

## Judges brush aside bail laws, and it costs you

The law is clear: Cash bail should be courts' last resort

**Jamie Satterfield**

Knoxville News Sentinel USA TODAY NETWORK – TENNESSEE

It is the Tennessee criminal justice system's dirty little secret: For decades, judges and magistrates have been brushing aside state law by making it the standard instead of the exception to require the accused to pay for their freedom before trial.

The law is clear: Cash bail should be a last resort, not the first choice. All defendants are presumed innocent and — except for those accused of capital murder — presumed eligible for release without forking over cash. Tennessee even passed bail reform in 1978 to standardize the rules. “We haven't been doing it right since we passed it,” veteran Nashville attorney David Raybin said.

Now, a federal court decision has declared unconstitutional Hamblen County's practice of requiring cash-for-freedom without a hearing. The decision sets up the possibility that all Tennessee counties will be required to give poor defendants lawyers and all defendants hearings before tossing them in jails, a decision made hundreds of times every day, a Knox News investigation shows.

*“If you plead guilty, I can get you out today. If you want a jury trial, you have to wait at least a year.”*

*Ethel Rhodes*

*Hamblen County assistant public defender, recalling what she has told defendants*



**Two years ago, Willie Santana took a job as a defender of the poor in Morristown. He worked closely with Ethel Rhodes, who helped open eyes to problems in the bail system. “I knew the system just didn't work like what we had learned in law school,” Santana told Knox News. “I was able to see it was wrong.”**  
PHOTOS BY BRIANNA PACIORKA/NEWS SENTINEL



**Kentucky, Texas and several other states have either eliminated the private cash bail system or are taking steps to do so. Knox News' investigation shows homeless people charged with being drunk in public in Tennessee have been jailed for weeks and, in rare cases, a month or more, before a hearing, too poor to pay a professional bondsman.**



**Raybin**

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“I think there’s a fundamental failure on the part of the judges to even know the law,” said Dawn Deaner, Nashville’s former public defender. “Many times these judges get on the bench having never practiced criminal law.”

The price for this judicial approach is high — for those too poor to buy their pretrial freedom; for the children left behind as the incarcerated sit in jail; for the state’s economy as defendants lose jobs; for Tennessee’s welfare systems; and for taxpayers and local governments who must build and maintain jails.

The fix for this decades-long reliance on cash bail as a first option, Deaner and others say, is simple: The default position judges should take is the presumption people are innocent, and release without cash bail should be the default. And if a cash bail is under consideration, a meaningful bail hearing should be standard. Judges insist they are not ignoring the law, and short of a statewide injunction or a flurry of appeals, no one can force them to change their ways.

“The general consensus among our conference is that all judges currently comply,” said Davidson County General Sessions Judge Lynda Jones. “We are unaware of any who currently do not.”

Jones, head of the Tennessee General Sessions Judges Conference, says the methods she personally employs are legal. They do not, however, follow the spirit of the law, an ongoing Knox News probe shows.

More than 30 years of improper detentions in Tennessee might never have been exposed but for the recent efforts of a couple of Hamblen County “rats” and some D.C. outsiders who successfully won an injunction by a federal judge that forces a Hamblen County judge to strictly follow constitutional safeguards for setting bail.

### **Why such a high bond? ‘I don’t know’**

Andrea Wright is homeless and mentally ill. When she got too noisy and people complained, the officer sent to deal with the situation wrote in a warrant that he had no choice but to take Wright to what the county’s own sheriff calls “a dungeon” — the Hamblen County Jail.

Why? Solely because she was homeless, the officer wrote.

“Given that she had no means to remove herself from public view,” the officer wrote, “she was taken into custody and transported to the Hamblen County Jail.”

Her cash bail on a disorderly conduct charge? \$35,000. Attorneys working with two Washington, D.C., nonprofits — Civil Rights Corps and Georgetown University Law’s Institute for Constitutional Advocacy and Protection — were shocked.

“We sort of came into Hamblen County to see if it was worth challenging (bail practices),” Civil Rights Corps attorney Tara Mikkilineni said. “It was absolutely horrendous. There were just bodies everywhere (inside the jail).”

Veteran Hamblen County public defender Ethel Rhodes was not surprised.

“We have been saying bonds were too high forever,” Rhodes said. “It’s the way we’ve always done it.” Teresa West wasn’t shocked by the figure either, a deposition obtained by Knox News shows. West sat down for the video deposition in April 2020 in the run-up to the recent federal court ruling on bail.

