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

March 25, 2022

Re: Principles for Judicial Administrative Order to Remedy Constitutional Deficiencies, for Discussion

Shelby County Leadership:

As our team has discussed with the County Attorney, we will be unable to resolve our concerns with the unconstitutionality of Shelby County's post-arrest practices unless local stakeholders implement a system by which any decision that functions to detain someone pretrial occurs after a sufficiently robust hearing. To that end, we preview here the components of true pretrial release/detention hearings that we view as essential, and which we look forward to discussing with you in April.

First, we offer high-level principles that must be understood in order for the parties to engage productively in a discussion of reforms. Second, we make explicit what we view as the bare minimum requirements for a system of new, adequate bail hearings.

Finally, we have crafted two detailed proposals to provide examples of the ways the General Sessions Judges, Judicial Commissioners, Public Defender, DA, and Pretrial Services Agency could work together to craft an adequate and functional system to determine pretrial conditions. Those proposed systems are attached as "Proposed Standing Bail Order A" and "Proposed Standing Bail Order B."

I. KEY PRINCIPLES FOR ADEQUATE POST-ARREST PROCESS

While the particulars, such as what judicial officer presides over a given proceeding, what proceedings are called, where they occur, and—within reason—the timing of hearings, are all subject to negotiation, we view the below principles as non-negotiable if we are to resolve our concerns short of litigation.

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

It is essential that policymakers understand that their obligations to arrested persons stem not only from Tennessee law, but also from the United States 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

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 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 under any regime, pretrial detention should be the “carefully limited exception” to the “norm” of release. *United States v. Salerno*, 481 U.S. 739, 755 (1987). Orders that detain have to be rigorously justified because the right to one’s bodily liberty pretrial is “fundamental” and thus any government action that infringes it must be narrowly tailored to advance a compelling government interest. *Id.*

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 there must be a delineation between orders of affordable and unaffordable bail: one functions to release the individual, the other to detain. This does not mean that judicial officers evaluating appropriate conditions of release (including bail) are to ignore other factors in calibrating appropriate release orders. However, local officials must 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

Because it is unconstitutional to detain someone due only to their inability to pay, and because 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. An individualized, accurate assessment of what a person could afford in bail could be gleaned with small modifications to the existing Pretrial Service Interview. 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.¹ Procedural safeguards are required to protect against systemic deprivations of this right. We go into more detail about these requirements in the next section.

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 only to remedy the legal deficiencies in the existing system, but also to incorporate practices that will make the system work better for all and, if done in a manner that embraces increased releases, 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, 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. Judicial officers in Harris County, Texas would be very knowledgeable about adopting changes similar to those we propose, including the benefits of those reforms. We also understand that judges in Knox County, TN recently adopted a bail hearing system in response to a similar litigation demand as the one our groups issued to you. The Knox

¹ 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.”).

County General Sessions Order is on file with the County Attorney. Our colleagues at JMI likely have other contacts they could suggest.

II. BARE MINIMUM REQUIREMENTS FOR HEARINGS

A judicial decision to release or detain (which a bail decision entails, because those who cannot afford the bail amount set will be detained) must be accompanied by sufficient procedural safeguards, and must be justified after considering less-restrictive alternatives.

While the specifics of a hearing system such as scheduling, recording, location, and staffing 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.

While there are a number of ways to do this, it is essential that *prior to any order that functions to detain (including an order of unaffordable bail)*:

- The individual receives a real hearing held within a reasonable period of time of arrest, which should generally be within 24 hours, and no later than 48 hours²;
- The hearing must be open to the public, either by being held in an open forum, or by being live-streamed if it is held via videoconference;
- The hearing must be recorded, either via live audio recording or court reporter;
- In advance of the hearing, individuals must be provided notice of the hearing, including the stakes of the hearing and what will be considered;³
- The individual must have an opportunity to be heard at a hearing, including to present evidence and cross-examine any government witnesses;⁴

² 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.”).

³ “[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).

⁴ 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)).

