SPLC Southern Poverty Law Center

CIVIL RIGHTS CORPS

January 19, 2022

Judge Chuck Cerny
Judge Judson Davis
Judge Patricia Hall Long
Judge Andrew Jackson, VI
Judge Tony W. Stansberry

Magistrate Christopher Rowe
Magistrate Ray Jenkins
Magistrate Dustin Dunham
Magistrate Robert Cole
Magistrate Sharon Frankenberg

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Dear Legal System Actors,

On April 2, 2021, the Southern Poverty Law Center ("SPLC") and Civil Rights Corps ("CRC") wrote to you regarding our investigation into Knox County, Tennessee's (the "County") bail practices. As we noted in that letter, we concluded, based on that investigation, that the County's bail practices violate state and federal law. *See* Ex. 1, SPLC/CRC Letter of April 2, 2021. In particular, we noted the County's failure to adhere to the constitutional standards laid out in *Torres v. Collins*, No. 2:20-CV-00026, 2020 WL 7706883 (E.D. Tenn. Nov. 3, 2020), in which Judge Clifton L. Corker preliminarily enjoined similar bail practices in neighboring Hamblen County.[1]

[1] In May of 2021, Judge Corker certified the following class in *Torres*: "All individuals arrested on an arrest warrant out of Hamblen County General Sessions Court (save for capital offenses) (1) who are, or will be, in the custody of the Hamblen County Sheriff, Esco Jarnagin; (2) whose bail amount was set in an ex parte fashion by the Defendants authorized by law to set bail for cases pending in Hamblen County general sessions court; (3) who have not waived and have not received an individualized hearing within a reasonable period of time; and (4) who remain in custody for

In July, the County's General Sessions judges implemented a new system, generally providing arrested individuals with bail hearings within 48 hours of arrest. We were encouraged by the County's adoption of this process. However, based on our own in-court observations as well as listening to the recordings of bail proceedings held over the past few months, we note that there continue to be several constitutional infirmities with the bail hearings. We have also observed a troubling lack of uniformity across judges in applying the state and federal standards applicable to bail determinations and—considering that people's fundamental rights are at stake—a shocking lack of knowledge about the law that governs bail determinations. *See, e.g.*, *infra* at 6 ("I honestly don't know who's got the burden of proof . . . ." at a bail hearing).

This letter identifies some of the recurring problems we've observed and offers a decision-making framework for judges that, if followed, would help resolve those concerns. We encourage you to adopt this framework as a local court rule to provide clear guidance to the public, parties, and judges about what legal standards govern bail determinations. Codifying this framework in a local rule would also promote uniformity while protecting arrestees' constitutional rights.

Problems Identified at Bond Hearings.

In *Torres*, Judge Corker, a federal judge in the United States District Court for the Eastern District of Tennessee, preliminarily enjoined Hamblen County's practice of detaining defendants before trial without first affording them individualized bail hearings. Judge Corker held that the Fourteenth Amendment requires courts to provide arrestees certain procedural protections at a bail hearing and that the Sixth Amendment grants arrestees the right to counsel. These procedural protections include:

- A bail hearing held "within a reasonable period of time of arrest[,]" which is presumptively "within 48 hours[,]" 2020 WL 7706883 at *12;

- Notice of the matters to be addressed at the hearing and "the need for information that would be pertinent to" the issue of bail, *id.* at *10;

- Representation by defense counsel, *see id.* 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.");

- An opportunity to present evidence and cross-examine the government's witnesses, *see id.* at *11;

- An inquiry into, and factual findings that address, the arrestee's ability to pay, *see id.* at *12;

- Meaningful consideration of "alternative conditions of release[,]" *id.*; and

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any amount of time." *Torres v. Collins*, No. 2:20-CV-00026-DCLC, Doc. 116, at *4 (May 5, 2021).

- Findings made in writing or, "at a minimum," verbally on the record regarding the adequacy of such alternative conditions, *id.*

Judge Corker also held that these procedural protections alone are insufficient. Because pretrial detention "infringes upon the fundamental right of an individual's personal liberty," *id.* at *8, the County must also satisfy the requirements of substantive due process. As Judge Corker explained, substantive due process is violated "'no matter what process is provided, unless the infringement" of an arrestee's fundamental right to pretrial liberty "is narrowly tailored to serve a compelling state interest.'" *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *see also id.* at *10 ("[S]ubstantive due process requires that the court must restrict its abridgement of an individual's liberty interest in as narrow a way as possible.").

Judge Corker's substantive due process ruling has significant implications for the imposition of secured money bail because unattainable money bail acts as a pretrial detention order. As discussed below, narrow tailoring in the money bail context requires a judge to make an express ability-to-pay finding. And, if a judge is considering setting an amount above what an arrestee can afford to pay, that judge must find—in writing or on the record—that pretrial detention is necessary because no other condition or combination of conditions of release would reasonably ensure the State's interests in public safety or court attendance.

As outlined in our original letter, Knox County's previous bail practices violated substantive and procedural due process because arrestees were provided none of these procedural protections and no magistrate or judge made these substantive findings. Today, bail continues to be set initially by the magistrates without any of these safeguards. And—while the General Sessions Court judges are now holding a subsequent bail hearing to review the magistrate's bail determination and providing arrestees at that hearing with some of the constitutionally required procedural safeguards—General Sessions Court judges continue to detain people without requiring the State to bear the burden of proof or engaging in the narrow tailoring that substantive due process requires. We explain these—and other—deficiencies below.

1. Placing the evidentiary burden on the arrestee to show that detention is unnecessary

In *Torres*, Judge Corker held that arrestees have a "fundamental" right to be free from pretrial detention and that Hamblen County must therefore satisfy the "compelling state interest" test before it can detain someone pretrial. 2020 WL 7706883, at *8 & n.5, *11. Judge Corker relied on the Supreme Court's decision in *United States v. Salerno* for that holding; *Salerno* explained that it is a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." 481 U.S. 739, 749 (1987); *id.* at 750 (describing right to pretrial liberty as "fundamental"); *id.* at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); *see also Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (citing *Salerno* as one of Court's "line of cases which interprets . . . 'due process of law' to . . . forbid[] the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest").

Multiple state and federal courts have also relied on *Salerno* to find that arrestees have a fundamental right to pretrial liberty and that the State must satisfy heightened scrutiny before a person may be detained pretrial. *See, e.g.*, *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 136 Nev. 155, 166 (2020) ("Because bail may be set in an amount that an individual is unable to pay, resulting in continued detention pending trial, it infringes on the individual's liberty interest. And given the fundamental nature of this interest, substantive due process requires that any infringement be necessary to further a legitimate government interest."); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780–81 (9th Cir. 2014) (en banc) (arrestees have a fundamental right to pretrial liberty, which may be infringed only if heightened scrutiny is satisfied); *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 a "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.").[2]

Although neither *Torres* nor the cases cited above directly address the burden of proof at a bail hearing, the Sixth Circuit has held in other contexts that heightened scrutiny places the burden

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[2] The Tennessee Constitution also appears to recognize pretrial liberty as a fundamental right. Although the Tennessee Supreme Court articulated this right as a "fundamental right to pretrial bail," *State v. Burgins*, 464 S.W.3d 298, 304 (Tenn. 2015) (emphasis added), scholars have described constitutional right to bail provisions—as is found in Tenn. Const. art. I, § 15—as more accurately describing a right to pretrial release "because the notion that bailability should lead to release was foundational in early American law." *See* Schnacke, Tim, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 43 (Sept. 2014); *see also Stack v. Boyle*, 342 U.S. 1, 4 (1951) (equating the "right to bail" with the "right to freedom before conviction"). Tracing "[t]he origins of pretrial bail [in the United States] back to medieval England," the Tennessee Supreme Court itself found that bail "served 'as a device to free untried prisoners,'" *Burgins*, 464 S.W.3d at 303 (citation omitted). This occurred initially through a personal surety system, *id.*; *see also Stack*, 342 U.S. at 5 (describing the "ancient practice of securing the oaths of responsible persons to stand as sureties for the accused . . . ."), and later—following the passage of the Statute of Westminster in 1275 to combat historical abuse—through establishing "offenses for which bail was automatically granted", *see Burgins*, 464 S.W.3d at 303–04; *see also* Schnacke, *Fundamentals of Bail*, at 42 ("Accordingly, in 1275 the right to bail was meant to equal a right to release and the denial of a right to bail was meant to equal detention."). The modern notion equating bail with secured money bail is a relatively new system that post-dates the Tennessee Constitution's ratification. *See State ex rel. Haynes v. Daugherty*, No. M201801394COAR10CV, 2019 WL 4277604, at *5 (Tenn. Ct. App. Sept. 10, 2019) (noting that commercial bonding companies did not form until "the turn of the 19th century," about 100 years after the adoption of Tennessee's constitution). Despite these permutations in English and American law, scholars have argued that bail has always "meant release" and was intended to strictly curtail detention. *See* Timothy R. Schnacke, *A Brief History of Bail*, Judges' J., Summer 2018, at 4, 6.

on the State to justify any infringement of fundamental rights and the United States Supreme Court has emphasized the importance of placing the burden on the State in other contexts before a person's liberty may be curtailed. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 81–82 (1992) (finding Louisiana's civil commitment statute unconstitutional in part because, "[u]nlike the sharply focused scheme at issue in *Salerno*," where "the State must prove by clear and convincing evidence that [a criminal defendant] is demonstrably dangerous the community . . . [,] the State need prove nothing to justify continued detention [of insanity acquitees], for the statute places the burden on the detainee to prove that he is not dangerous").

