

LET'S
TALK
BAIL

**JUDICIAL
COMMISSIONER
ASSOCIATION OF
TENNESSEE**

WINTER CONFERENCE

COURTNEY KING
BUERGER, MOSELEY & CARSON, PLC

DECEMBER 13, 2023

TOPICS WE WILL COVER TODAY:

- History of Bail
- Authority to Release Defendants
 - Release on recognizance or unsecured appearance bond
 - Release with conditions
 - Setting monetary bail
- ROR – Factors that MUST be Considered
- Conditions of Release
 - When are they permitted?
 - When are they required?
 - Examples:
 - Ignition Interlocks
 - Transdermal Monitoring (SCRAM) Devices
 - Global Positioning Monitoring Devices
 - 12-hour holds
- Monetary Bail – Factors that MUST be Considered
- Altering bonds / conditions of release

HISTORY OF BAIL

- Bail was used in medieval England (1066-1485)
- Colonial Americans relied on English structure in formulating first laws (~1776)
- The Eighth Amendment borrowed language from Section 9 of the Virginia Constitution and provided that "Excessive bail shall not be required..." (1789)
 - First Congress passed the Judiciary Act – defining what crimes were bailable
- Tennessee Constitution – 1796 (Art. 11th, Sec. 15 & 16)
- Federal Bail Reform Act – 1966
- Release from Custody and Bail Reform Act of 1978

TENNESSEE'S CONSTITUTIONAL RIGHT TO BAIL

- **Article I, Section 15:** “[A]ll prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great.”
 - This is echoed in T.C.A. § 40-11-102 (“Before trial, all defendants shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great.”).
- **Article I, Section 16:** “[E]xcessive bail shall not be required”

Sect. 15.th That all Prisoners shall be
bailable by sufficient Sureties, unless for Capital
offences, when the proof is evident or the presump-
tion great, and the privilege of the writ

Sect. 16.th That excessive Bail shall not
be required, nor excessive fines imposed, nor
cruel and unusual punishments inflicted.

T.C.A. § 40-11-104

AUTHORITY TO RELEASE DEFENDANTS

JUDICIAL COMMISSIONERS

At any time prior to or at the time the defendant is bound over to the grand jury, judicial commissioners may:

- ROR pursuant to T.C.A. § 40-11-115* or -116*; or
- Admit to bail pursuant to T.C.A. § 40-11-117 or -122

THE TRIAL COURT

At any time, except where contrary to law, the trial court may:

- ROR pursuant to T.C.A. § 40-11-115; or
- Admit to bail pursuant to T.C.A. § 40-11-116, -117 or -122; or
- Alter bail or other conditions of release pursuant to T.C.A. § 40-11-144

T.C.A. § 40-11-147

A defendant arrested in County A on a warrant issued in County B for an offense that carries a max punishment of 10 years or less imprisonment is entitled to be admitted to bail as if the warrant was issued in County A.

Two conditions:

1. The judicial commissioner or clerk of County A shall fix the amount of bail to be required and write it on the face of the warrant; and
2. The sheriff of County A must transmit the undertaking of bail to the sheriff of County B (where warrant was issued) who shall return it to the court of County B.

T.C.A. § 40-11-114

When not given in open court, bail is given by a written undertaking that:

1. Outlines the conditions of release
2. Contains the agreement of the defendant to:
 - A. Appear in the court having jurisdiction of the offense as directed by the court; and/or
 - B. Pay a certain amount of money for nonappearance
3. Is signed by the defendant, and
4. If made under § 40-11-122(2) (allowing for a written undertaking by defendant and two sureties who are not attorneys or bondsmen), is signed also by court-approved and sufficient surety or sureties.

The written undertaking must be approved by the officer taking it.

*Note: A fax copy has the same legal effect as the original written undertaking.

HYPOTHETICAL

You set bond and bond conditions for a defendant. When you ask the defendant to sign that he acknowledges the conditions of bond, he says, “You can’t tell me what to do,” and refuses to sign. It’s clear that he’s just being difficult.

What now?

No bond until defendant complies.

Law requires an opportunity to make bail, *not* that bail be unconditionally given.

Refusal to comply with conditions means defendant can be held until he/she agrees to comply.

OPTIONS AVAILABLE TO JUDICIAL COMMISSIONERS FOR THE RELEASE OF A DEFENDANT

**Release on recognizance or
Release on execution of an unsecured appearance bond**

(T.C.A. § 40-11-115)



Impose conditions on release

(T.C.A. § 40-11-116)



Require monetary bail

(T.C.A. § 40-11-117)

***Holding without bail:** Available ONLY for *capital offenses* “where the proof is evident or the presumption great” (Tenn. Const. Art. I, § 15; T.C.A. § 40-11-102) or for *probation/parole violations* of defendants who have already been convicted of the original criminal offense and are awaiting revocation hearings by the Trial Court or Board of Parole.

RELEASE ON RECOGNIZANCE OR UNSECURED APPEARANCE BOND

NEW LAW – Amended T.C.A. § 40-11-115(d)

Effective July 1, 2023

Judicial commissioners **SHALL NOT** ROR defendants charged with:

- A Class A felony;
- A Class B felony;
- Aggravated Assault (T.C.A. § 39-13-102);
- Aggravated Assault Against a First Responder (T.C.A. § 39-13-116); or
- Felony Domestic Assault (T.C.A. § 39-13-111),

without the approval of a general sessions, criminal court, or circuit court judge with jurisdiction over the charges.

RELEASE ON RECOGNIZANCE OR UNSECURED APPEARANCE BOND

T.C.A. § 40-11-115(b)—Factors that should be considered to determine whether release will reasonably assure appearance as required:

1. The defendant's length of residence in the community;
2. The defendant's employment status;
3. The defendant's prior criminal record*, including prior RORs or release on bail;
4. Whether, at the time of being charged with the offense, the defendant was on release pending trial, sentencing, or appeal in connection with another offense;

RELEASE ON RECOGNIZANCE OR UNSECURED APPEARANCE BOND

5. The nature of the offense, the apparent probability of conviction, and **the likely sentence**, insofar as these factors are relevant to the risk of nonappearance;
6. Any substance use or mental health issues that would be better addressed in a community-based treatment program*; and
7. Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

NEW LAW – Amended T.C.A. § 40-11-142

Effective July 1, 2023

After arrest but prior to the determination of bail, an arresting law enforcement officer or his/her agency must exercise due diligence in determining the existence of any prior arrest or conviction

- Due diligence means checking the TBI interstate identification index, Tennessee criminal history database, driver's license history, other official records of arrest/criminal history to which officer has access

The results of the criminal history investigation “must be made a part of the person's law enforcement file.”

