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4. Pretrial Release

Persons accused of a crime have a constitutional and statutory right to bail.[1] However, pretrial release need not be conditioned on posting bail. Persons may be released on their own recognizance without being required to post a bond with or without other conditions.[2] In fact, Tenn. Code Ann. § 40-11-116(a) (2012) requires courts to impose the "least onerous conditions reasonably likely to assure the defendant's appearance in court."

Unnecessary pretrial detention is detrimental to the accused, costly to the detaining authority, and counterproductive with regard to its impact on future criminal behavior.[3] Pretrial release decisions should not be determined by factors such as a person's gender, race, ethnicity, or financial resources. Rather, they should focus on protecting against the risk that the person will fail to appear for a scheduled court date and on protecting against the risks to the safety of specific persons or the community.[4] These decisions should be based on reliable information about the potential risks posed by a person's release and on an understanding of the community resources available to address or minimize the risks of non-appearance or danger to the community.[5]

Tennessee statutory standards for releasing persons on their own recognizance and for setting bail require courts to consider factors relevant to the likelihood that the person will appear for scheduled court dates and to the risk to public safety if the person is released.[6] While the Task Force did not receive information that the trial courts are failing to follow these standards, concern was expressed that Tennessee's slowness to adopt successful new pretrial release procedures being employed in other states may be having the effect of increasing the number of persons unnecessarily detained prior to trial.

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[1] Tenn. Const. art. I, § 15; Tenn. Code Ann. § 40-11-102 (2012) [Appendix 1]; *State v. Bergins*, 464 S.W.3d 298, 303-05 (Tenn. 2015) [Appendix 2].

[2] Tenn. Code Ann. §§ 40-11-104(a) [Appendix 3], -115(a) [Appendix 4] (2012).

[3] William F. Dressel & Barry Mahoney, *Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement* 4 Nat'l Judicial Coll., May 2013 (*Pretrial Justice in Criminal Cases*), https://www.judges.org/wp-content/uploads/pretrial-whitepaper0513.pdf.

[4] Tenn. Code Ann. § 40-11-118(b) (Supp. 2017) [Appendix 5].

[5] *Pretrial Justice in Criminal Cases*, at 2.

[6] Tenn. Code Ann. §§ 40-11-115(b)(1)-(8) [Appendix 4], -118(b) [Appendix 5].

Many persons who addressed the Task Force expressed concern regarding the fairness and efficacy of Tennessee's current commercial bail bond system. While there was substantial agreement that requiring bail is a proper way to ensure appearance and protect the safety of the public in appropriate cases, there was substantial unanimity among the prosecutors, public defenders, private defense counsel, and representatives of the law enforcement community that the current role of commercial bail bondsmen should be revisited.

The criticisms of the current commercial bail bond system focused on two shortcomings. First, many persons who have been arrested, fearing lengthy pretrial incarceration, exhaust their personal, and often their family's, financial resources to obtain a bond from a commercial bondsman. Had these resources not been used to make bail, they could have been used to retain a lawyer, thereby eliminating the need to appoint a public defender or private counsel. Second, commercial bondsmen provide little, if any, practical assistance to the courts or law enforcement. In the relatively rare instances when an accused fails to appear for a court date, he or she is most often apprehended by law enforcement agencies and returned to custody without the commercial bondsman's assistance.

The nationwide costs to communities stemming from the reliance on commercial bail bond systems are staggering. It is estimated that 450,000 persons are detained before trial on any given day in the United States. They account for approximately 63% of the total jail population, and the aggregate daily cost to the taxpayers for keeping them in jail is greater than $38 million.[7] In addition to the cost to the taxpayers, the amount of money pocketed by private bondsmen is substantial. For example, a recent study in Maryland found that from 2011 to 2015, the total amount paid to obtain bonds exceeded $256 million. The study also determined that $75 million of these payments were made by persons whose charges were eventually dropped or who were found not guilty.[8]

Concerns about the fairness and efficacy of Tennessee's heavy reliance on commercial bail bonds is not new. In 1996, the Commission on the Future of the Tennessee Judicial System, characterizing commercial bail bonds as "the judicial system's tawdry embarrassment," identified significant problems similar to those presented to the Task Force.[9] These shortcomings included:

- ❖ Opportunities for corruption;

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[7] Pretrial Justice Institute, *Pretrial Justice: How Much Does It Cost?* 2 (2017) (*How Much Does It Cost?*), https://university.pretrial.org/viewdocument/pretrial-justice-how-much-does-it.

