-will-offer-free-rides-to-court-for-those-charged-with-low-level-offenses/504458952/>.

²¹ "After Cash Bail," The Bail Project, <https://bailproject.org/after-cash-bail/-easy-footnote-bottom-4-39386> (identifying desirable and effective community supports).

²² "Multilevel Analysis of the Relationship Between Labor Surplus and Pretrial Incarceration," Office of Justice Programs, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/multilevel-analysis-relationship>

incentives for individuals continuing or beginning an educational program;²³ or requiring individuals to remain in the custody of a responsible member of the community.²⁴ Indeed, a version of the community support model already exists in Shelby County. The Shelby County Veteran's Court provides educational training and services; skills testing and educational assessment; job training and job-readiness training; and job placement services.²⁵

In addition to providing the supports outlined above, Shelby County should make efforts to combat pretrial homelessness by providing more funding for safe and accessible housing. Recently, a court acknowledged the link between homelessness and failure to report in the post-conviction context,²⁶ and research shows that spending time in jail is linked to later homelessness.²⁷ A snapshot of the County in January 2021 shows that unsheltered homelessness doubled between 2020 and 2021.²⁸

between-labor-surplus-and-pretrial (study finding increased pretrial incarceration at times of increased unemployment. Unemployed defendants were found to be 2.5 times more likely to face pretrial incarceration than were their employed counterparts); *see also* "Unemployment and Crime," Office of Justice Programs, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/unemployment-and-crime-1> (explaining that "[s]ome evidence of a relationship between unemployment and crime persists, however, although it appears that crime and unemployment are interrelated in some complex way with other aspects of economic disadvantage or social deprivation.").

²³ "Veterans: About Us," Shelby County Veterans Court, <https://veteranscourt.shelbycountyttn.gov/content/veterans-about-us> (explaining the Veterans Court's wide range of employment, educational, and other community supports for veteran releasees).

²⁴ "Alaska's New Pretrial Release System," 1, https://doc.alaska.gov/pnp/pdf/pretrial_fact_sheet.pdf; *see also* Elizabeth Johnson, "Sentenced by Tradition: The Third-Party Custodian Condition of Pretrial Release in Alaska," 26 Ala. L. Rev. 317 (Dec. 2009) <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1047&context=alr>.

²⁵ "Veterans: About Us," Shelby County Veterans Court, <https://veteranscourt.shelbycountyttn.gov/content/veterans-about-us> (explaining the Veterans Court's wide range of job training, skills, and placement supports for veteran releasees); *see also* "About Us," Shelby County Veterans Court, <https://veteranscourt.shelbycountyttn.gov/about-us>.

²⁶ *White v. State of Mississippi*, 311 So. 3d 1278 (Miss. Ct. App. 2021) (The Mississippi Court of Appeals reversed a circuit court decision that revoked Mr. White for absconding. The appellate court found that Mr. White—who was on post release supervision—could not report because he was experiencing homelessness and lacked transportation. Among other reasons, the Court struck down the revocation under *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). The Court of Appeals analogized failure to report when it is impossible to do so to failure to pay. The Court also ruled that the revocation violated due process because imprisoning Mr. White was arbitrary under the circumstances).

²⁷ Stephen Metraux, et. al, "Incarceration and Homelessness," National Symposium on Homelessness Research, 9-6 (Mar. 1-2 2007), <https://www.huduser.gov/publications/pdf/p9.pdf> ("The few studies on homelessness among jailed populations suggest that the rates of homelessness for those exiting jails are lower and more loosely coupled with the jail release than they are for those exiting prison. However, because the jail population is much larger than the prison population, the number of persons exiting jails who become homeless is much larger. Metraux and Culhane (2003) found that, among 76,111 persons released from New York City jails in 1997, 5.5 percent entered New York City shelters for single adults in the subsequent two-year period.").

²⁸ "Point-In-Time Count Memphis," CAFTH, <https://www.cafth.org/point-in-time-count/> (The Point-in-Time (PIT) Count is an annual count of sheltered and unsheltered homelessness on a single night in January. It is held toward the end of the month during the hours when unsheltered individuals are most likely to be identified. Required nationally by Housing and Urban Development, the PIT Count provides a snapshot of homelessness in Memphis and Shelby County at a given point in time, and it is one of several

And national research shows that the number of people exiting jails who become homeless is large when compared with the rates of homelessness among those leaving prison.²⁹ Despite the known rates of homelessness among pretrial individuals, few jails have pre-release programs that link people leaving jail to housing programs: Shelby County could be a leader of this sensible, productive model.³⁰

Housing is a basic need that, if met, can contribute to pretrial success. Supportive housing programs have proven effective at (1) significantly reducing re-arrest and reincarceration rates; and (2) significantly increasing the time between release and criminal justice contact.³¹ Research has also shown that providing affordable housing contributes to the public good by increasing job creation and economic power.³² Therefore, the County should set aside existing housing program funds to support people on pretrial release.