T.C.A. § 40-11-115(c)

Defendant is charged with a violation of T.C.A. § 55-50-504
(driving on a cancelled, suspended or revoked license)

+

License was cancelled, suspended, or revoked solely for failure to pay litigation taxes,
court costs, or fines imposed as the result of the disposition of any criminal charge

+

The defendant does not have a prior conviction
for failure to appear in the past 10 years

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Defendant SHALL be released ROR or on unsecured appearance bond

NEW LAW – Amended T.C.A. § 40-11-115(e)

Effective July 1, 2023

A defendant charged with Aggravated Assault (T.C.A. § 39-13-102) or Assault Against a First Responder or Nurse (T.C.A. § 39-13-116) where the offense involved strangulation of the victim **SHALL NOT be released ROR or on an unsecured appearance bond.**

“The magistrate must require the defendant to post bail to reasonably ensure the appearance of the person as required and the safety of the community, in addition to other conditions of release imposed.”

CONDITIONS OF RELEASE

If a defendant does not qualify for release on recognizance, “the magistrate shall impose *the least onerous conditions* reasonably likely to assure the defendant’s appearance in court.”

- T.C.A. § 40-11-116(a)

Conditions of release can be imposed **with** or **without** setting bond. They can accompany a release on recognizance or unsecured appearance bond, or a secured bond.

CONDITIONS OF RELEASE

Generally

If conditions of release are necessary, a judicial commissioner may impose one or more of the following conditions:

1. Release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court (The department of correction and its officers do not qualify under this section);
 - **NEW LAW:** Effective 7/1/2023, A judicial commissioner is NOT permitted to release a defendant charged with a Class A felony, Class B felony, Aggravated Assault, Aggravated Assault against a First Responder, or felony Domestic Assault on this condition without the approval of a general sessions or circuit court judge. (Pub. Ch. 362.)
2. Impose reasonable restrictions on the activities, movements, associations and residences of the defendant; and/or
3. Impose any other reasonable restriction designed to assure the defendant's appearance, including, but not limited to, the deposit of bail.

(T.C.A. § 40-11-116(b)).

EXAMPLES OF CONDITIONS OF RELEASE

- **Breath Alcohol Ignition Interlock Devices (“BAIIDs”)** – Devices designed to allow a driver to start a vehicle if the driver’s Breath Alcohol Concentration (BrAC) is below the set point and to prevent the driver from starting the vehicle if the BrAC is at or above the set point. (1340-03-06-.02(5)).
- **Transdermal Monitoring (“SCRAM”) Devices** – 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 (1/2) hour regardless of the person's location, and which detects the presence of alcohol or drugs and tampering, obstructing, or removing the device.
- **Global Positioning Monitoring Devices** – A system that electronically determines and reports the location of an individual through the use of a transmitter or similar device carried or worn by the individual that transmits latitude and longitude data to a monitoring entity through global positioning satellite technology.
 - Does NOT include a system that is implanted in or otherwise invades or violates the individual’s body

CONDITIONS OF RELEASE

Commission of certain offenses while out on bail for certain offenses

T.C.A. § 40-11-148(b)

When the defendant is charged with:

- Driving under the influence (T.C.A. § 55-10-401);
- Vehicular assault (T.C.A. § 39-13-106);
- Aggravated vehicular assault (T.C.A. § 39-13-115);
- Vehicular homicide (T.C.A. § 39-13-213(a)(2)); or
- Aggravated vehicular homicide (T.C.A. § 39-13-218)

AND

the above offense, for which bail is being set, was committed while the defendant was released on bail for a prior charge of any of the above listed offenses

→ **Judicial commissioners are *required to consider* the use of special conditions for the defendant, including, but not limited to:**

- Transdermal monitoring devices or other alternative alcohol monitoring devices;
 - EMIF eligible
- Electronic monitoring with random alcohol or drug testing; or
- Pretrial residency at an in-patient alcohol or drug rehabilitation center*

**OFFENSES THAT
REQUIRE SPECIFIC
CONDITIONS OF RELEASE**

NEW LAW - T.C.A. § 40-11-148(a)

Effective July 1, 2023

If a defendant is charged with the commission of one or more bailable offenses while out on bail / ROR for a criminal offense, the judicial commissioner **MUST set monetary bail on the new offense “in an amount not less than twice that which is customarily set for the [new] offense charged.”**

T.C.A. § 40-11-118(d)(1)

DUI (T.C.A. § 55-10-401),
Vehicular Assault (T.C.A. § 39-13-106),
Aggravated Vehicular Assault (T.C.A. § 39-13-115)
Vehicular Homicide (T.C.A. § 39-13-213(a)(2)), or
Aggravated Vehicular Homicide (T.C.A. § 39-13-218)

+

Alleged offense involved the use of alcohol

+

Any of the following conditions is present:

Alleged offense resulted in a
collision involving property damage

A minor was present in the vehicle
at the time of the alleged offense

The defendant's license has
previously been suspended for
refusing to submit to a breath test,
blood test, or both

=

Defendant has a prior conviction for
Reckless Driving, Reckless
Endangerment, DUI, Vehicular
Assault, Aggravated Vehicular
Assault, Vehicular Homicide,
Aggravated Vehicular Homicide

**An Ignition Interlock Device shall be a condition of the defendant's bail agreement*,
unless the judicial commissioner determines that ordering an ignition interlock device
is not in the best interest of justice and public safety.**

IMPORTANT NOTES

T.C.A. § 40-11-118(d)(1)(B): If defendant is indigent, must order the portion of the costs of the device that the defendant is unable to pay be paid by the electronic monitoring indigency fund (EMIF).

T.C.A. § 40-11-118(d)(1)(C): If the court does not require a functioning ignition interlock device as a bail condition, the court **SHALL include in its order written findings on why the requirement would not be in the best interest of justice and public safety.**

T.C.A. § 40-11-118(f)

DUI 3rd offense or greater & involving use of alcohol (T.C.A. § 55-10-401)*
Vehicular Assault (T.C.A. § 39-13-106),
Vehicular Homicide (T.C.A. § 39-13-213(a)(2)), or
Aggravated Vehicular Homicide (T.C.A. § 39-13-218)

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Prior alcohol-related conviction
(DUI, Vehicular Homicide (by intoxication), Vehicular Assault,
Aggravated Vehicular Homicide)

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**A Transdermal Monitoring Device
shall be a condition of the defendant's bail agreement***

*see next slide for important notes

IMPORTANT NOTES

T.C.A. 40-11-118(f)(1)(b) – **If defendant is charged with DUI 3rd or greater and the alleged offense involves use of alcohol**, the judicial commissioner SHALL order defendant, upon release on bail, to wear a transdermal alcohol monitoring device for a minimum period of 90 days of continuous sobriety without any confirmed drinking or tampering events (effective July 1, 2023).

- Only exception to this minimum period is if defendant's case is resolved within the 90-day period.

