



GEORGIA MISDEMEANOR BAIL PRACTICES

(INCLUDING S.B. 407 (2018); S.B. 402 (2020); AND S.B. 174 (2021) PROVISIONS)

— A Bench Card for Judges —

All misdemeanor defendants in Georgia (inclusive of offenses that are violations of local ordinances) have a right to pretrial bail, which includes “the release of a person on an unsecured judicial release[.]” OCGA § 17-6-1 (i). “When determining bail for a person charged with a misdemeanor, courts shall not impose excessive bail and shall impose only the conditions reasonably necessary to ensure such person attends court appearances and to protect the safety of any person or the public given the circumstances of the alleged offense and the totality of circumstances.” OCGA § 17-6-1 (b) (1).

KEY CONSIDERATIONS

INITIAL APPEARANCE WITHIN 48/72 HOURS OF ARREST

Every person arrested on a misdemeanor must be brought before a judge for a bail determination as soon as possible, but in no case later than 48 hours after a warrantless arrest (OCGA § 17-4-62) or 72 hours after an arrest on a warrant (OCGA § 17-4-26). See also Unif. Mag. Ct. R. 25.

- Per S.B. 407 (2018), determinations regarding bail should be made “as soon as possible.” OCGA § 17-6-1 (e) (2). “‘As soon as possible’ means within a reasonable time, having due regard to all the circumstances.” OCGA § 1-3-3. See also “Ability to Pay.”
- All offenses not included in OCGA § 17-6-1 (a), including violations of local ordinances, “are bailable by a court of inquiry” (including magistrate courts). OCGA §§ 17-6-1 (b) (1); 17-7-20; 17-7-23.

RELEASE ON ONLY THE CONDITIONS REASONABLY NECESSARY

S.B. 407 established that, “[w]hen determining bail for a person charged with a misdemeanor,” the court must consider a defendant’s ability to pay and “shall not impose excessive bail and shall impose **only the conditions reasonably necessary** to ensure such person attends court appearances and to protect the safety of any person or the public given the circumstances of the alleged offense and the totality of circumstances.” (Emphasis supplied). OCGA § 17-6-1 (b) (1). See also “Ability to Pay.”

ADDITIONAL CONDITIONS OF RELEASE

For a defendant in need of services, the court may consider referrals to *voluntary* supportive services (including substance abuse or mental health treatment, employment or education resources, counseling, or transportation assistance). OCGA § 17-6-1 (e) (2) (E). Other possible conditions of release include requirements that a defendant report by phone weekly or monthly; seek or maintain employment; continue or enroll in an educational program; continue or enroll in substance abuse or mental health treatment; report to a pretrial services agency or day reporting center; abide by a curfew; refrain from contact with specified persons; abide by travel or activity restrictions; or other reasonable conditions tailored to managing the particular risk a defendant presents. OCGA § 17-6-1 (b) (1), (e) (1).

USE OF BAIL SCHEDULES

Use of a bail schedule as the sole mechanism of assessing pretrial bail is improper, but the Eleventh Circuit has held that it is constitutional to use a bail schedule in conjunction with an individualized hearing that is held within 48 hours of arrest to determine whether the arrestee is indigent and also if the amount of bail should be reduced or another form of bail should be imposed. See *Walker v. City of Calhoun*, 901 F3d 1245 (11th Cir. 2018). Family violence offenses must be excluded from any bail schedule. OCGA § 17-6-1 (f) (2).

ABILITY TO PAY

If the court initially sets a monetary bail which the defendant cannot make, the defendant may seek to have the bail reduced pursuant to a hearing with enhanced protections to ensure that the bail was not excessive. OCGA § 17-6-1 (b) (1). While nothing prohibits an earlier/initial ability-to-pay determination, *Walker v. City of Calhoun* provides that indigency determinations made pursuant to a judicial hearing with court-appointed counsel for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest. 901 F3d 1245, 1266 (11th Cir. 2018). S.B. 407 clarified that, “[w]hen determining bail, as soon as possible, the court shall consider: (A) [t]he accused’s financial resources and other assets, including whether any such assets are jointly controlled; (B) [t]he accused’s earnings and other income; (C) [t]he accused’s financial obligations, including obligations to dependents; (D) [t]he purpose of bail; and (E) [a]ny other factor the court deems appropriate.” OCGA § 17-6-1 (e) (2) (A)-(E). While not binding, the American Bar Association Standards on Pretrial Release suggest that “[f]inancial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant’s appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.” ABA Standard 10-5.3 (a) (Release on financial conditions).

FORMS OF BAIL

The following forms of bail are permissible under Georgia law:

UNSECURED JUDICIAL RELEASE

S.B. 402 (2020) introduced the term “unsecured judicial release,” which means “any release that does not purport a dollar amount through secured means,” includes unsecured release on “a person’s own recognizance” or for “the purpose of entering a pretrial release program, a pretrial release and diversion program . . . , or a pretrial intervention and diversion program[.]” OCGA § 17-6-12 (a) (2).

Under OCGA § 17-6-12 (b), “[a]n elected judge, an appointed judge filling the vacancy of an elected judge, or judge sitting by designation may issue an unsecured judicial release if: (1) [s]uch unsecured judicial release is noted on the release order; and (2) [t]he person is not charged with a bail restricted offense” listed in OCGA § 17-6-12 (a) (1). “Except as provided in [OCGA § 17-6-12 (b)] and in addition to other laws regarding the release of an accused person, the judge of any court having jurisdiction over a person charged with committing an offense against the criminal laws of this state shall have authority, in his or her sound discretion and in appropriate cases, to authorize the release of the person on an unsecured judicial release only.” OCGA § 17-6-12 (c).

