

Tennessee Sheriff's Handbook

May 2006



**COUNTY GOVERNMENT
UNDER THE TENNESSEE
CONSTITUTION**

OFFICE OF SHERIFF

**DEPUTIES AND
ASSISTANTS**

PERSONNEL MATTERS

JAILS

WORKHOUSES

SERVICE OF CIVIL PROCESS

SHERIFF'S FEES

**FINANCIAL STRUCTURE
OF COUNTY GOVERNMENT**

**LIABILITY ASPECTS OF
COUNTY GOVERNMENT**

COUNTY RECORDS

THE UNIVERSITY of TENNESSEE



CTAS

**County Technical
Assistance Service**

*In cooperation with the Tennessee County
Services Association and the County Officials
Association of Tennessee*

TENNESSEE SHERIFF'S HANDBOOK

2006

**A General Reference Guide and Summary
of Tennessee and Federal Law Affecting Tennessee Sheriffs**

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Dear County Official:

The *Tennessee Sheriff's Handbook* is intended to be a basic summary of the state and federal laws affecting sheriffs, with the exception of criminal procedure. We have tried to include sufficient information to make this publication useful and informative, but the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken. Review of the actual laws and/or regulations is especially important because of the frequent changes that occur. This handbook is intended as a general reference guide and not as an authority. Your county attorney should be consulted before relying on any statement contained here.

The information included in this publication is general in nature, although references to more detailed information have been included. An important point in searching for a specific reference in the *Tennessee Code Annotated* is that most volumes have a supplement attached in the back of the volume. You should always consult the supplement first so that you will have the latest version of a particular statute.

The CTAS staff hopes this handbook will be useful to you; reference to it will assist you with most of the questions that will arise in your tenure with county government. However, please feel free to contact us if you have questions or comments regarding this publication.

Sincerely,

Michael R. Garland
Executive Director

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CHAPTER 1

COUNTY GOVERNMENT UNDER THE TENNESSEE CONSTITUTION

Under the Tennessee Constitution, counties are an extension of the state and are deemed political subdivisions of the state created in the exercise of its sovereign power to carry out the policy of the state. Counties, as the creation of the state, are subject to control by Tennessee's legislature, known as the General Assembly. Although the General Assembly has very broad powers to deal with county government, the state's constitution places some limitation on its discretion regarding counties.

A long line of Tennessee Supreme Court case law has held that counties have no authority except that expressly given them by statute or necessarily implied from it. *Bayless v. Knox County*, 286 S.W.2d 579 (Tenn. 1955). Although statutes are the primary source of county authority, the Tennessee Constitution does contain a few provisions specifically addressed to county government.

Elected Officials: Article VII, Section 1

Several amendments to the Tennessee Constitution were approved in 1978; among them was an amendment restructuring the basic framework of county government. Article VII, Section 1, of the Tennessee Constitution now provides counties with the following constitutional officers: county executive, sheriff, trustee, register, county clerk, and assessor of property. This section also requires the election of a legislative body of not more than 25 members, with no more than three members to be elected from a single district. The General Assembly sets the qualifications and duties of these offices. However, a county with a consolidated form of government (merger of the county and at least one municipality) is not required to have a county executive or legislative body as are the other counties. The General Assembly has given the title "county mayor" to all county executives and "county commissioner" to all county legislative body members not in a county with a consolidated form of government. T.C.A. §§ 5-5-102(f) and 5-6-101.

Before the 1978 constitutional changes, county government had been difficult to divide into executive, legislative, and judicial branches. With the creation of the office of county executive and of the county legislative body, along with several judicial interpretations of the powers and duties of each, county government is now more nearly divided into three branches, even though the county executive must share executive powers with other constitutional officers. **The legislature is afforded wide latitude in determining the duties that may be assigned to the various constitutional officers.** *Metropolitan Government v. Poe*, 383 S.W.2d 265 (Tenn. 1964).

Article VII, Section 2: Vacancies In County Offices

Vacancies in county offices are to be filled by the county legislative body, and any person so appointed serves until a successor is elected at the next election after the vacancy. The Tennessee Supreme Court has determined that the term “next election” means the next general election or other countywide election in the county. *McPherson v. Everett*, 594 S.W.2d 677 (Tenn. 1980).

Article XI, Section 9: Limitation on Power Over Local Affairs

The General Assembly has no power to pass a special, local, or private act that would remove an incumbent from any municipal or county office, change the term of office, or alter the salary of the office until the end of the current term.

Any act of the General Assembly that is private or local in form or effect, applicable to a particular county, must require within the terms of the act either approval by a two-thirds vote of the county legislative body or approval by the people of the county in a referendum.

Miscellaneous Constitutional Provisions Affecting County Government

Article X, Section 1, requires that every person chosen or appointed to any office of trust or profit under the constitution or any statute must take an oath to support the constitution of this state and of the United States, as well as an oath of office before entering on the duties of the office.

Article X, Section 3, prohibits any official or candidate from accepting any type gift or reward that might be considered a bribe. The section also provides that any person who directly or indirectly promises or bestows any such gift or reward in order to be elected is punishable as provided by law.

Article XI, Section 17, provides that no county office created by the legislature shall be filled in any manner other than by vote of the people or by appointment of the county legislative body.

CHAPTER 2

OFFICE OF SHERIFF

The office of sheriff is ancient in origin; its beginning can be traced back centuries to medieval England. The office of sheriff has been provided for in each of Tennessee's three constitutions (1796, 1835 and 1870) and was retained in the latest amendment in 1978. The sheriff is elected to a four-year term in the August general election in the same year in which the governor is elected. TENN. CONST., art. VII, § 1; T.C.A. § 2-3-202. *Smith v. Plummer*, 834 S.W.2d 311, 313 (Tenn. Ct. App. 1992) (Sheriffs are constitutional officers.).

Persons Ineligible for the Office of Sheriff

No member of the General Assembly shall be nominated or commissioned, nor shall any practicing attorney be obligated, to act as sheriff. T.C.A. § 8-8-101.

General Qualifications

The general qualifications of officeholders are set forth in the *Tennessee Code Annotated*, which provides that all persons 18 years old and over, who are citizens of the United States and of Tennessee, and who meet certain residency requirements are qualified to hold office except:

- (1) Those who have been convicted of offering or giving a bribe, or of larceny, or of any other offense declared infamous by law, unless restored to citizenship in the mode pointed out by law;
- (2) Those against whom there is a judgment unpaid for any moneys received by them, in any official capacity, due to the United States, Tennessee, or any county of this state;
- (3) Those who are defaulters to the treasury at the time of the election, and the election of any such person shall be void;
- (4) Soldiers, sailors, marines, or airmen in the regular Army or Navy or Air Force of the United States; and
- (5) Members of Congress, and persons holding any office of profit or trust under any foreign power, other state of the union, or under the United States.

T.C.A. § 8-18-101. *See Mathis v. Young*, 291 S.W.2d 592 (Tenn. 1956) (Alleged promises of protection to liquor dealers did not disqualify candidate for sheriff.). *Morrison v. Buttram*, 290 S.W. 399 (Tenn. 1926) (Constitutional provision, making person who obtains office by giving or promising reward to be elected ineligible, held self-executing.). Any person who

takes office in this state, by election or appointment, under any of the disqualifications specified above, commits a Class C misdemeanor. T.C.A. § 8-18-102. See *also* T.C.A. § 39-16-105.

Specific Qualifications

The sheriff, in all counties, except those with a metropolitan form of government in which law enforcement powers have been assigned to some other official, must have the following specific qualifications in addition to the general qualifications noted above:

- (1) Be a citizen of the United States;
- (2) Be at least 25 years of age prior to the date of qualifying for election;
- (3) Be a qualified voter of the county;
- (4) Have obtained a high school diploma or its equivalent in educational training as recognized by the Tennessee state board of education;
- (5) Not have been convicted of or pleaded guilty to or entered a plea of nolo contendere to any felony charge or any violation of any federal or state laws or city ordinances relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances; so long as the violation involves an offense that consists of moral turpitude or a misdemeanor crime of domestic violence;
- (6) Be fingerprinted and have the Tennessee Bureau of Investigation (TBI) make a search of local, state and federal fingerprint files for any criminal record. Fingerprints are to be taken under the direction of the TBI. It is the responsibility of the TBI to forward all criminal history results to the Peace Officer Standards and Training (POST) Commission for evaluation of qualifications;
- (7) Not have been released, separated or discharged from the armed forces of the United States with a dishonorable or bad conduct discharge, or as a consequence of conviction at court martial for either state or federal offenses;
- (8) Have been certified by a qualified professional in the psychiatric or psychological fields to be free of all apparent mental disorder as described in the Diagnostic and Statistical Manual of Mental Disorders, Third Edition (DSM III) or its successor, of the American Psychiatric Association; and

(9) Possess a current and valid peace officer certification as issued by the POST Commission as provided in T.C.A. § 38-8-107, and as defined in Title 38, Chapter 8, within 12 months prior to the close of qualification for the election for the office of sheriff. In the event that certification for peace officer is inactive or no longer valid, proof of the intent to run for the office of sheriff shall be presented to the POST Commission for approval to take the peace officer standards and training certification examination; provided, that all other requirements are met.

T.C.A. § 8-8-102(a). See *also* Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-2-.03 (2). Any full-time deputy employed after July 1, 1981, and any person employed or utilized as a part-time, temporary, reserve, or auxiliary deputy or as a special deputy after January 1, 1989, must meet certain minimum standards similar to those required for sheriffs. T.C.A. § 38-8-106.

Current and Valid Peace Officer Certification.

A current and valid peace officer certification issued by the POST Commission (or training that is approved by or meets the standard on minimum hours required to be certified by the POST Commission) is not a requirement for a person to initially qualify for election to the office of sheriff. T.C.A. § 8-8-102(d)(1). See *also* Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-2-.03 (2).

Recruit Training.

If a person without a current and valid peace officer certification qualifies to run for the office of sheriff and is elected to the office, such person is required to enroll, within six months after taking office, in the recruit training program offered by the Tennessee Law Enforcement Training Academy. Any cost associated with obtaining the required peace officer certification is paid by the county. To qualify for the office of sheriff in any subsequent election, the person must have completed the recruit training program and have obtained the peace officer certification during the person's first term of office as sheriff. T.C.A. § 8-8-102(d)(1). See *also* Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-2-.03 (2).

Elections

The sheriff is elected to a four-year term in the August general election in the same year in which the governor is elected. Elections for the office of sheriff are held on the first Thursday in August at the regular August election when the election immediately precedes the commencement of a full term. TENN. CONST., art. VII, § 1; T.C.A. § 2-3-202.

Nominating Petitions.

All independent and primary candidates must submit a nominating petition in order for their names to appear on the ballot. (Candidates nominated by a method other than primary, however, are certified directly to the election commission by the party.) T.C.A. § 2-5-101. Nominating petition forms are furnished by the county election commission and, for some offices, by the coordinator of elections. T.C.A. § 2-5-102. These petitions are not to be issued more than 90 days before the qualifying deadline for the office sought. T.C.A. § 2-5-102(b)(5). Candidates for the office of sheriff must file the original nominating petition with the county election commission in the county of residence. T.C.A. § 2-5-104.

For most offices, including the office of sheriff, the nominating petition must be signed by the candidate as well as a minimum of 25 or more registered voters who are eligible to fill the office. Either the signer's normal or legal signature is acceptable. The voter must also include the residence or other address as shown on the voter registration card. Including additional information on the petition which does not appear on the voter registration card will not disqualify the signature if there is no conflict in the information. T.C.A. § 2-5-101.

Qualifying Deadlines.

Candidates are required to qualify for election by certain statutorily prescribed deadlines. T.C.A. § 2-5-101(a). Independent and primary candidates for any office to be filled in a regular August general election for which a May primary has been called under T.C.A. § 2-13-203 must qualify by filing their petitions for the August election no later than 12 noon, prevailing time, on the third Thursday in February. In the event no May primary authorized under T.C.A. § 2-13-203 is called for any office to be filled in the regular August general election, then the candidates must qualify by filing their petitions no later than 12 noon, prevailing time, on the first Thursday in April. In presidential election years, if a political party calls for the county primary in February, the qualifying deadline for candidates in the primary and independent candidates for those offices is 12 noon, prevailing time, on the second Thursday in December. Independent candidates for offices that will appear on the county primary ballot must qualify by filing their petitions at the same time primary candidates qualify. T.C.A. § 2-5-101(a)(2).

This information is subject to change on a regular basis. It is extremely important to check on the specific qualifying deadlines for any election or primary with the county election commission.

Certification by the POST Commission.

Any person seeking the office of sheriff must file with the POST Commission, at least 14 days prior to the qualifying deadline, the following:

- (1) An affidavit sworn to and signed by the candidate affirming that the candidate meets the requirements of T.C.A. § 8-8-102; and
- (2) A confirmation of psychological evaluation form certified by the psychologist/psychiatrist providing psychological evaluation as provided for in T.C.A. § 8-8-102(a)(8) for the purposes of sheriff candidacy qualification. The form shall be made available by the POST Commission upon request by any candidate for the office of sheriff.

T.C.A. § 8-8-102(b)(1)(A) and (B).

If the affidavit and psychological evaluation form are not filed with the commission by the 14 day prior to the qualifying deadline, the candidate's name may not be placed on the ballot. The commission has the authority to verify the validity of the affidavit and psychological evaluation form. T.C.A. § 8-8-102(b)(2).

The commission must verify the POST certification of any person seeking the office of sheriff who meets the requirements set forth in T.C.A. § 8-8-102. The original notarized verification form from the commission must be filed by the commission with the county election commission by the withdrawal deadline. The POST Commission is responsible for certifying to the county election commission, by the withdrawal deadline, that the candidate is qualified pursuant to T.C.A. § 8-8-102. This certification is required before the candidate's name may be placed on the ballot. T.C.A. § 8-8-102(b)(3).

See the CTAS *County Government Handbook* for a discussion of the Campaign Financial Disclosure Act of 1980, the Campaign Contribution Limits Act, and Conflict of Interest Disclosure Statements.

Newly Elected Sheriffs' School

Every person who is elected to the office of sheriff after August 1, 2006, in a regular August general election for a four year term, and is a first term sheriff, regardless of their previous law enforcement experience, must successfully complete the newly elected sheriffs' school prior to the 1st day of September immediately following their election. Thereafter, the sheriff must successfully complete 40 hours of annual in-service training appropriate for the rank and responsibilities of a sheriff. The newly elected sheriffs' school is taught at the Tennessee Law Enforcement Training Academy during August, only in the years elections for sheriffs are held. Any cost associated with attending the newly elected sheriffs' school is paid by the county. Any sheriff who does not fulfill the obligations of this training course loses the power of arrest. T.C.A. § 8-8-102(c).

Oath

Before taking office, the Tennessee Constitution, Article X, Section 1, provides that every person chosen to any office of trust must take an oath to “support the Constitution of this State and of the United States, and an oath of office.” In addition, a sheriff must “take an oath that [he or she] has not promised or given, nor will give, any fee, gift, gratuity, or reward for the office or for aid in procuring such office, that [he or she] will not take any fee, gift, or bribe, or gratuity for returning any person as a juror or for making any false return of any process, and that [he or she] will faithfully execute the office of sheriff to the best of [his or her] knowledge and ability agreeably to law.” T.C.A. § 8-8-104.

Oaths of office for county officials may be administered by the county mayor, the county clerk, or a judge of any court of record in the county. Also, the judge of the general sessions court may administer oaths of office to all elected and appointed officials. The oath of office for any county official required to file an oath may be administered at any time after the certification of the election returns, in the case of elected officials, or after appointment, in the case of appointed officials. However, even if the official files an oath before the scheduled start of a term of office, the official may not take office until the term officially begins. T.C.A. § 8-18-109. The oath must be written and subscribed by the person taking it. Accompanying the oath must be a certificate executed by the officer administering the oath, specifying the day and the year it was taken. T.C.A. § 8-18-107. The oath and the certificate are filed in the office of the county clerk, who endorses on them the day and year of filing and signs the endorsement. T.C.A. §§ 8-18-109, 8-18-110.

Sheriff's deputies must take the same oaths as the sheriff. The oaths must be certified, filed, and endorsed in the same manner as the sheriff's oath. T.C.A. § 8-18-112. An example of the full oath of office for a sheriff and regular deputies is provided in the appendix to this handbook.

Bond

An official bond is an instrument that requires the party or parties designated as sureties to pay a specified sum of money if the official who executes the bond fails to perform certain acts or performs wrongful and injurious acts in the office. In other words, an official bond is a written promise, made by a public official to (1) perform all the duties of the office, (2) pay over to authorized persons all funds received in an official capacity, (3) keep all records required by law, (4) turn over to his or her successor all records, money, and property, and (5) refrain from anything that is illegal, improper, or harmful while acting in an official capacity. T.C.A. § 8-19-111. The sureties must be surety companies doing business in Tennessee unless the county commission by two-thirds majority vote authorizes two individuals to act as good sureties instead of a surety company. T.C.A. § 8-19-101. If the official fails to perform the duties, violates the law, or commits a harmful act, the person who is injured may collect damages from the sureties on the official bond. T.C.A. § 8-19-301.

Before entering into the duties of the office, the sheriff must enter into an official bond. The bond amount is \$25,000 or such greater sum as the county legislative body determines is appropriate. The sheriff's bond is payable to the state and conditioned on the sheriff to well and truly execute and make due return of all process directed to the sheriff, and to pay all fees and sums of money received by the sheriff or levied by virtue of any process into the proper office or to the person entitled, and faithfully to execute the office of sheriff and perform its duties and functions during the person's continuance in office. This bond must be acknowledged before the county legislative body in open session approved by it, recorded upon the minutes, and recorded in the office of the register of deeds and transmitted to the comptroller of the treasury for safekeeping. T.C.A. § 8-8-103. See *also* T.C.A. §§ 8-19-102 and 8-19-103. A surety bond is designed to protect the state and county from wrongdoing by the sheriff, particularly as regards the custody of money. If the surety has to pay any funds to the state or county under the terms of the bond, the surety may seek recovery of these funds from the sheriff personally.

The form of official bonds is prescribed by the comptroller of the treasury with the approval of the attorney general. T.C.A. § 8-19-101. Blank copies of official bonds, ready for use, are available from the comptroller, Division of Local Finance.

Official bonds of officers, which must be transmitted to the comptroller of the treasury, must be so transmitted for filing within 40 days of election or 20 days after the term of office begins. T.C.A. § 8-19-115. Any officer who is required by law to give bond and who fails to file it in the proper office within the time prescribed vacates the office. In such cases, the officer in whose office the bond is required to be filed must certify this failure to the appointing power. T.C.A. § 8-19-117. In addition, any officer required by law to give bond who performs any official act before the bond is approved and filed as required is guilty of a misdemeanor. T.C.A. § 8-19-119.

Upon the filing of a complaint alleging the failure of a county officer or constable to enter into an official bond as required by law, the circuit court clerk or the clerk and master having jurisdiction issues a summons that is served, together with a copy of the complaint, upon the county officer or constable in accordance with the Tennessee Rules of Civil Procedure. T.C.A. § 8-19-205. If the official fails or refuses to execute the required bond after receiving a copy of the complaint and a hearing, the court will enter a judgment declaring the office vacant, and the vacancy will be filled according to law. T.C.A. § 8-19-206.

The county legislative body shall from time to time demand new sureties from the sheriff if the old sureties die, remove from the county or become insolvent or otherwise unable to pay, as it, in its discretion, may judge necessary. A failure on the part of the sheriff to comply with such requirement within 30 days shall vacate the office. T.C.A. § 8-8-105. See *also* T.C.A. § 8-19-402.

County officials must enter into a new bond at the beginning of each term. If the original of any bond is lost or destroyed, the record of the bond will be considered the original and suit may be instituted on the recorded bond. T.C.A. § 8-19-105. The county pays the premiums for official bonds and registration fees of county officials and employees. T.C.A. § 8-19-106.

Compensation

The sheriff receives a minimum statutory compensation amount according to county population class. The General Assembly has reconfigured the county classification scheme, setting out 17 population classes for the purpose of determining the compensation of county officers. T.C.A. § 8-24-102. This statute provides base minimum salary schedules for three categories of county officers: (1) “general officers” which include assessors of property, county clerks, clerks of court, trustees, and registers of deeds; (2) sheriffs and chief administrative officers of highway departments; and (3) county mayors. These specified minimum salaries cannot be raised or lowered except through subsequent legislation, but since they are minimum salaries, the actual salary may be increased by resolution of the county legislative body. However, the class of general officers must all receive the same amount of any salary increase. T.C.A. § 8-24-102.

Minimum salaries are adjusted annually on July 1 by a dollar amount equal to the average annualized increase in state employees’ compensation, including the equivalent percentage increase in average state employees’ salaries represented by appropriated funds made available to address classification compensation issues during the prior fiscal year multiplied by the compensation established for county officials of the county with the median population of all counties, except that the adjustment cannot exceed 5 percent in any year. The average annualized general increase in state employees’ compensation for purposes of calculating the adjustment in salary for county officials means the average increase in base salary plus the equivalent percentage increase in average state employees’ salaries represented by recurring appropriation amounts provided to improve the level of retirement benefits, longevity benefits, deferred compensation benefits and other similar benefits not including health insurance benefits. These adjustments are calculated and certified by May 1 of each year by the commissioner of finance and administration. T.C.A. § 8-24-102.

Pursuant to T.C.A. § 8-24-102(g), compensation for the sheriff must be at least 10 percent higher than the salary paid to the general officers of the county. However, the county legislative body may increase the compensation of the sheriff above the minimum amount required by the state law. T.C.A. §§ 8-24-103 and 8-24-111.

If a person is elected to the office of sheriff and the person does not possess a current and valid POST certification, upon taking office the salary of that person will be 15 percent less than the salary of a person initially elected to the office of sheriff who does possess a current and valid POST certification provided that if during the first year in office, the person completes the recruit training program and obtains certification, the salary of that person will, as a matter of law, automatically be raised the month following the date

certification is obtained to the level of other persons initially elected to the office of sheriff who are certified. However, if that person does not complete the recruit training program and obtain certification during the first year in office, then the following reduction in salary shall occur as a matter of law until the person obtains certification:

- (1) During the second year in office, the salary shall be 20 percent less than the salary of a first-term sheriff who is certified;
- (2) During the third year in office, the salary shall be 25 percent less than the salary of a first-term sheriff who is certified; and
- (3) During the fourth year in office, the salary shall be 30 percent less than the salary of a first-term sheriff who is certified.

Notwithstanding this salary schedule, the salary will, as a matter of law, be automatically raised the month following the date certification is obtained to the level of a first-term sheriff who is certified. T.C.A. § 8-8-102(d)(2).

Additional Compensation

At their first session in each and every year, the county legislative body is required to make an allowance as they in their discretion think sufficient to compensate the sheriff for *ex officio* services. T.C.A. §§ 5-9-101(6), 8-24-111. In addition, the county legislative body is authorized to pay the sheriff an amount in addition to the salary allowed by T.C.A. § 8-24-102 for *ex officio* services as the superintendent of the workhouse if the workhouse is combined with the jail as provided for by Title 41, Chapter 2. T.C.A. § 8-24-103(a)(3).

Funding for the Office of Sheriff

Sheriffs receive fees from the public for services they perform. However, pursuant to T.C.A. § 8-24-103(a)(2), the sheriff must pay over to the trustee, on a monthly basis, all fees, commissions, and charges collected by the sheriff's office during the month. Because the sheriff is no longer on the "fee system," it is the duty of the county legislative body to make the necessary appropriation and pay to the sheriff the authorized expenses fixed by law for operating of the sheriff's office, direct from the county trustee in 12 equal monthly installments, irrespective of the fees earned by the sheriff. T.C.A. § 8-24-103(a)(1). Pursuant to T.C.A. § 8-20-120, the county legislative body is required to fund the operations of the sheriff's office. Accordingly, the county legislative body is authorized to appropriate moneys to purchase all necessary equipment for use by the sheriff for preservation of the peace and for the service and execution of all process, criminal and civil, and to pay the salaries of deputy sheriffs appointed pursuant to the provisions of Title 8, Chapter 20. T.C.A. § 5-9-101(21). All necessary books, stationery, office equipment, stamps, and supplies of all kinds used in the conduct of the sheriff's office are to be furnished and paid for by the county. T.C.A. § 8-22-107(a). Additionally, the sheriff is authorized to include in the sheriff's expense account, as part of the expenses of the office, the necessary cost of arresting criminals,

of furnishing and operating the county jail and maintaining the state and county prisoners therein, and all other necessary and legitimate expenses incurred in the proper and efficient administration of the sheriff's office. T.C.A. § 8-22-110(a).

Statutory Duties

The Tennessee Constitution does not prescribe the duties of the office of sheriff even though sheriffs are constitutional officers. **The office of sheriff carries all the common-law powers and duties except as modified by statute.** *State ex rel. Thompson v. Reichman*, 188 S.W. 225, 227, *reh'g denied*, 188 S.W. 597 (Tenn. 1916). As noted, the sheriff's duties were originally defined by the common law but are now largely prescribed by statute. *George v. Harlan*, 1998 WL 668637, *3 (Tenn. 1998) *citing Metropolitan Gov't of Nashville & Davidson County v. Poe*, 383 S.W.2d 265, 273 (1964). Over time, the sheriff's responsibilities have expanded from being primarily ministerial to include peacekeeping functions. **Today, the sheriff's statutory duties encompass his common law duties and can be grouped into four broad categories: (1) keeping the peace, (2) attending the courts, (3) serving the process and orders of the courts, and (4) operating the jail.** See *George v. Harlan*, 1998 WL 668637, *3 (Tenn. 1998). In counties with a metropolitan form of government, some of these functions may be assigned by the charter to other officials.

Keeping the Peace.

The sheriff "is the commander in chief of the law forces of the county. All judicial and ministerial officers of justice and all city officials are required to aid him, and the male population of his county is subject to his command 'in the prevention and suppression,' not only of violent breaches of the peace, but of all public offenses." *State ex rel. Thompson v. Reichman*, 188 S.W. 225, 227-228 (Tenn. 1916). **"The duties and powers of a sheriff within the limits of an incorporated city are precisely the same that they are in the remainder of the county. The law draws no distinction."** *Reichman at 228.*

The sheriff is the conservator of the peace, and it is the sheriff's duty to suppress all affrays, riots, routs, unlawful assemblies, insurrections, or other breaches of the peace. In addition, it is the duty of the sheriff to ferret out, detect, and prevent crime, to secure evidence of crimes; and to apprehend and arrest criminals. The sheriff is also charged with patrolling the roads of the county. The sheriff must furnish the necessary deputies to carry out these duties. T.C.A. §§ 8-8-213, 38-3-102, and 38-3-108.

Attending the Courts.

The sheriff is charged with the custody and security of the courthouse unless the county legislative body assigns this duty to someone else. It is the duty of the sheriff to prevent trespasses, exclude intruders, and keep the courthouse and the courthouse grounds in order, reporting from time to time the repairs required and the expense, to the

county legislative body. Further, it is the duty of the sheriff to see that the state and national flags are properly displayed in each courtroom while the county legislative body is in session. T.C.A. § 5-7-108. See also *Ferriss v. Williamson*, 67 Tenn. 424 (1874); *Driver v. Thompson*, 358 S.W.2d 477 (Tenn. 1962).

Except in Davidson County, it is the duty of the sheriff to attend upon all the courts held in the county when in session, cause the courthouse or courtroom to be kept in order for the accommodation of the courts, and obey the lawful orders and directions of the court. T.C.A. § 8-8-201(a)(2). And, unless otherwise provided, it is the duty of the sheriff in every county to provide sufficient bailiffs to serve the general sessions courts. T.C.A. § 16-15-715. Furthermore, it is the duty of the sheriff to furnish the necessary deputies and special deputies to attend and dispense with the business of the juvenile courts. T.C.A. § 37-1-213. See Op. Tenn. Atty. Gen. No. 00-009 (January 19, 2000) (Hamilton County).

Serving the Process and Orders of the Courts.

It is the duty of the sheriff to execute and return, according to law, the process and orders of the courts of record of this state, and of officers of competent authority, with due diligence, when delivered to the sheriff for that purpose. T.C.A. § 8-8-201(a)(1).

It is the duty of the sheriff to execute within the county all writs and other process legally issued and directed to the sheriff and make due return thereof, either personally or by a lawful deputy or, in civil lawsuits only, by a lawfully appointed civil process server. T.C.A. § 8-8-201(a)(5)(A). The provisions of T.C.A. § 8-8-201(a)(5)(A) relative to civil process servers do not apply in Hamilton, McMinn, Sullivan and Sumner counties. T.C.A. § 8-8-201(a)(5)(B).

It is the duty of the sheriff to levy every writ of execution upon a defendant's property, first on the defendant's goods and chattels if there are any and upon the defendant's lands in order to satisfy the plaintiff's judgment, and upon a surety's property in the proper case. T.C.A. § 8-8-201(a)(13), (14), and (15).

Operating the Jail.

Tennessee case law makes it clear that the sheriff, by virtue of his office, is the jailor and is entitled to the custody of the jail. *Felts v. City of Memphis*, 39 Tenn. 650 (1859); *State ex rel. Bolt v. Drummond*, 128 Tenn. 271, 160 S.W. 1082 (1913). See also *State v. Cummins*, 42 S.W. 880 (Tenn. 1897). It is the duty of the sheriff to take charge and custody of the jail of the sheriff's county and of the prisoners therein. The sheriff is charged with receiving those persons lawfully committed to the jail and with keeping them personally or by deputies or jailer until they are lawfully discharged. It is the duty of the sheriff to be constantly at the jail or have someone there with the keys to liberate the prisoners in case of fire. T.C.A. § 8-8-201(a)(3).

Additional Statutory Duties

Tennessee Code Annotated section 8-8-201(b)(1) sets forth a list of statutes that include additional statutory duties of the office of sheriff. In addition, T.C.A. § 8-8-201(b)(2) charges the sheriff with performing such other duties as are, or may be, imposed by law or custom. The following is a list of some of the additional statutory duties that are set forth in T.C.A. § 8-8-201(b)(1). Other duties will be covered in following chapters. The duties listed are not *ex officio* duties. See *George v. Harlan*, 1998 WL 668637, *2 (Tenn. 1998) (*ex officio* duties are defined as nonstatutory duties and *ex officio* services are defined as those services not required by statute). Some of the duties listed are applicable to the municipal chief of police as well as the sheriff.

Courtroom Security Committee.

Pursuant to T.C.A. § 16-2-505(d), **each county must establish a court security committee.** In addition to the sheriff, the committee is to be composed of the county mayor, the district attorney general, the presiding judge of the judicial district, and a court clerk from the county designated by the presiding judge. The committee is charged with examining the space and facilities to determine the security needs of the courtrooms in the county in order to provide safe and secure facilities.

Upon completing the examination of security needs, the administrative office of the courts distributes to the court security committee a copy of the minimum security standards as adopted by the Tennessee Judicial Conference. The committee must review and consider these standards in determining court security needs. No later than May 15 of each year, the court security committee must report its findings to the county legislative body and the administrative office of the courts. The county legislative body is required to review and consider the recommendations of the court security committee in preparing the budget. Any recommendation by the court security committee requiring county expenditures is subject to approval of the county legislative body. No later than December 1 of each year, the county legislative body is required to report to the administrative office of the courts any action taken to meet the security needs. No later than January 15 of each year, the administrative office of the courts is required to report to the General Assembly on the compliance by each county government with the security needs established by the court security committee.

Disposal of Physical Evidence.

Physical evidence other than documents and firearms used in judicial proceedings and in the custody of a court in cases where all appeals or potential appeals of a judgment have ended or when the case has been settled, dismissed or otherwise brought to a conclusion, may be disposed of following the procedure set forth in T.C.A. § 18-1-206 (except in Shelby County). Once the court has entered an order to dispose of the evidence, the clerk delivers the order and the items approved for disposition to the custody of the sheriff or of the chief of police in counties having a metropolitan form of government for disposition in accordance with the order of the court.

It is the duty of the sheriff to deliver the physical evidence to the owner(s) or to organization(s) when so ordered, personally or by return receipt mail. When ordered to sell physical evidence, the sheriff must advertise the sale(s) in a newspaper of general circulation for not fewer than three editions and not less than 30 days prior to the sale(s). The sheriff must conduct a public sale and maintain a record of each sale and the amount received. The proceeds of the sale(s) are deposited in the county general fund. When ordered to destroy physical evidence, it is the duty of the sheriff to completely destroy each item by cutting, crushing, burning or melting. The sheriff must then file an affidavit with the clerk of the court ordering the destruction showing a description of each item, the method of destruction, the date and place of destruction, and the names and addresses of all witnesses. T.C.A. § 18-1-206(a)(7).

Controlled substances and drug paraphernalia in the custody and possession of the court clerk by virtue of having been held as evidence or exhibits in any criminal prosecution where all appeals or potential appeals of a judgment have ended, or when the case has been dismissed or otherwise brought to a conclusion, are disposed of by the court clerk as set forth in T.C.A. § 53-11-451(j).

Disposal of Unlawful Telecommunications Devices.

It is the duty of the sheriff, upon order of the court, to destroy as contraband or to otherwise lawfully dispose of any unlawful telecommunication devices, plans, instructions, publication, or other related items used in violation of T.C.A. § 39-14-149. T.C.A. § 39-14-149(b).

Disposal of Alcoholic Beverages.

It is the duty of the sheriff, or other officer, upon the conviction of any person for a violation of T.C.A. § 39-17-713, to destroy or otherwise dispose of all alcoholic beverages according to law. T.C.A. § 39-17-714. See section below on Intoxicating Liquors.

Disposition of Confiscated Weapons.

It is the duty of the sheriff and the sheriff's deputies to confiscate any weapon that is possessed, used or sold in violation of the law. With few exceptions, such confiscated weapon shall be declared to be contraband by a court of record exercising criminal jurisdiction. The sheriff may petition the court for permission to dispose of the weapon in accordance with T.C.A. § 39-17-1317. Any weapon declared contraband by the court must, by written order of the court, be sold in a public sale, destroyed, or used for legitimate law enforcement purposes. T.C.A. § 39-17-1317(b).

If the court orders the weapon to be sold it must be sold at a public auction not later than six months from the date of the court order. The sale must be conducted by the sheriff of the county in which it was seized. The sale must be advertised in a daily or weekly newspaper circulated within the county. The advertisement must run for not fewer than three editions and not less than 30 days prior to the sale. The proceeds from the sale go

into the county general fund. If required by federal or state law, the sale can be conducted under contract with a licensed firearm dealer, whose commission may not exceed 20 percent of the gross sales price. Such dealer cannot not hold an elective or appointed job with the federal, state, county or city government in this state during any stage of the sales contract. T.C.A. § 39-17-1317(c).

If the court orders the weapon to be destroyed the sheriff must completely destroy the weapon by cutting, crushing or melting it within 90 days of receiving the destruction order. T.C.A. § 39-17-1317(e).

If the weapon is sold or destroyed, the sheriff is required to file an affidavit with the court issuing the sale or destruction order as follows: (1) the affidavit must be filed within 30 days after the sale or destruction; (2) the affidavit must identify the weapon, including any serial number, and must state the time, date and circumstances of the sale or destruction; (3) if the weapon has been destroyed, the affidavit must list the persons who destroyed the weapon and those who witnessed the destruction; and (4) if the weapon has been sold, the affidavit must list the name and address of the purchaser and the price paid for the weapon. T.C.A. § 39-17-1317(g).

If the court orders the weapon to be retained and used for legitimate law enforcement purposes, title to the weapon will be placed in the law enforcement agency retaining the weapon, and when the weapon is no longer needed for legitimate law enforcement purposes, it must be sold or destroyed in accordance with the procedures set forth above. T.C.A. § 39-17-1317(f).

Notwithstanding any other provisions of T.C.A. § 39-17-1317, no weapon shall be sold, destroyed or retained for law enforcement use in the following circumstances: (1) a weapon that may be evidence in an official proceeding shall be retained or otherwise preserved in accordance with the rules or practices regulating the preservation of evidence. Not less than 60 days nor more than 180 days after the last legal proceeding involving the weapon, the weapon shall be sold, destroyed or retained for legitimate law enforcement purposes; or (2) any weapon that has been stolen or borrowed from its owner, and the owner was not involved in the offense for which the weapon was confiscated, shall be returned to the owner if permitted by law. T.C.A. § 39-17-1317(h).

No weapon seized by law enforcement officials may be used for any personal or law enforcement purposes, sold, or destroyed except in accordance with T.C.A. § 39-17-1317. A violation of T.C.A. § 39-17-1317 is a Class B misdemeanor. T.C.A. § 39-17-1317(i) and (j). Nothing in T.C.A. § 39-17-1317 authorizes the purchase of any weapon, the possession of which is otherwise prohibited by law. T.C.A. § 39-17-1317(k).

The sheriff may petition the criminal court, or the court in the sheriff's county having criminal jurisdiction, for permission to exchange firearms that have previously been properly titled to the sheriff's office for other firearms suitable for use by the sheriff's office. This exchange of firearms is permitted only between the Department of Safety or the director of the Tennessee Bureau of Investigation or a municipal or county law

enforcement agency and a licensed and qualified law enforcement firearms dealer. T.C.A. § 39-17-1317(l).

If any firearm confiscated and adjudicated as contraband pursuant to Title 39, Chapter 17, Part 13, or any other provision of law could be sold at public auction or retained by the sheriff's office for law enforcement purposes as provided in T.C.A. § 39-17-1317, but for the fact that the serial number of the firearm has been defaced or destroyed, the sheriff of the county in which the firearm was confiscated may send the firearm to the director of the Tennessee Bureau of Investigation who shall assign the firearm a new serial number, permanently affix the number to the firearm, record the number in the bureau's computer system, and send the firearm back to the sheriff for disposition in accordance with law. T.C.A. § 39-17-1318(a). If any firearm assigned a new serial number by the TBI is later sold at public auction, 10 percent of the proceeds of the sale must be returned to the general fund of the state to defray the costs incurred by the bureau in the new serial number. T.C.A. § 39-17-1318(b).

Disposition of Conveyance Used in Robbery or Felony Theft.

Once a conveyance, including a vehicle, aircraft or vessel that was used to transport, conceal or store money or goods that were the subject of a robbery offense under Title 39, Chapter 13, Part 4, or felony theft under Title 39, Chapter 14, Part 1, has been forfeited under Title 40, Chapter 33, Part 1, it is the duty of the sheriff to remove it for disposition in accordance with the law. T.C.A. § 40-33-105.

At the direction of the court having jurisdiction over the property, all seized conveyances are required to be sold at a public sale by the sheriff in the manner provided for by law for judicial sales in civil cases. However, any vehicle seized by the sheriff and forfeited under the provisions of Title 40, Chapter 33, Part 1, may, at the direction of the court having jurisdiction over the property, be retained by the sheriff's office and used for purposes of law enforcement provided that any liens filed against the vehicle are satisfied by the sheriff's office. Proceeds that inure to the county under the provisions of Title 40, Chapter 33, Part 1, shall be earmarked and used exclusively by the sheriff's office for law enforcement purposes. T.C.A. § 40-33-107(2). *See also* T.C.A. § 40-33-110.

Disposition of Controlled Substances and Related Property.

Once property has been forfeited under Title 39, Chapter 17, Part 4, or Title 53, Chapter 11, Parts 3 and 4, it is the duty of the sheriff to remove it for disposition in accordance with the law. T.C.A. § 53-11-451(e).

Regardless of any other method of disposition of the property, the sheriff may, with the permission of the court and under such terms and conditions as are approved by the court, use the property taken or detained in the drug enforcement program of the county. In addition, with the approval of the court having jurisdiction over the property, the sheriff may sell the property and use the proceeds for the drug enforcement program of the county. T.C.A. § 53-11-451(d)(4). If goods are seized by a combination of the Tennessee Bureau

of Investigation and the sheriff's office, the court ordering their disposal shall determine the allocation of proceeds upon disposition of the goods. In all other cases, fines, forfeitures, and goods and their proceeds shall be disposed of as otherwise provided by law. T.C.A. § 39-17-420(a)(1).

Pursuant to T.C.A. §§ 39-17-420(a)(1) and 40-33-211(a), all fines and forfeitures of appearance bonds received because of a violation of any provision of Title 39, Chapter 17, Part 4, that are specifically set forth therein, that resulted from an arrest made by the sheriff's office **and the proceeds of all goods seized by the sheriff and forfeited under the provisions of T.C.A. § 53-11-451 and disposed of by the sheriff shall be paid to the county trustee and shall be accounted for in a special revenue fund.** Note that pursuant to T.C.A. § 39-17-428(c)(1), only 50 percent of the fine collected pursuant to T.C.A. § 39-17-428(b) is allocated to the special revenue fund. The remaining 50 percent is paid to the county general fund. All financial activities related to funds received under Title 39, Chapter 17, Part 4, must be accounted for in the special revenue fund. T.C.A. §§ 39-17-420(a)(1) and 53-11-415(a).

Moneys in the special revenue fund may be used only for the local drug enforcement program, local drug education program, local drug treatment program, and nonrecurring general law enforcement expenditures. T.C.A. §§ 39-17-420(a)(1) and 39-17-428(c)(2). The attorney general has opined that these funds may be used for private drug education and treatment programs in addition to county drug education and treatment programs. Op. Tenn. Atty. Gen. 97-125 (September 2, 1997). Funds derived from drug seizures, confiscations and sales may not be used to supplement the salaries of any public employee or law enforcement officer. T.C.A. § 40-33-211(b). However, the attorney general has opined that T.C.A. §§ 39-17-420 and 53-11-451 authorize the sheriff to use funds obtained from fines and appearance bond forfeitures and proceeds derived from the sale of property seized and forfeited in connection with illegal drug activities to pay the salaries of staff personnel who are employed in drug enforcement, education and treatment programs and only for work performed for such programs. Op. Tenn. Atty. Gen. 99-202 (October 6, 1999).

Note: All fines and forfeitures of appearance bonds received from the violation of the provisions of Title 39, Chapter 17, Part 4, and which are specifically set forth therein, the proceeds of goods seized and forfeited under the provisions of T.C.A. § 53-11-451 and disposed of according to law that arise from the activities of a judicial district drug task force are paid to an expendable trust fund maintained by the county mayor in a county designated by the district attorney general and can be used only in a drug enforcement or drug education program of the district as directed by the board of directors of the judicial district drug task force. All requests for disbursement from the expendable trust fund maintained by the county mayor for confidential purposes must be by written request signed by the drug task force director and the district attorney general. T.C.A. §§ 39-17-420(c) and 40-33-211(a).

Cash transactions related to undercover investigative operations of the county drug enforcement program must be administered in compliance with procedures established by the comptroller of the treasury. T.C.A. § 39-17-420(a)(1). The comptroller of the treasury and the Department of Finance and Administration, in consultation with the Tennessee Bureau of Investigation, the Tennessee Sheriffs' Association and the Tennessee Association of Chiefs of Police, were required to develop procedures and guidelines for handling cash transactions related to undercover investigative operations of county or municipal drug enforcement programs. These procedures and guidelines are applicable to the disbursement of proceeds from the drug enforcement program. T.C.A. § 39-17-420(f).

The sheriff is required to recommend a budget for the special revenue fund, to be approved by the county legislative body. T.C.A. § 39-17-420(a)(1). Upon the demand of the sheriff, the county trustee must pay to the sheriff's office the funds demanded for use in cash transactions related to undercover investigative drug enforcement operations. T.C.A. § 53-11-415(a). Expenditures from the special revenue fund are subject to the availability of funds and budgetary appropriations for the expenditure. T.C.A. §§ 39-17-420(a)(1) and 53-11-415(a). Any purchase made with moneys from the fund must be made in accordance with all existing purchasing laws applicable to the particular county, including private acts, that establish purchasing provisions or requirements for the county. T.C.A. §§ 39-17-420(a)(1) and 40-33-211(b). Special rules apply to Davidson County. See T.C.A. §§ 39-17-420(a)(2) and (b) and 53-11-415(b).

The sheriff is accountable to the county legislative body for the proper disposition of the proceeds of goods seized and forfeited under the provisions of T.C.A. § 53-11-451, and for the fines imposed by T.C.A. § 39-17-428. An annual audited report of these funds must be submitted by the sheriff to the county legislative body. In years when the Office of the Comptroller of the Treasury conducts an audit, it shall satisfy this requirement. If no audit is conducted by the comptroller, then an audit must be performed by a certified public accountant in order to satisfy this requirement. T.C.A. § 39-17-429.

Pursuant to T.C.A. § 39-17-420(g), if the sheriff's office receives proceeds from fines, forfeitures, seizures or confiscations under Title 39, Chapter 17, Part 4, or Title 53, Chapter 11, the sheriff may set aside a sum from such proceeds to purchase supplies and other items to operate and promote the DARE program, created by Title 49, Chapter 1, Part 4, or any other drug abuse prevention program conducted in the school system or systems within the county served by the sheriff's office. The local school board must approve the program before the program may become eligible to receive funds under T.C.A. § 39-17-420(g). Supplies and items that may be purchased with such proceeds include, but are not limited to, workbooks, T-shirts, caps and medallions.

In order to comply with state and federal fingerprinting requirements, except in Davidson County, 20 percent of the funds received by a sheriff's office pursuant to T.C.A. § 39-17-420 must be set aside and earmarked for the purchase, installation, maintenance of and line charges for an electronic fingerprint imaging system that is compatible with the Federal Bureau of Investigation's integrated automated fingerprint identification system. Prior to

purchasing the equipment, the sheriff must obtain certification from the Tennessee Bureau of Investigation that the equipment is compatible with the Tennessee Bureau of Investigation's and Federal Bureau of Investigation's integrated automated fingerprint identification system. Once the electronic fingerprint imaging system has been purchased, the sheriff's office may continue to set aside up to 20 percent of the funds received pursuant to T.C.A. § 39-17-420 to pay for line charges and maintaining the electronic fingerprint imaging system. T.C.A. § 39-17-420(h)(1).

Instead of purchasing the fingerprinting equipment, a local law enforcement agency may enter into an agreement for use of the equipment with another law enforcement agency that possesses the equipment. The agreement may provide that the local law enforcement agency may use the fingerprinting equipment for identifying people arrested by that agency in exchange for paying an agreed upon portion of the cost and maintenance of the fingerprinting equipment. If no agreement exists, it shall be the responsibility of the arresting officer to obtain fingerprints and answer for the failure to do so. T.C.A. § 39-17-420(h)(1). See also Op. Tenn. Atty. Gen. 01-088 (May 24, 2001).

Disposition of Vehicle Used in the Commission of DUI Offense.

Pursuant to T.C.A. § 55-10-403(k), it is the duty of the sheriff to properly dispose of a vehicle used in the commission of a person's second or subsequent violation of T.C.A. § 55-10-401 (driving under the influence of intoxicant, drug or drug producing stimulant), that was seized by the sheriff's office, once it has been forfeited pursuant to Title 40, Chapter 33, Part 2. T.C.A. § 40-33-210(d).

Forfeited vehicles may be used by the sheriff's office in the drug enforcement program for a period not to exceed five years. T.C.A. §§ 40-33-211(e) and 53-11-201(b)(2)(C). See also Op. Tenn. Atty. Gen. 99-190 (September 28, 1999). **Vehicles not used in the local drug enforcement program must be sold.** Revenue derived from the sale of vehicles seized by the sheriff's office and forfeited under T.C.A. § 55-10-403(k) is retained by the sheriff's office and used during each fiscal year to compensate the sheriff's office for the reasonable and direct expenses involved in confiscating, towing, storing, and selling the forfeited vehicles. All expenses claimed by the sheriff's office are subject to audit and review by the comptroller of the treasury to determine that the expenses claimed are direct and reasonable. Any remaining revenue must be transmitted to the Department of Health no later than June 30 of each fiscal year. T.C.A. § 40-33-211(f).

Disposition of Vehicle Used by Person Driving On Revoked License.

It is the duty of the sheriff to properly dispose of a vehicle, that was seized by the sheriff's office pursuant to T.C.A. § 55-50-504(h), once it has been forfeited pursuant to Title 40, Chapter 33, Part 2. T.C.A. § 40-33-210(d).

Forfeited vehicles may be used by the sheriff's office in the drug enforcement program for a period not to exceed five years. T.C.A. §§ 40-33-211(e) and 53-11-201(b)(2)(C). **Vehicles not used in the local drug enforcement program must be sold.**

Revenue derived from the sale of vehicles seized by the sheriff's office and forfeited under T.C.A. § 55-50-504(h) is retained by the sheriff's office and used during each fiscal year to compensate the sheriff's office for the reasonable and direct expenses involved in the confiscating, towing, storing, and selling the forfeited vehicles. All expenses claimed by the sheriff's office are subject to audit and review by the comptroller of the treasury to determine that the expenses claimed are direct and reasonable. Any remaining revenue must be transmitted to the Department of Health no later than June 30 of each fiscal year. T.C.A. § 40-33-211(c).

Disposition of Abandoned, Immobile or Unattended Motor Vehicles.

Pursuant to T.C.A. § 55-16-106(a), it is the duty of the sheriff to sell at a public auction the abandoned, immobile, or unattended motor vehicles that the sheriff's office has taken into custody and that have not been reclaimed as provided for in T.C.A. § 55-16-105. The sheriff's office must issue the purchaser of the motor vehicle a sales receipt. The purchaser takes title to the motor vehicle free and clear of all liens and claims of ownership. Upon presentation of the sales receipt, the Department of Safety must issue a certificate of title to the purchaser. T.C.A. § 55-16-106(b).

The proceeds of the sale of an abandoned, immobile, or unattended motor vehicle are to be used to pay the expenses of the auction; the costs of towing, preserving and storing the vehicle; and all notice and publication costs incurred pursuant to T.C.A. § 55-16-105. Any remainder from the proceeds of a sale must be held for the owner of the vehicle or entitled lienholder for 45 days, and then may be deposited in a special fund that is to remain available to pay auction, towing, preserving, storage and all notice and publication costs that result from placing other abandoned, immobile, or unattended vehicles in custody, whenever the proceeds from a sale of other abandoned, immobile, or unattended motor vehicles are insufficient to meet these expenses and costs. Whenever the chief fiscal officer of the county finds that moneys in the special fund are in excess of reserves likely to be needed for the purposes thereof, the officer may transfer the excess to the county general fund, but in such event, claims against the special fund, if the special fund is temporarily exhausted, shall be met from the general fund to the limit of any transfers previously made thereto. T.C.A. § 55-16-106(d) and (e).

Enforcement of Ammunition Tax Laws.

It is the duty of all sheriffs to enforce the provisions of Title 70, Chapter 3, dealing with the taxation of shotgun shells and metallic cartridges. T.C.A. § 70-3-113.

Enforcement of Hunting Laws.

It is the duty of all sheriffs to enforce the provisions of Title 70, Chapter 4, dealing with hunting on posted property. T.C.A. § 70-4-106.

Enforcement of Wildlife Laws.

It is the duty of all sheriffs and their deputies to seize and take possession of any and all furs, fish, wild animals, wild birds, guns, rods, reels, nets, creels, boats or other instruments, tackle or devices that have been used, transported or possessed contrary to any laws or regulations promulgated by the Wildlife Resources Commission, and impound and take them before the court trying the person arrested. T.C.A. § 70-6-201.

Execution of Class 3 Weapons Purchase Documents.

Pursuant to T.C.A. § 39-17-1361, it is the duty of the sheriff of the county of residence of a person purchasing any firearm, defined by the National Firearms Act, 26 U.S.C. § 5845 *et seq.*, to execute, within 15 business days of any request, all documents required to be submitted by the purchaser if the purchaser is not prohibited from possessing firearms pursuant to T.C.A. § 39-17-1316.

Handgun Carry Permit Application Checks.

In October of 1996, the Department of Safety began issuing handgun carry permits pursuant to 1996 Public Chapter 905. Previous to this change, handgun carry permits were issued by local sheriffs' offices. Handgun carry permits are no longer issued by sheriffs' offices. The Department of Safety has the sole responsibility to issue handgun carry permits. T.C.A. § 39-17-1351.

When the Department of Safety receives a handgun carry permit application, the department is required to send a copy of the application to the sheriff of the county in which the applicant resides. Within 30 days of receiving an application, the sheriff is required to provide the department with any information concerning the truthfulness of the applicant's answers to the eligibility requirements set forth in T.C.A. § 39-17-1351(c) that is within the knowledge of the sheriff. T.C.A. § 39-17-1351(g)(2). This does not require the sheriff to conduct a full criminal background investigation, only a check of local records within the sheriff's office.

As part of the process of applying for a handgun carry permit, an applicant is required to provide two full sets of classifiable fingerprints at the time the application is filed with the department. **The applicant may have his or her fingerprints taken by the department at the time the application is submitted, or the applicant may have his or her fingerprints taken at any sheriff's office and submit the fingerprints to the department along with the application and other supporting documents. The sheriff may charge a fee not to exceed \$5 for taking the applicant's fingerprints.** At the time an applicant's fingerprints are taken either by the department or a sheriff's office, the applicant is required to present a photo identification. If the person requesting fingerprinting is not the same person as the person whose picture appears on the photo identification, the department or sheriff must refuse to take the applicant's fingerprints. T.C.A. § 39-17-1351(d)(1).

Intoxicating Liquors - Traffic in Intoxicating Liquors.

It is the duty of all sheriffs and other peace officers charged with enforcing the laws of the state to enforce the provisions of Title 57, Chapter 3, dealing with the trafficking of intoxicating liquors. T.C.A. § 57-3-410.

Intoxicating Liquors - Beer and Alcoholic Beverages.

The police and penal provisions of Title 57, Chapter 5, dealing with beer and alcoholic beverages containing less than 5 percent alcohol are to be enforced by all sheriffs, deputy sheriffs, police officers and members of the state highway patrol. In addition, such officers, along with inspectors, agents, representatives or officers appointed by the commissioner of revenue, are charged with enforcing the revenue provisions of this Chapter 5. T.C.A. § 57-5-202(c).

Intoxicating Liquors - Destruction of Stills and Paraphernalia.

It is the duty of all sheriffs and deputy sheriffs to search for, seize and capture all:

- (1) Illicit distilleries, stills and worms, distilling and fermenting equipment and apparatus, and other paraphernalia connected therewith or used or to be used in the illicit manufacture of intoxicating liquors;
- (2) Raw materials and substances connected with or to be used in the illicit manufacture of intoxicating liquors; and
- (3) Containers connected with or used in the packaging of illicitly manufactured intoxicating liquors.

T.C.A. § 57-9-101(a).

It is the duty of all sheriffs and deputy sheriffs to destroy any and all whiskey, beer, or other intoxicants found at or near illicit distilleries or stills except with respect to intoxicating liquors upon which federal tax has been paid as provided in T.C.A. § 57-9-115. Further, it is the duty of all sheriffs and deputy sheriffs capturing such illicit distilleries, stills, distilling and fermenting equipment and apparatus, and other paraphernalia, to summarily destroy and render the property useless. T.C.A. § 57-9-101(b) and (c). Any intoxicants or other articles of personal property destroyed under the authority of T.C.A. § 57-9-101 must be destroyed in the presence of at least two credible witnesses. Within five days after the destruction, the officer destroying the intoxicants or other articles of personal property must file a written statement listing all the items destroyed, signed by the officer and the witness or witnesses thereto, with the circuit or criminal court clerk of the county where seized and, in addition, must file a copy of the written statement with the Alcoholic Beverage Commission. T.C.A. § 57-9-101(c).

It is the duty of all sheriffs and deputy sheriffs to arrest any and all people implicated, aiding or abetting in the manufacture of intoxicating liquors and take them before the proper officials and have them tried upon such charge. T.C.A. § 57-9-102. See *Hagan v. Black*, 17 S.W.2d 908, 909 (Tenn. 1929) (County court had no power to adopt resolution offering to pay reward to officers for conviction of liquor law violators.).

Intoxicating Liquors - Seizure of Illegal Liquor.

Pursuant to T.C.A. § 57-9-103, **it is the duty of all sheriffs and deputy sheriffs to take into their possession any intoxicating liquors, including wine, ale, and beer, that have been received by or are in possession of or are being transported by any person in violation of any law of this state. Furthermore it is the duty of the sheriff to hold such liquors pending further orders of the court.** *Casone v. State*, 140 S.W.2d 1081, 1082 (Tenn. 1940). When the sheriff seizes liquors under his general authority as a law enforcement officer and not as an agent or representative of the commissioner of revenue, the liquor remains in the sheriff's custody until it is determined by the court whether or not the liquor was legally in the possession of the person from whom it was seized. If the court determines that the liquor is contraband goods under the statute, then the court may entertain an application from the commissioner of revenue asserting his jurisdiction to possess the liquors and sell them for the benefit of the treasury. *Casone v. State*, 140 S.W.2d 1081, 1082 (Tenn. 1940). Note: The enactment of Title 57, Chapter 3 did not repeal in toto the provisions of T.C.A. § 57-9-103 *et seq.* Primarily, T.C.A. § 57-3-411 is a revenue measure to enforce payment of the liquor tax. *Casone* at 1082.

Every officer, other than the sheriff, who seizes intoxicating liquors, must within five days of the seizure deliver the intoxicating liquors to the sheriff of the county wherein the liquor was seized. Upon delivery, the sheriff must give the officer a written receipt for the liquor showing the kind and quantity of intoxicating liquors delivered, and the name or names of the person(s) from whom the intoxicating liquors were taken if the name(s) are known to the officer. T.C.A. § 57-9-106. See *Nichols v. State*, 181 S.W.2d 368 (Tenn. 1944). In addition, the seizing officer must, within five days after taking possession of any intoxicating liquors, file a written statement with the circuit or criminal court clerk of the county wherein the liquor was seized showing the kind and quantity of intoxicating liquors taken and, if known, the name or names of the person from whom the liquor was taken. T.C.A. § 57-9-104. Failure to file the required statement negates the seizure. *State v. Bellamy*, 1986 WL 10567 (Tenn. Crim. App. 1986). The filing of this statement is the only notice that is required to be given to the person from whom the liquors were taken, where the person resides within the jurisdiction of the court or where the person was arrested at the time of the seizure. T.C.A. § 57-9-109. Any person claiming an interest in the seized liquors must file a petition in the circuit or criminal court of the county in which the liquors were seized within 10 days after the filing of the statement showing the seizure. T.C.A. § 57-9-111. See *Nichols v. State*, 181 S.W.2d 368 (Tenn. 1944). If the sheriff or other officer seizing the liquor does not know the name of the person transporting, receiving or possessing the intoxicating liquors, the sheriff or other officer seizing the liquor must certify such fact in the statement required by T.C.A. § 57-9-104 and the clerk of the circuit or criminal court must give notice to whom it may concern by posting a notice at the

courthouse door setting forth in substance that such liquors have been seized in accordance with the law and notifying all persons claiming the liquor to do so within 30 days from the date of the posting of the notice. If a claim is not filed within the prescribed time, the seized property will be forfeited and disposed of as provided by law. T.C.A. §§ 57-9-110 and 57-9-111.

It is the duty of the sheriff to safely keep in his or her possession all intoxicating liquors, either taken by the sheriff or delivered to the sheriff, until ordered by the court to dispose of the liquor. T.C.A. § 57-9-107. Pursuant to T.C.A. § 57-9-108, at each term of the circuit or criminal court, the sheriff must deliver to the circuit or criminal court judge a written statement showing all the intoxicating liquors in the sheriff's possession, setting forth the kind and quantity of the liquor and the name of the person from whom the liquor was taken if the name of the person is known to the sheriff. If the sheriff does not know the name of the person, the statement must indicate the date of the posting of the notice required by T.C.A. § 57-9-110. The court may not order the sale or destruction of any of the liquors seized until the time for filing petitions alleging ownership thereof or an interest therein has elapsed. T.C.A. § 57-9-119. When any person claims an interest in any seized liquor the court shall hear the claim without a jury and determine whether the person is entitled to the return of the liquor. However, no person is deemed to have any property right in any intoxicating liquors transported, received, or possessed in violation of the laws of this state. If the court, upon hearing any petition alleging ownership of or an interest in intoxicating liquors, ascertains that the liquor has been received, transported or possessed in violation of any law of this state, the court shall direct the sale or destruction of the liquor by the sheriff as provided by law. T.C.A. § 57-9-114. See *Canepari v. State*, 89 S.W.2d 164 (Tenn. 1936); *Ambrester v. State*, 110 S.W.2d 332 (Tenn. 1937); *Casone v. State*, 140 S.W.2d 1081 (Tenn. 1940); and *Alcoholic Beverage Comm'n v. Simmons*, 512 S.W.2d 585 (Tenn. 1973).