T.C.A. § 40-11-118(f)(2), (3) – **When a transdermal monitoring device is required as a condition of bail under § 40-11-118(f):**

- **All expenses associated with transdermal monitoring device as a condition of bail shall be paid by the offender.**
 - NOT Electronic Monitoring Indigency Fund eligible
- The offender shall choose, from a court-approved list, an entity to provide, administer, and monitor the transdermal device ordered as a condition of bail.
- The offender on bail shall remain subject to transdermal monitoring for the duration of the time the offender is released on bail, *unless the judge or judicial commissioner specifically provides otherwise.* Best practice: Leave the decision to remove a device to the judge.

T.C.A. § 40-11-118(f)(2), (3).

T.C.A. § 40-11-118(d)(2)

DUI (T.C.A. § 55-10-401),
Vehicular Assault (T.C.A. § 39-13-106),
Aggravated Vehicular Assault (T.C.A. § 39-13-115),
Vehicular Homicide (T.C.A. § 39-13-213(a)(2)), or
Aggravated Vehicular Homicide (T.C.A. § 39-13-218)

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Defendant has one or more prior conviction for Reckless Driving, Reckless Endangerment, DUI, Vehicular Assault, Aggravated Vehicular Assault, Vehicular Homicide, Aggravated Vehicular Homicide

+

Defendant is not subject to the requirements of T.C.A. § 40-11-118(f)

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The judicial commissioner SHALL consider the use of special conditions, including:

- 1. The use of transdermal monitoring devices or other alternative alcohol monitoring devices***
- 2. The use of electronic monitoring with random alcohol or drug testing; or**
- 3. Pretrial residency in an in-patient alcohol or drug rehabilitation center**

*see next slide for an important note

IMPORTANT NOTE

If use of a transdermal monitoring device or other alternative alcohol monitoring device is ordered, and the judicial commissioner determines the defendant to be indigent, the judicial commissioner **SHALL** order the portion of the costs of the device that the defendant is unable to pay be paid by the electronic monitoring indigency fund (EMIF).

General Sessions Court
Williamson County
Franklin, Tennessee

**CONDITIONAL RELEASE
ORDER FOR PERSONS
CHARGED WITH OR
PREVIOUSLY CONVICTED OF
CERTAIN OFFENSES**

Case Number
12345678901341

State of Tennessee

vs.

John T Anderson

Pursuant to Tennessee Code Annotated, Section 40-11-118, AS AMENDED, and Article I, 15, of the Tennessee Constitution, the Court has reviewed the facts of the arrest and detention of the Defendant and has determined that the Defendant:

1. Has previously been convicted of a violation of TCA 55-10-401, 39-13-106, 39-13-115, 39-13-218, or 39-13-213 or is currently released on bail for a violation of TCA 55-10-401, 39-13-106, 39-13-115, 39-13-218, or 39-13-213
2. (for offenses charged on or after July 1, 2022) Is charged with a violation of TCA 55-10-401, 39-13-106, 39-13-115, 39-13-213(a)(2), or 39-13-218, and the alleged offense involved the use of alcohol, and one of the following factors is present:
- (i) The offense resulted in a collision involving property damage;
 - (ii) A minor was present in the vehicle at the time of the alleged offense;
 - (iii) The Defendant's driver license has previously been suspended for a violation of TCA 55-10-406; OR
 - (iv) The Defendant has a prior conviction for violation of TCA 55-10-205, 39-13-103, 55-10-401, 39-13-106, 39-13-115, 39-13-213(a)(2), or 39-13-218.
- *If this section is checked but requirement of an ignition interlock device is not in the best interest of justice and public safety, please document findings:
Just a made up scenario, no device needed.

3. Is not a threat to public safety as specified in Article I, 15, or the Tennessee Constitution.

4. Is reasonably likely to appear in court.

Pursuant to the above findings, the Defendant's release or bail is conditioned on the following and it is ORDERED that:

- 1. The defendant is enjoined from operating any motor vehicle not equipped with an ignition interlock device.
- 2. The defendant is prohibited from operation a motor vehicle unless properly licensed and insured.
- 3. The defendant is directed to be subjected to a transdermal alcohol monitoring device.
- 4. The defendant is directed to be subjected to a breath test.
- 5. The defendant is directed to be subjected to a Drug Patch.
- 6. The defendant is directed to a pre-trial residency in an in-patient alcohol or drug rehabilitation facility.
- 7. The defendant is prohibited from possessing or consuming alcohol or controlled substances EXCEPT as prescribed by a licensed physician.
- 8. The defendant shall not operate any motor vehicle while under the influence of drugs or alcohol.
- 9. The defendant is to submit to a drug screen urinalysis or blood test () once a week or () twice a week in conjunction with a transdermal monitoring device.
- 10. Any other order required to protect the safety of the public and to ensure the appearance of the defendant in Court.

BAIL SET AT: _____

IT IS FURTHERED ORDERED that a copy of this order be given to the defendant, the victim, and all appropriate law enforcement agencies.

I acknowledge these conditions:

Judge / Judicial Commissioner Date Defendant Date

NOTICE TO DEFENDANT

If you violate this order thinking that the other party has given you permission to do so, you are wrong and can be arrested and prosecuted. The terms of this order cannot be changed by agreement of the parties. Only the court can change this order.

VIOLATION OF THIS ORDER MAY CONSTITUTE CONTEMPT OF THE COURT AND/OR A CLASS A MISDEMEANOR PURSUANT TO T.C.A. 39-13-113 AND MAY CAUSE YOUR BAIL TO BE REVOKED.

Page 1 of 2

General Sessions Court Williamson County Franklin, Tennessee	CONDITIONAL RELEASE ORDER FOR PERSONS CHARGED WITH OR PREVIOUSLY CONVICTED OF CERTAIN OFFENSES	Case Number <u>12345678901341</u>
_____ State of Tennessee _____ vs. _____ John T Anderson _____		

ORDER DISCHARGING DEFENDANT FROM CONDITIONS OF BAIL

For good cause, IT IS ORDERED that the defendant is discharged from all conditions of bail set above, except

and the clerk shall send notice to appropriate law enforcement agencies.

JudgeDate

T.C.A. § 40-11-150

Child Abuse / Aggravated Child Abuse

Child Neglect / Aggravated Child Neglect

Child Endangerment /
Aggravated Child Endangerment

Neglect / Aggravated Neglect
of an Elderly or Vulnerable Adult

Abuse / Aggravated Abuse
of an Elderly or Vulnerable Adult

Stalking / Aggravated Stalking /
Especially Aggravated Stalking

Violation of an Order of Protection

Any offense against a person where the
victim is a victim of domestic abuse,
sexual assault, or stalking as defined in

T.C.A. § 36-3-601*
(next slide)

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**Review of facts of the arrest and detention of the defendant and,
via written findings where possible, determine whether the defendant is:**

- 1. A threat to the alleged victim;**
- 2. A threat to public safety; and**
- 3. Reasonably likely to appear in court.**

+

Impose one or more condition of release or bail to protect the victim & ensure defendant's appearance

(see next slides)

T.C.A. § 36-3-601: Victim

Domestic Abuse Victim

- (A) Adults or minors who are current or former spouses;
- (B) Adults or minors who live together or who have lived together;
- (C) Adults or minors who are dating or who have dated or who have or had a sexual relationship;
 - “Dating” & “dated” do not include fraternization between two individuals in a business or social context.
- (D) Adults or minors related by blood or adoption;
- (E) Adults or minors who are related or were formerly related by marriage; or
- (F) Adult or minor children of a person in a relationship that is described in (A)-(E).

