

BAIL- SETTING, ISSUES, and REVOICATIONS

Judicial Academy 2022

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Applicable Statute

- Bail matters in Tennessee are governed by statute rather than the common law
- Release from Custody and Bail Reform Act of 1978 – TCA 40-11-101 et. Seq.

Focus of Presentation

- This presentation will focus on:
- Setting of Bail
- Issues arising during the pendency of the case
- Revocation of Bail

Part 1

Setting of Bail

Too bad we don't have a crystal ball

Who Sets?

- Statute allows the following officials to set bail:
- Committing magistrate (sessions judges or judicial commissioners)
 - See definition of “magistrate” in 40-5-102
- Judge of Circuit or Criminal Court
- Clerk of Circuit or Criminal Court

Authority for Bail

- The right to bail in Tennessee is found both in the Tennessee Constitution and in statute.
- Article I, Section 15 of the Tennessee Constitution provides “That all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great.”
- Similarly, Tenn. Code Ann. 40-11-102 provides “Before trial, all defendants shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great.” See also, Tenn. Code Ann. 40-11-105(a)(1): “When the defendant has been arrested or held to answer for any bailable offense, the defendant is entitled to be admitted to bail by the committing magistrate, by any judge of the circuit or criminal court, or by the clerk of any circuit or criminal court....”

Twin Purposes of Bail

Applicable Defendants

- Assessing flight risk and safety of the public.
- 40-11-115(a) and (b)

- Any defendant detained pursuant to an arrest warrant
- Except:
 - Defendants accused of a capital crime
 - Defendants detained pursuant to an indictment
 - Defendants accused of a VOP
 - Defendants detained after a bond revocation hearing

Recent Bail Controversy – Setting of Bail

- Several lawsuits/threats of lawsuits against counties, judges
- “Local groups prepared for class action lawsuit against Shelby County if there’s no bail reform.” Brittani Moncrease, ABC 24 (12/2/21)
- “ACLU to Shelby County: Fix your ‘unconstitutional’ cash bail system or risk lawsuit.” Katherine Burgess, Memphis Commercial Appeal
- Letter from ACLU, Wharton Law Firm, Just City Memphis to **Shelby County** Government (12/1/21) – threatening lawsuit
- Letter from Southern Poverty Law Center, Civil Rights Corps to **Knox County** Government (4/2/21) – threatening lawsuit

Bail Controversy, cont.

- “Whose Burden is it Anyway?” – Willie Santana, Tennessee Bar Journal (September/October 2021)
- Summer Study by Tennessee General Assembly – summer 2021
- Torres v. Collins, 2:20-CV-00026-DCLC (U.S. Dist. Ct., Eastern Dist., Dec. 2021)
 - Held: Preliminary injunction granted, prohibiting Hamblen County officials (including the Sessions judge) from holding defendants on bail without an individualized hearing
 - Notable: court did NOT hold that Tennessee’s bail statute was unconstitutional
 - Court decided case on due process grounds, but noted that statute was not followed

Bail Controversy, cont.

- Torres – additional findings
- Setting of bail ex parte is NOT per se unconstitutional

So long as: each defendant is given an **individualized hearing** which contains certain attributes

Timing of Hearing: Strongly suggests 48 hours

Right to Counsel

Presentation of case by District Attorney – burden of proof on state

Opportunity to be heard, present proof

Torres, cont.

- Prior Notice of hearing
- Opportunity to cross examine
- Findings to be made – oral at a minimum, better if written
- Standard of proof – not specifically addressed (but see Hall)
- Statutory factors must be considered
- Ability to pay must be considered

Bail Controversy, cont.

- Hill v. Hall, 3:19-CV-00452 (U.S. Dist. Ct., Middle Dist., 2019)
- Tennessee's bail statute is not unconstitutional
- Statute requires a tiered analysis
- Bail schedules are not allowed
- Each defendant is entitled to an **individualized hearing**
- Preponderance of evidence standard is appropriate
- Ability to pay is relevant
- Pre-trial detention must be narrowly tailored to meet the state's interest in public safety and appearance in court

Bottom Line of Two Federal Court Cases:

- Have an **individualized hearing and follow the blooming statute**
- Provide counsel if possible
- Have the hearing pretty darn quick
- Allow DA to present state's case if possible

Ex Parte Setting Bond Schedules

The setting of bail in the first instance ex parte is acceptable ...IF

The defendant is later granted an individualized hearing

Use of bond schedules or presumptions is not allowed

But, remember...