If a defendant is released on bail, including an unsecured judicial release, he or she pledges to return to court as required (OCGA § 17-6-17) and to obey all laws. The court may still impose additional conditions of release *if “reasonably necessary.”* OCGA §§ 17-6-1 (b) (1), (i). “A bond set for any offense by an elected judge, an appointed judge filling the vacancy of an elected judge, or judge sitting by designation that purports a dollar amount shall be executed in the full-face amount of such bond through secured means.” OCGA § 17-6-1 (e) (4).

SECURED BOND

A secured bond means that a defendant is required to secure a bond in a specified amount in order to be released. See OCGA § 17-6-1 (e) (4). S.B. 407 established that, before setting bail, the court must consider the financial circumstances of the accused. OCGA § 17-6-1 (e) (2). See also “Ability to Pay” and “Use of Bail Schedules.” The court may still impose additional conditions of release *if “reasonably necessary.”* OCGA § 17-6-1 (b) (1). See “Additional Conditions of Release.” Bail may be secured by:

- **Cash:** Deposited with an “appropriate person, official, or other depository” and returned at the conclusion of the case so long as the defendant makes all required appearances. OCGA § 17-6-4 (a). See OCGA §§ 17-6-9; 17-6-10; Unif. Mag. Ct. R. 23.3 (1).
- **Personal Surety:** A third party guarantees the defendant’s future appearance and agrees to forfeit the bond amount if the defendant does not appear. OCGA § 17-6-4.
- **Commercial Surety:** A bail bondsman, also called a commercial surety, guarantees the bond for a nonrefundable fee paid by or on the behalf of the defendant. OCGA §§ 17-6-4; 17-6-30. **Note:** Judges are reminded of the provisions of OCGA § 17-6-31 (e), which states that “[i]f the prosecuting attorney does not try the charges against a defendant within a period of two years in the case of felonies and one year in the case of misdemeanors after the date of posting bond, then judgement rendered after such period may not be enforced against the surety on the bond and the surety shall thereafter be relieved of liability on the bond. This subsection shall not apply where the prosecuting attorney’s failure to try the charges is due to the fault of the principal.”
- **Real Property:** “[B]y real estate located within the State of Georgia with unencumbered equity, not exempted, owned by

the accused or surety, [and] valued at double the amount of bail set in the bond.” Unif. Mag. Ct. R. 23.3 (2).

- **Driver’s License:** The court may order a bond secured by the defendant’s driver’s license. OCGA § 17-6-2 (a) (1). Additionally, if a misdemeanor defendant has been incarcerated for five days or more, the sheriff can accept the defendant’s driver’s license as collateral for *any* secured bond up to \$1,000, provided the license is not suspended, expired, or revoked. *Id.* After execution of the bond agreement, the license will be returned to the defendant. OCGA § 17-6-2 (a) (2). Defendants charged with DUI under OCGA § 40-6-391 are not eligible. OCGA §§ 17-6-2; 40-5-67. The court or sheriff should inform defendants clearly that failure to appear will result in automatic license suspension and may result in criminal prosecution for bail jumping as well as an arrest warrant for the failure to appear. OCGA §§ 16-10-51; 17-6-2 (a) (2).

ELECTRONIC MONITORING

Defendant is released to an electronic pretrial release and monitoring program. OCGA § 17-6-1.1 (a), (j). The defendant must have no “outstanding warrants, accusations, indictments, holds, or incarceration orders . . . that require the posting of bond or further adjudication.” OCGA § 17-6-1.1 (d). The court still may impose additional conditions of release *if “reasonably necessary.”* OCGA §§ 17-6-1 (b) (1); 17-6-1.1 (e). See also “Additional Conditions of Release.”

ESTABLISH A LINE OF CONTACT AND PROVIDE CLEAR INFORMATION

Before release, it is essential to establish a means of contacting the defendant and to provide clear notice of the next steps in the case. For any defendant, a risk of failure to appear because of logistical or cognitive challenges is not a sufficient basis to restrict a person’s pretrial liberty. Instead, the court should provide clear notice of the person’s next court date and establish a reliable means of communication with the accused. Courts should: (a) ask each defendant how the court can contact him or her (phone, address, e-mail, etc.); (b) gather multiple contact numbers (spouse, immediate family, etc.); and (c) offer referrals to any local organizations that assist people in getting to court. Additionally, provide each defendant clear verbal *and* written notice of the following:

A. Next Court Date: Day, time, and precise location.

B. Consequences of Failure to Appear or Violation of Conditions: An arrest warrant may be issued, release may be revoked, any bond security may be forfeited, the case may be marked as resolved and any bond security applied as a fine, and the defendant may be prosecuted for bail jumping. OCGA §§ 16-10-51; 17-6-8; 17-6-10 (c); 17-6-12 (d); 17-6-17; 17-6-71; 17-6-72. Any driver’s license posted as collateral will be automatically suspended. OCGA § 17-6-2 (a) (3). “[A]bsent a finding of sufficient excuse to appear, the court shall summarily issue an order for his or her arrest” upon the failure of a person released “on an unsecured judicial release to appear for trial[.]” OCGA § 17-6-12 (d).

C. How to Contact the Court: By phone, in person, online, etc.

BAIL IN FAMILY VIOLENCE CASES

S.B. 407 requires a judge to set bail on an individualized basis in family violence cases, giving “particular consideration to the exigencies of the case at hand” and imposing “any specific conditions as he or she may deem necessary.” OCGA § 17-6-1 (f) (3). The court should maintain a list of possible conditions of release, and specific restrictions may apply in cases involving stalking. OCGA §§ 16-5-90; 16-5-91; 17-6-1 (b) (2) (B), (b) (3), (f) (1)-(3); 17-6-12 (a) (1) (B) (xviii), (c).