- Counsel should be made available for the arrested person, though they retain the right to represent themselves (this is generally achieved by having a “duty” attorney staff the hearing for the public defender’s office, on a provisional basis only);⁵
- The hearing must be governed by an evidentiary standard⁶ by which the government carries the burden to justify detention (including on an unaffordable bail), generally the “clear and convincing evidence” standard;⁷
- Prior to the imposition of any condition that serves to detain, the judicial officer must give meaningful consideration of alternative, less-restrictive conditions of release;⁸
- In order to know whether the judge’s order will be one that serves to release or detain, there must be an inquiry into, and factual findings that address, the arrestee’s ability to pay any bail requirement;⁹

⁵ *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).

⁶ “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).

⁷ The U.S. Supreme Court has indicated 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). The only pretrial detention scheme to ever 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. *See, also Schultz*, 330 F. Supp. 3d at 1372; *Caliste*, 329 F. Supp. 3d at 315.

⁸ *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).

⁹ *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.

- The judicial officer must provide an oral or written explanation of their decision imposing unaffordable bail, including the rationale for the decision and factual findings;¹⁰ and
- The individual must be given an opportunity to appeal an order that serves to detain them.

III. PREVIEW OF PROPOSED STANDING BAIL ORDERS

We emphasize again that the safeguards outlined above must be in place *if the judge is going to potentially order an individual's detention* via unaffordable bail. Swift decisions to release an individual on their own recognizance, or to release them subject to conditions that do not require a financial payment, *do not* require as robust a set of processes, because decisions to release do not infringe on the fundamental right to bodily liberty.

To that end, we have suggested one potential system in which judicial commissioners conduct initial screenings of cases solely to identify, in concert with Pretrial Services, individuals who should be immediately released on recognizance, on non-financial conditions, or on an affordable bail. The County could thus streamline the cases that require a more fulsome hearing with counsel for the cases where unaffordable bail is being considered in earnest. This is the system outlined in “Standing Bail Order A.” Functionally, cases would first be screened by the judicial commissioner for recognizance release, and if recognizance release were not appropriate, for release on other conditions, including *affordable* bail (as determined through the ability to pay assessment done via Pretrial Services). If the judicial commissioner determines that no set of conditions will suffice to reasonably assure the arrestee’s future court appearance, or has identifiable public safety concerns, the case proceeds for a fuller bail hearing before a General Sessions Judge within 24 to 48 hours of arrest.

The bare minimum hearing requirements could also be satisfied through the format of a single, one-time hearing. Under such a regime, all arrestees would proceed before a judicial officer for a complete determination of (1) first, whether their future court appearance can be reasonably assured by recognizance release, (2) second, whether

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).

¹⁰ *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”).

their court appearance and the safety of the public can be reasonably assured by other conditions including affordable bail, and (3) third and finally, whether notwithstanding the availability of less-restrictive alternatives, their continued detention is necessary, as justified by the facts of the case. Such a single-step approach is fleshed out in “Standing Bail Order B.”

We look forward to discussing these proposals with you, and addressing any questions or confusion you may have: we recognize the written documents that follow are a bit dense, but we offer them in the spirit of bring as detailed as possible.

Sincerely,

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**IN THE GENERAL SESSIONS CRIMINAL COURT OF SHELBY COUNTY,
TENNESSEE**

[PROPOSED] STANDING BAIL ORDER “A”

Consistent with its statutory authority under Tenn. Code Ann. § 40-1-111(a)(1)(A)(iv), the Court hereby issues the following Standing Bail Order establishing a procedure by which judges and judicial commissioners will determine the appropriate, least restrictive conditions of pretrial release for each individual arrestee. This Order is effective _____.

The procedures set forth below shall apply to all persons arrested in Shelby County for non-capital crimes. These procedures are to be adhered to for new charges even if the individual is subject to other detention holds from any authority. As discussed below, in cases where a detention hold is capable of being adjudicated by the local judiciary (i.e. bench warrant, contempt order, alleged probation or parole violation), judicial officers shall act promptly to adjudicate the hold. In cases where a detention hold is issued by another authority (i.e. federal detainer, extradition hold), the procedures below shall be adhered to with respect to the new arrest in Shelby County notwithstanding the hold.