When bail is set ex parte, reference should be made by the setting magistrate to the statutory factors to the maximum extent possible.

Have a training session with judicial commissioners if necessary

A word about ex parte setting:

- State v. Johnson, 980 S.W.2d 414, 1998 Tenn. Crim. App. LEXIS 872 (Tenn. Crim. App. 2998)
- No due process violation where defendant kept in pre-trial detention for 3 days prior to setting bond – judge saw defendant day after arrest, but declined to set a bond until 2 days later.
- But, keep in mind the Torres decision – 48 hours is strongly recommended.

Another word:

- Fields v. Henry County, 701 F.3d 180, 2012 U.S. App. LEXIS 25159 (6th Cir. 2012).
- Court held that “there is no constitutional right to speedy bail.” Defendant charged with DV held until next day before bail set.
- Note: the court’s statement that the use of bond schedules is not unconstitutional under the 8th amendment – this may be the case under the due process clause (see Torres).

Individualized Hearing

The defendant must be given an individualized hearing promptly.

Best Practice would be to hold the hearing within 48 hours of detention.

Stewart County Practice for Bail Hearings

- Because the Sessions judge is part-time in Stewart County:
- Bond hearings are held on Tuesdays and Fridays
- Public Defender is not available
- Local lawyers, including county's attorney, fill in; sometimes we have no counsel
- District Attorney is not available
- Result:
 - Many bonds are lowered, some to R.O.R. status
 - FTAs are a consequence

Who makes the first move?

Application for a hearing is not required.

The court should ensure each detained defendant is given the opportunity for a hearing.

Don't make the defendant request a hearing

Attributes of the Hearing

Statutory factors **must** be considered.

Right to counsel.

Right to present proof.

Right to cross examine.

Right to notice.

POE standard of proof.

Presentation by DA (if possible).

Findings made – better if written.

Step by Step...

- A **tiered analysis** is required by the statute:
 - First consideration: ROR without conditions
 - Second consideration: ROR with conditions
 - Third consideration: Monetary Bail

Real World Issue

- Often the setting magistrate will default to monetary bail
- That's contrary to the statute – **gotta** follow the statute – first stop is ROR
- That's asking for a lawsuit

Bail Factors And Release Conditions

- 40-11-115 – Factors for ROR bail
 - Note: statute was recently amended to include consideration of a validated risk assessment (if available) and the defendant's financial resources
- 40-11-116 – Acceptable bail conditions of release
- 40-11-118 – Factors for monetary bail

First Step:
ROR – 40-11-
115

- Factors:
 - Validated Risk Assessment
 - Length of Residence
 - Employment Status, **Financial Condition**
 - Prior Criminal Record (Including prior RORs)
 - Out on Bail when charged?
 - Nature of Offense, Probability of Conviction, Likely Sentence
 - SUD or Mental Health Issues better addressed in community treatment
 - Other factors bearing on community ties and flight risk
 - Safety of community now a factor

Second Step:
ROR with
Conditions –
40-11-116

If flight risk and/or safety of public concerns are not satisfied by ROR, conditions on release may be ordered.


Acceptable conditions include:

Release into care of responsible person or organization

Reasonable restrictions on activities, movements, associations

Other reasonable restrictions to assure appearance, **including monetary bail**

Third Step: Monetary Bail – 40-11- 118

- Factors to set Monetary Bail:
 - Length of Residence
 - Employment Status and **financial condition**
 - Family Ties
 - Reputation and Character and mental condition
 - Prior Criminal Record relating to flight risk
 - Nature of Offense, probability of conviction, likely sentence
 - Prior criminal record relating to risk of danger to public
 - Responsible community members vouching for defendant
 - Other flight risk factors
- 

Recent Statutory Change: Factors

- 40-11-115 – factors for ROR bail
 - Recently amended to include consideration of a validated risk assessment and the defendant's financial resources
- Court must inquire as to defendant's ability to pay
 - Case law requires it
 - Statute requires it

Statute amended as of July 1, 2021



Other considerations...