By embracing the release-increasing reforms outlined elsewhere in this document and its companion documents, the County should realize considerable savings on the cost of incarceration—currently one of its top budget items—and be in a position to re-invest funds in housing programs. The County ought to use the funds to develop initiatives with community housing service providers.³³ For example, the Shelby County Veteran’s Court provides a transitional housing model.³⁴ The County could extend this successful practice by providing Pretrial Services and other agencies the resources to create a similar housing program for all pretrial releasees in need.

critical elements used for measuring progress in our efforts to end homelessness.); “2021 Point-In-Time Summary,” Community Alliance for the Homeless, <https://www.cafh.org/wp-content/uploads/2021/08/2021-PIT-Summary-1.pdf>.

²⁹ *Supra* Stephen Metraux, et. al, “Incarceration and Homelessness.”

³⁰ *Supra* Stephen Metraux, et. al, “Incarceration and Homelessness.”

³¹ Jocelyn Fontaine, “Examining Housing as a Pathway to Successful Reentry: A Demonstration Design Process,” What Works Collaborative, 3 (Nov. 2013), <https://www.urban.org/sites/default/files/publication/24206/412957-Examining-Housing-as-a-Pathway-to-Successful-Reentry-A-Demonstration-Design-Process.PDF> (“Indeed, recent research by Fontaine and colleagues (2012a) showed that the provision of supportive housing for those released from Ohio state prisons with behavioral health issues and residential instability is a practice associated with very promising one-year outcomes...”).

³² “Impact of Affordable Housing on Families and Communities,” Enterprise Community Partners, 2 (2014), <https://homeforallsmc.org/wp-content/uploads/2017/05/Impact-of-Affordable-Housing-on-Families-and-Communities.pdf> (“Affordable housing contributes to significant economic impacts, including increases in local purchasing power, job creation and new tax revenues. Affordable housing has been shown to have a neutral or positive effect on surrounding property values”).

³³ Particularly since the pandemic, other counties have bought hotels at below-market rates in order to provide housing for those in need. *See, e.g.*, <https://www.seattletimes.com/seattle-news/homeless/king-county-has-quickly-bought-seven-hotels-for-homeless-but-will-it-be-enough/#:~:text=The%20Seattle%20Times%20maintains%20editorial,close%20to%20%24100%20million%20more>.

³⁴ “Veterans: About Us,” Shelby County Veterans Court, <https://veteranscourt.shelbycountyttn.gov/content/veterans-about-us>.

(c) Develop an Investigative Model

Pretrial Services, the Shelby County Sheriff's Office, and local judges should adopt an investigative model for persons who fail to appear (FTA). Most instances of nonappearance "result from common obstacles that include work schedules, childcare responsibilities, lack of access to adequate transportation, and difficulty navigating confusing court systems"³⁵ and are not the result of willful flight. In D.C., when a pretrial individual fails to appear, officials investigate the reason for the FTA. Relevant information "is documented and the court is informed of the findings," and in many instances, the court avoids issuing needless bench warrants because arrested persons are able to contact pretrial services in advance. The arrestees "provide information about a future court date for which they will be unable to appear."³⁶ Shelby County Pretrial Services should adopt a similar practice.

(2) Shelby County Should Reform its Pretrial Practices to Comply with Key Elements of the NIC's List of Essential Elements and with NAPSA Standards

According to the NIC, among the core elements of a high functioning pretrial services are: (1) operationalized mission; (2) universal screening; (3) sequential bail review; (4) risk or needs-based supervision; and (5) performance measurement and feedback.³⁷ Shelby County should incorporate and reform these basic elements by:

1. Reforming Pretrial Services

- a. Encouraging Pretrial Services to develop an operationalized mission statement that articulates goals of maximizing release rates, court appearance, and public safety;³⁸
- b. Encouraging Pretrial Services to supplement its intake interviews with a financial assessment, to facilitate release on recognizance, and to identify individuals who may benefit from supports like reminders or transportation assistance (but never to advocate for detention);³⁹

³⁵ "After Cash Bail," The Bail Project, <https://bailproject.org/after-cash-bail/ - easy-footnote-bottom-4-39386> (citing Lauryn P. Gouldin, "Defining Flight Risk," 85 *U. of Chi. L. Rev.* 677, 729–35 (2018); Daniel Bernal, "Note, Taking the Court to the People: Real-World Solutions for Nonappearance," 59 *Ariz L. Rev.* 547, 547-71 (2017), 547–71.).