Because any infringement of a person's fundamental right to pretrial liberty is subject to heightened scrutiny, the State must also bear the burden in the bail context to establish that any conditions are the least restrictive conditions of release.[3] Nevertheless, Knox County judges have often unconstitutionally shifted the burden to defense counsel to prove that her client is not a flight

[3] Other courts have allocated the burden of proof through a *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test. *See, e.g.*, *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021) (finding, after applying *Mathews*, that due process requires the State to bear the burden of proof at a bail hearing for noncitizens facing removal under 8 U.S.C. § 1226(a)). Under that balancing test, the State would also bear the burden of proof. The first factor, the private interest affected, weighs in favor of requiring the State to bear the burden of proof. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (citing *Foucha*, 504 U.S. at 80). The Supreme Court has repeatedly affirmed that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 at 739; *see also Foucha*, 504 U.S. at 80 ("We have always been careful not to minimize the importance and fundamental nature of the individual's right to liberty."). The second factor, the risk of an erroneous deprivation without additional procedural protections, also weighs in favor of the State bearing the burden of proof. By nature of their pretrial detention, arrestees will often have difficulty gathering evidence to prepare a defense. *Barker v. Wingo*, 407 U.S. 514, 533 (1972) ("[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."). Moreover, the State has at least as good—and sometimes better access—to the relevant information that a court must consider before setting financial conditions of release. *See, e.g.*, Tenn. Stat. Ann. § 40-11-118 ("nature of the offense and the apparent probability of conviction and the likely sentence" and the arrestee's "prior criminal record" and "record of appearance at court proceedings"). And, as the First Circuit explained in *Hernandez-Lara*, the State should bear the burden because "proving a negative (especially a lack of danger) can often be more difficult than proving a cause for concern." 10 F.4th at 31. The third factor, the State's interests, also weighs in favor of placing the burden on the State at a bail hearing. The State does not have an interest in detaining people unnecessarily, given the substantial harms associated with pretrial detention. "In short, given the risk that the current procedures lead to many instances of needless detention, entailing substantial social and financial costs, the public interest in placing the burden of proof on the detainee is uncertain at best, and may well be negative." *Hernandez-Lara*, 10 F.4th at 33.

risk or danger to the community.[4] For example, in the following exchange between a judge and a public defender at a recent bail hearing, the judge expressed uncertainty about who has the burden at a bail hearing, but then required the public defender to convince him that the person could be safely released from pretrial detention:

> I honestly don't know who's got the burden of proof right now. But if you want me to do something, you better show something to me, to give me an excuse to do it, respectfully. So, is there a practical burden on you? Yeah, uh-huh.

Ex. 2 at 24:5-10.

This statement illustrates how the Knox County General Sessions judges continue to detain people in violation of their constitutional rights by treating detention as the default condition and requiring the arrestee to convince a judge otherwise. But arrestees have a fundamental right to pretrial liberty that can only be infringed if heightened scrutiny is satisfied. Thus, a judge must first turn to the State to establish why detention is necessary, and why there are no less restrictive conditions of release that can reasonably ensure court attendance or public safety. The judges' failure to hold prosecutors to this burden—and to instead place the burden on arrestees to convince them that detention is unnecessary—violates arrestees' substantive and procedural due process rights.

2. Treating the magistrate's bail determination as presumptively correct rather than making a *de novo* bail determination at the first appearance in General Sessions Court

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[4] The Tennessee General Sessions Justice Conference recently concluded in its "Best Bail Practices" guide that whether the state has the burden of proof at a bail hearing is unsettled as a matter of state law. The Guide cited several Tennessee Supreme Court cases in the capital context to suggest that there is some support in caselaw for the broader proposition that the burden may be on the State at a bail hearing, even in non-capitol cases. *See* Best Bail Practices guide at 8 (quoting *Shaw v. State*, 47 S.W. 2d 92, 93 (Tenn. 1932) (". . . the burden of proving the right to custody is clearly upon the state, aided by no presumptions."); *see also State ex rel. Jefferson v. State*, 436 S.W.2d 437, 438 (Tenn. 1969) ("[T]he State [i]s correctly required to sustain the right of the State to retain [an arrestee] in custody . . . prior to any indictment."). Although the Guide did not cite *State v. Burgins*, 464 S.W.3d 298 (Tenn. 2015), that decision may provide even stronger support that the burden should be on the State at the initial bail hearing. In *Burgins*, the Tennessee Supreme Court held that the State must bear the burden of proof at a bail revocation hearing. *See id.* at 308 ("While many states do not expressly provide for a standard" at a revocation hearing, "the clear trend is for the State to bear the burden of establishing the facts to support revocation."); *see also id.* at 310 (holding that the burden is on the State to prove sufficient grounds to support revocation). If the State must bear the burden to revoke bail, it should also bear it at the initial bail hearing, where an individual's liberty interests are equally as strong—if not stronger—than at the revocation stage. However, even if there is some uncertainty under state law, as discussed *infra*, federal constitutional law requires the burden to be placed on the State to justify pretrial detention because, as Judge Corker found, pretrial liberty is a fundamental right that can only be infringed if there are no less restrictive conditions of release other than pretrial detention.

Before recent changes to bail-setting practices, the initial bail-setting in Knox County was nearly identical to the practices enjoined in Hamblen County. As in Hamblen County, Knox County magistrates set bail *ex parte* "without any regard for an arrestee's individual circumstances" such as "the arrestee's employment, financial condition and the like." *Torres*, 2020 WL 7706883 at *9. The magistrate's bail determination appeared to be utterly arbitrary: when SPLC attorneys asked how magistrates determined the bail amount, one magistrate licked his finger and pointed to the sky, as if pulling a number out of thin air or deciding which way the wind was blowing; another magistrate conceded to a reporter that his bail practices violated the Constitution. Letter to Knox County, Ex. 1 at 4; *see also* Jamie Satterfield, *Judges brush aside bail laws, and it costs you*, knoxnews.com (March 3, 2021). And, as recently as this summer, a General Sessions judge echoed these very concerns about how magistrates set bail:

> Right now it looks like we've got serious offenses. I'm going to review the narratives in the warrants. I'm going to scan the statutes real quick. But I don't know anything about what he's charged with, and let's take that one logical step further. **That puts me in the position of doing de facto what Magistrates have historically done, which is, looks serious, better add a couple zeroes.**

Ex. 2 at 11:3-11 (emphasis added).

Since we sent our initial letter, magistrates setting bail conditions at the initial appearance—held over video—have started asking additional questions relevant to the bail determination and adopted the use of a form to take notes about the factors that state statute require them to consider before setting monetary bail. *See* Tenn. Stat. Ann. § 40-11-118; *see also* Ex. 3. However, this video appearance does not afford arrestees with <u>any</u> of the procedural protections that Judge Corker and other federal courts have found are required to satisfy procedural due process; it "is simply a very short rapid-fire question and answer event." *Torres*, 2020 WL 7706883 at *10.[5]

Arrestees are not represented by counsel at the video appearance, nor are prosecutors required to bear the burden to justify any restriction on a person's liberty: the State is not present at all. Arrestees are not provided advance notice of the purpose of the appearance or the factors relevant to the magistrate's bail determination that would allow them to prepare or arrange for witnesses in the absence of counsel. The video appearance is also not on the record; the magistrates

[5] While officials have started using a form to allow magistrates to consider the statutory factors required under Tenn. Stat. Ann. § 40-11-118 before setting financial conditions of release, magistrates do not appear to be using any form that requires the magistrate to first consider release on recognizance or non-financial conditions of release as is required under Tenn. Stat. Ann. §§ 40-11-115 and 40-11-116. Those statutes require the magistrates to engage in a "multi-step process," *see Nashville Cmty. Bail Fund v. Gentry*, 496 F. Supp. 3d 1112, 1118 (M.D. Tenn. 2020), before secured financial conditions of release can be considered. Rather than complying with those statutes, magistrates appear to impose financial conditions without first making any findings about why release on recognizance or non-financial conditions would not reasonably ensure court attendance.

do not make an ability-to-pay finding; and magistrates do not provide written findings to explain the bail determination.

The video appearance also does not satisfy substantive due process. When conditions of release are set, those conditions are simply written into the casefile without any explanation about why continued pretrial detention is necessary to further a compelling State interest. For instance, in the attached example, the magistrate made no findings about why the $1,000 bond was the least restrictive condition of release and the only notations that the magistrate made in the record—that the defendant lived in the community his "entire life," worked in "pest control" before the COVID-19 pandemic, and had community ties with his "parents + siblings"—would presumably weigh in favor of the arrestee's release on his own recognizance rather than continued detention through unattainable secured money bail. *See* Ex. 3.

Of course, Judge Corker held that there is nothing "inherently unconstitutional," *Torres*, 2020 WL 7706883, at *5, about magistrates making an initial abbreviated bail determination so long as a full bail hearing is provided "within a reasonable period of time," *id.* at *13, at which the required procedural protections are afforded, and substantive findings are made. Although Judge Corker did not specify an exact timeframe within which a full bail hearing must be held to satisfy due process, other courts have specified that this hearing should, in the absence of extraordinary circumstances, generally occur within 48 hours of arrest. *See id.* at *13 (citing *Dixon v. City of St. Louis*, 2019 WL 2437026 (E.D. Mo. June 11, 2019)); *see also ODonnell v. Harris Cty.*, 892 F.3d 147, 160 (5th Cir. 2018) ("We conclude that the federal due process right entitles detainees to a [bail] hearing within 48 hours."); *Walker v. City of Calhoun, GA*, 901 F.3d 1245, 1266 (11th Cir. 2018) ("We agree with the Fifth Circuit; indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest."); *see also* Best Practices Guide at 6 ("Courts are urged to adhere to this [48-hour] timeframe . . . .").[6]

Since we sent our original letter, the General Sessions judges have begun holding a full bail hearing subsequent to the initial video appearance before the magistrate with some of these procedural protections, but are often placing the burden on the arrestee at that hearing to convince the judge why the amount that the magistrate set was incorrect. This practice is inconsistent with due process.

[6] It has recently come to our attention that bail hearings before the General Sessions Court judges are not always held within 48 hours during holidays—as during the recent Christmas and New Year's holidays. In finding that a full bail hearing is presumptively constitutional if held within 48 hours following arrest, federal courts "import[ed]" the Supreme Court's 48-hour presumption in the probable cause context to the bail context. *See, e.g.*, *Walker*, 901 F.3d at 1266. In *Cty. of Riverside v. McLaughlin*, the Supreme Court held that "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance" if a probable cause determination is not held within 48 hours. 500 U.S. 44, 57 (1991). The Court held that "intervening weekends" "does not qualify as an extraordinary circumstance." *Id.* Presumably—and to the extent that time limitations for probable cause and bail determinations are co-extensive—holidays would also not constitute an extraordinary circumstance that would justify holding a bail hearing outside this 48-hour window.

As discussed above, due process requires the General Sessions judges to place the burden on the State at a bail hearing—a burden that neither the magistrates nor the General Sessions judges require prosecutors to satisfy. The General Sessions judges cannot avoid placing the burden on prosecutors by simply holding more bail hearings but with fewer procedural protections than due process requires. In *Hernandez-Lara v. Lyons*, the First Circuit rejected a similar practice in the immigration bail context for noncitizens facing removal under 8 U.S.C. § 1226(a). The government argued that it should not have to bear the burden of proof at a bail hearing because the immigration statutes provide for three levels of independent review: "[B]ecause the burden is always on the noncitizen," the First Circuit held, "the availability" of three level of independent review "does little to change the risk of error inherent in the current burden allocation." 10 F.4th at 32. Loaded dice rolled three times are still loaded dice." *Id*.[7]

In short, the General Sessions judges cannot shift the burden to arrestees at the initial appearance to convince them why the magistrate's bail determination was incorrect because arrestees are entitled to a hearing—either before the magistrates or the General Sessions judges—where all the required procedural protections are afforded, including where the burden is placed on the State to justify continued pretrial detention. Neither appearance does so.