The procedures set forth below outline a system in which judicial officers have discretion to act appropriately in every individual case, consistent with the requirements of the U.S. Constitution and factors and considerations set forth by Tennessee law. These procedures distinguish between an unaffordable bail order and an affordable bail order, because an unaffordable bail order serves to detain an individual and an affordable bail order does not. These procedures contemplate that in certain instances, an unaffordable bail order may be appropriate, but only after careful consideration of less restrictive alternatives, adequate procedural safeguards, and sufficient findings.

After arrest, individuals will first be interviewed by a representative of Pretrial Services, and then screened by an on-duty Judicial Commissioner to evaluate them for recognizance release or release on other conditions (“release screening”). If the Judicial Commissioner does not elect to release the individual, they will appear before a General Sessions Judge at the next-available calendar day, no later than 48 hours after arrest, for a bail hearing.

I. Timing and Format of Initial Release Screening

Within 12 hours of arrest, an individual will come before a judicial commissioner for an evaluation of whether they shall be released on their own recognizance, released subject to additional conditions, or held for a further hearing to determine whether no conditions or combination of conditions will reasonably assure their future court appearance and/or the safety of persons in the community. This initial process before the judicial commissioner shall be known as the “release screening.”

Prior to the release screening:

1. The arrested individual shall be given notice, by a representative of the Pretrial Services Division, of the purpose of the release screening and the fact that their financial information will be collected for the purposes of determining the least restrictive conditions for their pretrial release. The individual will be notified that, if the commissioner does not order their release, they will appear before a judge for a later bail hearing (including the time, location, and purpose of the bail hearing). All reasonable accommodations shall be made to ensure the individual understands this notice, including but not limited to any needed language interpretation, moving to a quieter space, and providing extra time to review oral and written notice;
2. A representative from Pretrial Services shall administer a questionnaire to determine the individual's financial circumstances as part of their intake interview, such as the Ability to Pay Calculator developed by the Vera Institute; and
3. A representative from Pretrial Services shall provide relevant information, including but not limited to the arrestee's ability to pay bail, to the on duty judicial commissioner. Pretrial Services is empowered to recommend persons for recognizance release and/or release on other conditions.

At the release screening:

1. Pursuant to Tenn. Code Ann. § 40-11-115, and consistent with due process principles, all arrestees shall be presumed to be released on their own recognizance absent compelling evidence that recognizance release will not reasonably assure their future appearance in court.
 - a. The operation of this presumption shall mean that absent evidence that recognizance release will not reasonably assure future court appearance based on the factors in Tenn. Code Ann. § 40-11-115, an individual will be released on recognizance. Only upon a written determination that recognizance release will not reasonably assure an individual's future court appearance, may the judicial commissioner proceed to consider additional conditions of release. Written determinations can be simple and appear on a standardized form.
2. For those not released on their own recognizance, judicial commissioners must impose only the least restrictive conditions on release necessary to reasonably assure the individual's future court appearance, consistent with Tenn. Code Ann. § 40-11-116. In cases involving a charge that carries a statutorily-required condition of pretrial release (i.e. vehicular assault, vehicular homicide, or aggravated vehicular homicide with a prior alcohol-related conviction), the commissioner shall impose those mandatory conditions, and determine the least restrictive conditions necessary to assure future court appearance after considering

the mandatory conditions already imposed (in many cases, the mandatory conditions may be sufficient).

3. Because a secured bail amount that a person cannot afford is the equivalent of an order of detention, judicial commissioners are instructed to impose secured money bail as a condition of release only if, pursuant to an individualized financial inquiry, the commissioner determines the bail amount is affordable to the individual.
4. The judicial commissioner shall make written findings as to what amount an individual can afford to pay for secured money bail or other conditions, and if imposing bail, their basis for determining that the amount imposed is affordable.

