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 who 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.

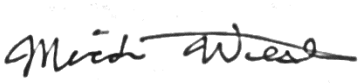
[32] Larsen Jay, *MARCH MEETING PREFERENCE (in-person vs virtual)*, Knox Cty. TN Comm'n F. (Feb. 26, 2021, 11:02 AM), https://knoxcounty.org/commission/commissionforum/viewtopic.php?f=2&t=368&sid=710df9f3475c3ade73f1986499be0d3c.

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,



Micah West
Keisha Stokes-Hough
Alexandra Jordan
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104
Tel: 334-314-8976
Email: micah.west@splcenter.org
keisha.stokeshough@splcenter.org
alexandra.jordan@splcenter.org

Tara Mikkilineni
Civil Rights Corps
1601 Connecticut Ave NW, Suite 800
Washington, DC 20009
Tel: 202-894-6124
Email: tara@civilrightscorps.org

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

MICHELLE TORRES, et al. Plaintiffs, vs. W. DOUGLAS COLLINS, et al. Defendants	)	2:20-CV-00026-DCLC

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiffs' Motion for a Preliminary Injunction [Doc. 5] and supporting memorandum [Doc. 26] claiming that Defendants' bail practices run afoul of the Fourteenth Amendment of the United States Constitution. Defendants have responded [Doc. 54] to which Plaintiffs have replied [Doc. 71, 84]. The parties have filed a stipulation of facts [Doc. 78] and agreed that an evidentiary hearing on the motion was not necessary and could be resolved on the pleadings. The matter is now ripe for adjudication.

This case involves the procedures Hamblen County, Tennessee, follows in setting bail for those charged with criminal offenses within its jurisdiction. Plaintiffs contend that these procedures, which do not include an individualized hearing, violate the Fourteenth Amendment of the Constitution and ask the Court to enter a preliminary injunction enjoining the sheriff from continuing to detain those for whom the minimum constitutional procedures have not been followed. Defendants contend its bail practices met the constitutional minimums.

In determining whether to issue a preliminary injunction, the Court must consider four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;

(2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Id.* "When a party seeks a preliminary injunction on the basis of a potential constitutional violation," however, "'the likelihood of success on the merits often will be the determinative factor.'" *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (order)(en banc)(per curiam)(citation omitted). In balancing these factors together and considering the constitutional issues involved, the Court finds the factor regarding Plaintiffs' likelihood of success on the merits determinative. In this case, the Court finds Plaintiffs will likely succeed on the merits of their constitutional claim and GRANTS Plaintiff's Motion for a Preliminary Injunction as outlined herein.

I. FACTUAL BACKGROUND

The parties have filed a Joint Stipulation which they agree is sufficiently specific to permit the Court to address Plaintiffs' motion for a preliminary injunction. These stipulations address the procedures Hamblen County follows in setting bail for those charged with criminal offenses. The stipulated facts are as follows:

After an officer arrests an individual without a warrant, the officer must promptly obtain an arrest warrant. In Hamblen County, the officer prepares an affidavit of complaint and provides that to either the Circuit Court Clerk Teresa West or her designee, who places the officer under oath. [Doc. 78-1, *Joint Stipulations*, ¶ 1]. The officer signs the affidavit under oath. The clerk then determines whether the facts constitute probable cause. If so, the clerk will sign and issue the

arrest warrant [Doc. 78-1, ¶ 1]; Tenn. Code Ann. § 40-6-203.[1] Either the general sessions judge, Clerk West, or one of the judicial commissioners will set the initial bail and records that amount on the warrant at the time the warrant is sworn out by the officer. [Doc. 78-1, ¶¶ 2-3, 6]. Options for bail include release on recognizance, release on non-financial conditions, or release on secured financial conditions, commonly referred to as "money bail." Money bail is the release condition for the majority of those arrested in Hamblen County. [*Id.* at ¶ 5]. Although Tennessee law does not require it, for the majority of those arrested, secured financial conditions (aka "money bail") are set as bail [*Id.* at ¶ 5]. This is done *ex parte* as the arrestee is not present [*Id.* at ¶ 6].

Those who set the initial bail do not follow a schedule, rubric or other guidelines [*Id.* at ¶ 7]. As a general matter, they also do not know whether the arrestee can afford the amount set. [*Id.* at ¶ 9]. Unless they have some experience with the arrestee, those who set bail typically will not know the arrestee's employment status, financial condition, family ties and relationships, or whether members of the community might vouch for the arrestee. [*Id.* at ¶ 11]. Notwithstanding that, it is not the intent of the general sessions judge for the arrestee to remain in jail when he sets the bail amount [*Id.* at ¶ 13].

The arrestee has four options to satisfy secured financial conditions of release: personal surety, real estate, commercial surety company, or cash. [*Id.* at ¶ 14]. Arrestees who make the initial bail are released from custody. Those, who do not make bail, remain detained in jail, until their initial appearance. [*Id.* at ¶ 19]. Initial appearances are held Mondays, Wednesdays, and

[1] Tenn R. Crim. P. 3 requires an Affidavit of Complaint alleging that a person has committed an offense be "made on oath before a magistrate or a neutral and detached court clerk authorized by Rule 4 to make a probable cause determination." Tenn.R.Crim.P. 4 authorizes the issuance of an arrest warrant if the Affidavit of Complaint establishes "that there is probable cause to believe that an offense has been committed and that the defendant has committed it."

Fridays at 8:30 a.m., unless it falls on a holiday, then the next initial appearance will be on the next scheduled date. [*Id.* at ¶ 20]. The general sessions judge or a judicial commissioner will preside over the initial appearances which are generally conducted by video conference between chambers and the jail and closed to the pubic [*Id*. at ¶¶ 22, 24-25]. Unless they are held in open court, they are not on the record [*Id.* at ¶ 26].

At the initial appearance, arrestees are advised of their charges, the initial amount of bail, and the scheduled date for the preliminary hearing, which must be set within 14 days of the arrest[2] [*Id.* at ¶ 28]; [Doc. 78-1, ¶ 45]; Tenn.R.Crim.P. 5(c)(2)(A) and (d)(2). At this hearing, the arrestees may request the appointment of counsel. If so, they complete an affidavit of indigency, and the judicial officer appoints counsel if the arrestee qualifies. In addition to the affidavit of indigency, the presiding officer also has the arrest warrant and arrestee's rap sheet, or criminal history, from Hamblen County, but does not have the arrestee's employment history, family ties and relationships in the community, or whether members of the community would vouch for the arrestee, unless the officer has some prior experience with the arrestee [*Id.* at ¶¶ 29, 31]. The presiding officer does not make any findings on the record regarding the arrestee's ability to make a secured financial condition, the necessity for the initial bail, the necessity of detention, and adequacy of alternative conditions of release [*Id.* at ¶ 33].

The general sessions judge does not revisit the initial bail amount at the hearing for the arrestee's initial appearance. [*Id.* at ¶ 35]. In fact, generally, the general sessions judge will not consider requests for bond modification at that time [*Id.* at ¶ 35]. Notwithstanding that, sometimes

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[2] Prior to the filing of this lawsuit, the Clerk's office did not have an office procedure for informing the public defender's office of new appointments [Doc. 79, ¶ 10; Doc. 77, ¶6]. Typically, the public defender's office would call court staff to find out their new appointments each day [Doc. 77, ¶ 8]. However, public defenders now attend initial appearances on a regular basis [Doc. 71, pg. 8, fn. 10].

he will *sua sponte* modify an arrestee's bond based on the affidavit of indigency [*Id.* at ¶ 51].

Arrestees, who do not satisfy the financial condition for release, remain detained until the preliminary hearing [*Id.* at ¶ 34]. Arrestees can ask the court for a bond reduction but there are no guidelines about the timing of when such a motion will be heard by the court and as noted, such requests made at the initial appearance are generally ignored [*Id.* at ¶ 59]. The general sessions judge often times refuses to consider modifying the initial bail amount when the district attorney objects [*Id.* at ¶ 60]. When the general sessions judge considers a motion to modify bail, he typically makes no findings on the record about public safety, whether the arrestee is likely to appear at future court dates, nor does he require the state to show why the arrestee should be detained in the amount initially set [*Id.* at ¶ 44].

There are four Plaintiffs in this case presently. Each of Plaintiffs' bail was set with secured financial conditions. Ms. Michelle Torres is a 50-year-old woman, who was arrested on February 15, 2020, for felony Manufacturing, Sale and Delivery of Schedule II Methamphetamine and Schedule VI and possession of Schedule II, III, and drug paraphernalia [Doc. 78-1, ¶¶ 77-78]. Her bail was initially set at $75,000 [Doc. 78-1, ¶¶ 78-79]. She was unable to pay that bail [Doc. 78-1, ¶ 80]. Her initial appearance was held on February 17, 202 in front of General Sessions Judge Collins [Doc. 78-1, ¶¶ 80-81]. At the hearing, the judge found her indigent and appointed counsel [Doc. 78-1, ¶ 81].

After the court advised Torres of her charges, the following colloquy occurred:

THE COURT: Do you understand what you've been charged with?

MS. TORRES: I understand it, but …

THE COURT: I understand you may not agree with it.

MS. TORRES: Yes.

THE COURT: I just want to make sure. This may be a co-defendant.

THE CLERK: Yeah, the (Off mic).

…

MS. TORRES: Yeah, I was in the car with someone.

THE COURT: Okay.

THE CLERK: We're going to look at April the 8th.

THE COURT: Are you going to make your bond?

MS. TORRES: No.

THE COURT: Can you make a bond?

MS. TORRES: I very seriously doubt it.

THE COURT: All right. We'll appoint the public defender to represent you. You just may have to deal with it.

THE CLERK: March the 4th at 1.

THE COURT: March 4th at 1 o'clock.

MS. TORRES: Is there any way I can get it lowered – my bond lowered so I can at least try?

THE COURT: But you told me you couldn't make the bond.

MS. TORRES: I mean I can try. That's all I can do.

THE COURT: Does she get another …

MS. TORRES: Yes, I have a case. I just got out.

THE COURT: I'm going to leave your bond where it is. You got another case, another drug case pending?

MS. TORRES: Yes. And I just got out.

THE COURT: Okay. The bond is still where it …

[Doc. 71-7, pg. 13-14]. On February 24, 2020, a third-party organization paid her bail, and Ms. Torres was released from jail [Doc. 78-1, ¶ 84].

Ms. Johnson-Loveday is a 49-year-old woman, who was arrested on February 11, 2020 for Driving Under the Influence, second offense, Driving on a Revoked License, and Violation of Implied Consent [Doc. 78-1, ¶¶ 86-87]. She was held at the Hamblen County Jail on $6,000 bail, with an additional requirement of an alcohol monitoring bracelet [Doc. 78-1, ¶ 88]. Ms. Johnson-Loveday was unable to pay her bail and bracelet fee [Doc. 78-1, ¶ 89]. Her initial appearance was held on February 14, 2020 before a judicial commissioner via video conference with no record of this proceeding [Doc. 78-1, ¶ 90]. At the hearing, she was found indigent and appointed counsel [Doc. 78-1, ¶ 90]. Her preliminary hearing was set for March 3, 2020 [Doc. 78-1, ¶ 91]. On February 25, 2020, a third-party organization paid her bail and bracelet fee, and Ms. Johnson-Loveday was released from jail [Doc. 78-1, ¶ 92].