Sexual Assault Victim – Any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with, or placed in fear of any form of rape (T.C.A. §§ 39-13-502, 39-13-503, 39-13-506, 39-13-522) or sexual battery (T.C.A. §§ 39-13-504, 39-13-505, 39-13-527).

Stalking Victim – Any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with, or placed in fear of the offense of stalking (T.C.A. § 39-17-315).

T.C.A. § 40-11-150(b)

Conditions may include:

1. An order enjoining defendant from threatening to commit or committing specified offenses against the alleged victim;
2. An order prohibiting defendant from harassing, annoying, telephoning, contacting or otherwise communicating with the alleged victim, either directly or indirectly;
3. An order directing defendant to vacate or stay away from the alleged victim's home and to stay away from any other location where the victim is likely to be;

T.C.A. § 40-11-150(b) (continued)

4. An order prohibiting defendant from using or possessing a firearm or other weapon specified by the judicial commissioner;
5. An order prohibiting defendant from possessing or consuming alcohol, controlled substances or controlled substance analogues;
6. An order requiring defendant to carry or wear a global positioning monitoring system device and, if able, pay the costs associated with operating that device and the electronic receptor device provided to the victim (see T.C.A. § 40-11-152); and
7. **Any other order required to protect the safety of the alleged victim and to ensure the appearance of defendant in court.**

T.C.A. § 40-11-150(c)

Concurrent with the imposition of one (1) or more conditions of release, a judicial commissioner shall:

- (1) Issue a written order for conditional release (see next slide) containing the conditions of the release on a form prepared and distributed by the AOC;
- (2) Immediately distribute a copy of the order to the law enforcement agency having custody of the defendant, which agency shall file and maintain the order in the same manner as is done for orders of protection; and
- (3) Provide the law enforcement agency with any available information concerning the location of the victim in a manner that protects the safety of the victim.

_____ Court _____ County _____, Tennessee	ORDER GRANTING BAIL FOR ABUSE CASES	Case Number _____
STATE OF TENNESSEE vs. _____		

Pursuant to Tennessee Code Annotated, Section 40-11-150, the Court has reviewed the facts of the arrest and detention of the defendant and determines and finds that the defendant: (check where applicable)

- 1. Is a threat to the alleged victim, _____, (hereinafter referred to as "the alleged victim" or "victim") or other family or household member.
 - 2. Is a threat to the public safety.
 - 3. Is reasonably likely to appear in court.
 - 4. Has been arrested for a criminal offense defined in title 39, chapter 13, in which the alleged victim of the offense is a domestic abuse victim as defined in §36-3-601, and that there is probable cause to believe the respondent either:
 - (A) Caused serious bodily injury, as defined in §39-11-106, to the alleged domestic abuse victim; or
 - (B) Used or displayed a deadly weapon, as defined in §39-11-106.
 - 5. Has been arrested for the offense of aggravated assault, under T.C.A. §39-13-102(a)(1)(i), (a)(1)(iii), or (a)(1)(iv), in which the alleged victim of the offense is a domestic abuse victim as defined in §36-3-601, and that there is probable cause to believe the respondent:
 - (A) Caused serious bodily injury, as defined in T.C.A. §39-11-106, to the alleged domestic abuse victim;
 - (B) Strangled or attempted to strangle the alleged domestic abuse victim; or
 - (C) Used or displayed a deadly weapon, as defined in T.C.A. §39-11-106.
- ** (Sections A - E below must be checked if the court finds #4 OR #5 above) ****

NO CONTACT ORDER

Pursuant to the above findings, the Defendant's release or bail is conditioned on the following and it is **ORDERED** that the following NO CONTACT order(s) are entered:

(Sections A - E below must be checked if the court finds #4 OR #5 above)

- A. The defendant is enjoined from threatening to commit or committing specified offenses set forth in the warrant and against the alleged victim or other family or household member.
- B. The defendant is prohibited from harassing, annoying, telephoning, contacting or otherwise communicating with the alleged victim either directly or indirectly. Contact includes but is not limited to telephoning, emailing, text messaging, communicating through the use of social media platforms, talking to, or using third parties to initiate contact.
- C. The defendant is directed to vacate or stay away from the home of the alleged victim and to stay away from any other location where the victim is likely to be.
- D. The defendant is prohibited from using or possessing a firearm or other weapon specified by the court as follows: _____
- E. The defendant is prohibited from possessing or consuming alcohol or controlled substances.
- F. The defendant is ordered to not abuse, threaten to abuse, hurt or try to hurt, or frighten the alleged victim and/or the alleged victim's minor children under 18.
- G. Any other order required to protect the safety of the alleged victim and to ensure the appearance of the defendant in court as determined by this court as follows: _____

Regarding the GLOBAL MONITORING SYSTEM, the Court finds as follows:

(Check if applicable):

- That the defendant's participation in a global monitoring system will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the alleged victim before trial.
- The defendant is able is unable to pay for the costs associated with the system in relation to the defendant and, if applicable, the costs associated with providing the victim with an electronic receptor device.
- That the defendant is indigent and should perform community service in lieu of paying the costs associated with the

- global monitoring system.
- That the court has discussed the global monitoring position with the victim per T.C.A. § 40-11-152(d) and the victim has consented to participate in the system.
- That the court has discussed the global monitoring position with the victim per T.C.A. § 40-11-152(d) and the victim has refused to participate in the system.

ORDER REGARDING GLOBAL MONITORING SYSTEM

(Check all applicable)

- The defendant shall carry or wear a global positioning monitoring system device.
- The defendant shall pay the costs associated with operating that device and any electronic receptor device provided to the victim, pursuant to T.C.A. § 40-11-152.
- The defendant is indigent and shall perform community service in lieu of paying the costs associated with the global monitoring system.
- The entity that operates the global position monitoring system shall notify the magistrate and the appropriate local law enforcement agency if a defendant violates a condition of the bond imposed under this section.
- The defendant is directed to vacate or stay away from the home of the alleged victim and to stay away from any other location where the victim is likely to be, including these specific locations that the victim has requested the defendant to stay away from: _____

BAIL SET AT: _____ TWELVE (12) HOUR HOLD EXPIRES: _____ : _____ : _____ M.