3. Applying an evidentiary standard less than "clear and convincing evidence"

A related question that has arisen at Knox County bail hearings is: what evidentiary standard applies to the bail determination? The Tennessee General Sessions Judges Conference recently concluded that the answer is "unclear," and *Torres* did not answer this question. Best Practices Guide at 7.[8] However, two Tennessee federal district courts have found that a

[7] Even if the burden was placed on the State at the video appearance, defense counsel cannot meaningfully challenge the magistrate's bail determination—nor can the General Sessions Court judges meaningfully review it—because defense counsel is not present at the video appearance, the appearance is not on the record, and the magistrates do not provide any explanation in the casefile as to why continued detention on unaffordable money bail is necessary. *See Schultz v. State*, 330 F. Supp. 3d 1344, 1373 (N.D. Ala. 2018) (finding that the absence of written findings in Cullman County, Alabama's bail procedures "affords appointed counsel no information regarding the rationale for her client's bond, making the task of identifying error and challenging the bail amount unreasonably—and potentially insurmountably—difficult."). In other contexts, federal courts have held repeatedly "that findings that are nothing more than broad general statements, stripped of underlying analysis or justification shedding some light on the reasoning employed, makes it impossible for this Court to give meaningful review to the judgment." *Echols v. Sullivan*, 521 F.2d 206, 207 (5th Cir. 1975); *Long v. United States*, 626 F.3d 1167, 1170 (11th Cir. 2010) ("[W]e have long required the district courts and administrative boards to facilitate meaningful appellate review by developing adequate factual records and making sufficiently clear findings as to the key issues.") (collecting cases).

[8] The Best Practices Guide, citing *State v. Burgins*, 464 S.W.3d 298, 303 (Tenn. 2015), notes that the Tennessee Supreme Court requires the State to satisfy a preponderance standard at a bail revocation hearing. However, that context is meaningfully different; the Court was clear in *Burgins*

preponderance of the evidence applies to pretrial detention decisions. *See Weatherspoon v. Oldham*, No. 17-CV-2535, 2018 WL 1053548 at *8 (W.D. Tenn. Feb. 26, 2018); *Hill v. Hall*, No. 3:19-CV-00452, 2019 WL 4928915 at *17 (M.D. Tenn. Oct. 7, 2019). Other courts have reached a different conclusion, holding that procedural due process requires the State to provide clear and convincing evidence before a person may be detained pretrial. *Schultz*, 330 F. Supp. 3d at 1372 ("[B]efore ordering an unaffordable secured bond, a judge must find by clear and convincing evidence that pretrial detention is necessary to secure the defendant's appearance at trial or to protect the public."); *Caliste*, 329 F. Supp. 3d at 313 (clear and convincing evidence necessary to justify pretrial detention to account for the "vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court."); *Valdez-Jimenez*, 460 P.3d at 987 ("[G]iven the important nature of the liberty interest at stake [at a bail hearing], the State has the burden of proving by clear and convincing evidence that no less restrictive alternative will satisfy its interests in ensuring the defendant's presence and the community's safety").

Despite this split of authority, the Tennessee General Sessions Judges Conference concluded that the best practice "would be to adhere to a clear and convincing standard . . . ." Best Bail Practices Guide at 8. The Conference did not explain this recommendation, but this higher standard of proof is consistent with United States Supreme Court cases in other contexts where liberty is at stake. For example, the Supreme Court has mandated a clear and convincing evidentiary standard whenever "the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)). This standard must be satisfied before civil commitment, parental termination, deportation, and denaturalization. *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282–83 (1990) (collecting cases). And "[i]n the administration of criminal justice," the Supreme Court explained, "our society imposes almost the entire risk of error upon itself." *Addington*, 441 U.S. at 423–24. In the civil commitment context, the Supreme Court has observed that, because the government has "no interest" in unnecessarily confining people, the State cannot be harmed by the higher standard, which "impress[es] the factfinder with the importance of the decision," *id.* at 426. Consistent with that general principle, the *Salerno* Court emphasized that the preventive detention provisions in the Bail Reform Act did not facially violate due process, in part, because the government must "prove[] by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community." 481 U.S. at 751; *see also Foucha*, 504 U.S. at 81 (invalidating Louisiana's civil commitment statute, in part, because, "[u]nlike the sharply focused scheme at issue in *Salerno*," Louisiana's civil commitment statute did not require clear and convincing evidence that an individual "is demonstrably dangerous to the community").

Knox County General Sessions judges should require the State to establish clear and convincing evidence before a person is detained pretrial—a requirement that the General Sessions Judges Conference itself concluded is best practice—because requiring a lower standard would be inconsistent with the United States Supreme Court's prior decisions in other contexts when liberty

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that it was dealing not with the initial determination of whether release on recognizance or monetary bail was necessary, but rather the standard applicable when a defendant, having been afforded his constitutional right to bail, can be deemed to have forfeited that right.

has been at stake and in which it has uniformly required the State to satisfy a clear and convincing evidentiary standard.

4. Relying primarily on the allegations in the charging instrument to find that an arrestee poses an unreasonable risk to public safety

One of the most common errors we have witnessed is the General Sessions judges' practice of over-relying on the allegations against the arrestee in the charging instrument to conclude that she poses an unreasonable danger to the community during the pretrial period. A judge cannot satisfy narrow tailoring by simply relying on those allegations, however, because those allegations alone are simply one factor, among many, that a judge must consider under Tennessee law to determine whether an arrestee would pose an unreasonable danger to the public if released pretrial.

In *Torres*, Judge Corker concluded that Hamblen County violated substantive due process because people were detained pretrial without an individualized hearing and based solely on their "criminal charges and criminal history." 2020 WL 7706883 at *10. Those facts alone, the Court concluded, were insufficient to satisfy Tennessee law or the individualized consideration that due process requires before a person may be detained pretrial. *Id.*

Judge Corker's decision is consistent with the Ninth Circuit's reasoning in *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006). The Ninth Circuit, relying on *Salerno*, concluded:

> [t]hat an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody. Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt . . . [I]f a defendant is to be released subject to bail conditions that will help protect the community from the risk of crimes he might commit while on bail, the conditions must be justified by a showing that a defendant poses a heightened risk of misbehaving while on bail. The government cannot . . . short-circuit the process by claiming that the arrest itself is sufficient to establish that the conditions are required.

Id. at 874.

Contrary to the due process principles articulated in *Torres* and *Scott*, prosecutors routinely rely solely on the allegations in the charging instrument to argue for conditions of release and judges overly rely on those allegations to conclude that an arrestee should be detained pretrial. To satisfy due process, the State must instead put forth evidence beyond those allegations to establish that the arrestee poses an unreasonable danger to public safety.[9] The judge must then carefully

[9] In *Burgins*, the Tennessee Supreme Court addressed whether documentary proof alone could ever justify bail revocation. The Court held that the trial court may "consider factual testimony and documentary proof supporting the ground for revocation of pretrial bail." 464 S.W.3d at 310. However, the Court held that "the State must also present testimony from a corroborating witness or witnesses as to facts supporting the allegations contained in the documents." *Id.* at 310–11. If the State must

weigh this evidence against any competing considerations and then "restrict . . . an individual's liberty interest in as narrow a way as possible." *Torres*, 2020 WL 7706883 at *10. The failure to do so violates due process.

5. Failing to conduct ability-to-pay inquiries and imposing unaffordable money bail without conducting the inquiry that is required for an order of detention

As discussed above, Judge Corker held in *Torres* that arrestees have a "fundamental" right to pretrial liberty and that Hamblen County must therefore satisfy the "compelling state interest" test before detaining someone pretrial. 2020 WL 7706883, at *8 & n.5, *11.

In order to satisfy this test, General Sessions judges must first conduct an ability-to-pay hearing to determine whether any monetary amount will result in that person's pretrial detention. *See Torres*, 2020 WL 7706883 ("[T]he court imposing detention upon an indigent defendant must both expressly consider and make findings of fact on the record regarding the defendant's ability to pay the bail amount imposed.") (quoting *Hill*, 2019 WL 4928915, at *13); *Caliste*, 329 F. Supp. 3d at 312 (due process violated unless judges "conduct an inquiry into criminal defendants' ability to pay prior to pretrial detention" through the imposition of unattainable secured money bail).

The General Sessions judges must make an ability-to-pay finding because imposing unattainable secured money bail acts as a detention order. *See State ex rel. Hemby v. O'Steen*, 559 S.W.2d 340, 342 (Tenn. Crim. App. 1977) ("The petitioner has now been confined nearly three months due to his inability to secure bail set by the General Sessions Judge. This is tantamount to a denial of bail."); *see also Brangan*, 80 N.E.3d at 963 (Unattainable money bail "is the functional equivalent of an order for pretrial detention."); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) (unattainable money bail "less honest method of unlawfully denying bail altogether"); *Schultz*, 330 F. Supp. 3d at 1358 ("unattainable bond amounts . . . serve as *de facto* detention orders for the indigent"); *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."); *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).

A judge may only set an amount above what an arrestee can afford to pay if that judge first considers alternatives to pretrial detention and finds that continued pretrial detention is necessary because there is no less restrictive condition or combination of conditions of release that would reasonably ensure public safety or court attendance. *See Schultz*, 330 F. Supp. 3d at 1372 ("[B]efore ordering an unaffordable secured bond, a judge must find by clear and convincing evidence that pretrial detention is necessary to secure the defendant's appearance at trial or to protect the public."); *Caliste*, 329 F. Supp. 3d at 314 (granting summary judgment in favor of plaintiffs because judge failed to inquire into arrestees' "ability to pay," make "findings on the record regarding ability to pay," and consider "alternative conditions of release" other than pretrial detention); *In re Humphrey*, 482 P.3d at 1013 ("In order to detain an arrestee" on unattainable

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produce corroborating witnesses to revoke someone on pretrial release, it may need to do the same to justify initial pretrial detention on unattainable money bail since an individual's liberty interest at the bail setting are as strong—if not stronger—than at the revocation stage.

money bail, "a court must first find by clear and convincing evidence that no condition short of detention could suffice . . . Detention in these narrow circumstances doesn't depend on the arrestee's financial condition. Rather, it depends on the insufficiency of less restrictive conditions to vindicate compelling government interests: the safety of the victim more generally or the integrity of the criminal proceedings."); *Valdez-Jimenez*, 460 P.3d at 984–85 ("Because bail may be set in an amount that an individual is unable to pay, resulting in continued detention pending trial, it infringes on the individual's liberty interest. And given the fundamental nature of this interest, substantive due process requires that any infringement be necessary to further a legitimate and compelling governmental interest.").