Determining an affordable bail:

1. A secured financial requirement will be considered “affordable” if an individual could pay it in its entirety within 24 hours without borrowing money from friends, family, or depending on a commercial surety;
2. The judicial commissioner will base their determination regarding “affordability” on the financial information obtained from the pretrial services interview;
3. The commissioner will consider any financial costs associated with other conditions of release, i.e. drug monitoring or treatment, and only impose the conditions if they are deemed affordable to the individual, using the same definition and methodology as described above; and
4. If an individual is unemployed or receives public benefits (including disability benefits), the commissioner shall presume that no secured bail amount or other condition that carries a financial cost is affordable to the individual.

II. Subsequent Bail Hearings for Persons Not Released

In cases where the judicial commissioner has a good faith basis to believe that no conditions or combination of conditions will reasonably assure the safety of an identifiable person(s) in the community or prevent the individual’s willful flight, the judicial commissioner shall set the case for a further hearing before a General Sessions Criminal Court Judge on the next-available calendar date. This hearing before the General Sessions Court will be known as the “bail hearing.” The bail hearing shall generally occur within 24 hours, and no longer than 48 hours, after arrest. At the bail hearing, the General Sessions Criminal Court Judge will evaluate the least onerous conditions that will reasonably assure the individual’s future court appearance and the safety of persons in the community. If and only if the General Sessions Criminal Court Judge determines that, by clear and convincing evidence, no condition or combination of conditions will suffice to reasonably prevent flight or reasonably assure the safety of an identifiable person or persons in the community, the General Sessions Criminal Court Judge may impose an unaffordable secured bail amount.

The Secured Bail Hearings shall contain the following features:

1. The arrested individual will have the right to be heard and to present evidence;

2. Legal counsel shall be made available to the arrestee free of charge, via a representative from the Shelby County Public Defender's office. The scope of representation from the Public Defender will be limited to advocating for the individual's interests for the purposes of the secured bail hearing, unless and until they are appointed as counsel in an individual's case. The individual will retain the right to represent themselves if they choose;
3. A representative of the Shelby County District Attorney's office shall be present and shall bear the burden of justifying, by clear and convincing evidence, the imposition of an unaffordable bail order, or other conditions beyond recognizance release;
4. The burden of proof will not shift from the prosecuting attorney;
5. The General Sessions Criminal Court Judge shall review the judicial commissioner's findings regarding the individual's ability to pay for secured money bail or other conditions. If the judicial commissioner set what they believed to be an affordable bail, but the person remains detained, the General Sessions Court will review the bail amount and ensure affordable bail is in fact affordable;
6. The General Sessions Criminal Court Judge shall review the judicial commissioner's determination that recognizance release was not appropriate. If the General Sessions Judge believes recognizance release *is* appropriate, they shall order recognizance release in accordance with Tenn. Code Ann. § 40-11-115;
7. The General Sessions Criminal Court Judge must consider all the factors expressed in Tenn. Code Ann. §§40-11-115-118, along with the individual's presumed innocence and constitutional right to pretrial liberty;
8. The General Sessions Criminal Court Judge must explain on the record the reason for finding clear and convincing evidence that no condition or combination of conditions will reasonably assure the individual's future court appearance or the safety of identifiable person(s) in the community. Clear and convincing evidence must be based on the totality of the circumstances, and cannot be justified solely by the nature of the pending charge or the individual's Public Safety Assessment score;
9. The General Sessions Criminal Court Judge is to consider that mere failures to appear in court are generally preventable with interventions such as court reminders or transportation assistance, and thus enter detention orders based only on a risk of willful flight or an identifiable danger to others;
10. The General Sessions Criminal Court Judge is to consider guidance from the U.S. Supreme Court that pretrial liberty is the norm, and detention prior to trial the "carefully limited exception." *United States v. Salerno*;

11. The General Sessions Criminal Court Judge will examine whether the individual is detained due to a hold from another case or authority (i.e. probation or parole holds, warrants from other jurisdictions). The General Sessions Criminal Court Judge shall set a prompt hearing to resolve any holds the jurisdiction of the Shelby County Courts to address (i.e. probation or parole holds, bench warrants, contempt orders). The presence of another hold will not be a basis to ignore the Court's obligations to set appropriate and least-restrictive conditions on the new pending case; and
12. The Secured Bail Hearings shall be open to the public, broadcast online via livestream if conducted via videoconference, and recorded via audio recording or a court reporter.