The court must order the destruction of seized liquor that does not have a federal stamp on the bottle or package, or the court may order it turned over to federal authorities for evidence. If the seized liquor has a federal tax stamp but is not fit for consumption, the court shall order it to be destroyed. T.C.A. § 57-9-117. **Seized liquor upon which the federal tax has been paid must be turned over to the Alcoholic Beverage Commission (ABC) for public sale by the commissioner of general services as contraband in accordance with the provisions of Title 57, Chapter 9, Part 2.** T.C.A. § 57-9-115(a).

It is the duty of the sheriff to notify the ABC in writing within 10 days after the seizure of intoxicating liquors, describing the brands and quantity, and to turn over the liquor to the ABC at the time and place designated by the ABC. It is the responsibility of the ABC to provide transportation and storage for the liquor. In the event the ABC requests the sheriff to transport the liquor, all expenses incurred by the sheriff in the transportation of the liquor is borne by the ABC, and the sheriff is allowed the same mileage fee as for transporting prisoners, in addition to the other actual cost of transportation. Each sheriff, deputy sheriff or constable of any county or any police officer of any municipality who has seized and confiscated any intoxicating liquors must make an itemized list of such beverages, showing

the quantity, brand, name and size of bottle, and must deliver a signed copy of the itemized list to the ABC at the time the beverages are delivered or turned over to the ABC for disposal. The agent or representative of the ABC receiving the beverages must likewise issue a receipt to the officer for the beverages. A copy of the list of beverages prepared by the officer making the seizure and confiscation must be delivered by the officer to the county mayor of the county if the seizure is made by a county officer, and a copy must be furnished to the mayor of the municipality if the seizure is made by a municipal officer. The ABC likewise must furnish the county mayor or city mayor with a copy of the list of beverages which it has received from the particular law enforcement officer. T.C.A. § 57-9-115.

All money received from the sale of the intoxicating liquors is deposited in the general fund of the state treasury provided that, in the case of all liquor captured or confiscated by a police officer of any incorporated municipality, the funds derived from the sale of the liquor, less 10 percent to be retained by the state for costs of administration, must be turned over to the municipality served by the police officer and provided further, that in the case of all liquor captured or confiscated by the sheriff, deputy sheriff or constable of any county, the funds derived from the sale of the liquor, less 10 percent to be retained by the state for costs of administration, must be turned over to the county served by the sheriff, deputy sheriff or constable. T.C.A. § 57-9-115(f). It is the duty of the sheriff to keep separate inventories of liquor captured by police officers and liquor captured by other officers so that the funds derived from the sale of the liquor may be properly divided between the county and incorporated city, town or municipality. T.C.A. § 57-9-118.

Any sheriff or deputy violating any of these provisions is guilty of a Class C misdemeanor and shall forfeit their office and be ineligible to reappointment or reelection to the same office for a period of five years. T.C.A. § 57-9-121. See *Mathis v. State*, 46 S.W.2d 44 (Tenn. 1932) and *Broyles v. State*, 341 S.W.2d 722 (Tenn. 1960).

Investigation of Child Abuse Cases.

Any person who has knowledge that a child has been the victim of child abuse has a duty to report the abuse to the appropriate agency or official, which includes the sheriff of the county where the child resides. T.C.A. § 37-1-403(a). **If the sheriff becomes aware of known or suspected child abuse through personal knowledge, receipt of a report, or otherwise, the sheriff has a duty to immediately report such information to the Department of Children's Services.** In appropriate cases, the child protective team must be notified to investigate the report. Further criminal investigation by the sheriff shall be conducted in coordination with the child protective team or the Department of Children's Services to the maximum extent possible. T.C.A. § 37-1-403(d). If the sheriff has reasonable cause to suspect that a child has died as a result of child abuse, the sheriff has a duty to report such suspicion to the appropriate medical examiner. The medical examiner must accept the report for investigation and must report the medical examiner's findings, in writing, to the local law enforcement agency, the appropriate district attorney general, and the Department of Children's Services. T.C.A. § 37-1-403(e).

All child abuse cases reported to the sheriff's office must be referred immediately to the local director of the county office of the Department of Children's Services for investigation. **The sheriff must also give notice of the report to the judge having juvenile jurisdiction where the child resides.** If the court or the sheriff finds that there are reasonable grounds to believe that the child is suffering from an illness or injury or is in immediate danger from the child's surroundings and that the child's removal is necessary, appropriate protective action must be taken under Title 37, Chapter 1, Part 1 (regarding the juvenile court). Whenever there are multiple investigations, the Department of Children's Services, the district attorney general, the sheriff's office, and, where applicable, the child protection team, must coordinate their investigations to the maximum extent possible so that interviews with the victimized child will be kept to an absolute minimum. Reference to the audio or videotape or tapes made by the child protection team or department should be used whenever possible to avoid additional questioning of the child. T.C.A. § 37-1-405.

Investigation of Child Sexual Abuse Cases.

Any person who knows or has reasonable cause to suspect that a child has been sexually abused has a duty to report such knowledge or suspicion to the Department of Children's Services. T.C.A. § 37-1-605(a). Pursuant to T.C.A. § 37-1-605(b)(1), reports of known or suspected child sexual abuse must be made immediately to the local office of the Department of Children's Services, which is responsible for the investigation of such reports, or to the judge having juvenile jurisdiction or to the office of the sheriff or the chief law enforcement official of the municipality where the child resides. Each report of known or suspected child sexual abuse occurring in a facility licensed by the Department of Mental Health and Developmental Disabilities or any hospital must also be made to the local law enforcement agency in the jurisdiction where the alleged offense occurred.

If the sheriff becomes aware of known or suspected child sexual abuse through personal knowledge, receipt of a report or otherwise, the sheriff must immediately report such information to the Department of Children's Services. In addition, for the protection of the child, the child protective team must be notified to investigate the report. Further criminal investigation by the sheriff's office must be conducted appropriately. T.C.A. § 37-1-605(b)(2). If the sheriff has reasonable cause to suspect that a child died as a result of child sexual abuse, the sheriff must report such suspicion to the appropriate medical examiner. The medical examiner must accept the report for investigation and must report the medical examiner's findings, in writing, to the local law enforcement agency, the appropriate district attorney general, and the Department of Children's Services. T.C.A. § 37-1-605(c).

Through legislation, the General Assembly has encouraged each sheriff to establish a child sex crime investigation unit within the sheriff's office for the purpose of investigating crimes involving the sexual abuse of children. T.C.A. § 37-1-603(b)(4)(E). To further this end, as part of the annual in-service training requirement, the sheriff and every deputy must receive training in the investigation of cases involving child

sexual abuse, including police response to and treatment of victims of such crimes. T.C.A. § 37-1-603(b)(4)(B).

The legislature has mandated that at least one child protective team shall be organized in each county. The Department of Children's Services is responsible for coordinating the services of these teams. T.C.A. § 37-1-607(a)(1). Each team must be composed of one person from the Department of Children's Services, one representative from the office of the district attorney general, one juvenile court officer or investigator from a court of competent jurisdiction, and one properly trained law enforcement officer with countywide jurisdiction (i.e., a sheriff's deputy) from the county where the child resides or where the alleged offense occurred. It is in the best interest of the child that, whenever possible, an initial investigation shall not be commenced unless all four disciplines are represented. An initial investigation may, however, be commenced if at least two of the team members are present at the initial investigation. The team may also include a representative from one of the mental health disciplines. Furthermore, in those geographical areas in which a child advocacy center meets the requirements of T.C.A. § 9-4-213(a) or (b), child advocacy center directors or their designees shall be members of the team for the purposes of providing services and functions established by T.C.A. § 9-4-213 or delegated pursuant to that section. T.C.A. § 37-1-607(a)(2).

It is the intent of the General Assembly that child protective team investigations be conducted by team members in a manner that not only protects the child but that also preserves any evidence for future criminal prosecutions. It is essential, therefore, that all phases of the child protective investigation be conducted appropriately and that further investigations, as appropriate, be conducted and coordinated properly. T.C.A. § 37-1-607(a)(3). All state, county and local agencies must give the team access to records in their custody pertaining to the child and shall otherwise cooperate fully with the investigation. T.C.A. § 37-1-406(c).

Immediately upon receipt of a report alleging, or immediately upon learning during the course of an investigation, that child sexual abuse has occurred, or an observable injury or medically diagnosed internal injury occurred as a result of the sexual abuse, the Department of Children's Services must orally notify the child protective team, the appropriate district attorney general and the appropriate law enforcement agency. **Criminal investigations conducted by a law enforcement agency must be coordinated, whenever possible, with the child protective team investigation.** If independent criminal investigations are made, interviews with the victimized child must be kept to an absolute minimum and, whenever possible, the videotape or tapes made by the child protective teams should be used. T.C.A. § 37-1-607(b)(3).

The sheriff may take a child into custody if there are reasonable grounds to believe that the child is a neglected, dependent or abused child, and there is an immediate threat to the child's health or safety to the extent that delay for a hearing would be likely to result in severe or irreparable harm. The sheriff may also take a child into custody if there are reasonable grounds to believe that the child may abscond or be removed from the jurisdiction of the court, and in either case, there is no less drastic alternative to removing

the child from the custody of the child's parent, guardian or legal custodian available that would reasonably and adequately protect the child's health or safety or prevent the child's removal from the jurisdiction of the court pending a hearing. T.C.A. §§ 37-1-608(a), 37-1-113(a)(3), and 37-1-114(a)(2).

Investigation of Drug Trademark Counterfeiting Cases.

It is the duty of the sheriff to assist and cooperate with the prosecuting attorney in investigating any violation of the provisions of Title 47, Chapter 25, Part 4, including procuring evidence to support the prosecution, which may be instituted by the prosecuting attorney. For such services, the sheriff is allowed and paid the same fees for meals and travel as are usually allowed in other criminal proceedings. T.C.A. § 47-25-404.

Investigation of Osteopathic Physicians.

It is the duty of the sheriff and the sheriff's deputies to investigate every supposed violation of Title 63, Chapter 9, dealing with the licensing of osteopathic physicians that comes to the sheriff's or deputy's notice and of apprehending and arresting all violators. T.C.A. § 63-9-110(b).

Notification to Next of Kin - Serious Accidents.

Sheriffs, sheriff's deputies, and employees of sheriff's offices are required to make a reasonable effort to promptly notify the next of kin of any person who has been killed or seriously injured in an accidental manner before any statement, written or spoken, is delivered or transmitted to the press by the sheriff, sheriff's deputy or employee, disclosing the decedent's or seriously injured person's name. For the purposes of the notification requirement, the investigating officer is responsible for making the determination, based upon the officer's personal opinion, as to whether a person is "seriously injured." Neither the officer nor the officer's employer shall incur any liability based upon the officer's opinion as to whether or not a person is seriously injured. T.C.A. § 38-1-106.

Prevention of Forest Fires.

It is the duty of all sheriffs (and state highway patrol officers) to use all effective methods in their power to prevent the spread of forest fires. Whenever the sheriff becomes aware that there is a forest fire in the vicinity, it is the duty of the sheriff to summon a sufficient number of the male citizens of the county in which the fire is burning, who are between 18 and 30 years of age, to control the fire. The sheriff is to be in complete charge and direction of the efforts to restrain the fire until duly relieved by Division of Forestry personnel. T.C.A. § 68-102-145.

Quarantine of Property Where Meth Was Manufactured.

In 2004 and 2005, the General Assembly passed several bills relating to the illegal manufacture of methamphetamine. Each of these new laws included new duties for Tennessee's sheriffs.

Public Chapter 855 of the Acts of 2004 gives the sheriff the authority to quarantine any property or any structure or room in any structure on any property located in the county where the manufacture of methamphetamine, its salts, isomers, and salts of its isomers is occurring or has occurred. If the sheriff quarantines such property, the sheriff becomes responsible for posting signs indicating that the property has been quarantined and, to the extent they can be reasonably identified, for notifying all parties having any right, title or interest in the quarantined property, including any lienholders. T.C.A. § 68-212-503(b). **Once the property has been quarantined it must remain quarantined until a certified industrial hygienist or other qualified person or entity certifies to the sheriff that the property is safe for human use.** T.C.A. § 68-212-505.

Public Chapter 18 of the Acts of 2005 enacted the Meth-Free Tennessee Act of 2005. The act amends T.C.A. § 68-212-503 to clarify that the purpose of the provision allowing for the quarantine of properties where methamphetamine manufacturing has occurred is to prevent people from being exposed to the hazards associated with methamphetamine and the chemicals associated with the manufacture of methamphetamine. The act also amends Title 68, Chapter 212, Part 5, by adding a new section that requires the sheriff, within seven days of issuing an order of quarantine, to transmit to the commissioner of environment and conservation the following minimal information regarding the site: date of the quarantine order, county, address, name of the owner of the site, and a brief description of the site (single family home, apartment, motel, wooded area, etc.). The sheriff must also notify the commissioner once the quarantine has been lifted.

Public Chapter 347 of the Acts of 2005 requires the sheriff, after quarantining real property or any structure or room in any structure on any real property due to the manufacture of meth, to file for recording a Notice of Methamphetamine Lab Quarantine in the office of county register in the county in which the real property or any portion thereof lies.

Registration of Sexual Offenders and Violent Sexual Offenders.

Public Chapter 921 of the Acts of 2004 enacted the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004. Public Chapter 316 of the Acts of 2005 amended the act. **The act requires offenders who live, work, or attend college in the county to register in person at the sheriff's office.** Homeless offenders are also subject to the registration requirements of the act. Offenders who are incarcerated in the county jail must register in person with the sheriff or the sheriff's designee within 48 hours prior to the offender's release. Offenders who are committed to mental health institutions or continuously confined to home or healthcare

facilities due to mental or physical disabilities are exempt from the registration requirement of the act. T.C.A. § 40-39-203. The information that must be collected from each offender is set forth in T.C.A. § 40-39-203(l). All data received from the offender, as required by the TBI and T.C.A. § 40-39-203(i), must be entered in to the TIES (Internet) within 12 hours of receipt. T.C.A. § 40-39-204(a). Within three days of an offender's initial registration, the sheriff must send the original signed TBI registration form to the TBI headquarters in Nashville by U.S. mail. T.C.A. § 40-39-203(j). The sheriff is required to retain a duplicate copy of the TBI registration form as a part of the business records of the sheriff's office. T.C.A. § 40-39-204(d).

The act requires all violent sexual offenders under the jurisdiction of the sheriff to report in person to the sheriff's office at least once during the months of March, June, September, and December of each calendar year and all sexual offenders to report in person to the sheriff's office once a year no earlier than seven calendar days before and no later than seven calendar days after the offender's date of birth to update their fingerprints, palm prints and photograph, as deemed necessary by the sheriff, and to verify the continued accuracy of the information in the TBI registration form. During the March reporting period, violent sexual offenders are required to pay an administrative fee not to exceed \$100. Sexual offenders pay the administrative fee during their annual reporting period. This fee is to be retained by the sheriff to purchase equipment, to defray personnel and maintenance costs, or for any other expenses incurred as a result of implementing the act. Violent sexual offenders and sexual offenders who reside in nursing homes and assisted living facilities, and offenders committed to mental health institutions or continuously confined to home or healthcare facilities due to mental or physical disabilities are exempt from the in-person reporting and administrative fee requirement. T.C.A. § 40-39-204(b) and (c).

All data received from the offender, as required by the TBI and T.C.A. § 40-39-203(i), must be entered into the TIES (Internet) within 12 hours of receipt. T.C.A. § 40-39-204(a). Within three days of a violent sexual offender's quarterly reporting date or a sexual offender's annual reporting date, the sheriff must send the original signed TBI registration form to the TBI headquarters in Nashville by U.S. mail. The sheriff is required to retain a duplicate copy of the TBI registration form as a part of the business records of the sheriff's office. T.C.A. § 40-39-204(d).

Reports to the Tennessee Bureau of Investigation.

Sheriffs are required by statute to submit to the director of the Tennessee Bureau of Investigation reports setting forth their activities in connection with law enforcement and criminal justice, including uniform crime reports. T.C.A. § 38-10-102. The refusal to make any report or do any act required by any provision of Title 38, Chapter 10, is deemed to be nonfeasance of office and subjects the official to removal from office. T.C.A. § 38-10-105.

Reporting of Stolen and Recovered Motor Vehicles.

It is the duty of the sheriff and every deputy sheriff who receives a report based on reliable information that any motor vehicle has been stolen to report the theft of the vehicle to the Department of Safety immediately after receiving the information. Any officer who recovers or upon receiving information of the recovery of any motor vehicle, chassis, engine, transmission or other parts and accessories taken from a vehicle that has previously been reported stolen must, immediately after receiving the information, report the recovery of the vehicle to the Department of Safety. Reports of the theft of any motor vehicle and the recovery of any motor vehicle are to be made to the Tennessee Highway Patrol dispatcher in the area in which the theft or recovery occurred. T.C.A. § 55-5-101(a)(1) - (3).

It is the duty of the sheriff to file and maintain reports of motor vehicle thefts and the recovery of stolen motor vehicles. These reports are to include, but are not limited to, available information as to ownership and the address of the owner; make, year and color of the vehicle; the license number and manufacturer's identification number; the date of theft or recovery; the name of person reporting the theft and location where the theft occurred; the name of the person reporting the recovery of the vehicle and the location of the recovery; the condition of the vehicle at the place of the recovery and a list of any parts or accessories found adjacent to the recovered vehicle; and the name and the location of any wrecker or garage operator pulling or storing the vehicle, its parts or accessories. T.C.A. § 55-5-101(a)(4). It is the further duty of the sheriff to transmit the aforementioned information pertaining to the theft or recovery of any motor vehicle, its chassis, engine, transmission or other parts and accessories, to the Tennessee Highway Patrol dispatcher in the area in which the theft or recovery occurred. T.C.A. § 55-5-101(a)(5). It is the duty of both the Department of Safety and the sheriff receiving information of the recovery of any motor vehicle, its chassis, engine, transmission, or other parts and accessories, to report the recovery to the owner. T.C.A. § 55-5-101(a)(6).

Summoning Jurors.

Another duty of the sheriff, as it relates to both attending the courts and serving process, is summoning the jury. When the venire for the grand and petit jurors for any term of criminal court or circuit court has been drawn, the clerk of the court issues the state's writ of venire facias to the sheriff containing the names of the jurors drawn, commanding the sheriff to summon the jurors for the term of court for which they were drawn. The clerk must swear the sheriff when delivering the writ to keep secret the names of the jurors to be summoned. Summons is to be made by personal service or by sending by registered or certified mail to the regular address of the persons selected as jurors notice of their selection for jury duty. Service by mail must be mailed at least five days prior to the date fixed for their appearance for such jury service. The cost will be paid as are other costs of summoning jurors. In counties where jurors are selected by mechanical or electronic means pursuant to T.C.A. §§ 22-2-302(d) and 22-2-304(e), the sheriff is required to send the summons by first-class mail to the regular address of each person selected as a juror giving notice of the person's selection for jury duty. This summons must be mailed

at least 10 days prior to the date fixed for the person's appearance for jury service. T.C.A. § 22-2-305.

If at a regular or special term of the court having criminal jurisdiction the required number of jurors cannot be obtained from the venire because of the disqualification of the proposed jurors or other cause, the clerk of the court will produce in open court the jury box and draw the number of names deemed by the judge sufficient to complete the juries. This process will, if necessary, continue until the grand and petit juries are completed. However, instead of following this procedure, the judge may furnish a sufficient number of names of persons to be summoned to the sheriff, or the judge may direct the sheriff to summon a sufficient number to complete the juries. T.C.A. § 22-2-308(a).

Whenever the presiding judge of the circuit or criminal court is satisfied that a jury cannot be obtained from the regular panel for the trial of a case, the judge may, before the case is assigned for hearing, cause the jury box to be opened by the clerk in the judge's presence in the clerk's office, and have the clerk draw a sufficient number of names as the judge deems sufficient to obtain a jury. The court clerk will then give this list to the sheriff whose duty it is to summon those whose names were drawn. If the jury cannot be made up from the panel drawn and summoned and the regular panel in attendance, another panel may be drawn and so on until the jury is completed or the jury box is exhausted. If, after the regular jury venire summoned for the term becomes exhausted, it becomes necessary to have additional jurors from which to select a jury to try a particular case or cases pending, the presiding judge may in the judge's discretion select from citizens of the county or direct the sheriff to summon people of the judge's selection whose names were not selected from the jury box. Neither the judge nor the sheriff are allowed to place on this list the name of any person who seeks either directly or indirectly, personally or through another, to be summoned as a juror, and such solicitations operate to disqualify such person for jury service. T.C.A. § 22-2-308(c).

It is a Class A misdemeanor for the sheriff or any of the sheriff's deputies to divulge any secrets of proceedings of the jury commissioners or to notify anyone what name, or names, constitute the panel or any part of it, or any name or names drawn from the jury box for service at any term of court or in any case pending in court, except where jury panel list publication is required under T.C.A. § 22-2-306, or fail to perform any duty imposed by Title 22, Chapter 2. Upon the conviction of a violation of this statute, such officer shall be removed from office and will be ineligible to hold any state or county office for a period of five years. T.C.A. § 22-2-102(a).

Transportation of Persons with a Mental Illness.

It is the duty of the sheriff to transport those who have been certified for emergency involuntary admission under Title 33, Chapter 6, Part 4, or nonemergency involuntary admission under Title 33, Chapter 6, Part 5, unless the person can be transported by (1) a secondary transportation agent designated by the sheriff, (2) a municipal law enforcement agency that meets the requirements for a secondary transportation agent and is designated by the sheriff, (3) a person authorized under other

provisions of Title 33, or (4) one or more friends, neighbors, other mental health professionals familiar with the person, relatives of the person, or a member of the clergy. T.C.A. § 33-6-901. If a mandatory prescreening agent, physician, or licensed psychologist with health service provider designation who is acting under T.C.A. § 33-6-404(3)(B) determines that the person does not require physical restraint or vehicle security, then any person identified in number (4) above, rather than the sheriff, may transport the person at the transporter's expense.

The sheriff is authorized by statute to designate a secondary transportation agent or agents for the county to transport people with mental illness or serious emotional disturbance whom a physician or mandatory prescreening authority has evaluated and determined do not require physical restraint or vehicle security. The secondary transportation agent must be available 24 hours per day, provide adequately for the safety and security of the person to be transported, and provide appropriate medical conditions for transporting persons for involuntary hospitalization. When designating a secondary transportation agent or a municipal law enforcement agency, the sheriff must take into account both its funding and the characteristics of the individuals who will be transported. A secondary transportation agent has the same duties and authority as the sheriff under Title 33, Chapter 6, in detaining and transporting such persons. The sheriff must consult with the county mayor before designating a secondary transportation agent. T.C.A. § 33-6-901(a).

The transportation of people to be involuntarily hospitalized is the responsibility of the county in which the person is initially detained. However, the sheriff or secondary transportation agent providing transportation may bill the county of residence for transportation costs. T.C.A. § 33-6-901(b).

EMERGENCY INVOLUNTARY ADMISSION. If the person who has been certified for emergency involuntary admission under T.C.A. § 33-6-404 is not already at the treatment facility where it is proposed that they are to be admitted, the medical professional who completed the certificate of need must give the original copy of the certificate to the sheriff or the designated transportation agent and turn the patient over to the custody of the sheriff or the designated transportation agent for transportation to a hospital or treatment facility that has available accommodations. Transportation to a state-owned or operated hospital or treatment facility may not commence without a certificate of need executed by a mandatory prescreening agent or by a physician or psychologist. T.C.A. § 33-6-406(a).

Before leaving with the patient, the sheriff or transportation agent must notify the hospital or treatment facility where the patient is being taken that the patient is coming, where the patient is currently, and an estimated time of arrival. If the sheriff or transportation agent has given the required notice and arrives at the hospital or treatment facility within the anticipated time of arrival, then the sheriff or transportation agent is required to remain at the hospital or treatment facility only long enough for the patient to be evaluated for admission but not longer than 1 hour and 45 minutes. After 1 hour and 45 minutes, the patient is the responsibility of the evaluating hospital or treatment facility, and the sheriff or transportation agent may leave. If the sheriff or transportation

agent has not given the required notice or has not arrived within the anticipated time of arrival, the sheriff or transportation agent must remain at the hospital or treatment facility for as long as it takes to complete the evaluation for admission. T.C.A. § 33-6-406(b)(1) - (3). In Shelby County the sheriff or transportation agent is relieved of further transportation duties after the person has been delivered to the hospital or treatment facility, and the transportation duties are assumed by appropriate personnel of the hospital or treatment facility. T.C.A. § 33-6-406(b)(4).

If, after evaluation, the person is not subject to admission and the sheriff or transportation agent is still under a duty to remain at the hospital or facility, the sheriff or transportation agent must return the patient to the county from which the person was transported. If, after evaluation, the person is not subject to admission and the sheriff or transportation agent is no longer under a duty to wait at the hospital or facility, the hospital or facility has the responsibility to return the person to the county from which the person was transported. T.C.A. § 33-6-407(c) and (d).

NONEMERGENCY INVOLUNTARY ADMISSION. When a person is about to be admitted to a hospital or treatment facility under the provisions of Title 33, Chapter 6, Part 5, the court will arrange the transportation of the person to the hospital. Whenever practicable, the person to be hospitalized will be permitted to be accompanied by one or more friends or relatives, who must travel at their own expense. Any reputable and trustworthy relative or friend of the person who will assume responsibility for the person's safe delivery may be allowed to transport the person to the hospital if such relative or friend will do so at their own expense. T.C.A. § 33-6-902(a).

Pending removal to a hospital, a person with mental illness or serious emotional disturbance taken into custody or ordered to be hospitalized under Title 33, Chapter 6, Part 5, may be detained in the person's home or in some suitable facility under such reasonable conditions as the court may order, but the person shall not be detained in a nonmedical facility used for the detention of those charged with or convicted of criminal offenses. Reasonable measures necessary to assure proper care of a person temporarily detained, including provision for medical care, must be taken. T.C.A. § 33-6-902(b).

Transportation of Juveniles to Youth Development Centers.

Counties are responsible for the expense of transporting delinquent children not found to have committed offenses punishable in the penitentiary. The fee the sheriff is allowed for transporting children found to have committed offenses punishable in the penitentiary to youth development centers is the same fee allowed by law for carrying prisoners to the penitentiary. When any female child is to be transported to a youth development center, the sheriff must deputize a suitable woman of good moral character to convey the child. In the event the sheriff cannot find such a woman in the county, the Department of Children's Services must provide a proper and suitable escort for the child, and this escort is paid from the allowance provided for the sheriff. The expense of the woman so deputized is paid from the allowance for the sheriff. T.C.A. § 37-5-205.

Transportation of Juveniles for Post-Commitment Hearings.

A juvenile in the custody of the Department of Children's Services pursuant to a commitment by a juvenile court of this state may petition for post-commitment relief under Title 37, Part 3. T.C.A. § 37-1-302. **It is the duty of the sheriff of the county where such proceedings are pending to receive and transport the juvenile to and from the institution that has custody of the juvenile and the courthouse if the court so orders or if for any reason the superintendent of the institution is unable to transport the petitioner.** The sheriff is entitled to the same costs allowed for the transportation of prisoners as provided in criminal cases upon presentation of the account certified by the judge and district attorney general. T.C.A. § 37-1-310(b). *See also* T.C.A. § 8-26-108.

Ex Officio Duties

Ex officio services are defined as “those duties performed by an officer for the compensation of which no express provision is made by law; services for which the law provides no remuneration.” *Hagan v. Black*, 17 S.W.2d 908, 909 (Tenn. 1929). In the case of *George v. Harlan*, 1998 WL 668637, *2 (Tenn. 1998), the Tennessee Supreme Court defined *ex officio* services as those services not required by statute and defined *ex officio* duties as nonstatutory duties. **The Court noted that the “duties which the common law annexes to the office of sheriff for which no fee or charge is specified in payment are generally referred to as ‘ex officio’ duties or services.”** *George* at *3, *citing State ex rel. Windham v. LaFever*, 486 S.W.2d 740, 742 (Tenn. 1972); and *Hagan v. Black*, 17 S.W.2d 908, 909 (1929). The compensation of a sheriff for *ex officio* services is to be determined by the county legislative body. *Shanks v. Hawkins*, 22 S.W.2d 355 (Tenn. 1929).

Workhouse Superintendent.

When the jail in any county has been declared a workhouse, as provided in T.C.A. § 41-2-102, the sheriff becomes the *ex officio* superintendent of the workhouse. T.C.A. § 41-2-108. It is the duty of the workhouse superintendent to: (1) discharge each prisoner as soon as the prisoner's time is out, or upon order of the board of workhouse commissioners; (2) see that the prisoners are properly guarded to prevent escape; (3) see that they are kindly and humanely treated and properly provided with clothing, wholesome food properly cooked and prepared for eating three times a day when at work; (4) see that they are warmly and comfortably housed at night and in bad weather; (5) see that when sick they have proper medicine and medical treatment and, in case of death, are decently buried; and (6) keep the males separate from the females. T.C.A. § 41-2-109.

Statutory Powers

Assignment of Officers to Judicial District Drug Task Force.

The sheriff has the authority to assign deputies to a judicial district or multijudicial district task force relating to the investigation and prosecution of drug and violent crime cases. Such assignment must be made in writing by the sheriff but does not become effective until approved by the board of directors or governing or advisory board of the task force or the district attorneys general of the judicial district. T.C.A. § 8-7-110(a).

Authority to Authorize Deputies to Carry Handguns.

Pursuant to T.C.A. § 39-17-1315(a)(1), the sheriff has the authority to authorize the carry of handguns by bonded and sworn deputy sheriffs who have successfully completed and continue to successfully complete on an annual basis a firearm training program of at least eight hours duration. The sheriff's authorization must be made by a written directive, a copy of which must be retained by the sheriff's office. Pursuant to the sheriff's written directive, POST-certified deputy sheriffs may carry their handgun at all times, regardless of the deputy's regular duty hours or assignments. Nothing in T.C.A. § 39-17-1315(a)(1) prohibits the sheriff from placing restrictions on when or where a deputy may carry his or her service handgun.

POST-certified deputy sheriffs may carry firearms at all times and in all places within Tennessee, on-duty or off-duty, regardless of the deputy's regular duty hours or assignments, **except** as provided by T.C.A. § 39-17-1350(c) (see below), federal law, lawful orders of court or the written directive of the sheriff. T.C.A. § 39-17-1350(a) and (d).

The authority conferred by T.C.A. § 39-17-1350 does not extend to a deputy sheriff:

- (1) Who carries a firearm onto school grounds or inside a school building during regular school hours unless such officer immediately informs the principal that such officer will be present on school grounds or inside the school building and in possession of a firearm. If the principal is unavailable, the notice may be given to an appropriate administrative staff person in the principal's office;
- (2) Who is consuming beer or an alcoholic beverage or who is under the influence of beer, an alcoholic beverage, or a controlled substance;
- (3) Who is not engaged in the actual discharge of official duties as a law enforcement officer while within the confines of an establishment where beer or alcoholic beverages are sold for consumption on-the-premises; or
- (4) Who is not engaged in the actual discharge of official duties as a law enforcement officer while attending a judicial proceeding.

T.C.A. § 39-17-1350(c). See also T.C.A. §§ 39-17-1305; 39-17-1306; 39-17-1309; and 39-17-1311; 39-17-1321. Op. Tenn. Atty. Gen. No. 99-024 (February 16, 1999).

Disposal of Property.

The sheriff is authorized by statute to dispose of all abandoned, stolen, and recovered or worthless property that remains unclaimed in the sheriff's custody and possession by virtue of confiscation, abandonment, or having been stolen and recovered. Such property may not be disposed of until a period of six months has elapsed from date of acquisition of the property by the sheriff. Prior to disposing of such property, the sheriff must make a reasonable effort to locate the true owner of the property and notify the owner of the sheriff's possession of the property. When located, the true owner must claim the property within a reasonable time. However, the sheriff is prohibited from returning any property to the owner, even if known, if the return of the property would be contrary to the public welfare. In the event that the owner of such property cannot be located, the sheriff must present to a judge of one of the criminal courts of the county a list of all such property to be disposed of, together with an affidavit that the sheriff has made a reasonable search for the true owner thereof and that the true owner cannot be located. **The sheriff must then procure an order from the court directing the manner in which such property is to be disposed of.** Proceeds from the disposition of such property must be paid over to the general fund of the county. T.C.A. § 8-8-501. See also T.C.A. § 66-29-101 *et seq.*

Disposition of Stolen Property in Possession of Pawnbroker.

An individual asserting ownership of any property, that the person alleges is stolen and in the possession of a pawnbroker may recover the property by making a report to the sheriff's office of the location of the property and providing the sheriff's office with proof of ownership of the property provided that a report of the theft of the property was made to the proper authorities within 30 days after obtaining knowledge of the theft or loss. In addition, the person asserting ownership must be willing to assist in prosecuting the individual pawning the property. The failure to file a timely report results in the loss of the right to recover possession of property under the Pawnbrokers Act. *Alsafi Oriental Rugs v. American Loan Co.*, 864 S.W.2d 41 (Tenn. Ct. App. 1993).

Upon receipt of the required proof of ownership, the sheriff and the sheriff's deputies are authorized to recover the property from the pawnbroker without expense to the rightful owner of the property unless the pawnbroker presents evidence of having received proof of ownership of the property by the person who sold the property to the pawnbroker or pledged the property as security for a loan. T.C.A. § 45-6-213(b)(1). The attorney general has opined that T.C.A. § 45-6-213 violates the due process requirements under the Tennessee and United States Constitutions in failing to provide pawnbrokers with prior notice or a hearing before recovering property from them. Op. Tenn. Atty. Gen. 02-090 (August 27, 2002). Any property recovered from a pawnbroker pursuant to this section must be returned to the rightful owner of the property, subject to use as evidence in any criminal proceeding. T.C.A. § 45-6-213(b)(1).

In the event that the individual asserting ownership of the pawned property has provided a timely report of the theft or loss of the property and the pawnbroker presents acceptable evidence to the sheriff's office of having received proper proof of ownership from the person selling or pledging the property, then the sheriff's office must inform the individual alleging ownership that it will be necessary for that person to commence an appropriate civil action for the return of the property within 30 days of receiving such notice. The pawnbroker will not be required to surrender the property to any law enforcement officer or agency or any other person absent an appropriate warrant. T.C.A. § 45-6-213(b)(2).

If for any reason after the sheriff's office has seized certain property and is unable to locate the rightful owner of the property after due diligence, then the property can be returned to the pawnbroker upon the pawnbroker executing a hold-harmless agreement to the sheriff's office pursuant to Title 40, Chapter 33. T.C.A. § 45-6-213(b)(3).

Exchange of Officers With Other Law Enforcement Agencies.

Pursuant to T.C.A. § 8-8-212(b)(1), **the sheriff is authorized to enter into agreements with other law enforcement agencies, including, but not limited to, other county sheriff's offices, for the exchange of law enforcement officers when required for a particular purpose.** Exchanged officers must be covered by liability insurance by the agency of their regular employment or by the agency to which the officers are being assigned. Responding officers under these agreements may be deputized by the requesting sheriff without making application to the court provided that the exchanged officers may serve in such capacity only for the time necessary to complete the particular purpose for which the exchange was made. Law enforcement officers exchanged under T.C.A. § 8-8-212(b) shall not be deemed to be special deputies. T.C.A. § 8-8-212(b)(2).

Inspection of Gun Dealer's Records.

The sheriff is authorized to inspect the records of a gun dealer relating to transfers of firearms in the course of a reasonable inquiry during a criminal investigation or under the authority of a properly authorized subpoena or search warrant. T.C.A. § 39-17-1316(k).

Inspection of Pawnbroker's Records.

All pawnbrokers are required to record certain information at the time of making a pawn transaction or a buy-sell transaction. T.C.A. § 45-6-209(b). These records must be delivered to the appropriate law enforcement agency, by mail or in person, within 48 hours following the day the transactions were made. In addition, these records must be made available for inspection each business day, except Sunday, by the sheriff of the county and the chief of police of the municipality in which the pawnshop is located. T.C.A. §§ 45-6-209(d) and (e) and 45-6-213(a).

Pursuant to T.C.A. § 45-6-209(b)(7), a pilot project has been established in Knox and Shelby counties that requires the pawnbroker to take the right thumbprint of the pledgor at the time of making the pawn or buy-sell transaction. If taking the right thumbprint is not

possible the pawnbroker must take a fingerprint from the left thumb or another finger and must identify on the pawn ticket which finger has been used. A thumb or fingerprint taken pursuant to T.C.A. § 45-6-209(b)(7) must be maintained by the pawnbroker for a period of five years from the date of the pawn transaction.

In Knox and Shelby counties, if the pawn transaction involves a firearm, the pawnbroker must exclude from the information sent to the sheriff's office or police department the name, address and identification numbers of the pledgor pawning the firearm. The name, address and identification numbers of the pledgor must remain with the pawnbroker along with the pledgor's thumbprint. A law enforcement officer inspecting a record involving a firearm may not take or record the name, address and identification numbers of the pledgor except pursuant to a subpoena. T.C.A. § 45-6-209(g)(1). If a court grants the request of a law enforcement officer for a subpoena to require production of the thumbprint of a pledgor taken and maintained by the pawnbroker, the pawnbroker must supply the law enforcement officer with the name, address and identification numbers of the pledgor whose thumbprint was subpoenaed. T.C.A. § 45-6-209(g)(2).

The attorney general has opined that a city does not have the authority to adopt an ordinance requiring the pledgor in a pawn transaction to place a thumbprint on the pawnbroker's copy of the pawn transaction. Op. Tenn. Atty. Gen. 00-071 (April 11, 2000). Nor does a city have the authority to adopt an ordinance requiring the pledgor in a pawn transaction to place a thumbprint on a form separate from the pawn ticket to be maintained by the pawnbroker and made available to law enforcement authorities. Op. Tenn. Atty. Gen. 00-167 (Oct. 26, 2000).

Investigations of Adult-Oriented Establishments.

Pursuant to T.C.A. § 7-51-1107, the sheriff is empowered to conduct investigations of people engaged in the operation of any adult-oriented establishment and inspect the license of the operators and establishment for compliance with Title 7, Chapter 51, Part 11.

Motor Vehicles - Impounding.

Pursuant to T.C.A. § 55-5-129, the sheriff has the authority to impound any vehicle after determining the existence of any one or more of the following factors:

- (1) The registration plate displayed on the vehicle is stolen or is otherwise not registered to such vehicle; or
- (2) The renewal decal displayed on the vehicle is stolen or is otherwise not registered to such vehicle.

However, law enforcement personnel must secure the permission of the owner of any private property before entering onto private property for the purpose of impounding a vehicle.

As used in T.C.A. § 55-5-129, "impound" means removing a vehicle from a private parking lot adjacent to a street, alley, highway, or thoroughfare by a uniformed deputy to the nearest garage or other place of safety or to a garage designated or maintained by the sheriff's office. The provisions of T.C.A. §§ 55-16-105 and 55-16-106 govern the disposition of any vehicle impounded pursuant to T.C.A. § 55-5-129.

Motor Vehicles - Taking Possession of Abandoned Vehicles.

The sheriff is authorized by statute to take into custody any motor vehicle found abandoned, immobile, or unattended on public or private property. In doing so, the sheriff may employ his or her own personnel, equipment and facilities or hire personnel, equipment, and facilities for the purpose of removing, preserving and storing abandoned, immobile, or unattended motor vehicles. T.C.A. § 55-16-104. A vehicle may not be towed without the authorization of the owner of the vehicle until 12 hours have elapsed since it was first observed to be immobile or unattended unless the vehicle is creating a hazard, is blocking access to public or private property, or is parked illegally. T.C.A. § 55-16-111.

Within 15 days of taking an abandoned, immobile, or unattended motor vehicle into custody, the sheriff's office must notify, by registered mail, return receipt requested, the last known registered owner of the motor vehicle and all lienholders of record that the vehicle has been taken into custody. The notice must describe the year, make, model and serial number of the motor vehicle; set forth the location of the facility where the motor vehicle is being held; inform the owner and any lienholders of their right to reclaim the motor vehicle within 10 days after the date of the notice upon payment of all towing, preservation and storage charges resulting from placing the vehicle in custody; and state that the failure of the owner or lienholders to exercise their right to reclaim the vehicle within the time provided shall be deemed a waiver by the owner and all lienholders of all right, title and interest in the vehicle and consent to the sale of the motor vehicle at a public auction. T.C.A. § 55-16-105(a).

In the event that there is no response to the notice by registered mail provided for in T.C.A. § 55-16-105(a), then there must be notice by one publication in one newspaper of general circulation in the area where the motor vehicle was abandoned, immobile, or unattended. Such notice must be in a small display ad format, but one advertisement may contain multiple listings of abandoned, immobile, or unattended vehicles. T.C.A. § 55-16-105(c).

The sheriff's office is not required to comply with the requirements of T.C.A. § 55-16-105(a) if it provides pre-seizure notice to the owner of the motor vehicle and all lienholders of record that the vehicle has been found to be abandoned, immobile, or unattended. Any pre-seizure notice must be sent by registered or certified mail, return receipt requested, to the last known address of the owner of record and to all lienholders of record. The notice must be written in plain language and must contain the year, make, model and vehicle identification number of the motor vehicle, if ascertainable; the location of the motor vehicle; and a statement advising the owner that the owner has 10 days to appeal the determination by the sheriff's office that the vehicle is abandoned, immobile, or unattended or to remove the vehicle from the property, or the sheriff's office will take the vehicle into

custody. The notice must further inform the owner and any lienholders of their right to reclaim the motor vehicle after it is taken into custody but before it is sold or demolished, upon payment of all towing, preservation, storage or any other charges resulting from placing the vehicle in custody, and state that the failure of the owner or lienholders to exercise their right to reclaim the vehicle shall be deemed a waiver by the owner and all lienholders of all right, title and interest in the vehicle and consent to demolition of the vehicle or its sale at a public auction. If the owner or lienholder cannot be located through the exercise of due diligence, notice by publication must be given as set out in T.C.A. § 55-16-105(c). If the owner or lienholder of an abandoned, immobile, or unattended motor vehicle fails to appeal the determination that the vehicle is abandoned, immobile, or unattended or fails to remove the motor vehicle within the time allowed for an appeal, the sheriff's office may take the vehicle into custody. If an appeal is made, the motor vehicle may not be taken into custody while the appeal is pending. Failure to appeal within the specific time period shall, without exception, constitute waiver of the right of appeal. T.C.A. § 55-16-105(b).

When the sheriff, deputy sheriff, or towing company contracting with the sheriff's office takes possession of a vehicle found abandoned, immobile, or unattended, an employee of the sheriff's office must verify ownership of the vehicle through the Tennessee Information Enforcement System (TIES) and must place the ownership information on the towing sheet or form. The sheriff's office must also provide the ownership information to any towing company or garagekeeper with whom the sheriff's office has a contract. If the sheriff's office attempts to verify ownership information through the Tennessee Information Enforcement System and the response is "Not on File," the sheriff's office must contact the Department of Safety Title and Registration Division which will search records not contained in Tennessee Information Enforcement System for the ownership information. If the Title and Registration Division locates ownership information through this search, it will notify the sheriff's office, and the sheriff's office must distribute the information as discussed above. T.C.A. § 55-16-105(e).

In addition to the notification requirements set forth in T.C.A. § 55-16-105(a), any garagekeeper or towing firm that has in its possession an abandoned, immobile or unattended motor vehicle taken into custody by the sheriff's office, and in whose possession the vehicle was lawfully placed by the sheriff's office, must, within 15 days of receiving possession of the vehicle, provide notice to the last known registered owner of the motor vehicle and all lienholders of record. All the notification requirements included in T.C.A. § 55-16-105(a) apply to the notice required to be provided by a garagekeeper or towing firm. T.C.A. § 55-16-105(f).

Regulation of Private Security Guards.

When a security guard is working in a county other than the security guard's primary county, the sheriff of the county in which the security guard is working must be notified in writing by the employer of the security guard within five days of the date of first service where the security guard will be assigned and the length of the assignment, unless other arrangements are made with the sheriff. In Davidson County the chief of police must be

notified. The sheriff and his or her deputies are required to recognize the state-issued security armed card as valid in their jurisdiction while any security guard is traveling to or from a job site and while performing duties while at the job site, or while any representative of a security company, supervisor or officers are traveling to or from job sites or operating as a street patrol service. T.C.A. § 62-35-131(b).

The sheriff may require an individual to present proof of compliance with Title 62, Chapter 35. However, the sheriff is required to waive the provisions relative to training for those individuals properly and duly registered and in possession of a valid armed registration card. But, if a valid objection exists, the sheriff must inform the commissioner of commerce and insurance or the commissioner's designee within 10 days and provide a written explanation of the sheriff's objection. A security guard may not work in any jurisdiction in which the sheriff has a pending objection to the training qualifications of the security guard. T.C.A. § 62-35-131(c) and (d).

Seizure of Conveyance Used in Robbery or Felony Theft.

Subject to the discretion of the court, where there is a final judgment of conviction, the sheriff is authorized, upon process issued by the court having jurisdiction over the property, to seize any conveyance, including a vehicle, aircraft or vessel that was used to transport, conceal or store money or goods that were the subject of a robbery offense under Title 39, Chapter 13, Part 4, or felony theft under Title 39, Chapter 14, Part 1. Seizure without process may be made if the seizure is incident to an arrest or a search under a search warrant. T.C.A. §§ 40-33-101 and 40-33-102.

A conveyance taken or detained by the sheriff under T.C.A. § 40-33-102 is not subject to replevin but is deemed to be in the custody of the sheriff, subject only to the orders and decrees of the court that has jurisdiction over the property. T.C.A. §§ 40-33-104(a) and 40-33-106. See *Knobler v. Knobler*, 697 S.W.2d 583, 586 (Tenn. Ct. App. 1985) (Property is in *custodia legis* if it has been lawfully taken by virtue of legal process.). When the sheriff seizes a conveyance pursuant to T.C.A. § 40-33-102, the sheriff may (1) place the conveyance under seal, (2) remove the conveyance to a place designated by the court; or (3) take custody of the conveyance and remove it to an appropriate location for disposition in accordance with law. T.C.A. § 40-33-104(b).

When the sheriff seizes a conveyance pursuant to T.C.A. § 40-33-102, the sheriff is required to give the person in possession of the conveyance, if any, a receipt. The receipt must state a general description of the seized conveyance, the reasons for the seizure, the procedure by which recovery of the conveyance may be sought, including the time period in which a claim for recovery must be presented, and the consequences of failing to file within the time period. If the person found in possession of the conveyance is not the sole unencumbered owner of the conveyance, the court having jurisdiction over the property is required to make a reasonable effort to notify the owner or lienholder of the seizure by furnishing all parties known to have an interest in the conveyance with a copy of the receipt. A copy of the receipt must be filed with the clerk of the court having jurisdiction over the property and shall be open to the public for inspection. T.C.A. § 40-33-107(1).

Any person claiming a seized conveyance may, within 15 days after receiving notification of seizure, file with the court a claim in writing requesting a hearing and stating the person's interest in the seized conveyance. The claimant must also file a cost bond with one or more good and solvent sureties in the sum of \$250 made payable to the state. An indigent person may file a claim *in forma pauperis* by filing an affidavit stating that they are unable to bear the cost of the proceeding. T.C.A. § 40-33-107(3). The court must set a date for a hearing within 45 days from the day a claim requesting a hearing is filed. T.C.A. § 40-33-107(4). *See also* T.C.A. § 40-33-108. In the event the decision of the court is favorable to the claimant, the clerk of the court is required to deliver the seized conveyance to the claimant. If the ruling of the court is adverse to the claimant, the clerk of the court directs the sheriff to sell or dispose of the conveyance. The expenses of storage, transportation, etc., are adjudged as part of the cost of the proceeding. T.C.A. § 40-33-107(5). If no claim is filed, the conveyance is forfeited without further proceedings and is sold or disposed of as provided in Title 40, Chapter 33, Part 1. T.C.A. § 40-33-109.

Seizure of Controlled Substances and Related Property.

The sheriff is authorized, upon process issued by the court having jurisdiction over the property, to seize:

- (1) All controlled substances that have been manufactured, distributed, dispensed or acquired in violation of Title 39, Chapter 17, Part 4 or Title 53, Chapter 11, Parts 3 and 4;
- (2) All raw materials, products and equipment of any kind that are used, or intended for use, in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance in violation of Title 39, Chapter 17, Part 4 or Title 53, Chapter 11, Parts 3 and 4;
- (3) All property that is used, or intended for use, as a container for the property described above;
- (4) All conveyances, including aircraft, vehicles or vessels, that are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale or receipt of the property described above;
- (5) All books, records, and research products and materials, including formulas, microfilm, tapes and data that are used, or intended for use, in violation of Title 39, Chapter 17, Part 4 or Title 53, Chapter 11, Parts 3 and 4;
- (6) Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of the Tennessee Drug Control Act of 1989, compiled in Title 39, Chapter 17, Part 4, and Title 53, Chapter 11, Parts 3 and 4, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to

facilitate any violation of the Tennessee Drug Control Act, compiled in Title 39, Chapter 17, Part 4, and Title 53, Chapter 11, Parts 3 and 4; and

(7) All drug paraphernalia as defined by T.C.A. § 39-17-402.

T.C.A. § 53-11-451(a). See *Payne v. Breuer*, 891 S.W.2d 200, 203 (Tenn., 1994) (The above statute clearly requires that a warrant be obtained prior to any seizure made under it unless one of the stated exceptions applies.).

Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon Title 39, Chapter 17, Part 4, or Title 53, Chapter 11, Parts 3 and 4;

(3) The sheriff has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) The sheriff has probable cause to believe that the property was used or is intended to be used in violation of Title 39, Chapter 17, Part 4, or Title 53, Chapter 11, Parts 3 and 4.

T.C.A. § 53-11-451(b). In *Fuqua v. Armour*, 543 S.W.2d 64, 68 (Tenn. 1976), the Tennessee Supreme Court held that T.C.A. § 52-1443(b)(4) [the earlier version of T.C.A. § 53-11-451(b)(4)] is constitutional only if the statute is construed to include an "exigent circumstances" requirement. The court stated:

T.C.A. § 52-1443(b)(4) should not be construed as authorizing the seizure of an automobile without a warrant under circumstances such as those disclosed in the facts of this case. The fact that probable cause exists for seizure is not enough; there must also exist "exigent circumstances"; therefore, T.C.A. § 52-1443(b)(4) should be construed as authorizing a seizure without a warrant, upon probable cause, only when "exigent circumstances" exist justifying summary seizure. "No amount of probable cause can justify a warrantless search or seizure, absent 'exigent circumstances.'" *Coolidge v. New Hampshire*, [403 U.S. 443, 468 (1971)]. Thus construed and restricted, T.C.A. § 52-1443(b)(4) may constitutionally be applied.

Fuqua, 543 S.W.2d at 68.

Property taken or detained by the sheriff under T.C.A. § 53-11-451 is not subject to replevin but is deemed to be in the custody of the sheriff subject only to the orders and decrees of the court that has jurisdiction over the property. T.C.A. § 53-11-451(d). See *State v. Vukelich*, 2002 WL 31249910 (Tenn. Crim. App. 2002) (property held in *custodia legis*, or in the custody of the law). When the sheriff seizes property under Title 39, Chapter 17, Part 4, or Title 53, Chapter 11, Parts 3 and 4, the sheriff may (1) place the property under seal, (2) remove the property to a place designated by the sheriff; or (3) take custody of the property and remove it to an appropriate location for disposition in accordance with law. T.C.A. § 53-11-451(d). Regardless of any other method of disposition of the property, the sheriff may, with the permission of the court and under such terms and conditions as are approved by the court, use the property taken or detained in the drug enforcement program of the county. In addition, with the approval of the court having jurisdiction over the property, the sheriff may sell the property and use the proceeds for the drug enforcement program of the county. T.C.A. § 53-11-451(d)(4). See *State v. Blackmon*, 78 S.W.3d 322, 332 (Tenn. Crim. App. 2001) (judicial authorization to use seized property).

Pursuant to T.C.A. § 40-33-201, all personal property, including conveyances, subject to forfeiture under the provisions of T.C.A. § 53-11-451 shall be seized and forfeited in accordance with the procedure set out in Title 40, Chapter 33, Part 2. See *also* Rules of Tennessee Department of Safety Administrative Division, CHAPTER 1340-2-2, The Rules of Procedure for Asset Forfeiture Hearings.

NOTICE OF SEIZURE. Upon the seizure of any personal property subject to forfeiture pursuant to T.C.A. § 40-33-201, the seizing officer must prepare a receipt entitled "Notice of Seizure" and provide the person found in possession of the property, if known, a copy of the receipt. The notice of seizure is a standard form promulgated by the agency charged by law or permitted by agreement with conducting the forfeiture proceeding for the particular property seized. T.C.A. § 40-33-203(a) and (c). The notice of seizure must contain the following:

- (1) A general description of the property seized and, if the property is money, the amount seized;
- (2) The date the property was seized and the date the notice of seizure was given to the person in possession of the seized property;
- (3) The vehicle identification number (VIN) if the property seized is a motor vehicle;
- (4) The reason the seizing officer believes the property is subject to seizure and forfeiture;
- (5) The procedure by which recovery of the property may be sought, including any time periods during which a claim for recovery must be submitted; and

(6) The consequences that will attach if no claim for recovery is filed within the applicable time period.

T.C.A. § 40-33-203(c). See *Holt v. Young*, 2001 WL 1285880, *5 (Tenn. Ct. App. 2001).

Upon the seizure of a conveyance, the seizing officer must make reasonable efforts to determine the owner or owners of the property seized as reflected by public records of titles, registrations and other recorded documents. T.C.A. § 40-33-203(b)(1). If the conveyance seized is a commercial vehicle or common or contract carrier and the person in possession of the vehicle at the time of seizure does not have an ownership interest in the vehicle, the seizing officer must make reasonable efforts to determine the owner of the conveyance and notify the owner of the seizure. If the cargo is not contraband and is not subject to forfeiture under some other provision of state or federal law, the seizing agency must release the cargo to the owner or transporting agent upon request. If the interest of the owner of the commercial vehicle or common or contract carrier is not subject to forfeiture under T.C.A. § 40-33-210(a)(2), then the vehicle or carrier is not subject to forfeiture, and the seizing officer may not seek a forfeiture warrant. The seizing agency must release the vehicle or carrier to the owner or transporting agent upon request. T.C.A. § 40-33-203(b)(2) and (b)(4). For purposes of T.C.A. § 40-33-203(b), "commercial vehicle" includes a private passenger motor vehicle that is used for retail rental for periods of 31 days or less.

If the conveyance seized is a commercial vehicle or common or contract carrier and the person in possession of the vehicle at the time of seizure has an ownership interest in the vehicle, the seizing officer must make reasonable efforts to determine the common or contract carrier responsible for conveying the cargo and notify the carrier of the seizure. If the cargo is not contraband and is not subject to forfeiture under some other provision of state or federal law, the seizing agency must release the cargo to the owner or transporting agent upon request. T.C.A. § 40-33-203(b)(3).

FORFEITURE WARRANT. Once personal property is seized pursuant to the applicable provision of law, no forfeiture action can proceed unless a forfeiture warrant is issued in accordance with T.C.A. § 40-33-204 by a judge who is authorized to issue a search warrant. The forfeiture warrant authorizes institution of the forfeiture proceeding. T.C.A. § 40-33-204(a). General sessions judges may authorize magistrates or judicial commissioners to issue forfeiture warrants. However, prior to such authorization, the general sessions judge must train and certify that the magistrates or judicial commissioners understand the procedure and requirements relative to issuing a forfeiture warrant. T.C.A. § 40-33-204(c)(3).

The officer making the seizure must apply for a forfeiture warrant by filing an affidavit within five working days following the property seizure. The forfeiture warrant is based upon proof by affidavit and must have attached to it a copy of the Notice of Seizure. The affidavit in support of the forfeiture warrant must state the legal and factual basis making the property subject to forfeiture. If the owner or co-owner of the property was not the person in possession of the property at the time of seizure and can be determined from public

records of title, registrations or other recorded documents, the affidavit must state with particular specificity the officer's probable cause for believing that the owner or co-owner of the property knew that such property was of a nature making its possession illegal or was being used in a manner making it subject to forfeiture as well as the legal and factual basis for the forfeiture of such interest. If the interest of a secured party with a duly perfected security interest as reflected in the public records of title, registration or other recorded documents is sought to be forfeited, the affidavit must state with particular specificity the officer's probable cause that the secured party's interest in the property is nevertheless subject to forfeiture as well as the legal and factual basis for the forfeiture of such interest. T.C.A. § 40-33-204(b).

If the seizing officer asserts to the judge that he or she was unable to determine the owner of the seized property or whether the owner's interest is subject to forfeiture within the required five-day period, the judge may grant up to 10 additional days to seek a forfeiture warrant. In order to grant additional time, the judge must find that the seizing officer has exercised due diligence and good faith in attempting to determine the owner of the property or whether the owner's interest is subject to forfeiture and made a factual showing that because of the existence of extraordinary and unusual circumstances an exception to the five-day forfeiture warrant requirement is justified. T.C.A. § 40-33-204(c)(2).

If the person in possession of the property is not the registered owner as determined from public records of titles, registration or other recorded documents, the judge may consider other indicia of ownership that proves that the possessor is nonetheless an owner of the property. Such other indicia of ownership shall include, but is not limited to, the following:

- (1) How the parties involved regarded ownership of the property in question;
- (2) The intentions of the parties relative to ownership of the property;
- (3) Who was responsible for originally purchasing the property;
- (4) Who pays any insurance, license or fees required to possess or operate the property;
- (5) Who maintains and repairs the property;
- (6) Who uses or operates the property;
- (7) Who has access to use the property; and
- (8) Who acts as if they have a proprietary interest in the property.

T.C.A. § 40-33-204(d).

The judge will issue the forfeiture warrant if the judge finds that the offered proof establishes probable cause to believe that the property is subject to forfeiture and if the property is owned by one whose interest is described in public records of titles, registrations or other recorded documents, that the owner's interest is subject to forfeiture. T.C.A. § 40-33-204(c)(1). Once the forfeiture warrant has been issued, the officer must, within seven working days, send the warrant, a copy of the affidavit and the notice of seizure to the Department of Safety Legal Division. The sheriff's office must maintain a copy of the notice of seizure for all property seized at its main office. The notices and receipts are public records. T.C.A. § 40-33-204(g). If no forfeiture warrant is issued and the property is not needed for evidence in a criminal proceeding, the sheriff's office must return the property to the owner, as determined from public records of titles, registration or other recorded documents, or if the owner cannot be determined, to the person in possession of the property at the time of seizure. T.C.A. § 40-33-204(f).

Upon receipt of the documents, the legal division will notify any other owner, as may be determined from public records of titles, registration or other recorded documents, or secured party that a forfeiture warrant has been issued. T.C.A. § 40-33-204(g). Any person asserting a claim to the seized property may, within 30 days of being notified by the legal division that a forfeiture warrant has issued, file a written claim requesting a hearing and stating the person's interest in the seized property for which a claim is made. T.C.A. § 40-33-206(a). See T.C.A. § 40-33-205 regarding interests of a secured party. Only the sheriff or the sheriff's designee may be permitted to negotiate or enter into any type of settlement agreement or agreements prior to the forfeiture hearing. In no event may any officer involved in seizing the property be allowed to negotiate or enter into any type of settlement agreement or agreements prior to the forfeiture hearing. All negotiated settlements by the sheriff's office are subject to the approval of the commissioner of safety. T.C.A. § 40-33-212. If a claim or proof of a security interest is not filed with the legal division within the specified time, the seized property will be forfeited and disposed of as provided by law. T.C.A. § 40-33-206(c).