³⁶ "Court Support," Pretrial Services Agency for the District of Columbia, https://www.psa.gov/?q=programs/court_support.

³⁷ *Supra* Pilnik et. al, "A Framework for Pretrial Justice" at 3.

³⁸ Pilnik et. al, "A Framework for Pretrial Justice" at 35.

³⁹ Pilnik et. al, "A Framework for Pretrial Justice" at 38-41 ("Research and best practice suggests that jurisdictions must make sure to create and validate tools (or re-validate existing tools) with a focus on avoiding potential racial bias and must use those tools as intended") (citing Skeem and Lowenkamp, "Risk and Needs Assessment and Race in the Criminal Justice System," Council of State Governments Justice Center (2016), <https://csgjusticecenter.org/2016/05/31/risk-and-needs-assessment-and-race-in-the-criminal-justice-system/>; see also "After Cash Bail," The Bail Project, <https://bailproject.org/after-cash-bail/ - easy-footnote-bottom-4-39386> (citing Wendy Sawyer, "How Race Impacts Who Is Detained Pretrial," Prison Policy Initiative (Oct. 2019), <https://bailproject.org/after-cash-bail/ - easy-footnote-bottom-3-39386>).

- c. Encouraging Pretrial Services to be proactive in conducting reviews of people who remain detained after their initial court hearings, and present the court with cases in which that ongoing detention appears to be in error.
2. Reforming Courts
 - a. Adopt the framework set forth in the Proposed Standing Bail Order to ensure speedy, adequate, equitable, and constitutionally-sound pretrial release determinations.
3. Reforming County Performance Measurements
 - a. Adopt the Proposed County Resolution to developing county-wide performance measurement and feedback for the pretrial justice system.

(3) Pretrial Services Should Reform its Conditional Release and Supervision Practices

Where a court determines that a person poses a risk of *willful flight* or poses an *imminent threat to the safety of identifiable person(s) in the community* and determines that conditions (including potentially supervision) will be sufficient to mitigate such risks, Pretrial Services should use its authority and discretion to:

1. Recommend what it views as the least restrictive conditions/supervision⁴⁰ needed for the individual;⁴¹
2. Explain the reason for the conditions of release/supervision to the individual (and any denials or alterations thereof) verbally and in plain language writing, in accordance with each person’s cognitive/intellectual needs. Explain clearly the requirements of the individual in order to comply with conditions.
3. Utilize County, state or grant funds to cover the costs of conditions like mandatory classes, drug testing and electronic location monitoring,⁴² especially for indigent individuals.

⁴⁰ “Court Support,” Pretrial Services Agency for the District of Columbia, https://www.psa.gov/?q=programs/court_support (explaining that in Washington, DC’s Pretrial Services Agency “recommends the least restrictive non-financial release conditions needed to protect the community and reasonably assure the defendant’s return to court.”).

⁴¹ See Pilnik et. al, “A Framework for Pretrial Justice” at 44-46 (noting that NAPSA and the American Bar Association (ABA) Standards define the purpose of pretrial supervision as “ensuring a defendant’s court appearance and minimizing the threat the defendant may pose to an individual or to the public.”).

⁴² See Kate Weisburd, et. al, “Electronic Prisons, The Operation of Ankle Monitoring in the Criminal Legal System,” George Washington University Law School 3 & 15 (2021), <https://issuu.com/gwlawpubs/docs/electronic-prisons-report?fr=sOGI5NDcxODg3> (see table breaking down user fees according to corresponding agency on page 15); see also Jack Karp, “Ankle Monitors Are Replacing Cash Bail, But At a Cost,” LAW360 (May 10, 2020), <https://www.law360.com/articles/1271391/ankle-monitors-are-replacing-cash-bail-but-at-a-cost> (describing high cost of EM. Many jurisdictions require people to pay for their electronic monitoring—between \$5 to \$35 per day.); see also “State-By-State Court Fees,” NPR (May 19, 2014) <https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees> (showing which states charge for electronic monitoring and other forms of supervision)