If #5 above applies, Twelve (12) Hour Hold Extended _____ Hours (up to 24 Hours after the time of arrest).
 TWELVE (12) HOUR HOLD PLUS ADDITIONAL _____ HOUR HOLD EXPIRES: _____ : _____ : _____ M.

IT IS FURTHERED ORDERED that a copy of this order be given to the defendant, the victim, and all appropriate law enforcement agencies.

 Judge Date

I acknowledge these conditions:

 Defendant Date

ORDER DISCHARGING DEFENDANT FROM CONDITIONS OF BAIL

For good cause, IT IS ORDERED that the defendant is discharged from all conditions of bail set above, except

_____ and the clerk shall send notice to appropriate law enforcement agencies.

 Judge Date

NOTICE TO DEFENDANT

If you violate this order thinking that the other party has given you permission to do so, you are wrong and can be arrested and prosecuted. The terms of this order cannot be changed by agreement of the parties. Only the court can change this order. VIOLATION OF THIS ORDER MAY CONSTITUTE CONTEMPT OF COURT AND/OR A CLASS A MISDEMEANOR PURSUANT TO T.C.A. §39-13-113 AND MAY CAUSE YOUR BAIL TO BE REVOKED.

If you hurt or try to hurt anyone while this Order, probation or diversion is in effect, you may face separate charges for aggravated assault, a Class C felony. (T.C.A. § 39-13-102(c)).

T.C.A. § 40-11-152

GLOBAL POSITIONING MONITORING SYSTEM

A judicial commissioner may order any defendant arrested for: stalking, aggravated stalking or especially aggravated stalking; any criminal offense against a person in which the victim is a victim of domestic violence, sexual abuse, or stalking; or violation of an order of protection, to do the following as a condition of bail:

1. Carry or wear a global positioning monitoring system device and, if able, pay the costs of operating that system in relation to the defendant;
- OR**
2. If the alleged victim of the offense consents to participate after receiving the **statutorily required information** (next slide), order the defendant to pay, if able, the costs associated with providing the victim with an electronic receptor device that:
 - is capable of receiving the monitoring system information from the device carried or worn by the defendant; and
 - notifies victim if defendant is at/near a location defendant has been ordered to stay away from

STATUTORILY REQUIRED INFORMATION

Before ordering the defendant to pay, if able, the costs associated with providing the victim with an electronic receptor device, a judicial commissioner MUST provide to an alleged victim information regarding:

1. The victim's right to participate or to refuse to participate, and the procedure for requesting termination of the victim's participation;
2. How the technology functions, the risks and limitations of the technology, and the extent to which the system will track and record the victim's location and movements;
3. Any locations that defendant is ordered to refrain from going to or near and the minimum distances, if any, that defendant must maintain from those locations;
4. Any sanctions that may be imposed on defendant for violating a bond condition imposed under § 40-11-152;

5. The procedure the victim is to follow, and support services available to assist the victim, if the defendant violates a condition of bond or if the monitoring equipment fails;
6. Community services available to assist the victim in obtaining shelter, counseling, education, childcare, legal representation, and other assistance available to address the consequences of domestic violence; and
7. The fact that the victim's communications with the judicial commissioner concerning the monitoring system and any restrictions to be imposed on the defendant's movements are not confidential.

The judicial commissioner shall also provide to a victim who participates in a monitoring system the name and phone number of an appropriate person employed by a local law enforcement agency who the victim may call to request immediate assistance if the defendant violates a condition of bond.

T.C.A. § 40-11-152

GLOBAL POSITIONING MONITORING SYSTEM

- Before ordering the defendant to **carry or wear a global positioning monitoring system device and, if able, pay the costs associated with operating that system in relation to the defendant**, a judicial commissioner must:
 1. Afford an alleged victim an opportunity to provide the judicial commissioner with a list of areas from which the victim would like the defendant excluded; and
 2. Consider the victim's request, if any, in determining the locations the defendant will be ordered to refrain from going near or to.
- **If the condition is imposed**, the judicial commissioner shall specifically describe the locations that the defendant has been ordered to refrain from going to or near AND the minimum distances, if any, that the defendant must maintain from those locations.

T.C.A. § 40-11-152

GLOBAL POSITIONING MONITORING SYSTEM

Other “Need-to-know” Provisions:

- In determining whether to order a defendant’s participation in a global positioning monitoring system, a judicial commissioner **shall consider** the likelihood that the defendant’s participation will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the alleged victim before trial.
- Alleged victim may terminate his or her participation in the monitoring system at any time.
 - The judicial commissioner may not impose sanctions on the victim for requesting termination of the victim’s participation in or refusing to participate in a monitoring system.
- The judicial commissioner that imposes a global positioning monitoring system condition **shall order** the entity that operates the global positioning monitoring system to notify the judicial commissioner and the appropriate local law enforcement agency if a defendant violates a condition of bond imposed under T.C.A. § 40-11-152.

NEW LAW - T.C.A. § 55-10-419

ELECTRONIC MONITORING INDIGENCY FUND

Effective October 1, 2023

The EMIF includes two accounts monitored by the State Treasury:

1. Ignition Interlock Device Account

- Covers eligible costs associated with the lease, purchase, installation, removal, and maintenance of IIDs, or with any other cost or fee associated with a functioning IID for persons determined by the court to be indigent.
- If defendant is indigent, the court shall order the defendant to pay \$30 per month, plus any other portion of the costs that he/she is able to pay, as determined by the court. Any portion defendant is unable to pay shall come from the EMIF account.

2. “Alternative Device Account”

- Transdermal Monitoring Device, Other Alternative Alcohol or Drug Monitoring Device, or Global Positioning Monitoring Device
- Covers eligible costs associated with the use of such devices when required by the court upon conviction, or, with respect to *global positioning monitoring devices*, if required as a bond condition pursuant to T.C.A. § 40-11-152, for persons determined by the court to be indigent.
- If defendant is indigent, the court shall order defendant to pay \$30 per month, plus any portion of the costs that he/she is able to pay, as determined by the court. Any portion defendant is unable to pay shall come from the EMIF account, subject to availability of funds.
- Counties have to opt in.

→ No more than \$200 per month for each device ordered, with at least \$30 of that amount coming from the defendant.

T.C.A. § 55-10-419(a)(5)

A person is considered “indigent” if he/she has been determined by a court to not possess sufficient means to pay for eligible costs after consideration of the following factors:

- The **income** of the person, regardless of source, including, but not limited to, governmental assistance or pensions;
- The person's **monthly expenses**;
- The number of other members of the person's household and any **dependents**;
- The person's **employment status and education level**;
- The person's ownership or equity in **real or personal property** or other assets;
- The person's **debts**;
- The **amount of the appearance or appeal bond**, whether the person has been able to obtain release by making bond, and, if the person obtained release by making bond, the amount of money paid and the source of the money;
- The **poverty level** income guidelines compiled and published by the United States department of labor; and
- **Other circumstances** presented to the court that the court finds to be relevant to the issue of indigency.