If the General Sessions Criminal Court Judge determines that detention is necessary and the least restrictive means to reasonably prevent the individual's willful flight and/or to prevent a serious risk of danger to an identifiable person or persons in the community, it may enter a secured bail requirement in an unaffordable amount, which will function as a detention order.

The individual will have an opportunity to appeal a secured bail order under the ordinary course.

The individual or their counsel may petition the Court to reconsider or reduce the bond requirement at any time upon the presentation of new evidence. Upon motions based on new evidence, it shall be the defendant's burden to justify a change in bond conditions. The individual or their counsel may otherwise petition the Court to reconsider or reduce the bond requirement every thirty (30) days. During periodic bond reviews, the Court will review the bond conditions *de novo*, and the prosecuting authority will carry the burden of justifying the continuance of the condition by a preponderance of the evidence.

III. Notices Upon Release from Jail

Persons ordered released shall be given notice of the time and place of their next court date, a clear explanation (orally or in writing¹) of how to connect with any services or conditions imposed as a requirement of release, as well as information on how to apply for indigent defense counsel. All reasonable accommodations shall be made to ensure the individual understands these notices and information, including but not limited to any needed language interpretation, moving to a quieter space, and providing extra time to review oral and written notices.

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¹ Written reminders and instructions, similar to an appointment reminder card from a doctor or dentist's office, will be particularly helpful for persons who have cognitive disabilities or may need information presented to them in more ways than just orally.

It is therefore ORDERED, ADJUDGED, AND DECREED, this ___ day of _____, 2022

Judge Bill Anderson
Division VII

Judge Karen L. Massey
Division XI

Judge Tim J. Dwyer
Division VIII

Judge Silvio R. Lucchesi
Division XII

Judge Gerald Skahan
Division IX

Judge Louis J. Montesi, Jr.
Division XIII

Judge Chris Turner
Division X

Judge Patrick Dandridge
Division XIV

Judge Loyce Lambert Ryan
Division XV

**IN THE GENERAL SESSIONS CRIMINAL COURT OF SHELBY COUNTY,
TENNESSEE**

[PROPOSED] STANDING BAIL ORDER “B”

Consistent with its statutory authority under Tenn. Code Ann. § 40-1-111(a)(1)(A)(iv), the Court hereby issues the following Standing Bail Order establishing a procedure by which judges and judicial commissioners will determine the appropriate, least restrictive conditions of pretrial release for each individual arrestee. This Order is effective _____.

The procedures set forth below shall apply to all persons arrested in Shelby County for non-capital crimes. These procedures are to be adhered to for new charges even if the individual is subject to other detention holds from any authority. As discussed below, in cases where a detention hold is capable of being adjudicated by the local judiciary (i.e. bench warrant, contempt order, alleged probation or parole violation), judicial officers shall act promptly to adjudicate the hold. In cases where a detention hold is issued by another authority (i.e. federal detainer, extradition hold), the procedures below shall be adhered to with respect to the new arrest in Shelby County notwithstanding the hold.

The procedures set forth below outline a system in which judicial officers have discretion to act appropriately in every individual case, consistent with the requirements of the U.S. Constitution and factors and considerations set forth by Tennessee law. These procedures distinguish between an unaffordable bail order and an affordable bail order, because an unaffordable bail order serves to detain an individual and an affordable bail order does not. These procedures contemplate that in certain instances, an unaffordable bail order may be appropriate, but only after careful consideration of less restrictive alternatives, adequate procedural safeguards, and sufficient findings.

