Whose Burden is it Anyway?
Bail hearings post-Torres v. Collins

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I. INTRODUCTION

There has long been a wide gulf between the law and practice of bail in the State of Tennessee. The law clearly states that setting financial conditions for release should be a last resort. However in practice, courts have been setting financial conditions as a matter of course. Since the preliminary injunction in *Torres v. Collins,*[2] bail practice in Tennessee's courts has started its slow march towards compliance with the law. Judges, district attorneys general, and criminal defense lawyers are adjusting to a new paradigm. The public is engaged.[3] Historically, "most judges require[d] the defendant to present proof as to why bond should be fixed at a certain amount."[4] While this has always been "counter to the clear mandate of the statutes" and established law, it is nevertheless the practice in most Tennessee Courts.[5] One major shift in practice concerns the party bearing the burden to establish whether any conditions of release are appropriate for a particular defendant and what standard of proof is required to establish such restrictions. The short answer is: The District Attorney General by Clear and Convincing Evidence. The long answer is below.

It is important to note that a bail hearing which occurs at the initial appearance, commonly referred to in practice as "arraignments,"[6] is not a motion for a modification of bail, but rather an initial bail setting.[7] This is true even if a clerk or magistrate affixes a money bail amount on the arresting instrument because this amount is set *ex parte* and lacks any individualized inquiry into

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[2] *Torres v. Collins*, No. 2:20-CV-00026-DCLC, 2020 WL 7706883, at *12 (E.D. Tenn. Nov. 30, 2020)

[3] Jamie Satterfield, Tennessee taxpayers are on the hook for judges who don't follow bail rules, May 23, 2021,https://www.knoxnews.com/story/news/crime/2021/05/24/tennessee-class-action-lawsuit-addresses-illegal-cash-bail-practices/5043773001/ (last visited May 28, 2021); Jamie Satterfield, Tennessee judges: Guaranteeing right to pretrial freedom is pricey and burdensome, Mar. 6, 2021, https://www.knoxnews.com/story/news/crime/2021/03/07/tennessee-judges-bail-system-pricey-and-burdensome/4592360001/ (last visited Apr. 11, 2021); Jamie Satterfield, Tennessee judges are brushing aside bail laws, and it's costing you, Knoxville News Sentinel Feb. 23, 2021, https://www.knoxnews.com/in-depth/news/crime/2021/02/23/tennessee-judges-ignoring-bail-laws-and-its-costing-you/4436704001/ (last visited Apr. 9, 2021).

[4] David Louis Raybin, 9 Tenn. Prac. Crim. Prac. & Procedure § 4:6.

[5] *Id*.

[6] See Davis Louis Rabyin, 9 Tenn. Prac. Crim. Prac. & Procedure § 3:2 (explaining the difference between an "initial appearance" and an "arraignment.").

[7] See. *Torres v. Collins*, 2020 WL 7706883, at *12 (finding the prior practices of Judge Collins and his codefendants unconstitutional and ordering that a bail hearing "occur within a reasonable period of time of arrest" suggesting 48 hours would be acceptable).

the accused person's circumstances.[8] Such an inquiry is required for an initial bail setting under Tennessee and federal law.[9] It is likewise important to note that when a court sets bail at an amount a defendant cannot afford, it is entering a detention order. [10]

II. WHO BEARS THE BURDEN?

It bears noting that every person who first appears in front of a general sessions court as a defendant is presumed innocent until convicted. Because of that important presumption, the Tennessee Constitution guarantees "all prisoners shall be bailable by sufficient sureties, unless for capital offen[s]es, when the proof is evident, or the presumption great."[11] This constitutional provision grants a defendant the right to pretrial liberty pending adjudication of criminal charges.[12] As a result, the Tennessee Supreme Court has explicitly held the "Tennessee Constitution guarantees a defendant the right to pretrial release".[13] There is also a statutory presumption against pretrial detention on all misdemeanors with specifically enumerated exceptions:

> Interlocking with these rules of constitutional force, Tennessee Code Annotated sections 40–7–118 and 55–10–207(a) provide that when an officer observes the commission of certain misdemeanors, the officer is **required** to cite and release the misdemeanant in lieu of effecting a custodial arrest. T.C.A. §§ 40–7–118(b)(1) (2003), 55–10–207(a) (Supp.2003). These more general "cite and release" statutes are in addition to the specific "cite and release" provisions contained in code section 55–9–603(f)(1), [.] "Accordingly, the Tennessee 'cite and release' statute creates a **presumptive right to be cited and released for the commission of a misdemeanor**." *14*

This statutory presumption is so strong that the court in *Harris* noted that a "custodial arrest in violation of the 'cite and release' statute constitutes a violation of the right against an unreasonable search and seizure."[15]

Under the "Release from Custody and Bail Reform Act of 1978" a person accused of a crime is presumed to qualify for release on their own recognizance *"[a]bsent a showing that*

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[8] Tenn. Code Ann. § 40-11-105(a)(2) ("The clerk of any circuit or criminal court may only admit the defendant to bail when the judge is not present in the court and the clerk reasonably believes that the judge will not be present within three (3) hours after the defendant has been committed to the county or city jail, following arrest"); Tenn. Code Ann. § 40-11-105(b)(establishing strict limits to the authority of clerks to set bail).

[9] *Torres v. Collins*, 2020 WL 7706883, at *12.

[10] **NEED CITE**

[11] Tenn. Const. art. I, § 15.

[12] *Swain v. State*, 527 S.W.2d 119, 120 (Tenn. 1975); *Wallace v. State*, 245 S.W.2d 192, 194 (Tenn. 1952); *State ex rel. Hemby v. O'Steen*,559 S.W.2d 340, 341 (Tenn. Crim. App. 1977); see also Tenn. Code Ann. § 40-11-102; Tenn. Code Ann. § 40-11-118(a).

[13] *State v. Burgins*, 464 S.W.3d 298, 301 (Tenn. 2015).

[14] *State v. Harris*, 280 S.W.3d 832, 841 n. 2 (Tenn. Crim. App. 2008)(quoting *State v. Walker*, 12 S.W.3d 460, 464 (Tenn.2000)) (emphasis added).

[15] *Id.*

conditions on a release on recognizance will reasonably assure the appearance".[16] The burden of evidence lies with the parties to an action, not a neutral tribunal. This is a long-standing, general principle of law. Bond hearings are not exempt from this principle and the District Attorney General bears the evidentiary burden of establishing the necessity of imposing any restrictions on a presumptively-innocent person's liberty under Tenn. Code Ann.§ 40-11-117. For instance, in *State ex rel. Jefferson v. State*, the Tennessee Supreme Court found "the State was *correctly required to carry the burden of proof and offer evidence to sustain the right of the State to retain petitioner in custody*, since this hearing on the issue of bail was held prior to any indictment."[17] In *ex. rel. Jefferson*, the accused was charged with a capital offense.[18] Thus, the burden of proof remains with the District Attorney General even in capital offense cases, which are the only instance under the Tennessee Constitution where the right to bail is not guaranteed.

This is not a new principle of law in this state. The fact the State bears the burden to hold a person in pretrial detention has been recognized since at least 1932:

> Upon the arrest of a person upon a criminal warrant, prior to indictment, it is required by statute that he may not be committed to prison until examination thereof be first had before some magistrate, and that the magistrate, "as soon as may be after the defendant appears," shall proceed to examine the case. Adjournment of the examination, without the consent of the accused, may not be ordered for more than three days. In such examination *the burden of proving the right to custody is clearly upon the state, aided by no presumptions*, and the accused is entitled to be heard in person and by witnesses in opposition.[19]

Nor is Tennessee alone holding that the State bears the burden of demonstrating pretrial detention is necessary. Courts across the country have explained it is the government's burden to demonstrate why a criminal defendant must be detained pretrial—not the defendant's burden to demonstrate why they can be released. The Supreme Court has clearly stated it is "the Government [who must] prove[] . . . an arrestee presented an identified and articulable threat" before that person may be detained pretrial.[20] Lower courts across the country have repeated that principle.[21] The American Bar Association's Standards state the same.[22] Courts have long looked to the Standards for guidance when answering constitutional questions about the appropriate

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[16] Tenn. Code Ann. § 40-11-117 (emphasis added).