Within 30 days from the day a claim is filed, the legal division will establish a hearing date and set the case on the docket. T.C.A. § 40-33-207(a). At the hearing, if it is determined that the state has carried the burden of proof with regard to all parties claiming an interest in the property and the ruling of the commissioner of safety is adverse to the claimant or claimants, the property will be sold or disposed of as provided by law. T.C.A. § 40-33-210(d). Once property has been forfeited, it is the duty of the sheriff to remove it for disposition in accordance with the law. T.C.A. § 53-11-451(e).

Seizure of Vehicle Used in the Commission of DUI Offense.

The sheriff is authorized to seize the vehicle used in the commission of a person's second or subsequent violation of T.C.A. § 55-10-401, or the second or subsequent violation of any combination of T.C.A. § 55-10-401 and a statute in any other state prohibiting driving under the influence of an intoxicant. Only POST-certified or state-commissioned law enforcement officers are authorized to seize such vehicles. T.C.A. § 55-10-403(k)(1) and (k)(4). In order for the provisions of T.C.A. § 55-10-403(k)(1) to be

applicable to a vehicle, the violation making the vehicle subject to seizure and forfeiture must occur in Tennessee within five years of the first offense, which must have occurred on or after January 1, 1997. T.C.A. § 55-10-403(k)(2).

All vehicles subject to forfeiture under the provisions of T.C.A. § 55-10-403(k) shall be seized and forfeited in accordance with the procedure set out in Title 40, Chapter 33, Part 2. T.C.A. § 40-33-201. The Department of Safety is designated as the applicable agency, as defined by T.C.A. § 40-33-202, for all forfeitures authorized by T.C.A. § 55-10-403(k). See *also* Rules of Tennessee Department of Safety Administrative Division, CHAPTER 1340-2-2, The Rules of Procedure for Asset Forfeiture Hearings.

See “NOTICE OF SEIZURE” and “FORFEITURE WARRANT” under “Seizure of Controlled Substances and Related Property” for a discussion of the applicable procedure to be used.

Seizure of Vehicle Used by Person Driving on Revoked License.

The sheriff is authorized to seize the vehicle used in the commission of a person's violation of T.C.A. § 55-50-504 when the original suspension or revocation was made for a violation of T.C.A. § 55-10-401 or a statute in another state prohibiting driving under the influence of an intoxicant. A vehicle is subject to seizure and forfeiture upon the arrest or citation of a person for driving while such person's driving privileges are cancelled, suspended or revoked. A conviction for the criminal offense of driving while such person's driving privileges are cancelled, suspended or revoked is not required. T.C.A. § 55-50-504(h).

All vehicles subject to forfeiture under the provisions of T.C.A. § 55-50-504(h) shall be seized and forfeited in accordance with the procedure set out in Title 40, Chapter 33, Part 2. T.C.A. § 40-33-201. The Department of Safety is designated as the applicable agency, as defined by T.C.A. § 40-33-202, for all forfeitures authorized by T.C.A. § 55-50-504(h). See *also* Rules of Tennessee Department of Safety Administrative Division, CHAPTER 1340-2-2, The Rules of Procedure for Asset Forfeiture Hearings.

See “NOTICE OF SEIZURE” and “FORFEITURE WARRANT” under “Seizure of Controlled Substances and Related Property” for a discussion of the applicable procedure to be used.

Shooting Ranges.

Sheriffs are authorized by statute to open their shooting ranges for public use when the range is not being used by the sheriff's personnel. The sheriff may establish reasonable regulations for use of the range in order to promote the full use of the range without interfering with the needs of the sheriff's personnel. The sheriff may also charge a reasonable fee for people or organizations using the range and may require users to make improvements to the range. T.C.A. § 38-8-116.

Special Deputies - Appointment Under T.C.A. § 8-8-212.

On urgent occasions, or when required for particular purposes, the sheriff may appoint as many special deputies as the sheriff deems proper. T.C.A. § 8-8-212(a). No person may serve as a special deputy under this statute unless that person proves to the appointing sheriff financial responsibility as evidenced by a corporate surety bond in no less amount than \$50,000 or by a liability insurance policy of the employer in no less amount than \$50,000. T.C.A. § 8-8-303(c).

Special Deputies - Emergency Appointment Under T.C.A. § 8-22-110.

In cases of great emergencies, such as in the case of a strike, riot, putting down a mob, or other like emergencies, when there is an immediate need for the sheriff to appoint an additional number of deputies to deal efficiently with the situation and to preserve order, the sheriff is authorized to make emergency appointments of special deputies without making application to the court. These special deputies may serve during the term of the emergency only. Once the emergency is over, the sheriff is required to make an itemized statement showing the services of the deputies and the time during which the special deputies served. The itemized statement must be presented to the county mayor for auditing and allowance. The mayor is required to authorize payment of the claims once the mayor is satisfied with the justness of the claims provided that no special deputy appointed by the sheriff may receive more than \$4 per day for services actually performed. T.C.A. § 8-22-110(b).

In-Service Training

Every person who is elected or appointed to the office of sheriff after May 30, 1997, is required, annually during the term of office, to complete a 40-hour in-service training course appropriate for the rank and responsibilities of a sheriff. All such training must be approved by the POST Commission. Any sheriff who does not fulfill the obligations of this annual in-service training shall lose the power of arrest. T.C.A. § 8-8-102(c).

All sheriffs must complete annual in-service training as set forth in T.C.A. § 38-8-111.

Sheriffs successfully completing annual in-service training receive a cash salary supplement in the same manner and under the same conditions as police officers except that the POST Commission makes the funds for sheriff's salary supplements available to the appropriate counties for payment to sheriffs. In performing its duties, the commission recognizes that the sheriff is an elected official without any employing agency. The commission must issue to any sheriff successfully completing recruit training, or possessing its equivalency and completing continuing annual in-service training, a sheriff's certificate of compliance in the manner in which it issues police officers' certificates of compliance. A sheriff already holding any certificate of compliance from the commission may request the commission to recognize the sheriff's certification. A sheriff receiving a certificate of compliance has a continuing duty to meet all requirements as set forth in T.C.A. §§ 38-8-111 and 8-8-102. In the event a person holding a police officer's certificate of compliance assumes the office of sheriff, the commission must substitute a sheriff's

certificate of compliance for the police officer certificate. T.C.A. § 38-8-111(f). See also Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-2-.03 (2).

The failure of a sheriff to successfully complete the in-service training requirement will result in the sheriff's loss of eligibility for the pay supplement set forth in T.C.A. § 38-8-111. The failure of a sheriff to successfully complete another in-service training session within one year will result in loss of certification. T.C.A. § 38-8-107(b).

Duties Upon Leaving Office

Upon leaving office, the sheriff must deliver to the sheriff's successor all books and papers pertaining to the office, all property attached and levied on and in the sheriff's hands unless authorized by law to retain the same, and all prisoners in the jail, and take a receipt therefor, which receipt will be an indemnity to the retiring officer. T.C.A. § 8-8-214. Upon the expiration of the sheriff's term, it is the duty of the sheriff to deliver the jail and the prisoners therein, with everything belonging or pertaining thereto, over to the sheriff's successor or any person duly authorized by law to take charge of the jail. The failure to discharge this duty is a misdemeanor. T.C.A. § 41-4-102. The sheriff is allowed two years from the time of leaving office to close unsettled business, with all the power and subject to all the limitations and restrictions of the actual sheriff. T.C.A. § 8-8-215.

UNEXECUTED PROCESS. The sheriff's power after going out of office is confined to unfinished business. It does not extend to the execution of process not yet commenced. The sheriff cannot execute a *fiery facias* (writ of execution) after the expiration of his term of office unless he has levied it before the expiration of his term. *Todd v. Jackson*, 22 Tenn. 398 (1842) (Indeed the sheriff has no power to execute or return process after he goes out of office. He can do no further official act. He cannot even return writs executed before he ceases to be an officer where the return day comes after he goes out of office. The writs should be delivered, even in such cases, to the new sheriff, who returns it into court.); *Fondrin v. Planters' Bank*, 26 Tenn. 447 (1846) (Held that where a sheriff received an execution before his term of service expired, returnable afterward, that unless he had made a levy before the expiration of his term, he had no power to act on the writ afterward, and that he and his sureties would not be liable on motion for its non-return.); *State ex rel. Nolin v. Parchmen*, 40 Tenn. 609 (1859) (It has been held that where the sheriff's term expires, as in the present case, the only duty imposed upon the outgoing sheriff is to deliver over the process to his successor because he has no power to execute or return the same after his term was at an end unless, while in office, he had begun its execution.); *Haynes v. Bridge, Townley & Co.*, 41 Tenn. 32 (1860).

UNLEVIED EXECUTION. If the outgoing sheriff has not levied an execution before the expiration of his term and the return date is after the expiration of his term, he has no power to act on the writ afterward. His only duty is to deliver it to his successor. This rule applies to all unexecuted process. A failure to execute and return such execution or other process, or deliver it to his successor, is not a breach of the sheriff's bond, and does not

render the sheriff's sureties liable. *Todd v. Jackson*, 22 Tenn. 398 (1842) (If Webb had levied or began the execution of the writ before his term expired, then his securities would have been fixed with the debt.); *Sherrell v. Goodrum*, 22 Tenn. 419 (1842); *Fondrin v. Planters' Bank*, 26 Tenn. 447 (1846); *State ex rel. Nolin v. Parchmen*, 40 Tenn. 609 (1859); *Haynes v. Bridge, Townley & Co.*, 41 Tenn. 32 (1860).

It has been held that the sheriff's failure to deliver an unlevied execution to his successor does not render the sheriff's sureties liable, but the sheriff was liable individually in an action on the case for failure to deliver. *State ex rel. Nolin v. Parchmen*, 40 Tenn. 609 (1859).

SALE AFTER EXPIRATION OF TERM. If the sheriff has levied an execution on personal property and has not sold it before the expiration of his term of office, the sheriff has to sell it afterward and make return in the same manner as if the sheriff's office had continued. A failure to do so renders the sheriff and the sheriff's sureties liable, and they are not discharged from liability by the sheriff's delivery of the writ and goods to the sheriff's successor. *Evans v. Barnes*, 32 Tenn. 292 (1852); *Campbell v. Cobb*, 34 Tenn. 18 (1854); *Testaman v. Holt*, 2 Shannon's Cases 375 (1877) (The officer who commences execution of a writ of *fiery facias* is bound to finish it, and if he has levied writ on debtor's goods, he cannot even deliver writ and goods to his successor in discharge of himself but must sell goods and make proper return in same manner as if his office had continued.). See *Overton v. Perkins*, 18 Tenn. 328 (1837).

A sale of land by a sheriff after the expiration of his term, under a *venditioni exponas* (a writ of execution commanding the sheriff to sell lands that he has taken in execution by virtue of a *fiery facias*) issued upon a levy made by the sheriff while in office is void. *Bank of Tenn. v. Beatty*, 35 Tenn. 305 (1855).

Vacancies

Vacancies can occur in county offices for a variety of reasons. According to statute, any of the following results in a vacancy in office:

- (1) The death of the incumbent;
- (2) The resignation, when permitted by law;
- (3) Ceasing to be a resident of the state, or of the district, circuit, or county for which the incumbent was elected or appointed;
- (4) The decision of a competent tribunal, declaring the election or appointment void or the office vacant;
- (5) An act of the General Assembly abridging the term of office, where it is not fixed by the constitution;

(6) The sentence of the incumbent, by any competent tribunal in this or any other state, to the penitentiary, subject to restoration if the judgment is reversed, but not if the incumbent is pardoned; or

(7) Due adjudication of the incumbent's insanity.

T.C.A. § 8-48-101. As noted earlier, a vacancy also results if an officer fails to satisfy the bond requirement. T.C.A. § 8-19-117.

If the sheriff's office becomes vacant due to death, resignation, incapacity, or other causes, the duties of the office are temporarily discharged by the chief deputy, administrative assistant, or other highest ranking member of the sheriff's office until the sheriff is able to reassume office or until the county legislative body appoints a successor. T.C.A. § 8-8-107. Vacancies in the office of sheriff are filled by the county legislative body, and any person so appointed serves until a successor is elected at the next general election. TENN. CONST., art. VII, § 2; T.C.A. §§ 8-8-106, 5-1-104(b).

See the CTAS *County Government Handbook* for a more detailed discussion of vacancies in county offices.

Removal from Office

According to the state constitution, county officials “shall be removed from office for malfeasance or neglect of duty” as these terms are defined by the legislature. TENN. CONST., art. VII, § 1. Any county official, except those whom the constitution provides are removable only and exclusively by other means, may be ousted for any of the following: (1) knowing or willful misconduct in office; (2) knowing or willful neglect of duties required by law; (3) voluntarily intoxication in a public place; (4) illegal gambling; or (5) commission of an act violating any statute if the act involves moral turpitude. T.C.A. § 8-47-101.

The Ouster statute is a salutary one, but those administering it should guard against its overencroachment. Shreds of human imperfections gathered together to mold charges of official dereliction should be carefully scanned before a reputable officer is removed from office. These derelictions should amount to knowing misconduct or failure on the part of the officer if his office is to be forfeited; mere mistakes in judgment will not suffice.

Vandegriff v. State ex rel. Davis, 206 S.W.2d 395, 397 (Tenn. 1947).

The attorney general, district attorney general, or county attorney may investigate a complaint against a county official after receiving notice in writing that such official has been guilty of any acts, omissions, or offenses set forth in T.C.A. § 8-47-101, discussed above. If upon investigation there is reasonable cause for the complaint, an ouster proceeding may be instituted. T.C.A. § 8-47-103. See *State, ex rel. Estep v. Peters*, 815 S.W.2d 161 (Tenn. 1991) (held that county school superintendent, who knowingly and willfully misapplied public funds without intent to benefit personally from his actions,

engaged in "misconduct" for purposes of ouster statute); *Edwards v. State ex rel. Kimbrough*, 250 S.W.2d 19 (Tenn. 1952) (action under ouster law for removal of sheriff from office for violating his statutory duty in failing to suppress unlawful assembly); *Vandergriff v. State ex rel. Davis*, 206 S.W.2d 395, 397 (Tenn. 1947) ("Where a sheriff has made an honest and reasonably intelligent effort to do his duty, he will not be removed from office by the courts, though his efforts may not have been wholly successful, for his right to hold and continue in office depends upon the good faith of his efforts rather than upon the degree of his success....").

See the CTAS *County Government Handbook* for a more detailed discussion of the ouster of county officials.

Conflicts of Interest

A conflict of interest exists if a county officer or employee is required to supervise or vote on a contract in which he or she has some kind of investment or concern. Most of the time a conflict of interest involves a financial relationship, but the interest may also be one of supervisory control: Is the official in the position of supervising himself or herself? **Under general state law a "direct" conflict of interest is prohibited, while an "indirect" conflict may be allowed if it is disclosed.** The statutory definitions of these terms read as follows:

"Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation.

...
"Indirectly interested" means any contract in which the officer is interested but not directly so

T.C.A. § 12-4-101.

In other words, a direct interest exists any time the county enters into an agreement with a county official personally or with any business in which the official is a sole proprietor, a partner, or the person owning the largest number of corporate shares. Basically, an indirect interest is anything else: It exists in a contract that could result in some type of benefit for a county official but that does not meet the definition for a direct interest.

Conflict of interest issues arise frequently in county government and each factual situation should be considered on an individual basis. However, as a general rule, a county official should determine who has the decision-making authority in a matter and who may derive a direct or indirect benefit from the decision. Penalties for violating conflict of interest rules may be severe, including loss of payment under the contract and dismissal from office. T.C.A. § 12-4-102. In light of these severe penalties, the safest course of action is to err on the side of caution. The attorney general frequently issues conflict of interest opinions

that may provide guidelines in specific situations. If in doubt regarding these issues, check with your county attorney.

Relationship to County Legislative Body and Other Officials

The sheriff must interact with the county mayor and a finance/budget director as well as the county legislative body regarding the sheriff's budget and budget amendments. The exact procedures vary from county to county depending upon whether the county operates under a charter or optional general law regarding budgeting or has a private act dealing with this subject. **However, all sheriffs must submit budget requests in a timely manner in the first half of each calendar year for inclusion in the county's annual budget.** Most counties have budget committees that may recommend appropriations for the sheriff's budget that differ from that submitted by the sheriff. The county legislative body determines the amount of the sheriff's budget, subject to certain restrictions, such as not reducing the sheriff's budget for personnel without the consent of the sheriff and following the requirements of any court order regarding a salary suit for deputies or assistants or any other lawsuit that may have been filed to require the county legislative body to fund an adequate jail or otherwise meet its statutory or constitutional duties. In many counties, depending upon the applicable law, the county mayor has the authority to approve line item amendments to the sheriff's budget within major categories unrelated to personnel costs, whereas major category amendments require the approval of the county legislative body. T.C.A. § 5-9-407.

Since the sheriff waits upon the courts and serves process directed to the sheriff, the sheriff must interact with the judges and chancellors holding court in the county as well as the clerks serving these courts. The clerks of court routinely add sheriff's fees to the bills of costs that are prepared in each case and collect these fees along with the fees of the clerks of court and other costs. Also, by state law the sheriff or deputy must go before an official deemed a "magistrate" to obtain arrest warrants, search warrants, and orders to a jailer to incarcerate a prisoner (mittimus).

The sheriff interacts with the office of the district attorney general in the vast majority of counties wherein the sheriff has law enforcement duties. It is the district attorney's office that prosecutes criminal cases in the courts with criminal jurisdiction that are held in the county. Therefore, a good working relationship with the district attorney's office is vital to successful law enforcement in the county. The district attorney's office also has investigators who can be very valuable in helping the sheriff carry out the sheriff's law enforcement duties.

CHAPTER 3

DEPUTIES AND ASSISTANTS

Employment of Deputies and Assistants

The county Sheriff has two options through which he may obtain authority to employ and compensate personnel to assist him to "properly and efficiently conduct the affairs and transact the business" of his office. T.C.A. § 8-20-101(a) (Supp.1996). The Sheriff may either file a salary petition, which is an adversary proceeding between himself and the county executive; or, if the county executive and the Sheriff agree on the number of deputies and assistants to be employed and the salary to be paid to them, a letter of agreement may be prepared and submitted to the court for approval. T.C.A. § 8-20-101(a)(2) & (c) (Supp.1996).

Shelby County Deputy Sheriff's Ass'n v. Gillless, 972 S.W.2d 683 (Tenn. Ct. App. 1997).

Tennessee Code Annotated section 8-20-101 provides that when the sheriff cannot properly and efficiently conduct the affairs and transact the business of the sheriff's office by devoting his or her entire working time thereto, he or she may employ such deputies and assistants as may be actually necessary to the proper conducting of the sheriff's office. T.C.A. § 8-20-101(a). Like other county officials, the sheriff may employ deputies and other staff under a letter of agreement or a court order. ***The sheriff must file a salary suit or enter into a letter of agreement. Doing nothing is not an option.***

Salary Suits.

"[T]he Sheriff has sole discretion to request the number of assistants he believes are 'actually necessary to the proper conducting' of his office, as well as the salaries he feels are necessary to attract and retain them." *Shelby County Deputy Sheriff's Ass'n v. Gillless*, 972 S.W.2d 683, 686 (Tenn. Ct. App. 1997).

If the sheriff chooses to petition a court for additional deputies or assistants or for greater salaries than the budget adopted by the county legislative body allows, the sheriff must file the petition with the state trial court exercising criminal jurisdiction in the county, either criminal court or circuit court. The petition or application for authority to appoint or employ one or more additional deputies or assistants must be heard and determined by a judge (or chancellor) serving the judicial district in which the petition or application is filed. Public Chapter 276 of the Acts of 2005.

The statutory scheme enacted by the General Assembly for staffing and compensating the sheriff's office through a salary suit is clear. The sheriff must demonstrate that he or she cannot properly and efficiently conduct the affairs and transact the business of his or her office by devoting his or her entire working time thereto; and, the sheriff must show the

necessity for the number of deputies and assistants required and the salary that should be paid each. *Boarman v. Jaynes*, 109 S.W.3d 286, 291 (Tenn. 2003). The sheriff is not required to demonstrate an inability to maintain his or her office by using the efforts of his or her staff as constituted and compensated at the time of the filing of the salary suit. *Boarman* at 291. Once the necessity of employing deputies or assistants is established, the appropriate trial court is empowered to determine the number of deputies and assistants needed and their salaries. *Id.* T.C.A. § 8-20-101(a) and (a)(2). See also *Shelby County Deputy Sheriffs' Ass'n v. Shelby County*, 1998 WL 74314, *3 (Tenn. Ct. App. 1998) (The sheriff has an absolute right to petition the court pursuant to T.C.A. § 8-20-101.); *Roberts v. Lowe*, 1997 WL 189345 (Tenn. Ct. App. 1997); *Easterly v. Harmon*, 1997 WL 718430 (Tenn. Ct. App. 1997).

The petition must be filed by the sheriff within 30 days after the date of final adoption of the budget for the fiscal year. No order increasing expenditures shall be effective during any fiscal year if the petition is filed outside the 30-day window unless the order is entered into by agreement of the parties. Also, a new officeholder has 30 days from taking office to file a petition and any order entered with respect to such petition may be effective during the fiscal year in which the petition was filed. T.C.A. § 8-20-101(b).

In the petition, the sheriff must name the county mayor as the party defendant. The county mayor is required to file an answer within five days after service of the petition, either admitting or denying the allegations of the petition or making such answer as the county mayor deems advisable under the circumstances. The petition and the answer are to be docketed, filed, and kept as permanent records of the court. The court must promptly in term or at chambers have a hearing on the application, on the petition and the answer. The court will develop the facts, and the court may hear proof either for or against the petition. The court may allow or disallow the application, either in whole or in part, and may allow the whole number of deputies or assistants applied for or a less number, and may allow the salaries set out in the application or smaller salaries, all as the facts justify. T.C.A. § 8-20-102. See *Moore v. Cates*, 832 S.W.2d 570, 572 (Tenn. Ct. App. 1992) (These statutes do not authorize the Trial Court to identify deputies by name and award them salary increases for a fixed period in the nature of a judgment against the county. Rather, the Trial Judge under the statutes is limited to authorizing the required number of deputies and fixing salaries for the positions.); *Roberts v. Lowe*, 1997 WL 189345 (Tenn. Ct. App. 1997).

The trial court does not have the authority to order retroactive pay for personnel hired by the sheriff prior to the filing of the petition to hire and employ deputies.

The only Tennessee decision directly addressing the question of whether a petition to employ and pay deputies may seek retroactive pay for deputies hired prior to the filing of the petition is *State ex rel. Obion County v. Bond*, 8 S.W.2d 367 (Tenn. 1928). In that case, the court interpreting the predecessor of T.C.A. § 8-20-101, The Public Acts of 1921, chapter 101, section 7, concluded that the intention of the legislature in enacting this legislation was to require the sheriff or other county official named in this

statute to petition the appropriate court to hire additional deputies and for the amount of salary to be paid to the additional deputies in *advance* of the expenditures. Therefore, the court concluded that a petition to employ and pay deputies could not properly seek retroactive pay for deputies hired prior to the filing of the petition. *Id.* at 368. We believe that in light of this interpretation of the statute by the Tennessee Supreme Court, Sheriff Woods was not authorized to petition the Circuit Court at Henderson County for funds to pay the three additional deputies retroactively that he had hired eight months prior to filing the petition. Accordingly, we hold that the trial court erred in granting Sheriff Woods' petition insofar as the petition seeks funds retroactively to pay these three deputies.

Woods v. Smith, 1992 WL 151443 (Tenn. Ct. App. 1992). *See also Roberts v. Lowe*, 1997 WL 189345 (Tenn. Ct. App. 1997) (T.C.A. § 8-20-101, *et seq.* (1993 & Supp. 1996), contains no provision for an award of retroactive raises, nor has Roberts cited any authority in his brief to support the trial court's action. We therefore conclude that the trial court abused its discretion in making the salaries effective retroactively.).

The order of the court is to be spread upon the minutes of the court and may from time to time, upon application, be amended or modified by increasing or decreasing the number of deputies and the salaries paid each. However, the sheriff may, without formal application to the court, decrease either the number of deputies or assistants and the salaries of any of them where the facts justify such course. T.C.A. § 8-20-104. *See Moore v. Cates*, 832 S.W.2d 570 (Tenn. Ct. App. 1992).

Either party dissatisfied with the decree or order of the court in the proceedings set out above has the right of appeal as in other cases. Pending the final disposition of the application to the court, or pending the final determination on appeal, the sheriff may appoint deputies or assistants to serve until the final determination of the case, who shall be paid according to the final judgment of the court. T.C.A. § 8-20-106.

The cost of the suit is paid out of the fees of the sheriff's office. The sheriff is allowed a credit for the same in settlement with the county trustee. T.C.A. § 8-20-107. *See Moore v. Cates*, 832 S.W.2d 570, 572 (Tenn. Ct. App. 1992) (Finally, the judgment against the county for attorney's fees is not authorized. While the Trial Court would have jurisdiction to approve fees for the filing of the application, such fees could only be ordered paid out of the Sheriff's funds, with the proviso that he receive credit for such items of cost in his settlement with the trustee.).

Pursuant to T.C.A. § 8-20-105, it is the duty of the sheriff to reduce the number of deputies and assistants and the salaries paid them when it can be reasonably done. The court or judge having jurisdiction may, on motion of the county mayor and upon reasonable notice to the sheriff, have a hearing on the motion and may reduce the number of deputies or assistants and the salaries paid any one or more when the public good justifies.

FIELD DEPUTIES. Pursuant to T.C.A. § 8-20-103, if the sheriff cannot establish that he or she is unable to personally discharge the duties of the sheriff's office by devoting his or her entire working time thereto, no deputy or deputies or assistants shall be allowed except for field deputy sheriffs. In addressing the former version of T.C.A. § 8-20-103, the Tennessee Court of Appeals noted that the "sheriff must apply to the court for the appointment of field deputy sheriffs, but need not show a necessity for their appointment." *Carter v. Jett*, 370 S.W.2d 576, 581 (Tenn. Ct. App. 1963).

Neither the current nor former version of T.C.A. § 8-20-103 define the term "field deputy sheriffs." However, the former version of the code, T.C.A. § 8-2003, stated that "the sheriff in each county may appoint all necessary field deputies for misdemeanor and criminal work and civil work before the justices of the peace; said field deputies to be appointed as provided under §§ 8-2001 and 8-2002. And in *Jones v. Mankin*, 1989 WL 44924 (Tenn. Ct. App. 1989), the court, in addressing the provisions of T.C.A. 8-20-103, refers to field deputies as patrol deputies. Recent appellate court cases dealing with salary suits filed by sheriffs have overlooked or failed to address the clear and unambiguous language of T.C.A. § 8-20-103, which does not require the sheriff to demonstrate an inability to discharge the duties of his or her office by devoting his or her entire working time thereto before the court is authorized to award the sheriff additional field deputies, and instead have focused on the language of T.C.A. § 8-20-101 which does require the sheriff to meet the aforementioned threshold showing before the court is authorized to award the sheriff additional field deputy sheriffs.

Letters of Agreement.

In 1993, the General Assembly amended T.C.A. § 8-20-101, adding the language that is now codified in subsection (c), in order to provide county elected officials with an alternate method of obtaining the authority to employ and compensate personnel. **If the sheriff agrees with the number of deputies and assistants and the compensation and expenses related thereto, as set forth in the budget adopted by the county legislative body, a court order is not necessary. Instead of filing a petition in court, the sheriff can enter into a letter of agreement with the county mayor using a form prepared by the comptroller of the treasury, setting forth the fact that they have reached an understanding in this regard.** The letter is then filed with the court. Sheriffs must file their letters of agreement with the circuit court except in counties where criminal courts are established, in which case the sheriff must file the letter of agreement with the criminal court. T.C.A. § 8-20-101(c)(1) and (c)(2). A sample letter is provided in the Appendix.

Funding for Salaries - Writ of Mandamus.

The county legislative body is required by law to fund authorized expenses fixed by law for the operation of the sheriff's office, including the salary of all the sheriff's deputies. T.C.A. § 8-24-103(a)(1). *State ex rel. Ledbetter v. Duncan*, 702 S.W.2d 163, 165 (Tenn. 1985) (We hold that the provision requires the county legislative body to fully fund the salaries of all deputies as set by the circuit or criminal court pursuant to T.C.A. Chapter 20 of Title 8.). **The county legislative body may not adopt a budget that reduces below**

current levels the salaries and number of employees in the sheriff's office without the sheriff's consent. In the event the county legislative body fails to budget any salary expenditure that is a necessity for the discharge of the statutorily mandated duties of the sheriff, the sheriff may seek a writ of mandamus to compel such appropriation. T.C.A. § 8-20-120. The writ of mandamus authorized by T.C.A. § 8-20-120 "is the same writ that has been recognized by the courts for many years. It can only be sought after the sheriff has gone through the local budget process and the application procedure required by" T.C.A. § 8-20-101(a)(2). *Jones v. Mankin*, 1989 WL 44924, *3 (Tenn. Ct. App. 1989) (If the county legislative body refuses to appropriate the funds required by the court's order, the sheriff may seek a writ of mandamus to compel it to do so.). See also *State ex rel. Ledbetter v. Duncan*, 702 S.W.2d 163, 165 (Tenn. 1985); *Sapp v. State ex rel. Nipper*, 524 S.W.2d 652, 653-54 (Tenn. 1975); *Atkinson v. McClanahan*, 520 S.W.2d 348, 353 (Tenn. Ct. App. 1974) (It would seem to us that the remedy of the Sheriff, in the event the decree of the Circuit Judge becomes final and is not carried out and its implementation refused, would be to file a bill for mandamus.); Op. Tenn. Atty. Gen. 04-104 (July 2, 2004).

Removal of Deputies and Assistants

The sheriff may terminate, at will, any and all deputies and assistants in his or her office. T.C.A. § 8-20-109. However, in any county having a civil service system for the sheriff's office pursuant to Title 8, Chapter 8, Part 4, or other provision of general law or the provisions of a private act, or a civil service system for all county employees pursuant to the provisions of a private act, the employment or termination of employment of any deputy or assistant in any offices covered by Title 8, Chapter 20 shall be pursuant to the provisions of such civil service system. The provisions of T.C.A. § 8-20-109 do not apply to counties with civil service. T.C.A. § 8-20-112. See *Patterson v. Rout*, 2002 WL 1592674 (Tenn. Ct. App. 2002).

Patronage Dismissals.

A sheriff may not dismiss a nonpolicymaking employee for political reasons. Such an unlawful firing may subject the sheriff and the county to liability under the federal civil rights laws.

At the same time that the [United States Supreme] Court has held that "the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments," *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), it has held that this protection does not extend to public employees who occupy "policymaking" positions in the government, *id.* at 367; see also *Rutan v. Republican Party*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (extending *Elrod'* s reasoning to promotions and demotions). Where the effective performance of a particular office demands affiliation with a particular party or subscription to a particular policy, the Constitution permits dismissal based on political grounds. See *Branti v. Finkel*, 445 U.S. 507, 518, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

Cagle v. Headley, 2005 WL 2108367, *2 (6th Cir. 2005). See also *Garvey v. Montgomery*, 128 Fed.Appx. 453, 463 (6th Cir. 2005) (The First Amendment protection against political discharges does not extend to public employees who hold positions in which "an employee's private political beliefs would interfere with the discharge of his public duties." This principle is known as the *Branti/Elrod* exception to the general rule that public employees may not be discharged on account of their political affiliations.); *Justice v. Pike County Bd. of Educ.*, 348 F.3d 554, 559 (6th Cir. 2003) ("Limiting patronage dismissals to policymaking positions is sufficient to achieve the valid governmental objective of preventing holdover employees from undermining the ability of a new administration to implement its policies." *Id.* In contrast, "[n]onpolicymaking individuals usually have only limited responsibilities and are therefore not in a position to thwart the goals of the in-party.") (citations omitted).

The Sixth Circuit Court of Appeals has held "that a deputy sheriff does not fall within the policymaking exception where 'the position of deputy sheriff was at the bottom of the chain of command in the [department],' the primary duty of the deputy sheriff was 'to patrol the roads of the county' and the record did not indicate that the deputy had 'the amount of discretion or policymaking authority[] that would make political affiliation an appropriate requirement for employment.'" *Cagle* at *3 (6th Cir. 2005) quoting *Hall v. Tollett*, 128 F.3d 418, 429 (6th Cir. 1997). See also *Heggen v. Lee*, 284 F.3d 675, 684 (6th Cir. 2002) (noting that serving civil and arrest warrants, transporting prisoners and providing courtroom security did not make a deputy sheriff a policymaker); *Sowards v. Loudon County*, 203 F.3d 426, 438 (jailer was not a policymaker where her duties included "providing for the needs and safety of the jail's inmates, such as providing food, bedding, and support for the inmates, taking precautions to ensure their safety, and arranging communications between inmates and the public"); *Ruffino v. Sheahan*, 218 F.3d 697, 700 (7th Cir. 2000) ("We note as well that it would be a remarkable extension of the policymaker line of cases to hold that the hundreds of deputy sheriffs in Cook County are all policymakers, for whom the Sheriff has a legitimate interest in insisting on personal and political loyalty.").

By contrast, the Court has held that the position of a chief deputy does qualify as a policymaking position where the employee "assumed the sheriff's duties in the sheriff's absence, supervised the deputies, scheduled their shifts, and recommended employees for dismissal to the sheriff." *Hall v. Tollett*, 128 F.3d 418, 425 - 426 & n. 4 (6th Cir. 1997). "A sheriff, no less than a governor, is 'entitled to select a person whom he kn[ows] to share his political beliefs to occupy a position with such high levels of discretion and policymaking authority.'" *Cagle* at *4 quoting *Hall* at 426. In *Cagle*, the Court found that the position of lieutenant in the sheriff's office qualified as a policymaking position and held that "political affiliation" was an appropriate requirement for employment where the employee attended weekly and often confidential meetings, possessed the authority to discipline other employees and had managerial power over a division. *Cagle* at *4. The Court noted that although lieutenants in the sheriff's office were required to handle pedestrian tasks as well as substantial ones and that they were required to "pursue the goals and objectives" of the sheriff, these facts did not prevent their position from being a policymaking one. See also *Garvey v. Montgomery*, 128 Fed.Appx. 453, 463 (6th Cir. 2005) (Former county employee's

position of administrative officer was one in which an employee's private political beliefs would interfere with the discharge of his public duties, and thus, the First Amendment protection against political discharges did not extend to the employee); *Fuerst v. Clarke*, 389 F.Supp.2d 1042 (E.D. Wis. 2005) (Promotion to sergeant sought by deputy sheriff was for a policymaking position exempt from First Amendment protections, and thus deputy sheriff could not maintain claim against county sheriff, alleging retaliatory failure to promote due to deputy's political activities; sergeants in position at issue worked autonomously and operated with some discretion when performing their duties and had meaningful input into implementation of department policy.).

Deputy Sheriffs

Definition.

A deputy sheriff may be deemed a full-time police officer under the laws pertaining to peace officers. "Full-time police officer" means any person employed by any municipality or political subdivision of the state of Tennessee whose primary responsibility is to prevent and detect crime and to apprehend offenders, and whose primary source of income is derived from employment as a police officer. T.C.A. § 38-8-101(1). See Op. Tenn. Atty. Gen. No. 85-224 (July 30, 1985).

Minimum Qualifications.

After July 1, 1981, any person employed as a full-time deputy sheriff shall:

- (1) Be at least 18 years of age;
- (2) Be a citizen of the United States;
- (3) Be a high school graduate or possess its equivalency which shall include a general educational development (GED) certificate;
- (4) Not have been convicted of or pleaded guilty to or entered a plea of nolo contendere to any felony charge or to any violation of any federal or state laws or city ordinances relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances;
- (5) Not have been released or discharged under any other than honorable discharge from any of the armed forces of the United States;
- (6) Have their fingerprints on file with the Tennessee Bureau of Investigation;
- (7) Have passed a physical examination by a licensed physician;
- (8) Have a good moral character as determined by a thorough investigation conducted by the employing agency; and

(9) Be free of all apparent mental disorders as described in the Diagnostic and Statistical Manual of Mental Disorders, Third Edition (DSM-III) of the American Psychiatric Association. An applicant must be certified as meeting these criteria by a qualified professional in the psychiatric or psychological field.

T.C.A. § 38-8-106. See *also* Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-2-.03 (1).

The minimum standards set forth in T.C.A. § 38-8-106 and in Rule 1110-2-.03 (1) are mandatory and are binding upon the county. Any person who appoints an applicant, who, to the knowledge of the appointor, fails to meet the minimum standards as set forth in T.C.A. § 38-8-106 and in Rule 1110-2-.03 (1), and any person who signs the warrant or check for payment of salary of a person who, to the knowledge of the signer, fails to meet the qualifications as a deputy sheriff as provided in T.C.A. § 38-8-106 and in Rule 1110-2-.03 (1), commits a Class A misdemeanor and upon conviction shall be subject to a fine not exceeding \$1,000. T.C.A. § 38-8-105(a) and (b). This provision does not apply to any officer hired by a county prior to July 1, 1982. T.C.A. § 38-8-105(c). See *also* Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-2-.01 and Rule 1110-2-.02. Nothing in Title 38, Chapter 8, precludes an employing agency from establishing qualifications and standards for hiring and training deputy sheriffs that exceed those set by the POST Commission. T.C.A. § 38-8-109.

Recruit Training and Certification.

Pursuant to T.C.A. § 38-8-107, **all deputy sheriffs employed after July 1, 1983, must successfully complete recruit training within one year of the date of their employment.** However, pursuant to POST rules, any officer seeking certification under the POST rules must satisfactorily complete the basic course within six months of initial employment as a law enforcement officer. During this initial six-month period prior to attending the basic course, the recruit must be paired with a field training officer or other certified senior officer. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-2-.03 (3).

The POST Commission will issue a certificate of compliance to any person who meets the qualifications for employment and satisfactorily completes an approved recruit training program. The commission may issue a certificate to any person who has received training in another state provided that the commission makes a determination that the training was at least equivalent to that required by the commission for approved police education and training programs in this state. In addition, the person seeking certification must satisfactorily comply with all of the other requirements of Title 38, Chapter 8. T.C.A. § 38-8-107. See *also* Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-2-.03 (1).

Oath.

Deputy sheriffs must take the same oaths as the sheriff, which are certified, filed, and endorsed in the same manner as the sheriff's. T.C.A. § 8-18-112. An example of the full oath of office for a sheriff and regular deputies is provided in the appendix to this handbook.

Bond.

There is no general law requirement that regular deputy sheriffs be bonded. However, T.C.A. § 39-17-1315, which authorizes the sheriff to issue a deputy a written directive authorizing the deputy to carry a handgun, refers to "bonded and sworn" deputy sheriffs. Based on this one reference alone, it is unclear whether or not a deputy sheriff must be bonded prior to being authorized to carry a handgun. Due to the lack of guidance from the legislature, the decision to bond or not bond each deputy sheriff is best left to the discretion of the sheriff and the county legislative body. *But see State ex rel. v. Slagle*, 89 S.W. 326 (Tenn. 1905) (makes reference to the statutory authority of the sheriff for the appointment of deputy sheriffs; held that, notwithstanding the fact that the bond of such deputies ran in the name of the sheriff to whom the deputy is responsible for his official acts, his rights and powers derive from the law and his duties are those of an officer of the law).

In-Service Training Requirements.

All deputy sheriffs, except those who have attended the Basic Law Enforcement School within the calendar year must successfully complete a POST-approved 40-hour in-service training session appropriate for their rank and responsibilities each calendar year. The failure of an individual deputy to successfully complete the annual in-service training requirement will result in the deputy's loss of eligibility for the pay supplement provided for in T.C.A. § 38-8-111. The failure of this individual deputy to successfully complete another in-service training session within one year will result in the loss of that deputy's certification. Each sheriff's office participating in the POST Commission's training program must file a letter of intent with the commission stating its commitment to mandatory training for all law enforcement officers. The failure of several deputies from one sheriff's office will be cause for the commission to examine that sheriff's office training policy and may result in the office being declared out of compliance with state standards and thereby not eligible to participate in the commission's training programs at no cost. Any travel expense is the responsibility of the individual sheriff's office. T.C.A. § 38-8-107; Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.01 (1) and Rule 1110-4-.12.

Certified or recognized courses must be at least 40 hours in duration and established by the sheriff's office to meet the educational requirements normal to the deputy's position and responsibility in accord with the course curriculum requirements established by the POST Commission. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.01 (2). Each in-service training session must include at least eight hours of firearms training requalification with the deputy's service handgun and any

other firearm authorized by the sheriff's office. Each deputy must score at least 75 percent to qualify. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.02. Each in-service training session must also include training in child sexual abuse. This training is mandatory for a deputy to be eligible for the salary supplement authorized in T.C.A. § 38-8-111. T.C.A. § 37-1-603(b)(4)(B); Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.05 (4). In addition, pursuant to Public Chapter 243 of the Acts of 2005, each deputy who operates an emergency vehicle must receive no less than two hours of annual training and pass a comprehensive examination covering all applicable laws pertaining to emergency vehicles, the operation of the vehicle in emergency and nonemergency situations, and response to actions of nonemergency vehicles. Each deputy must obtain a passing grade of at least 75 percent on all tests, 75 percent on the firearms qualification, and 75 percent on the defensive driving qualification. The in-service training session is not complete until the officer has taken the test and qualified with his firearm. Any deputy who fails the test or firearms or driving qualification must make up the failing score during the calendar year in order to keep their certification. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.12.

Attendance records must be maintained on each deputy and must be submitted to the POST Commission. An attendance roster listing the names of all deputies attending a scheduled block of training on a particular day must be maintained and kept on file by the sheriff's office. The sheriff and the instructor must certify to the POST Commission those deputies who successfully complete the in-service training. The certification must include the name of the reporting sheriff's office and the name, rank, and Social Security number of each deputy along with their test scores and firearm qualification score. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.06.

If a deputy attends a specialized school appropriate to his or her rank and responsibility, the eligibility of the school must be approved by the commission. Only schools of a law enforcement related nature will be considered for in-service credit toward meeting the 40 hour training requirement. A curriculum of each school and proof of successful completion by the individual attendee is required. See Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.09.

Any deputy who successfully completes a law enforcement course at any accredited institution of higher education, college, or university may be considered for annual fulfillment of all or a portion of the required 40 hours in-service credit hours, not including firearms training. See Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.11.

Requests for waivers of in-service training for a calendar year on the basis of medical disability must be submitted to the POST Commission by the chief administrative officer of the sheriff's office explaining the individual case. A doctor's statement must accompany the request. Each request will be considered individually. Requests for the waiver of in-service training for a calendar year on the basis that a deputy will retire during that year must be submitted by the deputy to his or her chief administrative officer stating the

intention to retire prior to completion of in-service training for the calendar year. If the request is approved by the sheriff's office, then a letter must be forwarded to the POST Commission for approval. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.10.

Authority to Carry Handguns.

Pursuant to T.C.A. § 39-17-1315(a)(1), **the sheriff has the authority to authorize the carry of handguns by bonded and sworn deputy sheriffs who have successfully completed and continue to successfully complete on an annual basis a firearm training program of at least eight hours duration.** The sheriff's authorization must be made by a written directive, a copy of which must be retained by the sheriff's office. Pursuant to the sheriff's written directive, POST certified deputy sheriffs may carry their handgun at all times, regardless of the deputy's regular duty hours or assignments. Nothing in T.C.A. § 39-17-1315(a)(1) prohibits the sheriff from placing restrictions on when or where a deputy may carry his or her service handgun. See *also* Op. Tenn. Atty. Gen. No. 99-024 (February 16, 1999).

POST-certified deputy sheriffs may carry firearms at all times and in all places within Tennessee, on-duty or off-duty, regardless of the deputy's regular duty hours or assignments **except** as provided by T.C.A. § 39-17-1350(c), federal law, lawful orders of court or the written directive of the sheriff. T.C.A. § 39-17-1350(a) and (d). (Note: Reserve, auxiliary, part-time and temporary deputy sheriffs may carry a weapon only when they are on-duty.)

The authority conferred by T.C.A. § 39-17-1350 does not extend to a deputy sheriff:

- (1) Who carries a firearm onto school grounds or inside a school building during regular school hours unless the deputy immediately informs the principal that the deputy will be present on school grounds or inside the school building and in possession of a firearm. If the principal is unavailable, the notice may be given to an appropriate administrative staff person in the principal's office;
- (2) Who is consuming beer or an alcoholic beverage or who is under the influence of beer, an alcoholic beverage, or a controlled substance;
- (3) Who is not engaged in the actual discharge of official duties as a law enforcement officer while within the confines of an establishment where beer or alcoholic beverages are sold for consumption on-the-premises; or
- (4) Who is not engaged in the actual discharge of official duties as a law enforcement officer while attending a judicial proceeding.

T.C.A. § 39-17-1350(c). See *also* T.C.A. § 39-17-1321 prohibiting the possession of a handgun while under the influence of alcohol or any controlled substance.

In addition to the restrictions contained in T.C.A. § 39-17-1350(c), an off-duty law enforcement officer cannot possess:

- (1) A firearm within the confines of a building open to the public where liquor, wine or other alcoholic beverages, or beer are served for on-premises consumption;
- (2) A firearm inside any room in which judicial proceedings are in progress;
- (3) A weapon or firearm on public or private school property;
- (4) A weapon in or on the grounds of any public park, playground, civic center or other building facility, area or property owned, used or operated by any municipal, county or state government, or instrumentality thereof, for recreational purposes.

T.C.A. §§ 39-17-1305; 39-17-1306; 39-17-1309; 39-17-1311. Op. Tenn. Atty. Gen. No. 99-024 (February 16, 1999).

Finally, T.C.A. §§ 39-17-1315(b)(2) and 39-17-1359 authorize private entities and governmental entities to prohibit the possession of weapons by any person at meetings conducted by, or on premises owned, operated, managed or under the control of the private entity or governmental entity. Notice of such prohibition must be posted and must be displayed in prominent locations. The attorney general has opined that T.C.A. § 39-17-1359 does not allow private entities or governmental entities to prohibit the possession of weapons by law enforcement officers on their property. The Attorney General has also opined that T.C.A. § 39-17-1315(b)(2) does not allow private entities or governmental entities to prohibit the possession of weapons by state law enforcement officers or POST-certified local law enforcement officers on their property. See Op. Tenn. Atty. Gen. No. 00-161 (October 17, 2000). Based upon the attorney general's reasoning, T.C.A. § 39-17-1315(b)(2) does allow private entities or governmental entities to prohibit the possession of weapons by off-duty non-POST certified local law enforcement officers (i.e., reserve, auxiliary, part-time and temporary deputy sheriffs and police officers) on their property.

Salary Supplement.

Every county that requires all deputy sheriffs to complete an annual 40-hour in-service training course appropriate to the deputy's rank and responsibility at a school certified or recognized by the POST Commission is entitled to receive 5 percent of each qualified deputy's annual salary, but not more than \$600 for any one deputy in any one year, from the commission to be paid to each deputy in addition to the deputy's regular salary. In the event that 5 percent of a qualified deputy's annual salary does not amount to \$600, the deputy is nevertheless entitled to receive the full amount of \$600 as is any other qualified deputy, subject only to the specific appropriation of funds in the general appropriations act for the purpose of implementing the provisions of Title 38, Chapter 8. T.C.A. §§ 38-8-111(a)(1) and 38-8-111(c); Rules of the Tennessee Peace Officer Standards and Training

Commission, Rule 1110-6-.01. *Carter v. McWherter*, 859 S.W.2d 343 (Tenn. Ct. App. 1993).

To be eligible to receive the salary supplement, a deputy sheriff must successfully complete 40 hours of in-service training during the calendar year. A deputy who has not completed eight months of full-time service during the calendar year is not eligible to receive the salary supplement except in the case of the deputy's death, retirement, or medical disability provided that the 40 hours of in-service training was completed prior to the death, retirement, or medical disability. Upon the submission of the proper documentation by a deputy, the commission will include time spent in active military service when calculating the required eight months of full-time service. Deputies who attend the Basic Law Enforcement School are not eligible to receive the salary supplement during that calendar year and are not required to attend in-service training during that year. These deputies are eligible to receive the salary supplement the following calendar year after the successfully completing 40 hours of in-service training. Deputies terminated for cause or decertified during the calendar year are not eligible to receive the salary supplement. Notwithstanding any other provision of law, rule or regulation to the contrary, any deputy sheriff who served or serves on active duty in the armed forces of the United States during Operation Enduring Freedom or any other period of armed conflict prescribed by presidential proclamation or federal law that occurs following the period of Operation Enduring Freedom will receive the cash salary supplement if his or her service prevented or prevents attending the in-service training program. T.C.A. § 38-8-111(a)(2) and (a)(3); Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-6-.02.

POST Commission funds made available to the county under T.C.A. § 38-8-111(a) and (b) must be received, held and expended in accordance with the provisions of T.C.A. § 38-8-111(a)-(c), the rules and regulations issued by the commission, and the following specific restrictions:

- (1) Funds provided shall be used only as a cash salary supplement to deputy sheriffs;
- (2) Each deputy sheriff shall be entitled to receive the state supplement which the deputy's qualifications brought to the county;
- (3) Funds provided shall not be used to supplant existing salaries or as substitutes for normal salary increases periodically due to deputy sheriffs; and
- (4) The cash salary supplement shall be considered as a bonus for the successful completion of training and shall not be considered as salary for subsequent years' determination of supplement or retirement purposes.

T.C.A. § 38-8-111(b). See *also* Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-6-.03. All accounts are subject to audit by the state

comptroller, and all records pertaining to salary supplements are subject to inspection by personnel of the POST Commission. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-6-.04.

Off-Duty Status.

There is no statute or rule of law in this state that places a mandatory duty upon police officers to keep the peace when "off duty." "To the contrary, when officers are 'off duty,' our statutes generally treat the officer as an ordinary private citizen and not as an agent or employee of the municipal police department under a general duty to keep the peace." *White v. Revco Discount Drug Centers, Inc.*, 33 S.W.3d 713, 720-721 (Tenn. 2000). "Of course, to say that officers do not continuously function in an official capacity is not to say that off-duty officers are prevented from assuming a duty to remedy a breach of the peace, or that officers are incapable of being summoned to official duty by the municipality. Nevertheless, it is clear that officers are not under a general duty to enforce the law while 'off duty,' and a blanket rule declaring that police officers are under a never-ending duty to keep the peace is contrary to existing Tennessee law." *Id.* at 721.

Off-Duty Employment.

The current state of the law regarding off-duty employment by law enforcement officers indicates that law enforcement agencies may constitutionally restrict or prohibit their law enforcement officers from engaging in secondary employment during off-duty time if, at the time in question, the agency had a clear policy restricting or prohibiting such employment and if the agency can articulate how its policy is rationally related to a legitimate government interest (the "rational basis" test). Courts treat cases involving the issue of secondary employment of law enforcement officers on a case-by-case basis. However, generally speaking, if the two requirements stated above are met, courts have upheld restrictions or even prohibitions on secondary employment set by law enforcement agencies. Op. Tenn. Atty. Gen. No. 01-075 (May 8, 2001).

In two cases, the plaintiffs had worked in the outside employment positions before that employment was prohibited by the public employer, "yet the courts nevertheless held that the plaintiffs' due process rights were not violated by the prohibition." *Allen v. Miami-Dade County*, 2002 WL 732108, *3 (S.D. Fla. 2002) *citing Ammon v. City of Coatesville*, 1987 WL 15032, *4 (E.D. Pa.) and *Ft. Wayne Patrolmen's Ben. Assoc. v. City of Ft. Wayne*, 625 F.Supp. 722, 730 (N.D. Ind. 1986). *See also Shelby County Deputy Sheriffs' Ass'n v. Gilliss*, 2003 WL 21206067 (6th Cir. 2003) (Sheriff's regulation prohibiting full-time deputy sheriffs from wearing uniform while performing off-duty work was not unconstitutional.); *Campbell v. City of Fort Worth*, 69 Fed.Appx. 657 (5th Cir. 2003) (Prohibition on off-duty work by a suspended police officer did not infringe on any interest protected by the Due Process Clause.); *Davis v. Carey*, 63 F.Supp.2d 361 (S.D. N.Y. 1999) (The regulation of police officers' off-duty employment is commonplace and lawful.); *McEvoy v. Spencer*, 49 F.Supp.2d 224, 227 (S.D. N.Y. 1999) (holding that "plaintiff does not have any interest of constitutional dimension in being a private investigator in his off-duty hours" and therefore dismissing the plaintiff's due process claim); *Puckett v. Miller*, 821 S.W.2d 791 (Ky. 1991)

(It is widely recognized that the rights of public employees may be abridged in the interest of preventing conflicts with official duties or promoting some legitimate interest of the governmental employer.); *Decker v. City of Hampton*, 741 F.Supp. 1223 (E.D. Va. 1990) (City police department regulation limiting types of off-duty work in which officers could engage did not deny due process to police detective who wanted to moonlight as private investigator.); *Bowman v. Township of Pennsauken*, 709 F.Supp. 1329 (D. N.J. 1989) (While it may be true that economic factors have forced police officers into the practice of moonlighting, a township has a legitimate interest in regulating its police department, including the off-duty activities of its officers. It is clear that such goals as reducing mental and physical fatigue, limiting litigation and lessening liability insurance expenses serve as legitimate government interests supporting regulation. Because of these legitimate goals, it is also clear that a municipality can regulate and even prohibit off-duty work.) (citations omitted); *Ammon v. City of Coatesville*, 1987 WL 15032 (E.D. Pa.), *aff'd* 838 F.2d 1205 (3d Cir. 1988) (The majority of courts considering the validity of regulations that in some way restrict the outside employment of government employees have upheld the regulations.); *Allison v. Southfield*, 432 N.W.2d 369 (Mich. 1988) (holding that secondary employment rule was not void for vagueness and did not violate due process or equal protection, where police officers were unambiguously prohibited from secondary employment unless prior approval had been obtained); *Rhodes v. Smith*, 254 S.E.2d 49 (S.C. 1979) (Regulations prohibiting all outside employment have been upheld.).

“[P]rivate employers may be held vicariously liable for the acts of an off-duty police officer employed as a private security guard under any of the following circumstances: (1) the action taken by the off-duty officer occurred within the scope of private employment; (2) the action taken by the off-duty officer occurred outside of the regular scope of employment, if the action giving rise to the tort was taken in obedience to orders or directions of the employer and the harm proximately resulted from the order or direction; or (3) the action was taken by the officer with the consent or ratification of the private employer and with an intent to benefit the private employer.” *White v. Revco Discount Drug Centers, Inc.*, 33 S.W.3d 713, 724 (Tenn. 2000).

Reserve, Auxiliary, Part-Time, Temporary Deputy Sheriffs

Definition.

Reserve, auxiliary, part-time and temporary deputy sheriff means any person employed by the county whose primary responsibility is to support the sheriff in preventing and detecting crime, apprehending offenders, and assisting in the prosecution of offenders for appropriate remuneration in measure with specifically assigned duties or job description. **These deputies may not work more than 20 hours per week for a total of not more than 100 hours per month. Any deputy who works in excess of the prescribed maximum hours must be reclassified to full-time status and must meet all the requirements for standards and training as mandated under the law and the Peace Officer Standards and Training Commission rules.** In any situation where a deputy is assigned temporarily for a period of one month or less to work more than 20 hours per week for a total of not more than 100 hours per month, the deputy does not need to be

reclassified to full-time status. T.C.A. § 38-8-101(2); Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-8-.01.

Minimum Qualifications.

After January 1, 1989, any person employed or used as a reserve, auxiliary, part-time or temporary deputy sheriff shall have the same minimum qualifications as a full-time deputy sheriff. T.C.A. § 38-8-106; Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-8-.02.

Reserve, auxiliary, part-time or temporary deputy sheriffs who were employed prior to January 1, 1989, and have had continuous service are exempt from the pre-employment requirements as long as they remain on active service with the sheriff's office that originally employed them. Any reserve, auxiliary, part-time or temporary deputy sheriff who has a break in service of any length whatsoever is required to meet the pre-employment and training standards. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-8-.02.

The minimum standards set forth in T.C.A. § 38-8-106 and in Rule 1110-8-.02 are mandatory and are binding upon the county. Any person who appoints an applicant who, to the knowledge of the appointor, fails to meet the minimum standards as set forth in T.C.A. § 38-8-106 and in Rule 1110-8-.02, and any person who signs the warrant or check for payment of the salary of a person who, to the knowledge of the signer, fails to meet the qualifications as a reserve, auxiliary, part-time or temporary deputy sheriff as provided in T.C.A. § 38-8-106 and in Rule 1110-8-.02, commits a Class A misdemeanor and upon conviction shall be subject to a fine not exceeding \$1,000. T.C.A. § 38-8-105(a) and (b). Nothing in Title 38, Chapter 8, precludes an employing agency from establishing qualifications and standards for hiring and training reserve, auxiliary, part-time or temporary deputy sheriffs that exceed those set by the POST Commission. T.C.A. § 38-8-109.

Training Requirements.

After January 1, 1989, any person newly employed or used as a reserve, auxiliary, part-time or temporary deputy sheriff must receive 40 hours of training in whatever duties they are required by the sheriff's office to perform. This training must be accomplished during the first calendar year of employment. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-8-.03.

Oath.

Reserve, auxiliary, part-time and temporary deputy sheriffs must take the same oaths as the sheriff, which are certified, filed, and endorsed in the same manner as the sheriff's. T.C.A. § 8-18-112. An example of the full oath of office for a sheriff and reserve, auxiliary, part-time and temporary deputies is provided in the appendix to this handbook.

Bond.

There is no general law requirement that reserve, auxiliary, part-time or temporary deputy sheriffs be bonded. However, T.C.A. § 39-17-1315, which authorizes the sheriff to issue a deputy a written directive authorizing the deputy to carry a handgun, refers to “bonded and sworn” deputy sheriffs. Based on this one reference alone, it is unclear whether or not a reserve, auxiliary, part-time or temporary deputy sheriff must be bonded prior to being authorized to carry a handgun. Due to the lack of guidance from the legislature, the decision to bond or not bond each reserve, auxiliary, part-time or temporary deputy sheriff is best left to the discretion of the sheriff and the county legislative body.

In-Service Training Requirements.

After the initial training has been completed, all reserve, auxiliary, part-time and temporary deputy sheriffs are required to attend 40 hours of in-service training each calendar year. This training may be spread over a 12-month period, but must be completed during the calendar year. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-8-.04.

Special Deputies Appointed Under T.C.A. § 8-8-212

On urgent occasions, or when required for particular purposes, the sheriff may appoint as many special deputies as the sheriff deems proper. T.C.A. § 8-8-212(a). See *General Truck Sales, Inc. v. Simmons*, 343 S.W.2d 884 (Tenn. 1961) (“This clearly gives the Sheriff the right, when in his judgment it is necessary, to appoint a Special Deputy for any particular occasion”). See also *Reves v. State*, 79 Tenn. 124, (1883) (“The act of 1870 shows a change of policy by the State, for the sheriff is thereby authorized to appoint as many regular deputies as he pleases, and special deputies on urgent occasions, of which he alone is to judge, ‘or when required for particular purposes.’”); *State v. Kizer*, 36 Tenn. 563 (1857) (“...it is not necessary, to make a valid deputation, that it should appear in the endorsement of the sheriff that an ‘urgent occasion’ existed, but that will be presumed.”).

Definition.

Special deputy means any person who is assigned specific police functions as to the prevention and detection of crime and general laws of this state on a volunteer basis, whether working alone or with other deputies. A special deputy working on a volunteer basis does not receive pay or benefits, except for honoraria, and may be used for an unlimited number of hours. T.C.A. § 38-8-101(3); Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-8-.01.