Ms. Cameron is a 36-year old woman, who was arrested on February 15, 2020 on Schedule II, III, and IV drug violations, Possession of Drug Paraphernalia, and Theft [Doc. 78-1, ¶ 94]. Her bail was set at $32,000 [Doc. 78-1, ¶¶ 94-95]. She was unable to pay her bail [Doc. 78-1, ¶ 96]. Her initial appearance was held on February 17, 2020 before Judge Collins [Doc. 78-1, ¶ 96-97]. At the hearing, she was found indigent and appointed counsel [Doc. 78-1, ¶ 97]. The following colloquy then occurred

THE COURT: Do you understand that that's what they've charged you with?

MS. CAMERON: Yes

THE COURT: Okay. That's a $2,000 bond.

MS. CAMERON: And I…

THE COURT: Can you make that bond?

MS. CAMERON: Possibly.

…

THE COURT: Are you going to make your bond?

MS. CAMERON: I can't afford the bond. And I was going to ask for bond adoption (phonetic). I've got a one year little girl, Your Honor, and I have no family to take care of her right now.

THE COURT: I cannot lower your bond on these charges today.

MS. CAMERON: And 30,000?

THE COURT: It will be 32,000 for both cases. I'll appoint a public defender to represent you. And we'll set your cases for hearing on –

THE CLERK: March 4th at 1:00

THE COURT: --- March 4th and 1 o'clock.

[Doc. 71-7, pg. 6-8]. On February 24, 2020, a third-party organization paid her bail, and she was released [Doc. 78-1, ¶ 100].

Ms. Edmond is a 36-year-old woman, who was arrested on February 12, 2020 for possession of Schedule III and IV drugs and Aggravated Criminal Littering [Doc. 78-1, ¶¶ 106-107]. Her bail was set at $1,500 [Doc. 78-1, ¶¶ 107-108]. She was unable to pay her bail [Doc. 78-1, ¶ 109]. Her initial appearance was held on February 14, 2020 before a judicial commissioner via video conference [Doc. 78-1, ¶¶ 109-110]. At the hearing, she was found indigent and appointed counsel [Doc. 78-1, ¶ 110]. On February 24, 2020, A third-party organization paid her bail, and Ms. Edmond was released [Doc. 78-1, ¶ 111].

II. ANALYSIS

A. Introduction

Plaintiffs allege that Defendants "routinely impose money bail without any consideration of or findings about an individual's financial circumstances," which results in wealth-based detention of indigent individuals [Doc. 26, pg. 13]. Plaintiffs also allege that Defendants deny arrestees any opportunity to timely contest their bond [Doc. 26, pg. 2]. As a result, individuals are detained for days or weeks before given the opportunity to present an argument for a lowered bail amount. Plaintiffs argue that Defendants violate both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Plaintiffs also claim that "Defendants violate individuals' Sixth Amendment rights by failing to provide counsel at initial appearance." [Doc. 26, pg. 11]. They request the Court "order Defendant Jarnigan [Sheriff of Hamblen County] to release Plaintiffs unless they are provided constitutionally adequate procedures." [Doc. 26, pg. 39]. Defendants oppose the motion, arguing that Defendants' procedures are constitutional, and that any injunction would excessively burden Defendants. They state that "Plaintiffs are essentially requesting an overhaul of the entire criminal system." [Doc. 54, pg. 5].

As an initial matter, where an individual is arrested without a warrant, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein v. Pugh*, 420 U.S. 103, 113-14, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). "Once that suspect is in custody, however, 'the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.'" *Cox v. City of Jackson, Tennessee*, 811 F. App'x 284, 286 (6th Cir. 2020)(quoting *Gerstein*, 420 U.S. at 114). The Sixth Circuit noted that at this stage "whatever procedure a State adopts, 'it must provide a fair and

reliable determination of probable cause [to arrest] as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.'" *Id.* quoting *Gerstein*, 420 U.S. at 125. "[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). In fact, *McLaughlin* found that those jurisdictions that provided a judicial probable cause determination within 48 hours "will be immune from systemic challenges." *Id.* The Supreme Court noted that jurisdictions may combine a bail hearing with a probable cause hearing, but if they do, it would have to meet the promptness requirement. *Id.*

Defendants in Hamblen County set every arrestee's initial bail *ex parte* without a hearing. There is nothing inherently unconstitutional about this practice. Generally, the judicial officers impose secured financial conditions in almost every case, that is, require some amount of money bail as a condition of release. Thus, Defendants' approach begins with the presumption that every defendant charged with a criminal offense should be detained unless they can satisfy the financial conditions for release. This approach is not without some immediate benefit to those who can make the financial conditions as they can obtain immediate release. But for those who cannot make the financial conditions, they all must remain detained in the local jail.

Analyzing a pretrial detention case, according to both equal protection and due process principles, requires similar and sometimes overlapping considerations. This Court, however, finds separate analyses can be made given the particular facts of this case. *See generally, Bearden v. Georgia*, 461 U.S. 660, 665 (1983) ("Due process and equal protection principles converge in the Court's analysis in these cases."); *see also cases involving the constitutionality of bail statutes, Walker v. City of Calhoun, Ga.*, 901 F.3d 1245 (11th Cir. 2018); *Pugh v. Rainwater*, 572 F.2d 1053

(5th Cir. 1978). This Court also does not find the pleadings require an analysis under the Eighth Amendment of the United States Constitution as Plaintiffs did not raise an Eighth Amendment claim and, in this case, Plaintiffs challenge "not the amount and conditions of bail *per se*, but the process by which those terms are set, which [they allege]…invidiously discriminates against the indigent." *Walker*, 901 F.3d at 1259.[3]

B. Equal Protection Challenge to Hamblen County's bail setting practice

Plaintiffs allege that Hamblen County's bail setting practice violates the Fourteenth Amendment's Equal Protection Clause. *U.S. Const. amend.* XIV, sec. 1. Specifically, Plaintiffs claim that Hamblen County detained them solely as a result of their indigency, which they claim violates the principles established in *Bearden*. For the reasons that follow, this Court does not agree that Defendants detained Plaintiffs based solely on their inability to pay bail nor does it find *Bearden* controlling on these facts.

At the outset, "[t]o state an equal protection clause claim, a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011)(quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich.*, 470 F. 3d 286, 299 (6th Cir. 2006)). The Court must consider whether Hamblen County's bail practices treat Plaintiffs disparately as compared to similarly situated individuals.

In this case, Plaintiffs contend Hamblen County sets bail in a way that results in wealth-

[3] This Court assumes the Fourteenth Amendment incorporates the bail clause of the Eighth Amendment making it applicable to the states and therefore to Defendants in this case. *See Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2694 n. 3, 61 L.Ed.2d 433 (1979); *Schilb v. Kuebel*, 404 U.S. 357, 365, 92 S.Ct. 479, 484, 30 L.Ed.2d 502 (1971).

based detention. To be sure, a government can run afoul of the Fourteenth Amendment when making wealth-based distinctions. For example, in *Griffin v. Illinois*, 351 U.S. 12 (1956), the Supreme Court held that Illinois violated the Equal Protection Clause by not providing trial transcripts to indigent criminal defendants who needed them to file their appeal. 351 U.S. at 13. In *Williams v. Illinois*, 399 U.S. 235 (1970), the Supreme Court examined a state practice of continuing to imprison defendants who had not paid fines and court costs regardless of whether that imprisonment exceeded the maximum period of incarceration for the underlying criminal offense. It found that practice to constitute "impermissible discrimination that rests on the ability to pay." *Id.* at 241. It struck down that practice, holding that a court may not "subject a certain class of convicted [indigent] defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency. *Id.* at 242. But in *Williams*, the Supreme Court recognized that "an indigent … may be imprisoned for a longer time than a non-indigent convicted of the same offense" and that, in and of itself, did not violate the Equal Protection Clause. *Id*. at 243. In other words, the Supreme Court held that the Constitution does not require that "two persons convicted of the same offense receive identical sentences" but it does require the statutory ceiling "be the same for all defendants irrespective of their economic status." *Id.* at 243-244.

Likewise, the Supreme Court found unconstitutional a state's practice of incarcerating indigent defendants who could not pay their fines accrued from traffic offenses. *Tate v. Short*, 401 U.S. 395, 398 (1971). It found that the state was subjecting the defendants "to imprisonment solely because of [their] indigency." *Id.* And, finally, in *Bearden*, the Supreme Court refused to permit a state to revoke probation of an indigent probationer based solely on non-willful failure to pay a fine or restitution.

In this case, Plaintiffs have not presented any evidence that Hamblen County's bail

practices are discriminatory or result in the disparate treatment of the indigent. The parties stipulated that in Hamblen County, the person setting bail does not have any information regarding an arrestee's ability to pay bail at the time bail is set. Thus, when setting bail, there is no direct discrimination or treatment of arrestees differently based upon their ability to pay. *See* [Doc. 78-1, *Joint Stipulations*, ¶ 9]. The ability of the arrestee is not considered whatsoever by the judicial officer. Moreover, the parties agreed that it was not the intent of the general sessions judge for these individuals not to be able make their bail [78-1, at ¶ 13]. In other words, Judge Collins was not intentionally discriminating against the indigent by imposing secured financial conditions that, ultimately, they could not meet. Thus, Defendants' treatment of the indigent is no different than their treatment of the non-indigent. To the extent that the amount of bail may disadvantage those unable to pay due to indigency, that fact alone does not show that they were treated differently. Additionally, those who are not indigent may also not be able to make bail. After all, the judicial officer sets the bail based on the criminal offense and the arrestee's rap sheet. Thus, those non-indigent arrestees, who cannot make bail, remain in the same jail cell as the indigent. Accordingly, it is difficult for the court to find an equal protection violation when both the indigent and the non-indigent are both locked up because of not being able to make their bail.

The period of time between the arrest and the initial appearance applies equally to those who cannot pay bail due to indigency as well as to those who need additional time to gather funds or who cannot pay bail because the amount is beyond their ability to pay, even though they are not technically indigent. Further, this Court notes that wealth, alone, without other considerations, is not a suspect class for equal protection analysis purposes. *See generally*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973)("at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages").

Plaintiffs claim that Hamblen County's bail practices runs afoul of *Bearden*. The Court finds *Bearden* distinguishable and not controlling on these facts. In *Bearden*, when a defendant could not pay the fine imposed as a result of his conviction, the state automatically detained him regardless of whether his failure to pay was willful. Since all the plaintiffs in *Bearden* had served their sentence, post-conviction detention turned solely on non-payment of the fine. No other factors were considered. That is not the case when setting bail.

In this case involving pretrial detention, the judicial officer considers the different criminal charges each arrestee faces and, if available, examines their unique criminal history when setting bail. Also, there may be times when a court sets bail exceptionally high given those factors such that the arrestee cannot make bail but is not indigent. Given the different considerations between post-conviction fines and pretrial bail, this Court finds the *Bearden* case distinguishable and that pretrial detention considerations are too individualized to provide a meaningful "similarly situated" analysis.