[8] *Id.* 4.

[9] Comm'n on the Future of the Tennessee Judicial System, *To Serve All People,* at 34 (June 1996) (*To Serve All People*).

- ❖ Unnecessary detention for minor offenses;
- ❖ Exhaustion of personal resources requiring appointment of public defenders or private counsel; and
- ❖ The release of dangerous prisoners who have access to money.[10]

Because of its concerns regarding Tennessee's commercial bail bond system, the Commission concluded that "the judicial system would be better served by its own bonding system."[11] A state-administered bonding system could generate significant revenue to fund the programs providing counsel to eligible adults and children.

The Task Force recommends the creation of a separate task force to study the standards and procedures for making pretrial release decisions and the fairness and efficacy of the commercial bail bond system. In addition, the Task Force also recommends that the study include examination of pretrial release programs in other jurisdictions, particularly the reforms adopted by Kentucky and Maryland, which have substantially reduced the incarceration rates and the associated costs. The Task Force also recommends establishing pilot projects to evaluate the efficacy in Tennessee of the pre-trial release reforms that have proved successful in other states.

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[10] *Id.* at 32-34; *see also* Pretrial Justice Institute, *Where Pretrial Improvements Are Happening* 1 (Jan. 2017), https://university.pretrial.org/viewdocument/where-pretrial-improvements-are-hap-2.

[11] *To Serve All People*, at 33.

APPENDIX 1

Tenn. Code Ann. § 40-11-102 (2012)

Before trial, all defendants shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. After conviction, defendants are bailable as provided by § 40-11-113, § 40-11-143 or both.

APPENDIX 2

State v. Bergins, 464 S.W. 3d 298, 303-05 (Tenn. 2015)

Bail is a basic component of the American judicial system and is predicated on the principle "that a person accused of [a] crime shall not, until ... finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment." *Hudson v. Parker*, 156 U.S. 277, 285, 15 S.Ct. 450, 39 L.Ed. 424 (1895). Pretrial release on bail "permits the unhampered preparation of a defense[ ] and serves to prevent the infliction of punishment prior to conviction." *Stack v. Boyle*, 342 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951) (citing *Hudson*, 156 U.S. at 285, 15 S.Ct. 450). Pretrial bail also accommodates the defendant's interest in pretrial liberty and "society's interest in assuring the defendant's presence at trial." Donald B. Verrilli, Jr., *Note*, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 Colum. L. Rev. 328, 329–30 (1982). Compare *Reynolds v. United States*, 80 S.Ct. 30, 32, 4 L.Ed.2d 46 (Douglas, Circuit Justice, 1959) ("The purpose of bail is to [e]nsure the defendant's appearance and submission to the judgment of the court."), *with Bandy v. United States*, 81 S.Ct. 197, 197, 5 L.Ed.2d 218 (Douglas, Circuit Justice, 1960) ("The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt."). Denying bail can create serious and long-lasting adverse effects on a defendant. These adverse effects, when possible, should be mitigated in light of the constitutional principle that a defendant is innocent until proven guilty. *See Tidwell v. State*, 922 S.W.2d 497, 501 (Tenn. 1996) (stating that a criminal defendant "is presumed by law to be innocent until proven guilty" (quoting *State v. Shelton*, 851 S.W.2d 134, 139 (Tenn. 1993))). *See* generally 3 Joseph G. Cook, *Constitutional Rights of the Accused* § 13:3 (3d ed. 1996).

The origins of pretrial bail date back to medieval England, where it served "as a device to free untried prisoners." Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964*, at 1 (1964). During this time, the penalty for most crimes was a monetary fine paid to the victim. Thus, the amount of bail, which was often guaranteed by a third-party surety, was identical to the potential penalty upon a conviction. *See* June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 519–20 (1983). Along with compensating victims, this system worked well to deter pretrial flight, as the surety was incentivized through financial responsibility to produce the accused for trial. *Id*. at 520.

