



## Tennessee

Hon. Steve Dozier, Judge  
Hon. Cheryl Blackburn, Judge  
Hon. Monte Watkins, Judge  
Hon. Angelita Dalton, Judge  
Hon. Jennifer Smith, Judge  
Hon. Mark Fishburn, Judge  
Davidson County Criminal Court  
A.A. Birch Building  
408 2<sup>nd</sup> Avenue North  
Nashville, TN 37201

CC: Hon. Howard Gentry, Criminal Court Clerk  
Jon Cooper, Director, Department of Law  
Mike Jameson, Executive Director, Metro Government of Nashville & Davidson County Council

*Via Electronic and Certified Mail*

September 27, 2019

***Re: Local Rule of Practice for Bail Bonds 10(B)***

Your Honors:

The American Civil Liberties Union Foundation of Tennessee, American Civil Liberties Union Foundation, Choosing Justice Initiative, and Civil Rights Corps write to alert you to our concerns with Davidson County Criminal Court Local Rule of Practice for Bail Bonds 10(B), which requires anyone who posts a cash bond to agree that the deposit will be subject to garnishment for fines, court costs, and restitution. As explained below, the rule is inconsistent with basic principles of bail and violates state and federal law. We also attach to this letter a public records request pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503(a). As this is a matter of urgent concern, we request that you cease enforcement of Rule 10(B) immediately. If you determine not to cease enforcement of Rule 10(B), we request that you respond to this letter by **Friday, October 4, 2019**.

Our organizations stand ready to engage with you in a proactive, solutions-oriented approach. We have combined experience engaging in policy discussions locally and nationwide in dozens of jurisdictions. Our organizations have worked collaboratively with policymakers in New Jersey, Colorado, California, and Georgia, among others, to improve pretrial practices. We have also filed federal class action lawsuits in dozens of jurisdictions locally and across the country.<sup>1</sup> These lawsuits—generally federal class action cases subject to fee-shifting—have an established record of success for the plaintiffs.

We would like to resolve our issues with Rule 10(B) without resorting to litigation. However, please treat this letter as a preservation notice regarding any documents and materials related to Rule 10(B)’s adoption, administration, and applicability.

### ***Rule 10(B) is Antithetical to the Function of Bail***

Rule 10(B)’s offset provision does not serve any of the public’s traditional interests in bail. Garnishing bail deposits does nothing to promote court appearance or public safety. The rule; however, does have the effect of deterring individuals from posting cash bonds for their release or the release of others. The chilling effect 10(B) has on posting cash bonds is likely *detrimental* to those public goals, as even very short-term pretrial incarceration carries intense negative consequences for the individual and the community at large.<sup>2</sup> The only credible purpose of Rule

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<sup>1</sup> See, e.g., *McNeil v. Cmty. Prob. Servs, LLC*, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019); *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758 (M.D. Tenn. 2016); *Ross v. Blount*, Case No. 19-cv-11076 (E.D. Mich.); *Mock v. Glynn*, 2019 WL 2847122 (S.D. Ga. July 2, 2019); *Daves v. Dallas*, 341 F. Supp. 3d 688 (N.D. Tex. 2018); *State v. Schultz*, 330 F.Supp. 3d 1344 (N.D. Ala. 2018); *Walker v. City of Calhoun, Georgia*, 901 F.3d 1245 (11th Cir. 2018); *ODonnell v. Harris County, Tex.*, 892 F.3d 147 (5th Cir. 2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296 (E.D. La. 2018) & 2019 WL 4072068 (5th Cir. Aug. 29, 2019); *Booth v. Galveston*, 2019 WL 3714455 (S.D. Tex. Aug. 7, 2019).

<sup>2</sup> Christopher T. Lowenkamp et al., Laura and John Arnold Foundation, *The Hidden Costs of Pretrial Detention* 3 (2013) (even 2-3 days in jail associated with increased arrest rates during pretrial period); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 768 (2017) (long-term, the increased arrest rates associated with pretrial detention offset any short-term protective function); Christopher T. Lowenkamp et al., Laura and John Arnold Foundation, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* 4 (November 2013) (those detained for the entire pretrial period are more likely to be sentenced to jail and prison—and receive longer sentences—than those who are released at some point before trial or case disposition); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 18 (Jan. 8, 2017) (finding that a person who is detained

10(B) is to generate revenue for the Davidson County Criminal Courts. Revenue generation—no matter how necessary—is not an acceptable basis to set bail or to infringe the individual rights of people in the criminal legal system. *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971) (declaring the government’s fiscal interest “irrelevant” in the face of invidious wealth-based discrimination); *Wallace v. State*, 193 Tenn. 182, 187 (Tenn. 1952) (the “primary purpose of bail in a criminal case is not to increase the revenue of the state, or to punish the sureties, but to combine the administration of criminal justice with the convenience of a person accused but not proved to be guilty.”).