The present case is also distinguishable from *O'Donnell v. Harris Cty.* 892 F.3d 147 (5th Cir. 2018) also cited by Plaintiffs. In the present case, bail is not set according to a "schedule or rubric or guidelines." [Doc. 78-1, at ¶ 7]. Bail is set by the judge, the county clerk or a judicial commissioner based upon the charges on the warrant and any personal knowledge or experience with the arrestee. [*Id*. at ¶ 11]. Thus, bail appears to be tied in some instances to personal knowledge of the arrestee. However, it is done *ex parte* without any input from the state or arrestee.

In *O'Donnell*, the Fifth Circuit found an equal protection violation when pretrial detention was solely due to a person's indigency. In that case, bail was set strictly on the basis of a schedule, without the introduction of any individualized factors. It found that Harris County engaged in a

"custom and practice [that] resulted in detainment solely due to a person's indigency because the financial conditions for release [were] based on predetermined amounts beyond a person's ability to pay and without any 'meaningful consideration of other possible alternatives.'" *O'Donnell*, 892 F.3d at 161 (citations omitted). The court found that the only difference between individuals with the same bail amounts was their ability to pay. Thus, those who could pay were released while those who could not pay were not released.

The facts in *O'Donnell* are not the facts here. In this case, unlike in *O'Donnell*, there is no evidence to suggest that Hamblen County sets the same bail amount for the same charge for any two arrestees, especially where the individual setting bail has personal knowledge of an arrestee. Moreover, the record in *O'Donnell* established that Harris County's practices evinced a "discriminatory purpose" which was evidenced by "numerous, sufficiently supported factual findings." *Id.* The parties stipulated here that it was not the judge's intention that bail would be unaffordable, and the defendant remain in jail. [78-1, at ¶ 13]. Indeed, unlike in *O'Donnell*, the record in this case does not establish that Hamblen County is detaining individuals based only on their indigency. In addition to the detention of the indigent, also detained are those who are not indigent and still cannot afford bail. For example, if two arrestees are charged with the same violent crime and receive the same bail amount, it is possible that neither could afford to pay bail even if one was not indigent.[4] Finding no discrimination based on wealth or disparate treatment of similarly situated individuals under the facts presented, the Court finds no violation of the Equal Protection Clause. The Court will now turn to the issue of Plaintiffs' due process claim.

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[4] "Any government benefit or dispensation can be framed in artificially narrow fashion to transform a diminishment into total deprivation. … If such narrowing is permissible, then any wealth-based equal protection claim becomes valid so long as the plaintiff frames his interest in a cramped enough style." *Walker v. City of Calhoun, Ga.*, 901 F.3d 1245, 1264 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun, Ga.*, 139 S. Ct. 1446, 203 L. Ed. 2d 681 (2019).

C. Due Process Challenge to Hamblen County's bail practices

Plaintiffs allege Defendants violated their right to due process under the Fourteenth Amendment of the United States Constitution. Plaintiffs correctly contend that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisana*, 504 U.S. 71, 80 (1992). In that same way, fairness of the relations between the state and a criminal defendant is a Due Process Clause issue. *Bearden*, 461 U.S. at 665. The Due Process Clause provides for both substantive due process protections and procedural due process protections. Plaintiffs allege Hamblen County's bail practices violate both.

1. Substantive Due Process

"[T]he Fourteenth Amendment 'forbids the government to infringe 'fundamental' liberty interests..., no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). "[T]he Due Process Clause bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Foucha,* 504 U.S. at 80 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). This guarantee, commonly referred to as substantive due process, requires the government action that infringes upon a fundamental right to be narrowly tailored to serve a compelling governmental interest. *Glucksberg*, 521 U.S. at 721 (citing *Reno*, 507 U.S. at 302).

In *United States v. Salerno*, the Supreme Court noted the "general rule … that the government may not detain a person prior to a judgment of guilt in a criminal trial" unless the detention satisfies a heightened standard of scrutiny. It noted the government's interest in that case to be "both legitimate and compelling." *United States v. Salerno*, 481 U.S. 739, 750 (citing

De Veau v. Braisted, 363 U.S. 144, 155 (1960)). "On the other side of the scale, of course, is the individual's strong interest in liberty." *Id*. That liberty interest, however, can be subordinated to the greater needs of society where the government's interest is "sufficiently weighty." *Id*. at 750-51.[5]

Plaintiffs allege that pretrial detention deprives them of their fundamental right to freedom from bodily restraint. *See Salerno*, 781 U.S. at 751 (An individual has a "strong interest in liberty. We do not minimize the importance and fundamental nature of this right.") Since detention infringes upon the fundamental right of an individual's personal liberty, this Court will begin by examining how the government arrived at its decision to detain Plaintiffs prior to trial—what criteria were used and the method of decision-making.[6]

Initially, bail is set by the judge, a judicial commissioner or the county clerk. [Doc. 78-1, at ¶ 2]. When bail is initially set, there is no consideration of the arrestee's "employment status, financial condition, family ties and relationships, or [the identification of] members of the community who might vouch for the arrestee, unless [the judicial officer] has some past knowledge or experience with the arrestee." [*Id.* at ¶ 11]. No one makes factual findings as to the reason for the amount of bail. [*Id*. at ¶ 12]. It is just set. Bail can be paid by personal surety, a commercial surety company, by putting up real estate or paying cash. [*Id*. at ¶ 14]. Those unable to pay bail are detained until their next hearing date, which is typically within 48 hours of arrest and

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[5] This Court reads the "sufficiently weighty" standard in *Salerno* as requiring a compelling state interest in this case where a liberty is at issue. So, this Court will apply the traditional "compelling state interest" standard believing that if Defendants illustrate a compelling state interest then they have met a "sufficiently weighty" standard. *Salerno*, 481 U.S. at 750-51.

[6] The Plaintiffs in this case were detained between two and three days before their first post-arrest hearing and were in jail a total of between nine and twelve days until an unnamed "third party organization" paid their bail, presumably in preparation for filing this lawsuit. [78-1, at ¶¶ 84, 92, 100, 111].

constitutes their initial appearance hearing. [*Id*. at ¶ 18-21]. This, of course, could be longer depending on when the individual was arrested and whether the next hearing date falls on a holiday.

Either the judge or a judicial commissioner presides over initial appearances. [*Id*. at ¶ 23]. Generally, no record is made of what is presented at the initial appearance, and pretrial detainees are not given notice of what will occur at the initial appearance, although the court will appoint counsel to qualifying detainees. [*Id*. at ¶ ¶ 26-27, 32, 47]. At the initial appearance, either the judge or a judicial commissioner advises the pretrial detainee of her charges, the amount of the initial bail, and sets the preliminary hearing date within 14 days from that date. [*Id*. at ¶ 28]. The only information before the presiding official is the arrest warrant, an affidavit of indigency (if submitted), any criminal history information in the court's computer and, if applicable, specialized DUI or domestic assault forms. [*Id*. at ¶ 29]. It appears that a court file may also be available containing information regarding whether the pretrial detainee is on probation or has any prior failure to appear charges. [*Id*. at ¶ 30]. The presiding officer does not make any findings of fact at this hearing. [*Id*. at ¶¶ 32-33]. If a pretrial detainee cannot pay the bail, she will be detained in the jail until her preliminary hearing or until the sessions judge modifies the conditions of the bond based on the detainee's motion for a bond reduction. [*Id*. at ¶ 34]. The parties stipulated that pretrial detainees can ask for a bond modification at the initial appearance, but they concede that their requests are generally ignored. [*Id*. at ¶ 35].

The fact that requests for bond modifications are not "generally considered" is of constitutional significance since the bail amount is initially set without any regard for an arrestee's individual circumstances. After all, it is done *ex parte* without information concerning the arrestee's employment, financial condition and the like. Apparently, the person setting bail may

have personal knowledge of the arrestee, but this Court has no evidence as to how frequently repeat offenders are arrested such that they would be familiar to the person setting bail. It is also unknown whether the person setting bail had any personal knowledge of Plaintiffs in this case. Assuming the judge hears bail modification requests at the initial appearance hearings, the transcripts from those hearings that have been provided to this Court demonstrate a complete lack of any meaningful individualized hearing.

For example, Plaintiff Torres was arrested February 15, 2020 and had her initial appearance hearing on February 17, 2020. She was charged with felony Manufacturing, Sale and Delivery of Schedule II Methamphetamine, and Schedule VI and Possession of Schedule II, III, and Possession of Drug Paraphernalia. Her initial bail was set at $75,000. The court found her indigent and appointed her counsel. [*Id*. at ¶¶ 77-85]. Based on the transcript, the following colloquy occurred between the general sessions judge and Torres:

THE COURT: Are you going to make your bond?

MS. TORRES: No.

THE COURT: Can you make bond?

MS. TORRES: I very seriously doubt it.

THE COURT: All right. We'll appoint the public defender to represent you. You just may have to deal with it.

***

MS. TORRES Is there any way I can get it lowered—my bond lowered so I can at least try?

THE COURT: But you told me you couldn't make the bond.

MS. TORRES: I mean I can try. That's all I can do.

THE COURT: Does she get another…

MS. TORRES: Yes, I have a case. I just got out.

THE COURT: I'm going to leave your bond where it is. You got another case another drug case pending?

MS. TORRES: Yes. And I just got out.

THE COURT: Okay. The bond is still where it…

[71-7, pg. 13-14].

Plaintiff Cameron was arrested on February 15, 2020 and had her initial appearance on February 17, 2020. She was charged with Schedule II, III, and IV drug charges along with a drug paraphernalia and theft charge. Her bail was set at $32,000. The court found her indigent and appointed counsel. Counsel did not speak on her behalf at the hearing. *Id*. at 93-105. Based on the transcript, the following colloquy occurred between the court and Plaintiff Cameron:

THE COURT: Okay. That's a $2,000 bond.

MS. CAMERON: And I…

THE COURT: Can you make that bond?

MS. CAMERON: Possibly.

THE COURT: Are you going to make your bond?

MS. CAMERON: I can't afford the bond. And I was going to ask for bond adoption (phonetic). I've got a one year little girl, Your Honor, and I have no family to take care of her right now.

THE COURT: I cannot lower your bond on these charges today.

MS. CAMERON: And 30,000?

THE COURT: It will be $32,000 for both cases. I'll appoint a public defender to represent you. And we'll set your cases for hearing on--

[71-7, at pg. 6-8].

There is no indication from the stipulated record that anyone was pursuing a particular interest in protecting the public or ensuring a criminal defendant's appearance at trial when they set bail initially or at the initial appearance hearing. The District Attorney was not called upon to raise any concerns she had about the need for the bond to be set at that amount. Although there is a generally recognized interest in protecting the public and ensuring court appearances, those interests are only a starting point and not a substitute for an actual inquiry and weighing of interests and factors in addressing bail issues. Moreover, substantive due process requires that the court must restrict its abridgment of an individual's liberty interest in as narrow a way as possible.