[17] 436 S.W.2d 437, 438 (1969) (emphasis added)

[18] *Id.*

[19] Shaw v. State, 47 S.W.2d 92, 93 (1932) (internal citations omitted) (emphasis added).

[20] *United States v. Salerno*, 481 U.S. 739, 751 (1987).

[21] See, e.g., *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 136 Nev. 155, 166 (2020) ("[T]he State has the burden of proving by clear and convincing evidence that no less restrictive alternative [to pretrial detention] will satisfy its interests in ensuring the defendant's presence and the community's safety."); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 311 (E.D. La. 2018), aff'd, 937 F.3d 525 (5th Cir. 2019) (referring to the "government burden" of presenting evidence in support of pretrial detention).

[22] See Standards for Criminal Justice: Pretrial Release § 10-5.10(f) (Am Bar Ass'n 2007) ("In pretrial detention proceedings, the prosecutor should bear the burden . . . .").

balance between individual rights and public safety in the field of criminal justice.[23] This flows from the basic due process principle that "forbids the government to infringe [upon] fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling interest."[24] The United States and Tennessee Constitutions require the State to bear the burden of presenting evidence that a criminal defendant should be convicted. They also require the State to demonstrate that a presumptively-innocent person should be detained pretrial, because the same fundamental liberty interest is at stake.

III. WHAT IS THE STANDARD OF PROOF?

It is abundantly clear that the burden is on the State of Tennessee, through the District Attorney General's Office, to overcome the presumption of release without conditions. The next question becomes, what standard of proof is required? Although there is no Tennessee law on point, the federal constitution requires that findings on the necessity of detention and the lack of viable nonfinancial conditions be made by clear and convincing evidence. In *State v. Burgins*, the Tennessee Supreme Court found the State's burden to revoke a criminal defendant's bond after release was a preponderance of the evidence standard but that case involved the forfeiture by wrongdoing of already established bail.[25] As the Supreme Court explained in *Addington v. Texas*,[26] the deprivation of the fundamental right to bodily liberty requires a heightened standard of proof beyond a mere preponderance to ensure the accuracy of the decision.[27]

The *Addington* court held a person with mental illness could not be confined based upon the possibility of future dangerousness unless the standard of proof was "equal to or greater than" the "clear and convincing" evidentiary standard.[28] The Court applied the *Mathews v. Eldridge* balancing test and weighed the government's interest in protecting the community against the important private interest in bodily liberty, and concluded "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."[29] "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[30] The "clear and convincing" standard enables the government to achieve its interest when it has a convincing basis, but simultaneously and rigorously protects the fundamental individual rights at stake.[31] Since *Addington*, the Supreme Court has never permitted application

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[23] *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010); *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984).
[24] *Torres v. Collins*, No. 2:20-CV-00026-DCLC, 2020 WL 7706883, at *8 (E.D. Tenn. Nov. 30, 2020) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (internal alterations and quotations omitted).
[25] *Burgins*, 464 S.W.3d at 310.
[26] 441 U.S. 418 (1979).
[27] *Id.* at 432–33.
[28] *Id*. at 433.
[29] *Id*. at 427.
[30] *Id.*
[31] *See Id.* at 424.

of a standard lower than clear and convincing evidence in any context in which bodily liberty is at stake.[32] The Courts of Appeals have followed suit.[33]

Many State courts, interpreting these cases alongside *Salerno*, have consistently required clear and convincing evidence to justify detaining a presumptively-innocent person prior to trial. Recently, the California Supreme Court held under the federal constitution that an arrested person may be detained "only if [the trial court] first finds, by clear and convincing evidence, no nonfinancial condition of release can reasonably protect" the State's interests.[34] Similarly, the Nevada Supreme Court held that given the "important nature of the liberty interest at stake, the State has the burden of proving by clear and convincing evidence that no less restrictive alternative will satisfy its interests in ensuring the defendant's presence and the community's safety."[35] In *Caliste v. Cantrell*,[36] the district court held the Due Process Clause requires that the government prove by clear and convincing evidence that pretrial detention is necessary to mitigate a risk of flight, due to the "vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court." Many other state courts have held that the clear-and-convincing-evidence standard applies.[37]