She’s the chief circuit court clerk, and Hamblen County General Sessions Court Judge Doug Collins allows West and her deputy clerks to set cash bails when he’s not around. The law allows it, but strictly limits the amount of cash bail a clerk can set to \$1,000 if the charge is a misdemeanor and \$10,000 if it’s a nonviolent felony, including most drug cases.

Clerks do have some leeway under the law to set higher bonds if prosecutors prove the arrestees are likely to flee if released, but West and most clerks do not even know they are required to hear proof on the issue.

West, who is not a lawyer, says she uses “my experience I guess” in deciding what figure to set — without a hearing and without an attorney present.

She set a \$75,000 bond for a drug-addicted woman charged with having small quantities of methamphetamine, cocaine and pot, for example, but later couldn’t explain why.

“There was a lot of drugs ... and there were just a lot of things and,” West said during her deposition, pausing before adding, “I don’t know the answer.”

Collins, she said, occasionally updated clerks and the county’s judicial magistrate — who also is not a lawyer — on any changes in bail laws but otherwise has never given them verbal or written instructions on the state’s bail laws. West’s account was confirmed in depositions by Collins and his judicial magistrate.

Collins reviews bail only on Mondays, Wednesdays and Fridays. In the recent past, his practice was to stay in his chambers and conduct video arraignments as much as possible, a Knox News review of court records show. No prosecutor or defense attorney would be present.

He didn’t tell the detainees they could ask for a bond hearing. If they asked him to lower the bond, Collins himself admitted he glanced over the warrant, checked a local database for prior arrests and conducted a quick review in his mind — all counter to the purpose of state’s 1978 bail reform.

He often refused to lower cash bails or even consider other options, all without a hearing, without speaking aloud his decision-making process or putting his ruling in writing. He didn’t advise the accused they can appeal the decision and had the right to an attorney for their appeal.

Even if the accused appealed, there would be no record for a reviewing judge to consider. People facing misdemeanors — with penalties ranging from a couple of days to no more than one day short of a year — rarely appeal a sessions judge’s bail setting. It would take as much as a month to even get a hearing.

By then, Knox News’ review shows, the accused would have already been offered a plea deal. If it’s a first offense or a nonviolent misdemeanor (drunken driving and spousal abuse are handled differently under the

state's bail laws), that deal likely comes with freedom.

The investigation by Knox News, whose journalists have covered the justice system in East Tennessee and statewide for decades, reveals that Collins' practices mirror those of general sessions judges in many counties across the state.

Knox News verified these practices through in-person observation of bailsetting practices in nearly half of Tennessee's 95 counties; document review of the practices in the remainder of counties, including thousands of pages of arrests, booking sheets and warrants; interviews with 29 experts in criminal law, including prosecutors and judges; tours of a half-dozen booking areas and jails; and interviews with six bail bondsmen, including a ride-along with one.

Collins, like many sessions judges Knox News has questioned about bail practices, says it's all perfectly legal. Like Jones, he claims high cash bails are necessary to make sure the accused show up for court. He was unabashed in factoring in the use of professional bail agents as part of his decision-making on releases.

"My intention is that, when I set a high bond, that the bonding company is going to keep a close eye on this person and ensure their return to court," Collins said.

In Collins' court, Rhodes, the public defender, didn't even get to meet pretrial detainees who were too poor to post cash bail until they'd been jailed two weeks. Even then — on a hearing date when prosecutors are supposed to at least reveal some evidence of guilt — she was handed a list as she walked in.

With Collins' waiting on the bench or in chambers, Rhodes would broker deals with prosecutors in the hallway or a corner of the courtroom and push for freedom in misdemeanor cases as part of the agreement. Then, she said, she had to deliver some bad news to the strangers she represented, defendants who had been accused but were months, perhaps years, away from a conviction.

"If you plead guilty, I can get you out today," Rhodes recounted telling defendants. "If you want a jury trial, you have to wait at least a year."

Enter Willie Santana.

### **Two 'rats' and some D.C. outsiders**

Santana had spent his early legal career as a Knox County prosecutor. Judges and magistrates in Knox County were not following the bail laws, either, he said, but the cash bail amounts weren't nearly as high as those in Hamblen County, and poor people were assigned public defenders within a few days.