4. Commit to handling small infractions and technical violations⁴³ that occur during pretrial release administratively, rather than criminally. The General Sessions Criminal Court should grant Pretrial Services permission to so proceed unless a representative from Pretrial Services requests a formal court proceeding to adjudicate a potential penalty for violating conditions.⁴⁴ Research shows that the most effective “incentives and sanctions” policies include the following elements:
 - i. Certainty: the pretrial services agency informs individuals of the supervision program’s response scheme beforehand;⁴⁵
 - ii. Swiftiness: the pretrial services agency responses are prompt and timely to the defendant’s behavior;⁴⁶
 - iii. Proportionality: the pretrial services agency responses are appropriate to the defendant’s behavior);⁴⁷
 - iv. Fairness: individuals perceive the pretrial services agency’s response as fair and just compared to the individual’s behavior; and
 - v. Individualization: the pretrial services agency’s responses consider the individual’s risk of future noncompliance or pretrial failure.⁴⁸

(4) Shelby County Should Draw Funding from a Wide array of Sources in Order to Expand Pretrial Services Programming and Increase its Staff Size

Shelby County can fund necessary pretrial services reforms through federal, local, and private grants; County Division savings; and state-wide initiatives. According to NAPSA, the annual budget for Pretrial Services should be a minimum of \$159,000, which was the median budget for pretrial programs nationally.⁴⁹ However, given that the County’s current jail population is about 2,000, the suggested annual budget for the County’s modified pretrial services program is upwards of \$1,000,000.

The County should hire at least two new staff members to help implement programmatic expansions. That will increase the total staff size to reflect the median staff size for pretrial programs nationally.⁵⁰ The addition of two staff members will increase Pretrial Service’s staffing costs and should be factored into the new budget.

⁴³ Council of State Governments, “Confined and Costly: How Supervision Violations are Filling Prisons and Burdening Budgets” (June 2019) <https://csgjusticecenter.org/wp-content/uploads/2020/01/confined-and-costly.pdf>. (finding that states spend more than \$9.3 billion a year imprisoning people for supervision violations and spend \$2.8 billion alone for technical violations, including violations of electronic monitoring rules).

⁴⁴ See Pilnik et. al, “A Framework for Pretrial Justice” at 47.

⁴⁵ See Pilnik et. al, “A Framework for Pretrial Justice” at 47.

⁴⁶ See Pilnik et. al, “A Framework for Pretrial Justice” at 47.

⁴⁷ See Pilnik et. al, “A Framework for Pretrial Justice” at 47.

⁴⁸ See Pilnik et. al, “A Framework for Pretrial Justice” at 47.

⁴⁹ “Pretrial Diversion in the 21st Century” at 11 (n. 12 “three respondents reported being funded entirely through the budgets of parent agencies. Four respondents did not report budget information.”).

⁵⁰ “Pretrial Diversion in the 21st Century” at 11.

This budget reflects the recommendation that Shelby County should avoid, if not totally eliminate, any pretrial services system that passes the cost of supervision onto the individual. Currently, some pretrial individuals in the County pay out-of-pocket for conditions such as drug testing and for programming such as anger management, drug use, and parenting classes. At minimum, the same ability to pay assessment that should inform bail conditions should be used to ensure that no arrestee is offered pretrial supports or court-imposed conditions at a cost they cannot afford. An individual's incarceration because any condition of pretrial release is unaffordable to them is plainly unconstitutional.

II. Adjusting Shelby County Divisions and Sub-division Budgets

The following Shelby County Divisions and sub-divisions can be leveraged to build an effective pretrial program. We discuss opportunities to alter distribution within each of these Divisions and their Sub-divisions in turn below.

(1) Community Services Division Budget Recommendations

The Community Services Division sits within the Mayor's Administration. The Division is perhaps the most appropriate target for budget reallocation because it houses the Office of Justice Initiatives (OJI), which oversees the Pretrial Services Program and the Mental Health Court.⁵¹ The Community Services Division also houses the Community Services Agency (CSA), which focuses on reducing poverty through resources and partnership.⁵² The Division also oversees the community resources budgeted from the American Rescue Plan Act (ARPA), which includes funds for housing and eviction assistance, mental health, and other areas of support. The ARPA funds could be used for pretrial housing and other pretrial interventions.

(a) Shift Use of Community Service Division OJI Grant

First, the Division's Office of Justice Initiatives has a number of state-provided grants that should be supplemented or expanded and used for pretrial support purposes. OJI's *2017 Safety & Justice Challenge*⁵³ should be augmented and/or renewed and expanded with a focus on reducing jail incarceration and jail use disparities by developing alternatives to detention. The County should also seek to augment OJI's *Tennessee Cooperative Agreement to Benefit Homeless Individuals (CABHI)*⁵⁴ grant to provide mental health and substance abuse services to pretrial releasees who suffer from homelessness.