Here, there is no evidence that the Hamblen County court attempted to do that. Unless the arrestee is personally known to the person setting bail, bail is set without any consideration of individualized factors other than the specific criminal charges and criminal history. Arrestees are not given any notice regarding their rights at the initial appearance hearing or their ability to request a reduction in bail or the need for information that would be pertinent to that request. When counsel are appointed at the initial appearance hearing, presumably that is the first time they have met their clients. It appears that there is no opportunity for the newly appointed counsel to consult with his/her client or present evidence in support of a lower bail or other options to pretrial detention. In point of fact, the transcript demonstrates the initial appearance is simply a very short rapid-fire question and answer event.

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. The record is silent on whether he ever addresses bail at that point. This refusal to address bail violates Plaintiffs' substantive due process rights. "[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 and whether non-monetary alternatives could serve the same purposes as bail. *Hill v. Hall*, No. 3:19-CV-00452, 2019 WL 4928915, at *13 (M.D. Tenn. Oct. 7, 2019)(citing numerous cases holding that the Due Process requires an inquiry into the arrestee's ability to pay and the consideration of alternative conditions of release).

There simply is nothing to indicate that Defendants have narrowly tailored the option of pretrial detention in any appreciable way. Nor has the government demonstrated how its interest is compelling vis-à-vis each individual Plaintiff. 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 with bail remaining as it was initially set, having no consideration given to their ability to pay or any alternative conditions of release.[7] And this is true for all arrestees, regardless of their ability to pay.

For purposes of substantive due process, "the question is whether the trial court's order of

[7] In fact, the Eighth Amendment prohibits "excessive bail" and that term means "[b]ail set at a figure higher than an amount reasonably calculated to" provide "adequate assurance that he will stand trial and submit to sentence if found guilty." *Stack v. Boyle*, 342 U.S. 1, 5 (1951). A court cannot determine whether a particular bond is excessive without some individualized considerations.

detention … was narrowly tailored to the protection of the government's interests or whether, instead, the petitioner's continued detention amounts to punishment." *Hill*, 2019 WL 4928915, at *9. That only occurs where there is a hearing where the court can make "an individualized determination that the defendant poses a risk of harm to the public safety and, therefore, that a detention order is narrowly tailored to the state's interest in protecting the public safety." *Id.* To make this judgment, it necessarily requires an individualized hearing, which is not occurring under the facts of this case. Accordingly, it appears that Plaintiffs' claim that Hamblen County's bail practices violate their right to substantive due process and is likely to succeed on the merits.

2. Procedural Due Process

"The Fourteenth Amendment of the United States Constitution protects individuals from the deprivation 'of life, liberty, or property, without due process of law.'" *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 855 (6th Cir. 2012) (quoting U.S. Const. amend. XIV, § 1). That language has been construed to "require[ ] that the government provide a 'fair procedure' when depriving someone of life, liberty, or property." *Id*. (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)(citations omitted). A procedural due process claim has three requirements: (1) a life, liberty or property interest protected by the Due Process Clause; (2) a deprivation of that protected interest; and (3) a procedural deficiency by the government before depriving an individual of that interest. *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006); *see also Fields v. Henry County, Tenn*., 701 F.3d 180, 185 (6th Cir. 2012). "Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest." *Warren v. City of Athens, Ohio*, 411 F.3d 697, 708 (6th Cir. 2005) (citing *Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001). The Court must "engage in a two-step analysis when resolving procedural due process issues. We initially

determine whether a protected property or liberty interest exists and then determine what procedures are required to protect that interest." *Johnston-Taylor v. Gannon*, 907 F.3d 1577, 1581 (6th Cir. 1990); *see also Warren*, 411 F.3d at 708 ("Only after a plaintiff has met the burden of demonstrating that he possessed a protected property or liberty interest and was deprived of that interest will the court consider whether the process provided the plaintiff in conjunction with the deprivation, or lack thereof, violated his rights to due process.")(citing *Hamilton v. Myers*, 281 F.3d 520, 529 (6th Cir. 2002)).

As previously stated, Plaintiffs allege Defendants failed to provide adequate procedural safeguards before depriving them of their fundamental right to liberty by way of pretrial detention. "The liberty interest at stake is actual liberty—the right of a person who has not been convicted of a crime to be free from detention prior to trial. There is no dispute that this is a fundamental liberty interest protected by the Due Process clause, for purposes of both procedural and substantive due process." *Hill*, 2019 WL 4928915, at *9 (citing *United States v. Watson*, 475 F. App'x 598, 601 (6th Cir. 2012) ("Pretrial detention violates the Fifth Amendment when it amounts to 'punishment of the detainee.'') (quoting *Bell v. Wolfish*, 441 U.S. 520,535 (1979)). Plaintiffs 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.

This leads the Court to the next inquiry and that is whether the procedures implemented by Hamblen County are constitutionally sufficient. A review of the stipulations reveal that the process followed in Hamblen County fails the minimum constitutional standards that must be followed in making bail determinations – "an individualized hearing of which [the arrestee] had adequate advance notice and where he was represented by counsel and permitted to present witnesses and cross-examine the government's witnesses." *Hill*, 2019 WL 4928915, at *16. The general sessions

court does not engage in any individualized assessment when reviewing the bail that was initially set.

Several courts have addressed the issue of constitutionally sufficient process regarding the bail process, and the common theme for all these cases is the requirement that the state actually consider the arrestee's ability to pay and alternative conditions of release. For example, in *Weatherspoon v. Oldham*, No. 17-cv-2535-SHM-cgc, 2018 WL 1053548 (W.D. Tenn. Feb. 26, 2018), the district court, in reviewing a Tennessee state court's bail determination, found a due process violation because the state court failed to consider whether non-monetary conditions of release could satisfy the purposes of bail. *Id.* at *7. Likewise, in *Hill*, the plaintiff challenged the constitutionality of his pretrial detention. Despite the state court failing to fully comply with the Tennessee Bail Reform Act,[8] the *Hill* court found the Due Process Clause was satisfied since bail was set only after an individualized assessment of plaintiff's circumstances, a consideration of all the evidence in the record and an enunciated finding that Hill posed a risk of harm to the public, a result of which the court determined that release was not warranted. *Hill*, 2019 WL 4928915 at *19.

There are many factors that bolster an individual's right to pretrial liberty: the need to help prepare a defense, the stigma attached to detention, loss of employment due to detention, family responsibilities, family hardship, the individual's ability to pay the bail, and ties to the community to name a few. *See Baker v. Wingo*, 407 U.S. 514, 532-33 (1972). Without an individualized

[8] The Tennessee Bail Reform Act, Tenn. Code Ann. §§ 40-11-115 through -118, is not the subject of this Court's inquiry. Although its provisions may prove instructive when considering procedural requirements under the Due Process Clause, that legislation does not control this Court's inquiry. That said, it is noted that the procedures utilized by Hamblen County fail to meet even the Tennessee statutory requirements. *See* Pre-set Bond Schedules, Tenn. Att'y Gen. Op. No. 05-018 (Feb. 4, 2005)(advising that individualized hearings are required for bail determinations under Tennessee statutory law).

hearing allowing the introduction and discussion of competing pretrial detention issues, a court cannot satisfy procedural due process nor did Defendants do so in this case.

The Sixth Circuit has also addressed Tennessee bail procedures. *Fields v. Henry County, Tenn.*, 701 F.3d 180, 185 (6th Cir. 2012). In *Fields*, the defendant was charged with domestic violence which required, under certain circumstances, a 12-hour period of detention, or "cooling off" period. The county used a bail schedule to set the amount of the money bail in his case. Fields did not claim he could not afford bail or that there was "any inherent problem with the dollar amount set in his case." *Id.* at 184. He also did not claim it was excessive "based on the particular facts of his case." *Id.* Indeed, Fields did "not argue that the evidence produced *at his hearing* was too weak to justify the amount." *Id.* at 185 (emphasis added). Although the Sixth Circuit noted that "[t]here is no constitutional right to a speedy bail," it noted that Fields actually had a hearing. *Id.* at 185. In this case, Plaintiffs did not.

As previously set forth, the government has a compelling interest in protecting the public and ensuring a criminal defendant attends trial. However, that interest does not exist in a vacuum. The government must actually utilize procedures that provide for a meaningful, individualized hearing where the government's interest is weighed against the liberty interest of an arrestee. Central to that inquiry is the necessity of bail and an arrestee's ability to pay bail.[9] To comport with due process, that hearing must also include an opportunity to be heard and present evidence, a consideration of alternative conditions for release and, at a minimum, verbal findings of fact regarding these factors. Further, the Court holds that a bail hearing must be within a reasonable period of time of arrest. The Supreme Court held that the probable cause determination had to be

[9] This type of inquiry will also protect against an Eighth Amendment violation of excessive bail. *See Pugh*, 572 F.2d at 1059.

within 48 hours. *McLaughlin*, 500 U.S. at 54; *Cox v. City of Jackson, Tennessee*, 811 F. App'x 284, 286 (6th Cir. 2020)(probable cause determination is a "condition for any significant pretrial restraint of liberty")(quoting *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975)). It has not applied that same time restriction to bail hearings. However, some courts have. *Dixon v. City of St. Louis*, 2019 WL 2437026 (E.D. Mo. June 11, 2019) (requiring individualized hearing within 48 hours of arrest that includes inquiry into an arrestee's ability to pay and opportunity to be heard).

Defendants contend that requiring an individualized hearing is tantamount to "overhauling the criminal justice system" in Tennessee and would unreasonably extend the length of initial appearances.[10] [Doc. 54, pg. 23] ("If the Plaintiffs' demand for immediate bond hearings is granted, it would likely result in the creation of a 'Night Court' scenario with a Judge, Public Defender, District Attorney, Court Clerk, and Court security present 24 hours a day, seven days a week."). They also claim it would drastically increase the time required per initial appearance, create a backlog of cases, create a need for more judges, judicial commissioners, additional staff, and result in higher taxes on the citizens of Hamblen County. [Doc. 54-1, pgs. 4, 9, 14, 19, 23]. The Court is not persuaded by this "sky is falling" argument as the issue in this case deals with constitutional concerns.

D. Sixth Amendment Right to Counsel

Plaintiffs allege that Defendants' failure to provide counsel at hearings that result in pretrial detention violates the Sixth Amendment to the United States Constitution. The Supreme Court has

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[10] It should not be lost on those who are making pretrial detention decisions for arrestees that Tennessee law also requires an individualized hearing to address the factors set out in Tenn. Code Ann. § 40-11-118. The Tennessee Attorney General has opined that Tennessee law entitles a defendant "to an *individual determination of bond* whether the arrest is warrantless arrest, arrest pursuant to a warrant, or an arrest pursuant to a capias or attachment." Pre-set Bond Schedules, Tenn. Att'y Gen. Op. No. 05-018 (Feb. 4, 2005) (emphasis added).

held that "the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie Cty*., 554 U.S. 191, 194 (2008); *See also, Michigan v. Jackson*, 475 U.S. 625, 629 (1986); *Brewer v. Williams*, 430 U.S. 387, 398-399 (1977). Restrictions are imposed on one's liberty at bail hearings.

