

Pretrial Release: Bail and Conditions of Release

Benjamin E. Novogroski, Esq.
Office of Legislative Counsel
January 5, 2024

Important Terms and Definitions

- Bail – any security, including cash, pledged to the court to ensure that a person charged with a criminal offense will appear at future court proceedings
- Appearance bond – a written agreement to pay a specified amount if a person fails to appear
- Secured appearance bond – a written agreement to pay a specified amount if a person fails to appear AND a portion is paid prior to release (usually 10%)
- Surety – a person who agrees to be responsible for guaranteeing the court appearance of the person charged with a criminal offense OR a person who agrees to be responsible for guaranteeing that another person complies with the conditions of a peace bond
- Surety bond – a written agreement under which a surety guarantees the appearance of another person AND pledges to pay the court a specified amount if the defendant fails to appear
- Flight from prosecution – any action or behavior undertaken by a person charged with a criminal offense to avoid court proceedings

Pretrial Release Generally

- People are innocent until proven guilty!
- Grounded in the U.S. and Vermont constitutions and detailed in statutes
 - U.S. CONST. amend VIII
 - VT. CONST. ch. II, § 40
 - 13 V.S.A. chapter 229
- The sole constitutionally legitimate purpose of bail is to ensure a person's appearance in court
- Bail cannot be used to punish the defendant or to protect the public
- Conditions of release can be a mechanism of public protection

Constitutional Requirements

- VT. CONST. ch. II, § 40
- Excessive bail shall not be exacted for bailable offenses. All persons shall be bailable by sufficient sureties, except as follows:
 - (1) A person accused of an offense punishable by death or life imprisonment may be held without bail when the evidence of guilt is great.
 - (2) A person accused of a felony, an element of which involves an act of violence against another person, may be held without bail when the evidence of guilt is great and the court finds, based upon clear and convincing evidence, that the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent physical violence. A person held without bail prior to trial under this paragraph shall be entitled to review de novo by a single justice of the Supreme Court forthwith.
 - (3) A person awaiting sentence, or sentenced pending appeal, may be held without bail for any offense.

A person held without bail prior to trial shall be entitled to review of that determination by a panel of three Supreme Court Justices within seven days after bail is denied.

Except in the case of an offense punishable by death or life imprisonment, if a person is held without bail prior to trial, the trial of the person shall be commenced not more than 60 days after bail is denied. If the trial is not commenced within 60 days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set bail for the person.

No person shall be imprisoned for debt.

Pretrial Release Statutory Foundations

- Any person charged with an offense, other than a person held without bail under section 7553 or 7553a of this title, **SHALL** at his or her appearance before a judicial officer be ordered released pending trial in accordance with this section.

13 V.S.A. § 7554(a) (emphasis added).

- The defendant **SHALL** be ordered released on person recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer **UNLESS** the judicial officer determines that such a release will not reasonably mitigate the risk of flight from prosecution as required.

13 V.S.A. § 7554(a)(1) (emphasis added).

Scope and Limitations of Bail

- “[B]ail may be used only to assure the defendant’s appearance in court and cannot be used ‘as a means of punishing the defendant, nor of protecting the public.’” *State v. Pratt*, 2017 VT 9, ¶ 13.
- Vermont’s bail statutes create a presumption in favor of pretrial release, with the courts required to impose the least restrictive conditions of release, unless the defendant is determined to be a flight risk. *Id.* at ¶¶ 10, 12; 13 V.S.A. § 7554(a)(1).
- Bail, secured appearance bonds, or appearance bonds cannot be imposed:
 - at the initial appearance for misdemeanors if the person is cited for the offense; or
 - at the initial appearance or upon temporary release pursuant to Vt. Crim. P. Rule 5(b) for a misdemeanor eligible for expungement UNLESS the court determines that imposing bail is necessary to mitigate the flight from prosecution
 - If court determines to impose bail for a misdemeanor that is eligible for expungement, bail is capped at \$200.00.
- Constitutional exceptions to bail are governed by 13 V.S.A. §§ 7553 (life imprisonment) and 7553a (violent felony).

Persons Held Without Bail

- Three constitutional exceptions that permit holding a person without bail:
 - Charged with an offense has a maximum potential sentence of life imprisonment
 - Charged with a violent felony
 - Awaiting sentencing or sentenced pending appeal for any offense
- 13 V.S.A. § 7553 (life imprisonment)
 - Crime charged has a maximum potential sentence of life imprisonment when the evidence of guilt is great
 - Presumption of detention under this statute
 - If evidence is not great, the court maintains discretion to release the defendant pursuant to 13 V.S.A. § 7554.
- 13 V.S.A. § 7553a (violent felony)
 - Crime charged with a (1) felony; (2) an element of which involves an act of violence against another; (3) the evidence of guilt is great; (4) clear and convincing evidence shows that release poses a substantial threat of physical violence to any person; and (5) no condition or combination of conditions will reasonably prevent the physical violence
 - 13 V.S.A. § 7553b requires trial to commence within 60 days after bail is denied under § 7553a
 - If not commenced and the defense does not request a waiver, the court sets a bail hearing

Bail and Risk of Flight

- How is someone determined to be a risk of flight from prosecution?
- Courts must consider, in addition to any other factors:
 - the seriousness of the offense charged; and
 - number of offenses with which the defendant is charged.
- If the court determines that the person is a risk of flight, it must craft the least restrictive conditions of release and must consider, on the basis of available information:
 - The nature and circumstances of the offense;
 - The weight of the evidence;
 - Employment;
 - Financial means, including ability to post bail (constitutional consideration);
 - Character and mental condition;
 - Length of residence in the community; and
 - Record of appearance at court, flight to avoid prosecution, or failure to appear at court