Eventually, however, certain problems arose. Over time, the amount of bail gradually ceased to correlate with the potential punishment, as monetary fines gave way to capital and corporal punishments. *Id*. at 520, 522. Further, accused persons started to face longer and longer delays between accusation and trial, with sheriffs "exercis[ing] a broad and ill-defined discretionary power to bail ... prisoners." *United States v. Edwards*, 430 A.2d 1321, 1326 (D.C. Cir. 1981) (en banc). These sheriffs also began to abuse their power widely, extorting money from many already entitled to release and accepting bribes in exchange for release from those not otherwise entitled to bail. *Id*.

Responding to historical abuses, the Magna Carta, created in 1215, established the

due process foundation for the right to bail, and the Statute of Westminster I, passed in 1275, established the offenses for *304 which bail was automatically granted. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 916–17 (2013) (explaining that the Statute of Westminster I left "the vast quantity of felonious, as well as nonfelonious, offenses as bailable"). In American colonial times through the era of the Constitution's inception, the right to bail was included in ordinances and statutes. Verrilli, *supra*, at 337–38. The United States Supreme Court later reaffirmed this right, stating, "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack*, 342 U.S. at 4, 72 S.Ct. 1.

The United States and Tennessee Constitutions provide for bail. The Eighth Amendment to the United States Constitution prohibits imposing "[e]xcessive bail" or "excessive fines" and inflicting "cruel and unusual punishments." U.S. Const. amend. VIII. Although this provision does not create a right to bail, *United States v. Salerno*, 481 U.S. 739, 754–55, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), it mandates that when pretrial bail is set for a criminal defendant, the amount shall not be excessive, *see Sellers v. United States*, 89 S.Ct. 36, 38, 21 L.Ed.2d 64 (Black, Circuit Justice, 1968). In contrast, the Tennessee Constitution guarantees that "all prisoners shall be bailable by sufficient sureties, unless for capital offen[s]es, when the proof is evident, or the presumption great." Tenn. Const. art. I, § 15. This constitutional provision grants a defendant the right to pretrial release on bail pending adjudication of criminal charges. *Swain v. State*, 527 S.W.2d 119, 120 (Tenn. 1975) (citing *State ex rel. Brown v. Newell*, 216 Tenn. 284, 391 S.W.2d 667 (1965); *Goins v. State*, 192 Tenn. 32, 237 S.W.2d 8 (1950); *Hicks v. State*, 179 Tenn. 601, 168 S.W.2d 781 (1943); Butt v. State, 131 Tenn. 415, 175 S.W. 529 (1914)).[2]

Presently, forty-one states have constitutional provisions addressing an individual's right to bail.[3] The most common articulation of this bail protection is the "Consensus Right to Bail" clause, which states, "[a]ll persons shall be bailable by sufficient sureties, except for

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[2]A defendant who has been convicted of a crime does not have a constitutional right to bail. The trial court, however, in its discretion and pursuant to applicable law, may grant bail to a defendant in a probation revocation proceeding. *See Butt*, 131 Tenn. at 415, 175 S.W. at 530–31; *see also* Tenn. R. Crim. P. 32(g).

[3]*See* Ala. Const. art. I, § 16; Alaska Const. art. I, § 11; Ariz. Const. art. II, § 22; Ark. Const. art. II, § 8; Cal. Const. art. I, § 12; Colo. Const. art. II, § 19; Conn. Const. art. I, § 8; Del. Const. art. I, § 12; Fla. Const. art. I, § 14; Idaho Const. art. I, § 6; Ill. Const. art. I, § 9; Ind. Const. art. I, § 17; Iowa Const. art. I, § 12; Kan. Const. B. of R. § 9; Ky. Const. § 16; La. Const. art. I, § 18; Me. Const. art. I, § 10; Mich. Const. art. I, § 15; Minn. Const. art. I, § 7; Miss. Const. art. III, § 29; Mo. Const. art. I, § 20; Mont. Const. art. II, § 21; Neb. Const. art. I, § 9; Nev. Const. art. I, § 7; N.J. Const. art. I, § 11; N.M. Const. art. II, § 13; N.D. Const. art. I, § 11; Ohio Const. art. I, § 9; Okla. Const. art. II, § 8; Or. Const. art. I, § 14; Pa. Const. art. I, § 14; R.I. Const. art. 1, § 9; S.C. Const. art. I, § 15; S.D. Const. art. VI, § 8; Tenn. Const. art. I, § 15; Tex. Const. art. I, § 11; Utah Const. art. I, § 8; Vt. Const. ch. II, § 40; Wash. Const. art. I, § 20; Wis. Const. art. I, § 8; Wyo. Const. art. I, § 14.