- All Conditions (including monetary bail) must be the **least onerous** to achieve the twin purposes of bail
- In considering the “nature of the offense,” the magistrate should **NOT** question the defendant directly about the facts, rely instead on the affidavit
- If the defendant has an FTA, monetary bail **must** be set – 40-11-104
- If the defendant is arrested while free on bail, the bail must be set in amount **twice** that which would be customary otherwise – 40-11-148

New charge while out on bail

- Notice that the magistrate is to consider that a defendant was out on bail when incurring new charges
- Factor considering ROR under 40-11-115
- “The defendant’s prior criminal record, **including prior releases on recognizance or bail**”

Key to Informed Bail Decisions

- In my experience, the key to making an informed bail is **data** – any information that would shed light on the defendant's flight risk and/or whether the defendant is a danger to the public
- Look for prior FTAs, VOPs, past or current charges involving violence, past or current charges involving deception or flight
- Consider the gravity of the charge and, to the extent possible, strength of the state's case

Types of Monetary Bail

Agreement of two

Agreement of two sufficient sureties – 40-11-122

Real Estate – 40-11-122

Cash – 40-11-118

Professional Bondsman – 40-11-122

Which type?

- A court cannot limit the defendant to any of the four types of bail – see Op. Atty Gen. 03-054 (2003)
 - For instance, a court could not restrict the defendant to a cash bail only
 - On the other hand, the court may set a cash bail amount and a secured bail amount

Real Estate as bail

- Statute requires:
- Real estate in Tennessee
- Non-exempt unencumbered equity owned by defendant or defendant's surety
- 1.5 times the amount of bail
- Deed of trust required (to clerk), must be recorded
- Costs to be paid by defendant
- 40-11-122(1)


Real Estate as Bail, cont.

- The District Attorney or Sheriff may reject a bond secured by real estate if the real estate is valued at less than 1.5 times the amount of bail set.
- Op. Atty Gen. 03-050 (2003)

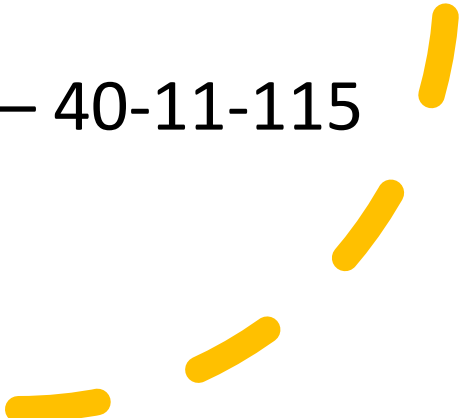
“Two Sufficient Sureties” as bail

- Statute requires:
- **Each** shall be worth the amount of the bail
- Additional sureties may be used “if the whole qualification is equivalent to two sufficient sureties”
- Court or DA may question the sureties as to their worth
- Other testimony is allowed
- 40-11-123

Other Observations...

- Good Bondsman can help with flight risk, not so much risk to public
 - Accurate criminal histories are key to good bail decisions
 - Cash bond can be given as option (low level offenses)
 - Counsel can be appointed for bond hearings and then relieved (perhaps helpful in obtaining willing attorneys)
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More Other Observations...

- Most misdemeanors committed in the presence are citable – 40-7-118
 - Certain Driving Offenses require special conditions under 40-11-118(d) and 40-11-148(b)
 - Certain Assaultive Offenses (DV, Violation OP, Elder Abuse) require special conditions – 40-11-150
 - Certain DORL/DOSL require ROR – 40-11-115
- 

Misdemeanors Committed in the Presence

- 40-7-118
- Most Misdemeanors committed in the presence of an officer **require** the issuance of a citation in lieu of arrest
- Exceptions: DUI (must arrest unless medical treatment > 3 hours)
- Traffic citations under 55-10-203, 207 do not fall within this statute
- Officer may **either arrest or cite**:
 - Shoplifting
 - Bad check
 - DOSL; DORL
 - Assault if danger to public
 - Prostitution if reason to believe more activity will occur

Misdemeanors committed in the presence, cont.

- Officer **may** arrest:
 - Likelihood FTA
 - Prosecution of case jeopardized by citation

- Officer **must** arrest:
 - Person unable to care for own safety
 - Offense likely to continue
 - No satisfactory identification
 - Demands to be taken to magistrate
 - Too intoxicated – danger to self or others
 - Outstanding warrants
 - Traffic accident involving serious bodily injury or death and no d/l or ins.

Misdemeanors committed in the presence, cont.