Under state law, these alternatives could include conditions such as unsecured bond, a court date reminder, drug or alcohol treatment, a no-contact order, or release to a third-party custodian in a more minor case or house arrest, firearms surrender, pretrial supervision, or electronic monitoring in a more serious case. Tenn. Stat. Ann. § 40-11-118. Empirical evidence demonstrates that these alternatives are often as effective or more effective than secured money bail. *See, e.g.*, *Schultz*, 330 F. Supp. 3d at 1363 ("The evidence demonstrates that secured bail is no more effective than other conditions to assure a criminal defendant's appearance at court proceedings, and secured bail is not necessary to secure a criminal defendant's appearance."); *In re Humphrey*, 482 P.3d at 1012–13 ("Other conditions of release — such as electronic monitoring, regular check-ins with a pretrial case manager, community housing or shelter, and drug and alcohol treatment — can in many cases protect public and victim safety as well as assure the arrestee's appearance at trial.").

In short, due process prohibits an arrestee from being held in pretrial detention on unattainable money bail unless a judge makes an individualized determination that (1) the arrestee has the financial ability to pay, but nonetheless fails to pay, the amount of bail the judge finds reasonably necessary to protect public safety or court attendance; or (2) detention is necessary to protect public safety or ensure court attendance and the State offers clear and convincing evidence that no less restrictive alternative will reasonably vindicate those compelling State interests.

Despite these requirements, the Knox County General Sessions judges routinely violate due process because they do not make an express ability-to-pay finding that would allow them to know whether secured money bail will result in an arrestee's pretrial detention. *See In re Humphrey*, 482 P.3d at 1018 ("If a court does not consider an arrestee's ability to pay, it cannot know whether requiring money bail in a particular amount is likely to operate as the functional equivalent of a pretrial detention order. Detaining an arrestee in such circumstances accords insufficient respect to the arrestee's crucial state and federal equal protection rights against wealth-based detention as well as the arrestee's state and federal substantive due process rights to pretrial liberty."); *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (finding, in immigration bail context, that "[s]etting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings. There is simply no way for the government to know whether a lower bond or an alternative condition would adequately serve those purposes when it fails to consider those matters.").

For example, in setting secured money bail, one Knox County General Sessions Court judge recently said:

> I also believe that if Defendant makes these bonds, that there should be pretrial supervision at level three.

Ex. 2 at 38:2–4.

The judge violated due process because he never engaged in an ability-to-pay inquiry that would have allowed him to know whether the arrestee could, in fact, pay the bond amount. The judge's failure to conduct an ability-to-pay inquiry meant that he did not know basic information about the effect of his own decision to set money bail—namely whether that decision would result in the person's continued detention or release from custody. And because the judge lacked this basic information, he failed to satisfy Judge Corker's requirement that judges engage in narrow tailoring—which requires a judge to know whether his or her decision will result in the release of a potentially dangerous person or the detention of someone who does not pose an unreasonable risk of flight or to public safety.

Suggested Framework for Complying with Substantive and Procedural Requirements

Based on the routine constitutional violations and lack of uniformity we have seen with respect to bail hearings in Knox County, we strongly encourage the following basic framework that the General Sessions judges could adopt as a local rule that addresses the requirements laid out in *Torres* and the other authorities cited above:

A. Procedural Requirements. At any court appearance (i.e., initial appearance or bail hearing) that could result in pretrial detention or imposition of a secured bond that an arrested individual (the "individual") cannot pay, the individual must be given a meaningful, individualized hearing that includes:

1. Notice to the individual of the purpose of the hearing;[10]

2. The opportunity to be heard and present evidence;

3. Consideration of alternative, nonmonetary release conditions;

4. Consideration of the necessity of detention in relation to the government's compelling interests (i.e., protecting community safety and against non-appearance);

[10] As an example of one way in which the court might provide notice consistent with Due Process, Judge Long recently began a bond hearing with the following colloquy: "I've got in front of me [Name of Defendant] in case number [ ] in an aggravated assault where the bond had been set by a commissioner at 5,000 dollars. There's also two additional aggravated assault, each with 5,000 dollar bonds. And today he's set for a bond hearing, with the presumption being we're starting over at a level of 0, which would be an ROR bond, which is the first and least restrictive bond that would apply to [Defendant], and it's going to be the state's burden today to establish by clear and convincing evidence if the court should set a bond at any higher rate than that, and they can proceed."

5. Representation by counsel; and

6. Verbal or written findings of fact regarding these factors.

B. Timing. The meaningful, individualized hearing must take place within a reasonable time period after arrest, and no later than 48 hours from arrest.

C. Appointment of Counsel. Counsel must be provided free of charge at the hearing to any individual who is indigent, and to any individual who cannot secure paid counsel in time for the hearing.

1. During any court proceeding at which release conditions and/or detention are being considered, the defendant shall be allowed to communicate fully, expediently, and confidentially with their attorney before and during the proceeding.

D. Ability to Pay. The individual's social and economic circumstances shall be considered when setting conditions of release.

1. Generally. Prior to an individual being given a release condition that includes monetary bail, the individual shall receive an inquiry into their ability to pay—using their own resources—the full amount of the monetary bail.

2. Inquiry Process

   a. The purpose of the inquiry shall be to determine the amount of money the defendant can pay, using the defendant's own financial resources only as would be available within twenty-four (24) hours of bond being set.

   b. Such inquiry shall allow the prosecutor, defense counsel, and the individual the opportunity to provide the court with information pertinent to the individual's ability to pay monetary bail. This information may be provided by proffer and may include statements by the individual's relatives or other persons who are present at the hearing and have information about the individual's ability to pay monetary bail.

   c. All information regarding the individual's ability to pay money bond shall be admissible if it is relevant and reliable, regardless of whether it would be admissible under the rules of evidence applicable at criminal trials.

E. Protections Against Unaffordable Bond. Because the imposition of an unaffordable bond creates a *de facto* detention order, an individual's inability to post a secured bond prohibits judicial officers from imposing unaffordable secured bond except where a judge finds based on clear and convincing evidence that:

1. The individual poses a significant risk of non-appearance in court or a risk to public safety; and

2. No less restrictive alternative condition, or combination of conditions, can sufficiently address the specific risks identified, as documented by written or verbal findings addressing the insufficiency of each alternative.

3. The evidentiary burden is on the State to prove that the individual poses a risk of non-appearance or a risk to public safety, and that no less restrictive alternative condition or combination of conditions can address the specific risks identified.

We would like to resolve these concerns about Knox County's bail practices amicably and are reaching out to you in good faith to address the constitutional concerns we've outlined above. We look forward to hearing from you and welcome the opportunity to discuss these matters further.

Sincerely,

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** Not admitted in Tennessee; admitted pro hac vice in the Eastern District of Tennessee*

** *Not admitted in Tennessee*

cc: Criminal Court Judge Steven W. Sword
Criminal Court Judge Kyle Hixson
Criminal Court Judge Scott Green

Encl: Exhibit 1 – April 2, 2021 Letter from SPLC and CRC
Exhibit 2 – August 6, 2021 General Sessions Court Transcript
Exhibit 3 – Initial Appearance Documents

EXHIBIT 1

April 2, 2021

Judge Chuck Cerny
Judge Geoffrey P. Emery
Judge Patricia Hall Long
Judge Andrew Jackson, VI
Judge Tony W. Stansberry
Magistrate Christopher Rowe
Magistrate Ray Jenkins
Magistrate Dustin Dunham
Magistrate Robert Cole
Magistrate Sharon Frankenberg
Judicial Clerk Esther L. Roberts
Knox County General Sessions Court
400 Main Street
Knoxville, TN 37902

Tom Spangler
Knox County Sheriff's Office
400 West Main Street
Knoxville, TN 37902

Eric Lutton
District Public Defender
Community Law Office
1101 Liberty Street
Knoxville, TN 37919

Charme P. Allen
District Attorney
Office of the District Attorney General
P.O. Box 1468
400 Main Street, Suite 168
Knoxville, TN 37901

Larsen Jay
Commission Chair
Knox County Commission
400 Main St., Ste. 603
Knoxville, TN 37902

Dear Legal System Actors,

The Southern Poverty Law Center (SPLC) and Civil Rights Corps (CRC) are committed to ensuring that a person's pretrial freedom does not depend on their access to money. We have filed lawsuits in state and federal courts across the country challenging the use of secured money bail to detain impoverished people before trial. The majority of those lawsuits have resulted in settlements or preliminary injunctions ending the illegal use of money to keep people in jail without the robust procedures that must accompany any order of pretrial detention.[1] Others have

[1] *See, e.g.*, *Schultz v. State*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018); *Daves v. Dallas Cty.*, 341 F. Supp. 3d 688, 694 (N.D. Tex. 2018); *Walker v. City of Calhoun*, No. 4:15-CV-0170, 2017 WL 2794064, at *3 (N.D. Ga. June 16, 2017), *vacated in part by* 901 F.3d 1245 (11th Cir. 2018); *Edwards v. Cofield*, No. 3:17-CV-321, 2017 WL 2255775, at *1 (M.D. Ala. May 18, 2017); *ODonnell v. Harris Cty., Texas*, 251 F. Supp. 3d 1052 (S.D. Tex. Apr. 28, 2017); *Martinez v. City of Dodge City*, No. 15-CV-9344 (D. Kan. Apr. 26, 2016); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 768–69 (M.D. Tenn. Dec. 17, 2015); *Thompson v. Moss Point*, No. 1:15cv182, 2015 WL 10322003, at *1 (S.D.

resulted in millions of dollars in attorneys' fees. A federal court, for example, recently awarded $4.7 million in attorneys' fees and costs against Harris County, Texas, after CRC filed a lawsuit challenging its reliance on secured money bail.

We spent the last 2.5 years investigating Knox County's ("County") bail practices. We observed multiple initial appearances, arraignments, and preliminary hearings in front of magistrates, prosecutors, public defenders, and General Sessions Court judges; collected data and court transcripts; and interviewed magistrates, defense counsel, and community organizations. Our conclusion that the County's bail practices violate state and federal law is consistent with Knox County Judicial Magistrate Ray H. Jenkins's own assessment in a recent newspaper article.[2]

This letter summarizes a recent federal court injunction that we obtained against the sheriff in Hamblen County, Tennessee and why, following our investigation, we believe that Knox County's bail practices are also unconstitutional. Although we would prefer to work with you to resolve our concerns, we will explore all our options if the County does not take immediate steps to end the routine violation of people's constitutional and statutory rights.

I. Hamblen County

On November 30, 2020, the United States District Court for the Eastern District of Tennessee preliminarily enjoined Hamblen County's practice of detaining defendants before trial, without first affording them individualized bail hearings. *See Torres v. Collins*, No. 2:20-CV-00026-DCLC, 2020 WL 7706883 (E.D. Tenn. Nov. 3, 2020). Judge Clifton L. Corker's decision highlights why Knox County's bail practices similarly violate the Constitution.