(b) Shift Use of Community Service Division Community Service Agency Grant

Within the Community Services Division, Community Services Agency grants can be supplemented and/or expanded to benefit the pretrial population. Shelby County can address

⁵¹ "Community Services Division Budget," Shelby County Commission, 173 (2020) <https://www.shelbycountyttn.gov/DocumentCenter/View/39130/12---Community-Services> (see "Community Services Division Organizational Chart").

⁵² "Community Services Division Budget" at 175.

⁵³ "Community Services Division Budget" at 185 (Amount not disclosed).

⁵⁴ "Community Services Division Budget" at 185 (Amount not disclosed).

housing concerns for its pretrial population by devoting more resources to providing safe and accessible housing to releasees. This means creating joint initiatives between jail and community homeless service providers. The Community Service Agency's \$62,500⁵⁵ *Community Service Block Grant* (CSBG) should be augmented to provide rent/mortgage assistance, medical prescription assistance, and family support case management to pretrial individuals specifically. The CSA's \$2,504,234⁵⁶ *Emergency Solutions Grant* should also be augmented to provide services to pretrial individuals who are at risk of homelessness during the Coronavirus pandemic.⁵⁷

(2) Sheriff's Division Budget Recommendations

The Sheriff Division consists of three sub-divisions: the Administrative Sub-division; the Law Enforcement Sub-division; and the Jail Sub-division.⁵⁸ The Jail Sub-division is the most pertinent to pretrial releasees in Shelby County because it houses the Jail Administration⁵⁹ and Jail Programs Departments.⁶⁰ The County should reallocate jail population reimbursements as well as revenues received through fines and fees to make pretrial services programs more robust, with a particular focus on alternatives to pretrial incarceration. This would involve shifting a significant part of savings money from the Sheriff Division to the Community Services Division/Pretrial Services.

(a) Shift Use of Sheriff's Division Jail Population Reimbursement Funding

Since the General Fund accounts for 97% of Sheriff Division revenues,⁶¹ the County should reevaluate how the General Fund is allocated within the Division. For example, if the County implements sensible reforms and robust pretrial services and releases even 50% of its current jail population (approximately 1,000 people), it would likely save tens of millions of dollars. Decreasing the jail population would consequently reduce jail expenditures more broadly—including jail food costs, jail medical and mental health care costs, and jail staff costs. We acknowledge that certain overhead costs associated with running the jail would remain fixed, and that the County may need to examine how reducing the jail population will affect its state reimbursements for services based on jail population. However, given the substantial current operating cost associated with pretrial detention, reforms that shift the default from detention to release with support from Pretrial Services (likely through the Community Services Division) should still net significant savings. And such a shift would net further benefits and savings via improved community health, public safety, and equity.

⁵⁵ "Community Services Division Budget" at 186 (see "Grant Program Detail" table).

⁵⁶ "Community Services Division Budget" at 186 (see "Grant Program Detail" table).

⁵⁷ "Community Services Division Budget" at 184.

⁵⁸ "Sheriff Division Budget," Shelby County Commission, 188-189 (2021)

<https://www.shelbycountyttn.gov/DocumentCenter/View/39131/13---Sheriff>.

⁵⁹ "Sheriff Division Budget" at 189 ("Jail Administration is responsible for management of Jail operations, including the functions of Staffing, Human Resources, Accreditation, and a General Investigative Unit.").

⁶⁰ "Sheriff Division Budget" at 189 ("This department is responsible for the numerous programs for inmates in the jail, including case management services, rehabilitative, recreational, educational and religious/volunteer programs.").

⁶¹ "Sheriff Division Budget" at 195 (See pie chart).

(b) Shift Use of Sheriff's Division Court Fees and Permits Funding

The County should also reallocate part of the \$1.4 million the Sheriff Division receives in fines, fees and permits through the court system. While fines and fees should be tailored to the financial circumstances of the individual, the revenues from fines and fees can be redistributed to Pretrial Services if the Sheriff's Division reduces its staff size in accordance with the reduction in the jail population. Currently, jail staff members make roughly \$40,000.⁶² Cutting even two staff members would result in about \$80,000 in savings that could be reallocated from fines and fees revenues.

⁶² Jackson Baker, "An Uneven Week for Sheriff Bonner," Memphis Flyer (Nov. 17, 2021), <https://www.memphisflyer.com/an-uneven-week-for-sheriff-bonner>.