capital offenses when the proof is evident or the presumption great." Hegreness, *supra*, at 923. Tennessee's constitutional provision creating a fundamental right to pretrial bail is consistent with a majority of states and is essentially the same as the constitutional provisions of twenty other states.[4] ***305** At the state level, the right to pretrial bail has traditionally been a "fundamental constitutional right." *See* Hegreness, *supra*, at 921 (explaining that "[t]he Right to Bail Clause in state constitutions has been remarkably consistent over time and among the states").

[4] *Compare* Tenn. Const. art. I, § 15, *with* Ala. Const. art. I, § 16; Alaska Const. art. I, § 11; Ark. Const. art. II, § 8; Conn. Const. art. I, § 8; Del. Const. art. I, § 12; Idaho Const. art. I, § 6; Ind. Const. art. I, § 17; Iowa Const. art. I, § 12; Kan. Const. B. of R. § 9; Ky. Const. § 16; La. Const. art. I, § 18; Me. Const. art. I, § 10; Minn. Const. art. I, § 7; Mo. Const. art. I, § 20; Mont. Const. art. II, § 21; N.J. Const. art. I, § 11; N.D. Const. art. I, § 11; Or. Const. art. I, § 14; S.D. Const. art. VI, § 8; *and* Wyo. Const. art. I, § 14.

APPENDIX 3

Tenn. Code Ann. § 40-11-104 (2012)

(a) Any magistrate may release the defendant on the defendant's own recognizance pursuant to § 40-11-115 or § 40-11-116 or admit the defendant to bail pursuant to § 40-11-117 or § 40-11-122 at any time prior to or at the time the defendant is bound over to the grand jury. The trial court may release the defendant on the defendant's own recognizance pursuant to § 40-11-115, admit the defendant to bail under § 40-11-116, § 40-11-117 or § 40-11-122, or alter bail or other conditions of release pursuant to § 40-11-144 at any time prior to conviction or thereafter, except where contrary to law.

(b) When a defendant has been released to appear as directed by the officer setting bail, and such defendant fails to appear as ordered, any new bail set shall be posted only pursuant to § 40-11-118 or § 40-11-122.

APPENDIX 4

Tenn. Code Ann. § 40-11-115 (2012)

(a) Any person charged with a bailable offense may, before a magistrate authorized to admit the person to bail, be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the magistrate.

(b) In determining whether or not a person shall be released as provided in this section and that a release will reasonably assure the appearance of the person as required, the magistrate shall take into account:

(1) The defendant's length of residence in the community;
(2) The defendant's employment status and history, and financial condition;
(3) The defendant's family ties and relationships;
(4) The defendant's reputation, character and mental condition;
(5) The defendant's prior criminal record, including prior releases on recognizance or bail;
(6) The identity of responsible members of the community who will vouch for defendant's reliability;
(7) The nature of the offense and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and
(8) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

APPENDIX 5

Tenn. Code Ann. § 40-11-118 (Supp. 2017)

(a) Any defendant for whom bail has been set may execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money in cash equal to the amount of the bail. Upon depositing this sum, the defendant shall be released from custody subject to the conditions of the bail bond. Bail shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required.

(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;
(2) The defendant's employment status and history and financial condition;
(3) The defendant's family ties and relationships;
(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.

(c)(1) Whenever a court's judgment includes the requirement that the defendant pay a fine or cost, the court may require that the payment of the fine or cost be secured by surety bond or other appropriate undertaking if such defendant has a history of past due fines and costs. A parent, guardian or other responsible party may be permitted to act as surety in order to guarantee the payment of the fine or cost.

(2) Notwithstanding any other provision of law to the contrary, unless the surety executes a bond or agreement which specifically makes the surety liable for the fine, cost, or restitution, no surety shall be held liable for the fine, cost or restitution without the surety's consent.