Bail and Conditions of Release

- Conditions of release related to bail
 - Place the defendant in custody of a designated person or organization agreeing to supervise the defendant if the defendant is charged with a nonviolent misdemeanor or felony as defined in 28 V.S.A. § 301
 - Place restrictions on the travel or association during the period of release
 - Require participation in alcohol or drug treatment program
 - Consideration given to ability to comply with an order of treatment and availability of treatment resources
 - Upon consideration of financial means, require execution of a secured appearance bond in cash or other security of a sum not to exceed 10% of the bond amount. Deposit is returned upon the appearance of the defendant as required
 - Upon consideration of financial means, require the execution of a surety bond with sufficient solvent sureties or cash
 - Any other condition reasonably necessary to mitigate the risk of flight from prosecution, including requiring the defendant to return to custody at specified hours
 - No contact condition prohibiting contact or harassment of a victim or witness, which takes effect immediately regardless of incarceration or release

Public Protection and Conditions of Release

- If the court determines that conditions of release related to bail will not reasonably protect the public, then the court may impose the least restrictive, or least restrictive combination of, additional conditions of release
- Based on available information, the court shall take into account:
 - The nature and circumstances of the offense;
 - The weight of the evidence;
 - Family ties, employment, character and mental condition;
 - Recent history of violence may be considered as bearing on character and mental condition
 - Length of residence in the community;
 - Record of convictions; and
 - Record of appearance at court, flight to avoid prosecution, or failure to appear at court

Public Protection and Conditions of Release

- Conditions of release related to public protection:
 - Place the defendant in custody of a designated person or organization agreeing to supervise the defendant if the defendant is charged with a nonviolent misdemeanor or felony as defined in 28 V.S.A. § 301.
 - Place restrictions on the travel, association, or place of abode during the period of release
 - Require participation in alcohol or drug treatment program
 - Consideration given to ability to comply with an order of treatment and availability of treatment resources
 - Upon consideration of financial means, require execution of a secured appearance bond in cash or other security of a sum not to exceed 10% of the bond amount. Deposit is returned upon the appearance of the defendant as required
 - Upon consideration of financial means, require the execution of a surety bond with sufficient solvent sureties or cash
 - Suspend a law enforcement officer's duties if the officer is charged with violating 13 V.S.A. § 2537 (embezzlement in official capacity) and necessary to protect the public
 - Any other condition reasonably necessary to mitigate the risk of flight from prosecution, including requiring the defendant to return to custody at specified hours
 - No contact condition prohibiting contact or harassment of a victim or witness, which takes effect immediately regardless of incarceration or release

Bail and Home Detention

- Governed by 13 V.S.A. § 7554b
- Home detention is a program of confinement and supervision that restricts a defendant to a preapproved residence continuously, except for authorized absences, such as for work, school, or treatment
- A defendant who is detained at a correctional facility for more than seven days for lack of bail may be reviewed by the court to determine whether home detention is appropriate
- A home detention review may be requested by the defendant, DOC, or the court
- Prior to scheduling the review, DOC files an assessment of the proposed residence for the use of electronic monitoring
 - Residence is usually deemed suitable if it has cell service or a landline

Bail and Home Detention

- In determining whether home detention is appropriate, the court considers:
 - The nature of the offense charged;
 - The defendant's prior convictions, history of violence, medical and mental health needs, history of supervision, and risk of flight from prosecution; and
 - Any risk or undue burden to other persons residing at the proposed residence, risk to third parties, or risk to public safety that may result from such placement
- DOC may revoke home detention status for an unauthorized absence or failure to comply with any other condition of the program and shall be returned to a correctional facility
- Defendant gets credit for time served while participating in the home detention program

Bail Revocation

- Under 13 V.S.A. § 7575, the right to bail may be revoked if the court finds that the accused has:
 - Intimidated or harassed a victim, potential witness, juror, or judicial officer in violation of a condition of release;
 - Repeatedly violated conditions of release in a manner that impedes the prosecution of the accused;
 - Violations alone are insufficient, there must be a nexus between the repeated violations and a disruption of the prosecution. *State v. Sauve*, 159 Vt. 566, 576, 621 A.2d 1296, 1302 (1993).
 - Violated a condition or conditions of release that constitute a threat to the integrity of the judicial system;
 - Bail may be revoked only when facts indicate a palpable threat to the integrity to the judicial process, like preventing destruction of evidence or endangering or threatening a witness. *State v. Stimpson*, 2017 VT 97, § 13.
 - Without just cause, failed to appear at a specified time and place ordered by a judicial officer; or
 - In violation of a condition of release, been charged with a felony or a crime against a person or an offense similar to the underlying charge, for which, after hearing, probable cause is found.

What Does This All Mean?

- Everyone is subject to bail as a matter of right unless one of the three constitutional exceptions apply
- It is presumed that everyone subject to bail must be released on personal recognizance or an unsecured appearance bond UNLESS their release will not reasonably mitigate the risk of flight from prosecution
- Bail amounts cannot be excessive but do not need to be affordable
- Conditions of release can be tied to both bail and public protection and must be crafted in the least restrictive way
- The right to bail can be revoked in legitimate and compelling circumstances