January 19, 2022

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

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

Judicial Clerk Esther L. Roberts
Knox County General Sessions Court
400 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

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

Dear Legal System Actors,

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

In May of 2021, Judge Corker certified the following class in Torres: "All in] P,ri in

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

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

Judge Corker's substantive due process ruling has significant implications for the

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

Because any infringement of a person's fundamental right to pretrial liberty is subject to heightened scrutiny, the State must also bear the burden in the bail context to establish that any

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

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

Ex. 2 at 24:5-10.

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

2. Treating the magistrate's bail determination as presumptively correct rather than making a bail determination at the first appearance in General Sstes

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

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

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

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

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

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

Of course, Judge Corker held that there is nothing "inherently unconstitutional," Torres

As discussed above, due process requires the General Sessions judges to place the burden

preponderance of the evidence applies to pretrial detention decisions. See Weatherspoon v. Oldham

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

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

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

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

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

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

Id. at 874.

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

---

money bail, “a court must first find by clear and convincing evidence that no condition short of detention could suffice . . . Detention in these narrow circumstances doesn’t depend on the

    5. **Representation by counsel; and**

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

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

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

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

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

    1. **<u>Generally</u>. Prior to an individual being given a release condition that includes monetary bail, the individual shall receive an inquiry into their ability to pay—using their own resources—the fulls " —tt ! ilsiy q ease. M**

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

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

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

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

Sincerely,

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

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

Mark E. Stephens
The Law Office of Mark E. Stephens
606 West Main Street, Suite 100
Knoxville, TN 37902
Tel: 865-224-8111
mark@markstephenslawfirm.com

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

**** Not admitted in Tennessee**

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

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

EXHIBIT 1

April 2, 2021

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

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

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

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

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

Dear Legal System Actors,

The Southern Poverty Law Center (SPLC) and Civil Rights Corps (CRC) are committed to ensuring that a person's pretrial freedom does not depend on their access to money. We have filed lawsuits in state and federal courts across the country challenging the use of secured money bail to detain impoverished people before trial. The majority of those lawsuits have resulted in settlements or preliminary injunctions ending the illegal use of money to keep people in jail without the robust procedures that must accompany any order of p-1(c)-1(c)a3/<(r)(r)3(of)-970443aWalker v.

*3 (N.D.CVGa-TJ No. 15-

16); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 768–69

; *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 (7lM2(t)-2(h)5(e)-1(l)-2(a)-1()-1(..c)sjgTd

- 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 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] .14tdent(e)-1niitillr37.(t)p-2(s).1--2(lB1-1(C.(t)nc)3t)(14t undet) appearances do so electronically, with the arrestee remaining in jail and the magistrates appearing

> 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:

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

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

“

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]

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]

Amendment rights to a public trial,

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

EXHIBIT 2

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

So, until I get that information -- and when you're in the posture such that the person you're calling upon to make this ruling doesn't have information, no matter how you slice it, you know, you can say, well, it's their burden. You know, that's fine. But if I don't have information or the Magistrate doesn't have the information, remember, Mr. Enn (phonetic) takes a position, Magistrate quote/unquote did his or her job and set these bonds appropriately, and now it's incumbent upon defendant to convince me to change the bonds. And I understand we're arguing that. I don't know for sure, I use the term placeholder bonds, I don't know for sure what happened in this particular case. It looks like this is the first appearance. And it looks like these bonds may have been, you know, just that knowing that there will be a 48-hour bond here, I don't know.

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

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

So, let's do this. Let me at least read the narrative, let me at least read the statute before I like to. And everybody has an interest in what the five of us are going to do, each of us individually. And to be honest, the right thing is for all of us to be consistent, of course.

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

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

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

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

If he were released to be living with his grandmother at 3000 Sunset Drive. He has no arrest interesting. I have nothing to use as some kind of guide for how we're going to do it except for the ping pong match that typically occurs when two passionate advocates are busting their tail, trying to get the best possible -- not right at this minute, but thank you.

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

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

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

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

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

DISTRICT ATTORNEY: But I believe prior (inaudible).

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

CERTIFICATE OF TRANSCRIBER

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

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

September 29, 2021

DATE JIMMY JACOB

EXHIBIT 3

STATE OF TENNESSEE

DOCKET NO(s) @ 1417754

IN GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE

DOCKET NO. @1417754

VS.

Andrue Thacker

UNIFORM AFFIDAVIT OF INDIGENCY

1. Full Name: Andrue Thacker 2. Any other names ever used: ______

TTORNEY

an attorney and that if I
torney the Court will
It is my desire to waive

____

D PLEA

e tried in Criminal
ment by the Grand Jury.
. I desire to waive these
ions Court on this

________ to the charge on

____

e Criminal procedure
plea of guilty, except as to

explained

____

ot object to this case being

____

equest of the District

ge the offense of:

____

____

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

Date:__________ Case #:__________

Defendant: Decker Appointed Attorney: [illegible] Stevenson

Charge:__________ Court Date:__________

IDN:__________ Administrative Fee:__________

- Charges are ...
- Right to remain silent, anything said may be used against you
- Right to a preliminary hearing
- Right to an attorney, and will be appointed [illegible]
- Bail / conditions of release
- Court date:
- Administrative fee:

TCA 40-11-118

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

(1) The defendant's length of residence in the community; [illegible]

(2) The defendant's employment status and history and financial condition; [illegible] was [illegible] Cookeville

(3) The defendant's family ties and relationships; [illegible]

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

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

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

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

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

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