Two years ago, he took a job as a defender of the poor in Morristown, where he lives with his wife and children. He and Rhodes became fast friends and legal partners. He shadowed her.

"I knew the (bail) system just didn't work like what we had learned in law school," Santana told Knox News. "I was able to see it was wrong."

"He watched me quietly for months," Rhodes said, "and he said, 'There's things in this system that aren't right.'"

Santana and Rhodes essentially went undercover, making copies of records as proof the bail systems wasn't operating as intended. Santana reached out to his former boss, a retired prosecutor in Knox County, to double-check on his reading of the state's bail laws.

"My first solution was a collaborative one," Santana said.

He presented Collins with the state's bail laws and explained that the judge was not considering cash-less options, providing defendants with individualized determinations or documenting his reasonings.

“The judge said, ‘How’s that any different than what’s going on now?’” Santana said.

The judge would repeat that defense for months — even after his bail practices were recorded. Those recordings revealed repeated instances of his failure to hold a hearing or reconsider cash bail. “Well, I go through them in my head,” Collins explained, insisting he considered all the bail factors listed in the law.

In a recent deposition in the federal suit against Hamblen County, the attorneys challenging Hamblen’s bail practices as unconstitutional questioned him about how he could consider information he didn’t even have at the time cash bails were set or approved.

“We feel we are in compliance,” Collins replied.

Asked to defend his statement that cash bail is the best way to ensure the accused will show up for court, Collins responded, “I’m not sure that money has got anything to do with it. I guess you’re insinuating, do they plead guilty just to get out of jail when they’re maintaining their innocence? I hope not.”

With that kind of resistance, Santana said, he and Rhodes decided to turn to the D.C. nonprofits for help.

Mikkilineni, of the Civil Rights Corps, and Jonathan Backer and Seth Wayne, of the Georgetown University Law Center, had amassed enough evidence by February 2020 to file a lawsuit and seek an injunction to force Collins reform his bail practices so they don’t infringe constitutional rights. Rhodes was in court with Collins when he got the news. Later, she was in the clerk’s office when Chief Clerk West remarked that Collins was certain there were “rats” among them, court records show.

Rhodes just smiled.

### **‘Pretrial liberty is a right’**

Deaner tried for years to challenge cash-for-freedom bail practices in Davidson County during her tenure as the county’s top defender.

“You are looked at by the judges as if you’ve lost your mind,” Deaner said. “Pretrial liberty is a right.”

Judges ignore bail laws. Prosecutors

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*“You can have a long record of convictions, but a good history of showing up for court appearances.”*

*David Raybin*

*Veteran Nashville attorney*

### **Deaner**



### **Jones**



**Mikkilineni****Collins**

The call for reform of Tennessee's bail system comes from law enforcement, too. The Tennessee District Attorney General's Conference wants the state 'to eliminate the unscrupulous agents, companies and their practices as well,' said Russell Johnson, district attorney general for Tennessee's 9th Judicial District in East Tennessee.



Knox County to this day remains under a federal court order capping the population in its downtown jail. That order came as a result of a lawsuit, and county taxpayers found themselves on the hook for fines whenever that cap was exceeded, plus the construction of a new detention facility. PHOTOS BY BRIANNA PACIORKA/NEWS SENTINEL

**Backer****Wayne**

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know but keep silent and many “defense attorneys don’t fight for the rights of their clients. It’s largely because people don’t care about poor people,” Deaner said.

She isn’t alone in her assessment. The Tennessee Attorney General’s office issued an opinion in 2005 reminding judges and magistrates the state bail laws required an “individualized determination” and that they should consider cash bail only as a last resort. The opinion didn’t have the force of law, though, and Tennessee judges brushed aside the opinion from the state’s top law enforcement

office.

Deaner wound up leaving the post after a decade to establish Choosing Justice Initiative, a nonprofit that directly tackles what she calls “wealth-based disparities” in the criminal justice system, including the heavy reliance on cash bail that puts poor Tennesseans in jail.

“Unless you have money, you’re going to stay in jail,” Deaner said. “There are all these ripple effects. If you can’t afford to hire a lawyer, the judge hearing your case will pick your lawyer. These are the same judges who are setting these bails. You are stuck in jail. Your sole focus is on how can I get out of jail. It’s traumatic to be locked up in a jail cell.