HHS 2023 POVERTY GUIDELINES

PERSONS IN FAMILY/HOUSEHOLD	POVERTY GUIDELINE
1	\$14,580
2	\$19,720
3	\$24,860
4	\$30,000
5	\$35,140
6	\$40,280
7	\$45,420
8	\$50,560
For households with >8 persons, add \$5,140 for each additional person	

<https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines>

_____ Court _____ County _____ Tennessee	UNIFORM AFFIDAVIT OF INDIGENCY FOR PURPOSES OF ELECTRONIC MONITORING INDIGENCY FUND (T.C.A. § 55-10-419) page 1 of 5	Case Number or Warrant Number
_____ vs. _____		

Comes the defendant and, subject to the penalty of perjury, makes oath to the following facts (please list, circle, complete, etc.):

PART I

1. Full Name: _____ 2. Other names used: _____
3. Birth date: _____ 4. Address: _____
5. Telephone Nos.: (Home) _____ (Work) _____ (Other) _____
6. Are you working anywhere? Yes () No () Where _____
7. How much do you make? _____ (weekly, monthly, etc.)
8. Do you receive any governmental assistance or pensions (disability, SSI, AFDC, etc.)? Yes () No ()
 What is its value? _____ (weekly, monthly, etc.)
9. Do you own any property (house, car, bank acct., etc.): Yes () No ()
 What is its value? _____
10. Total annual income after taxes is: \$ _____

PART II

11. Number of members in your household: _____
12. Names & ages of all dependents: _____ relationship _____
 _____ relationship _____
 _____ relationship _____
13. All my income from all sources (including, but not limited to wages, interest, gifts, AFDC, SSI, social security, retirement, disability, pension, unemployment, alimony, worker's compensation, etc.):

\$ _____ per _____ from _____
 \$ _____ per _____ from _____
 \$ _____ per _____ from _____

14. All money available to me from any source:
 - A. Cash _____
 - B. Checking, Saving, or CD Account(s)-give bank, acct. no., balance _____
 - C. Debts owed me _____
 - D. Other _____

15. I owe the following debts:

\$ _____	to: _____
\$ _____	to: _____
\$ _____	to: _____

_____ Court _____ County _____ Tennessee	UNIFORM AFFIDAVIT OF INDIGENCY FOR PURPOSES OF ELECTRONIC MONITORING INDIGENCY FUND (T.C.A. § 55-10-419) page 2 of 5	Case Number or Warrant Number
_____ vs. _____		

16. All vehicles/vessels owned by me, solely or jointly, within the last six months (including but not limited to cars, trucks, motorcycles, farm equip., boats etc.):

_____ value \$ _____ amt. owed _____
 _____ value \$ _____ amt. owed _____
 _____ value \$ _____ amt. owed _____

17. All real estate owned by me, solely or jointly, within the last six months (including land, lots, houses, mobile homes, etc.):

_____ value \$ _____ amt. owed _____
 _____ value \$ _____ amt. owed _____

18. All assets or property not already listed owned within the last six months or expected in the future:

_____ value \$ _____ amt. owed _____
 _____ value \$ _____ amt. owed _____

19. I am out of jail on bond of \$ _____ made by _____. The money to make bond, \$ _____ was paid by _____.

20. Other circumstances that the court may find relevant to the issue of indigency: _____

PART III

21. Acknowledging that I am still under oath, I certify that I have listed in Parts I and II all assets in which I hold or expect to hold any legal or equitable interest.
22. I agree to file a copy of my most recent income tax return if requested by the court.
23. I understand that, pursuant to the perjury offense set out in T.C.A. § 39-16-702, it is a Class A misdemeanor for which I can be sentenced to jail for up to 11 months, 29 days or be fined up to \$2,500, or both, if I intentionally misrepresent, falsify or withhold any information required in this affidavit. I also understand that I may be required by the Court to produce other information in support of my request to be declared indigent for purposes of using the electronic monitoring indigency fund.

This _____ day of _____, _____

Defendant

Sworn to and Subscribed before me this ____ day of _____, _____

Judge/Clerk

_____ Court _____ County _____ Tennessee	ORDER REGARDING INDIGENCY DETERMINATION FOR PURPOSES OF ELECTRONIC MONITORING INDIGENCY FUND (T.C.A. § 55-10-419) page 3 of 5	Case Number or Warrant Number
_____ vs. _____		

Judge must check one of the following:

____ I hereby find that the above-named defendant is NOT indigent and does not qualify for financial assistance to pay costs associated with a functioning ignition interlock device, transdermal monitoring device, other alternative alcohol or drug monitoring device, or global positioning monitoring device.

OR

____ I hereby find that the above-named defendant is indigent and, subject to availability of funds, qualifies for financial assistance to pay costs associated with a functioning ignition interlock device, transdermal monitoring device, other alternative alcohol or drug monitoring device, or global positioning monitoring system.

If defendant is declared indigent, the Judge must complete the next sections:

1. A. _____ Defendant is ordered to pay a minimum of \$30.00 per month toward the eligible costs for a functioning interlock device or alternative device, pursuant to T.C.A. § 55-10-419(h)(2).

OR

- B. _____ Defendant is found to have the ability to pay more than the required \$30.00 per month of the costs associated with the required device, and is ordered to pay \$ _____, pursuant to T.C.A. § 55-10-419(h)(2).

AND

- C. _____ Costs associated with the required device in the amount of \$ _____, [not to exceed \$170/month, per device, pursuant to T.C.A. § 55-10-419(h)(2)] may be reimbursed to the provider by the electronic monitoring indigency fund if eligible.

The total cost of the required device is \$ _____. [This is sum of Defendant's portion (A or B) and EMIF portion (C), and must not to exceed \$200.00/month]

2. Length of time the defendant is ordered to use/wear the device: _____

3. Number of devices the defendant is ordered to use/wear: _____

4. Type of device(s) ordered:

Ignition interlock device
 Transdermal monitoring device
 Other alternative alcohol or drug monitoring device (List type of device: _____)
 Global positioning monitoring system

Date

Signature of Judge

_____ Court _____ County _____ Tennessee	ORDER REGARDING INDIGENCY DETERMINATION FOR PURPOSES OF ELECTRONIC MONITORING INDIGENCY FUND (T.C.A. § 55-10-419) page 4 of 5	Case Number or Warrant Number
_____ vs. _____		

NOTICE TO DEFENDANT: YOU MAY NOT BE CHARGED ANY AMOUNTS FOR ELECTRONIC MONITORING THAT ARE NOT AUTHORIZED BY THIS COURT ORDER. T.C.A. §55-10-419(I).