In Hamblen County, bail is set when the arrest warrant is issued. [Doc. 78-1, at ¶ 2]. The first time arrestees go before the judge or judicial commissioner after arrest is at the initial appearance hearing, which generally is within 48 hours of arrest. [*Id.* at ¶¶ 18-21]. At this hearing, based upon the transcripts provided by Plaintiffs, either the judge or judicial commissioner informs the arrestee of the pending charges, considers the need for appointed counsel, and asks if the arrestee can make bail (in cases where the arrestee has not yet made bail).[11] To the extent this initial appearance serves also as a bail hearing, which from the record it does, the Sixth Amendment right to counsel is implicated. *Rothgery v. Gillespie Cty., Tex*., 554 U.S. 191, 194 (2008)("This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty").

The Hamblen County court appointed counsel at the initial appearance/bail hearing for each Plaintiff except Plaintiff Johnson-Lovejoy. [Doc. 78-1, at ¶¶ 81, 97, 110]. The parties' stipulate that it is customary for the Hamblen County court to examine an arrestee's affidavit of indigency, appoint counsel, and have counsel present at the initial appearance hearing when bail is discussed. *Id*. at 36. Where that occurs, there is no Sixth Amendment violation. Regarding

[11] Plaintiffs have only provided the transcripts of the initial appearance hearings involving Plaintiff Torres and Plaintiff Cameron. The parties have stipulated that the initial appearance hearings generally follow that same pattern. [Doc. 78-1, at ¶ 36]

Plaintiff Johnson-Lovejoy, ¶ 90 of parties' Joint Stipulations indicates that the Hamblen County court found her indigent for the purposes of appointing counsel but she "was not represented by counsel during the proceeding." This is a violation of the Sixth Amendment. 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.

E. Security Requirement

Fed.R.Civ.P. 65(c) typically requires the moving party to post a security to protect the other party, if the Court later finds that it was wrongfully enjoined. Defendants request that the Court impose the security requirement to offset the economic hardship of the imposed injunction, should the Court later find that they were wrongfully enjoined [Doc. 54, pgs. 24-25]. However, a court may waive the security at its discretion. *See Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 714 F.3d 424, 431 (6th Cir. 2013). As the Plaintiffs are indigent, the Court declines to impose a bond in this case.

III. CONCLUSION

Plaintiffs' Motion for Preliminary Injunction is **GRANTED**. Because all Plaintiffs in the case have been released on bail, this Preliminary Injunction is prospective only. Further this order is limited in scope. It does not pertain to criminal defendants who are charged with a capital offense, or who are detained as a result of an indictment, or who are detained on probation violations, or whose release has otherwise been revoked after a hearing. Accordingly, pursuant to Fed.R.Civ.P. 65, it is **ORDERED** that Defendant Esco Jarnigan, Sheriff of Hamblen County, is enjoined from detaining any criminal defendant arrested on an arrest warrant who, after having bail set in an *ex parte* fashion by the Defendants authorized by law to set bail for cases pending in Hamblen County general sessions court, is being detained without having had an individualized

hearing within a reasonable period of time consistent with the Due Process Clause requirements as outlined in this Order.

SO ORDERED:

s/ Clifton L. Corker
United States District Judge

2021 WL 1134487
Only the Westlaw citation is currently available.
Supreme Court of California.

IN RE Kenneth HUMPHREY on Habeas Corpus.

S247278
|
March 25, 2021

Synopsis

Background: After bail was initially set at $600,000 for a defendant charged with first degree robbery, first degree residential burglary, inflicting injury on an elder and dependent adult, and misdemeanor theft from an elder or dependent adult, defendant filed motion for a bail hearing. Following hearing, the Superior Court, San Francisco County, No. 17007715, Joseph M. Quinn, J., modified bail to be $350,000. Defendant filed petition for habeas corpus, claiming that he was denied due process as a result of being detained prior to trial due to his financial inability to post bail. The Court of Appeal, Kline, P.J., 19 Cal.App.5th 1006, reversed and remanded with directions. Review was granted on the Supreme Court's own motion to address the constitutionality of money bail as currently used in California.

Holdings: The Supreme Court, Cuellar, J., held that:

practice of conditioning pretrial release solely on whether an arrestee can afford bail is unconstitutional;

unless there is a valid basis for detention, court must set bail at a level that arrestee can reasonably afford; and

arrestee may not be held in custody pending trial unless the court has made the requisite individualized determination.

Affirmed.

First Appellate District, Division Two, A152056, San Francisco City and County Superior Court, 17007715, Joseph M. Quinn, Judge

Attorneys and Law Firms

Civil Rights Corps, Alec Karakatsanis, Katherine C. Hubbard; Wilmer Cutler Pickering Hale and Dorr, Seth P. Waxman, Daniel S. Volchok, Thomas G. Sprankling, Palo Alto; Jeff Adachi, Public Defender, Matt Gonzalez, Chief Deputy Public Defender, Paul Myslin, Christopher F. Gauge, Anita Nabha and Chesa Boudin, Deputy Public Defenders, for Petitioner Kenneth Humphrey.

Bartell, Hensel & Gressley, Donald J. Bartell, Lara J. Gressley, Riverside, and Michael W. Donaldson for California DUI Lawyers Association as Amicus Curiae on behalf of Petitioner Kenneth Humphrey.

Arnold & Porter Kaye Scholer, Krista Carter, Edmond Ahadome, Michael Isaacs and Oscar Ramallo, Los Angeles, for Human Rights Watch as Amicus Curiae on behalf of Petitioner Kenneth Humphrey.

Pillsbury Winthrop Shaw Pittman, Thomas V. Loran III; Goodin, MacBride, Squeri & Day and Francine T. Radford, San Francisco, for the 22 Social Scientists as Amici Curiae on behalf of Petitioner Kenneth Humphrey.

Keker, Van Nest & Peters, Daniel Purcell, Maya Karwande, Divya Musinipally, Divya Musinipally; and W. David Ball for Crime Survivors for Safety and Justice as Amicus Curiae on behalf of Petitioner Kenneth Humphrey.

Micaela Davis; Peter Eliasberg; David Loy, Oxnard; Remcho, Johansen & Purcell, Robin B. Johansen, Sacramento, and James C. Harrison, Sacramento, for ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties and California law professors as Amici Curiae on behalf of Petitioner Kenneth Humphrey.

University of San Francisco School of Law, Lara Bazelon; Columbia School of Law, Kellen R. Funk; University of Georgia School of Law and Sandra G. Mayson for National Law Professors of Criminal, Procedural, and Constitutional Law as Amici Curiae on behalf of Petitioner Kenneth Humphrey.

McDermott Will & Emery, A. Marisa Chun, San Francisco, and Sarah P. Hogarth for the Bar Association of San Francisco, The Los Angeles County Bar Association and The Santa Clara County Bar Association as Amici Curiae on behalf of Petitioner Kenneth Humphrey.

Todd W. Howeth, Ventura, and Michael C. McMahon, Santa Barbara, for California Public Defenders Association and Public Defender of Ventura County as Amici Curiae on behalf of Petitioner Kenneth Humphrey.

Bradley Arant Boult Cummings, J. Bradley Robertson, Candice L. Rucker, Rachel A. Conry and Kimberly M. Ingram for California Association of Pretrial Services, National Association of Pretrial Services Agencies, Pretrial Justice Institute and National Association for Public Defense as Amici Curiae on behalf of Petitioner Kennth Humphrey.

Emily Ludmir Aviad, Los Angeles; Michael L. Pomeranz; Jonathan L. Marcus, Paul M. Kerlin and Ryan J. Travers for Faith Leaders and Organizations as Amici Curiae on behalf of Petitioner Kenneth Humphrey.

Venable, Alex M. Weingarten, Belinda M. Vega, Los Angeles, Eric J. Blakewell, Matthew M. Gurvitz, Los Angeles; and Robert M. Carlson for American Bar Association as Amicus Curiae on behalf of Petitioner Kenneth Humphrey.

Institute for Constitutional Advocacy and Protection, Mary B. McCord, Douglas N. Letter, Joshua A. Geltzer and Seth Wayne for current and former prosecutors and law enforcement officials as Amici Curiae on behalf of Petitioner Kenneth Humphrey.

George Gascón, District Attorney, Sharon L. Woo, Chief Assistant District Attorney, Wade K. Chow, Assistant Chief District Attorney, Allison G. Macbeth, Assistant District Attorney; Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Seth K. Schalit and Katie L. Stowe, Deputy Attorneys General, for Respondent The People.

Summer Stephan, District Attorney, Mark A. Amador, Linh Lam and Marissa A. Bejarano, Deputy District Attorneys for San Diego County District Attorney as Amicus Curiae on behalf of Respondent The People.

Law Offices of Donald Kilmer, Donald Kilmer and Jessica Danielski for Crime Victims United Charitable Foundation as Amicus Curiae on behalf of Respondent The People.

Michael A. Ramos, District Attorney, and Brent J. Schultze, Deputy District Attorney, for District Attorney of San Bernardino County as Amicus Curiae on behalf of Respondent The People.

Kent S. Scheidegger and Kymberlee C. Stapleton for Criminal Justice Legal Foundation as Amicus Curiae on behalf of Respondent The People.

Albert W. Ramirez and Dale Christopher Miller, Riverside, for Golden State Bail Agents Association as Amicus Curiae.

Xavier Becerra, Attorney General, Edward DuMont, State Solicitor General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Joshua Klein, Deputy State Solicitor General, as Amicus Curiae.

Opinion

Opinion of the Court by Cuéllar, J.

***1** An arrestee's release pending trial is often conditioned on whether the arrestee can make bail. To do so, an arrestee posts security — in the form of cash, property, or (more often) a commercial bail bond — which is forfeited if the arrestee later fails to appear in court. Those who can't afford to satisfy the bail condition remain in jail until the end of the criminal proceedings.

Underlying this arrangement is a major premise: that the state has a compelling interest in assuring the arrestee's appearance at trial and protecting the safety of the victim as well as the public. Yet those incarcerated pending trial — who have not yet been convicted of a charged crime — unquestionably suffer a "direct 'grievous loss' " of freedom in addition to other potential injuries. (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 435, 166 Cal.Rptr. 149, 613 P.2d 210 (*Van Atta*).) In principle, then, pretrial detention should be reserved for those who otherwise cannot be relied upon to make court appearances or who pose a risk to public or victim safety. (Cf. *Bearden v. Georgia* (1983) 461 U.S. 660, 661–662, 103 S.Ct. 2064, 76 L.Ed.2d 221 (*Bearden*) [limiting the circumstances in which an indigent probationer may be incarcerated for failure to pay a fine or restitution]; *In re Antazo* (1970) 3 Cal.3d 100, 113–116, 89 Cal.Rptr. 255, 473 P.2d 999 (*Antazo*) [same].) But it's a different story in practice: Whether an accused person is detained pending trial often does not depend on a careful, individualized determination of the need to protect public safety, but merely — as one judge observes — on the accused's ability to post the sum provided in a county's uniform bail schedule. (See Karnow, *Setting Bail for Public Safety* (2008) 13 Berkeley J. Crim. L. 1, 16–17.)

Petitioner Kenneth Humphrey, joined by the Attorney General, challenges this system with a claim as simple as it is urgent: No person should lose the right to liberty simply because that person can't afford to post bail. His claim joins a "clear and growing movement" that is reexamining the use of money bail as a means of pretrial detention. (*ODonnell v. Harris County* (S.D.Tex. 2017) 251 F.Supp.3d 1052, 1084.)