I. Timing and Format of Bail Hearings

Within 24 hours of arrest, an individual will come before a judicial officer for an evaluation of whether they shall be released on their own recognizance, released subject to additional conditions, or detained on unaffordable bail. This hearing shall be known as the “bail hearing.”

Prior to the bail hearing:

1. The arrested individual shall be given notice, by a representative of the Pretrial Services Division, of the purpose of the bail hearing and the fact that their financial information will be collected for the purposes of determining the least restrictive conditions for their pretrial release. All reasonable accommodations shall be made to ensure the individual understands this notice, including but not

limited to any needed language interpretation, moving to a quieter space, and providing extra time to review oral and written notice;

2. A representative from Pretrial Services shall administer a questionnaire to determine the individual's financial circumstances, such as the Ability to Pay Calculator developed by the Vera Institute; and
3. A representative from Pretrial Services shall provide relevant information, including but not limited to the arrestee's ability to pay bail, to the judicial officer. Pretrial Services is empowered to recommend persons for recognizance release and/or release on other conditions.

At the bail hearing:

1. The arrested individual will have the right to be heard and to present evidence;
2. Legal counsel shall be made available to the arrestee free of charge, via a representative from the Shelby County Public Defender's office. The scope of representation from the Public Defender will be limited to advocating for the individual's interests for the purposes of the secured bail hearing, unless and until they are appointed as counsel in an individual's case. The individual will retain the right to represent themselves if they choose;
3. A representative of the Shelby County District Attorney's office shall be present and shall bear the burden of justifying conditions of release other than recognizance release, including the burden to justify orders of unaffordable bail based on a showing that no condition or combination of conditions will reasonably assure the individual's future court appearance or the safety of a person or persons in the community;
4. The judicial officer shall inquire into, and make findings on the record (orally or in writing) regarding the individual's ability to pay for secured money bail or other conditions.
5. Bail hearings shall be held daily between 9 a.m. and 6 p.m., be open to the public or broadcast online via livestream if conducted via videoconference, and recorded via audio recording or a court reporter.

II. Presumption of Recognizance Release

Pursuant to Tenn. Code Ann. § 40-11-115, and consistent with due process principles, all arrestees appearing for a bail hearing shall be presumed to be released on their own recognizance absent clear and convincing evidence that recognizance release will not reasonably assure their future appearance in court. The operation of this presumption shall mean that:

1. Absent evidence presented by the prosecuting authority that recognizance release will not reasonably assure future court appearance based on the factors in Tenn. Code Ann. § 40-11-115, an individual will be released on recognizance; and

2. There shall be no burden on the arrestee or their counsel to present argument or evidence other than to rebut argument and/or evidence from the prosecuting authority.

Only upon a determination, made orally or in writing, that recognizance release will not reasonably assure an individual's future court appearance, may the judicial officer proceed to consider additional conditions of release as described below.

III. Determinations of Ability to Pay, Least Restrictive Conditions

For those not released on their own recognizance, judicial officers must impose only the least restrictive conditions on release necessary to reasonably assure the individual's future court appearance, consistent with Tenn. Code Ann. § 40-11-116. In cases involving a charge that carries a statutorily-required condition of pretrial release (i.e. vehicular assault, vehicular homicide, or aggravated vehicular homicide with a prior alcohol-related conviction), the judicial officer shall impose those mandatory conditions, and consider the least restrictive conditions necessary to assure future court appearance after imposing any mandatory conditions (the mandatory conditions may in many instances be sufficient).

Because a secured bail amount that a person cannot afford is the equivalent of an order of detention, judicial officers must determine what if any bail amount is affordable to the individual, and treat orders of unaffordable bail as the equivalent of a detention order. The judicial officer may impose conditions that will function to detain, i.e. an unaffordable bail amount or other unattainable condition, but only upon (1) a motion from the prosecuting authority to do so and (2) a finding by clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of identifiable person(s) in the community or prevent the individual's willful flight.