***** A copy of this form must be submitted to the device provider of the ignition interlock device, transdermal monitoring device, other alternative alcohol or drug monitoring device, or global positioning monitoring devices. The device provider must submit a copy of this form to the County Government in which the issuing Court is located in form and fashion acceptable to said County prior to being reimbursed, along with a copy of the signed court order indicating that the use of the device(s) has been ordered by the Court. Pursuant to T.C.A. § 55-10-419(a)(1)(B), no more than two hundred dollars (\$170.00) per month shall be expended from the fund to pay the costs associated with the device.

T.C.A. § 40-11-150(h), (k)

Domestic Abuse
(any crime where victim is a victim
under [T.C.A. § 36-3-601](#))*

Sexual Assault
(including any form of
Rape or Sexual Battery,
all degrees)

Stalking
(all degrees)

=

12-Hour Hold

Physical Harm or Abuse
of an Elderly or Vulnerable Adult

Neglect or Aggravated Neglect
of an Elderly or Vulnerable Adult

=

12-Hour Hold

Exception

May release in less than 12 hours if,
in written findings attached to the
warrant and preserved in the record,
the judicial commissioner finds the
offender is not a threat to the victim.

→ IF RELEASED PRIOR TO THE
CONCLUSION OF THE 12-HOUR
HOLD, the judicial commissioner
shall make **all reasonable efforts**
to directly contact the victim and
inform the victim that the person
charged with the offense will be
released prior to the conclusion of
the 12-hour period.

T.C.A. § 40-11-150(m)

Any offense where victim is a domestic abuse victim

+

Finding that there is probable cause to believe the defendant either:

Caused serious bodily injury to the victim (T.C.A. § 39-11-106)

-OR-

Used or displayed a deadly weapon (T.C.A. § 39-11-106)

=

12-hour hold

(unless finding that defendant no longer poses a threat to victim/public safety)

+

No Contact Order prior to release

containing all conditions applicable for the protection of the victim

T.C.A. § 40-11-150(n)

Aggravated Assault where victim is a domestic abuse victim

+

Finding that there is probable cause to believe the defendant either:

Caused serious bodily injury to the victim (T.C.A. § 39-11-106)

-OR-

Strangled or attempted to strangle the victim

-OR-

Used or displayed a deadly weapon (T.C.A. § 39-11-106)

=

May extend 12-hour hold to 24 hours after time of arrest
(unless finding that defendant no longer poses a threat to victim/public safety)

+

No Contact Order prior to release
containing all conditions applicable for the protection of the victim

T.C.A. § 40-11-106

“Before the sheriff, magistrate, or other officer admits to bail and releases a defendant who is arrested for **any kidnapping offense involving a hostage or victim**, the releasing authority *shall make all reasonable and diligent efforts to notify the hostage or victim of the alleged offense that the defendant has been admitted to bail and is being released.*”

→ If the hostage or victim is under 18 or otherwise unavailable, the releasing authority shall make all reasonable and diligent efforts to notify the family, if any, of the hostage or victim that the defendant is being released.

T.C.A. § 40-11-153

Unauthorized Camping on State Property (T.C.A. § 39-14-414)

Vandalism (T.C.A. § 39-17-303)

Inciting to Riot (T.C.A. § 39-17-304)

Rioting / Aggravated Rioting (T.C.A. §§ 39-17-302, 39-17-303)

Disrupting a Meeting or Procession (T.C.A. § 39-17-306)

Obstructing a Highway (T.C.A. § 39-17-307(a)(1))

Exception

May release the defendant in less than 12 hours if the judicial commissioner finds, in writing, attached to the warrant and preserved as part of the record, that defendant is not likely to immediately resume the criminal behavior based on the circumstances of the arrest and defendant's prior criminal history, if any.

T.C.A. § 40-35-321(e)

Violent Felony

First Degree Murder
Second Degree Murder
Aggravated Kidnapping
Especially Aggravated Kidnapping
Aggravated Assault
Aggravated Child Abuse
Robbery
Aggravated Robbery
Especially Aggravated Robbery

Aggravated Burglary
Especially Aggravated Burglary
Carjacking
Sexual Battery
Sexual Battery by an Authority Figure
Aggravated Sexual Battery
Statutory Rape by an Authority Figure
Aggravated Statutory Rape
Rape

Aggravated Rape
Rape of a Child
Aggravated Rape of a Child
Aggravated Arson
Aggravated vehicular homicide
Criminally negligent homicide
Reckless homicide
Vehicular homicide
Voluntary manslaughter

or, for any of these offenses:

Attempt
Solicitation
Conspiracy
Criminal Responsibility
Facilitating the Commission
Accessory After the Fact

=

**Provision of a DNA sample is required
as a condition of release on bond or recognizance**

SETTING MONETARY BAIL

“Absent a showing that conditions on a release on recognizance will reasonably assure the appearance of the defendant as required, the magistrate shall, in lieu of the conditions of release set out in § 40-11-115 or § 40-11-116, require bail to be given.”

- Tenn. Code Ann. § 40-11-117

***Weatherspoon v. Oldham*, 2018 U.S. Dist. LEXIS 30386 (W.D. Tenn. Feb. 26, 2018)** (finding that the trial court violated plaintiff’s Procedural Due Process rights by failing to consider whether non-monetary conditions of release could satisfy the purposes of bail).

SETTING BAIL

“Bail shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required.”

– T.C.A. § 40-11-118

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, a judicial commissioner 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 (*note: 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.

JUDICIAL COMMISSIONERS MUST CONDUCT AN INDIVIDUALIZED ASSESSMENT OF THE § 40-11-118 FACTORS FOR EACH SPECIFIC DEFENDANT

Hill v. Hall, 2019 U.S. Dist. LEXIS 173758 (M.D. Tenn. Oct. 7, 2019): Emphasizing that, in determining options for release, important considerations include:

1. The defendant's ability to pay; and
2. Whether non-monetary alternatives could serve the same purposes as bail.

Tenn. Att'y Gen. Op. No. 05-018 (Feb. 4, 2005)

- Opining 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.” (emphasis added).

JUDICIAL COMMISSIONERS MUST CONDUCT AN INDIVIDUALIZED ASSESSMENT OF THE § 40-11-118 FACTORS FOR EACH SPECIFIC DEFENDANT

Staley v. Wilson County (M.D. Tenn. 2006)

- Class action suit against Wilson County, alleging its judicial commissioners set bail for arrested individuals based on an arbitrary formula that was not based on the individual's particular likelihood to flee or be a danger to the community if released.
- Wilson County judicial commissioners used a preset bail schedule based on the offense charged or other criteria that was not based on the individual, on some occasions would refuse to set bail, or would at times increase bail based on a request by a police officer.
- The parties reached a Settlement Agreement that provided for a comprehensive overhaul of the system of setting bail by Wilson County Judicial Commissioners, including required training of judicial commissioners and the creation of a system to track bail set by judicial commissioners.