We find merit in Humphrey's claim. The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional. 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. What we hold is that where a financial condition is nonetheless necessary, the court must consider the arrestee's ability to pay the stated amount of bail — and may not effectively detain the arrestee "solely because" the arrestee "lacked the resources" to post bail. (*Bearden*, *supra*, 461 U.S. at pp. 667, 668, 103 S.Ct. 2064.)

In unusual circumstances, the need to protect community safety may conflict with the arrestee's fundamental right to pretrial liberty — a right that also generally protects an arrestee from being subject to a monetary condition of release the arrestee can't satisfy — to such an extent that no option other than refusing pretrial release can reasonably vindicate the state's compelling interests. In order to detain an arrestee under those circumstances, a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements. (See *post*, pp. 21–23.)

***2** 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 and the public more generally or the integrity of the criminal proceedings. Allowing the government to detain an arrestee without such procedural protections would violate state and federal principles of equal protection and due process that must be honored in practice, not just in principle.

Because the trial court here failed to consider Humphrey's ability to afford $350,000 bail (and, if he could not, whether less restrictive alternatives could have protected public and victim safety or assured his appearance in court), we agree with the Court of Appeal: Humphrey was entitled to a new bail hearing.

I.

What brought Humphrey, 66 years old, to this point was his arrest on May 23, 2017, for first degree residential robbery and burglary against an elderly victim, inflicting injury on an elder adult, and misdemeanor theft from an elder adult. (Pen. Code, §§ 211, 368, subds. (c) & (d), 459, 667.9, subd. (a).) The criminal complaint also charged that Humphrey had suffered four prior strike convictions (see *id*., §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)) and four prior serious felony convictions (*id*., § 667, subd. (a)(1)), all for robbery or attempted robbery.[1]

The complaining witness, 79-year-old Elmer J., told police that Humphrey had followed him into his Fillmore District apartment in San Francisco, threatened to put a pillowcase over his head, and demanded money. When Elmer said he had no money, Humphrey took Elmer's cell phone and threw it to the floor. After Elmer handed over $2, Humphrey stole an additional $5 as well as a bottle of cologne. Before leaving, Humphrey moved the victim's walker into the next room, out of reach.

At arraignment on May 31, 2017, Humphrey sought release on his own recognizance (OR) without any condition of money bail. He cited his advanced age, his community ties as a lifelong resident of San Francisco, and his unemployment and financial condition. He also noted the minimal value of the property he was alleged to have stolen, the remoteness of his prior strike convictions (the most recent of which was in 1992), the lack of any arrests over the preceding 14 years, and his history of complying with court-ordered appearances. Humphrey invited the court to impose an appropriate stay-away order regarding the victim, who lived on a different floor of the senior home in which they both resided. The prosecutor requested bail in the amount of $600,000, as recommended by the bail schedule, as well as a criminal protective order directing Humphrey to stay away from the victim.

The trial court denied Humphrey's request for OR release and, acceding to the People's request, set bail at $600,000. After acknowledging Humphrey's ties to San Francisco and the age of his prior convictions, the court buttressed its decision by citing "the seriousness of the crime, the vulnerability of the victim, as well as the recommendation from pretrial services."

The court also ordered Humphrey to stay away from the alleged victim, including the victim's floor in the senior home.

Humphrey challenged this ruling. He did so by filing a motion for a formal bail hearing (Pen. Code, § 1270.2) and an accompanying request for OR release. As an exhibit to his motion, Humphrey, who is African American, attached a 2013 study of San Francisco's criminal justice system, which found that "Black adults in San Francisco are 11 times as likely as White adults to be booked into County Jail" prior to trial. (W. Haywood Burns Inst., *San Francisco Justice Reinvestment Initiative: Racial and Ethnic Disparities Analysis for the Reentry Council, Summary of Key Findings* (2013) pp. 4–5.) The motion also offered additional information about Humphrey's background, including the fact that he had successfully completed the Roads to Recovery drug rehabilitation program and earned a high school diploma while in custody at the San Francisco County Jail from 2005 to 2008; that upon his release he enrolled for nearly two years at City College of San Francisco and served as a mentor for young adults in the community, which ended when he suffered a relapse; and that he successfully completed a residential substance abuse program in May 2016. Finally, Humphrey announced that he had been accepted into another residential substance abuse and mental health treatment program, beginning the day after the date set for the bail hearing.

***3** At the hearing, the prosecutor pointed out the trial court would need to find unusual circumstances to justify a deviation from the bail schedule because Humphrey was charged with robbery, a serious and violent felony (see Pen. Code, § 1275, subd. (c)), and asserted there were no such circumstances here. He also argued that Humphrey's substance abuse and inability to address it constituted "a great public safety risk" and that Humphrey was a flight risk because he faced a lengthy prison sentence based on his prior strike convictions.

The trial court once again denied OR and supervised release, but did find unusual circumstances warranting a reduction of bail to $350,000. The court characterized the current charges as "serious" and similar to those Humphrey had committed in the past, "so that continuity is troubling to the court." Although "little was taken," "that's because the person whose home was invaded was poor [and] I'm not [going to] provide less protection to the poor than to the rich." The court elected to deviate from the bail schedule because of Humphrey's "willingness to participate in treatment, and I do commend that" — but only to a limited extent, citing "public safety and flight risk concerns." The court included an additional condition of bail: that Humphrey participate in the residential treatment program he had identified.

The public defender cautioned that Humphrey was too poor "to make even $350,000 bail" and would therefore be unable to participate in the required residential treatment program. The court did not comment on Humphrey's inability to afford bail. Nor did the court consider whether nonfinancial conditions of release could meaningfully address public safety concerns or flight risk.

Humphrey filed a petition for writ of habeas corpus in the Court of Appeal. Requiring money bail as a condition of release at an amount the accused cannot pay, he claimed, is nothing less than the functional equivalent of a pretrial detention order — which can be justified only if the state establishes a compelling interest in detaining the accused and demonstrates that detention is *necessary* to further that purpose. (*Humphrey*, *supra*, 19 Cal.App.5th at p. 1015, 228 Cal.Rptr.3d 513.) He requested immediate OR release or, in the alternative, a remand to the superior court for a new hearing consistent with what the California Constitution requires and with the substantive and procedural protections discussed in *United States v. Salerno* (1987) 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697. During such a hearing, the court could either (1) set the least restrictive, nonmonetary conditions of release necessary to protect public safety; or (2) if necessary to assure his appearance at future court hearings, impose a financial condition of release only upon making inquiry into and findings concerning Humphrey's ability to pay. (*Humphrey*, at pp. 1015–1016, 228 Cal.Rptr.3d 513.) After initially opposing the petition, the Attorney General filed a return and agreed that Humphrey was entitled to a new bail hearing. The Attorney General added that he would no longer defend " 'any application of the bail law that does not take into consideration a person's ability to pay, or alternative methods of ensuring a person's appearance at trial.' " (*Id.* at p. 1016, 228 Cal.Rptr.3d 513.)

The Court of Appeal granted habeas corpus relief, reversed the bail determination, and directed the trial court to conduct a new bail hearing. (*Humphrey*, *supra*, 19 Cal.App.5th at p. 1016, 228 Cal.Rptr.3d 513.) In its opinion, the court declared that principles of due process and equal protection "dictate that a court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably

necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and the community." (*Id.* at p. 1026, 228 Cal.Rptr.3d 513; see also *id.* at pp. 1041, 1045, 228 Cal.Rptr.3d 513.) Because the trial court had not made any such findings, the Court of Appeal remanded to allow "a new bail hearing at which the court inquires into and determines his ability to pay, considers nonmonetary alternatives to money bail, and, if it determines petitioner is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention." (*Id.* at p. 1014, 228 Cal.Rptr.3d 513.)

***4** No party petitioned for review. On remand, the superior court conducted a new bail hearing and ordered Humphrey released on various nonfinancial conditions, including electronic monitoring, an order to stay away from the victim and his residence, and participation in a residential substance abuse treatment program for seniors. A few weeks later, upon request by several entities (including the District Attorney of the City and County of San Francisco, which had not been designated a party in the Court of Appeal), we granted review on our own motion to address the constitutionality of money bail as currently used in California as well as the proper role of public and victim safety in making bail determinations.[2]

II.

It is one thing to decide that a person should be charged with a crime, but quite another to determine, under our constitutional system, that the person merits detention pending trial on that charge. Even when charged with a felony, noncapital defendants are eligible for pretrial release — on their own recognizance, on OR supervised release, or by posting money bail. When people can obtain their release, they almost always do so: The disadvantages to remaining incarcerated pending resolution of criminal charges are immense and profound.

If not released, courts have observed, the accused may be impaired to some extent in preparing a defense. (See *Van Atta*, *supra*, 27 Cal.3d at pp. 435–436, 166 Cal.Rptr. 149, 613 P.2d 210; accord, *Gerstein v. Pugh* (1975) 420 U.S. 103, 123, 95 S.Ct. 854, 43 L.Ed.2d 54.) Empirical evidence reveals additional disadvantages. Studies suggest that pretrial detention heightens the risk of losing a job, a home, and custody of a child. (See *Barker v. Wingo* (1972) 407 U.S. 514, 532–533, 92 S.Ct. 2182, 33 L.Ed.2d 101; *Van Atta*, at p. 436, 166 Cal.Rptr. 149, 613 P.2d 210.) And while correlation doesn't itself establish causation, time in jail awaiting trial may be associated with a higher likelihood of reoffending, beginning anew a vicious cycle. (See Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention* (2017) 69 Stan. L.Rev 711, 759–769; Pepin, 2012–2013 Policy Paper: Evidence-Based Pretrial Release (2013) p. 5; Lowenkamp et al., The Hidden Costs of Pretrial Detention (2013) p. 4.)

Pretrial detention also forces the state to bear the cost of housing and feeding those arrestees who could properly be released. (See *Van Atta*, *supra*, 27 Cal.3d at pp. 436–437, 166 Cal.Rptr. 149, 613 P.2d 210.) On any given day, nearly half a million people — none of whom has yet been convicted of a charged offense — sit in America's jails awaiting trial. (Crim. Justice Policy Program, Harvard Law School, Bail Reform: A Guide for State and Local Policymakers (Feb. 2019) p. 1 ["increases in pretrial detention rates are 'responsible for all of the net jail growth in the last twenty years' "].) This represents nearly 20 percent of the world's pretrial jail population. (*Id.* at p. 7.) Just six California counties (Alameda, Fresno, Orange, Sacramento, San Bernardino, and San Francisco), for example, spent $37.5 million over a two-year period jailing people who were never charged or who had charges dropped or dismissed. (See Human Rights Watch, "Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People (Apr. 11, 2017) p. 3; see generally Schnacke, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform (Sept. 2014) p. 15 ["the United States Department of Justice estimates that keeping the pretrial population behind bars costs American taxpayers roughly 9 billion dollars per year"].)