“Many of the people who end up in jail (pretrial) are fathers or mothers and have children,” she said. “It impacts their ability to work. You may lose jobs. Lots of people lose housing. There are health impacts — especially now in a pandemic.

“People who remain incarcerated pretrial are more likely to be convicted than someone who gets out of jail (by paying cash),” she continued, citing several peer-reviewed studies. “People who remain incarcerated pretrial are more likely to receive jail sentences than someone who gets out of jail (by paying cash). People who remain incarcerated pretrial are more likely to receive longer sentences.”

Rhodes gave an example that illustrated how the system was stacked against poor defendants: A woman who had never been in trouble before was accused of stealing \$540 worth of goods from Walmart.

“Her bond was set at \$18,000. It’s a charge she should have been cited on (released without cash). Even if she’s convicted, she’s eligible for diversion (freedom and a chance to wipe her record clean).

“Her sister sold all her worldly belongings to come up with (money to pay a bail bondsman) on a charge she should have been cited on. This sort of thing drives me wild.”

Santana added, “In this day and time, if you sit in jail (awaiting trial), you can lose your job, your house. The (state Department of Children’s Services) shows up to take your kids. (Judges and clerks) just pull (cash bail amounts) out of their behinds. They’re not even logical or consistent.”

Cash bail amounts vary widely across the state and even within the same county. A person accused of vandalism in Knox County may well be released without forking out cash. But the same person facing the same charge in Sevier County, by comparison, likely will face a cash bail of at least \$1,000.

“You may be behind bars in one county and then, one county over, you could be released on pretrial,” said Jasmine Heiss of the Vera Institute of Justice. “(Being jailed pretrial) makes poor people even more poor, and they’re more likely to wind up in jail again.” People too poor to pay for their freedom are not only are stuck in jail, but a Knox News’ review shows they are not eligible for rehabilitation programs while awaiting trial. Many rural jails don’t offer rehabilitation programs at all.

Bethany Edmond, 37, was held in jail for 14 days under a \$1,500 bond she was unable to afford on a charge of aggravated criminal littering, a misdemeanor.

The mother of two found herself in a cell designed to house 20 women that instead held 50.

“I was broke,” she said. “There was absolutely no way I could pay that.”

She told a judge she couldn’t afford the bail. He waved aside her request for a reduction.

“He said, ‘Well, we’re going to set your (preliminary hearing),’” Edmond said. “You don’t get an attorney (appointed) before (the hearing).”

Eric Lutton, Knox County’s newly elected public defender, said those sitting in jail because they can’t afford bond may well plead guilty to a crime they didn’t commit solely to get their freedom.

“As long as I’ve been practicing law, people have pled guilty just to get out of custody,” Lutton said. “People absolutely do plead guilty to things they didn’t do just to get out of custody. ... It sets them up for failure.”

Edmond maintains prosecutors had no evidence she was guilty of the littering charge, but she took a plea deal to a charge of vandalism to avoid more jail time.

“I had a seizure (while in jail),” Edmond said. “They threw me in the drunk tank with no shoes and no blanket. It’s like PTSD — as soon as you hear that door (close).”

The costs to taxpayers are high, as well.

### **Taxpayers pay for judges’ wrongs**

“We are just wasting tons of (tax) money,” Lutton said. “We’re misapplying our resources all over the place.”

The state’s 1978 bail law was designed, in part, to free up space in overcrowded local jails and standardize bail practices across the state.

But, as veteran attorney Raybin noted, judges began ignoring it while the ink was still wet on the law.

Local jails grew even more packed.

“Many jurisdictions (in Tennessee) are wasting incredible amounts of money to incarcerate people who don’t need to be jailed,” said Wayne, the Georgetown University Law Center attorney.

A Knox News review shows that on any given day in the state of Tennessee for the past decade, pretrial detainees who have been deprived bail hearings account for as much as 50 percent of the population in county

jails.

Many local jails in rural counties in Tennessee, including Cocke, Hamblen and Scott, are so packed, nasty and lacking in basic medical equipment the state won't even certify them as OK. The state doesn't have power, though, to shut them down or make improvements.

In every case of overcrowding in Tennessee, Knox News' review showed, those jails had high percentages of detainees facing misdemeanor charges with unaffordable cash bails — sometimes as high as 40 percent of the total population.