Minimum Qualifications.

After January 1, 1989, any person employed or used as a special deputy shall have the same minimum qualifications as a full-time deputy sheriff. T.C.A. § 38-8-106; Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-8-.02.

Special deputies who were employed prior to January 1, 1989, and have had continuous service are exempt from the pre-employment requirements as long as they remain on active service with the sheriff's office that originally employed them. Any special deputy who has a break in service of any length whatsoever is required to meet the pre-employment and training standards. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-8-.02.

The minimum standards set forth in T.C.A. § 38-8-106 and in Rule 1110-8-.02 are mandatory and are binding upon the county. Any person who appoints an applicant who, to the knowledge of the appointor, fails to meet the minimum standards as set forth in T.C.A. § 38-8-106 and in Rule 1110-8-.02, and any person who signs the warrant or check for payment of the salary of a person who, to the knowledge of the signer, fails to meet the qualifications as a special deputy as provided in T.C.A. § 38-8-106 and in Rule 1110-8-.02, commits a Class A misdemeanor and upon conviction shall be subject to a fine not exceeding \$1,000. T.C.A. § 38-8-105(a) and (b). Nothing in Title 38, Chapter 8 precludes an employing agency from establishing qualifications and standards for hiring and training special deputies that exceed those set by the POST Commission. T.C.A. § 38-8-109.

Training Requirements.

After January 1, 1989, any person newly employed or used as a special deputy must receive 40 hours of training in whatever duties they are required by the sheriff's office to perform. This training must be accomplished during the first calendar year of employment. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-8-.03.

Oath.

Special deputies must take the same oaths as the sheriff, which are certified, filed, and endorsed in the same manner as the sheriff's. T.C.A. § 8-18-112. An example of the full oath of office for a sheriff and special deputies is provided in the appendix to this handbook.

Bond.

No person may serve as a special deputy unless that person proves to the appointing sheriff financial responsibility, as evidenced by a corporate surety bond in no less amount than \$50,000 or by a liability insurance policy of the employer in no less amount than \$50,000. T.C.A. § 8-8-303(c). "The purpose of this provision is to protect third parties who may be injured by the special deputy." *State v. Epps*, 1989 WL 28906 (Tenn. Crim. App. 1989). Anyone incurring any wrong, injury, loss, damage, or expense resulting from any act or failure to act on the part of any special deputy appointed by the sheriff but not employed by the sheriff or the county may not bring suit against the sheriff or the county. The sheriff and county are immune from such suits. *See Hensley v. Fowler*, 920 S.W.2d 649 (Tenn. Ct. App. 1995). The plaintiff must proceed against the special deputy or the employer or employers of the special deputy, whether the special

deputy is acting within the scope of employment or not. T.C.A. § 8-8-303(b). See *Hensley v. Harbin*, 782 S.W.2d 480 (Tenn. Ct. App. 1989) (wrongful death action brought against special deputy).

In-Service Training Requirements.

After the initial training has been completed, all special deputies are required to attend 40 hours of in-service training each calendar year. This training may be spread over a 12-month period but must be completed during the calendar year. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-8-.04.

Special Deputies - Emergency Appointment Under T.C.A. § 8-22-110

Emergency Requirement.

Pursuant to T.C.A. § 8-22-110(b), the sheriff is authorized to make emergency appointments of special deputies when there is an immediate need for an additional number of deputies to deal efficiently with an emergency situation, such as in the case of a strike, riot, putting down a mob, or other like emergencies.

Oath.

Special deputies appointed pursuant to T.C.A. § 8-22-110(b) are not required to take an oath. T.C.A. § 8-18-112.

Limited Appointment.

Special deputies appointed under T.C.A. § 8-22-110 may serve only during the term of the emergency.

Payment Authorized.

Once the emergency is over, the sheriff is required to make an itemized statement showing the services of the deputies and the time during which the special deputies served. The itemized statement must be presented to the county mayor for auditing and allowance. The mayor is required to authorize payment of the claims once the mayor is satisfied with the justness of the claims provided that no special deputy appointed by the sheriff may receive more than \$4 per day for services actually performed.

Bailiffs

Except in Davidson County, it is the duty of the sheriff to attend upon all the courts held in the county when in session. T.C.A. § 8-8-201(a)(2). **And, unless otherwise provided, it is the duty of the sheriff in every county to provide sufficient bailiffs to serve the general sessions courts.** T.C.A. § 16-15-715. *Taylor v. Wilson County*, 216 S.W.2d 717 (Tenn. 1949) (Sheriff of Wilson County had statutory duty to wait on the

general sessions court for Wilson County, and he had the right to collect the compensation provided for by general law for performing required duty of attending the court for a substantial portion of a day.); Op. Tenn. Atty. Gen. No. 05-026 (March 21, 2005) (The sheriff has the duty to appoint court officers for general sessions courts except in municipalities with a metropolitan form of government and a population of more than 450,000.). Op. Tenn. Atty. Gen. No. 92-55 (Oct. 6, 1992) (It is the sheriff's responsibility to assign deputies to wait upon the courts. The judge cannot, however, order the sheriff to assign specific personnel to the courtroom.). Furthermore, it is the duty of the sheriff to furnish the necessary deputies and special deputies to attend and dispense with the business of the juvenile courts. T.C.A. § 37-1-213. Accordingly, the sheriff is authorized to employ deputies to carry out these functions. *Jones v. Mankin*, 1989 WL 44924, *9 (Tenn. Ct. App. 1989).

Criminal Investigators and Detectives

It is the duty of the sheriff to ferret out, detect, and prevent crime; to secure evidence of crimes; and to apprehend and arrest criminals. Pursuant to statute, the sheriff must furnish the necessary deputies to carry out these duties. T.C.A. §§ 8-8-213, 38-3-102, and 38-3-108.

Criminal Investigators - Child Sexual Abuse Cases

Child Protective Team.

Each county is required by law to have a child protective team. T.C.A. § 37-1-607(a)(1). Pursuant to the same statute, each team must have a properly trained law enforcement officer with countywide jurisdiction (i.e., a deputy sheriff) from the county where the child resides or where the alleged offense occurred. In addition, each team must be composed of one person from the Department of Children's Services, one representative from the office of the district attorney general, and one juvenile court officer or investigator from a court of competent jurisdiction. The team may also include a representative from one of the mental health disciplines. T.C.A. § 37-1-607(a)(2).

The teams conduct child protective investigations of reported child sexual abuse and also support and provide appropriate services to sexually abused children. The team determines the level of risk for the child and the services, including medical evaluations, psychological evaluations and short-term psychological treatment, and casework and coordination. The Department of Children's Services is responsible for coordinating the services of these teams. T.C.A. § 37-1-607(a)(1).

See Department of Children's Services, Administrative Policies and Procedures: 14.05, Investigation of Alleged Child Abuse and Neglect. See also Department of Children's Services, Administrative Policies and Procedures: 14.28, Child Protective Services Investigation of Children Exposed To Chemical Laboratories for the Manufacture of Methamphetamine.

Child Sex Crime Investigation Unit.

Through legislation, the General Assembly has encouraged each sheriff to establish a child sex crime investigation unit within the sheriff's office for the purpose of investigating crimes involving the sexual abuse of children. T.C.A. § 37-1-603(b)(4)(E). To further this objective, as part of the annual in-service training requirement **the sheriff and every deputy sheriff must receive training in the investigation of cases involving child sexual abuse, including law enforcement response to and treatment of victims of such crimes.** T.C.A. § 37-1-603(b)(4)(B); Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.05 (4).

Dispatchers

While sheriffs do not have a statutory obligation to provide dispatching services, dispatching is a necessary and reasonable support activity that helps the modern sheriff's office carry out the sheriff's statutory duties. *Jones v. Mankin*, 1989 WL 44924 (Tenn. Ct. App. 1989) (Courts may approve the cost of support personnel when they are required).

Minimum Qualifications.

After May 1, 1989, any person employed as a public safety dispatcher shall:

- (1) Be at least 18 years of age;
- (2) Be a citizen of the United States;
- (3) Be a high school graduate or possess equivalency;
- (4) Not have been convicted or pleaded guilty to or entered a plea of nolo contendere to any felony charge or to any violation of any federal or state laws or city ordinances relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances;
- (5) Not have been released or discharged under other than an honorable or medical discharge from any of the armed forces of the United States;
- (6) Have their fingerprints on file with the Tennessee Bureau of Investigation;
- (7) Have passed a physical examination by a licensed physician; and
- (8) Have a good moral character as determined by a thorough investigation conducted by the employing agency.

T.C.A. § 7-86-205(d). Notwithstanding other provisions of law to the contrary, the law in effect prior to May 1, 1994, relative to public safety dispatchers applies to any person who

had more than five years of continuous employment as a public safety dispatcher on May 1, 1994. T.C.A. § 7-86-205(f).

Training.

Pursuant to T.C.A. § 7-86-205(a), all emergency call takers and public safety dispatchers who receive initial or transferred 911 calls from the public are subject to the training and course of study requirements established by the Emergency Communications Board created pursuant to T.C.A. § 7-86-302.

Beginning July 1, 2006, all emergency call takers and public safety dispatchers must have successfully completed a course of study approved by the Emergency Communications Board. All emergency call takers and public safety dispatchers employed after July 1, 2006, have six months from the date of their employment to successfully complete the approved course of study. T.C.A. § 7-86-205(c) and (e).

Jail Personnel

Jailer.

It is the duty of the sheriff to take charge and custody of the jail and of the prisoners therein. **The sheriff is charged with keeping the prisoners personally or by deputies or jailer until they are lawfully discharged.** T.C.A. § 8-8-201(a)(3). **Pursuant to T.C.A. § 41-4-101 the sheriff has the authority to appoint a jailer for whose acts the sheriff is civilly responsible.** See *Davis v. Hardin County*, 2002 WL 1397276, *3 - *4 (W.D. Tenn. 2002), for a discussion of the differences between deputies and jailers for the purposes of the Tennessee Governmental Tort Liability Act.

Definition.

The Tennessee Corrections Institute defines a jailer as “one who is charged by an institution to detain or guard prisoners.” Rules of the Tennessee Corrections Institute, Rule 1400-1-.03 (37). The attorney general has opined that a jailer is one whose primary duty is to confine and control persons held in lawful custody. Op. Tenn. Atty. Gen. 85-222 (July 29, 1985).

Minimum Qualifications.

After July 1, 2006, any person employed as a jail administrator, jailer, corrections officer, or guard in a county jail or workhouse must:

- (1) Be at least 18 years of age;
- (2) Be a citizen of the United States;

- (3) Be a high school graduate or possess its equivalency which shall include a general educational development (GED) certificate;
- (4) Not have been convicted of, or pleaded guilty to, or entered a plea of nolo contendere to any felony charge or to any violation of any federal or state laws or municipal ordinances relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances;
- (5) Not have been released or discharged under any other than honorable discharge from any of the armed forces of the United States;
- (6) Have their fingerprints on file with the Tennessee Bureau of Investigation;
- (7) Have passed a physical examination by a licensed physician;
- (8) Have a good moral character as determined by a thorough investigation conducted by the sheriff's office; and
- (9) Be free from any disorder as described in the current edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association that would, in the professional judgment of the examiner, impair the subject's ability to perform any essential function of the job or would cause the subject to pose a direct threat to public safety. An applicant must be certified as meeting these criteria by a Tennessee licensed healthcare provider qualified in the psychiatric or psychological fields.

T.C.A. § 41-4-143(a).

The minimum standards set forth in T.C.A. § 41-4-143 are mandatory and are binding upon the county. T.C.A. § 41-4-143(b)(1). Any person who appoints an applicant, who, to the knowledge of the appointor, fails to meet the minimum standards as set forth in T.C.A. § 41-4-143, and any person who signs the warrant or check for payment of salary of a person who, to the knowledge of the signer, fails to meet the minimum qualifications as provided in T.C.A. § 41-4-143, commits a Class A misdemeanor and upon conviction shall be subject to a fine not exceeding \$1,000. T.C.A. § 41-4-143(b)(2). This provision does not apply to any jail administrator, jailer, corrections officer, or guard hired by a county prior to July 1, 2006. T.C.A. § 41-4-143(b)(3). Nothing in Title 41, Chapter 4, precludes an employing agency from establishing qualifications and standards for hiring and training jail or workhouse employees that exceed those set forth in T.C.A. § 41-4-143. T.C.A. § 41-4-143(c).

Oath.

The *Tennessee Code Annotated* contains no oath for jailers.

Guard.

The sheriff is authorized by statute to employ guards to:

- (1) Protect a defendant from violence, and to prevent the defendant's escape or rescue in all cases where a defendant charged with the commission of a felony is committed to jail, either before or after trial, and the safety of the defendant, or the defendant's safekeeping, requires a guard;
- (2) Transport a prisoner to another jail when the county jail is insufficient for the safekeeping of the prisoner; and
- (3) Transport a prisoner charged with a crime from one county to another for trial or safekeeping.

T.C.A. §§ 41-4-118, 41-4-121, and 41-4-126.

Minimum Qualifications.

After July 1, 2006, any person employed as a corrections officer or guard in a county jail or workhouse must have the same minimum qualifications as a jailer. T.C.A. § 41-4-143.

Oath.

The *Tennessee Code Annotated* contains no oath for guards.

Nurse.

The sheriff is authorized to hire a female registered nurse and a male registered nurse who are authorized to make complete physical examinations of all people committed to the custody of the sheriff for the purpose of preventing the spread of any contagious disease. T.C.A. § 41-4-138. See *Haywood County v. Hudson*, 740 S.W.2d 718, 719 (Tenn. 1987); *George v. Harlan*, 1998 WL 668637, *4 (Tenn. 1998) (“[I]t is clear that the Circuit Court has the power to authorize employment of personnel necessary to properly perform the duties of the office of the sheriff and the legislative body has the duty to provide the funds to carry out the order of the Circuit Court.”).

Cook.

Pursuant to statute, the jailer has a duty to furnish adequate food to prisoners in the jail. T.C.A. § 41-4-109. Tennessee courts have recognized that cooks are necessary for the operation of a jail. See *Jones v. Mankin*, 1989 WL 44924, *7 (Tenn. Ct. App. 1989).

Training.

Each facility is required to offer jail personnel a pre-service orientation program designed to familiarize each person with the functions and mission of the facility.

All personnel whose duties include the industry, custody, or treatment of prisoners are required to complete a 40-hour basic training program during the first year of employment. This training is provided by the Tennessee Corrections Institute. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06 (2) and (3). *But see Russell v. Robertson County*, 99 F.3d 1139 (Table) (6th Cir. 1996) *citing Beddingfield v. City of Pulaski*, 861 F.2d 968, 971 (6th Cir. 1988) (The City's decision to exclude its jail personnel from TCI training did not amount to a constitutionally impermissible failure to train "because the City provided its own in-house training program.").

In-Service Training.

All personnel whose duties include the industry, custody, or treatment of prisoners are required to complete 40 hours of in-service training each year covering the specific skill areas of jail operations. At least 16 hours will be provided by the Tennessee Corrections Institute. The remaining 24 hours may be provided by the facility if course content is approved and monitored by the Tennessee Corrections Institute. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06 (4).

The county legislative body may by resolution choose, by a two-thirds vote of its entire membership to establish an in-service training program for certified correction officers employed by the county. Each participating county is required to establish criteria and rules and regulations governing its own program. T.C.A. § 38-8-111(d).

Training in Use of Firearms and Chemical Agents.

All jail personnel who are authorized to use firearms or chemical agents must receive basic and ongoing in-service training in the use of these weapons. All such training must be recorded with the dates completed and kept in the officer's personnel file. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06 (6).

Salary Supplement.

The attorney general has opined that jailers are not entitled to receive the salary supplement provided for in T.C.A. § 38-8-111(a)-(c) because the primary duty of a full-time jailer is the confinement and control of persons held in lawful custody, not the prevention and detection of crime. Only full-time police officers, as defined in T.C.A. § 38-8-101, whose primary responsibility is the prevention and detection of crime, are eligible for the salary supplement provided for in T.C.A. § 38-8-111. Op. Tenn. Atty. Gen. 85-222 (July 29, 1985). See *also* Op. Tenn. Atty. Gen. 77-235A (July 22, 1977).

However, pursuant to T.C.A. § 38-8-111(d), the county legislative body may by resolution choose by a two-thirds vote of its entire membership to establish a cash supplement along

with an in-service training program for certified correction officers employed by the county. Each participating county is required to establish criteria and rules and regulations governing its own program.

Process Servers and Warrant Officers

It is the duty of the sheriff to execute and return, according to law, the process and orders of the courts of record of this state and of officers of competent authority, with due diligence, when delivered to the sheriff for that purpose. T.C.A. § 8-8-201(a)(1). And, it is the duty of the sheriff to execute all writs and other process legally issued and directed to the sheriff, within the county, and make due return thereof either personally or by a lawful deputy or, in civil lawsuits only, by a lawfully appointed civil process server. T.C.A. § 8-8-201(a)(5)(A). Note, the provisions of T.C.A. § 8-8-201(a)(5)(A) relative to civil process servers do not apply in Hamilton, McMinn, Sullivan and Sumner counties. T.C.A. § 8-8-201(a)(5)(B). See *George v. Harlan*, 1998 WL 668637 (Tenn. 1998) (The circuit court has jurisdiction to authorize the employment and pay of deputies and assistants needed by the sheriff to perform his statutory duties.).

Training Officers and Instructors

General Departmental Instructor.

Each sheriff's office that conducts a 40-hour in-service training course is required to designate one training officer who meets the POST Commission general departmental instructor standards for certification. The training officer who is designated as the general departmental instructor must apply for and be certified as a general departmental instructor as defined in Rule 1110-3-.04(3) of the Rules of the Tennessee Peace Officer Standards and Training Commission. The general departmental instructor is responsible for coordinating in-service training programs and developing lesson plans, goals and objectives, and may be required to instruct in more than one subject area. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.03.

Instructors.

Instructors used for in-service training sessions must be approved by the general department instructor and must be qualified by experience and training. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.04.

In-Service Training.

The general departmental instructor and all training officers are required to attend a POST Commission workshop at a time and place determined by the POST Commission and the Tennessee Law Enforcement Training Officer Association as part of their annual in-service training requirement for training officers. Rules of the Tennessee Peace Officer Standards and Training Commission, Rule 1110-4-.03.

CHAPTER 4

PERSONNEL MATTERS

This chapter contains a general overview of various topics related to the employer-employee relationship and personnel management issues that affect sheriffs in Tennessee. For in-depth coverage of all of these topics and more, please refer to the CTAS publication entitled *Legal Aspects of Personnel Management*, which is available on the CTAS Website at www.ctas.utk.edu.

Personnel Management in Counties

Various state statutes grant county officials and department heads authority over personnel matters within their offices or departments. For example, the County Uniform Highway Law provides that the chief administrative officer of the highway department has authority over highway department employees. T.C.A. § 54-7-109. **In counties that have adopted the Sheriff's Civil Service Law, the civil service commission establishes certain policies for the sheriff's office, but the sheriff can hire and fire employees pursuant to the policies as established.** T.C.A. § 8-8-401 *et seq.* The county board of education is responsible for personnel matters within the department of education. T.C.A. §§ 49-2-203, 49-2-209.

Because the state legislature has placed authority over personnel with various individual officeholders, such as the sheriff, the county legislative body has little control over personnel management in most county offices and departments. For example, the county legislative body generally cannot adopt personnel policies and apply them to all county offices without the agreement of the affected county officials. An exception to this rule has been found by the courts to exist in the largest counties in Tennessee, such as Shelby and Knox, which have centralized personnel management authorized by county charter, and Davidson, which has centralized personnel management by metropolitan charter. *See Shelby County Civil Service Merit Board v. Lively*, 692 S.W.2d 15 (Tenn. 1985); *see also Knox County v. Knox County Personnel Board*, 753 S.W.2d 357 (Tenn. Ct. App. 1988); *Bush v. Employee Benefit Board of Metro. Gov't*, 792 S.W.2d 932 (Tenn. Ct. App. 1990).

Required Personnel Policies

State law requires written personnel policies covering four topics for all employees of county government (except those in Davidson, Moore and Shelby counties). T.C.A. § 5-23-101 *et seq.* The four topics are (1) leave, (2) wage and hour, (3) nondiscrimination and sexual harassment, and (4) drug and alcohol testing (only for employees required by law to be tested). T.C.A. § 5-23-104.

Under this law, all “county officials” (defined as county trustees, registers of deeds, county clerks, judges who employ county employees, clerks of court, sheriffs, assessors, boards of education, and chief administrative officers of highway or public works departments) are required to have written personnel policies on the four topics specified in the act to govern the employees of their respective offices or departments. These policies are required to be reviewed by an attorney and then submitted to the county legislative body to be included in the minutes and filed in the office of the county clerk. The county legislative body does not approve these policies. T.C.A. § 5-23-103.

For all other county employees and for the employees of any county officials who choose not to have separate policies, the county legislative body and the county mayor are jointly responsible for preparing personnel policies on the four topics mentioned above. The policies will be prepared by one person or a group appointed by the county mayor with confirmation by the county legislative body. The policies must be reviewed by an attorney and approved by the county legislative body, and they must be included in the minutes and filed in the office of the county clerk. T.C.A. § 5-23-103. Upon completion of these policies, the county mayor may adopt separate policies for the employees of his or her office if the county mayor so chooses, using the same procedure as the “county officials” discussed above. T.C.A. § 5-23-103(d).

Officials and department heads are responsible for distributing copies of the policies to all employees under their direction (with special provisions for boards of education), including a statement that the policies do not affect the employment-at-will status of employees or create a contract of employment, and for having each employee sign an acknowledgment form. These officials and department heads are also responsible for furnishing a copy of T.C.A. § 39-16-504 to each employee, maintaining required personnel records, and ensuring that all required notifications are given to the employees under their direction. T.C.A. § 5-23-107.

Officials and employees whose intentional and knowing illegal acts or omissions in connection with the requirements of this act result in liability for the county that is not covered by insurance may be required to reimburse the county for such liability. T.C.A. § 5-23-109.

Courthouse Hours and Office Space

The county legislative body has no statutory authority to establish uniform courthouse hours and require other officials to remain open or closed during these scheduled hours. However, elected officials cannot neglect the business of the office without being subject to removal from office in an ouster suit. T.C.A. § 8-47-101. **Therefore, each official is under a duty to maintain office hours that will allow the public reasonable access to the offices and allow the work of the office to be performed in a timely and efficient manner.** Each official can decide whether to remain open on holidays. T.C.A. § 15-1-101. The county legislative body has the authority to assign office space within the courthouse. *See Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit*, 579 S.W.2d 875 (Tenn. Ct. App. 1978).

Residence

Counties can require all new employees hired after a certain date to be residents of the county. However, counties cannot dismiss or penalize its current employees solely on the basis of nonresidence in the county. Op. Tenn. Atty. Gen. U91-137 (Nov. 19, 1991); Op. Tenn. Atty. Gen. U91-138 (Nov. 19, 1991); T.C.A. § 8-50-107.

Voting Leave

Any employee entitled to vote in an election held in this state may take a reasonable time (not more than three hours) off from work on election day to vote. T.C.A. § 2-1-106. If the polls are open for more than three hours before or after the employee's shift begins or ends, the employee is not entitled to take time off to vote. If time off must be given, the employee is required to give the employer notice by noon on the day before the election, and the employer can specify the voting hours. T.C.A. § 2-1-106.

It is unlawful to coerce or direct an employee to vote or not vote for a candidate or measure, or to vote for any candidate, to circulate any statement or report intended to coerce or intimidate an employee to vote in a particular way, or to discipline or discharge an employee for the way he or she votes. T.C.A. § 2-19-134.

Jury Duty

All federal and state officeholders have a limited exemption from jury duty. The limited exemption means that the officeholder is not required to serve on the dates indicated on the summons but must designate a seven-day period when he or she will be available to serve within the next 12-month period after the date of the summons. Upon receipt of the summons, the officeholder must notify the clerk of the court issuing the summons of the seven-day period the officeholder will be available to serve. The officeholder will be required to serve on only one jury during the seven-day period. T.C.A. § 22-1-203.

Employees of officeholders are not exempt from jury duty. Upon receiving a summons to report for jury duty, an employee must present the summons to the supervisor on the next day he or she is working. The employee must be excused from work for the entire day or days the employee is required to serve as a juror except that the employee can be required to return to work on days when the employee is required to serve less than three hours. The employee is entitled to his or her usual compensation, less the amount of fee or compensation received for serving as a juror (of course, the employer may pay the employee the usual compensation without deducting the juror fee). The employer is not required to compensate an employee for more time than was actually spent serving and traveling to and from jury duty. These provisions do not apply to any employee who has been employed on a temporary basis for less than six months, and special rules apply to night-shift employees. T.C.A. § 22-4-108.

Employers are prohibited from discharging or discriminating against an employee for serving on jury duty if the employee, prior to taking time off, has given the required notice.

Any employee who is discharged, demoted, or suspended for having taken time off to serve on jury duty is entitled to reinstatement and reimbursement for lost wages and work benefits. T.C.A. § 22-4-108.

Parental Leave for Birth and Adoption

Tennessee's parental leave statute, T.C.A. § 4-21-408, applies to all employers who employ 100 or more full-time employees at a job site or location. Both male and female employees who have been employed at least 12 months are allowed up to four months off for adoption, pregnancy, childbirth and nursing an infant. The employee must give at least three months advance notice to the employer of the anticipated date of departure for leave except in cases of medical emergency that necessitate that leave begin earlier than originally anticipated. The notice must state the length of leave and the employee's intention to return to full-time employment after leave. The leave may be with or without pay. The employee must be reinstated to the same or a similar position with no reduction in vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which he or she was eligible at the date of leave, and any other benefits or rights of employment incident to the employee's position. However, the employer need not pay the cost of any benefits, plans or programs during the period of leave except to the extent that the employer pays for such benefits for all employees on leave of absence. If an employee's job position is so unique that the employer cannot, after reasonable efforts, fill that position temporarily, then the employer will not be liable for failure to reinstate the employee at the end of the leave period. The law requires that the provisions of the act be included in the next employee handbook published by the employer after May 27, 2005.

The federal Pregnancy Discrimination Act (PDA) amendment to the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k), prohibits employment discrimination against women on the basis of pregnancy, childbirth or related medical conditions. This means that pregnancy-related conditions must be treated the same as any other temporary medical incapacity. The PDA applies to employers who have 15 or more employees. The term "employees" includes local government employees, but does not include elected officials and their personal staff or policy-making appointees. The Tennessee Attorney General has opined that Tennessee's maternity leave statute does not conflict with the PDA. Op. Tenn. Atty. Gen. 91-22 (March 12, 1991).

The federal Family and Medical Leave Act (FMLA), 29 U.S.C. § 2654, provides that both male and female employees who have worked at least 12 months for the employer and who have worked at least 1,250 hours during the preceding 12-month period are eligible for up to 12 workweeks of unpaid leave in connection with the birth of a child or placement of a child for adoption or foster care. The employee must give at least 30 days advance notice of the need for leave except in cases of emergency. The leave must be concluded within the 12-month period beginning with the date of birth or placement of the child. The employee must be reinstated to the same or an equivalent position with no loss of accrued benefits. Leave can be requested prior to the birth or placement under certain circumstances such as visits to the doctor and other prenatal care,

and for counseling, court appearances and the like when required for adoption or foster care. If both the husband and wife are employed by the county government and both want to take FMLA leave for the birth or placement of a child, they are limited to a combined total of 12 workweeks.

Military Leave

Both state and federal laws require military leave and reinstatement of employees returning to employment after military service. Federal law does not require paid military leave, but state law does require pay under some circumstances. Of course, employers are free to grant returning veterans benefits in addition to those required by law.

Employers are required under the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) to allow military leaves of absence for draftees, volunteers, reservists and the National Guard, for active duty, training, and other military obligations. Employers must reinstate returning veterans to their former jobs without loss of seniority or benefits when they are honorably discharged from service in the United States armed forces or National Guard, as long as the returning veteran reports to the employer or submits an application for re-employment in a timely manner. The state law requirements for re-employment rights of public employees returning from active military service are found in T.C.A. §§ 8-33-101 through 8-33-108.

Under Tennessee law, all county officials and employees who are in any reserve component of the armed forces of the United States, including members of the Tennessee Army and Air National Guard, are entitled to leave of absence from their duties without loss of time, pay, regular leave or vacation, impairment of efficiency rating, or any other rights or benefits to which otherwise entitled, for all periods of military service. **The official or employee is entitled to compensation for a period not exceeding 15 working days per year, plus any additional days that may result from call to active state duty.** T.C.A. § 8-33-109. Public employers are authorized to provide partial compensation to employees who are engaged in active military service after the required 15 days of full compensation under T.C.A. § 8-33-109.

The Fair Labor Standards Act

The federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., establishes minimum wage, overtime pay, record keeping, and child labor standards for millions of workers in the private sector and in federal, state, and local governments, including counties. Special rules apply to state and local governments in fire protection and law enforcement activities, volunteer services, and compensatory time off in lieu of cash overtime pay. This publication contains only a general overview of selected topics under the FLSA. For a detailed discussion of the requirements of the act, consult the CTAS publication entitled *Legal Aspects of Personnel Management* (2006).

Almost as important as what the FLSA requires is what it does not require. The FLSA does not require vacation, holiday, severance or sick pay. The act does not require meal or rest periods or holidays, or vacation time off, and does not limit the number of hours an employee over 16 years of age may work. (State law regulates the hours that minors can work. See T.C.A. § 50-5-105.) The FLSA does not require premium pay for weekend or holiday work, nor does it require pay raises or fringe benefits, discharge notices, reasons for discharge, or immediate payment of final wages. Although the FLSA does not require it, employers are required by state law to inform employees of the amount they will be paid before they are hired. T.C.A. § 50-2-101.

Exemptions.

There are certain persons who are not covered by the provisions of the FLSA. These “non-covered employees” include elected officials and their personal staffs, policymaking appointees and legal advisors who are not covered by civil service laws. Non-covered employees also include bona fide volunteers (not otherwise employed by the county in a similar capacity), true independent contractors, prisoners (while working for the government), and certain trainees. These exclusions are narrowly defined and the rules are strictly applied.

There are also employees who are exempt from the minimum wage and overtime provisions of the act. These “exempt employees” include (1) “white collar” employees, including executive, administrative or professional employees, the requirements for which are outlined in detail in the federal regulations; (2) seasonal employees as defined in the regulations; and (3) public safety employees where there are fewer than five full-time or part-time law enforcement officers or firefighters. The payment of a salary rather than an hourly wage is not determinative of whether an employee is exempt from the provisions of the FLSA. All requirements of the federal regulations must be met before an exemption will apply.

Compensable Hours.

Compensable hours of work include all times during which the employee is on duty or on the employer's premises available for work or time spent away from the employer's premises under conditions that prevent the employee from using the time for personal activities. Work not requested or required by the employer but allowed or permitted is work time under the FLSA, even if performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that work is being performed, the work must be counted as hours worked.

Generally, periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his or her own purposes are not hours worked. Rest periods of short duration, running from five minutes to about 20 minutes, must be counted as hours worked. Meal periods of at least 30 minutes or more, where an employee is completely relieved from duty, are not a part of

hours worked. It is not necessary that an employee be permitted to leave the premises during a meal period so long as he or she is otherwise completely freed from duties. Whether waiting time is time worked under the FLSA depends upon the particular circumstances. Waiting time and sleeping time are specifically addressed in the federal regulations.

Minimum Wage.

Effective September 1, 1997, covered nonexempt workers are entitled to a minimum wage of \$5.15 an hour. Wages are due on the regular payday for the pay period covered. Deductions made from wages for items such as cash or merchandise shortages, employer-required uniforms, and tools of the trade are illegal if they reduce the employees' wages below the minimum rate or reduce the amount of overtime pay.

Overtime.

The FLSA generally requires overtime compensation for hours worked over 40 in a workweek (a consecutive seven-day period). After 40 hours of work are completed in a workweek, an employee must receive overtime pay at a rate of not less than one and one-half times the regular rate of pay. This requirement may not be waived by agreement between the employer and employee. An announcement by the employer that no overtime work will be permitted or that overtime work will not be paid for unless authorized in advance will not limit the employer's liability for the overtime work that the employer "suffers or permits." Regulations detail how to calculate the "time and one-half" amount as applied to an employee's "regular rate of pay," which generally is to be used as the basis for overtime compensation.

The FLSA establishes a somewhat complicated procedure that allows the establishment of longer work periods than seven day workweeks for public safety employees of state and local governments. Public safety personnel includes employees engaged in firefighting and law enforcement activities. See Special Overtime Rules For Law Enforcement Employees in the Appendix. The term may also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection or law enforcement activities. These provisions do not apply in cases in which public safety services are provided to the city or county under a contract with a private organization. For a detailed discussion of the requirements of the act, consult the CTAS publication entitled *Legal Aspects of Personnel Management* (2006).

Compensatory ("Comp") Time.

Employees of a county may receive compensatory time off in lieu of overtime compensation pursuant to an agreement or understanding with the employee. Like overtime pay, compensatory time accrues at the rate of one and one-half hours for each hour of overtime worked. The employer can use a combination of comp time and wages so long as the time-and-a-half requirement is met.

There are limits to the amount of compensatory time that may accrue. If the work for which compensatory time is provided is a public safety activity, an emergency response activity, or a seasonal activity, the employee may accrue up to 480 hours of compensatory time. For any other work, the employee may accrue up to 240 hours of compensatory time. After the maximum number of hours has accrued, the employee must be paid overtime compensation. Compensation for accrued comp time must be paid at the regular rate earned by the employee at the time of the payment. Upon termination of employment, an employee who has accrued comp time must be paid the greater of the average regular rate the employee received during the last three years, or the final regular rate of pay received by the employee.

When an employee requests the use of accrued comp time, the use must be permitted within a reasonable period after the request as long as the operations of the employer are not unduly disrupted.

Record-Keeping Requirements.

Employers must keep records of wages, hours, and other items as specified in U.S. Department of Labor record-keeping regulations. This type of information is usually maintained by employers in the ordinary business practice and in compliance with other laws and regulations. The records do not have to be kept in a certain form and time clocks do not have to be used. If an employee is subject to both minimum wage and overtime pay provisions, the following records must be kept: (1) personal information, including employee's name, home address, occupation, sex, and birth date (if under 19 years of age); (2) hour and day workweek begins; (3) total hours worked each workday and each workweek; (4) total daily or weekly straight-time earnings; (5) regular hourly pay rate for any week when overtime is worked; (6) total overtime pay for the workweek; (7) deductions from or additions to wages; (8) total wages paid each pay period; and (9) date of payment and pay period covered.

Record-keeping requirements for exempt employees differ slightly from those for nonexempt workers. Special information is required for employees working under uncommon pay arrangements, employees to whom lodging or other facilities are furnished, and employees receiving remedial education. Employers are not required to keep records for non-covered employees. Each county official responsible for personnel and payroll records should check to ascertain that all the information required is contained in the records.

Enforcement and Penalties.

Employers who willfully violate the minimum wage or overtime provisions of FLSA may be fined up to \$10,000, and if the employer has been convicted on a prior occasion he or she may also be imprisoned up to six months. Also, when an employee sues for violation of the minimum wage or overtime provisions, the employer may have to pay the unpaid minimum wage or overtime, as well as an equal amount for

liquidated damages, attorneys' fees, costs, and other relief, such as promotions and reinstatement. The U.S. Department of Labor may also initiate action against an employer.

Equal Pay Provisions.

The Equal Pay Act, 29 U.S.C. § 206(d), was enacted as an amendment to the Fair Labor Standards Act. **The equal pay provisions apply to all employees, even those who are exempt from the minimum wage and overtime provisions of the FLSA.** Gender-based wage differentials between men and women employed in the same establishment, on jobs that require equal skill, effort, and responsibility and that are performed under similar working conditions are prohibited. These provisions, and other statutes prohibiting discrimination in employment, are enforced by the Equal Employment Opportunity Commission. See T.C.A. § 50-2-202 for similar state law.

Complete information regarding the Fair Labor Standards Act is available from the United States Department of Labor. Additionally, the CTAS publication entitled *Legal Aspects of Personnel Management (2006)* contains detailed information regarding the requirements of the FLSA.

Family and Medical Leave Act

Under the federal Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2654, eligible county employees are entitled to up to 12 workweeks of unpaid leave during a 12-month period for the birth of a child, the placement of a child for adoption or foster care, a serious health condition of the employee that makes the employee unable to perform the functions of his or her job, or the serious health condition of a spouse, son, daughter or parent that requires the employee's presence.

Eligible employees are those who have been employed by the county for at least 12 months and who have worked at least 1,250 hours during the immediately preceding 12-month period. The term “employee” as used in the FMLA has the same meaning as under the FLSA, so persons who are covered by the FLSA (even if they are “exempt”) are covered by the FMLA. Persons who are not covered include elected officials, political appointees, volunteers and independent contractors.

Subject to certain conditions, accrued paid leave may be substituted for unpaid FMLA leave. Ordinarily, an employee must provide at least 30 days advance notice of the need to take FMLA leave. Medical certification may also be required. Special rules apply for husband and wife employed by the same employer, for highly compensated employees, and for local educational agencies. Upon returning from FMLA leave, the employee must be reinstated to the same or an equivalent position with no loss of accrued benefits.

For a more complete understanding of the FMLA, consult the federal regulations at 29 C.F.R. part 825.

Americans with Disabilities Act

The federal Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., prohibits discrimination against persons with disabilities in employment under Title I, and mandates their full participation in services and activities offered by local governments under Title II.

Title I of the ADA prohibits employers from discriminating against a qualified individual with a disability in all aspects of employment, including job applications, hiring, advancement, discharge, compensation, training and any other terms, conditions or privileges of employment. Local governments must make reasonable accommodations for known physical or mental limitations of an otherwise qualified individual unless to do so would result in an undue hardship. A local government cannot exclude people with disabilities from job opportunities unless they are unable to perform the essential functions of the job with reasonable accommodations. The employer cannot prefer or select a qualified person without a disability over an equally qualified person with a disability merely because the disabled person will require an accommodation.

The basic rule of Title II of the ADA is that no person is to be excluded from participation in or denied the benefits of the programs, services or activities of local governments on the basis of a disability, nor be subjected to discrimination by local governments. Government services and activities covered under Title II include education, highways and roads, law enforcement, parks, courts, personnel, voting, taxpaying, deed recording, motor vehicle registration, public meetings and public transportation.

Counties are required to have an ADA coordinator and grievance procedures in place to deal with complaints of violations of the ADA. Counties were required to conduct a self-evaluation and make necessary structural changes in existing structures in accordance with detailed accessibility guidelines by specified deadlines; ADA accessibility guidelines also apply for any new construction.

Equal Employment Opportunity

In addition to the Americans with Disabilities Act and Equal Pay Act, both discussed above, **various state and federal laws prohibit discrimination in employment matters including hiring, firing, promotion, compensation, terms, conditions and privileges of employment.** Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex or national origin. The Tennessee Human Rights Act, T.C.A. § 4-21-101 et seq., contains similar provisions. State law prohibits discrimination by counties in the hiring, firing and other terms and conditions of employment against any applicant for employment based solely upon any physical, mental or visual handicap of the applicant unless such handicap to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved. Discrimination against blind persons in any employment practices because of the use of a guide dog is also prohibited. T.C.A. § 8-50-103. As a result of a 1990 amendment that deleted T.C.A. § 8-50-103(c), people with AIDS,

tuberculosis, and other contagious diseases are no longer excluded from the prohibition against employment discrimination. Discrimination in employment against individuals who are over the age of 40 solely on the basis of their age is prohibited by T.C.A. § 4-21-407. See also 29 U.S.C. § 621 *et seq.*

Employees who have been victims of illegal discrimination may be entitled to reinstatement, back pay, compensatory damages, punitive damages, and attorneys' fees.

Miscellaneous Personnel Matters

Insurance.

Two sets of statutes coexist that authorize counties to provide group insurance for county employees. Under T.C.A. §§ 8-27-401 through 8-27-403, the county legislative body is authorized to provide group life, hospitalization, disability and medical insurance for county employees, and to provide for payment by the county of a portion of the premiums. The county legislative body is authorized to include retired county employees, officials, and their surviving spouses. The county legislative body approves the insurance contracts by majority vote.

Counties are also authorized to provide group life, hospitalization, disability and medical insurance under T.C.A. § 8-27-501 *et seq.* Under this set of statutes, all county employees and county officials have the option of electing the coverage, and the county is authorized to pay all or any portion of the premiums with the remainder to be deducted from the employees' salaries. The county legislative body is authorized to include retired county employees, officials, and their surviving spouses. A county insurance fund must be established for deposits of the county's share of the premiums as well as the payroll deductions. Once established, the insurance program cannot be discontinued except by two-thirds vote of the county legislative body and after three months notice to officials and employees.

On the state level, a local government insurance committee was created by the legislature in 1989 to establish a health insurance plan for employees of local governments and certain quasi-governmental organizations, with all costs of the plan to be paid by the participating local governments and eligible quasi-governmental organizations. The staff of the state group insurance program is to act as the staff of this program. T.C.A. § 8-27-207.

A state-supported local education employee group insurance program is established under T.C.A. § 8-27-301 *et seq.* Group insurance is available under either the basic state plan or an optional plan. T.C.A. § 8-27-302. The state pays a portion of the cost of participation in the plan. T.C.A. § 8-27-303. Local education agencies that have group insurance that is determined to be equal to or better than the state plan are eligible for direct payments from the state for a portion of the costs. T.C.A. § 8-27-303.

Under T.C.A. § 8-25-304, counties are authorized to use “cafeteria plans” or flexible benefit plans, which are approved under § 401(k) of the Internal Revenue Code. These plans allow a reduction of salary so that pre-tax dollars may be used to provide certain benefits.

Continuation of Insurance Coverage - COBRA.

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 29 U.S.C. §§ 1161--1168 and 42 U.S.C. §§ 300bb-1--300bb-8, requires most employers, including counties with more than 20 employees, who offer group health plans to offer continued health plan coverage for 18 months to terminating employees (unless terminated for gross misconduct) and up to 36 months for spouses who become widowed, divorced or legally separated when no longer qualifying for dependent coverage. Special rules apply to disabled qualified beneficiaries. COBRA requires employers to notify all covered employees and their spouses, if married, of the provisions.

Immigration Records.

Under the federal Immigration Reform and Control Act of 1986, employers must (1) have employees fill out their part of Form I-9 before they start to work, (2) check documents establishing employees' identity and eligibility to work, (3) properly complete the remaining portion of Form I-9, (4) retain the form at least three years after the date of hire or one year after termination of employment, whichever is later, and (5) be able to present the form for inspection if requested by authorized government officials such as federal Immigrations and Customs Enforcement or the U. S. Department of Labor. Failure to comply with the requirements of the act can lead to civil penalties, which can be levied for knowingly hiring unauthorized employees or for failing to comply with record-keeping requirements. The United States Citizenship and Immigration Services, a bureau of the Department of Homeland Security, has publications to assist the employer in completing Form I-9.

Drug and Alcohol Testing.

Employers have become increasingly interested in testing employees for drug and alcohol use. **Drug testing by government employers is permissible only under certain circumstances because the testing constitutes a “search” under the 4th and 14th Amendments to the United States Constitution.** Any testing must meet the constitutional standard of reasonableness, and testing must be conducted in accordance with the due process and equal protection clauses of the Constitution. As a general rule, only employees who are in safety sensitive positions may be tested. Local governments can be held liable for monetary damages when an employee's constitutional rights have been violated. Before considering any testing program, the employer should consult the sections on drug testing contained in the CTAS publication entitled *Legal Aspects of Personnel Management* (2006).

Federal regulations require testing of employees who are required by law to have a commercial driver's licenses (CDL). Employees who must be tested are those who drive (1) vehicles over 26,000 pounds GVWR, (2) trailers over 10,000 pounds GVWR if the

gross combination weight rating is more than 26,000 pounds, (3) vehicles designed to carry 16 or more passengers including the driver, and (4) any size vehicle used to transport hazardous materials (required to have a placard). These employees have been determined by the federal government to be in safety sensitive positions. As of January 1, 1996, all county departments where CDL drivers are employed were required to have a testing program in place for these drivers. The testing program must comply with detailed federal guidelines contained in the federal regulations.

Finally, workers' compensation laws and regulations have created a voluntary program of drug testing that can result in reduced premiums for workers' compensation insurance and denial of workers' compensation benefits to impaired workers. T.C.A. § 50-9-101 *et seq.* This program is optional; employers are not required to participate. The program must be carefully tailored to the needs of the government employer so that the employees' constitutional rights are not infringed.

It is *strongly recommended* that counties wishing to implement a drug or alcohol testing program, whether under DOT regulations or under the workers' compensation law, contract with a reputable and experienced company to handle all aspects of the testing program on the county's behalf. It is imperative that such a program not be implemented without the advice of the county attorney or another attorney hired to advise the county on this issue.

Workers' Compensation.

The workers' compensation laws are a nonfault-based statutory scheme for compensating employees who suffer injuries in the scope of their employment. T.C.A. § 50-6-101 *et seq.* In private industry, on-the-job injuries are governed by these laws, but counties are not covered by the workers' compensation laws unless they choose to be covered. T.C.A. § 50-6-106. A county's decision to come under these laws becomes effective 30 days after the county files written notice of exercising this option with the Workers' Compensation Division of the Tennessee Department of Labor and Workforce Development. Cancellation of the coverage may be accomplished at any time by giving the same type of written notice. A county, through its legislative body, can choose to cover only designated departments and may also cancel coverage on a selective basis.

Unemployment Compensation.

Under the Tennessee Employment Security Law, T.C.A. § 50-7-101 *et seq.*, unemployment insurance coverage is mandatory for county and other local government entity employees. All county employees are covered except popularly elected officials, members of the county legislative body, judges, members of the state National Guard or Air National Guard, employees serving on a temporary basis in case of emergency (fire, storm, snow, earthquake, flood, etc.), and those in a position that is designated according to law as “a major non-tenured policymaker or advisory position” or “a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week.” T.C.A. § 50-7-207(c)(6)(D).

Unemployment insurance premiums must be paid by the employer; no part of the premiums can be deducted from employees' wages. Governmental employers may finance unemployment insurance by implementing the reimbursement method or the premium/tax method. Under the reimbursement method, the employer submits quarterly payments to the Department of Employment Security for the exact amount of unemployment benefits paid to former employees and chargeable to the employer's account. Under the premium/tax method, the assigned premium rate is 1.5 percent until the account has been chargeable with benefits and subject to contributions throughout the 36 consecutive calendar month period ending on the computation date (the December 31 preceding a tax rate year, which begins on July 1). After this condition is met, the governmental employer's premium/tax rate will be computed according to a new rate table for governmental employers only. Tax rates will range from 0.3 percent to 3 percent, depending on the reserve ratio. The reserve ratio is computed by subtracting cumulative benefits charged to the employer's reserve account from cumulative contributions paid and dividing the difference by the average taxable payroll of the three recent calendar years. T.C.A. § 50-7-401 *et seq.*

Counties that wish to change their method of financing must file a written notice with the Department of Employment Security not later than 30 days prior to the beginning of the taxable year the change becomes effective. When a change is made from the reimbursement method to the premium/tax method, the employer remains liable for reimbursement of unemployment benefits that are paid after the change but are based on wages paid before the change. Benefit changes can occur up to nine calendar quarters after an employer pays wages to a worker. Either the fee official or the county may be deemed the employer, depending upon whether the fee official or the county pays the deputies and assistants.

The reasons for an employee's termination may affect unemployment compensation benefits. Employees who voluntarily quit or who are discharged for job-related misconduct are not eligible to receive unemployment compensation benefits. Former employees receiving unemployment benefits must be able to work, available for work, and making reasonable efforts to secure suitable work. T.C.A. § 50-7-303.

Information concerning the application and benefits of this program can be obtained from local offices of the state Department of Employment Security.

Termination Pay.

When an individual's employment terminates for any reason, the employee must be paid for all accrued overtime, compensatory time and regular earnings. In addition, the employee may be entitled to be paid for accrued but unused sick leave, vacation leave, or any other type of compensable leave, depending upon the agreement between the employer and employee. See *Phillips v. Memphis Furniture Mfg. Co.*, 573 S.W.2d 493 (Tenn. Ct. App. 1978).

Upon the death of an employee, if the employee has not designated a beneficiary to receive any unpaid wages or salary due the employee at the time of death, the employer may pay any unpaid wages or salary directly to the surviving spouse if the amount owing does not exceed \$5,000. If the deceased employee is a woman who is head of a household and the amount owing does not exceed \$5,000, the employer may pay the amount to the surviving children. If the employer is in possession of a sum less than \$5,000 due the employee that is not wages or salary and six months pass after the employee's death without application being made for the appointment of an executor or administrator, then the employer may pay the sum directly to the employee's surviving spouse, or if there is no surviving spouse then directly to the custodians or guardians of the employee's unmarried minor children. Unless the employee has designated a beneficiary to receive unpaid wages or salary, if the amount due exceeds \$5,000 the entire amount must be paid to an executor or administrator, or as ordered by the court. Employers are encouraged to inform employees of the right to designate a beneficiary at the time they are hired. T.C.A. § 30-2-103.

Retirement.

Title 8, Chapter 35, of the *Tennessee Code Annotated* contains the statutory framework for counties to participate in the Tennessee Consolidated Retirement System (TCRS). **The county legislative body may, by resolution legally adopted and approved, authorize all of its employees in all of its departments to participate in the TCRS, with the county making the employer's contribution into the TCRS.** T.C.A. § 8-35-201. Membership of the employees is then optional with each employee presently employed at the date of the approval of membership by the board of trustees of the TCRS, and mandatory for all eligible employees entering the employment of the county after that date. T.C.A. § 8-35-203. The county legislative body may make certain elections for coverage of its employees, such as cost-of-living benefits. T.C.A. §§ 8-35-207, 8-35-208. Special rules apply for participation in the TCRS by county officials. See T.C.A. §§ 8-35-109, 8-35-116.

To withdraw from the TCRS, the county must give the TCRS board at least one year's notice effective June 30 of the calendar year following the end of the notice period, which must be in the form of a resolution passed by a two-thirds vote of the membership of the county legislative body. Such resolution to withdraw may be rescinded by a two-thirds vote of the county legislative body at any time prior to the end of the one year's notice period. T.C.A. § 8-35-218.

A county may set a mandatory retirement age for members of the TCRS who are employed as firefighters or law enforcement officers. If these employees are in a supervisory or administrative position, they must be allowed to continue in service until they reach the age at which they are eligible for federal Social Security benefits. Any member who serves as chief of a fire department or police department may continue in service beyond the age at which the person is eligible for federal Social Security benefits. T.C.A. § 8-36-205.

These retirement statutes are complex, and amendments are made to these statutes by the General Assembly each year. The staff and legal counsel for the TCRS are available to help county officials with questions concerning the retirement program and to help individual participants with benefits questions.

Expense Accounts.

In counties having a population of 100,000 or more according to the latest federal census, salaried county officials who are paid from county funds and are elected by the people, the county legislative body or another board or commission, and any clerk or master appointed by the chancellor, must be reimbursed for actual expenses incurred incident to holding office, including but not limited to lodging while away on official business and travel on official business, both within and outside the county. The county legislative body may by resolution determine what other expenses are reimbursable. T.C.A. § 8-26-112(a).

In all other counties, the county legislative body may by resolution choose to pay the expenses of elected officials and may promulgate procedural rules regarding the method and type of expenses reimbursed. In counties where such a resolution has been adopted, the county mayor (1) prescribes forms to be used to reimburse expenses, (2) examines expense reports or vouchers to ensure items are legally reimbursable and filed according to legislative body rules, and (3) forwards proper expense reports to the disbursing officer for payment. T.C.A. § 8-26-112(b).

All officials who are authorized to incur reimbursable expenses are required to make out accurate, itemized expense accounts showing the date and amount of each item and the purpose for which the item was expended. The official must swear before an officer qualified to administer oaths that the expense account is correct and that the expenses were actually incurred in the performance of an official duty. Receipts should be attached to the expense voucher whenever practical, and vouchers must be numbered and referred to by number. T.C.A. § 8-26-109. Making a false oath on an expense account constitutes perjury. T.C.A. § 8-26-111.

Automobiles.

Depending upon population classification, certain counties may provide cars for salaried county officials' use. In a few counties, officials may receive a monthly car allowance in lieu of a county-owned car. T.C.A. § 8-26-113.

Wage Assignments and Garnishments.

Garnishment of wages, salaries or other compensation due from a county to any of its officers or employees is permitted. T.C.A. § 26-2-221. Employers cannot retaliate against an employee based on a wage assignment for alimony or child support, but the employer may impose a service charge of up to 5 percent, not to exceed \$5 per month. T.C.A. § 36-5-501. The maximum amount of earnings that may be garnished is set out in T.C.A. § 26-2-106. See *also* 15 U.S.C. § 1672(b).

FIT, FICA Withholding, and Miscellaneous Reporting Matters.

Counties are responsible for making the proper FICA and FIT withholdings. The county makes quarterly payments and reports to the Internal Revenue Service and the Social Security Administration. Counties must be aware of the taxation of fringe benefits, particularly the use of county-owned vehicles, as being income to the employees. If the county fails to make the proper withholdings from income, serious penalties can be imposed by the Internal Revenue Service. County officials may be responsible for filing Form 1099s with the IRS to report these benefits.

Commercial Driver Licenses.

County employees operating commercial-type vehicles and those requiring a special endorsement must obtain a commercial driver's license in order to operate many county vehicles. Vehicles (including vehicle combinations) that fall within the commercial classification include the following:

- (1) Vehicles weighing more than 26,000 pounds (gross vehicle weight rating);
- (2) Vehicles designed to transport more than 15 passengers (including the driver); and
- (3) Vehicles transporting hazardous material requiring placarding.

T.C.A. § 55-50-102.

Vehicles requiring a special endorsement listing on a driver's license include:

- (1) Those authorized to pull multiple trailers;
- (2) Those designed to carry more than 15 passengers (including the driver);
- (3) Tank vehicles;
- (4) Those transporting hazardous materials requiring placarding; and
- (5) School buses.

The commercial driver's license requirements include passing grades on certain knowledge and skills tests as well as a good driving record. A "grandfather" provision exists that exempts certain drivers from having to take the skills test. Furthermore, operators of emergency vehicles are exempt from these provisions.

School bus drivers must have a Class C commercial license with school bus endorsement. T.C.A. § 55-50-102; Op. Tenn. Att'y Gen. 89-122 (Sept. 21, 1989). This endorsement may be issued only if the applicant has had five years of unrestricted driving experience and can demonstrate good character, competency, and fitness. T.C.A. § 55-50-302.

CHAPTER 5

JAILS

The responsibilities related to the care and custody of prisoners held in county facilities are obligations imposed by law upon county sheriffs, sheriffs being the individuals who have been elected by the people of the various counties to perform these and other law enforcement functions.

Cooper v. State, 106 S.W.3d 688, 691 (Tenn. Ct. App. 2003).

At the common law, the custody of jails, of right belonged, and was annexed, as an incident, to the office of sheriff. The safe keeping of prisoners involved much peril and responsibility, and it was esteemed unsafe to commit them to the care of any less a personage than the sheriff himself, whose office was one of very ancient date, and of great trust and authority, and who might bring to his assistance the posse comitatus or power of the county.

He had the appointment of the keepers of jails, and was to put in such for whom he would answer; for being an immediate officer of the King's Court, and amenable for escapes, and subject to ameracements if he had not the bodies of prisoners in court, it was esteemed against all reason that another should have the keeping and custody of the jail. His right was favored, and could only be abridged by act of Parliament. Even the King's grant to another, of the custody of prisoners, was, after 5 H. 4, void. The care of Gaols, cited in Milton's case, 460, 34 a; 4 Bac. Ab. (Gaol and Gaoler, A.), 29.

These rules of law and principles govern the present case. The sheriff's common law right cannot be abridged, or given to another, unless the purpose so to do be clearly expressed by the Legislature; and this is not done here. The intendment of the law is in favor of the sheriff's right; and public policy requires that he should be the keeper of all prisons. It would be unsafe to commit so important a trust to another, unless for some imperative reason.

Felts v. City of Memphis, 39 Tenn. 650 (1859).

Tennessee case law makes it clear that the sheriff, by virtue of his office, is the jailor and is entitled to the custody of the jail. *Metropolitan Government of Nashville and Davidson County v. Poe*, 383 S.W.2d 265, 273 (Tenn. 1964) *citing Felts v. City of Memphis*, 39 Tenn. 650 (1859) and *State ex rel. Bolt v. Drummond*, 128 Tenn. 271, 160 S.W. 1082 (1913). *See also State v. Cummins*, 42 S.W. 880, 881 (Tenn. 1897) (From time immemorial the jail has, of right, belonged to the office of sheriff. It was so in Tennessee at the adoption of all the constitutions.); *Collier v. Montgomery County*, 54 S.W. 989, 990 (Tenn. 1900) (We think it plain that the sheriff cannot, against his will, be deprived of the

custody of the jail, so far as it is necessary for the detention of prisoners who have been committed for safekeeping, or who are under sentence of death, or who are awaiting trial or a transfer to state or other prisons, or who are detained merely as witnesses; in short, all such prisoners as have not been convicted and sentenced to the workhouse under the provisions of the acts providing that system.).

Pursuant to T.C.A. § 8-8-201(a)(3), it is the duty of the sheriff to take charge and custody of the jail of the sheriff's county and of the prisoners therein; receive those lawfully committed and keep them personally, or by deputies or jailer, until discharged by law; be constantly at the jail or have someone there with the keys to liberate the prisoners in case of fire. See also T.C.A. § 41-4-101. *Madewell v. Garmon*, 484 F.Supp. 823, 824 (E.D. Tenn 1980) (Tennessee law appears to place direct responsibility on a sheriff for the operations of his jail.); *Willis v. Barksdale*, 625 F.Supp. 411, 414 (W.D. Tenn. 1985) (The sheriff is an official popularly elected by county residents who has the statutory responsibility for safekeeping all prisoners within the jail.). However, the sheriff may be deprived of custody of the jail if it is jointly operated by two or more contiguous counties pursuant to an interlocal agreement. T.C.A. §§ 8-8-201(a)(3), 41-4-141.

Duty to Build and Maintain Jail

It is the duty of the county legislative body to erect a jail and to keep it in order and repair at the expense of the county, and it may levy a special tax for this purpose. T.C.A. §§ 5-7-104 and 5-7-106. *Ellis v. State*, 20 S.W. 500 (Tenn. 1892); *Henry v. Grainger County*, 290 S.W. 2 (Tenn. 1926); *Storie v. Norman*, 130 S.W.2d 101 (Tenn. 1939) (It is the duty of the county court to erect a jail and keep it in repair at the expense of the county, and it may levy a special tax for that purpose.); *Brock v. Warren County*, 713 F.Supp. 238, 243 (E.D. Tenn. 1989) (holding county liable for commissioners' failure to provide sufficient funds for a habitable jail or training of guards).

In construing the provisions of similar Alabama statutes (compare T.C.A. §§ 5-7-104, 5-7-106, and 5-7-110 with Ala. Code §§ 11-14-10 and 11-14-13), the Alabama courts have made it clear that the duty of the county to erect and maintain a county jail pertains exclusively to the physical plant of the jail. The duty to "maintain a jail" under § 11-14-10 is merely the duty to keep the "jail and all equipment therein in a state of repair and to preserve it from failure or decline." *Turquitt v. Jefferson County*, 137 F.3d 1285, 1290 (11th Cir. 1998) citing *Keeton v. Fayette County*, 558 So.2d 884, 886 (Ala. 1989). Accordingly, "the County will have violated Plaintiffs' Eighth Amendment rights if its failure to maintain the Jail constituted deliberate indifference to a substantial risk of serious harm to the prisoners." *Marsh v. Butler County*, 268 F.3d 1014, 1027 (11th Cir. 2001).