***5** Although California courts deny bail outright to felony defendants at roughly the same rate as courts in the rest of the country (Tafoya, Pretrial Detention and Jail Capacity in California (July 2015)),[3] arrestees in large urban counties in California reportedly end up in pretrial detention at much higher rates than arrestees in large urban counties elsewhere. (*Ibid.*) Part of the disparity may arise from the fact that even when bail is technically allowed, the amount that must be posted is considerably higher in California, on average, than elsewhere. And not in a way that can plausibly be justified

by the state's higher cost of living: "The median bail amount in California ($50,000) is *more than five times* the median amount in the rest of the nation (less than $10,000)." (*Ibid*., italics added.)

The indiscriminate imposition of money bail has consequences. "[S]ome people currently in California jails who are safe to be released are held in custody solely because they lack the financial resources for a commercial bail bond, and other people who may pose a threat to public safety have been able to secure their release from jail simply because they could afford to post a commercial bond." (Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice (Oct. 2017) p. 25.)

That disparity lies at the heart of this case.

III.

Twice, the superior court granted Humphrey bail — and on both occasions, the trial court set bail at sums Humphrey couldn't afford. Initially set at $600,000, bail was then reduced, after a formal bail hearing, to the still substantial sum of $350,000. At no point did the court inquire into Humphrey's ability to pay such an amount. As it turned out, Humphrey could not post bail so he remained in custody, even though a person facing similar charges, but with greater means, would've been able to post bail and be released.

The United States Supreme Court "has long been sensitive to the treatment of indigents in our criminal justice system." (*Bearden*, *supra*, 461 U.S. at p. 664, 103 S.Ct. 2064.) So have we. (See *Antazo*, *supra*, 3 Cal.3d at pp. 116–117, 89 Cal.Rptr. 255, 473 P.2d 999.) Humphrey asks whether it is constitutional to incarcerate a defendant solely because he lacks financial resources. We conclude it is not.

Neither this court nor the United States Supreme Court has yet held that a judge must consider what an arrestee can pay when fixing the amount of money bail. But from cases resolving analogous questions, we can perceive a theme. Consider *Bearden*, *supra*, 461 U.S. 660, 103 S.Ct. 2064, which examined the permissibility of imprisoning a probationer for failing to satisfy the balance due on a court-ordered fine and restitution. (*Id*. at pp. 661–662, 103 S.Ct. 2064.) Bearden argued that it violated the federal Constitution to imprison him "solely because" he lacked the ability to make these payments — a proposition that garnered agreement from the Supreme Court. (*Id*. at p. 661, 103 S.Ct. 2064.) *Bearden*'s analysis proves illuminating in our assessment of whether it likewise violates the state and federal Constitutions to hold an arrestee in custody solely because the arrestee cannot afford bail.

In *Bearden*, the court understood itself to be resolving "whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." (*Bearden*, *supra*, 461 U.S. at p. 665, 103 S.Ct. 2064.) The parties had examined this question "primarily in terms of equal protection," which inquired "whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation." (*Id*. at pp. 665, 666, 103 S.Ct. 2064.) Yet the court didn't quite buy the parties' argument that equal protection sufficiently captured the problem Bearden identified. Because "indigency in this context is a relative term rather than a classification, fitting 'the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.' " (*Id*. at p. 666 fn. 8, 103 S.Ct. 2064.) The court found the "more appropriate question" (*ibid*.) instead to be "whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine" (*id*. at p. 666, 103 S.Ct. 2064).

***6** Since the latter question turned out to be "substantially similar" to the equal protection inquiry (*Bearden*, *supra*, 461 U.S. at p. 666, 103 S.Ct. 2064), the court treated this case as one where "[d]ue process and equal protection principles converge" (*id*. at p. 665, 103 S.Ct. 2064). This led the court to conclude that "[w]hether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose' " in the case at hand. (*Id*. at pp. 666–667, fn., 103 S.Ct. 2064omitted.)

At stake in *Bearden* was the probationer's conditional freedom after pleading guilty to burglary and theft. (*Bearden*, *supra*, 461 U.S. at pp. 662, 672, 103 S.Ct. 2064.) By granting Bearden probation, Georgia had already determined that its "penological interests" did not require imprisonment (*id*. at

p. 670, 103 S.Ct. 2064) and that a fine and restitution could be the appropriate penalty for his crime. (*Id*. at p. 667, 103 S.Ct. 2064.) To be sure: His failure to pay those debts *may* have indicated "that this original determination need[ed] reevaluation, and imprisonment may now be required to satisfy the State's interests." (*Id*. at p. 670, 103 S.Ct. 2064.) But that would be so only under limited conditions: if the court determined (1) that he had the means to pay and willfully refused to do so *or* (2) that alternative measures would not be adequate "to meet the State's interests in punishment and deterrence." (*Id*. at p. 672, 103 S.Ct. 2064.) In other words, "[o]nly if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay." (*Ibid*.)

The Supreme Court then remanded the matter to allow the Georgia courts to determine either that Bearden had not made sufficient bona fide efforts to pay his fine or that alternative punishment could not satisfy the state's interest in punishment and deterrence. (*Bearden*, *supra*, 461 U.S. at p. 674, 103 S.Ct. 2064.) In the absence of such findings, though, "fundamental fairness" required that Bearden remain on probation. (*Ibid*.)

Principles of equal protection and substantive due process likewise converge in the money bail context. The accused retains a fundamental constitutional right to liberty. (See *United States v. Salerno*, *supra*, 481 U.S. at p. 750, 107 S.Ct. 2095 (*Salerno*); Cal. Const., art. I, § 7.) Further, the state's interest in the bail context is not to punish — it is to ensure the defendant appears at court proceedings and to protect the victim, as well as the public, from further harm. (See Cal. Const., art. I, §§ 12, 28, subd. (f)(3); Pen. Code, § 1275, subd. (a)(1).)[4]

***7** Yet 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.

Other jurisdictions have similarly concluded that detaining arrestees solely because of their indigency is fundamentally unfair and irreconcilable with constitutional imperatives. (See *Walker v. City of Calhoun*, *supra*, 901 F.3d 1245, 1258; *ODonnell v. Harris County*, *supra*, 892 F.3d at pp. 162–163; *Hernandez v. Sessions* (9th Cir. 2017) 872 F.3d 976, 992 ["By maintaining a process for establishing the amount of a bond that likewise fails to consider the individual's financial ability to obtain a bond in the amount assessed or to consider alternative conditions of release, the government risks detention that accomplishes 'little more than punishing a person for his poverty' "]; *Pugh v. Rainwater* (5th Cir. 1978) 572 F.2d 1053, 1057 ["The incarceration of those who cannot [afford bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements"]; *Brangan v. Com.* (2017) 477 Mass. 691, 80 N.E.3d 949, 954; *Valdez-Jimenez v. Eighth Judicial Dist. Court of Nevada* (2020) 136 Nev. 155, 460 P.3d 976, 984 ["bail must not be in an amount greater than necessary to serve the State's interests"]; *State v. Huckins* (2018) 5 Wash.App.2d 457, 426 P.3d 797, 804 ["the court abused its discretion by requiring monetary bail without considering less restrictive conditions as required by the law"].)

What we must therefore conclude is that pretrial detention is subject to state and federal constitutional constraints. Consistent with the aforementioned principles, we hold that such detention is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests. (Cf. *Bearden*, *supra*, 461 U.S. at p. 672, 103 S.Ct. 2064 ["Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay"]; accord, *Antazo*, *supra*, 3 Cal.3d at p. 114, 89 Cal.Rptr. 255, 473 P.2d 999 ["Because the state has available to it these alternative methods of collecting fines, we cannot conclude that imprisonment of indigents is necessary to promote this state interest"].)[5]

IV.

***8** In light of our conclusion that courts must consider an arrestee's ability to pay alongside the efficacy of less restrictive alternatives when setting bail, it may prove useful for us to sketch the general framework governing bail determinations.

When making any bail determination, a superior court must undertake an individualized consideration of the relevant

factors. These factors include the protection of the public as well as the victim, the seriousness of the charged offense, the arrestee's previous criminal record and history of compliance with court orders, and the likelihood that the arrestee will appear at future court proceedings. (Cal. Const., art. I, §§ 12, 28, subds. (b)(3), (f)(3); Pen. Code, § 1275, subd. (a)(1).)

The voters amended the Constitution to grant the people of this state the right to have the safety of the victim and the victim's family considered in the bail determination process. (Voter Information Guide, Gen. Elec. (Nov. 4, 2008) text of Prop. 9, p. 129.) To that end, they added "the safety of the victim" to the list of factors that a court shall consider in "setting, reducing or denying bail" ensuring that it, along with public safety, will be "the primary considerations" in those determinations. (Cal. Const., art. I, § 28, subd. (f)(3); see Pen. Code, § 1275, subd. (a)(1).) Along with those primary considerations of victim and public safety, the court must assume the truth of the criminal charges. (See *Ex parte Duncan* (1879) 53 Cal. 410, 411; *Ex parte Ruef* (1908) 7 Cal.App. 750, 752, 96 P. 24.) These are constitutionally permissible considerations, within certain parameters. (See *Salerno*, *supra*, 481 U.S. at pp. 750–751, 107 S.Ct. 2095 ["When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat"]; *U.S. v. Fidler* (9th Cir. 2005) 419 F.3d 1026, 1028 ["the detention is not based solely on the defendant's inability to meet the financial condition, but rather on the district court's determination that the amount of the bond is necessary to reasonably assure the defendant's attendance at trial or the safety of the community"].)

In determining what kind of threat to victim or public safety is required, we look to the standard of proof set forth in article I, section 12 of the California Constitution. Because that provision requires a court to find the specified risk of harm by "clear and convincing evidence" before detaining an arrestee by denying bail (Cal. Const., art. I, § 12, subds. (b), (c)), we similarly interpret our Constitution to bar a court from causing an arrestee to be detained pretrial based on concerns regarding the safety of the public or the victim, unless the court has first found clear and convincing evidence that no other conditions of release could reasonably protect those interests.

Our state Constitution does not explicitly state what standard of proof is required to justify pretrial detention when an arrestee poses a flight risk. On reflection, we agree with Humphrey that the standard of proof should likewise be clear and convincing evidence. There is no compelling reason why the quantum of evidence needed to establish that a given arrestee poses a risk of flight should differ from the quantum of evidence needed to establish that a given arrestee poses a risk to public or victim safety. (See *Kleinbart v. United States* (D.C. 1992) 604 A.2d 861, 870 ["A defendant's liberty interest is no less — and thus requires no less protection — when the risk of his or her flight, rather than danger, is the basis for justifying detention without right to bail"]; cf. Pen. Code, § 1272.1, subds. (a), (b) [applying the clear and convincing standard of proof to both the risk of flight *and* the risk to public safety when analyzing bail on appeal].) Accordingly, we conclude that our Constitution prohibits pretrial detention to combat an arrestee's risk of flight unless the court first finds, based upon clear and convincing evidence, that no condition or conditions of release can reasonably assure the arrestee's appearance in court. (See *Humphrey*, *supra*, 19 Cal.App.5th at p. 1037, 228 Cal.Rptr.3d 513.)[6]

***9** In those cases where the arrestee poses little or no risk of flight or harm to others, the court may offer OR release with appropriate conditions. (See Pen. Code, § 1270.) Where the record reflects the risk of flight or a risk to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial. If the court concludes that money bail is reasonably necessary, then the court must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and — unless there is a valid basis for detention — set bail at a level the arrestee can reasonably afford. And if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests.

