

SEPTEMBER 2024

**APPLICATION OF BOND**

**ALL YOU EVER WANTED TO KNOW ABOUT BONDS AND REVOCATIONS**

Judge Chuck Cerny  
Judge Lila Statom

## **I. BAIL**

### **A. New Standard When Bail is Required**

Tenn. Code Ann. § 40-11-117 previously provided “absent a showing that the conditions on recognizance will reasonable assure the appearance of the defendant as required, the magistrate shall, in lieu of the conditions of release set out in Tenn. Code Ann. § 40-11-115 or 40-11-116, require bail to be given.”

Tenn. Code Ann. § 40-11-117 was amended in July 2024. **After July 1, 2024**, “If the magistrate determines that a release on recognizance or with conditions **will not reasonably ensure the safety of the community** and the appearance of the defendant as required, then the magistrate must require bail to be given.”

### **B. New Standard Regarding Amount of Bail**

Tenn. Code Ann. § 40-11-118(a) previously provided “bail shall be set as low as the court determines is necessary to assure the appearance of the defendant as required,” while “at the same time protecting the safety of the public.”

Tenn. Code Ann. § 40-11-118(a) was amended in July 2024. **After July 1, 2024**, “Bail must be set as low as the court determines is necessary to **reasonably ensure the safety of the community** and the appearance of the defendant as required.”

### **C. Factors to be Considered When Setting Bond**

When setting the amount of bond, the Court must consider **all factors** in the Bail Reform Act. Tenn. Code Ann. § 40-11-118(b) enumerates the factors. Failure to consider all factors may result in a finding of abuse of the Court’s discretion. There is no hierarchy of factors. The Court determines the weight to be given to each factor based on the evidence presented.

#### **1. Length of Residence in the Community**

The caselaw provides that the length of residence in the court’s jurisdiction is a proper consideration as the ties to the community will likely deter the defendant from fleeing the jurisdiction. If the defendant has lived in the community for a substantial period, the Court might find this factor in favor of a lower bond.

#### **2. Employment Status and History and Financial Condition**

The length of time that a defendant has worked at the same employer may weigh in favor of setting a lower bond particularly if there are witnesses who testify other than the defendant to this factor. The caselaw provides that bail cannot be set so high for the sole purpose of preventing the defendant from making bond but can be set in an amount to assure he appears in court. When considering the defendant’s financial condition, the Court may consider whether

the defendant has a checking or savings account, owns property in the jurisdiction, has documented employment for a consistent period, owns other assets in the jurisdiction, and any other factors bearing on financial status.

**After May 1, 2024**, Tenn. Code Ann. § 40-11-118(b)(2), was amended to provide that the defendant's ability to pay a bond **shall not** be considered by the Court when setting bond.

### **3. Family Ties and Relationships**

Strong family ties would weigh in favor of a lesser bond. However, this factor should be vigorously scrutinized by the Court. If all the defendant's family lives outside the jurisdiction of the Court, the defendant might be more likely to flee to the location his family resides. The Court should review the strength of the relationships and knowledge the vouching family members or friends have of the defendant's criminal record, employment history, address, frequency of contact, and length of relationship. The Court might inquire whether the defendant lived in the testifying witness's home at the time the charged event allegedly occurred.

### **4. Reputation, Character, and Mental Condition**

The Court should consider all witnesses who testify to the defendant's reputation and character as it is generally believed that a person of good character and reputation would face his accusers in court and never fail to appear in court. Equally important is a defendant's mental condition. A defendant with an untreated mental health condition might flee prosecution if they are not stable on prescribed medication.

### **5. Prior Criminal Record, Record of Appearance at Court Proceedings and Flight to Avoid Prosecution**

The court should consider the defendant's prior criminal record when setting bond. However, if the defendant has numerous court appearances and has never failed to appear, the record of appearing in court when scheduled may weigh in his favor. The court should consider all prior failures to appear or any types of convictions where a defendant is fleeing or attempting to flee such as evading arrest or resisting arrest.

### **6. Nature of Present Offense, Probability of Conviction and Likely Sentence**

Caselaw seems to impose a requirement that all three parts of this factor be considered together. The Court cannot just summarily decide that the offense is serious and set a higher bond. There should be a review of the criminal statute that was allegedly violated, fact in the affidavit of complaint and the punishment the defendant would receive if he were convicted as charged. If the likelihood of conviction is probable, the defendant might be more likely to flee if he is facing a substantial punishment.

## **7. Prior Criminal Record and Risk of Danger to the Community**

This is the **second time** under the Bail Reform Act that the defendant's record is being considered. This factor seems to address whether the defendant's prior record shows a violent pattern that would endanger the community. The court could consider cases like domestic violence, any crime involving the use or display of a weapon, any crime against a person, drug offenses, threats to officers, threats to the court, or similar type offenses. If a defendant does not have a violent record, this factor will weigh in his favor for setting a lower bond.