- If the officer is acting pursuant to an arrest warrant issued by a magistrate for a misdemeanor, the magistrate may allow the officer make the arrest and then issue a citation, releasing the defendant
- 40-11-118(b)(1)

Traffic Offenses

- Most traffic offenses require a citation
- 55-10-207
- Citation is required for misdemeanor violations of
 - Vehicle operation/rules of the road
 - Vehicle equipment
 - Accidents
 - Driver's license
 - Insurance
 - Operation of OHV on highway

Traffic offenses, cont.

- Exceptions requiring an arrest for a traffic offense:
- Demands to see magistrate
- Criminally negligent homicide, voluntary manslaughter, murder
- DUI
- Failure to stop – accident involving death, injury, prop. Damage
- Defendant refuses to give promise to appear
- Traffic offenses above C misdemeanor
- 55-10-207(h)

Certain Driving Offenses

- 40-11-118(d) and 40-11-148(b)
- Certain offenses: DUI; Vehicular Assault; Agg. Vehicular Assault; Vehicular Homicide; Agg. Vehicular Homicide
- Court **shall** consider special conditions to bail
 - Ignition interlock device
 - Transdermal monitoring device
 - Electronic monitoring with random substance testing
 - Residency in in-patient rehab
- BUT: new law amends 40-11-118(d) – see next slide

Certain Driving Offenses, cont.

- New law effective July 1, 2022 – amends 40-11-118(d)
- If driver charged with: DUI; VA; AVA; VH; AVH **and** alcohol involved, then:
- IID **shall** be condition of bail if:
 - Collision involving property damage
 - Minor in vehicle
 - Suspended d/l due to implied consent, or
 - Prior conviction reckless driving, reckless endangerment, DUI, VA, AVA, VH, AVH
- Court retains discretion to not order IID; but must make findings not in best interest of justice and public safety

Certain Driving Offenses, cont.

- Vehicular assault, vehicular homicide, Agg. Vehicular homicide
- And: prior **alcohol**-related conviction
- Then, transdermal monitoring device is mandatory
- All expenses to be paid by defendant
- Court may waive for “legitimate medical reasons”
- 40-11-118(f)

Domestic Violence

- 40-11-150
- In addition to factors set out in 40-11-118, if:
- Offenses:
 - Involving domestic violence victim
 - Child abuse or Agg. Child abuse
 - Child neglect or Agg. Child neglect
 - Child endangerment or Agg. Child endangerment
 - Stalking, Agg. Stalking, or Esp. Agg. Stalking
 - Violation of Order of Protection

Domestic Violence, cont.

- Magistrate must “review the facts of arrest” and determine whether defendant is:
 - Threat to victim
 - Threat to public
 - Reasonably likely to appear in court
- Then, conditions may be imposed – 40-11-150(b) [“COR”]
- Conditions include: no contact with victim, vacate home or where victim is likely to be, no firearms, no substance use, GPS device (for GPS condition, see 40-11-152(b))

Domestic Violence, cont.

- In addition, if the offense is:
 - Domestic violence, or
 - Stalking, Agg. Stalking, Esp. Agg. Stalking
- Then: 12 hour hold unless magistrate finds offender is not a threat
- Now: 12 hour hold may be increased to **24 hours** if the domestic assault is also an aggravated assault (serious bodily injury, strangulation, deadly weapon) (effective July 1, 2022)
- **New subdivision (n) to 40-11-150**

Domestic Violence, cont.

- If the offender is released prior to the 12 hour hold expiring, the magistrate or jail official shall make all reasonable efforts to notify the alleged victim.
- 40-11-150(h)(3)
- 12 hour hold also applies to offenses involving harm or abuse of adult of advanced age
- 40-11-150(k)(1)

Domestic Violence, cont.

- The special bail provisions in 40-11-150 (domestic violence charges, etc.) are constitutional in the opinion of our state's Attorney General.
- See Op. Atty. Gen. 95f-057 (1995)

Special Provision – Illegal presence in USA

- Statute allows the magistrate to deem an accused a **flight risk** if:
 - Accused is not lawfully present in USA, and
 - Has no valid d/l, and
 - No proof of financial responsibility, and
 - Charged with traffic offense involving death or serious bodily injury
-
- 40-11-118(e)

Special Provision – Clerk’s Limits

- Clerk may set if judge absent >3 hours (40-11-105(a)(2))
- Clerk’s limits:
 - \$1000 – for misdemeanors
 - \$10,000 – for felonies not involving crime against person
 - \$50,000 – for felonies involving a crime against person
 - \$100,000 – for homicide offenses
- Exception: clerk is allowed to exceed limits if defendant “is deemed a risk of flight”
- 40-11-105