A clear and convincing evidence standard of proof is required for determinations of flight risk and dangerousness alike. "A defendant's liberty interest is no less—and thus requires no less protection—when the risk of his or her flight, rather than danger, is the basis for justifying detention without [the] right to bail."[38] This holding in *Kleinbart* was based in part on "*Salerno*'s emphasis on the clear and convincing evidence standard to sustain the constitutionality of [the] statute [at issue]."[39] The American Bar Association's Criminal Justice Standards on Pretrial

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[32] *See Santosky v. Kramer*, 455 U.S. 745, 756 (1982) ("This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" (quoting *Addington*, 441 U.S. at 424)); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 282–83 (1990) (explaining the Court has required the clear and convincing evidence standard for deportation, denaturalization, civil commitment, termination of parental rights, allegations of civil fraud, and in a variety of other civil cases implicating important interests); *Foucha*, 504 US 71, 85–86 (1992).

[33] *See, e.g.*, *Velasco Lopez v. Decker*, 978 F.3d 842, 855–56 (2d Cir 2020); *Singh v. Holder*, 638 F.3d 1196, 1203–04 (9th Cir 2011).

[34] *In re Humphrey*, 482 P.3d 1008, 1020 (2021).

[35] *Valdez-Jimenez*, 136 Nev. at 166, 460 P.3d at 987 (citing *Foucha*, 504 U.S. at 81, *Santosky*, 455 U.S. at 756, and *Addington*, 441 U.S. at 424).

[36] 329 F. Supp. 3d at 313.

[37] *See, e.g.*, *State v. Ingram*, 230 NJ 190, 202, 204–05, 165 A3d 797, 803–05 (2017); *State v. Butler*, No. 2011-K-0879, 2011 WL 12678268, at *1 (La App 4th Cir July 28, 2011), *writ not considered*, 75 So 3d 442 (La. 2011); *Wheeler v. State*, 160 Md App 566, 579, 864 A2d 1058, 1065 (2005); *Brill v. Gurich*, 965 P2d 404, 409 (Okla Crim App 1998), *as corrected* (Sept 23, 1998); *Lynch v. United States*, 557 A2d 580, 581 (DC 1989) (en banc). *Compare Aime v. Commonwealth*, 414 Mass 667, 678–83, 611 NE2d 204, 211–14 (1993), *superseded on other grounds by Commonwealth v. Diggs*, 475 Mass 79, 85, 54 NE3d 1115 (2016) (striking down preventive detention statute because it did not require the "clear and convincing" burden of proof), *with Mendonza v. Commonwealth*, 423 Mass 771, 782–83, 673 NE2d 22, 30 (1996) (upholding successor statute and holding that "clear and convincing" evidence standard is required for pretrial detention decisions based on a prediction of future dangerousness).

[38] *See Kleinbart v. United States*, 604 A.2d 861, 870 (DC 1992).

[39] *Id.*

Release are consistent with this view: Standard 10-5.8(a) explains that the "clear and convincing" standard applies to decisions relating to dangerousness and risk of flight.[40]

IV. CONCLUSION

At an initial bail hearing, the District Attorney General bears the burden of proof to establish why a person accused of a crime and presumptively innocent should not be released on their own recognizance and the necessity of any restrictions on their pretrial liberty. The standard of proof the State must meet is clear and convincing evidence. The injunction in *Torres v. Collins* was based exclusively on federal law.[41] Nevertheless, the Federal Court found the Hamblen County General Sessions Court and its codefendants' procedures also likely violated Tennessee law.[42] The Hamblen County General Sessions Court is not alone in this error. Thus all courts in the State of Tennessee face potential civil rights liability if they do bring their practices in line with the law. Criminal law practitioners should assist, or insist, that they do. To do so, Tennessee Courts should hold an adversarial initial bail hearing within 48 hours of arrest during which the State, not the accused or the Court, bears the burden of establishing by clear and convincing evidence why a criminal defendant must be detained.

[40] Standards for Criminal Justice: Pretrial Release § 10-5.8(a) (Am Bar Ass'n 2007).

[41] See *Torres v. Collins*, No. 2:20-CV-00026-DCLC, 2020 WL 7706883, at *25 n.8 (E.D. Tenn. Nov. 30, 2020).

[42] *Id*.