Overcrowded jail conditions across the state have led to pricey lawsuits taxpayers must pay to defend, violence against detainees and corrections staff, increased medical care costs, increased food costs, higher insurance premiums and staff hiring costs.

In more than a dozen counties, taxpayers have been forced over the past three decades to foot the bill for new jail construction because of overcrowded, unsanitary conditions. Those new jails cost millions to construct and millions more to operate.

The new jails, a Knox News review has shown, were often overcrowded with pretrial detainees within a year of operation.

Deaner points out the expense of keeping people in jail, and how much money and resources counties could shift to other priorities if they weren't keeping so many people behind bars.

Knox County Judicial Magistrate Ray H. Jenkins — the only magistrate contacted by Knox News who readily agreed the bail practices he follows aren't legal — said it was the threat of a jail overcrowding lawsuit that led Knox County judges to recently adopt a pretrial release program.

Knox County to this day remains under a federal court order capping the population in its downtown jail. That order came as a result of a lawsuit, and county taxpayers found themselves on the hook for fines whenever that cap was exceeded, plus the construction of a new detention facility. The new facility was packed nearly to capacity on a daily basis for more than four years pre-pandemic, according to an analysis of inmate population data obtained by Knox News.

In 2019, Knox County taxpayers paid to jail an average of 240 misdemeanor detainees and another 500 to 700 detainees facing low-level, nonviolent felonies every day. It cost taxpayers \$75 to \$100 to house a detainee for just one day.

“Two years ago, we started the pretrial experiment ... because (other jurisdictions) were on the verge of being sued because of their cash bail practices,” Jenkins said.

The Knox County program, Knox News' investigation shows, doesn't follow legal guidelines, either. The same is true for the pretrial program initiated in Davidson County around the same time.

But don't tell Davidson County's Judge Jones. She insists she's in the right.

### **Judge's bail practices put to legal test**

Knox News asked Jones to describe her bail practices.

“Defendants go through several opportunities to have no bond or low bond,” Jones said.

But they don't get a hearing with an attorney present before a bail decision is made, which is now mandated in Hamblen County under the injunction in the federal lawsuit filed against Hamblen County. Instead, a magistrate or Jones herself decides, she said, if the accused will be freed under the supervision of the pretrial release

program or face cash bail. Jones skips over signature bond and third-party custodian options when setting cash bail.

“Factors considered in determining whether (cash) bond is necessary is previous history of appearance in court, violence and threat to the community and previous pattern of criminal history as well as likelihood of conviction on current allegation,” Jones continued, listing some, but not all of the eight factors judges are supposed to consider. A federal judge in a Shelby County jail lawsuit noted how consideration is heavily weighted on past, not present, conduct.

Raybin said when judges rely too heavily on the past to gauge whether someone will show up for court, they’re ignoring the point of the bail law and applying flawed reasoning.

“You can have a long record of convictions, but a good history of showing up for court appearances,” Raybin said.

Jones said if pretrial release is denied, a cash bail will be set. With rare exceptions, there are no rules governing the amount, Knox News’ review shows. Cash bail for being drunk in public — a charge commonly placed against the homeless as a panhandling enforcement tool — can range from \$500 to \$1,500 or more, depending on the county of arrest and the judicial officer setting the bail.

If convicted of being drunk in public, the typical sentence is a 48-hour stint in jail.

Knox News’ investigation shows homeless people charged with being drunk in public in Tennessee have been jailed for weeks and, in rare cases, a month or more, before a hearing, too poor to pay a professional bondsman.

Jones continued, “Once a defendant is booked, they are given a hearing within 24 to 48 hours for an initial appearance where they are provided a lawyer if they cannot afford one.”

The accused is not given a bail hearing, however. Instead, Jones said she reviews, on her own initiative, the bail already

set. That, too, runs counter to the

process outlined by law.

“Most Tennessee counties follow this procedure,” Jones wrote. “There may be a few exceptions in counties of which I am unaware.”

Knox News provided Jones the Tennessee statutes governing bail practices. The newsroom asked Jones to review them and to poll the members of the sessions judges conference whether they follow it. There are 185 general sessions judges in Tennessee. Each can earn as much as \$180,000 annually. Not all are members of the conference Jones’ heads but most are.

Jones said she would consider it. (Conference members refused.) But she first launched a defense of cash bail and a critique of defense lawyers, who she says are responsible for ensuring their clients aren’t detained illegally.