Change in Bail (after setting in accordance with the statute)

- If the defendant wishes to change the bail or conditions on release:
- By written motion
- Court must have hearing, make findings
- 40-11-143

Review of Bail Decision

- A defendant aggrieved with the bail decision may seek relief in Circuit via writ of cert.
- 40-11-144

Part 2

Issues During Pendency of Case

Bondsmen, you can't live with them

And

You can't live without them

Forfeiture of Bail

- If defendant “does not comply with the conditions of the bail bond”
- Court **shall** order the bail to be forfeited
- Defendant can cure by surrendering within 30 days, or, within the 30 day period, prove that appearance and surrender are impossible
- If no cure, court “shall enter judgment ... for the amount of the bail **and costs of the proceedings.**”
- Any cash bond is forfeited. 40-11-120; 40-11-121
- Bail secured by other means (real estate, sufficient sureties, bondsman) are forfeited. 40-11-139

Forfeiture of Bail, cont.

- Upon forfeiture of a defendant's bail
- The court "shall" issue a capias
- 40-11-139(a)

Failure to Appear

- A vexing problem for all criminal courts
- Separate criminal charge – 39-16-609
- Offense must be “knowing”
- Failure to show for probation is not FTA
- Defense is “reasonable excuse”
- Could be the basis for a bond revocation (see Part 3 herein)
- FTA for C or B misdemeanor: A misdemeanor
- FTA for A misdemeanor or felony: E felony
- Sentence may be consecutive

Duration of Bond Obligation (No Surrender)

- 40-11-130; 40-11-138(b)
- Unless there is a “disposition” pursuant to 40-11-138(b), bondsman is obligated “until the time allowed by law for the defendant to appeal a finding of guilt to the court of criminal appeals.” 40-11-130
- Dispositions (under 40-11-138(b)): Acquittal; Agreement with the State, whether diversion or otherwise; or retirement.

Duration of Bond Obligation (No Surrender), cont.

- If the charge against the defendant is “disposed of by a conviction or plea of guilt”
- The bond remains in effect until sentencing
- 40-11-138(b)(2)(A)

Surrender

- Bondsman may be relieved of obligation (“exonerated”) upon surrender of defendant
- Surrender must be “for good cause”
- Good cause includes (but is not limited to):
 - Breach of contract
 - Good cause to believe defendant will FTA
 - Forfeit has been rendered
 - Defendant has FTA
 - Defendant has been arrested while on bond
- 40-11-132

Surrender, cont.

- Surrender may be “at any time” (so long as there is good cause) – 40-11-132
- Bondsman must notify “the officer of the surrender” – 40-11-137(a)
- Defendant entitled to a hearing within 72 hours of surrender – 40-11-137(b)(1)
- **Unless:** the bondsman received a conditional or final forfeiture (usually from an FTA) – then, no 72 hour hearing -- 40-11-137(b)(3)

Surrender, cont.

Who is this “officer” that is to be notified?

- In re: Tennessee Bonding Company, No. M2020-00656-CCA-R3-CD (Tenn. Crim. App. 2020)
- “We determine that the term ‘officer’ ... means a judicial officer, such as the court clerk, not a sheriff’s deputy or law enforcement officer.”
- Duty is on the bondsman
- Notification of the judge is allowed
- “Because [the bondsman] breached its statutory duty to notify the court of the surrender, the court had the discretionary authority to order [the bondsman] to refund the premium paid by the defendant and release the defendant from any further obligation to pay the premium.”

Surrender, cont.

- Bondsman may arrest the defendant on a **certified copy of the undertaking**
- At any place either in or out of the state
- Bondsman may authorize another to make the arrest “by written authority endorsed on the certified copy”
- If a certified copy cannot be obtained from the clerk’s office, “a duplicate copy of the same shall suffice until such time that a certified copy can be obtained....”
- 40-11-133(a)

Surrender, cont.

- Bondsman entitled to the aid of the sheriff in making the arrest. 40-11-134, 135
- The surrender must be to the sheriff of the county where the defendant faces the charge. 40-11-136
- The “undertaking” – the bond – may also include the underlying criminal process against the defendant
- “The endorsed bond in the hands of the bail’s agents is a substitute for a warrant.” Poteete v. Olive, 527 S.W.2d 84, 87-88 (Tenn. 1975).

Surrender, cont.