For the purposes of this section:

1. A secured financial requirement will be considered "affordable" if an individual could pay it in its entirety within 24 hours without borrowing money from friends, family, or depending on a commercial surety;
2. The judicial officer will base their determination regarding "affordability" on the financial information obtained from the pretrial services interview and any colloquy by the judicial officer and the arrestee and their counsel;
3. The judicial officer will consider any financial costs associated with other conditions of release, i.e. drug monitoring or treatment, and only impose the conditions if they are deemed affordable to the individual, using the same definition and methodology as described above; and
4. If an individual is unemployed or receives public benefits (including disability benefits), the judicial officer shall presume that no secured bail amount or other condition that carries a financial cost is affordable to the individual.

IV. Motion for Unaffordable Bail

In cases where the prosecuting authority has a good faith basis to believe that no conditions or combination of conditions will reasonably assure the safety of an identifiable person(s) in the community or prevent the individual's willful flight, the prosecuting authority shall move for an unaffordable bail order. Upon such a motion:

1. The judicial officer must consider all the factors expressed in Tenn. Code Ann. §§40-11-115-118, along with the individual's presumed innocence and constitutional right to pretrial liberty;
2. The arrested individual and their counsel must be given an opportunity to present evidence and argument in response to the motion;
3. The prosecuting authority bears the burden of justifying detention by clear and convincing evidence;
4. The judicial officer must explain on the record the reason for finding clear and convincing evidence that no condition or combination of conditions will reasonably assure the individual's future court appearance or the safety of identifiable person(s) in the community. Clear and convincing evidence must be based on the totality of the circumstances, and cannot be justified solely by the nature of the pending charge or the individual's Public Safety Assessment score;
5. Consistent with the allocation of the burden of proof, the judicial officer cannot impose detention without a motion from the government, nor shift the burden to the defense to resist detention absent a sufficient showing of an unmitigable risk of flight or danger to others if the individual were released;
6. The judicial officer is to consider that mere failures to appear in court are generally preventable with interventions such as court reminders or transportation assistance, and thus enter detention orders based only on a risk of willful flight or an identifiable danger to others; and
7. The judicial officer is to consider guidance from the U.S. Supreme Court that pretrial liberty is the norm, and detention prior to trial the "carefully limited exception." *United States v. Salerno*.

If, upon following the procedures listed above, the judicial officer determines by clear and convincing evidence that no condition or combination of conditions will suffice to reasonably prevent flight or reasonably assure the safety of an identifiable person or persons in the community, the judicial officer may impose an unaffordable secured bail amount.

The individual will have an opportunity to appeal an unaffordable bail order under the ordinary course.

V. Other Considerations

If an individual remains incarcerated seventy-two (72) hours after their bail hearing, but was not ordered detained pursuant to a valid order (i.e. the judicial officer intended that they be

released), they shall be brought as soon as practicable before a General Sessions Criminal Court Judge for a bail review. The purpose of the bail review will be to examine why, notwithstanding the court's prior release order, the individual remains detained. If their detention is due to a condition of release proving to be unattainable despite the Court's release order, the General Sessions Criminal Court Judge shall adjust the condition to effectuate their release. If their detention is due to a hold from another case or authority, the General Sessions Criminal Court Judge shall set a prompt hearing to resolve any holds the jurisdiction of the Shelby County Courts to address (i.e. probation or parole holds, bench warrants, contempt orders).

The individual or their counsel may petition the Court to reconsider or reduce the bond requirement at any time upon the presentation of new evidence. Upon motions based on new evidence, it shall be the defendant's burden to justify a change in bond conditions. The individual or their counsel may otherwise petition the Court to reconsider or reduce the bond requirement every thirty (30) days. During periodic bond reviews, the Court will review the bond conditions *de novo*, and the prosecuting authority will carry the burden of justifying the continuance of the condition by a preponderance of the evidence.

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It is therefore ORDERED, ADJUDGED, AND DECREED, this ___ day of _____, 2022

Judge Bill Anderson
Division VII

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