### **Cash bail benefits private bail agencies**

“If you took a poll of judges you will find that many believe (cash bail) is necessary for some defendants,” Jones said. “It is not needed for all defendants.”

She says she and other sessions judges believe the higher the amount of cash bail set, the more likely the accused will show up for court. She says professional bail bonds companies provide a service by chasing after folks who skip court.

“Do you think it’s possible that SOME lawyers are not zealously representing their clients?” Jones asked. “Just eliminating ALL bail does not solve the complex issue. Bonds are nuanced. Good lawyers know how to argue for lower bond.”

The law, though, makes clear it’s not the burden of the accused to hire a lawyer to argue for a lower bond. Judges and magistrates are supposed to consider pretrial freedom as a first option, without bond at all.

Jones’ stance on cash bail and the bail bonds industry is similar to the narrative — without any peer-reviewed studies supporting it — pushed by a national trade association of bail insurance companies and various state bail bondsman associations, including one in Tennessee.

“If you say you’re going to release all (people accused of) misdemeanors and some felonies (without requiring cash bail), you’re going to put these companies out of business,” veteran Nashville lobbyist Bill Nolan told Knox News.

He lobbies legislators on behalf of the Tennessee Association of Professional Bail Agents. There was no such group when the Legislature adopted the 1978 bail laws that made cash bail an option of last resort. But as more and more judges ignored those bail laws, the number of bail agents and bail firms skyrocketed. There are now more than 1,400 of these businesses in the state. Nolan represents most of them as a lobbyist.

Nolan defended cash bail as the best option to ensure the accused show up for court, citing the same argument used by Jones. He supplied Knox News with a letter association president Ernie Arredondo drafted in 2019 to legislators — just in case they were considering bail reform efforts that are ongoing across the country, he said.

In the letter, Arredondo blamed judges for creating overcrowding in local jails.

“Our problem in Tennessee is not in pretrial (release programs) but in the trial period of incarceration,” he wrote.

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**In East Tennessee's Hamblen County, the accused are given a list of bail bonds agencies as part of the booking process and allowed to use jail phones for free to call those companies. There is no evidence in Tennessee that the accused freed during the pandemic either failed to show up for court or committed new crimes at a rate any higher than in pre-COVID times. BRIANNA PACIORKA/NEWS SENTINEL**



## Lutton

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“Getting defendants in front of a judge for adjudication as soon as possible is the only way to reduce an overcrowded jail for the long term without exploding expenditures and increasing dangers to the public.”

Arredondo also wrote a letter to Tennessee’s general sessions judges and magistrates in 2019, raising an alarm about a bill — later tanked — that would have made it easier for the accused to get out of jail without paying cash bail.

The bill “presents an attack on the discretion of magistrates and judges to decide the conditions of a defendant’s release,” Arredondo wrote. “(It) would require magistrates to document in writing the reasons why a particular defendant was not released on his or her own recognizance or an unsecured bond.” Kentucky, Texas and several other states have either eliminated the private cash bail system or are taking steps to do so. But Tennessee’s bail laws do not need an overhauling, Deaner and others say. Judges just need to follow best practices.

“The myth of cash bail giving people incentive to return to court is pretty ridiculous,” Deaner said. “I don’t know what the good of cash bail is, except for the (bail bonds) businesses.”

On this point, Deaner and other advocates for the poor have an unusual ally: Prosecutors.

“Our (Tennessee) District Attorney General’s Conference would like to see bail/bond reform in Tennessee to eliminate the unscrupulous agents, companies and their practices as well,” 9th Judicial District Attorney General Russell Johnson told Knox News. “The bonding industry is one area where the traditional tenet of capitalism — more competition breeds better service — does not ring true.

“The proliferation of the number of bonding companies that operate, almost like check cashing businesses, has led to too much competition and a decrease in service to the client,” Johnson said. “The defendants become indebted for life when they hand over their credit cards to the bonding agent.”

He said prosecutors are pushing legislators to eliminate the use of commercial bail bonds businesses in Tennessee and instead allow detainees to pay into the court system the money they would have paid a bail agency.

The primary purpose of bail is to ensure the accused will show up for court. Bail measures can also legally be used to ensure public safety — but it’s up to prosecutors to prove to a judge’s satisfaction in most cases that a threat justifies keeping a person jailed, and the law gives the defendant the right to present testimony and evidence to rebut that.