(d)(1) When the court is determining the amount and conditions of bail to be imposed upon a defendant, if the defendant is charged with a violation of § 55-10-401, and has one (1) or more prior convictions for the offense of driving under the influence of an intoxicant under § 55-10-401, vehicular assault under § 39-13-106, aggravated vehicular assault under § 39-13-115, vehicular homicide under § 39-13-213(a)(2), aggravated

vehicular homicide under § 39-13-218, or a prior conviction in another state that qualifies under § 55-10-405(b), the court shall consider the use of special conditions for the defendant, including, but not limited to, the conditions set out in subdivision (d)(2).

(2) The special conditions the court shall consider pursuant to subdivision (d)(1) are:

(A) The use of ignition interlock devices;

(B) The use of transdermal monitoring devices or other alternative alcohol monitoring devices. However, if the court orders the use of a monitoring device on or after July 1, 2016, and determines the defendant is indigent, the court shall order the portion of the costs of the device that the defendant is unable to pay be paid by the DUI monitoring fund, established in § 55-10-419;

(C) The use of electronic monitoring with random alcohol or drug testing; or

(D) Pretrial residency in an in-patient alcohol or drug rehabilitation center.

(3) As used in this subsection (d), "court" includes any person authorized by § 40-11-106 to take bail.

(e) After an inquiry pursuant to § 40-7-123 into the citizenship status of a defendant who is arrested for causing a traffic accident resulting in either the death or serious bodily injury, as defined in § 55-50-502, of another while driving without a valid driver license and evidence of financial responsibility as required by § 55-12-139, if it is determined that the defendant is not lawfully present in the United States, when determining the amount of bail, the defendant may be deemed a risk of flight.

(f)(1) If the judge or magistrate determines that a person charged with vehicular assault under § 39-13-106, vehicular homicide under § 39-13-213(a)(2), or aggravated vehicular homicide under § 39-13-218 on or after July 1, 2015, has a prior alcohol-related conviction, the use of a transdermal monitoring device shall be a condition of the person's bail agreement.

(2) All expenses associated with a person being subject to a transdermal monitoring device as a condition of bail shall be paid by that person. If the person believes there are legitimate medical reasons why the person is unable to be subject to the order, those reasons may be presented at the person's first appearance before a general sessions court judge or judge of a court of record. After hearing from the person subject to monitoring, the judge may waive, modify, or affirm an order requiring that person to be subject to transdermal monitoring.

(3) The offender shall choose an entity from a list approved by the court to provide, administer, and monitor the transdermal device ordered as a condition of bail. However, any entity placed on the approved list must have the ability to monitor the person's device

on a daily basis and report any violation to the court having jurisdiction over the person's case by no later than the business day next following the violation. The person on bail shall remain subject to transdermal monitoring for the duration of the time the person is released on bail, unless the judge or magistrate specifically provides otherwise.

(4) If the report from the transdermal monitoring entity to the judge indicates that the person being monitored violated the conditions of release, the judge may issue a capias for the person's arrest for violation of bond conditions.

(5) As used in this subsection (f):

(A) "Alcohol-related conviction" means the person has been convicted prior to the instant conviction of a violation of § 39-13-213(a)(2), § 39-13-106, § 39-13-218, or § 55-10-401; and

(B) "Transdermal monitoring device" means any device or instrument that is attached to the person, designed to automatically test the alcohol or drug content in a person by contact with the person's skin at least once per one-half (½) hour regardless of the person's location, and which detects the presence of alcohol or drugs and tampering, obstructing, or removing the device.

(g)(1) If a person is required as a special bond condition to submit to monitoring pursuant to subdivisions (d)(2)(A)-(C), subsection (f), § 40-11-150, or § 40-11-152, it is a Class B misdemeanor:

(A) For that person to knowingly tamper with, remove, or vandalize the monitoring device; or

(B) For any person to knowingly aid, abet, or assist a person in tampering with, removing, or vandalizing a monitoring device.

(2) If an entity monitoring the device becomes aware that there has been an attempt to either tamper with, disable, remove, or otherwise make the device ineffective, or if the bonding agent becomes aware the person has violated any bond condition ordered by the court, then the entity monitoring the device shall promptly give notice of the violation to the court with jurisdiction over the person and the surety of the person's bail bond.

(3) The court shall take such action as the case may require, including, but not limited to, the revocation of bail. Additionally, the violation also constitutes a grounds for surrender under § 40-11-132.