

FOCUSING ON THE FUNDAMENTALS OF PRETRIAL RELEASE



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INTRODUCTION:

THE FUNDAMENTALS OF PRETRIAL JUSTICE

The American criminal justice system rests on the familiar canon that everyone is innocent until proven guilty beyond a reasonable doubt. In Tennessee, absent a first-degree murder charge, every defendant has a constitutional right to bail. This is set forth in Article I, Section 15 of the Tennessee Constitution, which provides “[t]hat all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great.” There is not, however, a presumption of release without bail in line with the canon of innocent until proven guilty.

To address this and other shortcomings in Tennessee’s approach to pretrial justice, we recommend:

- There should be a presumption of pretrial release without conditions or cash bond, grounded in the American maxim that people are innocent until proven guilty.
- Conditions of release, if any, should be the least restrictive to ensure public safety and appearance at trial.
- Courts—after due process—should have the authority to deny bail in the most serious cases involving highly dangerous defendants after determining that a compelling government interest exists and there are no possible conditions under which the defendant could be released that would reasonably protect public safety and ensure re-appearance.
- The burden should be on the state to prove the need for conditions of release or denial of bond in an adversarial proceeding where the accused is present.
- Individual judicial consideration should be required for each accused.

THE STATE OF PRETRIAL RELEASE IN TENNESSEE

Magistrates have significant discretion when determining whether to release a defendant on personal recognizance or assign bail. Pursuant to T.C.A. § 40-11-115(a) “any person charged with a bailable offense may, before a magistrate authorized to admit the person to bail, be ordered released pending trial on the person’s personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the magistrate.” In determining a defendant’s release, T. C. A. § 40-11-115 requires the magistrate to take into account the following factors:

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

What is missing here is a presumption of release on personal recognizance, especially for low-level, nonviolent misdemeanants. If this presumption was present, then the burden of proof, with clear and convincing evidence, would be placed on the state to prove, using the risk factors above, that release on personal recognizance would not likely ensure public safety or the return of the accused for trial.

Instead, Tennessee law creates a general presumption in favor of imposing bail to secure release. T.C.A. § 40-11-117 states that “[a]bsent 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.”

If the defendant is deemed ineligible for release on their own recognizance as provided under Section 115, then T. C. A. § 40-11-116(a) requires that the magistrate “impose the least onerous conditions reasonably likely to assure the defendant's appearance in court.” The magistrate has the discretion to choose amongst the following conditions set forth in T. C. A. § 40-11-116(b):

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. This supervisor shall maintain close contact with the defendant, assist the defendant in making arrangements to appear in court, and, where appropriate, accompany the defendant to court. The supervisor shall not be required to be financially responsible for the defendant, nor to forfeit money in the event the defendant fails to appear in court. The department of correction and its officers are not to be considered an appropriate qualified organization or person under this section;
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.* ... (Emphasis added.)

OVERCROWDING IN TENNESSEE JAILS

The Tennessee system's deference to bail over risk—coupled with the spread of the opioid epidemic—has possibly contributed to jail overcrowding throughout the state. In 2018, Tennessee jails housed an average of 15,852 pretrial detainees, 5,285 of whom were detained on misdemeanor allegation (TDOC, Dec. 2018). In fact, the number of pretrial detainees comprised 50 percent of Tennessee's total jail population. (TDOC, Dec. 2018). In Cocke County alone—where the jail facilities were at 140 percent capacity by the end of 2017—the total population of pretrial detainees hit 79.8 percent, with 41.6 percent detained for a misdemeanor offense (TDOC, Dec. 2017).

Housing pretrial detainees is a significant financial burden on local taxpayers. It costs roughly \$39 per day to house someone in the local jail (TN Pub. Ch. 1061 at 63). Thus, Tennessee taxpayers pay roughly an average of \$618,228 per day to house pretrial detainees, including \$206,115 per day to house pretrial misdemeanants. The cost only multiplies for those counties forced to build new jails to accommodate the population growth. In reality, for those defendants who cannot afford bail, the cost simply shifts to the taxpayer. The cost does not mean that defendants should simply be released, but it should spur policymakers to look more closely at reforms to the system.

How Validated Pretrial Risk Assessments Function to Inform a Court's Decision on Pretrial Release

Across the country, many jurisdictions are implementing actuarial risk assessments to allow judges to better exercise their discretion as to bail and release on recognizance based on defendants' individual risk level. Studies have shown these risk assessments can accurately predict which individuals will fail to appear or commit a new offense, particularly a violent offense.

The U.S. Department of Justice, Bureau of Justice Assistance defines pretrial risk assessments as “designed to provide information about the risk of failure that a given defendant poses if released before adjudication of his or her case” (Summers and Willis, 1). Pretrial risk assessment instruments are tools used to identify a defendant's level of risk, both in terms of flight and danger to the community (BJA, 1). Generally, there are four classification levels set forth as follows:

1. Low risk—individuals who can be released with little or no supervisory conditions with reasonable assurances that they will appear in court and will not threaten community safety.
2. Moderate risk—individuals who can be released with conditions placed on them with reasonable assurances that they will appear in court and will not threaten community safety.
3. High risk—individuals who can be released only with the most stringent conditions

placed on them with reasonable assurances that they will appear in court and will not threaten community safety.

4. Highest risk—individuals who cannot be released with any reasonable assurance that they will appear in court or that they will not be a threat to community safety (VanNostrand and Rose; Summers and Willis, 1).

Risk factors that might be included in the instrument's formulation include age, criminal record, any previous failures to appear for hearings, employment status, substance use, and age of first offense. Points are assigned to each factor, resulting in a total score. Instruments are designed to inform decisions regarding custody, supervision, and referral for services. Risk assessment instruments are typically validated, meaning they are retrospectively tested to demonstrate that each factor and the total risk score are highly correlated with recidivism, failure to appear, or both. Validated risk assessments are preferred and should be the only ones considered.

Many of the jurisdictions that rely primarily, if not completely on a risk assessment to determine pretrial release, have seen detention rates decrease. For instance, the detention rate is at six percent in Washington, D.C., and eight percent in Travis County, Texas (Levin and Haugen, 13). A study by the Laura and John Arnold Foundation of Kentucky's risk assessment instrument found that within the first six months of its 2013 adoption, the number of new crimes committed by defendants on pre-trial release was down 15 percent, despite the fact that the population of defendants released and awaiting trial had increased (Arnold Foundation 2014, 1). New Jersey implemented the pretrial risk assessment tool in January 2017, and since then has seen a 29 percent decrease in the pretrial detainee population (NJ Courts, 1). Moreover, the state's overall crime rate decreased 15.4 percent during that time period (NJ State Police).

CONCLUSION

With over 50 percent of Tennessee's jail population made up of pretrial detainees, the state should begin to reform its pretrial justice system. The first step must be to implement standards that protect defendants' constitutional rights and support the presumption of innocence. Foremost among these would be a presumption of release on personal recognizance. The adoption of risk assessment instruments can also aid in this transition by providing courts with improved objectivity in assessing a defendant's risk. This may also ease the burden of Tennessee's overpopulated jails and increase public safety.

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