Judge Corker's decision recognizes that the right "to be free from detention prior to trial" is a fundamental liberty interest. *Id.* at *11 (citation omitted). As the court explained, arrestees "are deprived of that fundamental right to liberty when they are confined to jail prior to their criminal trial without a hearing that takes into account their individualized circumstances." *Id.*

Accordingly, Judge Corker held that the Sixth and Fourteenth Amendments require courts to provide rigorous procedural protections and make appropriate factual findings before any person can be detained pretrial. These procedures include:

- A bail hearing held "within a reasonable period of time of arrest[,]" which is presumptively "within 48 hours[,]" *id.* at *12;

- Notice of the matters to be addressed at the hearing and "the need for information that would be pertinent to" the issue of bail, *id.* at *10;

Miss. Nov. 6, 2015); *Jones. v. City of Clanton*, No. 2:15cv34, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015); *Snow v. Lambert*, No. 15-567, 2015 WL 5071981, at *2 (M.D. La. Aug. 27, 2015); *Cooper v. City of Dothan*, No. 1:15- CV-432, 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015); *Pierce v. City of Velda City*, No. 4:15-cv-570, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015).

[2] Jamie Satterfield, *Judges brush aside bail laws, and it costs you*, knoxnews.com (Mar. 3, 2021).

- Representation by defense counsel, *see id.* 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.");

- An opportunity to present evidence and cross-examine the government's witnesses, *see id.* at *11;

- An inquiry into, and factual findings that address, the arrestee's ability to pay, *see id.* at *12;

- Meaningful consideration of "alternative conditions of release[,]" *id.*; and

- Findings made in writing or, "at a minimum," verbally on the record regarding the adequacy of such alternative conditions, *id.*

Judge Corker's decision is consistent with rulings from across the country, which have additionally required courts to satisfy the "clear and convincing" evidentiary standard before entering an order of detention. *See, e.g.*, *Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 460 P.3d 976, 987 (Nev. 2020); *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1372 (N.D. Ala. 2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 313 (E.D. La. 2018); *Kleinbart v. United States*, 604 A.2d 861, 872 (D.C. 1992). Indeed, the California Supreme Court reaffirmed last week that the federal Constitution confers on arrestees a "fundamental right to pretrial liberty" and a "federal equal protection right[] against wealth-based detention." *In re Kenneth Humphrey*, No. S247278, --- P.3d ----, 2021 WL 1134487, at *7, *10 (2021). The court explained that a judge may not impose secured money bail that results in a person's detention "unless the court has made an individualized determination that (1) the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect [the] victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests." *Id.*

As explained more fully below, Knox County's bail practices satisfy none of the minimal constitutional requirements identified in Judge Corker's or the California Supreme Court's rulings.

II. Knox County

In Knox County, hundreds of presumptively innocent people languish in pretrial detention everyday solely because they are unable to purchase their freedom. A 2019 report concluded that the jail is operating at 113% of its capacity and projected that it would be operating at 250% of its capacity by 2043.[3] The jail's size is driven—in large part—by the County's pretrial practices:

[3] *See* Justice Planners, *Jail Population & Justice System Analysis Draft Report*, at 1, 22 (Sept. 16, 2019) (forecasting an average daily jail population of 3,532.6 inmates for a jail with a capacity of 1,371 people).

more than 75% of people in custody are in pretrial detention.[4] We describe in more detail below why the County's pretrial practices violate state law and the federal Constitution.[5]

A. Warrant Application

Conditions of release in Knox County are initially set on an electronic warrant at the jail after an *ex parte* conversation between the arresting officer and magistrate. Magistrates often rely on information provided by law enforcement officers outside the four corners of the warrant application in setting conditions of release, but do not identify that information in the warrant or explain why any conditions are required. And, if financial conditions are imposed, a dollar amount is simply written on the warrant without further explanation. This "mak[es] the task of identifying error and challenging the bail amount unreasonably—and potentially insurmountably—difficult." *Schultz*, 330 F. Supp. 3d at 1373.

The magistrate's decision is sometimes aided by a risk assessment score, but the use of a risk assessment tool cannot substitute for the procedural protections—such as notice, counsel, and the opportunity to present and confront evidence—that Judge Corker held that the constitution requires. Moreover, the tool itself does not account for all of the statutory factors—including the person's employment, community, and family ties—that Tennessee law requires a magistrate to consider before setting conditions of release.[6] For example, magistrates have no information about an arrestee's financial conditions or family ties—even though Tennessee law requires magistrates to consider this information—or whether any financial condition of release will result in a person's detention. Indeed, when SPLC attorneys asked how monetary conditions are determined, one magistrate licked his finger and pointed to the sky, as if pulling a number out of thin air.

B. Initial appearance

Any person who is detained is entitled to an initial appearance under Tennessee law.[7] The purpose of the initial appearance is to inform the person of the charges; the right to counsel and the right to remain silent; and any conditions of release.

A person charged with a felony will appear before the magistrate through video conference from the jail the day he or she is arrested or the following morning. Magistrates conducting initial

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[4] *Id.* at 6, 9.

[5] Although bail practices in Knox County have changed somewhat during the COVID pandemic, bail hearings continue to violate state law and the federal Constitution. Moreover, the changes in practice are set to expire on April 30, 2021 and there is no indication that they will become permanent. *See* 06/12/20 General Temporary Revised Order Regarding Pre-Trial Detention; 12/12/20 General Temporary Second Revised Order Regarding Pre-Trial Detention First Extension.

[6] Tenn. Code Ann. § 40-11-115 (enumerating eight factors that magistrates "shall consider" when determining whether to release an arrestee on her own recognizance); *see also* Tenn. Code Ann. § 40-11-118 (identifying nine factors that magistrates "shall consider" when determining the amount of bail necessary to reasonably ensure court attendance and public safety).

[7] Tenn. R. Crim. P. 5(d)

appearances do so electronically, with the arrestee remaining in jail and the magistrates appearing via Skype from the basement of the Knox County courthouse.[8]

A detained person charged with a misdemeanor will either appear before the magistrate through video conference from the jail or in person the following morning before a General Sessions Court judge.

All the hallmarks of a constitutionally adequate bail hearing are absent from the initial appearance and—except in unusual circumstances—bail is not reviewed at all:

- The arrestee is not represented by counsel;
- There is no opportunity to present or confront evidence;
- No inquiry—or findings—are made about the arrestee's ability to pay money bail or the suitability of alternative conditions of release;
- Magistrates and the General Sessions Court judges do not satisfy a clear and convincing evidentiary standard when setting conditions of release; and
- Findings are not made in writing—or on the record—about why particular conditions of release are required or why alternative conditions are inadequate.

Misdemeanor defendants' initial appearances before the General Sessions Court Judges are particularly troubling. As a matter of practice, most General Sessions Judges do not review conditions of release for misdemeanor defendants at the initial appearance—a practice that Judge Corker found to be unconstitutional in his order enjoining Hamblen County's bail practices:

> At this point, the general sessions judge knows the arrestee is indigent and has appointed an attorney. He conducts no individualized hearing on the arrestee's bail conditions and instead leaves them detained under the same bail conditions that were set ex parte until he recalls the case for a preliminary hearing. This refusal to address bail violates Plaintiffs' substantive due process rights. The court imposing detention upon an indigent defendant must both expressly consider and make findings of fact on the record regarding the defendant's ability to pay the bail amount imposed and whether non-monetary alternatives could serve the same purposes as bail . . . Rather than conducting an individualized hearing where the court would consider the various interests of both the state and the individual, the court simply leap frogs over the bail hearing and schedules a preliminary hearing that very well may be 14 days later. The effect of this is to leave an arrestee in jail

[8] The hearings are generally not open to the public, which raises serious First and Sixth Amendment concerns about the public's right to observe these judicial proceedings. *In re Search of Fair Fin.*, 692 F.3d 424, 429 (6th Cir. 2012); *Waller v. Georgia*, 467 U.S. 39 (1984).

with bail remaining as it was initially set, having no consideration given to their ability to pay or any alternative conditions of release.

Torres, 2020 WL 7706883, at *10.

Indeed, rather than evaluating a person's conditions of release, General Sessions Court judges routinely give misdemeanor defendants a choice between a public defender—and continued pretrial detention—or a guilty plea and time-served in jail. This violates the Sixth Amendment right to counsel that Judge Corker held is applicable to bail hearings. *Torres*, 2020 WL 7706883, 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."). The following exchange is typical:

JUDGE CERNY: Jennifer Tweed? Ms. Tweed, you're charged with panhandling. You understand that?
MS. TWEED: Yes, sir.
JUDGE CERNY: Two hundred and fifty dollar bond. Can you make it?
MS. TWEED: No, sir.
JUDGE CERNY: Free lawyer or time served?
MS. TWEED: Time served.
JUDGE CERNY: How do you plead?
MS. TWEED: Guilty.
JUDGE CERNY: I find you guilty. Time served. Waive the costs.

Because of these practices, every year hundreds of people agree to uncounseled pleas simply to get out of jail:

JUDGE CERNY: Mr. Davidson, you're charged with public intoxication -- you got two of those -- and indecent exposure and a littering. You understand all that?

MR. DAVIDSON: Yes.

JUDGE CERNY: Can you make bond?

MR. DAVIDSON: No, sir.

JUDGE CERNY: You want to get a free lawyer on your case or plead guilty to time served?

MR. DAVIDSON: Plead guilty, time served.

JUDGE CERNY: I find you guilty of public intoxication --

MR. DAVIDSON: Do I get out of jail today?

Those misdemeanor arrestees who do not plead guilty often languish in jail for weeks before any opportunity to argue for alternative conditions of release—even though many federal courts have required constitutionally adequate bail hearings to be held within 48 hours after arrest. *See Torres*, 2020 WL 7706883, at *13.

C. Preliminary Hearing

Bail practices are similar for felony defendants. In Knox County, the first opportunity for a felony defendant to argue for alternative conditions of release is the preliminary hearing scheduled up to two weeks following the individual's arrest. Even then, bail is only reviewed if an arrestee files a motion for a bond reduction and the hearing itself does not afford all the procedural protections that Judge Corker found to be constitutionally required.[9]

III. Empirical evidence and cost

A. Money bail does not advance the County's interests

Knox County's bail practices are not only unconstitutional, but also bad public policy. Empirical evidence demonstrates that there is no significant relationship between secured money bail and court attendance. An analysis of criminal cases in Philadelphia and Pittsburgh found that

[9] Pursuant to local practice, a judge will only consider a motion for a bail reduction if that motion is in writing and the district attorney's office has been given five days to respond.