Tennessee’s judges and magistrates typically don’t even hear from prosecutors or seek them out when first setting a cash bail, Knox News’ investigation shows.

### **Bail agencies rarely forced to pay**

And here’s another dirty little secret among judicial system participants — the accused don’t even pay bail if they skip court. Neither do the bail agencies. In fact, no one does. It’s a system that generates massive revenue for private firms but very little for taxpayers, Knox News’ investigation shows.

If a bail agency customer skips court, the agency still doesn't pay the cash bail amount to the court and won't — unless the accused doesn't turn up in six months. Even then, Knox News' review shows, bail agencies often petition to avoid ponying up the cash they promised. Many are successful. Knox News' analysis of arrest records reveals that most people who skip court are most often located by police, not bail agents.

"I've been doing this 30 years and only had to pay one bond off," a veteran East Tennessee bondsman told Knox News.

Bail agents advertise inside many county jails across the state.

In Hamblen County, the depositions of Sheriff Jarnagin and his chief jail administrator show the accused are given a list of bail bonds agency as part of the booking process and allowed to use jail phones for free to call those companies. Knox News has observed bail businessfriendly practices repeatedly — for years — in nearly all county jails in East Tennessee.

The COVID-19 pandemic has put the lie to the notion that cash bail makes the community safer and the accused more likely to show up for court, Knox News' investigation shows. The state Supreme Court in March ordered judges to start clearing local jails of pretrial detainees accused of misdemeanors or nonviolent felonies who were being held solely because they couldn't pay a cash bail.

Not all judges complied with that order, but most did. Jail populations took a nose dive. Knox County, for instance, was averaging 1,400 inmates daily pre-pandemic. When judges started setting detainees free, the population dropped to as low as 660 at one point. When the Tennessee Supreme Court lifted its temporary ban on in-person court hearings and jury trials last summer, many sessions court judges and magistrates went right back to ignoring bail rules.

By September, the inmate population in Knox County was averaging 1,150 daily. When the high court shut down jury trials again and pushed another round of jail-clearing as the pandemic began to surge in November, jail populations again fell, though only slightly in most counties. Knox County taxpayers were paying to house 957 inmates daily in mid-January. Nearly a third of that number are being held pretrial on misdemeanor

charges.

But, so far, there is no evidence those freed during the pandemic either failed to show up for court or committed new crimes at a rate any higher than in pre-COVID times.

"I have not noticed a huge difference in failures to appear," Magistrate Jenkins told Knox News.

Deaner said the Community Bail Fund — a nonprofit in Nashville whose members pay bail for poor people and provide them services — has "a really high return to court rate," too, chiefly because the group phones its clients to remind them of a pending court date.

"The desire to get out of jail and stay out is incentive to go to court, especially if (you plan to fight the charge)," Deaner said. "The government is paying to build jails to put money into the hands of private industries like bail bonds firms and jail services. There's a whole industry around it."

It's too soon to have enough data for a statistical analysis to determine the COVID- effect on the issue of bail. Judge Jones, though, says she is "hearing back from judges who increased their (cashless) releases," she said. "They are reporting an increase in (missed court appearances)."

She didn't have any data. Jenkins, too, hasn't compiled data.

That's part of the data Nolan and his bail bonds industry clients want the Legislature to require clerks and jail staff to collect. Heiss said the Vera Institute is already compiling the data and expects it will support the group's work in eliminating "wealth-based" bail practices in Tennessee and across the country.

“I’m not here picking a fight with the bail bonds industry,” Heiss said. “We’re not here to change anything. This is the first time the status quo has been challenged. There’s an overwhelming reliance on money bond despite the state’s statutes. ... Rigorous research shows people released on unsecured bond had the same rates of return of those with a cash bail.”

### **‘The Constitution requires compliance’**

Hamblen County taxpayers are on the financial hook in the lawsuit involving Judge Collins, though the action is seeking change, not cash. Veteran government defenders Jonathan Taylor and Arthur Knight III are defending Collins’ bail practices.

The state Attorney General’s office is not seeking to intervene. Former state Attorney General Paul Summers opined more than a decade ago that individualized bail determinations are a requirement under state law and the Constitution.

In December, U.S. District Judge Clifton Corker declared Collins’ bail practices — which mirror those by sessions court judges and magistrates statewide — a violation of the Constitution. Corker ordered Sheriff Esco Jarnigan to start releasing any detainee who had been deprived a bail hearing already and ordered Collins to immediately release anyone held in violation of his ruling and to hold hearings going forward.