***Rule 10(B) Exceeds the Authority Granted This Court Under State Statute***

Tennessee law does not authorize Rule 10(B)’s garnishment provision. Tennessee law only allows bail bond deposits to be used to offset fines, fees, and costs under two general circumstances. The first is when a court enters a final bond forfeiture for failure to comply with the terms of pretrial release. Tenn. Code Ann. § 40-11-120 (solely contemplating bond as payment for judgment and costs in the event of final forfeiture); Tenn. Code Ann. § 40-11-139 (permitting court to enter judgment against a defendant and his sureties for court costs “if the defendant . . . does not comply with conditions of bail” and proceeds through a final forfeiture.); Tenn. Code Ann. § 40-11-140 (allowing use of cash bond “to satisfy the judgment and costs” only “if judgment is entered in favor of the state on any bail bond.”); *see also* Tenn. Op. Att’y Gen. No. 17-38 (Sept. 1, 2017) (describing these provisions as well as Tenn. Code Ann. § 40-11-121<sup>3</sup> as “demonstrat[ing] that the General Assembly” wanted to ensure court costs did not go unpaid “*as a result of a defendant’s failure to comply with his bail obligations.*”) (emphasis added). By contrast, Rule 10(B) applies to all Davidson County arrestees, regardless of whether they violate a condition of release.

The second circumstance falls under Tenn. Code Ann. § 40-11-118(c), which provides that court fines or costs may be satisfied by surety bonds if a convicted person “has a history of past

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pretrial is 13% more likely to be convicted and 21% more likely to plead guilty than a person who is not detained).

<sup>3</sup> Rule 10(B) further exceeds the authority provided by § 40-11-121 in that it (1) extends to deposits made not only by the defendant, but third parties, and (2) extracts payment for restitution where the statute only contemplates payment for fines and costs. In any event, as discussed below, the extraction of bail for impermissible reasons is unconstitutional as a matter of federal law.

due fines and costs.” But this provision does not authorize Rule 10(B) for two reasons. First, nothing in Rule 10(B) distinguishes between persons with a history of unpaid fines and those without. Second, the Tennessee Supreme Court has clarified that this provision “addresses post- and not pre-judgment proceedings,” and therefore cannot be used as a basis for extracting fines and costs from a pretrial cash bond, notwithstanding § 40-11-118(c)’s “confusing inclusion in the statute governing cash appearance bonds.” *State v. Clements*, 925 S.W.2d 224, 226 (Tenn. 1996).

### ***Rule 10(B) Violates the Eighth and Fourteenth Amendments***

Pursuant to Rule 10(B), a cash bond deposit is returned only after the clerk deducts “any fines, court costs or restitution as ordered by the Court,” regardless of the arrestee’s pretrial conduct and successful court appearances. Imposing this additional condition renders bail “excessive” under the Eighth Amendment. *See Cohen v. United States*, 82 S.Ct. 526, 528 (1962) (Douglas, J., in chambers) (holding a local rule conditioning the return of bail on the payment of additional fines unconstitutionally “excessive”); *United States v. Rose*, 791 F.2d 1477, 1480 (11th Cir. 1986) (holding that requiring an individual’s bond to be used to pay subsequent court fines reflects a purpose “other than that for which bail is required under the Eighth Amendment” and is therefore “excessive”); *see also Cain v. United States*, 148 F.2d 182, 183 (9th Cir. 1945) (“a requirement by the Court that the bail bond should contain a condition that the bond should also operate as a supersedeas to a judgment for the payment of a fine, made the bail required excessive.”) (internal citation omitted); *State ex rel. Baker v. Troutman*, 553 N.E.2d 1053, 1055 (Ohio 1990) (“... the purpose of bail is to ensure the appearance of the defendant....[and] conditions that do not relate to appearance are necessarily excessive.”).