Where a municipal body is vested with this sort of fiscal obligation to a jail, its liability for insufficient funding or maintenance will depend on its knowledge of conditions at the jail. *O'Quinn v. Manuel*, 773 F.2d 605, 609 (5th Cir. 1985) (Clearly the [municipality] had a duty to fund and maintain the Jail.). In *Strandell v. Jackson County*, 634 F.Supp. 824, 830 (S.D. Ill. 1986), the court found that the allegations in the complaint, that Jackson County

provided inadequate funding for its jail facility and had failed to maintain the jail facility in conformity with state law and constitutional standards, were sufficient to satisfy the “custom” requirement, and that plaintiffs had therefore stated a cause of action against the county. And in *Littlefield v. Deland*, 641 F.2d 729, 732 (10th Cir.1981), the court upheld a finding of county liability for grossly inadequate facilities for mentally ill detainees where the “nature and extent of jail facilities” were under the county commissioners’ control. Even though the facilities’ inadequacy had been repeatedly brought to the county commissioners’ attention, the county had “pursued a policy of indifference” that justified holding the county liable for damages under 42 U.S.C. § 1983 based upon the failure of its commissioners to adequately fund the county jail.

In a more recent case, *May v. County of Trumbull*, 127 F.3d 1102 (Table) (6th Cir. 1997), the plaintiff argued “that inadequate funding of the jail and the resulting understaffing of the facility rose to the level of deliberate indifference sufficient to support § 1983 liability for Trumbull County.” The Sixth Circuit held that the county’s policy decisions and allocation of resources could not form the basis for municipal liability under § 1983 because the evidence presented did not show that the county “made its funding and staffing decisions with a known risk of the potential for detainees’ suicides and a conscious disregard of that risk.” *Id.* at *3, citing *Roberts v. City of Troy*, 773 F.2d 720, 725 (6th Cir. 1985) (holding that funding and staffing decisions, even where they did not comply with regulations, could not form the basis for a charge of deliberate indifference because intent and cause had not been demonstrated). See also *Gaston v. Ploeger*, --- F.Supp.2d ----, 2005 WL 3079099, *11 (D. Kan. 2005) (entering summary judgment in favor of county commissioners in their official capacity on plaintiff’s § 1983 claims based upon inadequate funding).

Nevertheless, if the county chooses to run a jail it must do so without depriving inmates of the rights guaranteed to them by the federal Constitution. “It is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement nor will an allegedly contrary duty at state law.” *Smith v. Sullivan*, 611 F.2d 1039, 1043-1044 (5th Cir. 1980) (citations omitted). See also *Newman v. State of Alabama*, 559 F.2d 283, 286, 291 (5th Cir. 1977) (It should not need repeating that compliance with constitutional standards may not be frustrated by legislative inaction or failure to provide the necessary funds.); *Williams v. Edwards*, 547 F.2d 1206, 1213 (5th Cir. 1977) (Thus lack of funds does not justify operating a prison in an unconstitutional manner.); *Laube v. Haley*, 234 F.Supp.2d 1227, 1252 (M.D. Ala. 2002) (Courts have repeatedly made clear that cost is not a defense to constitutional violations.); *Nicholson v. Choctaw County*, 498 F.Supp. 295, 311 (S.D. Ala. 1980) (The decision to withhold resources from the jail cannot be an adequate justification for depriving inmates of their constitutional rights and of their rights under state law.).

Location of Jail

The jail, unlike most other county buildings, may be erected outside the limits of the county town but it must be within the boundaries of the county. However, if two or more counties enter into an interlocal agreement providing for a jail to serve the counties that are parties to the agreement, then a county that is a party to the agreement is not required to have a

jail located within the boundaries of the county, but any jail serving more than one county must be located within the boundaries of one of the counties that is a party to the agreement. T.C.A. § 5-7-105. See Op. Tenn. Atty. Gen. No. 03-060 (May 6, 2003).

Jail Specifications

The county jail must be of sufficient size and strength to contain and keep securely the inmates confined therein and must contain at least two apartments, one for males and one for females. The jail must be properly heated and ventilated, and have sufficient sewerage to ensure the health and comfort of the inmates. T.C.A. § 5-7-110. See also Rules of the Tennessee Corrections Institute, Rule 1400-1-.04.

Article I, Section 32, of the Tennessee Constitution provides that the erection of safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for. This provision has never been construed in any reported case. However, it has been held that Article I, Section 32, of the Tennessee Constitution does not afford any greater protection than is now available for prisoners under the aegis of the Eighth Amendment of the United States Constitution. *Grubbs v. Bradley*, 552 F.Supp. 1052, 1125 (M.D. Tenn. 1982).

The Eighth Amendment clearly requires states to furnish its inmates with "reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977). Those areas are generally considered as the "core" areas entitled to Eighth Amendment protections. They are the basic necessities of civilized life, and are, during lawful incarceration for conviction of a crime, wholly controlled by prison officials. Inmates must necessarily rely upon prison officials and staff to ensure that those basic necessities are met.

A corollary to the state's obligation to provide inmates with constitutionally adequate shelter is the requirement of minimally adequate living space that includes "reasonably adequate ventilation, sanitation, bedding, hygienic materials, and utilities (i.e., hot and cold water, light, heat, plumbing)." *Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981). Other courts have held that adequate shelter must include adequate provisions for fire safety. *Leeds v. Watson*, 630 F.2d 674, 675-76 (9th Cir.1980); *Ruiz v. Estelle*, 503 F.Supp. 1265, 1383 (S.D. Tex. 1980), *aff'd in part, rev'd in part and remanded*, 679 F.2d 1115 (1982); *Gates v. Collier*, 349 F.Supp. 881, 888 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

On the other hand, constitutionally adequate housing is not denied simply by uncomfortable temperatures inside cells, unless it is shown that the situation endangers inmates' health. *Smith v. Sullivan*, 553 F.2d 373, 381 (5th Cir. 1977). Similarly, high levels of noise are not, without more, violations of the Eighth Amendment. *Hutchings v. Corum*, 501 F.Supp. 1276, 1293 (W.D. Mo.

1980). As noted by the Supreme Court in *Rhodes*, the Constitution simply does not require complete comfort and does not prohibit double celling *per se*. 452 U.S. at 349, 101 S.Ct. at 2400, 69 L.Ed.2d at 70.

The Eighth Amendment, as noted, does require the maintenance of reasonably sanitary conditions in prisons, especially in the housing and food preparation and service areas. *Ramos, supra*, 639 F.2d at 569-72. In general, conditions must be sanitary enough so that inmates are not exposed to an unreasonable risk of disease. *Id.*; *Lightfoot v. Walker*, 486 F.Supp. 504, 524 (E.D. Wis. 1980). Inmates must be furnished with materials to keep their cells clean, *Ramos*, 639 F.2d at 570, and for the maintenance of personal hygiene. *Sweet v. South Carolina Department of Corrections*, 529 F.2d 854, 860 n. 11 (4th Cir. 1975).

Id. at 1122 - 1123.

Replacement of Jail

Whenever, in the opinion of a majority of the members of the county legislative body, two-thirds of them being present, the site of a jail is unhealthy, insecure or inconvenient in its location to the county, the town, or inhabitants of the town in which it is situated, or the interest and convenience of the town would be promoted by the removal of any of the same, the members may order a sale of the site and of the whole or part of the materials used in its construction; and they may also order that a more eligible, convenient, healthy or secure site be purchased and cause to be erected thereon a new jail better suited to the convenience of the town, and to secure the safe custody, health and comfort of inmates. T.C.A. § 5-7-111. *Henry v. Grainger County*, 290 S.W. 2 (Tenn. 1926) (By statute provision is made for the sale of a courthouse or jail under certain circumstances and the purchase of another site and the erection of a new building.); *Jackson v. Gardner*, 639 F.Supp. 1005 (E.D. Tenn. 1986) (holding that the county must reduce the jail population and build a new workhouse).

Appointment of Jailer

Under the common law the sheriff had the right to appoint a jailer. *Felts v. City of Memphis*, 39 Tenn. 650 (1859). **The right of the sheriff to appoint a jailer has been codified in T.C.A. § 41-4-101, wherein it states that the sheriff is authorized to appoint a jailer for whose acts the sheriff is civilly responsible.**

Under Tennessee law, "[t]he sheriff of the county ... may appoint a jailer, for whose acts the sheriff is civilly responsible." Tenn.Code Ann. § 41-4-101 (1997). Jailers are charged with the following responsibilities: to receive and safely keep convicts on their way to the state or federal penitentiary, to file and keep safe under the sheriff's direction the mittimus or process by which a prisoner is committed or discharged from jail, to determine within their discretion what type of precautions to take for guarding against escape and

to prevent the importation of drugs, to provide support, to furnish adequate food and bedding, to enforce cleanliness in the jails, to convey letters from prisoners to their counsel and others, and to admit persons having business with the prisoner.

Sowards v. Loudon County, 203 F.3d 426, 436 (6th Cir. 2000). See also *United States v. Hill*, 60 F. 1005, 1009 (6th Cir. 1894) (... the Tennessee statute makes the sheriff civilly responsible for the acts of the jailer whom he appoints.). See also *Davis v. Hardin County*, 2002 WL 1397276, *3 - *4 (W.D. Tenn. 2002), for a discussion of the differences between deputies and jailers for the purposes of the Tennessee Governmental Tort Liability Act.

Persons Confined to Jail

The sheriff is charged with receiving those persons lawfully committed to the jail and with keeping them until they are lawfully discharged. T.C.A. § 8-8-201(a)(3). This includes federal as well as state prisoners. *United States v. Hill*, 60 F. 1005, 1009 (6th Cir. 1894).

In addition to convicts sentenced to imprisonment in the county jail, the jail may be used as a prison for the safekeeping or confinement of the following persons:

- (1) Persons committed for trial for public offenses;
- (2) Convicts sentenced to imprisonment in the penitentiary, until their removal to the penitentiary;
- (3) Persons committed for contempt or on civil process;
- (4) Persons committed on failure to give security for their appearance as witnesses in any criminal cases;
- (5) Persons charged with or convicted of a criminal offense against the United States;
- (6) Insane persons, pending transfer to the insane hospital, or other disposition; and
- (7) All other persons committed thereto by authority of law.

T.C.A. § 41-4-103(a).

A county jail must accept all persons arrested pursuant to law by the sheriff or municipal police officers. Op. Tenn. Atty. Gen. No. 02-015 (Feb. 6, 2002). Additionally, the jailer is required to receive all persons arrested by officers of the Tennessee Department of Homeland Security and TVA peace officers. T.C.A. §§ 38-3-114 and 38-3-120. The jailer cannot refuse acceptance of an arrestee who complains about a medical

problem or has an obvious injury needing medical attention. Op. Tenn. Atty. Gen. No. 02-015 (Feb. 6, 2002). A county jailer cannot require an arresting city police officer to take a prisoner for medical examinations prior to being accepted by the jailer; after a mittimus has been issued the jailer must receive the prisoner. Op. Tenn. Atty. Gen. No. U91-01 (1991).

The attorney general has opined that the sheriff does not have the authority to refuse to accept a prisoner accompanied by a valid mittimus, even when the jail has reached its design capacity, nor does the sheriff have the authority to refuse to accept a person arrested for a violation of state law prior to the issuance of a mittimus. Op. Tenn. Atty. Gen. No. 89-65 (April 28, 1989); Op. Tenn. Atty. Gen. No. 94-041 (March 31, 1994) (Likewise, this office is not aware of any grounds, absent an emergency medical situation or superseding court order, that would authorize a sheriff to refuse to accept a person arrested for a state violation for a temporary holding prior to the individual's appearance before a magistrate and the issuance of a mittimus.). See *also State v. Mitchell*, 593 S.W.2d 280, 282 (Tenn. 1980); *Wynn v. State*, 181 S.W.2d 332, 334 (Tenn. 1944) (The criminal statutes and rules permit "a temporary holding without a mittimus."). A mittimus is a court order that directs an officer to convey an individual to the jail and directs the jailer to receive and keep the individual. A mittimus is the authorization for commitment to a county jail.

Convicts En Route to the Penitentiary.

It is the duty of the jailer to receive and safely keep, without any fee therefor, all convicts on their way to the penitentiary, whenever the sheriff or other officer in charge of such convicts may deem it necessary. T.C.A. § 41-4-104. *Sowards v. Loudon County*, 203 F.3d 426, 436 (6th Cir. 2000) (Jailers are charged with the following responsibilities: to receive and safely keep convicts on their way to the state or federal penitentiary,).

Delayed Commitment to the Department of Correction.

Pursuant to T.C.A. § 8-8-201(a)(36), it is the duty of the sheriff to promptly turn over and transfer custody of any inmate sentenced to the Department of Correction who is being housed in the sheriff's local jail awaiting transfer when called upon to do so by a state official pursuant to T.C.A. § 40-35-212 or T.C.A. § 41-8-106. However, during times when the state prison population exceeds 95 percent of the relevant designated capacity, the governor may declare that a state of overcrowding emergency exists. T.C.A. § 41-1-503. Pursuant to T.C.A. § 41-1-504, upon declaring that an overcrowding emergency exists, the governor is required to invoke one or both of the following powers to reduce overcrowding:

- (1) Direct the board in writing to reduce the release eligibility dates of all male or female inmates, or both, excluding any inmate convicted by a court of escape, by a percentage sufficient to enable the board to consider immediately and to release on supervised parole enough inmates to reduce

the in-house population of appropriate state correctional facilities to 90 percent of the relevant designated capacity.

(2) Direct the commissioner in writing to notify all state judges and sheriffs that commitment to the department of felons who have been on bail prior to their convictions shall be stayed or otherwise delayed until up to 60 days after the in-house population of appropriate correctional facilities has been reduced to 90 percent of the relevant designated capacity either through normal release, contract sentencing, or the power granted in T.C.A. § 41-1-504(a)(1), or all such methods.

T.C.A. § 41-1-504(a)(1) and (a)(2). *State v. Lock*, 839 S.W.2d 436 (Tenn. Crim. App. 1992) (The governor can order the delay in prisoners being transferred from a local jail to a Department of Correction facility.).

The governor's directive invoking the power granted pursuant to T.C.A. § 41-1-504(a)(2) may include any conditions the governor may wish to impose as to which inmates or types of inmates will immediately be accepted by the Department of Correction or which inmates or types of inmates will be subject to the delayed intake directive, or both. The commissioner must transmit any conditions imposed by the governor to the judges and sheriffs in the notification that intake to the department has been delayed. T.C.A. § 41-1-506(a). The governor does not have the authority to direct that the commitment of an inmate be delayed any longer than six months from the date of sentencing or the date of the final judgment of the highest state appellate court to which an appeal is taken, whichever date is later. T.C.A. § 41-1-506(b). During times in which the power to delay the intake of inmates is invoked, a judge may order the sheriff to take the inmate into local custody to await removal to the Department of Correction. T.C.A. § 41-1-506(c). Notwithstanding any other provision of law to the contrary, during the time that the power of restricted intake has been invoked pursuant to T.C.A. § 41-1-504(a)(2), no sheriff may convey an inmate to the Department of Correction unless authorized to do so. No sheriff shall be deemed to have violated any duty of office by not conveying such inmate when notified to do so. T.C.A. § 41-1-506(e).

Notwithstanding any other provision of law to the contrary, all prisoners sentenced to the Department of Correction whose commitments are delayed pursuant to Title 41, Chapter 1, Part 5, or pursuant to the order of a federal court, and who are being held by the county pending such commitment, may, at the discretion of the sheriff or workhouse superintendent, participate in appropriate academic, vocational and work-related programs that are available to persons sentenced to local jails or workhouses, and may be awarded time reduction credits as authorized by Title 41, Chapter 2, Part 1, for participation in such programs. T.C.A. § 41-1-510.

Removal to the State Penitentiary.

In counties where, because of the insufficiency of the county jail or for any other cause, the court may be of opinion that the safekeeping of the convicts may require it, the court may

order the immediate removal of convicts to the penitentiary or to the nearest branch prison, at the cost of the state, before the expiration of the time allowed to remove such convicts. Every such convict shall, as soon as possible after conviction, be safely removed and conveyed to the penitentiary or to one of the branch prisons by the person appointed by the commissioner of correction for that purpose. T.C.A. § 40-23-107. *Dover v. Rose*, 709 F.2d 436, 437 n.1 (6th Cir. 1983) (State trial judges in Tennessee have the authority to transfer prisoners in county jails to the state penitentiary or the nearest branch prison "where, because of the insufficiency of the county jail, or for any other cause, the court may be of opinion that the safekeeping of the convicts may require it,") *citing Chisom v. State*, 539 S.W.2d 831, 833 (Tenn. Crim. App. 1976) (Clearly, the trial judge was within his authority to commit the defendant, a convicted rapist, to the penitentiary pending the outcome of any attendant appellate proceedings in his case.). *See Burt v. State*, 454 S.W.2d 182 (Tenn. Crim. App. 1970) (holding that transfer of convict to state penitentiary prior to final determination of appeal does not raise a constitutional question). *But see State v. Grey*, 602 S.W.2d 259 (Tenn. Crim. App. 1980) (holding that the trial court was without authority to transfer a pretrial detainee to the state penitentiary).

Federal Prisoners.

The jailer is liable for failing to receive and safely keep all persons delivered under the authority of the United States to the like pains and penalties as for similar failures in the case of persons committed under authority of the state. However, the marshal or person delivering such prisoner under authority of the United States is liable to the jailer for fees and the subsistence of the prisoner while so confined, which shall be the same as provided by law for prisoners committed under authority of the state. The jailer will also collect from the marshal 50 cents a month for each prisoner, under the resolution of the first Congress, and pay the same to the county trustee forthwith, to be accounted for by the trustee as other county funds. T.C.A. § 41-4-105. *United States v. Hill*, 60 F. 1005, 1009 (6th Cir. 1894) (holding that where the sheriff is civilly responsible for the safe keeping of prisoners committed to his care, and any party aggrieved may sue on his official bond in the name of the state, the United States may, in such an action, recover, for allowing the escape of a prisoner under indictment by a federal grand jury, the expenses of the arrest and keeping of the prisoner, and money expended in recapturing him).

Pursuant to 18 U.S.C. 4002, for the purpose of providing suitable quarters for the safekeeping, care, and subsistence of federal prisoners, the United States attorney general may contract, for a period not exceeding three years, with the proper state or county authorities for the imprisonment, subsistence, care, and proper employment of federal prisoners. Federal prisoners may be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of the state or political subdivision in which they are imprisoned. The rates to be paid for the care and custody of said persons must take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.

Detention of Juveniles.

A child alleged to be dependent or neglected may not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses or of children alleged to be delinquent. T.C.A. § 37-1-116(d). A child alleged to be delinquent or unruly may be detained in a jail or other facility for the detention of adults only if:

- (1) Other facilities listed in T.C.A. § 37-1-116(a)(3) are not available;
- (2) The detention is in a room separate and removed from those for adults;
and
- (3) It appears to the satisfaction of the court that public safety and protection reasonably require detention, and it so orders.

T.C.A. § 37-1-116(a)(4). See *State v. Carroll*, 36 S.W.3d 854, 862 (Tenn. Crim. App. 1999) (“Tenn.Code. Ann. § 37-1-116 (1996) explicitly limits appropriate places of detention for juveniles, as opposed to custody of juveniles ...”).

The sheriff or other official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime must immediately inform the court if a person who is or appears to be under 18 years of age is received at the facility, and must bring the person before the court upon request or deliver the person to a detention or shelter care facility designated by the court. T.C.A. § 37-1-116(b).

Pursuant to T.C.A. § 37-1-116(e), no child may be detained or otherwise placed in any jail or other facility for the detention of adults, except as provided in T.C.A. § 37-1-116(c) and (h). A juvenile may be temporarily detained for as short a time as feasible, not to exceed 48 hours, in an adult jail or lockup, if:

- (1) The juvenile is accused of a serious crime against persons, including criminal homicide, forcible rape, mayhem, kidnapping, aggravated assault, robbery and extortion accompanied by threats of violence;
- (2) The county has a low population density not to exceed 35 people per square mile;
- (3) The facility and program have received prior certification by the Tennessee Corrections Institute as providing detention and treatment with total sight and sound separation from adult detainees and prisoners, including no access by trustees;
- (4) There is no juvenile court or other public authority or private agency as provided in T.C.A. § 37-1-116(f) able and willing to contract for the placement of the juvenile; and

(5) A determination is made that there is no existing acceptable alternative placement available for the juvenile.

T.C.A. § 37-1-116(h).

The attorney general has opined “that a juvenile offender who has attained the age of majority before being convicted of an offense by a juvenile court may not be held in an adult facility, such as the local jail. Such a defendant may only be held in a juvenile detention facility ... and may not be held beyond the defendant's nineteenth birthday, regardless of whether the offense is a misdemeanor or a felony.” Op. Tenn. Atty. Gen. No. 04-038 (March 12, 2004).

If a case is transferred to another court for criminal prosecution, the child may be transferred to the appropriate officer or detention facility in accordance with the law governing the detention of persons charged with crime. T.C.A. § 37-1-116(c). After a petition has been filed in juvenile court alleging delinquency based on conduct that is designated a crime or public offense under the laws, including local ordinances, of this state, the court, before hearing the petition on the merits, may transfer the child to the sheriff of the county to be held according to law and to be dealt with as an adult in the criminal court of competent jurisdiction. T.C.A. § 37-1-134(a).

JUVENILE DETENTION FACILITIES. Notwithstanding the provisions of T.C.A. § 37-1-116 to the contrary, in any facility that meets the following requisites of separateness, juveniles who meet the detention criteria of T.C.A. § 37-1-114(c) may be held in a juvenile detention facility that is in the same building or on the same grounds as an adult jail or lockup provided that no juvenile facility constructed or developed after January 1, 1995, may be located in the same building or directly connected to any adult jail or lockup facility complex:

(1) Total separation between juvenile and adult facility spatial areas such that there could be no haphazard or accidental contact between juvenile and adult residents in the respective facilities;

(2) Total separation in all juvenile and adult program activities within the facilities, including recreation, education, counseling, healthcare, dining, sleeping and general living activities;

(3) Separate juvenile and adult staff, including management, security staff and direct care staff, such as recreational, educational and counseling. Specialized services staff, such as cooks, bookkeepers and medical professionals who are not normally in contact with detainees or whose infrequent contacts occur under conditions of separation of juveniles and adults, can serve both; and

(4) In the event that state standards or licensing requirements for secure juvenile detention facilities are established, the juvenile facility must meet the standards and be licensed or approved as appropriate.

T.C.A. § 37-1-116(i)(1). In determining whether the criteria set out above are met, the following factors will serve to enhance the separateness of juvenile and adult facilities:

(1) Juvenile staff are employees of or volunteers for a juvenile service agency or the juvenile court with responsibility only for the conduct of the youth serving operations. Juvenile staff are specially trained in the handling of juveniles and the special problems associated with this group;

(2) A separate juvenile operations manual, with written procedures for staff and agency reference, specifies the function and operation of the juvenile program;

(3) There is minimal sharing between the facilities of public lobbies or office/support space for staff;

(4) Juveniles do not share direct service or access space with adult offenders within the facilities, including entrance to and exits from the facilities. All juvenile facility intake, booking and admission processes take place in a separate area and are under the direction of juvenile facility staff. Secure juvenile entrances (sally ports, waiting areas) are independently controlled by juvenile staff and separated from adult entrances. Public entrances, lobbies and waiting areas for the juvenile detention program are also controlled by juvenile staff and separated from similar adult areas. Adult and juvenile residents do not make use of common passageways between intake areas, residential spaces and program/service spaces;

(5) The space available for juvenile living, sleeping and the conduct of juvenile programs conforms to the requirements for secure juvenile detention specified by prevailing case law, prevailing professional standards of care, and by state code; and

(6) The facility is formally recognized as a juvenile detention center by the state agency responsible for monitoring, reviewing or certifying of juvenile detention facilities.

T.C.A. § 37-1-116(i)(2).

Commitment of Defendant to Jail

It is the duty of the sheriff in whose custody the defendant is at the rendition of the judgment, or afterwards legally comes, to execute the judgment of imprisonment by committing the defendant, as soon as possible, to jail or to the warden of the penitentiary according to the exigency of the writ. T.C.A. § 40-23-103. With respect to a sentence of confinement to be served in the state penitentiary, the Tennessee Court of Criminal Appeals has interpreted "as soon as possible" to mean as soon as space is available at the penitentiary and that the courts should interpret "as soon as possible" in its most literal sense. *Carver v. State*, 2003 WL 21663688 (Tenn. Crim. App. 2003.).

A criminal sentence commences on the day the defendant legally comes into the custody of the sheriff for the execution of the judgment of imprisonment. *Kelly v. State*, 61 S.W.3d 341 (Tenn. Crim. App. 2000). See also *State v. Chapman*, 977 S.W.2d 122 (Tenn. Crim. App. 1997) (The sheriff is obligated to execute the judgment of imprisonment by committing the defendant and to keep a confined prisoner in his or her custody.); *Wilson v. State*, 882 S.W.2d 361, 364 (Tenn. Crim. App. 1994) (In this jurisdiction, a sentence commences "on the day on which the defendant legally comes into the custody of the sheriff for execution of the judgment of imprisonment." Furthermore, it is the duty of the sheriff "to execute the judgment of imprisonment by committing the defendant, as soon as possible, to jail.").

Sheriffs do not have the authority, as does the governor, to delay the commitment of inmates to their institutions. T.C.A. § 41-1-506(e); Op. Tenn. Atty. Gen. No. 89-65 (April 28, 1989). However, pursuant to T.C.A. § 55-10-403(p) the sheriff may delay the commitment of an individual convicted of a violation of T.C.A. § 55-10-401 (driving under the influence of an intoxicant or drug) up to 90 days if there is limited space available in the jail. If, in the opinion of the sheriff, space will not be available to allow an offender convicted of a violation of T.C.A. § 55-10-401 to commence service of his or her sentence within 90 days of conviction, the sheriff must use alternative facilities to incarcerate the offender. The county legislative body must approve the alternative facilities to be used in the county. *Kelly v. State*, 61 S.W.3d 341 (Tenn. Crim. App. 2000) ("[T]he State's delay of four years in executing [petitioner's] sentence and its failure to attempt the location of alternative facilities was, if not affirmatively improper, certainly grossly negligent.").

As used in T.C.A. § 55-10-403(p), "alternative facilities" include but are not limited to vacant schools or office buildings or any other building or structure owned, controlled or used by the county that would be suitable for housing DUI offenders for short periods of time on an as-needed basis. The county may contract with another governmental entity or private corporation or person for the use of alternative facilities when needed and may, by agreement, share use of alternative facilities with other governmental entities.

Place of Confinement - Felony Offenders

A defendant convicted of a felony in this state is sentenced in accordance with Title 40, Chapter 35. T.C.A. § 40-35-104(a).

A defendant who is convicted of a felony and who is sentenced to a total sentence of at least one year but not more than three years shall not be sentenced to serve such sentence in the Department of Correction, **if the legislative body for the county from which the defendant is being sentenced has either contracted with the department or has passed a resolution that expresses an intent to contract for the purpose of housing convicted felons with such sentences.** If the sentencing court concludes that incarceration is the appropriate sentencing alternative, such defendant must be sentenced to the local jail or workhouse and not to the department. T.C.A. § 40-35-104(b)(1).

A defendant who is convicted of a felony and who is sentenced to at least one year but not more than six years shall not be sentenced to serve such sentence in the department if the defendant is being sentenced from a county with a population of not less than 477,811 according to the 1980 federal census or any subsequent federal census, **and the legislative body for any such county has contracted with the department or has passed a resolution that expresses an intent to contract for the purpose of housing convicted felons with such sentences.** If the sentencing court concludes that incarceration is the appropriate sentencing alternative, such defendant must be sentenced to the local jail or workhouse and not to the department. T.C.A. § 40-35-104(b)(2).

“Although one serving a sentence of three years or less (and six years or less in a county having a population not less than 477,811 in the 1980 census) may not be sentenced to the Department of Correction if the county has a contract with the Department, there is not authority for a sentence over six years to be served in a local jail or workhouse.” *State v. Beard*, 2005 WL 2546964, n. 3 (Tenn. Crim. App. 2005).

In *State v. McDaniel*, 2002 WL 1732334 (Tenn. Crim. App. 2002), the defendant was convicted of two counts of manufacturing a Schedule II controlled substance. He was sentenced to concurrent three-year sentences. The trial court ordered that the defendant have split confinement with supervised probation after serving one year in the Tennessee Department of Correction. The defendant appealed this sentence, arguing, among other things, that his sentence should be served at the county workhouse pursuant to T.C.A. § 40-35-104(b)(1). The Tennessee Court of Criminal Appeals affirmed the judgment of the trial court. Finding no evidence in the record of a contract between the county and the Department of Correction to house convicted felons, or a resolution of the county legislative body that convicted felons be housed in the county jail, the court held that there was no basis to conclude that the defendant's sentence should not be served in the Department of Correction. *Id.*

In imposing a sentence, the court determines under what conditions a sentence will be served as provided by law. A defendant may be sentenced to the Department of Correction unless prohibited by T.C.A. § 40-35-104(b). T.C.A. § 40-35-212(a). The court retains full

jurisdiction over the manner of the defendant's sentence service unless the defendant receives a sentence in the Department of Correction. T.C.A. § 40-35-212(c). Notwithstanding the provisions of T.C.A. § 40-35-212(c), the court retains full jurisdiction over a defendant sentenced to the Department of Correction during the time the defendant is being housed in a local jail or workhouse awaiting transfer to the department. Such jurisdiction continues until the time the defendant is actually transferred to the physical custody of the Department of Correction. T.C.A. § 40-35-212(d).

If the minimum statutory punishment for any offense is imprisonment in the penitentiary for one year, but in the opinion of the court the offense merits a lesser punishment, the defendant may be sentenced to the local jail or workhouse for any period less than one year, except as otherwise provided. T.C.A. § 40-35-211(2). *See also* T.C.A. § 40-20-103.

If a defendant is convicted of an offense designated as a felony but the court imposes a sentence of less than one year in the local jail or workhouse, the defendant is considered a felon but is sentenced as in the case of a misdemeanor and, therefore, is entitled to sentence credits under T.C.A. § 41-2-111. Upon such defendant becoming eligible for work release, furlough, trusty status or related rehabilitative programs as specified in T.C.A. § 40-35-302(d), the defendant may be placed in such programs by the sheriff or administrative authority having jurisdiction over the local jail or workhouse. T.C.A. § 40-35-211(3).

If confinement is directed, the court shall designate the place of confinement as a local jail or workhouse if required pursuant to T.C.A. § 40-35-104(b), or, if the sentence is eight years or less and combined with periodic or split confinement not to exceed one year, the court shall designate the place of confinement as a local jail or workhouse. If confinement in a local jail or workhouse is not mandated by T.C.A. §§ 40-35-104(b), 40-35-306 or 40-35-307, all convicted felons sentenced after November 1, 1989, to continuous confinement for a period of one year or more shall be sentenced to the Department of Correction. After November 1, 1989, if a court sentences or has sentenced a defendant to a local jail or workhouse when such court was not authorized to do so by this chapter, it shall be deemed that such sentence was a sentence to the department, and the commissioner of correction shall have the authority to take such a defendant into the custody of the department. T.C.A. § 40-35-314(a). "This code section clearly requires that any sentence of confinement over eight years is to be served in the Tennessee Department of Correction." *Carver v. State*, 2003 WL 21663688, *4 (Tenn. Crim. App. 2003).

Report by Sheriff to Department of Correction.

Pursuant to T.C.A. § 40-23-113, whenever any person sentenced to the custody of the Department of Correction has been detained in the jail or workhouse pending arraignment, trial, sentencing or appeal, the sheriff must prepare and transmit with the defendant, at the time of commitment to the Department of Correction, a short report furnishing such information pertaining to the defendant's behavior while in local custody as may be requested by the department. Notwithstanding any other provision of the law to the contrary, no person sentenced to the custody of the Department of Correction shall be

committed or conveyed to the department unaccompanied by the completed report required by T.C.A. § 40-23-113.

Filing of Mittimus

The mittimus or process by which any prisoner is committed or discharged from jail, or an attested copy thereof, must be filed and retained at the sheriff's office by the sheriff or the jailer under the sheriff's direction. T.C.A. § 41-4-106. "A mittimus is an affidavit to the sheriff or jailer as to the defendant's sentence. A mittimus serves to direct the jailer or sheriff as to a prisoner's commitment or discharge and is kept by the sheriff, or jailer, under the sheriff's direction." *Taylor v. State*, 2005 WL 578825 (Tenn. Crim. App. 2005); *Carr v. Mills*, 2000 WL 1520267 (Tenn. Crim. App. 2000).

Booking

The comptroller of the treasury, in consultation with the Tennessee Bureau of Investigation, the Tennessee Sheriffs' Association, the Tennessee Association of Chiefs of Police, and the Tennessee Corrections Institute, have developed standardized booking procedures, which include:

- (1) A photograph of the arrestee;
- (2) Two sets of fingerprint cards, properly completed and mailed to the Tennessee Bureau of Investigation;
- (3) Delivery to the appropriate local law enforcement agency of a completed judgment order signed by a judge to be used by the local law enforcement agency for completion of an R-84 Disposition Card, except as follows: A local law enforcement agency and a clerk of court can collaborate on an automated process for the electronic submission of final dispositions for criminal cases to the Tennessee Bureau of Investigation. After a law enforcement agency and a clerk of court have implemented an automated process for the electronic submission of final dispositions for criminal cases, and have had the process certified by the Tennessee Bureau of Investigation, all final dispositions shall be reported electronically. Upon implementation of an automated process for the electronic submission of final dispositions for criminal cases, the delivery to the local law enforcement agency of a completed judgment order signed by a judge to be used by the local law enforcement agency for completion of an R-84 Disposition Card, and the submission by the local law enforcement agency of a completed R-84 Disposition Card to the Tennessee Bureau of Investigation are no longer required;
- (4) An arrest report; and

(5) Delivery to the appropriate court clerk office of a warrant or *capias* for offense containing the state control number assigned by the law enforcement agency upon the arrest of an individual to be recorded in the court information system of the court clerk's office.

T.C.A. § 8-4-115(a)(1).

Upon establishment of an automated system for final disposition reporting, clerks of court must submit final disposition reports electronically to the Tennessee Bureau of Investigation. Jurisdictions that submit final disposition reports electronically will cease submitting R-84 Disposition Cards upon advisement from the Tennessee Bureau of Investigation. The submission of an electronic final disposition report shall have the same force and effect as the submission of a R-84 Disposition Card. T.C.A. § 8-4-115(h).

Any automated court information system being used or developed on or after July 1, 2005, including, but not limited to, the Tennessee Court Information System (TnCIS) being designed pursuant to T.C.A. § 16-3-803(h) must ensure that an electronic file of final disposition data will be reported to the Tennessee Bureau of Investigation. The form, general content, time, and manner of submission of the electronic file of final disposition data will comply with the rules and regulations prescribed by the Tennessee Bureau of Investigation. T.C.A. § 8-4-115(i).

Fingerprinting.

It is the duty of the sheriff to take or cause to be taken two full sets of fingerprints of each person arrested whether by warrant or *capias* for an offense that results in such person's incarceration in a jail facility or the person's posting of a bond to avoid incarceration. Two full sets of fingerprints must be sent to the Tennessee Bureau of Investigation. Upon receipt of the fingerprints, the Tennessee Bureau of Investigation is required to retain one set of the fingerprints as provided in T.C.A. § 38-6-103 and send one set of the fingerprints to the Federal Bureau of Investigation. T.C.A. § 8-8-201(a)(35)(A). *See also* T.C.A. § 38-3-122(a) (duty of arresting officer to take fingerprints). Notwithstanding the provisions of T.C.A. § 8-8-201(a)(35) (duty of sheriff) or T.C.A. § 38-3-122 (duty of arresting officer) to the contrary, it is the duty of the law enforcement agency responsible for maintaining the arrested person's booking records to take the two full sets of fingerprints as required by such sections. T.C.A. § 8-4-115(a)(2).

A person who is issued a citation pursuant to T.C.A. § 40-7-118 or T.C.A. § 40-7-120 shall not, for purposes of T.C.A. § 8-8-201(a)(35), be considered to have been arrested, and the agency issuing the citation shall not be required to take the fingerprints of such person. T.C.A. § 8-8-201(a)(35)(B). *See also* T.C.A. § 38-3-122(b).

Where individuals are arrested multiple times for a violation of T.C.A. § 39-17-310, the offense of public intoxication, the arresting officer shall note on the arrest report that fingerprints are on file for this individual pursuant to T.C.A. § 38-3-122(a). T.C.A. § 8-4-115(a)(3).

Compliance with these standardized booking procedures shall be the basis for the comptroller of the treasury determining compliance with the fingerprinting requirements of T.C.A. §§ 8-8-201(a)(35) and 38-3-122. The Tennessee Corrections Institute and the Tennessee Law Enforcement Training Academy are required to train correctional personnel in municipal, county and metropolitan jurisdictions in the application of these standardized booking procedures. T.C.A. § 8-4-115(a)(4).

Audit by Comptroller.

The comptroller of the treasury is required to audit or cause to be audited on an annual basis the sheriff's office to determine whether or not the sheriff's office is in compliance with the requirements of T.C.A. § 8-4-115, including but not limited to two full sets of classifiable fingerprints taken at arrest and maintenance by the arresting agency of at least an 85 percent retention rate by the Tennessee Bureau of Investigation of such fingerprints. If the comptroller of the treasury determines that a particular sheriff's office is not in compliance with T.C.A. §§ 8-8-201(35), 38-3-122 and 8-4-115, the comptroller is required to notify the sheriff and the POST Commission of such noncompliance within 30 days of the determination. T.C.A. § 8-4-115(c)(1).

Show Cause Hearing.

The sheriff shall show cause to the POST Commission within 30 days of notification why the sheriff should not be found to be in noncompliance with the requirements of T.C.A. §§ 8-8-201(35) and 38-3-122. If the sheriff does not respond or show good cause within 30 days, the POST Commission is required to decertify the sheriff and impound the salary supplement provided for the sheriff in T.C.A. § 38-8-111. The POST Commission is then required to notify the comptroller of the treasury and both the sheriff and county commission of such action. T.C.A. § 8-4-115(c)(2).

The burden shall be on the sheriff to demonstrate compliance to the POST Commission, and if the sheriff is found to be in compliance with the provisions of T.C.A. § 8-4-115 within 60 days after decertification, the POST Commission is required to rescind the decertification order and cause any salary supplement impounded to be returned to the sheriff except for one-twelfth of the annual supplement. T.C.A. § 8-4-115(c)(3).

Removal from Office.

In addition to any ouster proceeding under the provisions of Title 8, Chapter 47, the sheriff may be removed from office in accordance with the provisions of T.C.A. § 8-4-115. The comptroller of the treasury is required to forward a copy of reports of noncompliance with the provisions of T.C.A. § 8-4-115 by the sheriff to the district attorney general having jurisdiction and to the attorney general and reporter. The district attorney general and the attorney general and reporter must each review the report and determine if there is sufficient cause for further investigation. If further investigation indicates willful misfeasance, malfeasance or nonfeasance by the sheriff, the district attorney general shall proceed pursuant to Title 8, Chapter 47, to remove the sheriff from office. T.C.A. § 8-4-

115(d). At least annually the comptroller of the treasury's office is required to send to each county mayor and sheriff a notice advising them of the provisions of T.C.A. § 8-4-115, including the penalty for noncompliance with T.C.A. §§ 8-8-201(35), 38-3-122 and 38-8-111(g). T.C.A. § 8-4-115(e).

Purchase of Fingerprint System.

Prior to purchasing an electronic fingerprint imaging system, the sheriff must obtain certification from the Tennessee Bureau of Investigation that the equipment is compatible with the Tennessee Bureau of Investigation's system and the Federal Bureau of Investigation's integrated automated fingerprint identification system. T.C.A. § 8-4-115(f).

Funding.

The county legislative body is required by law to appropriate funds for the sheriff's office, including funds for personnel and supplies that are sufficient to comply with the provisions of T.C.A. § 8-4-115. T.C.A. § 8-4-115(b).

In order to comply with state and federal fingerprinting requirements, except in Davidson County, 20 percent of the funds received by a sheriff's office pursuant to T.C.A. § 39-17-420 must be set aside and earmarked for the purchase, installation, and maintenance of and line charges for an electronic fingerprint imaging system that is compatible with the Federal Bureau of Investigation's integrated automated fingerprint identification system. Prior to the purchase of the equipment, the sheriff must obtain certification from the Tennessee Bureau of Investigation that the equipment is compatible with the Tennessee Bureau of Investigation's and Federal Bureau of Investigation's integrated automated fingerprint identification system. Once the electronic fingerprint imaging system has been purchased, the sheriff's office may continue to set aside up to 20 percent of the funds received pursuant to T.C.A. § 39-17-420 to pay for the maintenance of and line charges for the electronic fingerprint imaging system. T.C.A. § 39-17-420(h)(1).

Instead of purchasing the fingerprinting equipment, a local law enforcement agency may enter into an agreement with another law enforcement agency that possesses the equipment for the use of the equipment. The agreement may provide that the local law enforcement agency may use the fingerprinting equipment to identify people arrested by that agency in exchange for paying an agreed upon portion of the cost and maintenance of the fingerprinting equipment. If no agreement exists, it shall be the responsibility of the arresting officer to obtain fingerprints and answer for the failure to do so. T.C.A. § 39-17-420(h)(1). See *also* Op. Tenn. Atty. Gen. 01-088 (May 24, 2001).

Subject to the approval of the General Assembly, a portion of the funds derived from the additional privilege tax levied on all criminal cases instituted in this state as provided for in T.C.A. § 67-4-602(g) may be appropriated to the Tennessee Bureau of Investigation for the purchase, installation, maintenance, and line charges of electronic fingerprint imaging systems. T.C.A. § 8-4-115(g).

Telephone Call.

Pursuant to state law, no person under arrest by any officer or private citizen shall be named in any book, ledger or any other record until such time that the person has successfully completed a telephone call to an attorney, relative, minister or any other person that the person shall choose, without undue delay. One hour shall constitute a reasonable time without undue delay. However, if the arrested person does not choose to make a telephone call, then the person shall be booked or docketed immediately. T.C.A. § 40-7-106(b).

Pursuant to state regulations, a telephone must be available within the receiving or security area at the time of booking. The detainee must be allowed to complete at least one telephone call to the person of his or her choice. Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(3).

In *State v. Claybrook*, 736 S.W.2d 95 (Tenn. 1987), the Tennessee Supreme Court held that the failure to allow the defendant to make a telephone call as prescribed by T.C.A. § 40-7-106(b) did not render his statement to a law enforcement officer involuntary. The court stated that the failure to comply with the statute did not require that the defendant's statement be suppressed. "The failure to afford to a defendant the phone call required by this statute is but one factor to be considered in determining the voluntariness of the defendant's statement and whether the conduct of the officers has overcome the will of the accused. Automatic suppression of the statement is not called for." *Id.* at 103.

There is no constitutional right to make a telephone call upon arrest or completion of booking. *Cannon v. Montgomery County*, 1998 WL 354999 (E.D. Pa. 1998). See also *Dietzen v. Mork*, 101 F.3d 110 (Table) (7th Cir. 1996) (declining to hold that an arrestee has an absolute constitutional right to a telephone call); *State Bank of St. Charles v. Camic*, 712 F.2d 1140, 1145 n. 2 (7th Cir.) ("[T]here is no constitutional requirement that a phone call be permitted upon completion of booking formalities."), *cert. denied*, 464 U.S. 995 (1983); *Hodge v. Ruperto*, 739 F.Supp. 873, 876 (S.D. N.Y. 1990) (There is no constitutional requirement that a detainee be permitted a telephone call upon completion of booking formalities.). The right to make a telephone call occurs only when certain constitutional rights are implicated, for example the right to consult with counsel. *Dietzen*, 101 F.3d 110, *citing Tucker v. Randall*, 948 F.2d 388, 390-391 (7th Cir. 1991).

In *Harrill v. Blount County*, 55 F.3d 1123 (6th Cir. 1995), the plaintiff, an arrestee, brought a § 1983 action against the county and sheriff's deputies. The plaintiff argued that T.C.A. § 40-7-106(b) created a federal constitutional right under the 14th Amendment Due Process Clause and that the booking officer's refusal to allow her to call her father immediately after her arrest violated her federal rights. The Sixth Circuit Court of Appeals stated that this argument was in error. The court noted that a state statute cannot "create" a federal constitutional right. While some state statutes may establish liberty or property interests protected by the Due Process Clause, the court found that this statute creates neither a federally protected liberty or property interest. The court stated that the right to make a phone call immediately upon arrest is not a recognized property right, nor is it a

traditional liberty interest recognized by federal law. The violation of a right created and recognized only under state law is not actionable under § 1983. *Id.* at 1125. The court further found that because T.C.A. § 40-7-106(b) does not set forth a federal right actionable under § 1983, it cannot be used to destroy the defendants' claim of qualified immunity. Thus, the court stated, the defendants did not violate the plaintiff's clearly established federal rights, and therefore they have qualified immunity from plaintiff's § 1983 claims. *Id.* at 1126. *But see Carlo v. City of Chino*, 105 F.3d 493, 495-500 (9th Cir. 1997) (holding that the California statute mandating a post-booking telephone call created a liberty interest protected by the 14th Amendment of the United States Constitution).

Courts have ruled that persons making telephone calls from telephones in the booking area of a county jail do not have a reasonable expectation of privacy in making the telephone call. Accordingly, telephone calls made from the booking area may be monitored. *State v. Erwin*, 2001 WL 314340, *6 (Tenn. Crim. App. 2001)); *People v. Ross*, 2000 WL 33388690, *2-3 (Mich. App. 2000) (same).

Intake

Pursuant to state regulations, each jail must have a space where inmates are received, searched, showered, and issued clothing (if provided by the facility) prior to assignment to the living quarters. Rules of the Tennessee Corrections Institute, Rule 1400-1-.04(10).

An intake form must be completed for every person admitted to the jail and must contain the following information, unless otherwise prohibited by statute:

- (1) Picture;
- (2) Fingerprints;
- (3) Booking number;
- (4) Date and time of intake;
- (5) Name and aliases;
- (6) Last known address;
- (7) Date and time of commitment and authority therefore;
- (8) Names, title, signature and authority therefore;
- (9) Specific charge(s);
- (10) Sex;

- (11) Age;
- (12) Race;
- (13) Date of birth and place of birth;
- (14) Occupation and last place of employment;
- (15) Education;
- (16) Name and relationship of next of kin and address of next of kin;
- (17) Driver's license and Social Security number;
- (18) Disposition of vehicle (where applicable);
- (19) Court and sentence (if sentenced prisoner);
- (20) Notation of cash and property;
- (21) Bonding company and amount of bond;
- (22) Date of arrest;
- (23) Warrant number;
- (24) Court date and time; and
- (25) Cell assignment.

Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(1).

The admitting officer must assure himself or herself that each prisoner received is committed under proper legal authority. Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(2). See T.C.A. §§ 8-8-201(a)(3) and 41-4-103(a).

Inventory Searches.

Pursuant to state regulations, cash and personal property must be taken from the prisoner upon admission, listed on a receipt form in duplicate, and stored securely pending the prisoner's release. The receipt must be signed by the receiving officer and the prisoner, the duplicate given to the prisoner and the original kept for the record. If the prisoner is in an inebriated state, there must be at least one witness to verify this transaction. As soon as the prisoner is able to understand what he is doing, he must sign and be given the duplicate of the receipt. Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(4).

The constitutional propriety of inventory searches of arrestees is not novel. In *Illinois v. Lafayette* (1983), 462 U.S. 640, the Supreme Court of the United States addressed the question of whether it was constitutionally permissible under the Fourth Amendment to the United States Constitution to inventory the personal effects of a person arrested prior to incarceration without a warrant. The court held such warrantless routine inventory process proper as an incident to booking and incarceration of the arrested person. The justification was determined to rest not on probable cause but upon consideration of orderly police administration. The court stated at page 646 the following:

"At the station house, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. A range of governmental interests supports an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the station house. A standardized procedure for making a list of inventory as soon as reasonable after reaching the stationhouse not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person. Arrested persons have also been known to injure themselves--or others--with belts, knives, drugs, or other items on their person while being detained. Dangerous instrumentalities--such as razor blades, bombs, or weapons--can be concealed in innocent-looking articles taken from the arrestee's possession. The bare recital of these mundane realities justifies reasonable measures by police to limit these risks--either while the items are in police possession or at the time they are returned to the arrestee upon his release. Examining all the items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure."

State v. Raines, 1988 WL 125031, *2 (Ohio App. 1988). See also *State v. Crutcher*, 989 S.W.2d 295, 301 (Tenn. 1999) (noting that law enforcement authority in cases of incarceration "extends to performing a detailed 'inventory search' of all personal effects in the arrestee's possession") (citing *Illinois v. Lafayette*, 462 U.S. 640, 648, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983)).

Both the arrestee and the property in his immediate possession may be searched at the jail, and if evidence of a crime is discovered, it may be seized and admitted in evidence. Likewise, the arrestee's clothing or other belongings may be seized upon arrival at the jail and later may be subjected to laboratory analysis, and the test results may be admissible at trial. *United States v. Edwards*, 415 U.S. 800, 803-804, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974).

[O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail, and at a later time searched and taken for use at the subsequent criminal trial. The result is the same where the property is not physically taken from the defendant until sometime after his incarceration.

Id. at 807-808, 94 S.Ct. at 1239.

The Tennessee Court of Criminal Appeals has held that no warrant is necessary to search a defendant after he is arrested and transported to jail. *State v. McDougle*, 681 S.W.2d 578, 584 (Tenn. Crim. App. 1984), citing *United States v. Edwards*, 415 U.S. 800, 803, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974). In *Morelock v. State*, 1996 WL 454996, *4 (Tenn. Crim. App. 1996), the court noted that this "type of inventory or booking search has been routinely upheld in many courts on grounds that those arrested have no privacy interest in items taken from them incident to arrest." See also *State v. Cothran*, 115 S.W.3d 513, 526 (Tenn. Crim. App. 2003), citing *State v. Crutcher*, 989 S.W.2d 295, 301 (Tenn. 1999) (noting that law enforcement authority in cases of incarceration "extends to performing a detailed 'inventory search' of all personal effects in the arrestee's possession"). Cf. *United States v. McCroy*, 102 F.3d 239, 241 (6th Cir. 1996); *United States v. Akins*, 995 F.Supp. 797, 811 (M.D. Tenn. 1998).

Pat Down Searches.

Pursuant to state regulations, each jail must have a written policy and procedure providing for searches of facilities and inmates to control contraband. Each newly admitted inmate must be thoroughly searched for weapons and other contraband immediately upon arrival in the jail, regardless of whether the arresting officer has previously conducted a search. A record must be maintained on a search administered to a newly admitted prisoner. The procedure must differentiate between the searches allowed (pat down, strip, or orifice) and identify when these may occur and by whom such searches may be made. Inmates must be searched by jail personnel of the same sex except in emergency situations. Rules of the Tennessee Corrections Institute, Rule 1400-1-.07.

While the Fourth Amendment generally requires that the issuance of a warrant, supported by probable cause, precede any search, the Supreme Court has recognized several exceptions to the warrant requirement, including so-called "stationhouse" searches of individuals arrested by the police. See *Illinois v. Lafayette*, 462 U.S. 640, 645-46, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1270 (7th Cir.1983). As this Court has stated, however, "custodial searches

incident to arrest must still be reasonable ones.... This type of police conduct must [still] be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Id.* at 1270-71 (quotations omitted).

Stanley v. Henson, 337 F.3d 961, 963 (7th Cir. 2003).

The United States Supreme Court has held "that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." *United States v. Edwards*, 415 U.S. 800, 803, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974). The police may search an arrestee and inventory his personal effects at the station house following an arrest, prior to confining him. *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983).

Strip Searches (Visual Body Cavity Search).

As used in T.C.A. § 40-7-119, "strip search" means having an arrested person remove or arrange some or all of the person's clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or undergarments of the person. **No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance or other contraband.** T.C.A. § 40-7-119(a) and (b).

In *Timberlake by Timberlake v. Benton*, 786 F.Supp. 676 (M.D. Tenn. 1992), the district court noted that, while T.C.A. § 40-7-119 explicitly sets guidelines for custodial searches of arrested persons, it does not set rules for the location of the search or the manner in which a search is to be conducted. The court stated that this "oversight is critical since the law governing the reasonableness of strip searches is founded upon such factors." *Id.* at 695. Regarding municipal liability, the district court stated that the failure to set a policy governing such a highly intrusive police action can render a municipality's actions as culpable as if they had a policy permitting unreasonable searches themselves. "A local governing body does not shield itself from liability by acting through omission. Thus, when a city provides no guidance to its officers regarding such intrusive actions as strip searches, it must face the consequences of its inaction by being subject to suit." *Id.* at 696, citing *Marchese v. Lucas*, 758 F.2d 181, 189 (6th Cir. 1985), *cert. denied*, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 685 (1987) (sheriff's failure to train and ratification of unconstitutional behavior subjects county to suit).

Pursuant to state regulations, each jail must have a written policy and procedure providing for searches of facilities and inmates to control contraband. Each newly admitted inmate must be thoroughly searched for weapons and other contraband immediately upon arrival in the jail, regardless of whether the arresting officer has previously conducted a search. A record must be maintained on a search administered to a newly admitted prisoner. The procedure must differentiate between the searches allowed (pat down, strip, or orifice) and identify when these may occur and by whom such searches may be made. Inmates must be searched by jail personnel of the same sex except in

emergency situations. All orifice searches must be done under medical supervision. The jail's policy and procedures must require that all inmates, including trustees, be searched thoroughly by jail personnel whenever the inmates enter or leave the security area. Rules of the Tennessee Corrections Institute, Rule 1400-1-.07.

"Courts have repeatedly held that strip searches that include visual inspection of the anal and genital areas are inherently invasive." *Calvin v. Sheriff of Will County*, --- F.Supp.2d ----, 2005 WL 3446194, *5 (N.D. Ill. 2005).

In *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), the Court adopted a presumption that a "full search" incident to custodial arrest and aimed toward the discovery of weapons and contraband would be reasonable under the Fourth Amendment, but warned that "extreme or patently abusive" searches might not be. 414 U.S. at 227-236, 94 S.Ct. at 473-77. *United States v. Edwards*, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), authorized warrantless searches of the clothing of arrestees who were confined overnight. As in *Robinson*, the court in *Edwards* reaffirmed that custodial searches incident to arrest must be reasonable. Neither *Robinson* nor *Edwards* specifically addressed "the circumstances in which a strip search of an arrestee may or may not be appropriate." *Illinois v. Lafayette*, 462 U.S. at 646 n.2, 103 S.Ct. at 2609 n.2.

Fann v. City of Cleveland, 616 F.Supp. 305, 310-311 (D.C. Ohio 1985).

The United States Supreme Court's opinion in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), is the seminal strip search case. In *Bell*, the Court held that strip and visual body cavity searches may, in certain instances, be conducted on inmates with less than probable cause.

The application of the Fourth Amendment to warrantless strip searches has been developed largely in cases involving such searches in prisons and in schools. In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Supreme Court held that visual body cavity inspections during strip searches of pre-trial detainees and convicted prisoners after they had contact with outsiders were not "unreasonable" searches under the Fourth Amendment. The searches were conducted at the "federally operated short-term custodial facility in New York City designed primarily to house pretrial detainees." *Id.* at 523, 99 S.Ct. 1861. The Court stated that applying "[t]he test of reasonableness under the Fourth Amendment ... [i]n each case ... requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559, 99 S.Ct. 1861. It pointed out that a "detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Id.*

Reynolds v. City of Anchorage, 379 F.3d 358, 362 (6th Cir. 2004).

Despite holding that particular policy constitutional, *Bell* did not validate a blanket policy of strip searching pretrial detainees. Rather, *Bell* held that pretrial detainees retain constitutional rights, including the Fourth Amendment's protection against unreasonable searches and seizures, which are subject to limitations based on the fact of confinement and the institution's need to maintain security and order.

Calvin v. Sheriff of Will County, --- F.Supp.2d ----, 2005 WL 3446194, *4 (N.D. Ill. 2005) (citations omitted).

Courts, beginning with *Bell*, have consistently held that institutional security is a legitimate law enforcement objective, and may provide a compelling reason for a strip search absent reasonable suspicion of individualized wrongdoing. Courts have given prisons latitude to premise searches on the type of crime for which an inmate is arrested. When the inmate has been charged with only a misdemeanor or traffic violation, crimes not generally associated with weapons or contraband, however, courts have required that officers have a reasonable suspicion that the individual inmate is concealing contraband.

Id. at *5 (citation omitted).

Misdemeanor Arrestees.

Under the law regarding strip searches of persons arrested on a misdemeanor charge it is well established that the Fourth Amendment requires that strip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons.

In *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989), the Sixth Circuit Court of Appeals held that “authorities may not strip search persons arrested for traffic violations and nonviolent minor offenses solely because such persons ultimately will intermingle with the general population at a jail when there [are] no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail.” *Id.* at 1255.

It is objectively reasonable to conduct a strip search of one charged with a crime of violence before that person comes into contact with other inmates. There is an obvious threat to institutional security. However, normally no such threat exists when the detainee is charged with a traffic violation or other nonviolent minor offense.

The decisions of all the federal courts of appeals that have considered the issue reached the same conclusion: a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence

and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable.

Id. See, e.g., *Skurstenis v. Jones*, 236 F.3d 678, 682 (11th Cir. 2000) (holding jail policy violated the Fourth Amendment because it did not require reasonable suspicion as a predicate to strip searching newly admitted detainees); *Shain v. Ellison*, 273 F.3d 56, 64-66 (2d Cir. 2001) (holding county's policy of conducting strip searches of misdemeanor arrestees remanded to local jail following arraignment, absent reasonable suspicion that arrestees were carrying contraband or weapons, violated the Fourth Amendment); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (holding that the Fourth Amendment precludes jail officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053, 105 S.Ct. 2114, 85 L.Ed.2d 479 (1985) (holding jail policy requiring all persons booked into the county jail to be strip searched unconstitutional); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (holding city's policy of subjecting women, but not men, who had been arrested and detained on misdemeanor charges, to a strip search regardless of the charges against them or whether detention officers had any reasonable suspicion that a particular woman was concealing weapons or contraband, violated the Fourth Amendment); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (holding indiscriminate strip search policy routinely applied to all detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations); *Tinetti v. Wittke*, 620 F.2d 160 (7th Cir. 1980) (*per curiam*) (holding strip searches of persons arrested and detained overnight for non-misdemeanor traffic offenses without probable cause to believe that detainees are concealing contraband or weapons on their bodies are unconstitutional). *But see Dobrowolskyj v. Jefferson County*, 823 F.2d 955 (6th Cir. 1987) (holding that a pretrial detainee's Fourth Amendment rights were not violated when he was searched immediately before being transferred to a situation where he would have contact with the general prison population); *Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir. 2005) (*en banc*) ("Most of us are uncertain that jailers are required to have reasonable suspicion of weapons or contraband before strip searching-for security and safety purposes-arrestees bound for the general jail population. Never has the Supreme Court imposed such a requirement.").

In other situations, at least one court has found that it is not *per se* unconstitutional to strip search pretrial detainees charged with minor, nonviolent offenses. In *Richerson v. Lexington Fayette Urban County Gov't*, 958 F.Supp. 299, (E.D. Ky. 1996), the federal district court, while noting that a blanket policy allowing strip searches of all pretrial detainees during the booking/intake process, including those detained on minor misdemeanor charges or traffic offenses, is unconstitutional, held:

[W]here pretrial detainees, including those charged with minor, nonviolent offenses, are kept in a detention center's general population prior to arraignment, and are thereafter ... put in a position where exposure to the general public presents a very real danger of contraband being passed to a detainee, a policy of strip searching the detainees upon their return from the courthouse and prior to their being placed back in the general population of the detention center is both justified and reasonable. The detention center's legitimate security interests outweigh the detainees' privacy interests in such a situation.