- Note the distinction between a “bondsman” and a “bounty hunter.”
- A “bounty hunter” is a person who: (1) acts as an agent of a professional bondsman, and (2) takes into custody, or attempts to take into custody, a person who FTAs and whose bond has been forfeited. 40-11-318(a)

Surrender, cont.

- This is important because:
- Before a bounty hunter takes into custody one who has failed to appear in court:
- A bounty hunter must:
- Make a good faith effort to verify the person's address, and
- Present to appropriate law enforcement:
 - Certified copy of the underlying criminal process
 - Certified copy of the bond or capias (if there is one)
 - Credentials verifying agency of the bondsman, and
 - Pocket card with photo certifying training
- 40-11-318(c)

A word about Exonerations

- 40-11- 132; 40-11-203
- Court's discretion outside the statute should be "sparingly exercised." State v. Scott, W2012-02746-CCA-R3-CD (Tenn. Crim. App. 2013)
- Diligence or good faith of surety does not control. Id. (citing State v. Frankgos, 85 S.W. 79, 80-81 (Tenn. 1905) (relief of sureties "may only be exercised in extreme cases, such as the death of the defendant").
- In re: Radar Bonding Company, Inc., No. M2008-01161-CCA-R3-CD (Tenn. Crim. App. 2009) (flight by defendant to another country is not grounds for relief)
- Extreme expenses to be incurred by bondsman is not an excuse. Frankgos
 - Suck it up, buttercup

After FTA

- If the defendant fails to appear:
- The court “shall enter an order declaring the bail to be forfeited.” 40-11-139(a)
- A conditional judgment “may” be entered against the defendant and the defendant’s sureties. 40-11-201(a)
- The court can grant an extension rather than enter a conditional judgment. 40-11-201(a) (Note: rarely done **at this stage** – IMO)
- If a conditional judgment is entered, the defendant and defendant’s sureties are notified by scire facias to show cause why the judgment should not be made final. 40-11-202

After FTA, cont.

- If the defendant is arrested on an FTA warrant, the surety is released. 40-11-139(a)
- The surety (usually a bondsman) is allowed 180 days from service of the scire facias to surrender the defendant. 40-11-139(b)

After FTA, cont.

- If the surety does not surrender the defendant during the 180 days, the court “may” then enter a final judgment. 40-11-139(b)
- Courts often grant extensions at this stage.
- The final judgment is for “the amount of the bail and **costs of the proceedings.**” 40-11-139(b)
- Court has wide discretion in granting extensions – State v. Marin, 2011 Tenn. Crim. App. LEXIS 332 (Tenn. Crim. App. 2011)

A word about extensions

- I often grant an initial extension after the 180 days has past
- Unless I suspect the extension will not accomplish anything
- I try to keep the matter (initial 180 days, extensions, final judgment) to a period of less than 1 year
- I rarely grant subsequent extensions unless:
 - Proof that defendant is in jail or prison with detainer in place
 - Testimony from the bail agent that the defendant has been located and efforts are being made to surrender (“hot on the trail”)

After FTA, cont.

- The final forfeiture does not become “final” until 30 days after its entry. 40-11-139(c); In re: Danny Blakeship Bonding Co., No. W2012-02746-CCA-R3-CD (Tenn. Ct. Crim. App. 2013).
- Then the surety is obligated to pay the amount of the bail **and the court costs**. 40-11-139(b); 40-11-120
- Practical point: the costs of some criminal charges (DUI, Simple Possession, UDP) are quite high.
- Op. Atty Gen. 17-38 (2017) – surety’s obligation includes costs

After FTA, cont.

- The rules of civil procedure apply in bond forfeiture proceedings
- State v. Scott, No. W2012-02746-CCA-R3-CD (Tenn. Crim. App. 2013);
In re: Danny Blakenship Bonding Co., Id.
- Practical impact: 30 days for judgment to become final

Detainers

- If defendant is in jail in another jurisdiction
- Detainer filed (holding defendant in other jail)
- Bondsman liable for costs to return
- If detainer is refused, or if defendant is released against the detainer, bondsman exonerated
- Bondsman must present adequate proof
- 40-11-201(c)

Bondsman's Reports

- Required to file semi-annual reports
- With clerk's office
- 40-11-303

What happens after bind over?

- Bonding company still liable
- In re: Rader Bonding Company, No. M2017-01687-SC-R11-CD (Tenn. 2019).