Further, Rule 10(B) creates an impermissible financial incentive for judges to set cash bail as a means for recovering court costs. This fiscal arrangement creates a conflict of interest that violates due process. *Caliste v. Cantrell*, 2019 WL 4072068 at \*4, 6 (5th Cir. Aug. 29, 2019); *see also Tumey v. State of Ohio*, 273 U.S. 510, 532, 535 (1927) (where official had an interest in the financial well-being of the local government he served, his role assessing fees and costs against accused persons presented conflict of interest); *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 60 (1972) (even where public official does not directly receive money, his assessment of fees for the local village created “possible temptation” amounting to conflict of interest); *Brucker v. City of Doraville*, 391 F. Supp. 3d 1207 (N.D. Ga. 2019) (finding municipality’s fiscal dependence on

criminal fines, fees, and forfeitures presented a conflict of interest substantial enough to survive motion to dismiss), and *Harjo v. City of Albuquerque*, 326 F.Supp.3d 1145, 1193–95 (D. New Mexico 2018) (incentives created by a forfeiture program violated due process); *Rose v. Vill. of Peninsula*, 875 F. Supp. 442, 453 (N.D. Ohio 1995) (where mayor served as both chief executive and judge, program designed to generate village revenue presented conflict of interest that violated due process).

Rule 10(B) presents a second violation of due process. It is beyond question that bail must serve regulatory interests, not punitive ones. *See e.g. United States v. Salerno*, 481 U.S. 739, 748 (1987); *Simpson v. Miller*, 241 Ariz. 341, 346 (Ariz. 2017). Courts therefore must craft pretrial release conditions solely to promote an acceptable regulatory function: to mitigate serious risks of flight or danger. *State v. Burgins*, 464 S.W.3d 298, 303 (Tenn. 2015) (citing *Reynolds v. United States*, 80 S.Ct. 30, 32, (Douglas, Circuit Justice, 1959)). Rule 10(B)’s offset provision infects a mechanism of pretrial release—cash bail deposits—with punishments that must be reserved for after conviction. This violates due process.

Davidson County’s criminal courts may validly assess fines, costs, and restitution at the conclusion of a criminal case. *See United States v. Powell*, 639 F.2d 224, 225 (5th Cir. 1981) (noting that state and federal law provide alternate, valid ways to satisfy judgments without using bail deposits to serve that purpose). They may not, however, condition pre-conviction release on bail on payment for judgments not yet justified or entered. *Compare United States v. Cannistraro*, 871 F.2d 1210, 1213 (3rd Cir. 1989) and *United States v. Higgins*, 987 F.2d 543, 547 (8th Cir. 1993) (no excessive bail violation where bail independently set and later used to offset fines entered in securities and tax fraud cases) *with Cohen*, 82 S. Ct. at 528 (appeal bond conditioned on posting security for the payment of fine excessive) and *Rose*; 791 F.2d at 1479 (excessive bail violation where a promise to pay any eventual fines is a condition of bail).<sup>4</sup>

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<sup>4</sup> *See also Powell*, 639 F.2d 224, 225 (5th Cir. 1981) (noting “[t]he purpose of bail is to secure the presence of the defendant . . . not to enrich the government or punish the defendant,” and that practice of subjecting bail bonds to fines and fees violated principles of contract law); *United States v. Wickenhauser*, 710 F.2d 486, 487–88 (8th Cir. 1983) (same).

***Davidson County Criminal Court Must Immediately Suspend Enforcement of Rule 10(B)***

Rule 10(B) is unlawful and contravenes public policy. **We therefore urge Davidson County to immediately suspend enforcement of Rule 10(B)'s** provision subjecting cash bond deposits to offset. There are a number of more effective policies Davidson County may engage to promote a fair system of pretrial justice.<sup>5</sup>

We look forward to speaking with you about implementing changes to Rule 10(B) and very much hope all sides can engage in a productive, mutually beneficial discussion. **Please confirm receipt. In the event your Court does not immediately suspend enforcement of Rule 10(B), please respond to this letter by Friday, October 4, 2019.**

Respectfully,



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<sup>5</sup> For example, simple text messages providing court date reminders reduce failures to appear. Pretrial Justice Center for Courts, *Use of Court Date Reminder Notices to Improve Court Appearance Rates*, Pretrial Justice Brief 10, 2010. Even re-writing court forms so information is provided in plain, understandable language has been documented to reduce failures to appear. Brice Cooke et al., *Using Behavioral Science to Improve Criminal Justice Outcomes Preventing Failures to Appear in Court*, Ideas41 and The University of Chicago Crime Lab.