Id. at 307. See also *Black v. Franklin County*, 2005 WL 1993445 (E.D. Ky. 2005).

Felony Arrestees.

It is unclear whether the strip search of an arrestee charged with a felony offense is *per se* constitutional when it is based solely on the offense charged (i.e., absent a reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband.) In one case, the Sixth Circuit Court of Appeals, the circuit under which Tennessee falls, found that the strip search of a felony arrestee was constitutional even though reasonable suspicion was lacking. However, other federal circuits do not agree and this issue has not been decided by the United States Supreme Court.

In *Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983), the court held that the visual body cavity search conducted at a county jail by a female jailer did not violate the Fourth Amendment rights of a female inmate who had been arrested for felonious assault. Finding the search constitutional, the court noted: "It is enough here that (a) the arrestee was formally charged with a felony involving violence, (b) that her detention was under circumstances which would subject her potentially to mingle with the jail population as a whole, and (c) that the search actually conducted was visual only, and was carried out discreetly and in privacy." *Id.* at 1089.

In *Black v. Franklin County*, 2005 WL 1993445 (E.D. Ky. 2005), the district court found that the strip search of an arrestee did not violate the constitutional rights of the arrestee who was charged with driving on a suspended license, possession of a controlled substance in the first degree, and possession of a controlled substance in the third degree. *Id.* at *9.

Both the First and Fifth Circuit Courts of Appeal have approved of strip searches based upon the nature of the crime charged. See *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001) ("The reasonable suspicion standard may be met simply by the fact that the inmate was charged with a violent felony."); *Watt v. City of Richardson Police Dep't*, 849 F.2d 195, 198 (5th Cir. 1988) ("Reasonableness under the fourth amendment must afford police the right to strip search arrestees whose offenses posed the very threat of violence by weapons or contraband drugs that they must curtail in prisons."). Cf. *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) ("Reasonable suspicion may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record.").

In contrast, the Ninth Circuit Court of Appeals, in *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702 (9th Cir.1990) (as amended), found the Los Angeles Police Department's blanket policy of performing strip and body cavity searches on all felony arrestees was unconstitutional. However, the court noted that a body cavity search could be justified where officials had "reasonable suspicion" to conduct a particular search. *Id.* at 715. See also *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991) (Applying *Kennedy*, the court again found that the policy of the Los Angeles Police Department to subject all felony arrestees to strip/visual body cavity searches was unconstitutional.).

One federal district court has held that it is unconstitutional to strip search arrestees charged with a nonviolent, nonweapon, nondrug felony offense, absent a reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband. *Tardiff v. Knox County*, 397 F.Supp.2d 115 (D. Me. 2005).

While the First Circuit has not directly addressed the appropriate test for the validity of a strip search during the booking process at a local jail and incident to a felony arrest, this Court concludes that, with respect to detainees charged with a non-violent, non-weapon, non-drug felony, the particularized reasonable suspicion test is applicable, rather than strip searches of all felony arrestees being authorized based solely on the fact that they had been arrested on a charge categorized under state law as a felony. *Swain*, 117 F.3d at 7 ("[I]t is clear that at least the reasonable suspicion standard governs strip and visual body cavity searches in the arrestee context..."). This conclusion is based in part on the First Circuit's clear statements about constitutional protections applicable to individuals who are the subject of a governmentally initiated strip search. The law in this Circuit does not countenance a policy permitting strip searches of all non-violent, non-weapon, non-drug felony detainees upon arrival at a local correctional facility simply because they stand accused of a felony. The distinction between felony and misdemeanor detainees alone fails to address the likelihood that a detainee would be concealing drugs, weapons, or other contraband. See *Tennessee v. Garner*, 471 U.S. 1, 14, 105 S.Ct. 1694, 85 L.Ed.2d 1, (1985) ("[T]he assumption that a 'felon' is more dangerous than a misdemeanant [is] untenable."). Moreover, a non-violent, non-weapon, non-drug felony charge fails to create a presumption of reasonable suspicion required to perform a strip search.

Though the crime for which a detainee is charged is an important factor for consideration, it does not independently establish reasonable suspicion necessary under the Fourth Amendment. Officers should evaluate whether the crime charged involves violence, drugs, or some other feature from which an officer could reasonably suspect that an arrestee was hiding weapons or contraband as well as other factors like the circumstances of the arrest and the particular characteristics of the arrestee. When these factors are considered, it is possible that the strip search of many accused felons may be legitimate. Nevertheless, strip searching all individuals charged with

felony crimes that do not involve violence, weapons, or drugs as part of the booking process at a local jail is unconstitutional.

Id. at 130-131. See also *Dodge v. County of Orange*, 282 F.Supp.2d 41, 85 (S.D. N.Y. 2003), *app. dismissed, case remanded on other grounds*, 103 Fed.Appx. 688, 2004 WL 1567870 (2d Cir. 2004) (finding county policy was unconstitutional insofar as it called for strip searching all newly-admitted detainees arrested on suspicion of a felony); *Sarnicola v. County of Westchester*, 229 F.Supp.2d 259, 270 (S.D. N.Y.2002) (holding that the mere arrest for felony drug charges does not permit strip search absent reasonable suspicion that the individual is secreting drugs or other contraband within body cavities).

Body Cavity Searches.

State law defines a "body cavity search" as an inspection, probing or examination of the inside of a person's anus, vagina or genitals for the purpose of determining whether such person is concealing evidence of a criminal offense, a weapon, a controlled substance or other contraband. T.C.A. 40-7-121(a). **Pursuant to state law, no person shall be subjected to a body cavity search by a law enforcement officer or by another person acting under the direction, supervision or authority of a law enforcement officer unless the search is conducted pursuant to a search warrant issued in accordance with Rule 41 of the Tennessee Rules of Criminal Procedure.** T.C.A. 40-7-121(b). **Furthermore, a body cavity search conducted pursuant to T.C.A. 40-7-121 must be performed by a licensed physician or a licensed nurse.** T.C.A. 40-7-121(g). A law enforcement officer who conducts or causes to be conducted a body cavity search in violation of T.C.A. 40-7-121, and the governmental entity employing such officer, shall be subject to a civil cause of action as now provided by law. T.C.A. 40-7-121(f).

Note: The provisions of T.C.A. 40-7-121 do not apply to a body cavity search conducted pursuant to a written jail or prison security procedures policy if the policy requires such a search at the time it was conducted. T.C.A. 40-7-121(e).

With regard to body cavity searches, state regulations simply require that body cavity searches be performed under medical supervision. Rules of the Tennessee Corrections Institute, Rule 1400-1-.07.

In *Bell* [*v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)], the Supreme Court considered the propriety of body cavity searches of pretrial detainees as well as convicted prisoners under a Fourth Amendment standard, though it appeared to assume, rather than decide, that this was the proper standard. *Id.* at 558. Several years after the Supreme Court decided *Bell*, it held that a prison inmate lacks a reasonable expectation of privacy in his prison cell and thus cannot sustain a Fourth Amendment claim regarding a search of his cell. *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). But *Hudson* did not disturb *Bell's* application of the Fourth Amendment to searches of a detainee's or inmate's person, and courts have continued to apply the Fourth Amendment when assessing the

propriety of strip searches and body cavity searches of arrestees, pretrial detainees, and convicted prisoners.

Thompson v. County of Cook, 2005 WL 1950363, * (N.D. Ill. 2005) (citing cases).

“Whether a body cavity search is ‘reasonable’ under the Fourth Amendment requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.” *Levoy v. Mills*, 788 F.2d 1437, 1439 (10th Cir. 1986), citing *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979). In *Levoy*, the Court did not formulate a particular standard of suspicion to warrant an anal body cavity search, but it did hold that the government must demonstrate a legitimate need to conduct such a search. *Id.* See also *Calvin v. Sheriff of Will County*, --- F.Supp.2d ---, 2005 WL 3446194, *4 (N.D. Ill. 2005) (In balancing the Fourth Amendment rights of an inmate with the interests of a penal institution with respect to a search, a court must consider four factors: (1) the scope of the particular intrusion; (2) the manner in which it is conducted; (3) the place in which it is conducted; and (4) the justification for initiating it.).

Case law suggests that “[t]he more intrusive the search, the closer governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted.” *Nelson v. Dicke*, 2002 WL 511449 (D. Minn. 2002), citing *Jones v. Edwards*, 770 F.2d 739, 741 (8th Cir. 1985) (quoting *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983)). See also *Levoy v. Mills*, 788 F.2d 1437, 1439 (10th Cir. 1986) (It is an established Fourth Amendment principle that “the greater the intrusion, the greater must be the reason for conducting a search.”). When weighing the competing interests in a Fourth Amendment challenge, greater intrusiveness in a search must be offset by greater justification for the search. *State v. Wallace*, 642 N.W.2d 549, 559 (Wis. App. 2002), citing *Security and Law Enforcement Employees, Dist. Council 82 v. Carey*, 737 F.2d 187, 208 (2d Cir. 1984) (“[T]he greater the intrusion, the greater must be the reason for conducting a search.” (citation omitted)); *United States v. Quintero-Castro*, 705 F.2d 1099, 1100 (9th Cir. 1983) (“[A]s a search becomes more intrusive, it must be justified by a correspondingly higher level of suspicion of wrongdoing.” (citation omitted)).

When determining the reasonableness of a body cavity search, courts also consider the manner in which the search was conducted. “To make this determination, courts consider issues such as privacy, hygiene, the training of those conducting the searches, and whether the search was conducted in a professional manner.” *Isby v. Duckworth*, 175 F.3d 1020, 1999 WL 236880, *2 (7th Cir. 1999). See also *Hill v. Koon*, 977 F.2d 589, *1 (Table) (9th Cir. 1992) (“This circuit has established that three requirements must be satisfied in order for a digital body cavity search of an inmate to be constitutional under the Fourth Amendment. First, there must be reasonable suspicion to believe that the person searched is concealing contraband. In addition to reasonable suspicion, there must also be a valid penological need for the search. Finally, the search must be conducted in a

reasonable manner. This requires considering whether the search was performed in private by trained personnel under hygienic conditions.”).

In *Evans v. Stephens*, 407 F.3d 1272, 1281 (11th Cir. 2005), the Eleventh Circuit Court of Appeals found the manner in which a body cavity search was conducted violated the suspects’s Fourth Amendment right’s. However, the court did not hold that body cavity searches that penetrate orifices are *per se* unconstitutional. *Id.* at 1281, n. 11.

Clothing Exchange.

Pursuant to state regulations, each jail must have a space where inmates are received, searched, showered, and issued clothing (if provided by the facility) prior to assignment to the living quarters. Rules of the Tennessee Corrections Institute, Rule 1400-1-.04(10).

The standard clothing issue for anyone detained longer than 48 hours in a jail for both males and females shall include the following:

- (1) Clean socks;
- (2) Clean undergarments;
- (3) Clean outer garments; and
- (4) Footwear.

Clean prisoner's personal clothing (if available) may be substituted for institutional clothing at the discretion of the jail administrator. **Prisoner clothing, whether personal or institutional, must be exchanged and cleaned at least twice weekly unless work, climatic conditions or illness necessitate more frequent change.** Rules of the Tennessee Corrections Institute, Rule 1400-1-.15(1) and Rule 1400-1-.15(7).

In *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003), the Seventh Circuit Court of Appeals found that a jail’s clothing-exchange procedure, which required a female arrestee to change into a jail uniform in a small room in the presence of a female officer, was reasonable and did not violate the arrestee's Fourth Amendment search and seizure rights. The court noted that the observed clothing-exchange policy employed by the jail was a rational approach to achieving the objective of preventing the smuggling of weapons or other contraband into the general jail population, a rather substantial concern given the nature of the jail system, and to ensure that a full and complete inventory was accomplished. *Id.* at 966-967.

Collection of Biological Specimens for DNA Analysis

When a court sentences a person convicted of violating or attempting to violate T.C.A. § 39-13-502 (aggravated rape), T.C.A. § 39-13-503 (rape), T.C.A. § 39-13-504 (aggravated sexual battery), T.C.A. § 39-13-505 (sexual battery), T.C.A. § 39-13-522 (rape of a child) or T.C.A. § 39-15-302 (incest), or when a juvenile court adjudicates a person to be a delinquent child for violating or attempting to violate T.C.A. § 39-13-502 (aggravated rape), T.C.A. § 39-13-503 (rape), T.C.A. § 39-13-504 (aggravated sexual battery), T.C.A. § 39-13-505 (sexual battery), T.C.A. § 39-13-522 (rape of a child) or T.C.A. § 39-15-302 (incest), it shall order the person to provide a biological specimen for the purpose of DNA analysis. If the person is not incarcerated at the time of sentencing, the order shall require the person to report to the county or district health department, which shall gather the specimen. If the person is incarcerated at the time of sentencing, the order shall require the chief administrative officer of the institution of incarceration to designate a qualified person to gather the specimen. The biological specimen is to be forwarded by the approved agency or entity collecting the specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. The court shall make the providing of such a specimen a condition of probation or community correction if either is granted. T.C.A. § 40-35-321(b).

If a person convicted of violating or attempting to violate T.C.A. § 39-13-502 (aggravated rape), T.C.A. § 39-13-503 (rape), T.C.A. § 39-13-504 (aggravated sexual battery), T.C.A. § 39-13-505 (sexual battery), T.C.A. § 39-13-522 (rape of a child) or T.C.A. § 39-15-302 (incest) and committed to the custody of the commissioner of correction for a term of imprisonment has not provided a biological specimen for the purpose of DNA analysis, the commissioner or the chief administrative officer of a local jail shall order the person to provide a biological specimen for the purpose of DNA analysis before completion of the person's term of imprisonment. The biological specimen shall be forwarded by the approved agency or entity collecting such specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. No person shall be released on parole or otherwise unless and until such person has provided such a specimen as required by law. T.C.A. § 40-35-321(c).

When a court sentences a person convicted of any felony offense committed on or after July 1, 1998, it shall order the person to provide a biological specimen for the purpose of DNA analysis. If the person is not incarcerated at the time of sentencing, the order shall require the person to report to the county or district health department, which shall gather the specimen. If the person is incarcerated at the time of sentencing, the order shall require the chief administrative officer of the institution of incarceration to designate a qualified person to gather the specimen. The biological specimen shall be forwarded by the approved agency or entity collecting such specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. The court shall make the providing of such a specimen a condition of probation or community correction if either is granted. T.C.A. § 40-35-321(d)(1).

If a person convicted of any felony offense and committed to the custody of the commissioner of correction for a term of imprisonment has not provided a biological specimen for the purpose of DNA analysis, the commissioner or the chief administrative officer of a local jail shall order the person to provide a biological specimen for the purpose of DNA analysis before completion of the person's term of imprisonment. The biological specimen shall be forwarded by the approved agency or entity collecting such specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. T.C.A. § 40-35-321(d)(2).

Classification of Inmates

The jailer is authorized to evaluate inmates for purposes of classification, management, care, control and cell assignment. T.C.A. § 41-4-103(b). **Pursuant to state regulations each jail must have a written plan for prisoner classification.** The plan must specify the criteria and procedures for classifying prisoners in terms of level of custody required, housing assignment and participation in correctional programs. **The classification plan must ensure total sight, sound and physical contact separation between male and female inmates and between adults and juveniles being tried as adults.** Rules of the Tennessee Corrections Institute, Rule 1400-1-.17.

“The courts accord wide-ranging deference to correction officials in adopting and administering policies that, in the officials' judgment, are needed to preserve internal order and discipline and to maintain institutional security.” *Utley v. Tennessee Dept. of Correction*, 118 S.W.3d 705, 713 (Tenn. Ct. App. 2003) *citing Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126, 97 S.Ct. 2532, 2538, 53 L.Ed.2d 629 (1977); *Bell v. Wolfish*, 441 U.S. 520, 548, 99 S.Ct. 1861, 1879, 60 L.Ed.2d 447 (1979); *Jaami v. Conley*, 958 S.W.2d 123, 125 (Tenn. Ct. App. 1997) (recognizing prison officials' broad authority regarding prisoner classification). “Accordingly, the courts consistently decline to substitute their judgment for that of prison officials when it comes to difficult and sensitive matters of prison administration.” *Utley* at 713, *citing O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353, 107 S.Ct. 2400, 2407, 96 L.Ed.2d 282 (1987).

The classification of prisoners is a matter largely within the discretion of prison officials. A prisoner has no right to any particular security classification level. *Makoka v. Cook*, 2002 WL 31730880, *2 (Tenn. Ct. App. 2002) *citing Olim v. Wakinekona*, 461 U.S. 238, 245, 103 S.Ct. 1741, 1745 (1983); *Montayne v. Haymes*, 427 U.S. 236, 242-243, 96 S.Ct. 2543, 2547 (1976); *Beard v. Livesay*, 798 F.2d 874, 876 (6th Cir.1986). “[P]risoners have no liberty interest in the procedure affecting his or her classification because the resulting restraint does not impose an atypical and significant hardship in relation to the ordinary incidents of prison life. *Henderson v. Mills*, 2005 WL 2104958, *6 (Tenn. Ct. App. 2005), *citing Sandin v. Conner*, 515 U.S. 472, 482, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). *See also Jaami v. Conley*, 958 S.W.2d 123, 125 (Tenn. Ct. App. 1997) (Though regulations for the classification of prisoners normally take into account the inmate's crime and sentence, their primary purpose is not punishment, but security. A state prison inmate has no right to a particular classification under state law, and prison officials

must have broad discretion, free from judicial intervention, in classifying prisoners in terms of their custodial status.); *Thompson v. County of Medina*, 29 F.3d 238 (6th Cir, 1994) (Pretrial detainees challenging county's failure to properly classify inmates according to seriousness of charged crimes failed to adequately allege that classification system violated their Eighth Amendment right to personal safety, absent any claim that they ever suffered injury as result of jail's classification system or showing of causal link between alleged fights and assaults among other inmates and classification system.); *Burciaga v. County of Lenawee*, 123 F.Supp.2d 1076, 1078 (E.D. Mich. 2000) (Although neither the court nor the parties have found binding precedent squarely on point, the overwhelming weight of persuasive authority holds that unless the state has an intent to punish, or at least displays an indifference toward potential harm to an inmate, pretrial detainees have no due process right to be housed separately from sentenced inmates. Conversely, neither the state nor its agents may place a pretrial detainee in certain housing conditions if their intent is to punish that detainee or if their decision is made in a manner that is deliberately indifferent to the safety of that detainee.) (citations omitted).

The state, by its own actions, may create liberty interests protected by the due process clause. *Beard v. Livesay*, 798 F.2d 874, 876 (6th Cir. 1986) citing *Hewitt v. Helms*, 459 U.S. 460, 469, 103 S.Ct. 864, 870, 74 L.Ed.2d 675 (1983); *Bills v. Henderson*, 631 F.2d 1287, 1291 (6th Cir.1980). In *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983), the United States Supreme Court described when the action of a state will create such an interest. The state creates a protected liberty interest by placing substantive limitations on official discretion. *Olim* at 249. *Doe v. Sullivan County*, 956 F.2d 545, 557 (6th Cir. 1992) (This court has stated that "where substantive limitations have in fact been placed on the discretion of prison officials in classifying inmate's [sic] security status, a protectible liberty interest has been created."). "If the decisionmaker is not 'required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' *ibid.*, the State has not created a constitutionally protected liberty interest." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466-467, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981) (BRENNAN, J., concurring). See *Vitek v. Jones*, 445 U.S. 480, 488-491, 100 S.Ct. 1254, 1261-1262, 63 L.Ed.2d 552 (1980) (summarizing cases). "Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgement are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

Segregation of Sexes

Pursuant to T.C.A. § 41-4-110, male and female prisoners, except husband and wife, cannot be kept in the same cell or room in the jail. There are no reported cases in Tennessee that address this section of the code. However, it is beyond controversy that male and female prisoners may lawfully be segregated within a prison system. "Gender-based prisoner segregation and segregation based upon prisoners' security levels are common and necessary practices." *Klinger v. Dept. of Corrections*, 107 F.3d 609, 615 (8th Cir. 1997). "Indeed, the physical differences between male and female inmates may

require different regulation in order to promote safety and hygiene.” *Ahkeen v. Parker*, 2000 WL 52771 (Tenn. Ct. App. 2000). Nevertheless, the Eighth Amendment does not require the separate placement of inmates based on sex. *Galvan v. Carothers*, 855 F.Supp. 285 (D. Alaska 1994) (The placement of a female inmate in an all-male prison wing did not constitute cruel and unusual punishment.); *Dimarco v. Wyoming Department of Corrections*, 300 F.Supp.2d 1183, 1192-1194 (D. Wyo. 2004) (The placement of an intersexual inmate, who was of alleged female gender but was anatomically situated as a male due to the presence of a penis, in segregated confinement for a period of 438 days, with concomitant severely limited privileges, solely because of the condition and status of ambiguous gender was not a violation of the Eighth Amendment prohibition against cruel and unusual punishment where the safety of the inmate and other inmates was secured by placing the inmate in administrative segregation, and the inmate was provided the basic necessities of food, shelter, clothing and medical treatment.); *Lucrecia v. Samples*, 1995 WL 630016 (N.D. Cal. 1995) (The transfer of a transsexual inmate to an all-male facility and her housing in an all-male cell did not violate the due process clause where the inmate failed to demonstrate the infringement of a liberty interest.).

Supervision of Inmates

The sheriff or other person must remain in the jail every night from 8 o'clock p.m. to 6 o'clock a.m. T.C.A. § 41-4-113.

All prisoners must be personally observed by a staff member at least once every hour on an irregular schedule. More frequent observation must be provided for prisoners who are violent, suicidal, mentally ill or intoxicated, and for prisoners with other special problems or needs. The time of all such checks must be logged, as well as the results. The facility must have a system to physically count prisoners and record the results on a 24 hour basis. Rules of the Tennessee Corrections Institute, Rule 1400-1-.16(1) and Rule 1400-1-.16(2).

Incidents that involve or endanger the lives or physical welfare of custodial officers or prisoners must be recorded in a daily log and retained. Such incidents shall include, at a minimum:

- (1) Death;
- (2) Attempted suicide;
- (3) Escape;
- (4) Attempted escape;
- (5) Fire;
- (6) Riot;

- (7) Battery on a staff member or prisoner;
- (8) Sexual assault; and
- (9) Serious infectious disease within facility.

Rules of the Tennessee Corrections Institute, Rule 1400-1-.16(3).

Pursuant to state regulations, prisoners are not permitted to supervise, control, assume or exert authority over other prisoners. Rules of the Tennessee Corrections Institute, Rule 1400-1-.16(5). It has been held that the failure to provide adequate personnel to ensure security at the jail and the continued use of inmate trustees to carry out sensitive tasks such as carrying the keys and distributing drugs violates the Eighth Amendment. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 309 (S.D. Ala. 1980); *Gates v. Collier*, 501 F.2d 1291, 1308 (5th Cir. 1974) (holding trusty system, which utilized unscreened inmates violated state law, and which allowed inmates to exercise unchecked authority over other inmates, constituted cruel and unusual punishment in violation of the Eighth Amendment). See also *Dawson v. Kendrick*, 527 F.Supp. 1252, 1289-1290 (S.D. W.Va. 1981) (finding that the inadequacy of the jail's staffing and the systematic inadequacy of supervision at the jail placed prisoners in reasonable fear for their safety and well being and that the understaffing practice was not rationally connected to a legitimate governmental interest; holding that the failure to retain a trained staff of sufficient numbers gave rise to an unreasonable risk of violence in the jail and constituted a violation of the 14th Amendment as to pretrial detainees and the Eighth Amendment as to convicted prisoners).

Monitoring of Inmates by Guards of the Opposite Sex.

Pursuant to state regulations, facilities that are used for the confinement of females must have a trained female officer on duty or on call when a female is confined in the facility to perform the following functions: (1) searches, and (2) health and welfare checks. Rules of the Tennessee Corrections Institute, Rule 1400-1-.16(4).

Numerous courts "have viewed female inmates' privacy rights vis-a-vis being monitored or searched by male guards as qualitatively different than the same rights asserted by male inmates vis-a-vis female prison guards." *Colman v. Vasquez*, 142 F.Supp.2d 226, 232 (D. Conn. 2001) (Female inmate assigned by prison to special unit for victims of sexual abuse retained limited right to bodily privacy under Fourth Amendment, and thus could maintain an action against prison officials for subjecting her to pat down search by male guards based on violations of Fourth Amendment.). See also *Hill v. McKinley*, 311 F.3d 899, 904 (8th Cir. 2002) ("Thus, we hold that Hill's Fourth Amendment rights were violated when the defendants allowed her to remain completely exposed to male guards for a substantial period of time after the threat to security and safety had passed."); *Jordan v. Gardner*, 986 F.2d 1521, 1530-1531 (9th Cir. 1993) (en banc) (holding that the prison's policy, which required male guards to conduct random, nonemergency, suspicionless clothed body searches on female prisoners, constituted cruel and unusual punishment in violation of the

Eighth Amendment); *Lee v. Downs*, 641 F.2d 1117, 1120 (4th Cir.1981) (upholding jury verdict for violation of privacy interests of female inmate who was forced to undress in the presence of male guards).

The United States Supreme Court has held that “the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.” See *Hudson v. Palmer*, 468 U.S. 517, 526-528, 104 S.Ct. 3194, 3200-3201, 82 L.Ed.2d 393 (1984) (upholding, against Fourth Amendment challenge, a policy permitting random cell searches) (“A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.”).

At least one court has construed *Hudson* as holding categorically that the Fourth Amendment does not protect privacy interests within prisons. In *Johnson v. Phelan*, 69 F.3d 144 (7th Cir.1995), *cert. denied*, 519 U.S. 1006, 117 S.Ct. 506, 136 L.Ed.2d 397 (1996), the Seventh Circuit Court of Appeals held that “the [F]ourth [A]mendment does not protect privacy interests within prisons.” *Id.* at 150. The court found that permitting female guards to monitor naked male inmates does not violate the inmates' privacy rights and does not constitute cruel and unusual punishment so long as the monitoring policy has not been adopted to humiliate or harass the inmate. *Id.* at 145-150. See also *Canedy v. Boardman*, 16 F.3d 183 (7th Cir.1994), which holds that a right of privacy limits the ability of wardens to subject men to body searches by women, or the reverse. *But see Peckham v. Wisconsin Dept. of Corrections*, 141 F.3d 694, 697 (7th Cir.1998) (narrowing *Johnson v. Phelan*, rejecting interpretation of *Canedy* and *Johnson* that Fourth Amendment does not apply to prisoners).

In 1993, the Ninth Circuit Court of Appeals observed that “prisoners' legitimate expectations of bodily privacy from persons of the opposite sex are extremely limited” and that, while inmates “may have protected privacy interests in freedom from cross-gender clothed body searches, such interests have not yet been judicially recognized. *Jordan v. Gardner*, 986 F.2d 1521, 1524-1525 (9th Cir. 1993) (en banc). However, the court held that the prison's policy, which required male guards to conduct random, nonemergency, suspicionless clothed body searches on female prisoners, constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 1530-1531.

In *Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997), the Ninth Circuit considered a male inmate's claim that his Fourth and Eighth Amendment rights were violated when he was subjected to routine visual body cavity searches by female guards and when female guards watched him showering naked. At the outset, the court noted that “we have never held that a prison guard of the opposite sex cannot conduct routine visual body cavity searches of prison inmates ... [n]or have we ever held that guards of the opposite sex are forbidden from viewing showering inmates.” *Id.* at 620. The court held that the guards were entitled to qualified immunity on the plaintiff's Fourth Amendment claim. Rejecting the Fourth Amendment claim the court stated: “Thus, it is highly questionable even today whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex, or from viewing of their unclothed bodies by officials of the

opposite sex. Whether or not such a right exists, however, there is no question that it was not clearly established at the time of the alleged conduct.” *Id.* at 622. The court also rejected the inmates Eighth Amendment claim noting that “[c]ross-gender searches ‘cannot be called inhumane and therefore do[] not fall below the floor set by the objective component of the [E]ighth [A]mendment.’” *Id.* at 623 (citation omitted). The court distinguished *Somers* from *Jordan* by noting that the “psychological differences between men and women,” ... “may well cause women and especially physically and sexually abused women, to react differently to searches of this type than would male inmates subjected to similar searches by women.” *Id.*

In *Carlin v. Manu*, 72 F.Supp.2d 1177 (D. Or. 1999), female inmates in the state prison brought an action against male correctional officers alleging that skin searches performed on the female inmates in the presence of the male officers violated their Fourth and Eighth Amendment rights. The district court held that the male correctional officers were entitled to qualified immunity on the female inmates' claims that skin searches by female correctional officers in the presence of the male officers violated their Fourth and Eighth Amendment rights, since observation by male guards during strip searches of female inmates was not clearly identified as unlawful under existing constitutional law. Significant to the court's holding were the facts that although the male guards looked at female inmates they did not touch them, and the observation was an isolated event occasioned by emergency removal of female inmates to a male prison. The court concluded “that while precedent indicates that it is possible the Court of Appeals might in the future recognize a right by female inmates to be free from the presence of and viewing by male guards while they were being strip searched, that right is not now, and was not in February 1996, a ‘clearly established’ one which would foreclose the defendants from qualified immunity.” *Id.* at 1178.

Other courts, including the Sixth Circuit, have concluded that inmates retain limited rights to bodily privacy under the Fourth Amendment. In *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir.1992) the Sixth Circuit noted that it has joined other circuits “in recognizing that a convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners.” The court held that “in challenging the conditions of his outdoor strip search before several female OSR correctional officers, Cornwell raised a valid privacy claim under the Fourth Amendment ...” *Id.* The court based its conclusion on the Fourth Amendment but without mentioning *Hudson*. See also *Everson v. Michigan Dept. of Corrections*, 391 F.3d 737, 757 (6th Cir. 2004).

In an earlier case the Sixth Circuit did cite *Hudson* and noted that the United States Supreme Court has never held that the Fourth Amendment “right to privacy” encompasses the right to shield one's naked body from view by members of the opposite sex. *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir.1987). Nevertheless, the court concluded “that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex.” *Id.* The court went on to hold that “assuming that there is some vestige of the right to privacy retained by state prisoners and that this right

protects them from being forced unnecessarily to expose their bodies to guards of the opposite sex, the instant complaint did state a constitutional claim upon which relief can be granted.” The court also held that the male inmate had stated a claim under the Eighth Amendment by alleging that female prison guards had allowed themselves unrestricted views of his naked body in the shower, at close range and for extended periods of time, to retaliate against, punish and harass him for asserting his right to privacy. *Id.* at 1227-1228.

In a more recent case, the Sixth Circuit held that the accidental viewing of a female pretrial detainee’s bare breasts by a male jailer while she was being searched by two female jailers did not violate the Fourth Amendment in the absence of any evidence that either the normal search policy was unconstitutional or that it was carried out in an unconstitutional manner. *Mills v. City of Barbourville*, 389 F.3d 568, 578-579 (6th Cir. 2004). However, the court noted that “[a]s to jail employees of the opposite gender viewing prison inmates or detainees, we have recognized that a prison policy forcing prisoners to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked--for example while in the shower or using a toilet in a cell--would provide the basis of a claim on which relief could be granted.” *Id.* See also *Roden v. Sowders*, 84 Fed.Appx. 611 (6th Cir. 2003) (Strip search of male prisoner in the presence of female sergeant did not violate prisoner's Fourth Amendment privacy rights or Eighth Amendment rights. Search was reasonable under the circumstances and was reasonably related to the legitimate penological interest of security and order.); *Henning v. Sowders*, 19 F.3d 1433 (Table) (6th Cir. 1994) (Involuntary body cavity search of female inmate in the presence of male officers did not violate prisoner's Fourth Amendment privacy rights and was reasonably related to the legitimate penological interests of safety and security.); *Rose v. Saginaw County*, 353 F.Supp.2d 900 (E.D. Mich. 2005) (Jail policy of taking all the clothing from detainees confined in administrative segregation violates the Fourth and Fourteenth Amendments of the Constitution based upon the facts of the case.); *Wilson v. City of Kalamazoo*, 127 F.Supp.2d 855 (W.D. Mich. 2000) (Detaining arrestee in jail without any clothing or covering, with limited exposure to viewing by members of the opposite sex, violates detainee’s right of privacy under the Fourth Amendment. The removal of detainee’s underclothing was not adequately justified even if they were removed as a suicide prevention measure.); *Johnson v. City of Kalamazoo*, 124 F.Supp.2d 1099 (W.D. Mich. 2000) (Stripping male pretrial detainees to their underwear after detainees refused to answer intake question as to whether they were suicidal did not violate detainees' right of privacy under Fourth Amendment, even though disrobing occurred in presence of female officers.).

Cell Searches.

It is clear that prisoners have no Fourth Amendment rights against searches of their prison cells.

In *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), the United States Supreme Court addressed the question of whether the Fourth Amendment applies within a prison cell. The court held that it does not.

[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.

Id. at 526-528, 104 S.Ct. at 3200-3201.

The *Hudson* Court upheld, against a Fourth Amendment challenge, a policy permitting random cell searches.

The uncertainty that attends random searches of cells renders these searches perhaps the most effective weapon of the prison administrator in the constant fight against the proliferation of knives and guns, illicit drugs, and other contraband. The Court of Appeals candidly acknowledged that “the device [of random cell searches] is of … obvious utility in achieving the goal of prison security.”

A requirement that even random searches be conducted pursuant to an established plan would seriously undermine the effectiveness of this weapon. It is simply naive to believe that prisoners would not eventually decipher any plan officials might devise for “planned random searches,” and thus be able routinely to anticipate searches. The Supreme Court of Virginia identified the shortcomings of an approach such as that adopted by the Court of Appeals and the necessity of allowing prison administrators flexibility:

“For one to advocate that prison searches must be conducted only pursuant to an enunciated general policy or when suspicion is directed at a particular inmate is to ignore the realities of prison operation. Random searches of inmates, individually or collectively, and their cells and lockers are valid and necessary to ensure the security of the institution and the safety of inmates and all others within its boundaries. This type of search allows prison officers flexibility and prevents inmates from anticipating, and thereby thwarting, a search for contraband.” *Marrero v. Commonwealth*, 222 Va. 754, 757, 284 S.E.2d 809, 811 (1981).

We share the concerns so well expressed by the Supreme Court and its view that wholly random searches are essential to the effective security of penal institutions.

Id. at 528-529, 104 S.Ct. at 3201-3202. See also *Block v. Rutherford*, 468 U.S. 576, 589-591, 104 S.Ct. 3227, 3234-3235, 82 L.Ed.2d 438 (1984) (holding that a county jail's

practice of conducting random, irregular shakedown searches of pretrial detainees' cells in the absence of the detainees was a reasonable response by jail officials to legitimate security concerns and did not violate the Due Process Clause of the Fourteenth Amendment); *Bell v. Wolfish*, 441 U.S. 520, 555-557, 99 S.Ct. 1861, 1882-1884, 60 L.Ed.2d 447 (1979) (holding requirement that pretrial detainees remain outside their cells during routine "shakedown" inspections by prison officials did not violate the Fourth Amendment, but simply facilitated the safe and effective performance of searches); *State v. Dulsworth*, 781 S.W.2d 277 (Tenn. Crim. App. 1989) (A prisoner does not have a justifiable, reasonable or legitimate expectation of privacy that is subject to invasion by law enforcement officers, as the United States Supreme Court ruled in *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)); *State v. Gant*, 537 S.W.2d 711 (Tenn. Crim. App. 1975) (We think it is recognized that, for safety and security purposes, prison officials are authorized to search a prisoner's cell without a warrant for weapons.).

Support of Inmates

“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being.” *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005-1006, 103 L.Ed.2d 249 (1989).

The Eighth Amendment to the Constitution of the United States, reinforced by the Fourteenth Amendment, prohibits the imposition of cruel and unusual punishment. It is much too late in the day for states and prison authorities to think that they may withhold from prisoners the basic necessities of life, which include reasonably adequate food, clothing, shelter, sanitation, and necessary medical attention.

It should not need repeating that compliance with constitutional standards may not be frustrated by legislative inaction or failure to provide the necessary funds.

On the other hand, lawful incarceration necessitates withdrawal of or limitations upon many individual privileges and rights. A prisoner does not retain constitutional rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Wide ranging deference must be accorded the decisions of prison administrators. They, and not the courts, must be permitted to make difficult judgments concerning prison operations.

If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight.

Newman v. State of Alabama, 559 F.2d 283, 286, 291 (5th Cir. 1977) (citation omitted).

Every person committed to jail may furnish their own support under such precautions as the jailer may deem proper to adopt for the purpose of guarding against escapes and to prevent the importation of intoxicants or narcotics. If support is not furnished by the prisoner, it must be furnished by the jailer. T.C.A. § 41-4-108.

In 1978, the attorney general opined that “a sheriff does not have the authority to absolutely ban the importation of any food into the jail by prisoners, but may set up reasonable rules regarding such importation.”

It would not be unreasonable, therefore, for a sheriff to regulate the importation of food if he does so for the purpose of preventing escapes or the importation of contraband. The dangers are obvious.

Case law directly on point is nonexistent. There is, however, much authority for the proposition that the courts will not interfere with the right of prison officials to enforce reasonable regulations to maintain discipline and security within prisons.

Op. Tenn. Atty. Gen. No. 78-55 (January 31, 1978).

However, in 1979, the United States Supreme Court ruled that the prohibition against pretrial detainees' receipt of packages of food and personal items from outside a federal correctional facility did not violate the Fifth Amendment, especially in view of obvious fact that such packages were handy devices for smuggling of contraband. *Bell v. Wolfish*, 441 U.S. 542, 554-555, 99 S.Ct. 1875, 1882, 60 L.Ed.2d 447 (1979).

Prison officials must be allowed to take reasonable precautions to guard against the smuggling of weapons, drugs or other contraband, the presence of which could pose a serious threat to the safety of corrections personnel and other inmates, or indeed, to the institution itself. Thus, in *Bell v. Wolfish*, 441 U.S. 542, 558-59, 99 S.Ct. 1875, 1884-85 (1979), the Supreme Court held that requiring inmates to submit to so serious an intrusion as body-cavity searches after every contact visit with a person outside the institution did not violate the Fourth Amendment.

Smith v. Fairman, 678 F.2d 52, 54 (7th Cir. 1982).

Food and Bedding.

Pursuant to T.C.A. § 41-4-109, the jailer must furnish adequate food and bedding for the inmates. See Rules of the Tennessee Corrections Institute, Rule 1400-1-.10. See also *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1247 (6th Cir. 1989) (**Tennessee law provides that the sheriff has a duty to provide adequate food and bedding, maintain cleanliness and provide toiletries and showers.**); *State v. Trotter*, 218 S.W. 230 (Tenn. 1920) (It is the duty of the sheriff to see that prisoners in a county jail are supplied with wholesome drinking water, but he need not furnish such water at his own expense.); *Grubbs v. Bradley*, 552 F.Supp. 1052, 1122 (M.D. Tenn. 1982) (The Eighth Amendment clearly requires states to furnish its inmates with reasonably adequate food.).

The failure to properly prepare and serve nutritionally adequate food to inmates who are unable, due to their confinement, to seek alternative sources of nutrition can constitute a violation of the inmates' Eighth and Fourteenth Amendment rights. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 309 (S.D. Ala. 1980). See also *Trotter v. Engelsjerd*, 2004 WL 2567632, *3 (E.D. Mich. 2004) ("The Supreme Court has held that the Eighth Amendment imposes upon prison officials the duty to 'provide humane conditions of confinement,' and that among the obligations attendant to the discharge of that duty is to 'ensure that inmates receive adequate food, clothing, shelter, and medical care.'") citing *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Aldridge v. 4 John Does*, 2005 WL 2428761 (W.D. Ky. 2005).

The Eighth Amendment to the Constitution requires only that states provide an inmate with "nutritionally adequate food." *State v. York*, 701 N.E.2d 463, 469 (Ohio App. 1997) citing *Ramos v. Lamm*, 639 F.2d 559, 570-571 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981); *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977), rev'd in part on other grounds, *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) ("If the State furnishes its prisoners with reasonably adequate food, ... that ends its obligations under Amendment Eight."). "A well-balanced meal, containing sufficient nutritional value to preserve health, is all that is required." *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977). "The Eighth Amendment does not require prisons to provide prisoners with more salubrious air, healthier food, or cleaner water than are enjoyed by substantial numbers of free Americans." *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001) (citations omitted).

Cleanliness.

Jailers are required by statute to enforce cleanliness in their respective jails. They are required to furnish the necessary apparatus for shaving once a week, provide bathing facilities separate for males and females, furnish hot and cold water, provide clean and sufficient bedding, and provide laundering once a week to prisoners who are not able to provide for themselves. Jailers are required to keep the jails clean, and must remove all filth from each cell once every 24 hours. T.C.A. § 41-4-111. See Rules of the Tennessee Corrections Institute, Rule 1400-1-.09 and Rule 1400-1-.15. See

also *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1247 (6th Cir. 1989) (Under Tennessee law the sheriff has the responsibility of conforming to at least minimal constitutional standards in providing and maintaining adequate bedding, toiletries, and cleanliness.).

It has been held that the “failure to regularly provide prisoners with clean bedding, towels, clothing and sanitary mattresses, as well as toilet articles including soap, razors, combs, toothpaste, toilet paper, access to a mirror and sanitary napkins for female prisoners constitutes a denial of personal hygiene and sanitary living conditions.” *Dawson v. Kendrick*, 527 F.Supp. 1252, 1288-1289 (S.D. W.Va. 1981) (finding conditions to be violative of the 14th Amendment as to pretrial detainees and the Eighth Amendment as to convicted prisoners) (citation omitted); *Laaman v. Helgemoe*, 437 F.Supp. 269, 310 (D. N.H. 1977) (When the deprivation of basic elements of hygiene and the presence of unsanitary conditions in the cells threaten the health of the occupants, the Constitution is violated.).

The Eighth Amendment requires states to furnish its inmates with reasonably sanitary conditions, reasonably adequate ventilation, hygienic materials, and utilities (i.e., hot and cold water, light, heat, plumbing). Inmates must be furnished with materials to keep their cells clean and for the maintenance of personal hygiene. *Grubbs v. Bradley*, 552 F.Supp. 1052, 1122-1123 (M.D. Tenn. 1982). “Where reasonably sanitary conditions are not maintained, an Eighth Amendment violation may be sustained.” *Jones v. Stine*, 843 F.Supp. 1186, 1190 (W.D. Mich. 1994) citing *Walker v. Mintzes*, 771 F.2d 920, 928 (6th Cir.1985); *Grubbs v. Bradley*, 552 F.Supp. 1052, 1122-23 (M.D. Tenn. 1982). See *Brown v. Brown*, 46 Fed.Appx. 324 (6th Cir. 2002) (Any inconvenience that prisoner suffered due to his inability to purchase personal hygiene and toiletry items for several months because of unlawful hold on his account did not demonstrate a condition of confinement that fell beneath the minimal civilized measure of life's necessities, and therefore did not violate Eighth Amendment.); *Lunsford v. Bennett*, 17 F.3d 1574 (7th Cir. 1994) (Delay in providing inmates with requested hygiene supplies for approximately a 24-hour period found not to violate the Eighth Amendment where the record contained no evidence indicating that inmates' cells were unusually dirty or unhealthy, or that health hazards existed.); *White v. Nix*, 7 F.3d 120, 121 (8th Cir. 1993) (No Eighth Amendment violation found where inmate was housed in a screened cell for 11 days. All the cells in the cellblock were equipped with a toilet, a sink with hot and cold water, a bed and table, and each cell was wired for cable television.); *Jones v. Stine*, 843 F.Supp. 1186, 1190 (W.D. Mich. 1994) (Mere denial of cleanser and disinfectant found not to violate the Eighth Amendment where inmate had access to running water, a sponge and weekly access to a mop and duster.).

The lack of adequate ventilation and air flow can violate the minimum requirements of the Eighth Amendment if it undermines the health of inmates and the sanitation of the jail. *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985) citing *Ramos v. Lamm*, 639 F.2d 559, 569 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981). While courts have recognized that a constitutional right to adequate ventilation exists, it does not assure the right to be free from all discomfort. *Board v.*

Farnham, 394 F.3d 469, 486 (7th Cir. 2005). “Inadequate ventilation, usually in combination with other factors, may give rise to an Eighth Amendment claim. **However, the problem must be extreme.** Conditions such as poor ventilation, or dry air, do not fall below ‘the minimal civilized measure of life's necessities,’ absent medical or scientific proof that such conditions exposed a prisoner to diseases or respiratory problems which he would not otherwise have suffered.” *Gibson v. Ramsey*, 2004 WL 407025, *7 (N.D. Ill. 2004) (citations omitted). See *Bomer v. Lavigne*, 101 Fed.Appx. 91 (6th Cir. 2004) (Lack of power in prisoner's cell from Friday until Monday, when electrician was scheduled to perform repair, could not support civil rights claim under Eighth Amendment where, aside from a lack of ventilation, prisoner did not allege that he was harmed by the power outage.); *Ingram v. Jewell*, 94 Fed.Appx. 271 (6th Cir. 2004) (Confiscation of electrical extension cord used by state inmate to operate fan to ventilate his cell did not violate Eighth Amendment given absence of allegation that cell ventilation was so inadequate as to fall below minimal civilized measure of life's necessities.); *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085 (7th Cir. 1986) (Sufficient evidence existed to support jury finding that ventilation in county jail was adequate and did not constitute punishment of pretrial detainees or cruel and unusual punishment of convicted inmates.); *Carver v. Knox County*, 753 F.Supp. 1370 (E.D. Tenn. 1989) (County jail intake center's lack of adequate ventilation was constitutionally impermissible under either Eighth or 14th Amendments.).

Forcing a nonsmoking prisoner with a serious medical need to share a cell with a prisoner who smokes can constitute a violation of the Eighth Amendment. *Talal v. White*, 403 F.3d 423, 427 (6th Cir. 2005). “[T]he mere existence of non-smoking pods does not insulate a penal institution from Eighth Amendment liability where, as here, a prisoner alleges and demonstrates deliberate indifference to his current medical needs and future health.” *Id.* See also *Wilcox v. Lewis*, 47 Fed.Appx. 714 (6th Cir. 2002) (Alleged exposure of state prisoner, who was diagnosed with cancer, to environmental tobacco smoke (ETS) did not violate his Eighth Amendment rights where there was no evidence that ETS had anything to do with his serious medical condition, prison officials were not aware that prisoner had any serious medical need for a smoke-free environment, and each cell in prison had separate intake and exhaust ventilation system and prisoners were permitted to smoke only in their cells and in prison yard.).

“Adequate lighting is one of the fundamental attributes of ‘adequate shelter’ required by the Eighth Amendment.” *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985) (holding that the lighting at the penitentiary violated the Eighth Amendment where the evidence showed that the lighting was so poor that it was inadequate for reading and caused eyestrain and fatigue and hindered attempts to ensure that basic sanitation was maintained). It has been held that the “failure to provide security quality lighting fixtures of sufficient illumination to permit detainees and convicted inmates to read without injury to their vision constitutes a danger to the health and security of pre-trial detainees and prisoners alike.” *Dawson v. Kendrick*, 527 F.Supp. 1252, 1288 (S.D. W.Va. 1981) (citation omitted). “Inadequate lighting has been recognized in a variety of contexts as constituting cruel and unusual punishment violative of the Eighth Amendment when, in the absence of a valid governmental interest, it unnecessarily threatens the physical and mental well-being of prisoners.” *Id.*

Such conditions as poor plumbing and sewage systems rise to the level of a constitutional violation where they appear "in such disrepair as to deprive inmates of basic elements of hygiene and seriously threaten their physical and mental well-being." *Jones v. City and County of San Francisco*, 976 F.Supp. 896, 910 (N.D. Cal. 1997) citing *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985). See also *Dawson v. Kendrick*, 527 F.Supp. 1252, 1288 (S.D. W.Va. 1981) (finding antiquated, neglected and unsanitary state of the plumbing and the plumbing fixtures was both punitive and violative of the 14th Amendment rights of the pretrial detainees and the Eighth Amendment rights of the convicted inmates; further finding that conditions constituted a breach of county officials statutory duties under state law to keep the jail in a "clean, sanitary and healthful condition" and in "constant and adequate repair"). *But see Benjamin v. Fraser*, 2003 WL 22038387 (2d Cir. 2003) (Although some showers at city jails provided water that was either too hot or too cold, such plumbing problems were not sufficiently pervasive to amount to violation of pretrial detainees' due process rights.).

Medical Care of Inmates.

It is the duty of the county legislative body to provide medical attendance for all prisoners confined in the county jail. The county legislative body shall authorize the compensation of the county jail physician, as agreed upon in writing between the county and the attending jail physician, or as may be fixed by the county legislative body. T.C.A. § 41-4-115(a). The Tennessee Supreme Court has recognized that it is the statutory duty of the county legislative body to furnish the services of a physician to treat illnesses of inmates. *George v. Harlan*, 1998 WL 668637, *4 (Tenn. 1998). See also *Manus v. Sudbury*, 2003 WL 22888883, *4 (Tenn. Ct. App. 2003) ("By statute, county legislative bodies alone have the power and duty to provide medical care to prisoners confined in their jail."). Cf. *County Hosp. Auth. v. Bradley County*, 66 S.W.3d 888, 889 (Tenn. Ct. App. 2001); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1250 (6th Cir. 1989) ("Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights."); *Willis v. Barksdale*, 625 F.Supp. 411 (W.D. Tenn. 1985) (medical needs); *Andrews v. Camden County*, 95 F.Supp.2d 217, 228 (D. N.J. 2000). See also *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

Pursuant to state regulations, provision of medical services for the jail is to be the responsibility of a designated medical authority such as a hospital, clinic, or physician. There must be an agreement between the county and the designated medical authority responsible for providing the medical services. The designated medical authority must be notified in instances where an inmate may be in need of medical treatment and the jail must document this notification. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(1). Note: Contracting out jail medical care does not relieve the county of its constitutional duty to provide adequate medical treatment to those in its custody. *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1250 (6th Cir. 1989).

“The right to adequate medical care is guaranteed to convicted federal prisoners by the Cruel and Unusual Punishment Clause of the Eighth Amendment, and is made applicable to convicted state prisoners and to pretrial detainees (both federal and state) by the Due Process Clause of the Fourteenth Amendment.” *Johnson v. Karnes*, 398 F.3d 868, 873 (6th Cir. 2005).

The Eighth Amendment's proscription of the failure to provide medical care to prisoners was delineated by the United States Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), as follows:

An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical “torture or a lingering death,” the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.

The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that “(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”

We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the “unnecessary and wanton infliction of pain,” proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.

Id. at 103-105, 97 S.Ct. at 290-291 (citations and footnotes omitted).

Although the Eighth Amendment's protections apply specifically to post-conviction inmates, the Due Process Clause of the Fourteenth Amendment operates to guarantee those same protections to pretrial detainees as well. Where any person acting under color of state law abridges rights secured by the Constitution or United States laws, including a detainee's Eighth and Fourteenth Amendment rights, 42 U.S.C. § 1983 provides civil redress.

The Supreme Court has adopted a mixed objective and subjective standard for ascertaining the existence of deliberate indifference in the context of the Eighth Amendment: [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or

safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. The objective component of the test requires the existence of a "sufficiently serious" medical need. A sufficiently serious medical need is predicated upon the inmate demonstrating that he or she "is incarcerated under conditions imposing a substantial risk of serious harm."

The subjective component, by contrast, requires a showing that the prison official possessed "a sufficiently culpable state of mind in denying medical care." Deliberate indifference requires a degree of culpability greater than mere negligence, but less than "acts or omissions for the very purpose of causing harm or with knowledge that harm will result." The prison official's state of mind must evince "deliberateness tantamount to intent to punish." "Knowledge of the asserted serious needs or of circumstances clearly indicating the existence of such needs, is essential to a finding of deliberate indifference." Thus, "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."

Miller v. Calhoun County, 408 F.3d 803, 812-813 (6th Cir. 2005) (citations omitted). See also *Butler v. Madison County Jail*, 109 S.W.3d 360, 366 (Tenn. Ct. App. 2002) ("When a prisoner suffers pain needlessly and relief is readily available, they have a cause of action against those whose deliberate indifference is the cause of suffering.").

"Mere negligence, mistake or difference of medical opinion in the provision of medical care to prisoners do not rise to an Eighth Amendment deprivation under the *Estelle* standard." *Dawson v. Kendrick*, 527 F.Supp. 1252, 1306 (D.C. W.Va. 1981). See also *Butler v. Madison County Jail*, 109 S.W.3d 360, 366 (Tenn. Ct. App. 2002) (Neither negligence nor gross negligence will support a § 1983 claim.). Moreover, officials are "entitled to rely on the professional judgment of trained medical personnel with regards to a prisoner's medical history and the need for medical care." *Miltier v. Beorn*, 896 F.2d 848, 854-855 (4th Cir. 1990). "A prisoner's difference of opinion with prison physicians regarding the type of treatment he should receive does not rise to the level of a constitutional violation." *Rauh v. Ward*, 112 Fed.Appx. 692, 695 (10th Cir. 2004); *LaFlame v. Montgomery County Sheriff's Department*, 3 Fed.Appx. 346 (6th Cir. 2001) (Jail inmate's difference of opinion with doctor over his diagnosis and treatment does not state an Eighth Amendment claim.); *Westlake v. Lucas*, 537 F.2d 857, 860 n. 5 (6th Cir.1976) (same).

Furthermore, not all inadequate medical treatment rises to the level of an Eighth Amendment violation. "Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. **In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.**" *Estelle*, 429 U.S. at 106, 97 S.Ct. at 292. A plaintiff must prove "objectively that he was exposed to a substantial risk of serious harm,"

and that "jail officials acted or failed to act with deliberate indifference to that risk," which requires actual knowledge and deliberate disregard. *Victoria W. v. Larpenter*, 369 F.3d 475, 483 (5th Cir. 2004) (citation omitted). See also *Butler v. Madison County Jail*, 109 S.W.3d 360, 366 (Tenn. Ct. App. 2002) ("In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.") (citation omitted).

Inmates are not entitled to "unqualified access to health care." *Hudson v. McMillan*, 503 U.S. 1, 9, 112 S.Ct. 995, 1000, 117 L.Ed.2d 156 (1992). Nor are they entitled to a medical program that caters to their every whim. *Meadows v. Woods*, 1994 WL 267957, *2 (W.D. Tenn. 1994). "The right to treatment is ... limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable." *Bowring v. Godwin*, 551 F.2d 44, 47-48 (4th Cir. 1977). See also *Dean v. Coughlin*, 804 F.2d 207, 215 (2d Cir.1986) ("The Constitution does not command that inmates be given the kind of medical attention that judges would wish to have for themselves....") (citation omitted); *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981) ("[T]he essential test is one of medical necessity and not one simply of desirability."); *Feliciano v. Gonzalez*, 13 F.Supp.2d 151, 208 (D.C. P.R. 1998) (Under the Eighth Amendment, the standard of care for inmates does not include the most sophisticated care that money can buy, but only that which is reasonably appropriate within modern and prudent professional standards in the field of medicine and health.). Cf. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 308 (S.D. Ala. 1980) (The county is under no duty to provide prosthetic devices such as eyeglasses or dentures, or to provide routine diagnostic care for inmates. These services are not provided by the county to its free world citizens, and a person does not gain a greater right to services or benefits upon being convicted of a criminal offense.). But see *Newman v. Alabama*, 349 F.Supp. 278, 286-288 (M.D. Ala. 1972) (Upholding the right to prosthetic care for inmates in a long-term facility.).

Budgetary constraints do not justify the intentional withholding of necessary medical care. *Jones v. Johnson*, 781 F.2d 769, 770-72 (9th Cir. 1986). **However, the county is required only to furnish inmates with routine and emergency medical care. The county is not required to furnish other and additional elective medical care, which is not essential to the immediate welfare of the inmates and the lack of which poses no threat to life or limb.** See *Kersh v. Bounds*, 501 F.2d 585, 588-589 (4th Cir. 1974); *Jackson v. Fair*, 846 F.2d 811, 817 (1st Cir.1988) ("Although the Constitution does require that prisoners be provided with a certain minimum level of medical treatment, it does not guarantee to a prisoner the treatment of his choice."). See also *Buckley v. Correctional Medical Services, Inc.*, 125 Fed.Appx. 98 (8th Cir. 2005) (Inmate failed to establish that 20-month delay in scheduling elective elbow surgery after it was recommended was deliberate indifference to inmate's serious medical need, as required to support inmate's § 1983 action against medical provider.); *Grundy v. Norris*, 26 Fed.Appx. 588 (8th Cir. 2001) (Delay in shoulder surgery did not amount to constitutional violation where medical evidence showed that the surgery was elective and the delay was not of great concern.); *Olson v. Stotts*, 9 F.3d 1475 (10th Cir. 1993) (An 11-day delay in elective heart surgery did not constitute deliberate indifference.); *Cook v. Hayden*, 1991

WL 75648, *3 (D. Kan. 1991) (“[T]he mere delay of elective surgery does not establish a violation of an inmate's protected rights.”). *But see McCabe v. Prison Health Services*, 117 F.Supp.2d 443, 450 (E.D. Pa. 1997) (The fact that a surgery is elective “does not abrogate the prison's duty, or power, to promptly provide necessary medical treatment for prisoners.”); *Delker v. Maass*, 843 F.Supp. 1390, 1400 (D. Or. 1994) (“Where surgery is elective, prison officials may properly consider the costs and benefits of treatment in determining whether to authorize that surgery, but the words ‘elective surgery’ are not a talisman insulating prison officials from the reach of the Eighth Amendment. **Each case must be evaluated on its own merits.**”).

Medical Screening.

An initial medical screening must be performed on all inmates upon admission to the jail prior to their placement in the general housing area. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(4).

It is generally recognized that prompt medical screening is a medical necessity in pretrial detention facilities. When an inmate presents with a treatable medical problem, jail officials are required to ensure that the inmate receives proper medical treatment. *See Neal v. Swigert*, 2005 WL 1629779, *3 (S.D. Ohio 2005) (Conducting a rectal examination on an inmate complaining of urological problems during an initial medical screening does not amount to cruel and unusual punishment.); *Aaron v. Finkbinder*, 793 F.Supp. 734, 737 (E.D. Mich. 1992) (Sheriff's deputy who booked insulin-dependent diabetic prisoner was not deliberately indifferent to prisoner's medical needs, even though he failed to record on prisoner's medical screening chart that prisoner needed to be provided with insulin, where he called and advised clinic that prisoner was diabetic and in need of insulin.).

The nonconsensual testing of inmates for tuberculosis is constitutional. *Karlovetz v. Baker*, 872 F.Supp. 465 (N.D. Ohio 1994), *citing Dunn v. White*, 880 F.2d 1188 (10th Cir.1989) (holding that a nonconsensual test for HIV does not violate a prisoner's constitutional rights). It has been held that a prison's failure to test all incoming inmates for tuberculosis and other serious communicable diseases violates noninfected inmates' Eighth Amendment rights. *LaReau v. Manson*, 651 F.2d 96, 109 (2nd Cir.1981); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (same). *Cf. Zaire v. Dalsheim*, 698 F.Supp. 57, 60 (S.D. N.Y. 1988) (holding that the forcible administration of inoculations for diphtheria-tetanus administered solely for the protection of the prisoner and other inmates, and not for purposes such as illicit punishment or nonconsensual psychotherapy, did not violate the constitution), *aff'd*, 904 F.2d 33 (2d Cir. 1990); *Ormond v. State*, 599 So.2d 951, 957-958 (Miss. 1992) (holding that the state's interest in eliminating the spread of infectious disease among closely confined jail population outweighed any privacy interest of defendant; accordingly, taking defendant to health department for treatment of his gonorrhea did not violate the inmate's privacy interest).