## **8. Responsible Members of the Community Who Will Vouch for Defendant's Reliability**

This factor requires proof from a witness or witnesses that are willing to stand up and vouch that the defendant can be trusted, based on their experience with the defendant, to return to court to face the charges levied against them.

## **9. Ties to the Community or Risk of the Defendant's Failure to Appear**

Prior to July 1, 2024, Tenn. Code Ann. §40-11-118(b)(9) provided "Any other factors indicating the defendant's ties to the community or bearing on the risk of the defendant's willful failure to appear."

As of July 1, 2024, Tenn. Code Ann. § 40-11-118(b)(9) was amended to "Any other factors indicating the defendant's ties to the community or bearing on the risk of the defendant's willful failure to appear, **including, but not limited to, whether the defendant is lawfully present in this state.**"

## **10. Commits a New Offense While on Bail for Another Offense**

Under Tenn. Code Ann. § 40-11-148(a), if the defendant is on bond for a criminal offense, whether prior to or during trial or pending appear, and the defendant is charged with the commission of one (1) or more bailable offenses while released on bond, the magistrate or judge shall set the defendant's bail in an amount not less than twice the amount is customarily set for the offense charged.

# **II. REVOCATION OF BAIL**

## **A. WHO MAY FILE**

Pursuant to Tenn. Code Ann. § 40-11-141(b) and *State v. Burgin's*, 464 S.W.3d 298 (Tenn. 2015), the Court may conduct an evidentiary hearing to revoke a defendant's bail:

1. upon motion filed by the State alleging at least one statutory ground for revocation, or

2. on motion of the Court, *sua sponte*.

## **B. NOTICE AND OPPORTUNITY TO BE HEARD**

### **1. By Motion to Alter Bail or Conditions of Release - Generally**

Pursuant to **Tenn. Code Ann. § 40-11-143**, a motion to alter the bond or any condition of release must be in writing and served on the defendant or his attorney. The court must hold a hearing within a reasonable amount on the motion to alter or revoke the defendant's bail. The court must set forth in writing the reasons for its decision.

### **2. By Motion to Revoke Bond for Violation of Condition of Release, New Charges, or Obstruction of Court Proceedings**

Pursuant to **Tenn. Code Ann. § 40-11-141(b)**, when the "Defendant violates a condition of release, is charged with an offense committed during the defendant's release or engages in conduct which results in the obstruction of the orderly and expeditious progress of the trial or other proceedings, then the court may revoke and terminate the defendant's bond and order the defendant held without bail pending trial or without release during trial."

Under *State v. Burgins*, 464 S.W.3d 298 (Tenn. 2015), the court should first consider whether additional bail conditions would protect the safety of the community. The Court in *Burgins* also required the court considering a motion to revoke bond to revisit the bail factors in Tenn. Code Ann. § 40-11-118(b) before making a decision on the bond revocation.

### **3. Burden of Proof in Revocation Hearing**

In a revocation hearing, the State has the burden of proof to show by the preponderance of the evidence that the defendant's conduct was such that would support amending his conditions of release or revocation of bond.

### **4. Evidence in Revocation Hearing**

In *State v. Burgins*, 464 S.W.3d 298 (Tenn. 2015), the Court held the State must call witnesses to establish the violation alleged in their motion. The court also has the authority to add witnesses to be examined by the District Attorney General. The Court further stated that reliable hearsay is also permissible in a violation hearing.

### **5. Permissive or Mandatory Arrest for Violations**

Pursuant to Tenn. Code Ann. § 40-11-112(a), as amended July 1, 2024, if the court **increases the bond** after a hearing, the court **shall** declare a forfeiture and **may** issue a warrant for the arrest of the defendant.

Pursuant Tenn. Code Ann. § 40-11-112(b) as amended July 1, 2024, if the defendant **fails to comply with any condition** of bond, the court having jurisdiction at the time of the failure **shall** declare a forfeiture and **may** issue a warrant for the arrest of the defendant; however, if the defendant is **charged with a Class A, B, C or D felony**, then the court **shall** issue a warrant for the arrest of the defendant.

#### **6. New Class A Misdemeanor**

As of July 1, 2024, under 2024 Tenn. Pub. Acts, ch. 942 § 1 (Tenn. Code Ann. not yet numbered) if the defendant violates any condition of release imposed under law, he can be convicted of a new offense for such violation. However, he cannot be prosecuted for this section and a violation of the conditions of release under Tenn. Code Ann. § 39-13-113(i) for the same criminal offense.

### **III. CONFUSING NEW STATUTE PRETRIAL MONITORING FOR CERTAIN FELONIES**

**A. Tenn. Code Ann. § 40-11-148**, is amended by adding the following as a new subsection:

**(c)** If a defendant charged with a Class A, B, C, or D felony has been arrested pursuant to a warrant issued under § 40-11-112(b) for failure to comply with the conditions of release, then the defendant shall **only be released** by a **criminal or circuit court judge**.