"money bail has a negligible effect or, if anything, *increases* failures to appear."[10] A study conducted in Colorado found that, *regardless of the defendant's risk level*, "unsecured bonds offer the same likelihood of court appearance as do secured bonds."[11]

Nor does secured money bail make Knox County safer. Several studies demonstrate that even two or three days in pretrial detention increases the likelihood that person will commit additional crimes when released.[12] Over the long term, pretrial detention has been shown to *increase* crime and diminish public safety.[13]

B. Money bail harms defendants and the community

Knox County's pretrial practices are devastating to residents, as evidenced by numerous empirical studies showing that wealth-based, pretrial detention leads to tremendous human and economic costs.

Pretrial detention causes instability in employment, housing, and care for children and other dependent relatives. Even a few days in pretrial detention can cause a person to lose housing, be removed from a shelter list, be terminated from a job, be exposed to unsafe and unsanitary conditions at the jail, and may result in serious trauma to dependent children.

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[10] *See*, *e.g.*, Arpit Gupta, Christopher Hansman, & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization* 21 (May 2, 2016) (emphasis added), *available at* https://goo.gl/OW5OzL.

[11] Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 11 (October 2013), *available at* https://goo.gl/UENBKJ.

[12] *See* Department of Justice, National Institute of Corrections, *Fundamentals of Bail* 15-16 (2014), *available at* https://goo.gl/jr7sMg ("[D]efendants rated low risk and detained pretrial for longer than one day before their pretrial release are more likely to commit a new crime once they are released, demonstrating that length of time until pretrial release has a direct impact on public safety."); Christopher T. Lowenkamp *et al.*, Laura & John Arnold Found., *The Hidden Costs of Pretrial Detention* 3 (November 2013), *available at* https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf (studying 153,407 defendants and finding that "when held 2–3 days, low risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours"); Paul Heaton *et al.*, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 768 (2017), *available at* https://goo.gl/Waj3ty ("While pretrial detention clearly exerts a protective effect in the short run, for misdemeanor defendants it may ultimately service to compromise public safety," and finding that in a representative group of 10,000 misdemeanor offenders, pretrial detention would cause an additional 600 misdemeanors and 400 felonies compared to if the same group had been released pretrial).

[13] *See* Gupta, et al., *supra* note 10, at 3 ("We document that the assessment of money bail increases recidivism in our sample period by 6–9% yearly.").

Detention on unaffordable money bail also increases the likelihood of conviction.[14] Studies show that those detained pretrial face worse outcomes at trial and sentencing than those released pretrial, even when charged with the same offense.[15] Controlling for other factors, those detained pretrial will be given longer jail sentences.[16] Detained defendants are more likely to plead guilty just to shorten their jail time, even if they are innocent,[17] and they have a harder time preparing a defense, gathering evidence and witnesses, and meeting with their lawyers. A person's ability to pay money bail thus has an irreparable impact on the outcome of a criminal case and the attendant costs to the criminal justice system.

For all the harms that are caused by unaffordable money bail, it is still the *more* expensive option.[18] Without relying on a person's ability to afford cash bail, pretrial supervision programs can save taxpayer expense while maintaining high public safety and court appearance rates.

C. Alternative models are effective

Other jurisdictions throughout the country do not keep people in jail based on their wealth. Instead of relying on money, these jurisdictions release arrestees with a mix of unsecured financial conditions, non-financial conditions, and pretrial supervision practices and procedures that can help increase court attendance and public safety without requiring detention.

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[14] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 18 (May 2, 2016), *available at* https://goo.gl/riaoKD (finding that a person who is detained pretrial is 13% more likely to be convicted and 21% more likely to plead guilty than a person who is not detained); *see also* Gupta, et al., *supra* note 10, at 15, 19 (finding a 12 percent increase in the likelihood of conviction using the same data).

[15] Christopher T. Lowenkamp *et al.*, Laura & John Arnold Found., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* 4 (November 2013), *available at* https://goo.gl/FLjVZP (those detained for the entire pretrial period are more likely to be sentenced to jail and prison—and receive longer sentences—than those who are released at some point before trial or case disposition).

[16] Lowenkamp et al., *supra* note 15, at 4.

[17] Stevenson, *supra* note 14 at 18 ("Pretrial detention leads to an expected increase of 124 days in the maximum days of the incarceration sentence, a 42% increase over the mean."); *see also* Gupta, et. al, *supra* note 10, at 18–19 ("Criminal defendants assessed bail amounts appear frequently unable to produce the required bail amounts, and receive guilty outcomes as a result. Entered guilty pleas by defendants unwilling to wait months prior to trial and unable to finance bail likely contribute to this result.").

[18] *See, e.g.*, Pretrial Justice Institute, *Pretrial Justice: How Much Does It Cost?* (Jan. 11, 2017), *available at* https://goo.gl/0lLtLM ("It has been estimated that implementing validated, evidence-based risk assessment to guide pretrial release decisions could yield $78 billion in savings and benefits, nationally."); United States Court, *Supervision Costs Significantly Less than Incarceration in Federal System* (July 18, 2013), *available at* https://goo.gl/dJpDrn (In 2012, "[p]retrial detention for a defendant was nearly 10 times more expensive than the cost of supervision of a defendant by a pretrial services officer in the federal system.").

For example, Washington, D.C., releases more than 94% of all defendants without financial conditions of release, and no one is detained on secured money bail that they cannot afford.[19] Empirical evidence shows that nearly 90% of released defendants in D.C. make all court appearances, nearly 90% complete the pretrial release period without any new arrests, and 98-99% consistently avoid re-arrest for violent crime.[20]

Several other jurisdictions have joined D.C. in recent years in moving away from reliance on secured money bail. After Harris County, Texas, decided to abolish secured money bail for most misdemeanor defendants, an independent monitor found that the change did not lead to an increase in arrests.[21] New Jersey, too, has virtually ended the use of secured money bail without any impact on court attendance or public safety: since January 1, 2017, of 129,387 total eligible defendants, courts have required money bail only a total of 191 times.[22] In 2018, defendants released pretrial "appear[ed] in court at a nearly 90 percent rate" and fewer than 1 percent of people released pretrial were re-arrested and charged with a serious crime.[23] The trend *away* from reliance on secured money bail is growing: Illinois recently enacted legislation that "will fully end the use of money bond, making it the first state to explicitly and entirely end a system of wealth-based freedom that has not only disproportionately affected low-income populations but also communities of color."[24]

IV. Video Hearings

In addition to the parallels between Knox County's practices and those held unconstitutional in the Hamblen County case, we believe that the Knox County General Sessions Court's use of video conferencing technology for initial appearances, *see supra* Section II.B, violates both the public's First Amendment right to access public hearings and defendants' Sixth

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[19] *See* D.C. Code § 23-1321; *see also* Pretrial Services Agency for the District of Columbia, *Release Rates for Pretrial Defendants within Washington, DC available at* https://goo.gl/VSDeDk ("In Washington, DC, we consistently find over 90% of defendants are released pretrial without using a financial bond").

[20] *See* Pretrial Services Agency for the District of Columbia, *Outcomes for Last Four Years*, *available at* https://www.psa.gov/?q=node/558; Pretrial Just. Inst., *The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth* 2 (2009), *available at* https://goo.gl/6wgPM8 ("The high non-financial release rate has been accomplished without sacrificing the safety of the public or the appearance of defendants in court. Agency data shows that 88% of released defendants make all court appearances, and 88% complete the pretrial release period without any new arrests.").

[21] Jolie McCullough, *Report: Harris County's bail reforms let more people out of jail before trial without raising risk of reoffending*, The Texas Tribune (Sept. 3, 2020), https://www.texastribune.org/2020/09/03/harris-county-bail-reform/.

[22] Glenn A. Grant, *Report to the Governor and the Legislator* 26 (2020), *available at* https://njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=AF6

[23] *Id.* at 6, 7.

[24] *See* Safia Samee Ali, *Did Illinois get bail reform right? Criminal justice advocates are optimistic*, nbcnews.com (Feb. 15, 2021), *available at* https://www.nbcnews.com/news/us-news/did-illinois-get-bail-reform-right-criminal-justice-advocates-are-n1257431.

Amendment rights to a public trial, effective representation, and confrontation of witnesses. Though the COVID-19 pandemic has necessitated emergency use of video appearances for some court proceedings, General Sessions Magistrates were relying heavily on this technology prior to the pandemic.

Court hearings are presumptively public under both the First and Sixth Amendments. Any closure of the court must be "'essential to preserve higher values'" and "'narrowly tailored to serve that interest."' *In re Search of Fair Fin.*, 692 F.3d 424, 429 (6th Cir. 2012) (quoting *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 9-10 (1986)) (detailing the First Amendment standard); *see also Waller v. Georgia*, 467 U.S. 39 (1984) (The Sixth Amendment "is no less protective of a public trial than the implicit First Amendment right of the press and public."). The General Sessions Court's routine practice of holding felony initial appearance hearings over video, with the Magistrate alone in a locked room on the basement floor of the courthouse and the defendant appearing from a common area in the jail, did not meet these constitutional standards.

But even if the Court were to remedy the closed nature of these video hearings by live-streaming every hearing to the public, pervasive use of video hearings—either for bail determinations or other aspects of the criminal case—undermines the entire justice system and numerous constitutional protections. Nearly 20 years ago, the Federal Courts rejected a proposed rule that would have allowed for live testimony to be presented via videoconference during a defendant's trial after numerous judges, including Supreme Court Justice Antonin Scalia, stated that the proposed change was "of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution."[25] Cook County, Illinois, ended its practice of remote video bail hearings after a lawsuit was filed alleging that the hearings violated due process and denied defendants the effective assistance of counsel.[26] *See Mason v. County of Cook*, No. 06 C 3449 (N.D. Ill. June 26, 2006).

Video appearances also undermine the judgment of decisionmakers:

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[25] J. Antonin Scalia, Statement on Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure 1-2 (2002), *available at* https://www.uscourts.gov/sites/default/files/fr_import/CR2002-09.pdf ("As we made clear in [*Maryland v.*] *Craig*, [497 U.S. 836,] 846-847 [(1990)], a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image.").

[26] "While the defendant is in a remote location, his lawyer cannot answer questions, and, perhaps most importantly, she cannot hear any variances her client has to the information provided by the Pretrial Services Representative or the Assistant State's Attorney. The attorney renders assistance at bail review hearings by listening to her client's input and forming proffers and arguments based on the information he provides. Counsel may be familiar with the case and the anticipated arguments at the hearing, but the client frequently has firsthand information about the nuances of the information the judge is to consider, such as his 'family ties, employment status and history, financial resources, . . . length of residence in the community, and length of residence in [the s]tate.'" Edie Fortuna Cimino, et al., *Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process*, 45 U. Balt. L.F. 56, 81 (2014) (quoting Maryland Rule of Criminal Procedure regarding relevant considerations at a bail hearing).