Pursuant to Tennessee law, the sheriff is authorized to hire a female registered nurse and a male registered nurse who are authorized to make complete physical examinations of all persons committed to the custody of the sheriff for the purpose of preventing the spread of any contagious disease. Such physical examinations may include the taking of blood tests and Pap smear tests and any other tests that are approved and recommended by the county health officer. All females committed to the custody of the sheriff are to be examined only by the female registered nurse hired for that purpose, and all males committed to the custody of the sheriff are to be examined by the male nurse hired for that purpose. T.C.A. § 41-4-138. See *Haywood County v. Hudson*, 740 S.W.2d 718, 719 (Tenn. 1987); *George v. Harlan*, 1998 WL 668637, *4 (Tenn. 1998) (“It appears to this Court that the services of nurses to prevent the spread of disease, and the services of a physician to treat illnesses are separate and distinct functions, the furnishing of the former being a statutory duty of the sheriff, and the furnishing of the latter being a statutory duty of the county legislative body.”).

Medical Segregation.

Inmates suffering from communicable diseases and those who are sick but do not require hospitalization must be housed separate from other inmates. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(14).

Placement in medical isolation is a permissible administrative intake procedure when an inmate refuses to take a TB test. *Johnson v. County of Nassau*, 2005 WL 991700 (E.D. N.Y. 2005), citing *Hewitt v. Helms*, 459 U.S. 460, 468, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). See also *Davis v. City of New York*, 142 F.Supp.2d 461, 464 (S.D. N.Y. 2001) (The brief placement of an inmate in medical isolation in order to restrict his exposure to the general population and facilitate a medical examination in consequence of his refusal to submit a blood sample did not violate any constitutional rights because it served the legitimate penological interest of insuring the health and safety of other prisoners.); *Jones-Bey v. Wright*, 944 F.Supp. 723, 732 (N.D. Ind. 1996) (Placement of prisoner who refused to submit to TB screening test in medical isolation unit for maximum of 40 days did not violate Eighth Amendment cruel and unusual punishments clause.); *Westbrook v. Wilson*, 896 F.Supp. 504 (D. Md. 1995) (Regulation and practice of placing inmates who refuse to submit to test for TB in medical segregation is constitutional; test is minimally intrusive, related to legitimate prison management goal of protecting other inmates and staff, and placement in medical segregation is reasonable.).

Several federal circuit courts have upheld against constitutional challenge the practice of segregating HIV-positive prisoners from the rest of the prison population on the theory that such segregation is a reasonable anticontagion measure even though it incidentally and necessarily effects disclosure of medical information. In *Harris v. Thigpen*, 941 F.2d 1495, 1521 (11th Cir. 1991), the Eleventh Circuit Court of Appeals found that the decision to segregate HIV-positive inmates from the general prison population served a legitimate penological interest in reducing the transmission of HIV and reducing the threat of violence. See also *Onishea v. Hopper*, 171 F.3d 1289, 1297-1299 (11th Cir. 1999) (allowing segregation of HIV-positive prisoners), *cert. denied*, 528 U.S. 1114, 120 S.Ct. 931, 145

L.Ed.2d 811 (2000). Other courts of appeals have likewise upheld the segregation of HIV-positive inmates from the general population. See, e.g. *Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir. 1992) (finding HIV segregation policy reasonably related to legitimate penological interests); *Matthews v. Graham*, 235 F.3d 1339 (Table) (5th Cir. 2000) (Placement in administrative segregation in a county jail for three months due to HIV-positive status serves a legitimate penological interest.); *Carter v. Lowndes County*, 89 Fed.Appx. 439 (5th Cir. 2004) (County's segregation policy for inmates with contagious diseases served a legitimate penological interest.); *Camarillo v. McCarthy*, 998 F.2d 638, 640 n. 2 (9th Cir. 1993) (reserving question of whether HIV segregation policy is constitutional but holding officers entitled to qualified immunity); *Bowman v. Beasley*, 8 Fed.Appx. 175, 178-179 (4th Cir. 2001) (The practice of segregating HIV-positive inmates is within the wide deference afforded prison administrators, and it is reasonably related to legitimate penological interests.). Cf. *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir.1995) (holding that the constitutional rights of an HIV-positive inmate are not infringed when prison officials undertake to warn prison officials and inmates who otherwise may be exposed to contagion, even if those warnings are administered on an ad hoc basis).

In *McRoy v. Sheahan*, 2005 WL 1926560 (N.D. Ill. 2005), the district court found that jail officials were not deliberately indifferent to the presence of tuberculosis bacteria in the jail in violation of the 14th Amendment rights of a pretrial detainee who contracted latent form of tuberculosis where jail officials followed the screening, isolation, and treatment policies of the Centers for Disease Control (CDC) and the American Thoracic Society (ATS).

Temporary inconveniences incurred while being held in medical segregation usually do not rise to the level of a constitutional violation. *Taggart v. MacDonald*, 131 Fed.Appx. 544, 546 (9th Cir. 2005) (upholding dismissal of inmate's claims regarding his confinement in medical segregation because his allegations that he was temporarily deprived of reading material, temporarily unable to properly cleanse himself, and was yelled at by a prison official, were not objectively serious enough to rise to a constitutional claim).

Physical Examination.

A complete physical examination must be completed on inmates within 14 days of their initial confinement date. This examination must be performed by a physician or a person who has been designated by a physician as capable of performing such examination. If a designee performs the examination he or she must do so under the supervision of a physician and with a protocol or set of instructions and guidelines from the physician. This examination shall include:

- (1) Inquiry into current illness and health problems, including those specific to women;
- (2) Inquiry into medications taken and special health requirements;
- (3) Screening of other health problems designated by the responsible physician;

- (4) Behavioral observation, including state of consciousness and mental status;
- (5) Notification of body deformities, trauma markings, bruises, lesions, jaundice, ease of movement, etc.;
- (6) Condition of skin and body orifices, including rashes and infestations; and
- (7) Disposition/referral of inmates to qualified medical personnel on an emergency basis.

Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(5).

An intake physical examination is advisable in order to screen out drug addicts, alcoholics, and physical ailments for treatment, to avoid contagion within the jail population, and as a public health function. *Collins v. Schoonfield*, 344 F.Supp. 257, 277 (D. Md. 1972) (Lack of complete physical examination for inmates upon entry into city jail did not constitute cruel and unusual punishment under constitutional standards as they existed in 1972.). See also *Smith v. Swanson*, 2004 WL 1157433 (Ohio App. 2004) (County jail inmate's § 1983 complaint alleging that upon his arrival at the jail he was denied a proper physical examination failed to allege "serious deprivation of human need" as required to state a claim for a violation of Eighth Amendment's cruel and unusual punishment cause.); *Mawby v. Ambroyer*, 568 F.Supp. 245, 250 (E.D. Mich. 1983) (Failure to provide incoming inmates with a physical exam found not to violate the Eighth Amendment absent claim that inmates had actually been denied treatment of any serious medical needs.).

Sick Call.

Sick call, conducted by a physician or other person designated by a physician as capable of performing such duty, must be available to each prisoner according to a written procedure for sick call. All inmates must be informed of these procedures upon admission to the jail. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(6).

While society does not expect that inmates will have unqualified access to health care, a jail official who does not attend to the serious medical needs of an inmate violates that inmate's constitutional right. See *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S.Ct. 995, 1000, 117 L.Ed.2d 156 (1992). See also *Dawson v. Kendrick*, 527 F.Supp. 1252, 1308 (S.D. W.Va. 1981) (holding that the "denial of adequate medical screening, classification, record keeping, sick call procedures and timely access to care at the Mercer County Jail constitutes deliberate indifference to the potentially serious medical needs of the pre-trial detainees and convicted prisoners alike in violation of the Eighth Amendment"); *Facility Review Panel v. Holden*, 356 S.E.2d 457, 460-461 (W.Va. 1987) (holding that failure to medically screen inmates upon admission, to keep medical records, or to hold regular sick call violated prohibition against cruel and unusual punishment under federal constitution).

It has been held that sick call administered by prison security staff instead of medical staff violates constitutional standards and subjects prisoners to cruel and unusual punishment. *Carty v. Farrelly*, 957 F.Supp. 727, 737-738 (D. Virgin Islands 1997). It has also been held that providing inadequate medical staff effectively denies inmates access to diagnosis and treatment and constitutes deliberate indifference. *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979). However, the mere fact that staff is not on "sick call" seven days a week does not constitute deliberate indifference to the serious medical needs of prisoners so long as emergency treatment is available during weekends and holidays. *Luca v. Scalzo*, 892 F.2d 83 (9th Cir. 1989) (The failure to provide regular medical office hours for two out of every seven days for nonemergency medical needs is not evidence of serious understaffing establishing deliberate indifference.); *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990) (Only delays that cause substantial harm violate the Eighth Amendment.). See also *Gregory v. McGann*, 1992 WL 559661 (N.D. Ind. 1992) (finding policy of one day a week hospital sick call (except for emergencies) does not offend the Eighth Amendment); *Pounds v. Myers*, 76 Fed.Appx. 630 (6th Cir. 2003) (holding that allegations that nurse told inmate that he could be seen for only one complaint per sick call along with one day suspension of sick call privileges failed to state a claim upon which relief could be granted absent any allegation that the delay in receiving treatment had any detrimental effect on inmate's condition); *County of El Paso v. Dorado*, --- S.W.3d ----, 2005 WL 3254498 (Tex. App. 2005) ("Evidence of sick call requests, examinations, diagnoses and medications may rebut an inmate's claim of deliberate indifference.").

Medications.

All medications in the possession of an inmate at the time of admission to the jail must be taken from him or her and the identification of and the need for such medication must be verified by a physician before it is administered. All medications must be issued by a physician or his designee at the time of use, and a medication receipt system must be established. This shall include controlled drugs and injections. There must be strict control of medications to be issued to inmates. All medications must be given only upon a doctor's written orders, and they must be kept in a secure place within the administrative offices in the jail. An officer must be responsible to see that the medicine is taken as directed. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(9) - (11).

It has been held that a prison official's actions of confiscating a diabetic prisoner's stockpiled medication and requiring him to take the medication under supervision did not amount to deliberate indifference to the prisoner's serious medical needs. *Jackson v. Lucine*, 119 Fed.Appx. 70 (9th Cir. 2004). See also *Loggins v. Phils*, 10 Fed.Appx. 793 (10th Cir. 2001) (Complaint alleging that a detention facility dispensed medication to inmate without first performing a physical examination or securing a doctor's prescription, resulting in significant side effects, stated, at most, a claim of medical malpractice, and did not state a claim under § 1983 for violation of civil rights, absent allegation of facts evidencing deliberate indifference to serious medical needs.).

“Differences in opinion by a doctor and a prisoner over the appropriate medication to be prescribed is a disagreement over a treatment plan and does not implicate the Eighth Amendment. The Eighth Amendment is not implicated by prisoners' complaints over the adequacy of the care they received when those claims amount to a disagreement over the appropriateness of a particular prescription plan. At most, such allegations may rise to the level of a medical malpractice claim, a type of action in which the Eighth Amendment is not implicated.” *Veloz v. New York*, 339 F.Supp.2d 505, 525 (S.D. N.Y. 2004) (citations omitted). See *Houston v. Zeller*, 91 Fed.Appx. 956, 957 (5th Cir. 2004) (Inmate’s disagreement with prison physician’s choice of medications cannot support a claim of cruel and unusual punishment.); *White v. Correctional Medical Services Inc.*, 94 Fed.Appx. 262 (6th Cir. 2004) (same); *Chance v. Armstrong*, 143 F.3d 698, 702, 703 (2d Cir. 1998) (same). See also *Edens v. Larson*, 110 Fed.Appx. 710 (7th Cir. 2004) (holding that a doctor’s refusal to dispense a medicine containing barbiturates until he could directly observe and evaluate an inmate’s headaches was not so substantial a departure from reasonable and accepted practice as to imply deliberate indifference, so as to support the inmate’s Eighth Amendment claim in a § 1983 suit); *Kittelson v. Nafrawi*, 112 Fed.Appx. 946 (5th Cir. 2004) (Inmate’s claim that his receipt of other inmates’ medication was negligent, medical malpractice, and illegal is not sufficient to establish deliberate indifference.).

The Eighth Amendment proscription on the infliction of cruel and unusual punishment prohibits jail guards from “intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.” *Zentmyer v. Kendall County*, 220 F.3d 805, 810 (7th Cir. 2000) (citations omitted). “Refusing to provide prescribed medication may violate the Constitution. However, as with any other Eighth Amendment claim, plaintiff will have to show both that the denial of the medication caused a substantial risk of serious harm to his health *and* that defendants were deliberately indifferent to his health.” *King v. Frank*, 328 F.Supp.2d 940, 948 (W.D. Wis. 2004) (citations omitted). See also *Cherry v. Berge*, 98 Fed.Appx. 513, 515 (7th Cir. 2004) (Prison staff act with deliberate indifference if they refuse to carry out a doctor’s prescribed treatment in the face of a substantial risk to an inmate’s health.).

The mere delay in administering medication to an inmate does not in and of itself constitute deliberate indifference to a serious medical need. *Van Court v. Lehman*, 137 Fed.Appx. 948 (9th Cir. 2005) (One-day delay in administering pain medication to inmate after he was injured in attack by another inmate did not demonstrate deliberate indifference to a serious medical need.). “Where the alleged lapses in treatment are minor and inconsequential in that they do not result in substantial risk of injury, an Eighth Amendment claim cannot be made out.” *Atkins v. County of Orange*, 372 F.Supp.2d 377, 413 (S.D. N.Y. 2005). See also *Smith v. Carpenter*, 316 F.3d 178, 188 (2nd Cir. 2003) (Noting that “[a]lthough [inmate] suffered from an admittedly serious underlying condition, he presented no evidence that the two alleged episodes of missed medication resulted in permanent or on-going harm to his health...”); *Hill v. Dekalb Regional Youth Detention Ctr.*, 40 F.3d 1176, 1188 (11th Cir. 1994) (“An inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of the delay in the medical treatment to succeed.”). The failure to “dispense

bromides for the sniffles or minor aches and pains or a tiny scratch or a mild headache or minor fatigue - the sorts of ailments for which many people who are not in prison do not seek medical attention - does not ... violate the Constitution." *Zentmyer v. Kendall County*, 220 F.3d 805, 810 (7th Cir. 2000) (citations omitted).

It has been held that jail personnel are not deliberately indifferent to an inmate's serious medical need when they unsuccessfully attempt to get an inmate to take his prescribed medication. *Atwell v. Hart County*, 122 Fed.Appx. 215, 218 (6th Cir. 2005). It has also been held that jail personnel do not act with deliberate indifference in not dispensing an inmate's medication when the inmate refuses to comply with the rules for receiving medication. *Cherry v. Berge*, 98 Fed.Appx. 513, 515 (7th Cir. 2004), *citing Hernandez v. Keane*, 341 F.3d 137, 147 (2nd Cir. 2003) (no deliberate indifference where doctors attempted to provide post-operative treatment but inmate declined some of the treatment); *Watkins v. City of Battle Creek*, 273 F.3d 682, 686 (6th Cir. 2001) (Staff were not deliberately indifferent in failing to treat detainee when he denied need for treatment and staff did not force him to accept treatment.); *Logan v. Clarke*, 119 F.3d 647, 650 (8th Cir. 1997) (Doctor was not deliberately indifferent when inmate did not follow treatment instructions.). See also *Holley v. Deal*, 948 F.Supp. 711, 718-719 (M.D. Tenn. 1996) (Prison officials did not act with deliberate indifference in forcibly administering medication to inmate, and thus did not subject him to cruel and unusual punishment in violation of Eighth Amendment.).

In *Quint v. Cox*, 348 F.Supp.2d 1243, 1251 (D. Kan. 2004), the district court found that the sheriff's practice of not having a medical nurse or better trained personnel on staff to dispense medications to inmates did not amount to deliberate indifference to the inmates' serious medical needs.

Inmates do not have a constitutional right to take medications in private. *Chevrette v. Marks*, 558 F.Supp. 1133, 1134 (M.D. Pa. 1983) (An inmate is not subjected to cruel and unusual punishment simply because he is not allowed to take his prescribed medication in private.).

The jail's written policy and procedure must prohibit inmates from performing patient care services, scheduling health care appointments or having access to medications, health records or medical supplies and equipment. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(2).

At least one federal district court has held that the use of inmate trustees to carry out sensitive tasks such as distributing drugs violates the Eighth Amendment. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 309 (S.D. Ala. 1980).

Medical Records.

Pursuant to state regulations, medical records must be kept in a separate file from other inmate records. Medical records must contain documentation of the inmate's physical condition on admission, during confinement, and at discharge. The record must indicate all medical orders issued by the jail physician or any other medical personnel who are responsible for rendering medical services. These records must be retained for a period of five years after the inmate's release. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(12).

Jail personnel have a duty to maintain complete medical records on each inmate. Records should also be kept on drugs administered to inmates. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 309 (S.D. Ala. 1980) (The failure to keep adequate medical records constitutes a danger to the lives and health of inmates.). *See also Dawson v. Kendrick*, 527 F.Supp. 1252, 1306-1307 (S.D. W.Va. 1981) (The Eighth Amendment has also been held to be implicated when a prison's "inadequate, inaccurate and unprofessionally maintained medical records" give rise to "the possibility for disaster stemming from a failure to properly chart" medical care received by prisoners.), *citing Burks v. Teasdale*, 492 F.Supp. 650, 676 (W.D. Mo. 1980).

Whether prisoners have any constitutional privacy rights in their prison medical records and treatment appears to be an unsettled question. In *Doe v. Delie*, 257 F.3d 309 (3d Cir. 2001), the Third Circuit Court of Appeals joined the Second Circuit in recognizing that the constitutional right to privacy in one's medical information exists in prison.

We acknowledge, however, that a prisoner does not enjoy a right of privacy in his medical information to the same extent as a free citizen. We do not suggest that Doe has a right to conceal this diagnosed medical condition from everyone in the corrections system. Doe's constitutional right is subject to substantial restrictions and limitations in order for correctional officials to achieve legitimate correctional goals and maintain institutional security.

Specifically, an inmate's constitutional right may be curtailed by a policy or regulation that is shown to be "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

Id. at 317. *See Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999).

In *Anderson v. Romero*, 72 F.3d 518 (7th Cir. 1995), the Seventh Circuit Court of Appeals recognized a "qualified constitutional right to confidentiality of medical records and medical communications" outside of prison but concluded that it was an open question as to whether the right applied in the prison setting. *Id.* at 522. The court concluded that prison officials were entitled to qualified immunity because, if such a right existed, it was not clearly established in 1992 or in 1995. *Id.* at 524.

The Sixth Circuit does not recognize the right to privacy in one's medical information in any setting. In *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir.1994), the Sixth Circuit Court of Appeals explicitly held that the right of privacy is not implicated at all by prison official's disclosure of an inmate's medical status. *Id.* at 740. See *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) (concluding that "the Constitution does not encompass a general right to nondisclosure of private information"); *Tokar v. Armontrout*, 97 F.3d 1078, 1084-1085 (8th Cir. 1996) (noting that prisoners do not have a constitutional right to confidentiality of their medical records). See also *Reeves v. Engelsjerd*, 2005 WL 3534906, *4 (E.D. Mich. 2005) ("Although other Circuits have recognized a constitutional right to privacy in the information in one's medical records, the Sixth Circuit has specifically held that such a right generally does not exist.").

The Tennessee Supreme Court has held that the confidentiality of records is a statutory matter left to the legislature. *Doe v. Sundquist*, 2 S.W.3d 919 (Tenn. 1999), citing *Tennessean v. Electric Power Bd. of Nashville*, 979 S.W.2d 297, 300-301 (Tenn. 1998); *Thompson v. Reynolds*, 858 S.W.2d 328 (Tenn. Ct. App. 1993).

Pursuant to T.C.A. § 10-7-504(a)(1), the medical records of county inmates shall be treated as confidential and shall not be open for inspection by members of the public.

First Aid Training.

At least one jail employee per shift must be trained in first aid as defined by the American Red Cross. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(7). First aid kits must be available in the jail. A physician must approve the number, contents, and locations of such first aid kits. Documentation of the physician's approval must be in the jail's permanent records or attached to the kit itself. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(3).

"Jail personnel should be trained in basic health care delivery and must be trained in emergency health techniques." *Nicholson v. Choctaw County*, 498 F.Supp. 295, 309 (S.D. Ala. 1980). See also *Bunyon v. Burke County*, 306 F.Supp.2d 1240, 1258 (S.D. Ga. 2004) (It is undisputed that jail staff are charged with ensuring that an inmate's medical needs are met while he or she is detained at the county Jail. Thus, the need to train personnel in the constitutional requirements of providing adequate medical care can be said to be so obvious that failure to do so could properly be characterized as deliberate indifference to constitutional rights.); *Brock v. Warren County*, 713 F.Supp. 238, 243 (E.D. Tenn. 1989) (finding that the sheriff and the county commissioners were deliberately indifferent to plaintiffs' decedent's constitutional rights in failing to provide minimal medical training to the jail guards).

County Liability for Inmate Medical Care.

In *Chattanooga-Hamilton County Hosp. Authority v. Bradley County*, 66 S.W.3d 888 (Tenn. Ct. App. 2001), the plaintiff hospital (Erlanger Health System) sued the county for the payment of medical bills for care provided to an arrestee who was shot by Bradley County officers during his apprehension. The pertinent facts were as follows. "A Bradley County officer shot Dunn in the process of an arrest, and Bradley County EMS requested an air ambulance service from Erlanger. Dunn was transported to Erlanger, accompanied by a County deputy, and was admitted. Dunn was under a police hold while in Erlanger at the request of Bradley County, and upon his release from the hospital, was picked up by the Bradley County Sheriff's Department and taken to the County Jail." *Id.* at 889.

Noting that the trial court had correctly found that it was the county's duty to provide medical care to Dunn, the Tennessee Court of Appeals cited the United States Supreme Court's opinion in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983).

In *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983), officers attempted to detain an individual who attempted to flee, and the individual was shot by an officer. An ambulance was summoned and the individual was taken to Massachusetts General Hospital. The hospital sued the City of Revere seeking payment for medical services rendered. Justice Blackman, speaking for the Court, said at p. 2983 of the Opinion:

The Due Process Clause, however, does require the responsible government or governmental agency to provide medical care to persons, such as Kivlin, who have been injured while being apprehended by the police. In fact, the due process rights of a person in Kivlin's situation are at least as great as the Eighth Amendment protections available to a convicted prisoner. (Citation omitted). We need not define, in this case, Revere's due process obligation to pretrial detainees or to other persons in its care who require medical attention. (Citations omitted). Whatever the standard may be, Revere fulfilled its constitutional obligation by seeing that Kivlin was taken promptly to a hospital that provided the treatment necessary for his injury. And as long as the governmental entity ensures that the medical care needed is in fact provided, the Constitution does not dictate how the cost of that care should be allocated as between the entity and the provider of the care. That is a matter of state law.

Id. at 889 - 890.

Pursuant to T.C.A. § 41-4-115, it is the duty of the county legislative body to provide medical attendance for all prisoners confined in the county jail. The statute is silent with respect to persons who have yet to be confined in the county jail. Relying on this statute, the county argued that state law does not require the county to pay for medical services

on the facts of this case. Nevertheless, despite the fact that the United States Supreme Court's holding in *Revere* clearly states that the cost of medical care provided to persons such as Dunn is a matter of state law, **the Tennessee Court of Appeals held that implicit in the Supreme Court's holding in *Revere* "is the requirement that the State or responsible governmental agency, in discharging its duty to provide these medical services, must provide the method for payment of these services."** *Id.* at 890.

To bolster its conclusion, the Court of Appeals cited the Tennessee Supreme Court's decision in *Bryson v. State*, 793 S.W.2d 252 (Tenn. 1990). In *Bryson*, the issue was whether or not the state of Tennessee is liable for the payment of medical expenses incurred by a convict who is injured while on a furlough from a state institution. The Tennessee Supreme Court held that the state is liable for the medical costs of state prisoners who are out of prison on a temporary furlough. Central to the Court's holding were its findings that the prisoner remained in the state's custody while on furlough and remained a prisoner for the purpose of medical treatment, absent a waiver by the prisoner of the right (under state law) to have the state provide him with medical care. *Bryson*, 793 S.W.2d at 254-255.

Noting the Tennessee Supreme Court's finding that being "in custody" was sufficient to trigger governmental liability for the prisoner's care, the Court of Appeals, finding that Dunn was in the custody of the Bradley County Sheriff's Office while he remained in the hospital, held that the county was liable for Dunn's medical expenses even though he was not confined in the county jail. 66 S.W.3d at 891.

In the case of *In re Estate of Davis*, 1994 WL 44448 (Tenn. Ct. App. 1994), the single issue was whether the estate of a deceased state inmate was liable for the decedent's hospital expenses irrespective of the responsibility of the state of Tennessee to the estate of the decedent for these expenses. Noting that "[t]here is nothing in the language of our statutes to suggest Mr. Davis's status as a prisoner precludes him or his estate from being liable to pay the hospital for his medical care," the Tennessee Court of Appeals held that the estate of the deceased state inmate was liable for hospital expenses incurred while the inmate was serving his sentence in the county jail. *See also City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 245 n. 7, 103 S.Ct. 2979, 2984 n. 7, 77 L.Ed.2d 605 (1983) ("Nothing we say here affects any right a hospital or government entity may have to recover from a detainee the cost of medical services provided to him.").

The attorney general has opined that if an inmate has health insurance coverage, there appears to be no provision of law that would allow the insurance carrier to avoid paying covered medical costs solely because the insured was incarcerated in the county jail at the time the claim arose. However, an individual loses eligibility for TennCare upon becoming incarcerated. Accordingly, TennCare may properly deny coverage to an individual who is incarcerated either before or after conviction. Op. Tenn. Atty. Gen. 97-010 (February 4, 1997). See also Op. Tenn. Atty. Gen. 95-095 (September 15, 1995) (A county is permitted to collect from a nonindigent inmate housed in the county jail the cost of providing needed medical or dental care to the

inmate. However, the county is the party ultimately responsible for paying providers who render medical or dental services to county inmates.).

As a general rule a county may include medical expenses incurred on behalf of an inmate as jailers' fees taxable in the bill of costs. A defendant convicted of a criminal offense is responsible for paying the costs associated with the prosecution. The costs of a criminal case include all costs incident to the arrest and safekeeping of the defendant, including the costs of the jailer. Op. Tenn. Atty. Gen. 03-072 (June 10, 2003).

Inmate Copay.

Any county may, by resolution adopted by a two-thirds vote of the county legislative body, establish and implement a plan authorizing the county jail administrator to charge an inmate in the county jail a copay amount for any medical care, treatment, pharmacy services or substance abuse treatment by a licensed provider provided to the inmate by the county. A county adopting a copay plan must establish the amount the inmate is required to pay for each service provided. However, an inmate who cannot pay the copay amount established by the plan cannot be denied medical care, treatment, pharmacy services or substance abuse treatment by a licensed provider. T.C.A. § 41-4-115(d).

If an inmate cannot pay the copay amount established by a plan adopted pursuant to T.C.A. § 41-4-115(d), the plan may authorize the jail administrator to deduct the copay amount from the inmate's commissary account or any other account or fund established by or for the benefit of the inmate while incarcerated. T.C.A. § 41-4-115(e).

Notwithstanding any other provision of law to the contrary, a plan established pursuant to T.C.A. § 41-4-115(d) may also authorize the jail administrator to seek reimbursement for expenses incurred in providing medical care, treatment, hospitalization or pharmacy services to an inmate incarcerated in the jail from an insurance company, healthcare corporation, TennCare or other source, if the inmate is covered by an insurance policy or TennCare or subscribes to a healthcare corporation or other source for those expenses. T.C.A. § 41-4-115(f). Note: An individual loses eligibility for TennCare upon becoming incarcerated. Accordingly, TennCare may properly deny coverage to an individual who is incarcerated. See Op. Tenn. Atty. Gen. 97-010 (February 4, 1997).

The United States Constitution, on its face, says nothing about medical care due inmates. The right to medical care was inferred by the United States Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976) and the contours of that right have been shaped by subsequent case law. Constitutional principles derived from the Eighth Amendment's prohibition of "cruel and unusual punishments" establish the government's obligation to provide medical care for those whom it is punishing by incarceration. *Id.* See also *Helling v. McKinney*, 509 U.S. 25, 32, 113 S.Ct. 2475, 2480, 125 L.Ed.2d 22 (1993); *Marsh v. Butler County*, 268 F.3d 1014 (11th Cir. 2001).

“Although the Supreme Court has held that a state must provide inmates with basic medical care, the Court has not tackled the question whether that care must be provided free of charge.” *Reynolds v. Wagner*, 128 F.3d 166, 174 (3d Cir. 1997), citing *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 245 n. 7, 103 S.Ct. 2979, 2984 n. 7, 77 L.Ed.2d 605 (1983) (“Nothing we say here affects any right a hospital or government entity may have to recover from a detainee the cost of medical services provided to him.”). See also *Englehart v. Dasovick*, 12 F.3d 1102 (8th Cir. 1993) (Table) (“While the state has an obligation to provide medical care to prisoners, the Constitution does not dictate how the cost of that care is to be allocated.”) (citations omitted).

There is no general constitutional right to free healthcare. *Reynolds*, 128 F.3d at 173. In *Reynolds*, the Third Circuit Court of Appeals affirmed a district court’s ruling that there is nothing unconstitutional about a program that requires inmates with adequate resources to pay a small portion of their medical care. The court rejected the inmates’ argument that charging inmates for medical care is *per se* unconstitutional. The court found that if a prisoner is able to pay for medical care, requiring such payment is not “deliberate indifference to serious medical needs.” The court noted that “such a requirement simply represents an insistence that the prisoner bear a personal expense that he or she can meet and would be required to meet in the outside world.” *Id.* at 174. See also *Roberson v. Bradshaw*, 198 F.3d 645 (8th Cir. 1999) (County’s policy of requiring jail inmates to pay for their own medications if they could afford to do so did not violate the Eighth Amendment.).

If an inmate cannot pay, he must be maintained at the county’s expense; it cannot deny minimal medical care to poor inmates. If an inmate can pay for his medical care, then the county may require reimbursement. No right described or alluded to in the Constitution is implicated by a decision of the county to seek compensation for its actual, reasonable costs in maintaining an inmate. As he was obliged to pay court costs, he may be obliged to pay his medical costs. Tennessee imprisoned him; it did not adopt him. See *Bihms v. Klevenhagen*, 928 F.Supp. 717, 718 (S.D. Tex. 1996). See also *White v. Correctional Medical Services Inc.*, 94 Fed.Appx. 262, 264 (6th Cir. 2004) (“It is constitutional to charge inmates a small fee for health care where indigent inmates are guaranteed service regardless of ability to pay.”); *George v. Smith*, 2005 WL 1812890 (W.D. Wis. 2005).

In *Breakiron v. Neal*, 166 F.Supp.2d 1110, 1114-1115 (N.D. Tex. 2001), the district court found that deducting payments from an inmate’s inmate commissary or trust account for medical services rendered does not violate the Due Process Clause of the Fourteenth Amendment. The court noted that states may decide who should pay for the medical care of inmates. *Id.*, citing *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244-245, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983). Accord *Negron v. Gillespie*, 111 P.3d 556, 558-559 (Colo. App. 2005) (“As long as the state meets an inmate’s serious medical needs, each state may determine whether a governmental entity or an inmate must pay the cost of medical services provided to the inmate.”) (citing cases).

Reimbursement for State Inmate Medical Care.

The state is liable for expenses incurred from emergency hospitalization and medical treatment rendered to any state prisoner incarcerated in a county jail or workhouse, provided that the prisoner is admitted to the hospital. The sheriff of the county in which the state prisoner is incarcerated must file a petition with the criminal court committing the state prisoner to the county jail or workhouse attaching thereto a copy of the hospital bills of costs for the state prisoner. It is the duty of the court committing the state prisoner to the county jail or workhouse to examine bills of costs, and if the costs are proved, the court is required to certify the fact thereon and forward a copy to the judicial cost accountant. Expenses for emergency hospitalization and medical treatment are paid in the same manner as court costs. T.C.A. § 41-4-115(b).

The state is responsible for transportation costs and cost of any guard necessary when a state prisoner is admitted to a hospital or requires follow-up treatment. Such reimbursement is to be made according to the procedures established by T.C.A. § 41-8-106, but shall be in addition to the per diem established in T.C.A. § 41-8-106. T.C.A. § 41-4-115(c).

If a defendant serving a felony sentence in a local jail develops medical problems that the local jail is not equipped to treat, the court has the authority to transfer the defendant to the Department of Correction. T.C.A. § 40-35-314(e).

Psychiatric Care of Inmates.

The Eighth Amendment requirement of adequate medical care for a prisoner applies equally to psychiatric care. *McCullough v. Barnes*, 2005 WL 2704878, *8 (M.D. Tenn. 2005), *citing Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

Dental Care of Inmates.

The requirement that the state furnish healthcare includes necessary dental services. *Grubbs v. Bradley*, 552 F.Supp. 1052, 1123 (D.C. Tenn. 1982). Pursuant to state regulations, dental treatments, not limited to extractions, must be provided when the health of the inmate would otherwise be adversely affected during confinement, as determined by a physician or dentist. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(8).

“[N]ot all claims regarding improper dental care will be constitutionally cognizable. Dental conditions, like other medical conditions, may be of varying severity. **The standard for Eighth Amendment violations contemplates ‘a condition of urgency’ that may result in ‘degeneration’ or ‘extreme pain.’**” *Chance v. Armstrong*, 143 F.3d 698, 702 (2nd Cir. 1998). “A cognizable claim regarding inadequate dental care, like one involving medical care, can be based on various factors, such as the pain suffered by the plaintiff, the

deterioration of the teeth due to a lack of treatment, and the inability to engage in normal activities." *Goodnow v. Palm*, 264 F.Supp.2d 125, 132 (D. Vt. 2003) (citations omitted). See also *Fields v. Gander*, 734 F.2d 1313, 1314-1315 (8th Cir. 1984) (Inmate's claims that sheriff knew of the pain he was suffering and still refused to provide dental care for him for up to three weeks could support a finding of an Eighth Amendment violation.).

Charging Inmates for Issued Items.

Any county may, by a resolution adopted by a two-thirds vote of the county legislative body, establish and implement a plan authorizing the jail administrator to charge an inmate committed to the county jail a fee, not to exceed the actual cost, for items issued to the inmate upon each new admission to the county jail. T.C.A. § 41-4-142(a).

Additionally, any county may, by a resolution adopted by a two-thirds vote of its county legislative body, establish and implement a plan authorizing the jail administrator to charge an inmate committed to the jail a nominal fee set by the county legislative body at the time of adoption for the following special services when provided at the inmate's request:

- (1) Participation in GED or other scholastic testing for which the administering agency charges a fee for each test administered;
- (2) Escort by correctional officers to a hospital or other healthcare facility for the purpose of visiting an immediate family member who is a patient at such facility; or
- (3) Escort by correctional officers for the purpose of visiting a funeral home or church upon the death of an immediate family member.

T.C.A. § 41-4-142(b).

A plan adopted pursuant to T.C.A. § 41-4-142(a) or (b) may authorize the jail administrator to deduct the amount from the inmate's jail trust account or any other account or fund established by or for the benefit of the inmate while incarcerated. **Nothing in T.C.A. § 41-4-142 shall be construed as authorizing the jail administrator to deny necessary clothing or hygiene items or to fail to provide the services specified in T.C.A. § 41-4-142(b) based on the inmate's inability to pay such fee or costs. T.C.A. § 41-4-142(c).**

"[D]ebiting an inmate's account for costs associated with his incarceration does not deprive him of a protected property interest without due process of law. More specifically, such debits are not 'deprivations' in the traditional sense because an inmate has been provided with a service or good in exchange for the money debited." *Browder v. Ankrom*, 2005 WL 1026045 (W.D. Ky. 2005) (holding that charging of a per diem for room and board is not in violation of an inmate's federally protected constitutional rights). See also *Sellers v. Worholtz*, 86 Fed.Appx. 398 (10th Cir. 2004) (holding prisoner's due process rights were not violated by withdrawing funds from his prison account to pay various fees, and officials

did not violate prisoner's Eighth Amendment rights by withdrawing funds from his prison account to pay various fees).

Safety of Inmates.

Under the common law the sheriff and his jailer have a duty to treat prisoners "kindly and humanely." See *State ex rel. Morris v. National Surety Co.*, 39 S.W.2d 581 (Tenn. 1931); *Hale v. Johnston*, 203 S.W. 949 (Tenn. 1918). See also *Wisconsin Dept. of Corrections v. Kliesmet*, 564 N.W.2d 742, 746 (Wis. 1997) (The duty of sheriffs to maintain a safe jail was recognized at common law.). Moreover, **the sheriff has a constitutional duty to protect inmates from violence at the hands of other inmates and guards.** "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005, 103 L.Ed.2d 249 (1989).

Employment of Guard.

In all cases where a defendant charged with the commission of a felony is committed to jail, either before or after trial, and the safety of the defendant or the defendant's safekeeping requires a guard, it is the duty of the sheriff to employ a sufficient guard to protect the defendant from violence and to prevent the defendant's escape or rescue. T.C.A. § 41-4-118.

While the United States Constitution "does not mandate comfortable prisons," neither does it permit inhumane ones. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 1976, 128 L.Ed.2d 811 (1994) quoting *Rhodes v. Chapman*, 452 U.S. 337, 349, 101 S.Ct. 2392, 2400, 69 L.Ed.2d 59 (1981). Under the Eighth Amendment's prohibition of "cruel and unusual punishments," prison officials must "take reasonable measures to guarantee the safety of the inmates." *Id.*, quoting *Hudson v. Palmer*, 468 U.S. 517, 526-527, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984). They "have a duty ... to protect prisoners from violence at the hands of other prisoners." *Id.* at 833, quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.), cert. denied, 488 U.S. 823, 109 S.Ct. 68, 102 L.Ed.2d 45 (1988). "It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety." *Farmer* at 834. See *Clark v. Corrections Corp. of America*, 98 Fed.Appx. 413 (6th Cir 2004) (In the prison context, the Eighth Amendment imposes a duty on prison officials to take reasonable measures to guarantee the safety of inmates. "[D]eliberate indifference of a constitutional magnitude may occur when prison guards fail to protect one inmate from an attack by another.") (citations omitted); *Dellis v. Corrections Corp. of America*, 257 F.3d 508 (6th Cir. 2001) (Prison officials have a duty to protect prisoners from violence suffered at the hands of other prisoners.) (citations omitted).

In *Buckner v. Hollins*, 983 F.2d 119, 122-123 (8th Cir.1993), the Eighth Circuit Court of Appeals held that a prison official was not entitled to qualified immunity when he allowed fellow corrections officers to attack a prisoner and he possessed the only set of keys to the

prisoner's holding cell. The court concluded the official could be found liable because he deliberately ignored a prisoner's serious injury and failed to protect the prisoner from a foreseeable attack or otherwise guarantee the prisoner's safety. The court concluded the officer had a duty to intervene. And in *McHenry v. Chadwick*, 896 F.2d 184, 188 (6th Cir. 1990), the Sixth Circuit Court of Appeals held that a prison official has "a duty to try and stop another officer who summarily punishes a person in the first officer's presence." Accordingly, a correctional officer who observes an unlawful beating may be held liable without actively participating in the unlawful beating. See also *Walker v. Norris*, 917 F.2d 1449 (6th Cir. 1990) (prison guard's failure to prevent inmate's stabbing by another inmate violated inmate's Eighth Amendment rights where the guards had the opportunity to prevent the stabbing but failed to do so and instead looked on while the inmate was attacked); *Roland v. Johnson*, 856 F.2d 764, 769-70 (6th Cir. 1988); *McGhee v. Foltz*, 852 F.2d 876, 880-81 (6th Cir. 1988).

Sufficient Jails.

The sheriff has authority, when the jail of the county is insufficient for the safekeeping of a prisoner, to convey the prisoner to the nearest sufficient jail in the state. T.C.A. § 41-4-121(a). This authority is subject to the securing of a court order. *State v. Grey*, 602 S.W.2d 259 (Tenn. Crim. App. 1980). In all cases, also, where it is shown to the committing magistrate, judge or court that the jail of the county in which the commitment should be made is insufficient for the safekeeping of the prisoner, the commitment shall be by mittimus or warrant stating the fact to the nearest sufficient county jail. T.C.A. § 41-4-121(b). In all cases where the jail in which a prisoner is confined becomes insufficient from any cause, any circuit or criminal judge, upon application of the sheriff and proof of the fact, may order the prisoner, by mittimus or warrant, to be removed to the nearest sufficient jail. T.C.A. § 41-4-121(c).

In *Chisom v. State*, 539 S.W.2d 831, 833 (Tenn. Crim. App. 1976), the Court of Criminal Appeals held that the trial judge acted within his authority in ordering the removal of a convicted rapist, for safekeeping reasons, from the county jail to the state penitentiary pending his appeal. However, in *State v. Grey*, 602 S.W.2d 259 (Tenn. Crim. App. 1980), the court held that the statute providing authority for a criminal judge to order a prisoner to be removed to the nearest sufficient jail, upon proof that jail in which prisoner was confined was insufficient, did not justify an order transferring the defendant, who was being detained in a local jail prior to trial, to the state penitentiary for safekeeping upon finding that defendant was an escape risk. The court found that the term "jail" was not intended to include the state penitentiary, and there was no showing that there was no nearby jail sufficient to contain defendant safely.

Guard for Removal of Prisoner.

The sheriff is authorized to employ as many as two guards, if necessary, in removing a prisoner under T.C.A. § 41-4-121, and they shall each be allowed for such services as are provided for similar services in conveying convicts to the penitentiary. T.C.A. § 41-4-122. On demand made immediately preceding or during the term at which the

prisoner is triable, the prisoner must be delivered to the sheriff or deputy sheriff of the county from which the prisoner was sent. T.C.A. § 41-4-123. When the court orders the prisoner to be carried to the jail of another county for safekeeping for want of a sufficient jail in the county where the case is pending, it may make a reasonable allowance to the sheriff and necessary guard, including expenses for conveying the prisoner to the jail so ordered by the judge. T.C.A. § 41-4-124. If the court directs the sheriff to summon more than two guards in order to carry safely any prisoner charged with a crime from one county to another for trial or safekeeping, the commissioner of finance and administration shall allow such additional guards ordered by the court the same compensation that is allowed by law to the two guards, and give a warrant for the same to the sheriff. T.C.A. § 41-4-126. See also T.C.A. § 8-26-108.

The jailer in such case may prove costs in the circuit or criminal court of the county and obtain the certificate of the district attorney general of that court thereto. The clerk of the court shall forward the same to the court where the cause is pending to be taxed in the bill of costs. T.C.A. § 41-4-125.

Overcrowding.

The Tennessee Supreme Court has held that an "insufficient" jail under T.C.A. § 41-4-121 includes one that is so overcrowded that it violates the prisoner's rights under the Eighth Amendment to the United States Constitution. *State v. Walker*, 905 S.W.2d 554, 557 (Tenn. 1995).

If a sheriff is of the opinion that he is being asked to house too many inmates at his facility, he can request the committing judge or any circuit or criminal judge to order prisoners removed to the nearest sufficient jail. Under T.C.A. § 41-4-121(c), the court may order such a transfer "[i]n all cases where the jail in which the prisoner is confined becomes insufficient from any cause ...". The population level is relevant to the determination of sufficiency, but is not conclusive as to this issue.

With regard to the sheriff's legal obligations under the Eighth Amendment, it is important to bear in mind that **insufficiency under the statute is not the same thing as unconstitutionality**. The jail is not necessarily unconstitutionally overcrowded simply because it houses more inmates than its Tennessee Corrections Institute (TCI) capacity. *Feliciano v. Barcelo*, 497 F.Supp. 14, 35 (D.P.R.1979). TCI and American Correctional Association (ACA) standards do not establish the constitutional standard. *Grubbs v. Bradley*, 552 F.Supp. 1052, 1124 (M.D. Tenn. 1982). Overcrowding is not a per se constitutional violation. *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981).

Op. Tenn. Atty. Gen. 89-65 (April 28, 1989). See also Op. Tenn. Atty. Gen. 02-015 (February 6, 2002) (This office has maintained "that insufficiency under the statute is not the same thing as unconstitutionality. **The jail is not necessarily unconstitutionally**

overcrowded simply because it houses more inmates than its Tennessee Corrections Institute (TCI) capacity.").

"It is ... beyond dispute that county officials have a duty to maintain their jails to minimize the risks resulting from overcrowding, *i.e.*, conflicts among and injury to those individuals incarcerated in the jail, lest they violate the prisoners' constitutional rights (and subject themselves to liability under 42 U.S.C. § 1983.)." *Patrick v. Jasper County*, 901 F.2d 561, 569, n. 16 (7th Cir. 1990), *citing Carver v. Knox County*, 887 F.2d 1287 (6th Cir. 1989); *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3d Cir. 1983), *cert. denied*, 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130 (1984).

However, overcrowding is not a *per se* constitutional violation. *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). A claim alleging that the "overall conditions" of confinement are inadequate cannot give rise to an Eighth Amendment violation when no specific deprivation of a single human need exists. *Wilson v. Seiter*, 501 U.S. 294, 305, 111 S.Ct. 2321, 2327, 115 L.Ed.2d 271 (1991) ("Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.").

In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Supreme Court held that "double-bunking" pretrial detainees in cells that have a total floor space of approximately 75 square feet did not violate the pretrial detainees' due process rights. "[W]e are convinced as a matter of law that 'double-bunking' as practiced at the MCC did not amount to punishment and did not, therefore, violate respondents' rights under the Due Process Clause of the Fifth Amendment." *Id.* at 541, 99 S.Ct. at 1875. In *Bell*, the Court noted that the respondents' "reliance on other lower court decisions concerning minimum space requirements for different institutions and on correctional standards issued by various groups was misplaced." *Id.* at 543, n. 27, 99 S.Ct. at 1876, n. 27. The Court stated that "while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." *Id.*

In *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), the United States Supreme Court considered whether double-bunking inmates in 63 square foot cells was cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court found no Eighth Amendment violation.

The court found that the double-celling made necessary by an unanticipated increase in the prison population (38 percent over design capacity) did not lead to deprivations of essential food, medical care, or sanitation. The court found no evidence that double-celling under the circumstances of the case either inflicted unnecessary or wanton pain or was grossly disproportionate to the severity of crimes warranting imprisonment. The court noted that the Constitution does not mandate comfortable prisons. *Id.* at 348, 101 S.Ct. at 2400.

In finding a constitutional violation, the lower court had relied on, among other considerations, square footage standards promulgated by the American Correctional Association (60-80 square feet); the National Sheriffs' Association (70-80 square feet); and the National Council on Crime and Delinquency (50 square feet). The Supreme Court stated that the lower court had "erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency." As the court noted in *Bell v. Wolfish*, such opinions may be helpful and relevant with respect to some questions, but "they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." *Id.* at 350, n. 13, 101 S.Ct. at 2401, n. 13, citing *Bell v. Wolfish*, 441 U.S. 520, 543-544, n. 27, 99 S.Ct. 1861, 1876, n. 27, 60 L.Ed.2d 447 (1979).

In *Stevenson v. Whetsel*, 52 Fed.Appx. 444 (10th Cir. 2002), the Tenth Circuit Court of Appeals held that the county's placement of three pretrial detainees in a jail cell designed for two did not violate the detainee's due process rights. The court held that the detainee could not recover damages for injuries allegedly sustained due to prison overcrowding absent a showing that the overcrowding resulted in the denial of the minimal civilized measure of life's necessities, or that prison officials were aware that overcrowding created excessive risks to inmate safety.

[O]vercrowding alone is not "sufficiently serious" to establish a constitutional violation. Stevenson has not demonstrated that placing three inmates in a cell designed for two denied him the minimal civilized measure of life's necessities. He has not alleged that the situation led to "deprivations of essential food, medical care, or sanitation." Nor has he alleged facts allowing an inference that conditions rose to the level of "conditions posing a substantial risk of serious harm."

Id. at 446. See also *Kennibrew v. Russell*, 578 F.Supp. 164, 168 (E.D. Tenn. 1983) (The United States Supreme Court has held that double-celling of prison inmates in cells containing 63 square feet of floor space (31.5 square feet per inmate) does not constitute cruel and unusual punishment.).

"The constitutional standard on overcrowding cannot be expressed in a square footage formula. Rather, whether a particular institution is unconstitutionally overcrowded depends on a number of factors including the size of the inmate's living space, the length of time the inmate spends in his cell each day, the length of time of his incarceration, his opportunity for exercise and his general sanitary and living conditions." *Carver v. Knox County*, 753 F.Supp. 1398, 1401 (E.D. Tenn. 1990) (citations omitted). The correct legal standard recognizes that the issue is not overcrowding *per se*, rather, it is *unconstitutional* overcrowding. In other words, a prison facility is not unconstitutional simply because it is overcrowded. In order to ascertain whether a particular facility is unconstitutionally overcrowded, the court must review "... a number of factors including the size of the inmates' living space, the length of time the inmate spends in his cell each day, the length of time of his incarceration, his opportunity for exercise and his general sanitary and living conditions ...". *Id.* However, even though the court is required

to consider all of the prison's conditions and circumstances in evaluating the sentenced inmates' Eighth Amendment claims, the court must find a specific condition on which to base an Eighth Amendment claim, *i.e.*, it must amount to a deprivation of "life's necessities." *Id.* at 1400 (citations omitted).

See *Roberts v. Tennessee Dept. of Correction*, 887 F.2d 1281 (6th Cir. 1989) and *Carver v. Knox County*, 887 F.2d 1287 (6th Cir. 1989), for cases dealing with the court ordered removal of state inmates from county jails.

Fire Safety.

If the jail is not fireproof and any person is confined in the jail, it is the duty of the sheriff to be constantly at the jail or to constantly have a jailer at the jail with all the keys necessary to liberate all the prisoners in the jail in case of fire. T.C.A. § 41-4-112.

Courts have held that adequate shelter must include adequate provisions for fire safety. *Grubbs v. Bradley*, 552 F.Supp. 1052, 1122-1123 (M.D. Tenn. 1982) *citing Leeds v. Watson*, 630 F.2d 674, 675-76 (9th Cir.1980); *Ruiz v. Estelle*, 503 F.Supp. 1265, 1383 (S.D. Tex. 1980), *aff'd in part, rev'd in part and remanded*, 679 F.2d 1115 (1982); *Gates v. Collier*, 349 F.Supp. 881, 888 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

Inmates "have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions." *Jones v. City and County of San Francisco*, 976 F.Supp. 896, 908 (N.D. Cal. 1997) (finding that county failed to reasonably respond to fire safety risks in the jail and holding that the risks constituted punishment in violation of pretrial detainees' 14th Amendment rights) *citing Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985). See also *Nicholson v. Choctaw County*, 498 F.Supp. 295, 308 (S.D. Ala. 1980) (County officials' failure to correct the fire safety violations as ordered by the state fire marshal violated inmates' Eighth and 14th Amendment rights.); *Dawson v. Kendrick*, 527 F.Supp. 1252, 1289-1290 (S.D. W.Va. 1981) ("Prisoners likewise have the right not to be subjected to the unreasonable threat of injury or death by fire. Prisoners need not wait until they are actually injured by an assault or a fire in order to obtain relief from such conditions.") (citations omitted).

Pursuant to T.C.A. § 68-102-130, **the state fire marshal may at all hours enter the county jail for the purpose of making an inspection or investigation.** The State Fire Marshal's Office will inspect a county jail upon the written complaint of any citizen or whenever the state fire marshal or his or her deputies or assistants deem it necessary. T.C.A. § 68-102-116. The officer shall order remedies to be made if the officer finds that the jail is especially liable to fire or is in a dangerous or defective condition and is situated so as to endanger life or property due to:

- (1) A lack of repairs;

- (2) A lack of sufficient fire escapes;
- (3) A lack of automatic or other fire alarm apparatus;
- (4) A lack of fire-extinguishing equipment;
- (5) Age or dilapidated condition; or
- (6) Any other cause.

If the officer finds any combustible or explosive matter or inflammable conditions dangerous to the safety of the jail, the officer shall order the same removed. **Such orders must be immediately complied with by the county.** T.C.A. § 68-102-117(a)(1). If compliance with such order is not expedient and does not permanently remedy the condition, after giving written notice, then the officer has the authority to issue a citation for the violation, requiring the person found to be responsible for the dangerous or defective conditions to appear in court at a specified date and time. T.C.A. § 68-102-117(a)(2). (NOTE: It is the duty of the county legislative body to keep the jail in order and repair. T.C.A. §§ 5-7-104 and 5-7-106.) If the person cited fails to appear in court on the date and time specified, the court shall issue a bench warrant for such person's arrest. T.C.A. § 68-102-117(a)(3).

Inmate Labor

The 13th Amendment to the Constitution provides that "[n]either slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1.

The United States Supreme Court has observed that requiring convicted prisoners to work without pay does not violate the 13th Amendment's prohibition against involuntary servitude. *United States v. Kozminski*, 487 U.S. 931, 943-944, 108 S.Ct. 2751, 2760, 101 L.Ed.2d 788 (1988) ("Our precedents reveal that not all situations in which labor is compelled by physical coercion or force of law violate the Thirteenth Amendment. By its terms the Amendment excludes involuntary servitude imposed as legal punishment for a crime."). "When a person is duly tried, convicted, and sentenced in accordance with the law, no issue of personage or involuntary servitude arises." *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir.1963).

Pretrial Detainees.

"Requiring a pretrial detainee to work or be placed in administrative segregation is punishment. Requiring a pretrial detainee to perform general housekeeping chores, on the other hand, is not." *Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992), cert. denied, 507 U.S. 1009, 113 S.Ct. 1658, 123 L.Ed.2d 277 (1993). See also *Channer v. Hall*,

112 F.3d 214, 218-19 (5th Cir. 1997) (recognizing the existence of a judicially created "housekeeping-chore" exception to the prohibition against involuntary servitude).

"[T]he pretrial detainee, who has yet to be adjudicated guilty of any crime, may not be subjected to *any* form of 'punishment.' But not every inconvenience encountered during pre-trial detention amounts to 'punishment' in the constitutional sense. To establish that a particular condition or restriction of his confinement is constitutionally impermissible 'punishment,' the pretrial detainee must show either that it was (1) imposed with an expressed intent to punish or (2) not reasonably related to a legitimate non-punitive governmental objective, in which case an intent to punish may be inferred." *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988) (citations omitted).

The Fourth Circuit Court of Appeals has held that requiring pretrial detainees to perform "general housekeeping responsibilities" does not violate the 13th Amendment. *Hause v. Vaught*, 993 F.2d 1079, 1085 (4th Cir. 1993) (requiring pretrial detainee to participate in cleaning cell block was not inherently punitive and was related to legitimate governmental objective of prison cleanliness, and was not in violation of detainee's right not to be punished prior to conviction for some crime). See also *Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999) (Inmate's status as pretrial detainee does not necessarily mean that he cannot be compelled to perform some service in the prison.).

In *Bijeol v. Nelson*, 579 F.2d 423, 424 (7th Cir. 1978), the Seventh Circuit Court of Appeals held that a pretrial detainee may constitutionally be compelled to perform simple housekeeping tasks in his or her own cell and community areas.

A pretrial detainee has no constitutional right to order from a menu or have maid service. Daily general housekeeping responsibilities are not punitive in nature and for health and safety must be routinely observed in any multiple living unit. In this case, the affidavit of a unit manager at the Metropolitan Correctional Center stated that the approximate daily time required for the assigned housekeeping chores was between 45 and 120 minutes, that the assignments were rotated weekly, and that inmates were required to clean up areas which became unusually messy prior to the regularly scheduled cleaning (in this case Bijeol was requested to clean up some cigarette butts outside the door to his room and adjacent to the television room). The arrangement seems as fair and equitable as is possible when you have groups of people living together, some of whom may tend to be neater than others.

***Id.* "The work must not be overly burdensome in the time or labor required. In addition, such work must not be assigned so as to preclude a pretrial detainee from effectively participating in his or her defense to pending criminal charges." *Id.* at 425.**

In *Ford v. Nassau County Executive*, 41 F.Supp.2d 392 (E.D. N.Y. 1999) the district court found that requiring a pretrial detainee to work without payment as a food cart worker did not deprive the detainee of liberty without due process of law.

Ford's being required to distribute food cannot, by itself, be considered punishment. The work involved, helping to feed other inmates, is clearly the type that may be classified as serving a legitimate government purpose. Furthermore, as Ford himself testified, he was rewarded for his assistance by being given extra food. Compensation, even minimal compensation, is not in keeping with an intent to punish. Moreover, the kinds of chores Ford did, handing out food, mopping and sweeping, more closely resemble those that have been held to be allowable reasonable "housekeeping duties" than those held to be forced labor.

Id. at 397.

It is important to add that certain types of required labor might indicate an intent to punish and, therefore, would constitute a interference with the liberty interest under *Bell v. Wolfish*. While help with the "chores" around the detention center is a reasonable requirement of those who live there, tasks which carry with them demeaning connotations might amount to punishment—for instance, requiring a detainee to clean a toilet with a toothbrush. Alternatively, even non-demeaning tasks may be unduly strenuous for a particular detainee and, therefore, exceed what is acceptable. Although this type of case-by-case review may appear to force courts to engage in unwarranted supervision of prison institutions, in fact, it should be fairly obvious to any professional warden what are acceptable "chores" and what are not. Here, there is no evidence that Ford's chores, despite his medical status, were overly burdensome to him. Under any standard, the tasks assigned to plaintiff were reasonable, appropriate, and not punishment.

Id. at 398-399.

In addition to dismissing Ford's due process claim, the court dismissed Ford's 13th Amendment claim. "In the present case, Ford does not allege that a burdensome work schedule was imposed upon him. Instead, he asserts that while a detainee he could be called upon at any time to help distribute food. This does not smack of the kind of evil prohibited by the Thirteenth Amendment." *Id.* at 401.

In *Brooks v. George County*, 84 F.3d 157 (5th Cir. 1996), the county held Brooks as a pretrial detainee.

In March 1991, during the time period in which he was confined in the George County jail, Brooks requested and was granted trusty status. Brooks specifically asked that he be made trusty. As a trusty, Brooks was not locked down in his cell, but was, instead, allowed the freedom to roam in and out of his cell, Sheriff Howell's office, the jail and the surrounding grounds area.

While incarcerated, Brooks performed, at his own request, various services for Sheriff Howell, George County and others, including several charitable

and benevolent organizations. Brooks performed these services on public property as well as private property. Brooks performed these services for two reasons: (1) he was able to secure his release from jail during the day and (2) Brooks earned extra money by working on the outside. Brooks was not compensated for those services he performed on public property, but on several occasions, was paid money or received goods in exchange for the services he rendered on private property.

Id. at 161.

The Fifth Circuit Court of Appeals held that Brooks was not subject to involuntary servitude and thus presented no claim under the 13th Amendment. The court noted that as a pretrial detainee, Brooks was entitled only to be confined until trial. The sheriff was under no obligation to allow Brooks the freedom he enjoyed.

Brooks made the request for trusty status. He desired to leave the jail and chose to work as the price for that right. Since Brooks was not being punished by being detained until trial, the choice between this confinement and work as a trusty cannot be considered coercive because the benefits he received for working were not benefits for which he was otherwise entitled. Admittedly, the choice described might have been a painful one, but it was nonetheless a choice.

Id. at 162-163. See also *Watson v. Graves*, 909 F.2d 1549, 1552-1553 (5th Cir. 1990) (Inmates who voluntarily request work have no 13th Amendment claim.).

Convicted Prisoners.

Officials having responsibility for the custody and safekeeping of defendants may promulgate and enforce reasonable disciplinary rules and procedures requiring all able-bodied inmates to participate in work programs. Such rules and procedures may provide appropriate punishments for inmates who refuse to work, including, but not limited to, increasing the amount of time the defendant must serve in confinement or changing the conditions of the defendant's confinement, or both. Any such increase in the amount of time a defendant must serve for refusing to participate in a work program shall not exceed the sentence originally imposed by the court. T.C.A. § 40-35-317(b).