***ATTACHMENT 1:  
PUBLIC RECORDS  
REQUEST***

Hon. Howard Gentry, Criminal Court Clerk  
Hon. Steve Dozier, Judge  
Hon. Cheryl Blackburn, Judge  
Hon. Monte Watkins, Judge  
Hon. Angelita Dalton, Judge  
Hon. Jennifer Smith, Judge  
Hon. Mark Fishburn, Judge  
Davidson County Criminal Court  
A.A. Birch Building  
408 2<sup>nd</sup> Avenue North  
Nashville, TN 37201

**Attn: Budget and Public Records Custodian**

September 27, 2019

***Re: Public Records Request Regarding Budget and Policy Documents Related to Davidson County Criminal Court Local Rule of Practice for Bail Bonds 10(B)***

This letter serves as a request for public records under Tennessee Public Records Act, T.C.A. § 10-7-503(a). For the purposes of this request, “documentation and materials” means any and all budget records, fiscal notes, itemized lists, ledgers, spreadsheets, records, emails, correspondence, notes, meeting minutes, transcripts, memoranda, or other documentation.

Please produce the following:

1. Any and all documentation and materials, as defined above, regarding the creation or subsequent approval of Davidson County Local Rule of Practice for Bail Bonds 10(B). This includes, but is not limited to, any such materials providing the rationale for adopting rule 10(B).
2. Any and all documentation and materials, as defined above, showing the amount of money collected as “court costs” pursuant to Davidson County Local Rule of Practice for Bail Bonds 10(B) for the years 2016, 2017, 2018, and 2019 to date.
  - a. This request includes any and all documentation and materials, as defined above, demonstrating how money collected as “court costs” pursuant to Davidson County Local Rule of Practice for Bail Bonds 10(B) for the years 2016, 2017, 2018, and 2019 was spent.



3. Any and all documentation and materials, as defined above, showing the amount of money collected as “fines” pursuant to Davidson County Local Rule of Practice for Bail Bonds 10(B) for the years 2016, 2017, 2018, and 2019 to date.
  - a. This request includes any and all documentation and materials, as defined above, demonstrating how money collected as “fines” pursuant to Davidson County Local Rule of Practice for Bail Bonds 10(B) for the years 2016, 2017, 2018, and 2019 was spent.
4. Any and all documentation and materials, as defined above, showing the amount of money collected as “restitution” pursuant to Davidson County Local Rule of Practice for Bail Bonds 10(B) for the years 2016, 2017, 2018, and 2019 to date.
  - a. This request includes any and all documentation and materials, as defined above, demonstrating how money collected as “restitution” pursuant to Davidson County Local Rule of Practice for Bail Bonds 10(B) for the years 2016, 2017, 2018, and 2019 was spent.

If you claim that any document or portion thereof is exempt from inspection under T.C.A. § 10-7-504, or any other statute or judicial decision, as to each document or portion you claim to be exempt, please state the basis for the exemption, and identify the document or portion by date; by sender, recipient, or author; and by a description of the contents sufficiently detailed to enable an independent evaluation of the exemption.

If any record is otherwise withheld for any reason, please indicate the type of record withheld, the title or style of the record, the length or size of the record, the author of the record, a description of the subject matter of the record, the file(s) where the record (or copies thereof) may be located, and the reason(s) the record is being withheld.

Pursuant to state law, I request a copy of these public records be forwarded to the address indicated on this letter within seven (7) days. If you anticipate that the completion of this request will take longer to complete, please contact me with an anticipated time for completion of this request.

If some or all of the requested public records exist in electronic form, (i.e. a pdf, excel spread sheet, jpg file, word document, etc.) please provide them in such form. For records that are not available in an electronic format, please provide black and white, hard copies of the requested materials.

If there is a copying or production fee that exceeds \$100, please contact me to let me know the total cost before proceeding. If you determine that some portions of the requested records are exempt from disclosure, please provide me with the portions that can be disclosed or documents

in redacted form. Additionally, if specific data or documents are not available or not available in the format requested, please provide documents that contain as much of the requested information as is available and/or the closest approximation to this information that is available.

Signed,



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