> Where the defendant is "present" for a proceeding as no more than an image on a video monitor, there is a diminution of the court's ability to gauge such matters as the defendant's credibility, his competence, his physical and psychological wellbeing, his ability to understand the proceedings, and the voluntariness of any waivers of rights that the defendant may be called upon to make—all of which raise serious procedural due process concerns.[27]

Judges and jurors are less likely to find defendants or witnesses only testify via video credible, likeable, intelligent, and truthful.[28] These psychological effects of video testimony have real world consequences: an analysis of the Cook County remote video bail hearings showed "a sharp increase in the average amount of bail set in cases subject to the CCTP [closed circuit television procedure], but no change in cases that continued to have live hearings," with an average "increase of roughly $20,958 or 51%."[29] During one of our observations of video appearances in Knox County, a magistrate told us that he had difficulty hearing defendants over video and mouthed "Wah Wa Wa Wah"—imitating the sounds adults make when speaking in Charlie Brown.

In light of the numerous legal and ethical issues with video hearings, we were concerned to learn that the County Commission recently passed a resolution authorizing Sheriff Spangler to build a $1.5 million facility at the jail for video court appearances.[30] Like the failed Cook County video hearing system, Knox County's wholesale adoption of video hearings appears to lack any research "to evaluate its likely or actual effect."[31] Furthermore, long-term entrenchment of video hearings at this late stage in the COVID-19 pandemic is not justifiable from a public health perspective. Instead, this investment in remote video hearings appears to be a matter of government convenience at the expense of constitutional protections for defendants and the public: the Commission that approved the new Video Courtroom Facility has begun meeting in person in acknowledgement of the "continued decrease in COVID-19 case counts and increases in vaccinations across the County."[32]

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[27] Shari Seidman Diamond, et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869, 879 (2010).

[28] Cimino, et al., *supra* note 26, at 71–72 (citing Bjorn Bengtsson, et al., *The Impact of Anthropomorphic Interfaces on Influence, Understanding, and Credibility*, 32 Ann. Haw. Int'l. Conf. Systems Sci. 1, 11-12 (1999); Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 Law & Pol'y 211, 221-22 (2006)).

[29] Diamond, et al., *supra* note 27, at 870, 892.

[30] Knox Cty. Comm'n, Comm'n Minutes 30-31 (Feb. 22, 2021), https://www.knoxcounty.org/clerk/CommMinutes/2021/02-22-2021.pdf.

[31] *See* Cimino, et al., *supra* note 26, at 884.

[32] Larsen Jay, *MARCH MEETING PREFERENCE (in-person vs virtual)*, Knox Cty. TN Comm'n F. (Feb. 26, 2021, 11:02 AM), https://knoxcounty.org/commission/commissionforum/viewtopic.php?f=2&t=368&sid=710df9f3475c3ade73f1986499be0d3c.

V. Conclusion

We would prefer to work collaboratively with you to address our concerns about Knox County's bail practices. However, we will explore all our options if immediate steps are not taken to bring Knox County's bail practices in line with state law and the federal Constitution. We are attaching for your reference Judge Corker's memorandum opinion and order issuing a preliminary injunction against the Hamblen County sheriff as well as the recent decision from the California Supreme Court. We hope that these opinions provide a helpful starting point for further dialogue about Knox County's bail practices.

We look forward to hearing from you and working together.

Sincerely,

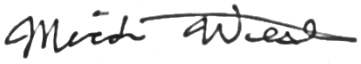

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EXHIBIT 2

KNOX COUNTY GENERAL SESSIONS COURT

FELONY COURT JUDGE CERNY

SUBBING FOR JUDGE STANSBERRY

HEARING FOR JAMES EDWARD WEBB

(HEARING 2)

FRIDAY, AUGUST 6, 2021

incidentally doing this right does require re-reading it until you actually have it committed to memory. You know, and there are some people who are smarter than I am, who can read these things one time and have them committed to memory. I have to re-read stuff a little bit, you know.

So, until I get that information -- and when you're in the posture such that the person you're calling upon to make this ruling doesn't have information, no matter how you slice it, you know, you can say, well, it's their burden. You know, that's fine. But if I don't have information or the Magistrate doesn't have the information, remember, Mr. Enn (phonetic) takes a position, Magistrate quote/unquote did his or her job and set these bonds appropriately, and now it's incumbent upon defendant to convince me to change the bonds. And I understand we're arguing that. I don't know for sure, I use the term placeholder bonds, I don't know for sure what happened in this particular case. It looks like this is the first appearance. And it looks like these bonds may have been, you know, just that knowing that

there will be a 48-hour bond here, I don't know.

So, the bottom line is, if you want me to know something, then you have to present it. Right now it looks like we've got serious offenses. I'm going to review the narratives in the warrants. I'm going to scan the statutes real quick. But I don't know anything but what he's charged with, and let's take that one logical step further. That puts me in the position of doing de facto what Magistrates have historically done, which is, looks serious, better add a couple of zeroes.

You know, I don't agree that that's the right thing to do either, because I don't want people who might be charged with something that they might have a defense to, but they are poor and so they rot in a pokey till we can get around to it. I absolutely don't want that. But having some sort of moral conviction to try and do the right thing doesn't necessarily mean that we're going to defaulting to doing the right thing because we have good intentions.

So, let's do this. Let me at least read the narrative, let me at least read the statute before I

like to. And everybody has an interest in what the five of us are going to do, each of us individually. And to be honest, the right thing is for all of us to be consistent, of course.

You know, at this stage, as a practical matter, if you want some relief from any judge, myself included, tell me some good reason to do it, that wouldn't hurt.

So, you know, we can go through the semantics stuff, we can go through the academic stuff, we can figure out which of these cases is controlling the Sixth Circuit. It looks like it's, you know, based on reading the yellow stuff, it looks like it's pretty well-reasoned, but I don't know if it should be distinguished based on the stuff that's not yellow. You know, I haven't read the whole thing. And so it's smart enough to bring the yellow stuff that supports his position. But, you know, does the Sixth Circuit thing control? Does the Supreme Court stuff is actually controlling the circumstance? Is that more applicable to us? Do we have some State cases?

You know, if I'm called upon to do this in

one-and-a-half hour hearing, looks like it's half hour, a little over half an hour. And then hopefully get it right, in case there is ever an appeal and what I say in this tape gets reviewed by smarter judges than myself who get 8, 10 weeks to work on it. I honestly don't know who's got the burden of proof right now. But if you want me to do something, you better show something to me, to give me an excuse to do it, respectfully.

So, is there a practical burden on you? Yeah, uh-huh.

PUBLIC DEFENDER: Okay. I understand. So, what I would proffer at this point is information that you can mostly glean from the record. It's that Mr. Webb is a very young man. You can see that visibly, but also his information, his date of birth will indicate that he is 22 years old. He does have a high school diploma. He has lived in Knoxville all his life. His parents live here, his grandparents live here, his aunts and uncles live here.

If he were released to be living with his grandmother at 3000 Sunset Drive. He has no arrest

interesting. I have nothing to use as some kind of guide for how we're going to do it except for the ping pong match that typically occurs when two passionate advocates are busting their tail, trying to get the best possible -- not right at this minute, but thank you.

My bench clerk was passing me a note indicating that he could get me the 8/12 C misdemeanor warrants if that was needed. I think I understand what I would learn from them already.

So, this is what I believe about what I've heard and this is what I believe generally. I think it would be unfortunate if in this country poor people can't be on release status on those same facts and circumstances where a rich person could be on release status. And so, as a result, monetary bond in this B felony, I'm reducing. With all due respect to the State's argument, I'm changing it to $5,000. I'm leaving the C felony $5,000 as it is. I'm not changing the domestic assault $1,000 bond at this time. This misdemeanor case, $5,000 -- pardon me -- $500 bond, changing those to ROR. And I understand

that this should be indicated as over State's objection. I also believe that if Defendant makes these bonds, that there should be pretrial supervision at level three.

I'm signing up, signing my name, taking responsibility for this ruling. I'm going to assume that Mr. Webb will not be able to make these bonds. I've tried to set him lower in case his family can help.

DISTRICT ATTORNEY: 24 is still a good day, Your Honor?

THE COURT: We have to look at that, don't we?

DISTRICT ATTORNEY: But I believe prior (inaudible).

THE COURT: August 24, is that a good day for everybody?

PUBLIC DEFENDER: Could we do it on the 25 or the 26?

THE COURT: Are you okay with 25?

DISTRICT ATTORNEY: (Inaudible) I work this around.

CERTIFICATE OF TRANSCRIBER

I, JIMMY JACOB, do hereby certify that this transcript was prepared from audio to the best of my ability.

I am neither counsel for, related to, nor employed by any of the parties to this action, nor financially or otherwise interested in the outcome of this action.

September 29, 2021

DATE JIMMY JACOB

EXHIBIT 3

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE

Vs.

Andrue Thacker
DEFENDANT

DOCKET NO(s) @ 1417754

ORDER APPOINTING LEGAL COUNSEL

It appearing, based upon the Affidavit of Indigency filed in this cause, and after due inquiries made, that the defendant is an indigent person and thereby qualifies for appointed legal counsel.

It is therefore, Ordered that the (District Public Defender) Mark Stephens, Attorney at Law, is hereby appointed as counsel for the defendant as provided by law.

_____ In accordance with T.C.A. §40-14-103(b), the defendant is assessed a Court Appointed Counsel Administrative Fee in the amount of $_____, which shall be paid into the General Sessions Court Clerk's Office on or before _____. The Clerk shall receive a commission of five percent (5%) for collecting and disbursing said payments.

__✓__ In accordance with T.C.A. §40-14-103(b), the Court finds that the defendant lacks financial resources sufficient to pay the Court Appointed Counsel Administrative Fee.

_____ The Court having previously assessed the Court Appointed Counsel Administrative Fee in a pending case, said fee is hereby waived as to this appointment.

This 17 day of October, 20 21.

Mary Trukenbrod
JUDGE/MAGISTRATE

ORDER FOR PARTIAL REIMBURSEMENT OF COST OF COURT APPOINTED COUNSEL

The defendant is Indigent but able to partially reimburse the State's expense in providing him/her Court Appointed Counsel. It is therefore, Ordered that the defendant pay into the office of the Clerk of the Court, the sum of $_____ per _____, until the sum of $_____ is paid. The Clerk shall receive a commission of five percent (5%) for collecting and disbursing payments.

This _____ day of _____, 20_____.

JUDGE/MAGISTRATE

DETERMINATION OF NON-INDIGENCY

It appearing, based upon the Affidavit of Indigency filed in this cause, and after due inquiries made, that the defendant is not an Indigent person as defined by law. It is Ordered and Adjudged that the defendant does not qualify for Court Appointed Counsel.

This _____ day of _____, 20_____.