Corker did not mince words about his opinion of a claim made not only by Collins but also by Judge Jones and her conference members that to afford hearings and attorneys to the accused would cost too much money.

“The court is not persuaded by this ‘sky is falling’ argument as the issue in this case deals with constitutional concerns,” Corker wrote.

The county isn’t appealing the injunction.

“Obviously, we’re really pleased by the ruling,” Backer, the Georgetown University Law Institute lawyer, told Knox News. “(Hamblen’s bail practices are) pretty typical for counties across Tennessee. Folks are just sitting in jails for weeks before they get any real (hearing).”

Statewide as of Nov. 30, 2020, taxpayers were footing the bill to daily house more than 14,000 pretrial detainees facing misdemeanors and nonviolent felonies — half of the total jail population

in Tennessee.

Mikkilineni pointed out that “Hamblen County is on the verge of building a new jail for tens of millions of taxpayer dollars. That’s just an enormous unnecessary expense.”

A Knox News review shows more than half of Hamblen County’s daily inmate population is made up of pretrial detainees denied bail hearings. In November, the county jail — featured by the New York Times in 2016 as one of the worst jails in America — had bed space for 255. It was housing 290 — with 150 pretrial detainees facing misdemeanors and nonviolent felonies.

The nonprofit lawyers, Santana, Deaner and Raybin all noted Tennessee taxpayers are already paying general sessions court judges well but think judges should spend more time on the bench for what they’re paid.

Some sessions court judges across the state are off the bench by early afternoon. One Knox County sessions judge has repeatedly been observed by Knox News pushing attorneys to finish Friday court dockets by noon during Tennessee’s football season. He even wears UT shorts under his robe on occasion.

“The Constitution requires compliance whether it’s a strain on your time or not,” Wayne said. “The law is the law.”

Santana said Collins has improved things since the decision in the lawsuit. Public defenders get to meet their clients within 48 hours. He's now holding arraignments in the courtroom — with attorneys and prosecutors present. But he's still requiring the detainee to file a written motion for a cash bail reduction, Rhodes said in an October interview, which is not a requirement and puts the onus on the defendant for justifying bail when it should be on prosecutors to fight it.

“And guess what?” Santana said. “The judicial system is still running. He still gets to go home by 10 a.m. on Fridays ... The fear is when this lawsuit goes away, will we go back to the old ways? Everybody has that (cash) bail first mentality.”

### **Legislator pushes bill to gut bail rules**

Knox News did a follow-up interview with Santana in January. He said bail hearings still weren't being held properly and prosecutors are now “aggressively” defending cash bail when challenged. He's not bitter, though. He thinks good change is on the way in Tennessee.

“I think we're going to get there,” Santana said. “I'm an optimist at heart. I'm thankful for the kind of progress we've gotten. It feels fantastic. I'm focused on my little corner of the (judicial) district, but I hope (the injunction) will help countless people across the state.”

Knox News learned this month that state Sen. Ferrell Haile, R-Gallatin, has been shopping a bill that would essentially gut the pretrial liberty protections the state's current bail laws affords, limiting a presumption of innocence and pretrial freedom largely to first-time offenders facing a misdemeanor or low-level felony.

To entice prosecutors like Johnson, Haile is also including in the bill a provision to allow pretrial detainees facing cash bail less than \$7,500 to pay for freedom via a deposit with the court clerk of 10 percent of the bail, a bond tax and an administrative fee totaling 10 percent of the bail.

His proposed bill makes mandatory the use of a preprinted form when magistrates or judges set cash bail to prove they considered all relevant bail factors — without a hearing and without anything other than the judge's word that all factors were considered.

Judge Collins is already using the form — even though Haile hasn't even filed his bill and, when he does, the bill would require the Tennessee Administrative Office of the Courts to author and approve a form before it could be used.

Knox News also checked back in with Judge Jones in late January.

“We will be having a panel discussion on best practices at our February conference,” Jones responded.

“Several colleagues have responded that magistrates hired by (the) county set the bonds. Some judges are already giving the Collins case to their county attorney to instruct those county magistrates.

“My executive committee does not want to conduct a survey since they have no authority over those magistrates other than to overrule a bond decision,”

she said.



**Johnson**



**Haile**

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