The experiences of those jurisdictions that have reduced or eliminated financial conditions of release suggest that releasing arrestees under appropriate nonfinancial conditions — such as electronic monitoring, supervision by pretrial services, community housing or shelter, stay-away orders, and drug and alcohol testing and treatment (see, e.g., Pen. Code,

§ 646.93, subd. (c); N.J. Stat. Ann. § 2A:162-17) — may often prove sufficient to protect the community. (See Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice, *supra*, at pp. 51–53; Crim. Justice Policy Program, Harvard Law School, Bail Reform: A Guide for State and Local Policymakers, *supra*, at pp. 26, 38, 44, 49, 59, 62–63.) Yet just as neither money bail (nor any other condition of release) can guarantee that an arrestee will show up in court, no condition of release can entirely *eliminate* the risk that an arrestee may harm some member of the public. (See *In re Nordin* (1983) 143 Cal.App.3d 538, 546, 192 Cal.Rptr. 38 [" 'Prediction of the likelihood of certain conduct necessarily involves a margin of error, but is an established component of our pretrial release system' "].) In choosing between pretrial release and detention, we recognize that absolute certainty — particularly at the pretrial stage, when the trial meant to adjudicate guilt or innocence is yet to occur — will prove all but impossible. A court making these determinations should focus instead on risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur. (See *Stack v. Boyle* (1951) 342 U.S. 1, 8, 72 S.Ct. 1, 96 L.Ed. 3 (conc. opn. of Jackson, J.) ["Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice"]; cf. *Salerno*, *supra*, 481 U.S. at p. 751, 107 S.Ct. 2095 [discussing an arrestee's "identified and articulable threat to an individual or the community"].)

Even when a bail determination complies with the above prerequisites, the court must still consider whether the deprivation of liberty caused by an order of pretrial detention is consistent with state statutory and constitutional law specifically addressing bail — a question not resolved here[7] —and with due process. While due process does not categorically prohibit the government from ordering pretrial detention, it remains true that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*Salerno*, *supra*, 481 U.S. at p. 755, 107 S.Ct. 2095.)

***10** Marking the boundary between the general rule and the limited exception requires a careful balancing of the government's interest in preventing crime against the individual's fundamental right to pretrial liberty. (*Salerno*, *supra*, 481 U.S. at pp. 749–750, 107 S.Ct. 2095.) This territory has not yet been fully mapped, but we can nonetheless discern that an order of detention requires an interest that "is sufficiently weighty" in the given case — and courts should likewise bear in mind that *Salerno* upheld a scheme whose scope was "narrowly focuse[d] on a particularly acute problem." (*Id.* at p. 750, 107 S.Ct. 2095.) Indeed, the law under review there authorized pretrial detention "only on individuals who have been arrested for a specific category of extremely serious offenses." (*Ibid.*; accord, *Com. v. Vieira* (2019) 483 Mass. 417, 133 N.E.3d 296, 301 ["The practice of pretrial detention on the basis of dangerousness has been upheld as constitutional in part because the Legislature 'carefully limit[ed] the circumstances under which detention may be sought to the most serious of crimes' "].)[8]

A court's procedures for entering an order resulting in pretrial detention must also comport with other traditional notions of due process to ensure that when necessary, the arrestee is detained "in a fair manner." (*Salerno*, *supra*, 481 U.S. at p. 746, 107 S.Ct. 2095; see *Mathews v. Eldridge* (1976) 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18.) Among those fair procedures is the court's obligation to set forth the reasons for its decision on the record and to include them in the court's minutes. (See Cal. Const., art. I, § 28, subd. (f)(3).) Such findings facilitate review of the detention order, guard against careless or rote decision-making, and promote public confidence in the judicial process. (*Humphrey*, *supra*, 19 Cal.App.5th at p. 1038, 228 Cal.Rptr.3d 513; see *In re John H.* (1978) 21 Cal.3d 18, 23, 145 Cal.Rptr. 357, 577 P.2d 177.)

Accordingly, striking the proper balance between the government's interests and an individual's pretrial right to liberty requires a reasoned inquiry, careful consideration of the individual arrestee's circumstances, and fair procedures. But — as both parties emphasize — this is not a case that requires us to lay out comprehensive descriptions of every procedure by which bail determinations must be made. We leave such details to future cases. (See *In re Nordin*, *supra*, 143 Cal.App.3d at pp. 544–545, fn. 4, 192 Cal.Rptr. 38.)

V.

In a crucially important respect, California law is in line with the federal Constitution: "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*Salerno*, *supra*, 481 U.S. at p. 755, 107 S.Ct. 2095.) An arrestee may not be held in custody pending trial 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 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. (See *Humphrey*, *supra*, 19 Cal.App.5th at p. 1026, 228 Cal.Rptr.3d 513.) Pretrial detention on victim and public safety grounds, subject to specific and reliable constitutional constraints, is a key element of our criminal justice system. Conditioning such detention on the arrestee's financial resources, without ever assessing whether a defendant can meet those conditions or whether the state's interests could be met by less restrictive alternatives, is not.

Because the trial court failed to determine whether Humphrey had the financial wherewithal to post bail — and, if not, whether less restrictive alternatives could reasonably have satisfied the government's compelling interest in seeking his detention — the Court of Appeal reversed the trial court's bail order and remanded for the court to conduct a new hearing. Before we granted review, the trial court held that hearing and released Humphrey under various nonfinancial conditions, including his participation in a residential substance abuse treatment program for seniors, electronic monitoring, and an order to stay away from the victim and the victim's residence. In December 2018, Humphrey was released from his court-ordered residential treatment program, but his other nonfinancial conditions remained in place, along with a requirement to attend Alcoholics Anonymous meetings and outpatient treatment. No party sought relief from the Court of Appeal's judgment, and no party is seeking relief from the trial court's most recent ruling. We therefore affirm the judgment of the Court of Appeal.

We Concur:

CANTIL-SAKAUYE, C.J.

CORRIGAN, J.

LIU, J.

KRUGER, J.

GROBAN, J.

JENKINS, J.

All Citations

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Footnotes

1 We rely largely on the Court of Appeal's statement of facts. (*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1016–1022, 228 Cal.Rptr.3d 513 (*Humphrey*); see Cal. Rules of Court, rule 8.500(c)(2).)

2 Although Humphrey himself was no longer detained or subject to money bail, we granted review to address "important issues that are capable of repetition yet may evade review" and " 'to provide guidance for future cases.' " (*In re White* (2020) 9 Cal.5th 455, 458, fn. 1, 262 Cal.Rptr.3d 602, 463 P.3d 802.)

3 <https://www.ppic.org/publication/pretrial-detention-and-jail-capacity-in-california/> [as of Mar. 25, 2021]; all Internet citations in this opinion are archived by year, docket number, and case name at <http://www.courts.ca.gov/38324.htm>.

4 Appearing as amici curiae, the District Attorneys of San Bernardino and San Diego Counties question whether the concepts of substantive due process and equal protection even have a role to play in setting or reviewing bail. According to this view, Humphrey's entitlement to relief, if any, can derive only from the Eighth Amendment to the United States Constitution and its specific prohibition on excessive bail. (Cf. *Graham v. Connor* (1989) 490 U.S. 386, 394–395, 109 S.Ct. 1865, 104 L.Ed.2d 443.) We disagree. Equal protection and due process apply in a wide variety of contexts where the government imposes benefits or burdens on people. It's true "that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." (*United States v. Lanier* (1997) 520 U.S. 259, 272, fn. 7, 117 S.Ct. 1219, 137 L.Ed.2d 432.) But the claim that bail is excessive under the Eighth Amendment is not one Humphrey makes in this case — and this opinion does not purport to address or resolve any such claim. His objection instead targets the *method* by which his bail was determined. What he claims is that because the trial court failed to consider his ability to pay or the efficacy of less restrictive conditions of release, he was detained without adequate justification. Because that sort of claim is not " 'covered by' " the Eighth Amendment (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 843, 118 S.Ct. 1708, 140 L.Ed.2d 1043), neither *Graham* nor *Lanier* precludes his hybrid argument based on the convergence of the due process and equal protection clauses. (See *Walker v. City of Calhoun* (11th Cir. 2018) 901 F.3d 1245, 1259; *ODonnell v. Harris County* (5th Cir. 2018) 892 F.3d 147, 157; *U.S. v. Giangrosso* (7th Cir.

1985) 763 F.2d 849, 851; see generally *Salerno*, *supra*, 481 U.S. at p. 749, 107 S.Ct. 2095 [recognizing an arrestee's general substantive due process right to liberty prior to a judgment of guilt].) Those latter clauses protect the "specific constitutional right[s] allegedly infringed" here. (*Graham*, at p. 394, 109 S.Ct. 1865.)

5 *In re York* (1995) 9 Cal.4th 1133, 40 Cal.Rptr.2d 308, 892 P.2d 804 did not consider — and thus did not reject — the hybrid due process/equal protection challenge Humphrey has asserted here. York claimed a violation of equal protection when the court required him to submit to drug testing and warrantless searches as conditions for his OR release. He complained that such conditions "could not be imposed upon a defendant who is able to, and does, post reasonable bail." (*York*, at p. 1152, 40 Cal.Rptr.2d 308, 892 P.2d 804.) We indulged, "without deciding," York's predicate assumption that those on bail could not be subjected to conditions other than those related to assuring the arrestee's appearance in court (*ibid*.) — but we have since rejected this assumption as mistaken. (See *In re Webb* (2019) 7 Cal.5th 270, 278, 247 Cal.Rptr.3d 107, 440 P.3d 1129 ["trial courts have authority to impose reasonable conditions related to public safety on persons released on bail"]; see generally Cal. Const., art. I, § 28, subd. (b)(3).) *York* never considered whether or to what extent a court must consider a defendant's financial resources in setting bail.

6 We have not been asked to decide and do not determine here whether the California Constitution permits pretrial detention based on risk of nonappearance or flight alone, divorced from public and victim safety concerns.

7 Because this case does not involve an order *denying* bail, we leave for another day the question of how two constitutional provisions addressing the denial of bail — article I, sections 12 and 28, subdivision (f)(3) — can or should be reconciled, including whether these provisions authorize or prohibit pretrial detention of noncapital arrestees outside the circumstances specified in section 12, subdivisions (b) and (c). (See *In re White*, *supra*, 9 Cal.5th at pp. 470–471, 262 Cal.Rptr.3d 602, 463 P.3d 802.)

8 Even when eligible for detention under constitutional and statutory provisions, an arrestee who ends up detained "for want of bail" may ask the court to reconsider the bail amount. (Pen. Code, § 1270.2; see *In re Avignone* (2018) 26 Cal.App.5th 195, 200, 236 Cal.Rptr.3d 744; see generally *In re Weiner* (1995) 32 Cal.App.4th 441, 444, 38 Cal.Rptr.2d 172.)