A quick word about bondsmen

- IMO: good bonding agencies are critical to our system
- Law enforcement does not have the resources to track down FTAs
- Law enforcement does not have the incentive to track down FTAs
- Bondsmen often drive defendants to court
- The bail system is dependent on bondsmen making good underwriting decisions
- Often bondsmen can “vouch” for defendant’s FTA excuse
- BUT – don’t let them think you’re a pushover

Part 3

Revocation

The “nuclear option” for judges

First, the Statute (non- DV)

- 40-11-141(b)
- The defendant's bond can be revoked if the defendant:
 - Violates a condition of release, or
 - Is charged with an offense committed during release, or
 - Engages in conduct resulting in "obstruction of the orderly and expeditious progress of the trial or other proceedings"

The Statute -

- Sounds pretty broad, right?
- It is. Very broad. More on this in a moment.

Second, what is the procedure to revoke a bond?

- It ain't this:
- Defendant's Sessions bond conditions included a prohibition against using drugs
- Defendant's case reset 60 days; at the 60 day mark, defendant subjected to drug test, tests positive, given 10 days in jail
- No lawyer; no involvement by DA; no notice; no sworn testimony; unclear whether matter was revocation or contempt
- No matter: COA stated court "exceeded its jurisdiction and **acted illegally**"
- State v. Moore, 262 S.W.3d 767, 2008 Tenn. Crim. App. LEXIS 28 (Tenn. Crim. App. 2008)

It's more like this:

- State v. Burgins, 464 S.W.3d 298, 2015 Tenn. LEXIS 285 (Tenn. 2015).
- Bail is a constitutional right, but may be lost due to defendant's acts.
- Defendant out on bail and arrested on attempted carjacking.
- Bond revoked under statute, but **no hearing**; revocation challenged.
- Court held: defendant entitled to evidentiary hearing
- Revocation can be initiated by court sua sponte or state.
- Written notice required. Date, time, and place of hearing.
- Disclosure of evidence against defendant.
- Opportunity to be heard.

Burgins, cont.

- Right of confrontation and cross examination
 - Right to make arguments in defense
 - State has burden of proof
 - Standard of proof is preponderance of evidence
 - Documentary proof is allowed, but corroboration is required
 - Reliable hearsay is allowed
-
- Note: court did not address right to counsel

Burgins, cont.

- Court may:
 - Revoke bail
 - Continue bail
 - Increase bail amount and/or add conditions
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- In determining which option is appropriate, court must consider bond factors in assessing flight risk and/or safety of public (our old friends from the initial setting of bail)

What happens if the bond is revoked?

- Simple answer: the court “may revoke and terminate the defendant’s bond and order the defendant held without bail pending trial or without release during trial.”

Bond revocation, practically speaking

- Bond revocation is a drastic step
- Consider use when the public safety is threatened (subsequent charges involving violence or stalking, etc.)
- Consider use when the court's orders are ignored (report to probation, no contact orders, no use of alcohol or illegal drugs, no new charges, etc.)
- IMO: ignoring court orders is disrespect

Revocation – DV cases

- Statute: 40-11-150(i) (domestic violence bail)
- If defendant violates a condition of release:
- Subject to immediate arrest
- If the violation is a criminal offense, person can be charged and bail revoked
- If the violation is not a criminal offense, violation can be treated as contempt and bail revoked
- Op. Atty Gen. 05-183 – for guidance

Suggestion:

- Add language to arrest warrant that puts defendants on notice of possible bond revocation
- Stewart County: we added a line to the form: “Notice: if you are out on bond, you are hereby put on notice that your previous bond may be revoked.”

For what it's worth:

- To be a good general sessions judge (and a good family law judge), a broad knowledge is handy
- No shame in being a generalist
- “A human being should be able to change a diaper, plan an invasion, butcher a hog, conn a ship, design a building, write a sonnet, balance accounts, build a wall, set a bone, comfort the dying, take orders, give orders, cooperate, act alone, solve equations, analyze a new problem, pitch manure, program a computer, cook a tasty meal, fight efficiently, die gallantly. Specialization is for insects.” *Robert Heinlen*

- Sessions judges are the “face” of the judiciary for most citizens
- Rarely do normal citizens go to Circuit court or Appellate court
- Real often, they appear pro se
- Court appearances are a big deal for most people – they remember
 - Traffic court in 1985, Chattanooga

- Try to greet each litigant and each lawyer before getting down to business
- Be patient, answer questions, explain stuff, hold the line
- In other words, don't mess it up for the rest of us