JUDGE/MAGISTRATE

IN GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE DOCKET NO. @1417754

VS. Andrue Thacker

UNIFORM AFFIDAVIT OF INDIGENCY

Part I

Comes the defendant, subject to the penalty and perjury, makes oath of the following facts

1. Full Name: Andrue Thacker 2. Any other names ever used: ______
3. Address: 1705 [illegible] Drive
4. Telephone No(s): (Home) 865-356-0463 (Work) ______ (Email) ______
5. Are you currently employed? ☑ Yes ☐ No Where? ______
6. Income $______ ☐ Weekly ☐ Bi-weekly ☐ Monthly 7. Date of Birth: 11/02/1990
8. Do you receive government assistance or pensions? ☐ Disability/SSI ☐ AFDC ☐ Other: ______
9. Do you own property? ☐ Yes ☒ No What kind of property do you own? ☐ House ☑ Car ☐ Other: ______
10. Are you or your family going to be able to post bond and/or hire an attorney? ☐ Yes ☒ No
11. Are you now in custody? ☒ Yes ☐ No If so, how long have you been in custody? ______

If a defendant is in custody, unable to make bond and the answers to questions one (1) through eleven (11) make it clear that the defendant has no resources to hire a private attorney, skip Part II and complete Part III. If Part II is to be completed, do not list items already listed in Part I.

Part II

12. Name and ages of all dependents: Name: ______ Age: ______ Relationship: ______
Name: ______ Age: ______ Relationship: ______
Name: ______ Age: ______ Relationship: ______
13. I have met with the following lawyer(s), have attempted to hire said lawyer(s) to represent me, and having been unable to do so:
Name: ______ Address: ______
14. All income from all sources, including, but not limited to wages, interest, gifts, AFDC, SSI, Social Security, retirement, disability, pension, unemployment, alimony, worker's compensation, etc.:$ ______ per ______ from:
$ ______ per ______ from ______
$ ______ per ______ from ______
15. All money available to me from any source: ☐ Cash ☐ Checking ☐ Savings ☐ CD Accounts-give Acct. No. & balances
______
16. Debts owed to me:$ ______ Credit Card(s): Account Numbers, Balance, Credit Limit, Visa/MasterCard, etc.
______
17. All vehicles/vessels/real estate owned by me, solely or jointly, within the last six months (including, but not limited to cars, trucks, motorcycles, farm equipment, boats, land, lots, houses, mobile homes, etc.)
______ Value $ ______ Amt. Owed: ______
______ Value $ ______ Amt. Owed: ______
______ Value $ ______ Amt. Owed: ______
18. All assets or property not already listed owned within the last six months or expect in the future: ______
Value: ______ $ Amt. Owed: ______
19. The last income tax return filed was the year ______, and it reflected a net income of $ ______. I will file a copy if required
20. I am out of jail on bond of $ ______ made by ______, the money to make bond, was paid by ______

Part III

21. Acknowledging that I am still under oath, I certify I have listed in Parts I and II all assets in which I hold or expect to hold any legal or equitable interest.
22. I am financially unable to obtain the assistance of a lawyer and request the Court to appoint a lawyer for me.
23. I understand that it is a Class A Misdemeanor for which I can be sentenced to jail for up to 11 months and 29 days or be fined up to $2500.00 or both if I intentionally or knowingly misrepresent, falsify, or withhold any information required in the affidavit. I also understand that I may be required by the Court to produce other information in support of my request for an attorney.

This ______ day of ______, 20 ______. [signature]
Defendant

Sworn to and subscribed before me, this 17 day of Oct, 20 21.

[signature]
JUDGE/MAGISTRATE

JUDGMENT

IT IS THE JUDGMENT OF THE COURT THAT:

____ The defendant is found guilty of the offense of

_____

_____

_____

_____

_____

AND the defendant shall pay costs.
[ ] Execute on Costs.

____ Defendant is sentenced to be confined in the Knox County Detention Facility or equivalent institution for a period of _____

_____

_____

____ Defendant shall pay a fine of
$_____

____ Defendant shall pay restitution of
$_____

____ LIC. Taken in Court_____

____ LIC. REV. _____

____ Supervised probation thru the Knox County Probation Office. [ ] Until Restitution Paid.

____ The charge is dismissed.

____ The charge will be dismissed upon payment of costs by the defendant.

____ The defendant is bound to the Grand Jury pursuant to the attached record of Preliminary Examination.
Bond $ _____.

____ Diversion_____

_____

____ Other: _____

_____

_____

_____

_____

This the _____ day of _____ _____

_____
Judge

____ Defendant's probation is/is not revoked due to following conditions:

_____

_____

_____ _____
Judge Date

NO. @1417754

STATE OF TENNESSEE
VS
ANDRUE TAYLOR THACKER (ALIAS) - IDN 1116995

1705 DONINGHAM DR,
KNOXVILLE, TN 37918

Offense:
CRIMINAL TRESPASS, TCA Section 39-14-405, CLASS C MISDEMEANOR

Issued this 16th day of October, 2021.

RETURN

Came to hand and executed by arresting the defendant this 15th day of October, 2021 at 08:59 AM

KPD _____ 1710

Case Setting:
10-18-21 M/BH

_____

_____

_____

_____

_____

_____

_____

_____

Bail is set at: $1000 Appearance Conditions:
DEF MUST STAY AWAY FROM FATHER'S RESIDENCE.

Bail set this 17th day of October, 2021.

_____
SHARON D FRANKENBERG, Magistrate

Atty. for Def. Mark Stephens

Officer available court dates after: 11/14/2021

Co-Defendants: CRYSTAL LEANNE BAKER

WAIVER OF ATTORNEY

I understand that I have the right to an attorney and that if I am indigent and cannot afford an attorney the Court will appoint an attorney to represent me. It is my desire to waive my right to an attorney in this case.

_____

WAIVER AND PLEA

I understand that I have the right to be tried in Criminal Court upon an indictment or presentment by the Grand Jury. I also have the right to a trial by jury. I desire to waive these rights and to be tried in General Sessions Court on this warrant.

I Plead _____ to the charge on this warrant.

_____
Signature

NOTICE: The Tennessee rules of the Criminal procedure provide that there is no appeal from a plea of guilty, except as to sentence.

Mackey & McClintock enhancement explained

_____

The District Attorney General does not object to this case being tried in General Sessions Court.

_____
Signature

___ This warrant is canceled at the request of the District Attorney General.

___ This warrant is amended to charge the offense of:

_____

___ By agreement of the parties.

___ By motion of the STATE.

_____ _____
Date Judge

AFFIDAVIT OF COMPLAINT

DEFENDANT: **ANDRUE TAYLOR THACKER (ALIAS) - IDN 1116995**

AFFIANT: TRAVIS EDWARD SHULER - IDN 450799

THE AFFIANT, AFTER FIRST BEING DULY SWORN ACCORDING TO LAW, STATES THAT A CRIMINAL OFFENSE HAS BEEN COMMITTED IN KNOX COUNTY, TENNESSEE, BY THE DEFENDANT. FURTHER, AFFIANT MAKES OATH THAT THE ESSENTIAL FACTS CONSTITUTING THE SAID OFFENSE ARE AS FOLLOWS:

The defendant committed the offense of CRIMINAL TRESPASS, in violation of TCA Section 39-14-405. This incident occurred on or about Friday, October 15, 2021 at 08:59 AT 1705 DONINGHAM DRIVE. ON 10/16/2021 AT AROUND 0859 HOURS, THE DEFENDANT WAS ON THE PROPERTY OF 1705 DONINGHAM DR AFTER BEING TOLD TO STAY OFF THE PROPERTY BY THE HOMEOWNER AND BEING EVICTED BY THE HOMEOWNER ON/AROUND 09/13/2021 AT 1953 HOURS. THIS TOOK PLACE IN KNOXVILLE, KNOX COUNTY, TN. A CITATION WAS NOT ISSUED BECAUSE LIKELY THE OFFENSE WILL CONTINUE.

The defendant is hereby instructed that if the defendant's charge is dismissed, a no true bill is returned by a grand jury, the defendant is arrested and released without being charged with an offense, or the court enters a nolle prosequi in the defendant's case, the defendant is entitled, upon petition by the defendant to the court having jurisdiction over the action, to the removal and destruction of all public records relating to the case without cost to the defendant.

1710

TRAVIS EDWARD SHULER, AFFIANT

800 HOWARD BAKER JR. DR, KNOXVILLE, TN 37915
Phone #: (865) 215-7000

Personally sworn to and subscribed by the affiant before me this 16th day of October, 2021.

DUSTIN SEAN DUNHAM, Magistrate

ARREST WARRANT @1417754

TO THE DEFENDANT:
Andrue Taylor Thacker (ALIAS), based on the affidavit of complaint filed in this case, there is probable cause to believe that, in violation of T.C.A. §39-14-405, you have committed the offense of CRIMINAL TRESPASS, Class C Misdemeanor.

TO THE LAWFUL OFFICER:
You are therefore commanded in the name of the State of Tennessee to immediately arrest the defendant named above and bring the defendant to this court to answer the charges.

Issued this 16th day of October, 2021.

DUSTIN SEAN DUNHAM, Magistrate

WITNESSES			
NATHANIEL J. THACKER -	(865)256-0693	1705 DONINGHAM DR KNOXVILLE TN 37918	VICTIM
CRYSTAL LEANNE BAKER -	(865) 951-3688	HOMELESS KNOXVILLE, TN -	CO-DEFENDANT

Agency: KPD

Incident # 21038975

Date:_____ CoA:_____

Defendant: Thacker Appointed Attorney: M. Stephens

Charge:_____ Court Date:_____

IDN:_____ Administrative Fee:_____

- Charges are…
- Right to remain silent, anything said may be used against you.
- Right to a preliminary hearing.
- Right to an attorney, one will be appointed if indigent.
- Bail / conditions of release.
- Court date.
- Administrative fee.

TCA 40-11-118
(b) In determining the amount of bail necessary to reasonably assure the appearance of the defendant while at the same time protecting the safety of the public, the magistrate shall consider the following:

(1) The defendant's length of residence in the community; whole life

(2) The defendant's employment status and history and financial condition; Pest Control was shut down for Covid

(3) The defendant's family ties and relationships; parents + siblings

(4) The defendant's reputation, character and mental condition;

(5) The defendant's prior criminal record, record of appearance at court proceedings, record of flight to avoid prosecution or failure to appear at court proceedings;

(6) The nature of the offense and the apparent probability of conviction and the likely sentence;

(7) The defendant's prior criminal record and the likelihood that because of that record the defendant will pose a risk of danger to the community;

(8) The identity of responsible members of the community who will vouch for the defendant's reliability; however, no member of the community may vouch for more than two (2) defendants at any time while charges are still pending or a forfeiture is outstanding; and

(9) Any other factors indicating the defendant's ties to the community or bearing on the risk of the defendant's willful failure to appear.