USE OF A MATRIX, GUIDELINE, OR SUGGESTED RANGE IN SETTING BAIL

Use of a matrix, guideline, or suggested range in setting bail is permissible as long as the judicial commissioner conducts an individualized assessment of the bail factors and the bond is adjusted accordingly.

- ***Malmquist v. Metro. Gov't of Nashville*, 2011 U.S. Dist. LEXIS 136696, at *28-29 (M.D. Tenn. 2011)** – Finding that there is no “blanket prohibition against a magistrate beginning the bail determination process with a default amount corresponding to the particular charge of arrest – or ending with that same amount – when setting bail in the exercise of his or her discretion, according to the factors and directives set out in T.C.A. § 40-11-118.”
- ***Fields v. Henry County*, 701 F.3d 180 (6th Cir. 2012)** – noting that use of guidelines in setting bail is not inherently unconstitutional as long as the bail set is proportional to the circumstances presented.

***Nashville Cmty. Bail Fund v. Gentry* (M.D. Tenn.)**

- NCBF – a nonprofit in Nashville that pays cash bail for individuals who cannot afford to do so – relies on a “revolving fund”: Pays cash bail, and when defendant’s case is completed, accepts the refund and places it back into NCBF’s budget to be applied toward posting cash bail for another pretrial detainee.
- 20th Judicial District Local Rules of Practice and Clerk (Gentry) conditioned acceptance of a cash bond on the depositor’s signing an acknowledgment that fines, costs, and restitution would be subtracted from the cash bond before return. NCBF sued on 2/5/2020.

Held: Requiring defendant to agree to post-conviction bail garnishment in order to secure pretrial release constitutes excessive bail under the Eighth Amendment (citing *Cohen v. United States*, 82 S. Ct. 526 (1962) (Bail that is conditioned on the payment of a fine is “excessive” because it would be used to serve a purpose for which bail was not intended)).

***Nashville Cmty. Bail Fund v. Gentry* (M.D. Tenn.)**

In its opinion, the Court discussed the effect of a failure to obtain pretrial release:

“It is . . . not difficult to imagine why detention would have a negative effect on an individual’s criminal defense. The government has much greater leverage over an incarcerated person than a free person. A person on pretrial release can continue to work, make money, and take part in family life, while a detained person may lose his job or even custody of his children. A person on pretrial release can also participate more directly and comprehensively in his defense. He is significantly less likely to be under the intense surveillance present in jailhouses, particularly regarding conversations with the outside world. He can seek continuances—for example, to investigate exculpatory or mitigating evidence—without each continuance meaning more time in jail. Finally, he will not be subject to the daily psychological toll of incarceration and can make decisions about how to proceed with his case surrounded by family and friends. In turn, pretrial release deprives the government of the bargaining chip that accepting a quick deal may get the defendant out of confinement sooner. That enticement is likely to be especially strong in misdemeanor and minor felony cases, which are likely to carry a short sentence after conviction but which can have long-ranging effects on the defendant's life, due to their civil and criminal collateral consequences.”

446 F. Supp. 3d at 290.

***Torres v. Collins* (E.D. Tenn.)**

- Plaintiffs filed for preliminary injunction, alleging that Hamblen County officials “‘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.”
 - The parties stipulated that initial bail is set without consideration of the individualized bail factors, that no factual findings are made, and that, while pretrial detainees can ask for a bond modification at a 48-hour review hearing, their requests are generally ignored.
- **Order Granting Preliminary Injunction (11/30/2020)**
 - There is nothing inherently unconstitutional about setting initial bail *ex parte* without a hearing.
 - The Court rejected the Plaintiffs’ Equal Protection argument.
 - “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.”

Torres v. Collins – Order Granting Preliminary Injunction

- Due Process Argument
 - The Court took issue with the fact that requests for bond modifications are not “generally considered” at the initial appearance where “the bail amount is initially set without any regard for an arrestee’s individual circumstances.”
 - “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.”
 - “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.”

(see examples on next slide)

Plaintiff Torres

- Arrested 2/15/20
- Initial appearance 2/17/20
- Charges:
 - Felony Manufacturing Sale & Delivery of Schedule II, VI Possession of Schedule II, III Possession of Drug Paraphernalia
- Initial bail set at \$75,000
- Court found her indigent and appointed counsel

Initial Appearance

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.

...

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: 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 . . .

Plaintiff Cameron

- Arrested 2/15/20
- Initial Appearance 2/17/20
- Charges:
 - Schedule II, III, and IV drug charges Drug Paraphernalia and Theft charges
- Initial Bail set at \$32,000
- Court found her indigent and appointed counsel

Initial Appearance

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 . . .

The Court held that the failure of the court to conduct an individualized hearing on the arrestee's bail conditions at the initial appearance violates substantive due process rights.

Torres v. Collins – Order Granting Preliminary Injunction

“[T]he 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.** 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 within 48 hours. . . . 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).”

Order, pp. 26-27.

Torres v. Collins – Order Granting Preliminary Injunction

- The Court granted the preliminary injunction and enjoined the Sheriff from detaining any criminal defendant arrested on an arrest warrant who, after having bail set in an *ex parte* fashion, is being detained without having had an individualized hearing within a reasonable period of time consistent with the Due Process requirements outlined in the Order.
- The injunction is prospective and does not apply to defendants:
 - Charged with a capital offense
 - Detained as a result of an indictment
 - Detained on probation violations, or
 - Whose release has otherwise been revoked after a hearing

WHAT THIS MEANS FOR JUDICIAL COMMISSIONERS

While the holding in *Torres* focused on bail review hearings during the initial court appearance, the Court's emphasis on the **importance of individualized determinations** regarding the **necessity of bail** and, specifically, the **ability of the defendant to pay**, gives us an indication of what courts are likely to focus on in reviewing challenges of all bail determinations – including those made by a judicial commissioner.

WHAT THIS MEANS FOR JUDICIAL COMMISSIONERS

Regardless of the holding in *Torres*, Tennessee's Attorney General has opined for many years that judicial commissioners must also make individualized findings when setting bail...and this is clearly supported by the statutory language.

While you are not in a position to hold a full-blown evidentiary hearing, you should still gather whatever relevant information you can and evaluate bond based on ALL of the factors, giving consideration to the interests of the defendant, the State, and the public.

Knox County

- In 2022, the Southern Poverty Law Center and Civil Rights Corps wrote a letter to Knox County officials alleging that Knox County's bail practices violated state and federal law
- The complaints mostly centered on the individualized bail hearings afforded by the court as opposed to the initial bail determination, but there were complaints about the initial bail determinations:
 - “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.”
- Ultimately, this didn’t result in litigation, presumably because procedural changes were made

ALTERING BAIL

A judicial commissioner **DOES NOT** have authority to alter bail or conditions of release after a defendant has already been admitted to bail.

T.C.A. § 40-11-143; Tenn. AG Op. No. 12082 (Aug. 23, 2012).

Only the Court can make changes!

QUESTIONS????