The legislature has clearly stated its intent to require able-bodied inmates to participate in work programs. Under T.C.A. § 40-35-317(b), officials in charge of county jails or workhouses may promulgate and enforce disciplinary rules requiring such work and punishing inmates refusing to work. Op. Tenn. Atty. Gen. No. 83-363 (August 15, 1983).

All those convicted of a felony whose imprisonment has been by the jury commuted to imprisonment in the county jail shall be compelled to work out the term of imprisonment at hard labor in the county workhouse in the county where convicted. T.C.A. § 40-23-105.

“The Thirteenth Amendment permits involuntary servitude without pay as punishment after conviction of an offense, even when the prisoner is not explicitly sentenced to hard labor.” *Smith v. Dretke*, 2005 WL 3420079 (5th Cir. 2005) (holding the plaintiff failed to show that the defendants violated his rights by making him hold a prison job). *See also Walton v. Texas Dept. of Criminal Justice, Institutional Div.*, 146 Fed.Appx. 717, 718 (5th Cir. 2005) (“Compelling an inmate to work without pay does not violate the Constitution even if the inmate is not specifically sentenced to hard labor. The State maintains discretion to determine whether and under what circumstances inmates will be paid for their labor.”); *Ali v. Johnson*, 259 F.3d 317, 317-318 (5th Cir. 2001) (This appeal leads us to reiterate that inmates sentenced to incarceration cannot state a viable 13th Amendment claim if the prison system requires them to work.); *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (“The Thirteenth Amendment excludes convicted criminals from the prohibition of involuntary servitude, so prisoners may be required to work.”), *cert. denied*, 507 U.S. 928, 113 S.Ct. 1303, 122 L.Ed.2d 692 (1993); *Mikeska v. Collins*, 900 F.2d 833, 837 (5th Cir. 1990) (Forcing inmates to work without pay, and compelling them to work on private property without pay, does not violate the 13th Amendment.); *Murray v. Mississippi Department of Corrections*, 911 F.2d 1167 (5th Cir. 1990) (same); *Moss v. Arbogast*, 888 F.2d 1392, *1 (6th Cir. 1989) (Table) (There is no 13th Amendment violation of the prohibition against involuntary servitude when a prisoner is forced to work without pay.) (citation omitted); *Jones v. Brown*, 793 F.2d 1292, *2 (6th Cir. 1986) (Table) (“However, compelling prisoners to work does not violate the thirteenth amendment.”) (citation omitted); *Newell v. Davis*, 563 F.2d 123, 124 (4th Cir. 1977) (There is no 13th Amendment violation of prohibition against involuntary servitude when a prisoner is forced to work without pay), *cert. denied*, 435 U.S. 907, 98 S.Ct. 1455, 55 L.Ed.2d 498 (1978); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir.) (“When a person is duly tried, convicted and sentenced in accordance with the law, no issue of peonage or involuntary servitude arises.”), *cert. denied*, 375 U.S. 915, 84 S.Ct. 214, 11 L.Ed.2d 153 (1963); *Borrer v. White*, 377 F.Supp. 181, 183 (W.D. Va. 1974) (There exists no constitutional right on the part of a state prisoner to be paid for his labor.); *McLaughlin v. Royster*, 346 F.Supp. 297, 311 (E.D. Va. 1972) (“Prisoners validly convicted may be forced to perform work, whether or not compensated and whether or not related to purposes of rehabilitation, so long as it does not amount to cruel and unusual punishment.”). *But see Anderson v. Morgan*, 898 F.2d 144 (Table) (4th Cir. 1990) (Forcing an inmate to perform work that inures solely to an individual's private benefit, as opposed to the public benefit, is not as plainly allowed under the 13th Amendment's exception for work imposed as punishment for crime.), *citing Matthews v. Reynolds*, 405 F.Supp. 50 (W.D. Va. 1975).

“Compelling prison inmates to work does not contravene the Thirteenth Amendment. However there are circumstances in which prison work requirements can constitute cruel and unusual punishment. [F]or prison officials knowingly to compel convicts to perform physical labor which is beyond their strength, or which constitutes a danger to their lives or health, or which is unduly painful constitutes an infliction of cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution of the United States as included in the 14th Amendment.” *Ray v. Mabry*, 556 F.2d 881, 882 (8th Cir. 1977) (per curiam) (citations omitted). *See also Berry*

v. Bunnell, 39 F.3d 1056 (9th Cir. 1994) (The 13th Amendment does not apply where prisoners are required to work in accordance with prison rules. And the Eighth Amendment does not apply unless prisoners are compelled to perform physical labor that is beyond their strength, endangers their lives or health, or causes undue pain.); *Madewell v. Roberts*, 909 F.2d 1203, 1207 (8th Cir.1990) (“Cruel and unusual punishment encompasses (1) deliberate indifference to serious medical needs, and (2) compelled labor beyond an inmate's physical capacity, that is, labor which is (a) beyond the inmate's strength, (b) dangerous to his or her life or health, or (c) unduly painful.”).

Conversely, inmates have no constitutional right to work or to be paid for work. And, while work activity is preferable to idleness, the conferral of a job upon an inmate is a matter within the sound discretion of jail administrators. Finally, inmates have no constitutional right to be paid for idle time. *Kennibrew v. Russell*, 578 F.Supp. 164, 169 (E.D. Tenn. 1983), *citing Manning v. Lockhart*, 623 F.2d 536, 538 (8th Cir.1980) and *Inmates, Washington County Jail v. England*, 516 F.Supp. 132, 141 (E.D. Tenn. 1980). *See also Carter v. Tucker*, 69 Fed.Appx. 678, 680 (6th Cir. 2003) (“A prisoner has no constitutional right to prison employment or a particular prison job. Further, as the Constitution and federal law do not create a property right for inmates in a job, they likewise do not create a property right to wages for work performed by inmates.”); *Sotherland v. Myers*, 41 Fed.Appx. 752, 753 (6th Cir. 2002) (Prisoners do not have a constitutionally protected right to a prison job.); *Clegg v. Bell*, 3 Fed.Appx. 398, 399 (6th Cir. 2001) (State prisoners possess no right to a specific prison job.); *Newsom v. Norris*, 888 F.2d 371, 374 (6th Cir. 1989).

“[T]he Constitution does not create a property or liberty interest in prison employment [and] any such interest must be created by state law by ‘language of an unmistakably mandatory character.’” *Miller v. Campbell*, 108 F.Supp.2d 960, 967 (W.D. Tenn. 2000), *citing Newsom v. Norris*, 888 F.2d 371, 374 (6th Cir. 1989) (citations omitted) (quoting *Ingram v. Papalia*, 804 F.2d 595, 596-597 (10th Cir. 1986)); *Watts v. Morgan*, 572 F.Supp. 1385, 1388 (N.D. Ill. 1983). “As the Constitution and federal law do not create a property right for inmates in a job, they likewise do not create a property right to wages for work performed by inmates.” *Id.*, (citing cases). “Rather, prison administrators may assign inmates jobs and wages at their discretion.” *Id.*, (citations omitted).

In *Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999), the Third Circuit Court of Appeals found that **the 13th Amendment does not preclude prison authorities from compelling a prisoner to work during the pendency of his or her appeal from a conviction.** Likewise, other circuits have held that a person sentenced to serve a term of imprisonment can be required to work during the time his or her appeal is pending before a reviewing court. *See Stiltner v. Rhay*, 322 F.2d 314, 315 (9th Cir. 1963) (“There is no federally protected right of a state prisoner not to work while imprisoned after conviction, even though that conviction is being appealed.”). *See also Plaisance v. Phelps*, 845 F.2d 107, 108 (5th Cir. 1988) (“The fact that appellant is appealing does not require the district court to assume that his conviction was other than duly obtained.”); *Omasta v. Wainwright*, 696 F.2d 1304, 1305 (11th Cir. 1983) (holding that “where a prisoner is incarcerated pursuant to a presumptively valid judgment ... the Thirteenth Amendment's prohibition

against involuntary servitude is not implicated even though the conviction may be subsequently reversed").

Pursuant to T.C.A. § 41-2-147(a), any sheriff having responsibility for the custody of any person sentenced to a local jail pursuant to the provisions of T.C.A. § 40-35-302 (misdemeanor sentence), T.C.A. § 40-35-306 (split confinement), T.C.A. § 40-35-307 (probation coupled with periodic confinement) or T.C.A. § 40-35-314 (felon confined in local jail) shall, when such person has become eligible for work-related programs pursuant to such sections, be authorized to permit that person to perform any of the duties set out in T.C.A. § 41-2-123 or T.C.A. § 41-2-146.

Road Work.

When any prisoner has been sentenced to imprisonment in a county jail for a period not to exceed 11 months and 29 days, the sheriff is authorized to permit the prisoner to work on the county roads or within municipalities within the county on roads, parks, public property, public easements or alongside public waterways up to a maximum of 50 feet from the shoreline. T.C.A. § 41-2-123(b)(1).

It is the duty of such prisoners to pick up and collect litter, trash and other miscellaneous items that are unsightly to the public and that have accumulated on the county roads. All such prisoners participating in this work program shall be under the supervision of the county sheriff or the sheriff's representative. Prisoners used by a municipality shall be supervised by representatives of the municipality. The prisoners may be used by municipalities for such duties or manual labor as the municipality deems appropriate. T.C.A. § 41-2-123(b)(2).

Neither the state nor any municipality, county or political subdivision thereof, nor any employee or officer thereof, shall be liable to any person for the acts of any prisoner while on a work detail, while being transported to or from a work detail, while attempting an escape from a work detail, or after escape from a work detail. T.C.A. § 41-2-123(d)(1).

Neither the state nor any municipality, county, or political subdivision thereof, nor any employee or officer thereof, shall be liable to any prisoner or prisoner's family for death or injuries received while on a work detail, other than for medical treatment for the injury during the period of the prisoner's confinement. T.C.A. § 41-2-123(d)(2).

Jail Maintenance Work.

When any prisoner has been sentenced to imprisonment in a county jail or is serving time in the county jail pursuant to an agreement with the Department of Correction, the sheriff is authorized to permit the prisoner to participate in work programs. T.C.A. § 41-2-146(a).

Sentence Reduction Credits.

There is no right under the Constitution to earn or receive sentence credits. *Miller v. Campbell*, 108 F.Supp.2d 960, 966 (W.D. Tenn. 2000), *citing Hansard v. Barrett*, 980 F.2d 1059, 1062 (6th Cir. 1992). Neither is there any fundamental right to parole or to release from a sentence of incarceration that has itself been lawfully imposed. *Id.*, *citing Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).

Road work performed by a prisoner under T.C.A. § 41-2-123(b) shall be credited toward reduction of the prisoner's sentence as follows: for each one day worked on the road by the prisoner, the prisoner's sentence shall be reduced by two days. T.C.A. § 41-2-123(b)(3). Work performed by a prisoner under T.C.A. § 41-2-146 shall be credited toward reduction of the prisoner's sentence as follows: for each one day worked on such duties by the prisoner, the sentence shall be reduced by two days. T.C.A. § 41-2-146(b). *See also* T.C.A. § 41-2-147 (Work performed by a prisoner under T.C.A. § 41-2-147 shall be credited toward reduction of the prisoner's sentence as follows: for each one day worked on such duties by the prisoner, the sentence shall be reduced by two days.); Op. Tenn. Atty. Gen. No. 03-125 (September 29, 2003).

Any prisoner receiving sentence credits under T.C.A. § 41-2-147 is not eligible for good time credits authorized by T.C.A. § 41-2-111. T.C.A. § 41-2-147(c).

FELONY OFFENDERS. Sentence reduction credits for good institutional behavior as authorized by T.C.A. § 41-21-236 for state prisoners serving sentences in county jails shall likewise apply in accordance with the terms of T.C.A. § 41-21-236, and under the criteria, rules and regulations established by the Department of Correction, to all felony offenders serving sentences of one or more years in local jails or workhouses and to all inmates serving time in county jails or workhouses because the inmate's commitment to the Department of Correction has been delayed due to invocation of the governor's emergency overcrowding powers or through an injunction from a federal court restricting the intake of inmates into the Department of Correction. When T.C.A. § 41-21-236 is applied to such offenders, references therein to "warden" are deemed references to the superintendent or jailer, as appropriate. Such felony offenders are not eligible to receive any other sentence credits for good institutional behavior provided that in addition to the sentence reduction credits for good institutional behavior as authorized by T.C.A. § 41-21-236, such felony offenders may receive any credits for which they are eligible under Title 41, Chapter 2, for work performed or satisfactory performance of job, educational or vocational programs. T.C.A. § 41-21-236(d).

With respect to sentence reduction credits, when a state inmate is serving a sentence in a county jail the sheriff is deemed to be a warden pursuant to T.C.A. § 41-21-236(d) and is, therefore, required to keep written records on a monthly basis of the sentence reduction credits a prisoner has earned. T.C.A. § 41-21-236(a)(3). Because prisoners may become ineligible to earn sentence reduction credits (see T.C.A. § 41-21-236(b)(7)) and may also be deprived of sentence reduction credits they have already earned (see T.C.A. § 41-21-236(a)(5), (6)), these records must reflect any

actions that either render a prisoner ineligible to earn sentence credits or deprive a prisoner of previously earned sentence reduction credits. *Cooley v. May*, 2001 WL 1660830, *6 (Tenn. Ct. App. 2001).

“Although no statute or rule expressly requires a sheriff housing a state prisoner to send an accounting of a prisoner's sentence reduction credits to the Department of Correction, this obligation is a necessary part of T.C.A. § 41-21-236(a)(3). It would be nonsensical to allow state prisoners to earn sentence reduction credits while they are incarcerated in a county jail but then not to require a sheriff to inform the Department of Correction – the legal custodian of the prisoner – how many sentence reduction credits the prisoner had earned or forfeited on a monthly basis.” *Id.*

Good Time Credit.

Each prisoner who has been sentenced to the county jail for any period of less than one year on either a misdemeanor or a felony, and who behaves uprightly, shall have deducted from the sentence imposed by the court time equal to one-quarter of such sentence. In calculating the amount of good time credit earned, the one-quarter reduction shall apply to the entire sentence, including pretrial and posttrial confinement. Fractions of a day's credit for good time of one-half or more shall be considered a full day's credit. If any prisoner violates the rules and regulations of the jail or otherwise behaves improperly, the sheriff may revoke all or any portion of the prisoner's good time credit provided that the prisoner is given a hearing in accordance with due process before a disciplinary review board and is found to have violated the rules and regulations of the institution. T.C.A. § 41-2-111(b).

Any prisoner receiving sentence credits under T.C.A. § 41-2-147 is not eligible for good time credits authorized by T.C.A. § 41-2-111. T.C.A. § 41-2-147(c).

Disciplinary Review Board.

Each county is required to have a disciplinary review board that shall be composed of six impartial members, one or more of whom may be members of the jail staff. Members of the disciplinary review board are appointed by the sheriff or the jail administrator, subject to approval by the county legislative body. Members serve for a period of two years, except that appointments made to fill unexpired terms are for the period of such unexpired terms. No less than one and no more than three of the members of the disciplinary review board are required to transact the business authorized by law. Members of the board, while acting in good faith, shall not be subject to civil liability relative to the performance of duties delegated to the board by law. T.C.A. § 41-2-111(c).

The prisoner shall be given notice of the disciplinary hearing and shall have the right to call witnesses in the prisoner's behalf. Decisions of the disciplinary review board may be appealed to the sheriff. T.C.A. § 41-2-111(d).

Except in Shelby County, the county legislative body is authorized to establish the rate of compensation for members of the disciplinary review board. T.C.A. § 41-2-111(c)(5).

Work Mandatory - Punishment for Refusing to Work.

Except as provided in T.C.A. § 41-2-150(b), any person sentenced to the county jail for either a felony or misdemeanor conviction in counties with programs whereby prisoners work either for pay or sentence reduction or both shall be required to participate in such work programs during the period of incarceration. Any prisoner who refuses to participate in such programs when work is available shall have any sentence reduction credits received pursuant to the provisions of T.C.A. § 41-2-123 or T.C.A. § 41-2-146 reduced by two days of credit for each one day of refusal to work. Any prisoner who refuses to participate in such work programs who has not received any sentence reduction credits pursuant to such sections may be denied good time credit in accordance with the provisions of T.C.A. § 41-2-111(b), and may also be denied any other privileges given to inmates in good standing for refusing to work. T.C.A. § 41-2-150(a).

The only exceptions to the requirements of T.C.A. § 41-2-150(a) are for those who, in the opinion of the sheriff, would present a security risk or a danger to the public if allowed to leave the confines of the jail and for those who, in the opinion of a licensed physician or licensed medical professional, should not perform such labor for medical reasons. T.C.A. § 41-2-150(b).

“The Eighth Amendment requires prison officials to provide humane conditions of confinement. A prison official may be liable for denying an inmate humane conditions of confinement only if he or she ‘knows of and disregards an excessive risk to inmate health or safety.’ There is no dispute that forcing an inmate to work beyond his physical abilities could pose a serious risk to an inmate's health or safety.” *Moore v. Moore*, 111 Fed.Appx. 436, 438 (8th Cir. 2004) (holding that assigning prison inmate, who suffered from advanced osteoarthritis in his back, to work detail that included cleaning prison yard and clearing ice and snow from walkways did not amount to cruel and unusual punishment in violation of his Eighth Amendment rights, where inmate was subject to certain work restrictions and he worked within the restrictions while on the work detail). *Cf. Williams v. Norris*, 148 F.3d 983, 987 (8th Cir. 1998) (finding sufficient evidence that prison officials violated the Eighth Amendment by forcing an inmate to work in excess of his medical restrictions).

Pursuant to T.C.A. § 41-2-120(a), any prisoner refusing to work or becoming disorderly may be confined in solitary confinement or subjected to such other punishment, not inconsistent with humanity, as may be deemed necessary by the sheriff for the control of the prisoners, including reducing sentence credits pursuant to the procedure established in T.C.A. § 41-2-111. Such prisoners refusing to work, or while in solitary confinement, shall receive no credit for the time so spent. T.C.A. § 41-2-120(b).

In *Hope v. Pelzer*, 240 F.3d 975 (2001), the United States Court of Appeals for the Eleventh Circuit held that "the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment." *Id.* at 980-981. And in *Hope v. Pelzer*, 536 U.S. 730, 737, 122 S.Ct. 2508, 2514, 153 L.Ed.2d 666 (2002), the United States Supreme Court agreed. "In 1995, Alabama was the only State that followed the practice of chaining inmates to one another in work squads. It was also the only State that handcuffed prisoners to 'hitching posts' if they either refused to work or otherwise disrupted work squads." *Id.* at 733, 122 S.Ct. at 2512. The Supreme Court stated:

As the facts are alleged by Hope, the Eighth Amendment violation is obvious. Any safety concerns had long since abated by the time petitioner was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison. He was separated from his work squad and not given the opportunity to return to work. Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation. The use of the hitching post under these circumstances violated the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man. This punitive treatment amounts to gratuitous infliction of "wanton and unnecessary" pain that our precedent clearly prohibits.

Id. at 738, 122 S.Ct. at 2514-2515. See also *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974) (holding the practice of handcuffing inmates to a fence and to cells for long periods of time and forcing inmates to stand, sit or lie on crates, or stumps, or otherwise maintain awkward positions for prolonged periods violates the Eighth Amendment and offends contemporary concepts of decency, human dignity, and precepts of civilization); *Ort v. White*, 813 F.2d 318, 325 (11th Cir. 1987) (holding that an officer's temporary denials of drinking water to an inmate who repeatedly refused to do his share of the work assigned to a farm squad "should not be viewed as punishment in the strict sense, but instead as necessary coercive measures undertaken to obtain compliance with a reasonable prison rule, *i.e.*, the requirement that all inmates perform their assigned farm squad duties"); *Murray v. Unknown Evert*, 84 Fed.Appx. 553 (6th Cir. 2003) (The mere fact that state prisoner was placed in detention, with nothing more, was insufficient to state an Eighth Amendment claim under § 1983; he did not allege that his detention was more severe than the typical conditions of segregation or that he was deprived of the minimum civilized measures of life's necessities.).

“It is not constitutionally permissible for officers to administer a beating as punishment for a prisoner's past misconduct,” nor may government officials use gratuitous force against a prisoner who has been already subdued or incapacitated. *Skrnich v. Thornton*, 280 F.3d 1295, 1300-1303 (11th Cir. 2002).

Under the Eighth Amendment, force is deemed legitimate in a custodial setting as long as it is applied "in a good faith effort to maintain or restore discipline [and not] maliciously and sadistically to cause harm." To determine if an application of force was applied maliciously and sadistically to cause harm, a variety of factors are considered including: "the need for the application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response." From consideration of such factors, "inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." Moreover, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held personally liable for his nonfeasance.

Id.

In *Skrnich*, officers were called to Skrtich's cell to perform a "cell extraction" because he had refused to vacate his cell so it could be searched. Skrtich was on "close management status" due to his history of disciplinary problems. Skrtich's prison records set out his disciplinary problems, which included a conviction for aggravated assault with a deadly weapon for repeatedly stabbing a prison guard. Skrtich had been subject to several cell extractions in the past. The officers arrived at Skrtich's cell wearing riot gear. The officers entered Skrtich's cell and used an electronic shield to shock Skrtich, knocking him to the floor. Once on the floor, the officers kicked him repeatedly in the back, ribs and side, and one of the officers struck him with his fists. Three times, after falling, Skrtich was lifted onto his knees and the beating continued each time. Two officers watched and did nothing to stop the beating. At some point, one of those officers verbally threatened Skrtich and actively participated in the assault by knocking Skrtich to the ground several times after the other officers picked him up, and by slamming his head into the wall. *Id.* at 1299-1300. As a result of his injuries, Skrtich had to be airlifted by helicopter to a hospital. The kind of injuries Skrtich suffered included multiple rib fractures, back injuries, lacerations to the scalp, and abdominal injuries requiring nine days of hospitalization and several months of rehabilitation. *Id.* at 1302.

The court found that in "the absence of any evidence that any force, much less the force alleged here, was necessary to maintain order or restore discipline, it is clear that Skrtich's Eighth Amendment rights were violated." *Id.*

Other Work Permitted.

Inmates housed in a county jail may voluntarily perform any labor on behalf of a charitable organization or a nonprofit corporation or a governmental entity. T.C.A. § 41-3-106(b)(2). See *also* T.C.A. § 41-2-148(b)(2); Op. Tenn. Atty. Gen. No. 03-075 (June 18, 2003).

Inmate Labor for Private Purposes Prohibited.

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail may employ, require or otherwise use any such inmate housed therein to perform labor that will or may result directly or indirectly in such sheriff's, jailer's or other person's personal gain, profit or benefit or in gain, profit or benefit to a business partially or wholly owned by such sheriff, jailer or other person. This prohibition shall apply regardless of whether the inmate is or is not compensated for any such labor. T.C.A. § 41-2-148(a). See *also* Op. Tenn. Atty. Gen. No. 03-075 (June 18, 2003).

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail may permit any such inmate housed therein to perform any labor for the gain, profit or benefit of a private citizen, or for-profit corporation, partnership or other business unless such labor is part of a court-approved work release program or unless the work release program operates under a commission established pursuant to T.C.A. § 41-2-134. T.C.A. § 41-2-148(b)(1). See *also* Op. Tenn. Atty. Gen. No. 03-125 (September 29, 2003).

Penalties.

Any sheriff, jailer or other person responsible for the custody of an inmate housed in a local facility who violates the provisions of T.C.A. § 41-2-148 regarding inmate labor for private purposes, upon such person's first such conviction therefor, commits a misdemeanor and shall be punished by a fine equal to the value of the services received from the inmate or inmates and imprisonment for not less than 30 days nor more than 11 months and 29 days. Upon a second or subsequent conviction for a violation of T.C.A. § 41-2-148, such sheriff, jailer or other person is guilty of a felony and shall be punished by a fine of not less than the value of the services received from the inmate or inmates nor more than \$5,000 and imprisonment for not less than one nor more than five years. If the person violating T.C.A. § 41-2-148 for the second or subsequent time is a public official, in addition to the punishment set out above such person shall immediately forfeit his office and shall be forever barred from holding public office in this state. T.C.A. § 41-2-148(d)(1).

Any private citizen, corporation, partnership or other business knowingly and willfully using inmate labor in violation of T.C.A. § 41-2-148(b) commits a Class A misdemeanor and, upon conviction, shall be punished by a fine of \$1,000 and by imprisonment for not more than 11 months and 29 days. Each day inmate labor is used in violation of T.C.A. § 41-2-148(b) constitutes a separate offense. T.C.A. § 41-2-148(d)(2).

In the case of *In re Williams*, 987 S.W.2d 837 (Tenn. 1998), the Tennessee Supreme Court heard the appeal of Judge Billy Wayne Williams from the Court of the Judiciary's judgment recommending that he be removed from the office of general sessions court judge of Lauderdale County. Judge Williams had, among other things, used an inmate from the county jail to help build a house for his son.

“Judge Williams asserted that he was unaware that the practice of using prison labor for personal work was illegal. He believed that he had committed no impropriety because other county officials had also used prison labor as an ‘informal work release program.’ Although several other witnesses testified that private individuals in Lauderdale County had a long standing practice of using inmate labor for personal work, it was undisputed that Lauderdale County did not have a formal, approved work release program.” *Id.* at 838-839.

Noting that the use of an inmate for a private purpose is a criminal offense, the court found that neither assertion constituted a defense to the disciplinary charges and held that the judge's use of an inmate from the county jail to help build a house for his son violated several canons of the Code of Judicial Conduct. *Id.* at 841-842. The Supreme Court affirmed the Court of the Judiciary's recommendation that Judge Williams be removed from office. *Id.* at 844.

Forcing an inmate to perform work that inures solely to an individual's private benefit, as opposed to the public benefit, is not as plainly allowed under the 13th Amendment's exception for work imposed as punishment for crime. *Anderson v. Morgan*, 898 F.2d 144 (Table) (4th Cir. 1990), *citing Matthews v. Reynolds*, 405 F.Supp. 50 (W.D. Va. 1975).

Work Release Programs

See “Work Release” under Chapter 6, Workhouses.

Inmate Discipline

Pursuant to state regulations, each jail must develop written policies and procedures governing disciplinary and administrative actions. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (3).

The written jail rules along with the corresponding range of sanctions for rule violations and disciplinary procedures to be followed must be given to each inmate during the booking process. A record must be maintained of this transaction. Socially, mentally, or physically impaired inmates must be assisted by staff members in understanding the rules. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (1).

Disciplinary reports must be prepared by staff members and must include, but are not limited to, the following information:

- (1) Names of persons involved;
- (2) A description of the incident;
- (3) Specific rule(s) violated;
- (4) Staff or prisoner witnesses;
- (5) Any immediate action taken, including use of force; and
- (6) Reporting staff member's signature, date and time report is made.

Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (2).

The written policy must provide prisoners with a hearing prior to segregation, except in cases where the security of the facility is threatened as determined by the jail administrator or his or her designee. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (5).

The written policy must provide for disciplinary hearings to be held in cases of alleged violations of prisoner conduct rules. These hearings must include the following administrative due process guarantees:

- (1) Written notice of charges and time of hearing prior to hearing;
- (2) A brief period of time after the notice, no less than 24 hours, to prepare for the appearance before an impartial officer or board;
- (3) The right to call and cross examine witnesses and present evidence in the prisoner's own defense, when permitting him or her to do so will not be unduly hazardous to institutional safety or correctional goals;
- (4) Reasons for any limitations placed on testimony or witnesses must be stated in writing by the hearing officer;
- (5) A written statement by the fact finder(s) as to evidence relied on and reasons for the disciplinary action; and
- (6) An appeal process.

Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (4).

For segregated prisoners, a disciplinary hearing must be held within 72 hours of placement in segregation, excluding holidays, weekends and emergencies, and for other prisoners a disciplinary hearing must be held within seven days of the write-up. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (6).

The prisoner must receive a copy of the disciplinary decision and a copy must be kept in the prisoner's record. The written policy and procedure must provide that disciplinary reports are removed from all files on prisoners found not guilty of an alleged violation. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (7) and Rule 1400-1-.08 (8).

“The courts accord wide-ranging deference to correction officials in adopting and administering policies that, in the officials' judgment, are needed to preserve internal order and discipline and to maintain institutional security.” *Utley v. Tennessee Dept. of Correction*, 118 S.W.3d 705, 713 (Tenn. Ct. App. 2003) (citations omitted).

The United States Supreme Court has held that state prisoners do not have a liberty interest in the procedural rights created by internal prison disciplinary regulations unless the punishment they receive "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 483-484, 115 S.Ct. 2293, 2300, 132 L.Ed.2d 418 (1995). In other words, *Sandin v. Conner* holds that due process is not necessary as long as the prisoner's punishment is not disproportionate to the rigors of prison life.

An inmate has no liberty interest in remaining free of disciplinary or administrative segregation, as such segregation does not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Gore v. Tennessee Dept. of Correction*, 132 S.W.3d 369, 371-372 (Tenn. Ct. App. 2003), *citing Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 2301, 132 L.Ed.2d 418 (1995) (holding that a punishment of 30 days segregation was not an atypical, significant deprivation). *See also Willis v. TDOC*, 2002 WL 1189730 (Tenn. Ct. App. 2002) (finding that punitive segregation was not an atypical, significant deprivation).

Denial of due process claims are analyzed using a two-part inquiry. “The first question is whether the [inmate] has identified a ‘liberty’ or ‘property’ interest that is entitled to protection by the Due Process Clause. An affirmative answer to this question requires the consideration of a second question – what process is due under the particular circumstances? The answer to the second question is situational because due process is a flexible concept that calls for only those procedural protections that the particular situation demands.” *Jeffries v. Tennessee Dept. of Correction*, 108 S.W.3d 862, 870 (Tenn. Ct. App. 2002). “Accordingly, the fate of the due process claims of a prisoner seeking judicial review of internal disciplinary proceedings depends upon the punishment the prisoner received.” *Id.* at 871.

Tennessee cases addressing petitions filed by prisoners seeking judicial review of prison disciplinary proceedings typically hold that placement in maximum security, the loss of good time credits, the loss of a prison job, and small fines, either separately or in combination, do not trigger due process concerns because the punishments do not impose an atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life. *Id.*, citing cases.

Corporal Punishment and Use of Force.

Pursuant to state regulations, corporal punishment is not to be permitted under any circumstances. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (9). However, the use of force may be used to:

- (1) Overcome resistance;**
- (2) Repel aggression;**
- (3) Protect life; or**
- (4) Retake prisoner or property.**

The use of physical force must be thoroughly documented with a detailed account of who was involved, the force that was used and justification for its use. This report must be submitted to the jail administrator. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (10).

“It is not constitutionally permissible for officers to administer a beating as punishment for a prisoner's past misconduct,” nor may government officials use gratuitous force against a prisoner who has been already subdued or incapacitated. *Skrtich v. Thornton*, 280 F.3d 1295, 1300-1303 (11th Cir. 2002).

Under the Eighth Amendment, force is deemed legitimate in a custodial setting as long as it is applied "in a good faith effort to maintain or restore discipline [and not] maliciously and sadistically to cause harm." To determine if an application of force was applied maliciously and sadistically to cause harm, a variety of factors are considered including: "the need for the application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response." From consideration of such factors, "inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." Moreover, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held personally liable for his nonfeasance.

Id. See also *Hope v. Pelzer*, 240 F.3d 975, 980-981 (2001) (holding that "the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment"), *affirmed*, 536 U.S. 730, 737, 122 S.Ct. 2508, 2514, 153 L.Ed.2d 666 (2002).

The maintenance of prison security and discipline may require that inmates be subjected to physical contact actionable as assault under common law; however, a violation of the Eighth Amendment will nevertheless occur if the offending conduct reflects an unnecessary and wanton infliction of pain. Factors to consider in determining whether the use of force was wanton and unnecessary include the extent of injury suffered by an inmate, the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response.

Billingsley v. Shelby County Dept. of Correction, 2005 WL 2659105, *2 (W.D. Tenn. 2005), citing *Combs v. Wilkinson*, 315 F.3d 548, 556-557 (6th Cir. 2002).

Under the Eighth Amendment, prison “officials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force.” *Combs v. Wilkinson*, 315 F.3d 548, 557 (6th Cir. 2002) (citation omitted). Because prison officials “must make their decisions in haste, under pressure, and frequently without the luxury of a second chance,” courts analyzing a claim of excessive force in violation of the Eighth Amendment must grant them “wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Id.*, (citations omitted).

The *Combs* Court found that a corrections officer's use of mace against a death row inmate while quelling a disturbance in the death row unit was not malicious or sadistic as required to support the inmate's claim of excessive force in violation of the Eighth Amendment. *Id.* See also *Brikho v. Horan*, 146 Fed.Appx. 13 (6th Cir. 2005) (finding deputy sheriff's kick or nudge to back of sleeping inmate when he did not wake up was not excessive force and did not violate Eighth Amendment, absent evidence of malicious or sadistic purpose); *Jennings v. Peiffer*, 110 Fed.Appx. 643 (6th Cir. 2004) (finding correctional officers use of chemical agents on an inmate in a good-faith effort to maintain or restore discipline defeated the inmate's Eighth Amendment excessive force claim under § 1983); *Davis v. Agosto*, 89 Fed.Appx. 523 (6th Cir. 2004) (finding prison officers' use of force in attempting to bring inmate under control was not excessive and thus did not violate inmate's Eighth Amendment rights where inmate refused to comply with officers' command to submit to handcuffs, forced his way out of cell when door was opened, continued to resist after he was tackled by guard in hallway, and was struck with batons only after he tried to hit guard); *Leonard v. Hoover*, 76 Fed.Appx. 55 (6th Cir. 2003) (finding corrections officers' use of force to extract inmate from his cell was justified under the Eighth Amendment where officers had reason to believe that inmate had dangerous contraband in his cell and inmate repeatedly refused to comply with orders to submit to a search, and inmate suffered only minor injuries); *Kennedy v. Doyle*, 37 Fed.Appx. 755 (6th Cir. 2002) (holding that placing prisoner in restraints after he broke his prison cell window did not violate the prisoner's Eighth Amendment right against cruel and unusual punishment and 14th Amendment right to due process; the restraints were designed to control the prisoner's behavior, more restrictive restraints were placed on the prisoner after he continued to be

involved in breaking one window while in restraints and attempting to break another window, and placement in such restraints did not impose "atypical and significant hardship"); *Davis v. Sutton*, 2005 WL 3434633 (W.D. Tenn. 2005) (finding defendants in contempt of court for violating permanent injunction prohibiting the use of chemical agents as a form of inmate discipline and awarding inmates a total of \$95,000 in compensatory damages for the inmates' pain and suffering).

Correspondence and Visitors.

After examining and committing prisoners, the jailer is required to convey letters from prisoners to their counsel and others, sealing and putting them in the post office if required. The jailer must also admit, without charge, people having business with prisoners and must remain present at all interviews between prisoners and others, except their counsel. T.C.A. § 41-4-114.

Mail.

Pursuant to state regulations, the jail must have a written policy outlining the facility's procedures governing prisoner mail. Each jail must develop a written policy governing the censoring of mail. Any regulation for censorship must meet the following criteria:

(1) The regulation must further an important and substantial governmental interest unrelated to the suppression of expression (e.g., detecting escape plans that constitute a threat to facility security or the well-being of staff or prisoners); and

(2) The limitation must be no greater than is necessary to protect the particular governmental interest involved.

Incoming mail must be inspected for contraband items prior to delivery unless received from the courts, attorney of record, or public officials, where the mail must be opened in the presence of the prisoner. Outgoing mail must be collected and incoming mail must be delivered without unnecessary delay. A prisoner must be notified if a letter is rejected, whether it is written by or addressed to him. When a letter is rejected, the author must be given a reasonable opportunity to protest that decision. Written policy and procedure must provide that the facility permits postage for two free personal letters per week for prisoners who have less than \$2 in their account. They must also receive postage for all legal or official mail. Rules of the Tennessee Corrections Institute, Rule 1400-1-.11 (1)-(7).

Prisoners have a limited liberty interest in their mail under the First Amendment. Prison actions that affect an inmate's receipt of nonlegal mail must be "reasonably related to legitimate penological interests." Legitimate practices include inspection of inmate mail for contraband, escape plans or other threats to prison security.

Leslie v. Sullivan, 2000 WL 34227530, *7 (W.D. Wis. 2000) (dismissing plaintiff's claim that delay in mail delivery violated the First Amendment) (citations omitted).

A prisoner's right to receive mail is subject to prison policies and regulations that are "reasonably related to legitimate penological interests," *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), such as "security, good order, or discipline of the institution." *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989). Courts generally afford great deference to prison policies, regulations, and practices relating to the preservation of these interests. *Id.* at 407-08, 109 S.Ct. 1874. In *Turner*, the Supreme Court set forth the following four factors to determine whether a prison's restriction on incoming publications was reasonably related to legitimate penological interests: (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest asserted to justify it; (2) the existence of alternative means for inmates to exercise their constitutional rights; (3) the impact that accommodation of these constitutional rights may have on other guards and inmates, and on the allocation of prison resources; and (4) the absence of ready alternatives as evidence of the reasonableness of the regulation. *Cornwell v. Dahlberg*, 963 F.2d 912, 917 (6th Cir. 1992) (citing *Turner*, 482 U.S. at 89, 107 S.Ct. 2254).

Harbin-Bey v. Rutter, 420 F.3d 571, 578 (6th Cir. 2005) (upholding regulation prohibiting prisoners from receiving mail depicting gang symbols or signs finding that the prison's policy was reasonably related to the prison's goal of maintaining security and order). See *Thompson v. Campbell*, 81 Fed.Appx. 563, 567-568 (6th Cir. 2003) (upholding policy of withholding mail advocating "anarchy" or containing "obscenity" finding that the policy on its face does not violate the First Amendment).

Different standards apply to the evaluation of regulations governing incoming mail and outgoing mail. While a prisoner's right to receive mail is subject to prison policies and regulations that are "reasonably related to legitimate penological interests," *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 2262, 96 L.Ed.2d 64 (1987), a prisoner's right to send mail is subject to prison regulations or practices that "further an important or substantial governmental interest unrelated to the suppression of expression," and that extend no further "than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974). Prison officials must demonstrate that regulations authorizing the censorship of prisoners' mail furthers one or more of the substantial interests of security, order, and rehabilitation. *Id.*

In *Martucci v. Johnson*, 944 F.2d 291, 295-296 (6th Cir. 1991), the Sixth Circuit found that a jailer's decision to withhold both the incoming and outgoing mail of a pretrial detainee was legitimate under the dual standards enunciated in *Procunier* and *Turner v. Safley* where the jailer believed that the pretrial detainee was planning an escape. See also *Burton v. Nault*, 902 F.2d 4 (6th Cir.), cert. denied, 498 U.S. 873, 111 S.Ct. 198, 112

L.Ed.2d 160 (1990). In exercising their authority to monitor inmate correspondence, prison officials justifiably may refuse to send “letters concerning escape[] plans or containing other information concerning proposed criminal activity, whether within or without the prison. Similarly, prison officials may properly refuse to transmit encoded messages.” *Koutnik v. Brown*, 351 F.Supp.2d 871, 879 (W.D. Wis. 2004) (citation omitted).

The Seventh Circuit has held that “a jail is allowed to screen and intercept non-privileged mail that contains threats or seeks to facilitate criminal activity.” *Grisette v. Ramsey*, 81 Fed.Appx. 67, 68 (7th Cir. 2003) (citation omitted). “[B]ecause of their reasonable concern for prison security and inmates’ diminished expectations of privacy, prison officials do not violate the constitution when they read inmates’ outgoing letters.” *United States v. Whalen*, 940 F.2d 1027, 1035 (7th Cir. 1991) (citation omitted). “In short, it is well established that prisons have sound reasons for reading the outgoing mail of their inmates.” *Id.*

In *Martin v. Kelley*, 803 F.2d 236 (6th Cir. 1986) the Sixth Circuit delineated the “minimum procedural safeguards” referred to in *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) that must be in place before inmates’ letters are withheld or censored. First, an incoming mail censorship regulation must provide that notice of rejection be given to the inmate-recipient. Second, the mail censorship regulation must require that notice and an opportunity to protest the decision be given to the author of the rejected letter. Finally, the mail censorship regulation must provide for an appeal of the rejection decision to an impartial third party prior to the letter being returned. *Id.* at 243-244. See *Rogers v. Martin*, 84 Fed.Appx. 577, 579 (6th Cir. 2003) (upholding prison mail policy that prohibited photographs depicting actual or simulated sexual acts by one or more persons finding that the policy was reasonably related to legitimate penological interests. The inmate was given notice of the rejections, hearings were held to determine whether the magazines violated the policy, and the inmate was given an appeal.).

An indigent inmate has no constitutional right to free postage for nonlegal mail. *Argue v. Hofmeyer*, 80 Fed.Appx. 427, 429 (6th Cir. 2003) *citing Moore v. Chavez*, 36 Fed.Appx. 169, 171 (6th Cir. 2002) and *Hershberger v. Scaletta*, 33 F.3d 955, 957 (8th Cir. 1994).

Legal Mail.

Prison regulations or practices that affect a prisoner’s legal mail are of particular concern because of the potential for interference with a prisoner’s right of access to the courts. See *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). When the incoming mail is “legal mail,” courts “have heightened concern with allowing prison officials unfettered discretion to open and read an inmate’s mail because a prison’s security needs do not automatically trump a prisoner’s First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner’s legal rights, the attorney-client privilege, or the right of access to the courts.” *Sallier v. Brooks*, 343 F.3d 868, 874 (6th Cir. 2003) *citing Kensu v. Haigh*, 87 F.3d 172, 174 (6th Cir. 1996) and *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003).

“In an attempt to accommodate both the prison's needs and the prisoner's rights, courts have approved prison policies that allow prison officials to open ‘legal mail’ and inspect it for contraband in the presence of the prisoner.” *Sallier* at 874, citing *Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (upholding such a policy against a Sixth Amendment attorney-client privilege claim and a 14th Amendment due process claim based on access to the courts).

“Not all mail that a prisoner receives from a legal source will implicate constitutionally protected legal mail rights.” *Sallier* at 874. Nevertheless, “even constitutionally protected mail can be opened (although not read) and inspected for contraband. The only requirement is that such activity must take place in the presence of the recipient, if such a request has been made by the prisoner.” *Id.*

In *Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992), the Sixth Circuit addressed an opt-in system in which prison officials could open any mail sent to a prisoner unless the prisoner affirmatively requested that “privileged mail,” defined by the policy as mail sent by a court or by counsel, be opened in his presence. The court found that the opt-in system was constitutionally sound as long as prisoners received written notice of the policy, did not have to renew the request upon transfer to another facility, and were not required to designate particular attorneys as their counsel. *Id.* If such a system is in place, the Sixth Circuit has held that “[a]s a matter of law, [prison officials] cannot be liable for having opened mail, even if it is ‘legal mail,’ prior to the time [the inmate] made his written request to have such mail opened in his presence.” *Sallier*, 343 F.3d at 875.

Correspondence From Legal Organizations.

Correspondence from an organization such as the American Bar Association may be opened pursuant to a prison’s regular mail policy without violating the First Amendment rights of a prisoner when there is no specific indication that the envelope contains confidential, personal, or privileged material; that it was sent from a specific attorney at the organization; or that it relates to a currently pending legal matter in which the inmate is involved. *Sallier*, 343 F.3d at 875. Compare *Jensen v. Klecker*, 648 F.2d 1179, 1183 (8th Cir. 1981) (finding that a letter from the National Prison Project, bearing the name of an attorney and stamped “Lawyer Client Mail Do Not Open Except In Presence of Prisoner” appears to come well within the definition of protected attorney-client legal mail). Cf. *Boswell v. Mayer*, 169 F.3d 384, 388-89 (6th Cir. 1999) (upholding prison policy of treating mail from a state attorney general's office as protected legal mail only if (a) the envelope contains the return address of a licensed attorney and (b) the envelope has markings that warn of its privileged content); *Wolff v. McDonnell*, 418 U.S. 539, 576, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (finding it entirely appropriate for a state to require any communication from an attorney to be specially marked as originating from an attorney, including the attorney's name and address, if the communication is to be given special treatment).

Correspondence From County Clerks.

Correspondence from a county clerk or register of deeds may be opened pursuant to a prison's regular mail policy without violating the First Amendment rights of a prisoner when there is no specific indication that the envelope contains confidential, personal, or privileged material; that it was sent from an attorney; that it relates to a currently pending legal matter in which the inmate is involved; or that it is to be opened only in the presence of the prisoner. As a general matter mail from a county clerk or register of deeds does not implicate constitutionally protected legal mail rights. *Sallier*, 343 F.3d at 876.

Correspondence From State and Federal Courts.

Correspondence from a state or federal court constitutes "legal mail" and cannot be opened outside the presence of a prisoner who has specifically requested otherwise. *Sallier*, 343 F.3d at 876-877. *See also Taylor v. Sterrett*, 532 F.2d 462, 475 (5th Cir.1976) (holding that an inmate's right of access to the courts requires that incoming prisoner mail from courts, attorneys, prosecuting attorneys, and probation or parole officers be opened only in the presence of the inmate).

Correspondence From Attorneys.

Correspondence from an attorney cannot be opened outside the presence of a prisoner who has specifically requested otherwise. *Sallier*, 343 F.3d at 877-878 ("We find that the prisoner's interest in unimpaired, confidential communication with an attorney is an integral component of the judicial process and, therefore, that as a matter of law, mail from an attorney implicates a prisoner's protect legal mail rights. There is no penological interest or security concern that justifies opening such mail outside of the prisoner's presence when the prisoner has specifically requested otherwise.") (citation omitted). *See also Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992) (holding that a prisoner may not be required to designate ahead of time the name of the attorney who will be sending the prisoner confidential legal mail).

Correspondence from the attorney general's office requires similar protection because of the potentially confidential nature of such correspondence. *Muhammad v. Pitcher*, 35 F.3d 1081, 1083 (6th Cir. 1994) ("The conclusion that mail from an attorney general to an inmate may be confidential should not be surprising, for courts have consistently recognized that 'legal mail' includes correspondence from elected officials and government agencies, including the offices of prosecuting officials such as state attorneys general.") (citations omitted).

Outgoing Legal Mail.

A prisoner's right to send "legal mail" is subject to prison regulations and practices that "further an important or substantial governmental interest unrelated to the suppression of expression," and that extend no further "than is necessary or essential to the protection of the particular governmental interest involved." *Bell-Bey v. Williams*, 87 F.3d 832, 838 (6th Cir. 1996) *citing Proconier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974) and *Martucci v. Johnson*, 944 F.2d 291, 295-96 (6th Cir. 1991). In *Bell-Bey*, the Sixth Circuit rejected an inmate's challenge to a prison mail policy, which required prison officials to "inspect" outgoing legal mail to determine whether the mail was in fact legal mail. The court upheld the policy, noting that there was no proof that the policy directed officials to read prisoners' legal mail. *Id.* at 839. In addition, the court noted that there were procedural safeguards that limited the prison official's inspection of a prisoner's legal mail. Under the policy at issue, "1) the official's inspection [wa]s limited to scanning legal mail for docket numbers, case title, requests for documents, et cetera; 2) the inspection [wa]s conducted in the prisoner's presence in his cell; and 3) the prisoner [could] seal his mail after the inspection [wa]s completed." *Id.* at 837.

While it is clear that an indigent inmate has no constitutional right to free postage for nonlegal mail, *Argue v. Hofmeyer*, 80 Fed.Appx. 427, 429 (6th Cir. 2003) (citations omitted), "[i]t is indisputable that indigent inmates must be provided at State expense with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them." *Bounds v. Smith*, 430 U.S. 817, 824-825, 97 S.Ct. 1491, 1496, 52 L.Ed.2d 72 (1977). "**Bounds, however, does not require that inmates be provided with unlimited free postage.**" *Blaise v. Fenn*, 48 F.3d 337, 339 (8th Cir. 1995) *citing Smith v. Erickson*, 884 F.2d 1108, 1111 (8th Cir. 1989); *accord Chandler v. Coughlin*, 763 F.2d 110, 114 (2d Cir. 1985). *See also Myers v. Hundley*, 101 F.3d 542, 544 (8th Cir. 1996) (Inmates do not have a right to unlimited stamp allowances for legal mail.); *Hershberger v. Scaletta*, 33 F.3d 955, 956 (8th Cir. 1994) (holding that inmates who were not permitted to work for money nor provided with any allowance or other form of income must be provided with one first-class stamp per week for legal mail); *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986) ("However, although prisoners have a right of access to the courts, they do not have a right to unlimited free postage."); *Hoppins v. Wallace*, 751 F.2d 1161, 1162 (11th Cir. 1985) ("The constitutional right to access to the courts entitles indigent prisoners to some free stamps as noted in *Bounds* but not unlimited free postage as is urged by the plaintiff.").

Visitation.

Pursuant to state regulations, the jail must have a written policy defining the facility's visitation policies. State regulations require that each prisoner be allowed one hour of visitation each week, that prisoners submit a list of visitors, and that prisoners be allowed to visit with their children. Visitors may be required to register before being admitted to the facility and may be denied admission for refusal to register,

for refusal to consent to a search, or for any violation of posted institutional rules. Probable cause must be established in order to do a strip or body cavity search of a visitor. When probable cause exists, the search must be documented. Rules of the Tennessee Corrections Institute, Rule 1400-1-.11 (8).

Regulation of Inmate Visitation.

Convicted prisoners “have no absolute, unfettered constitutional right to unrestricted visitation with any person, regardless of whether that person is a family member or not. Rather, visitation privileges are subject to the discretion of prison officials.” *Bazzetta v. McGinnis*, 902 F.Supp. 765, 769 (E.D. Mich. 1995), *aff’d*, 124 F.3d 774 (6th Cir. 1997) (citations omitted) (upholding regulations restricting visitation by minors to children, stepchildren, or grandchildren of prisoners and the overall number of visitors a prisoner may see to 10). *See also Spear v. Sowders*, 71 F.3d 626, 629-30 (6th Cir. 1995) (“It is clear that a prisoner does not have a due process right to unfettered visitation A fortiori, a citizen simply does not have a right to unfettered visitation of a prisoner that rises to a constitutional dimension.”) (citations omitted).

The United States Supreme Court has recognized that “[t]he very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner.” *Overton v. Bazzetta*, 539 U.S. 126, 131, 123 S.Ct. 2162, 2167, 156 L.Ed.2d 162 (2003). Prison inmates retain only those constitutional rights that are consistent with their status as prisoners or with the legitimate penological objectives of the corrective system. The “freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context.” *Id.*

In *Overton*, the United States Supreme Court addressed prison regulations affecting prisoners' visitation privileges. The regulations in question excluded minor nieces and nephews and children as to whom parental rights had been terminated from noncontact visitation of inmates, required children who were authorized to visit to be accompanied by an adult family member or legal guardian, prohibited inmates from visiting with former inmates, and subjected inmates with two substance-abuse violations to a ban of at least two years on future visitation. The Supreme Court held that the challenged regulations did not violate the prisoners' constitutional rights under the First and Eighth Amendments or violate their 14th Amendment substantive due process rights.

Turning to the restrictions on visitation by children, we conclude that the regulations bear a rational relation to MDOC's valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury. The regulations promote internal security, perhaps the most legitimate of penological goals, by reducing the total number of visitors and by limiting the disruption caused by children in particular. Protecting children from harm is also a legitimate goal.

To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable. Visits are allowed between an inmate and those children closest to him or her - children, grandchildren, and siblings. The prohibition on visitation by children as to whom the inmate no longer has parental rights is simply a recognition by prison administrators of a status determination made in other official proceedings.

As for the regulation requiring children to be accompanied by a family member or legal guardian, it is reasonable to ensure that the visiting child is accompanied and supervised by those adults charged with protecting the child's best interests.

Id. at 133, 123 S.Ct. at 2168 (citations omitted).

MDOC's regulation prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes. We have recognized that "communication with other felons is a potential spur to criminal behavior."

Id. at 133-134, 123 S.Ct. at 2168 (citations omitted).

Finally, the restriction on visitation for inmates with two substance-abuse violations, a bar which may be removed after two years, serves the legitimate goal of deterring the use of drugs and alcohol within the prisons. Drug smuggling and drug use in prison are intractable problems. Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose. In this regard we note that numerous other States have implemented similar restrictions on visitation privileges to control and deter substance-abuse violations.

Id. at 134, 123 S.Ct. at 2168-2169 (citations omitted).

In addition, the court found that the two-year ban on visitation for inmates with two substance-abuse violations did not violate the Eighth Amendment prohibition against cruel and unusual punishment.

The restriction undoubtedly makes the prisoner's confinement more difficult to bear. But it does not, in the circumstances of this case, fall below the standards mandated by the Eighth Amendment. Much of what we have said already about the withdrawal of privileges that incarceration is expected to bring applies here as well. Michigan, like many other States, uses withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline. This is not a dramatic departure from accepted standards for conditions of confinement. Nor does the regulation create inhumane

prison conditions, deprive inmates of basic necessities, or fail to protect their health or safety. Nor does it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur.

Id. at 136-137, 123 S.Ct. at 2170 (citations omitted).

In *Bazzetta v. McGinnis*, 423 F.3d 557 (6th Cir. 2005), the Sixth Circuit, addressing the same substance abuse regulation addressed in *Overton*, found that the regulation did not, on its face, violate the inmates' 14th Amendment procedural due process rights. The Sixth Circuit noted that "although the issue was not directly before the *Overton* Court, Court precedent and dictum has signaled against our finding a liberty interest on the face of the substance abuse regulation." *Id.* at 565. The Sixth Circuit found that the *Overton* Court had "foreclosed a facial procedural due process challenge under the standard set forth in" *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). *Id.* The court noted, however, that the Supreme Court's decision in *Overton* did not preclude individual prisoners from challenging a particular application of the substance abuse regulation on First Amendment, Eighth Amendment or 14th Amendment grounds.

In *Wirsching v. Colorado*, 360 F.3d 1191, 1198-1201, 1205 (10th Cir. 2004), the Tenth Circuit, applying *Overton*, held that prison officials did not violate a convicted sex offender's familial association and due process rights by refusing to allow prison visits by his daughter due to his refusal to comply with requirements of the prison's treatment program for sex offenders, and "that visitation with a particular person does not constitute basic necessity, the denial of which would violate the Eighth Amendment."

In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 1884-1885, 60 L.Ed.2d 447 (1979), the Supreme Court considered whether it was permissible to conduct warrantless strip and body cavity searches of prisoners and pretrial detainees on less than probable cause after contact with outside visitors. The court held that requiring inmates to submit to a visual bodycavity search after every contact visit with a person outside the institution did not violate the Fourth Amendment.

The Fourth Amendment prohibits only unreasonable searches and under the circumstances, we do not believe that these searches are unreasonable.

A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record and in other cases.

441 U.S. at 558-559, 99 S.Ct. at 1884-1885. See also *Wood v. Hancock County Sheriff's Dept.*, 2003 WL 23095279 (1st Cir. 2003) (Except in atypical circumstances, a blanket policy of strip searching inmates after contact visits is constitutional.).

In *Block v. Rutherford*, 468 U.S. 576, 588, 104 S.Ct. 3227, 3234, 82 L.Ed.2d 438 (1984), the Supreme Court found that a county jail's blanket prohibition of contact visits between pretrial detainees and their spouses, relatives, children, and friends was an entirely reasonable nonpunitive response to the legitimate security concerns identified in the case and was consistent with the 14th Amendment.

Monitoring Inmate Conversations.

Jail administrators may monitor and record an inmate's conversations with visitors.

"[T]o say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument.... In prison, official surveillance has traditionally been the order of the day." *Lanza v. New York*, 370 U.S. 139, 143, 82 S.Ct. 1218, 1220-1221, 8 L.Ed.2d 384 (1962).

In *United States v. Hearst*, 563 F.2d 1331, 1344 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978), the defendant challenged the secret recording of a conversation between herself and her visitor, which took place in the jail visiting room over a telephone-like communication system while the two looked at each other through a bulletproof glass window. The conversation was monitored and recorded through a switchboard-type device operated by a deputy sheriff pursuant to an established jail policy to watch for security problems within the jail. The Ninth Circuit Court of Appeals stated:

An intrusion by jail officials pursuant to a rule or policy with a justifiable purpose of imprisonment or prison security is not violative of the Fourth Amendment. Under this rule, a prisoner is not deprived of all Fourth Amendment protections; the rule recognizes, however, the government's weighty, countervailing interests in prison security and order.

Id. at 1345 (citations omitted). As a result, the court found that the defendant's Fourth Amendment rights had not been violated and noted that the government "adequately established that its practice of monitoring and recording prisoner-visitor conversations was a reasonable means of maintaining prison security." *Id.* at 1346. *See also Christman v. Skinner*, 468 F.2d 723, 726 (2d Cir. 1972) (Monitoring county jail inmate's conversations with visitors violated no right of privacy possessed by inmate.); *Rodriguez v. Blaedow*, 497 F.Supp. 558, 559 (E.D. Wis. 1980) ("[A]n inmate's right of privacy is not violated when prison officials monitor his conversations with visitors."); *State v. McKercher*, 332 N.W.2d 286 (S.D. 1983) ("The United States Supreme Court has stated, however, that prisoners' constitutional rights are subject to some restrictions. These restrictions allow jail officials to monitor and record conversations between detainees and their visitors for security reasons and to use the conversation as evidence against the detainee without violating the Fourth Amendment."); *People v. Clark*, 466 N.E.2d 361, 365 (Ill. App. 1984) (holding that the defendant had no reasonable expectation of privacy in his conversation with another detainee in jail where electronic monitoring system was designed and used to maintain safety at jail); *People v. Myles*, 379 N.E.2d 897, 936 (Ill. App. 1978) ("It has also been held

that there is no reasonable expectation of privacy in an ordinary jailhouse conversation between spouses.”).

Likewise, in *United States v. Peoples*, 71 F.Supp.2d 967, 978 (W.D. Mo. 1999), the district court found that the visitor of prisoner did not have a reasonable expectation of privacy in conversations with the prisoner or in telephone calls involving the prisoner necessary to support a claim that his Fourth Amendment rights were violated when the prison recorded the conversations as part of a general recording program undertaken to maintain prison safety and order by reducing the flow of contraband into prison.

Regulation of Visitors.

“[A] citizen simply does not have a right to unfettered visitation of a prisoner that rises to a constitutional dimension. In seeking entry to such a controlled environment, the visitor simultaneously acknowledges a lesser expectation of privacy.” *Spear v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995) (citations omitted). See also *Gray v. Bruce*, 26 Fed.Appx. 819, 824 (10th Cir. 2001) (Neither prisoners nor their visitors have a constitutional right to unfettered visitation.); *Johnson v. Medford*, 208 F.Supp.2d 590, 592 (W.D. N.C. 2002) (“Moreover, it is well settled that neither prisoners nor their would-be visitors have a constitutional right to prison visitation.”).

Individuals who wish to visit inmates are subject to jail visitation policies and regulations. “Prison authorities have both the right and the duty by all reasonable means to see to it that visitors are not smuggling weapons or other objects which could be used in an effort to escape or to harm other prisoners. They have a duty to intercept narcotics and other harmful contraband.” *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977). For similar language, see *Roach v. Kligman*, 412 F.Supp. 521, 525 (E.D. Pa. 1976); *Seale v. Manson*, 326 F.Supp. 1375, 1379 (D. Conn. 1971).

Prison officials are responsible for the safety and security of inmates, employees and visitors of their institutions. They have a great deal of discretion in establishing policies and rules which further the penological purposes of safety and security. It is well established that visitation of prisoners is subject to regulation. *Spear v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995). Persons who seek to enter a prison in order to visit an inmate do not have unfettered rights to such visitation. *Id.* Where visitors' interests may be affected by prison limitations on visits, courts have generally “[struck] the balance in favor of institutional security,” and accorded great weight to the “professional expertise of corrections officials.” *Id.* (citations omitted).

[B]ecause of the need for prison security, visitors do not have the same right of unimpeded access to prisoners, without government scrutiny, that they would have to persons in society outside prison.... [T]he government's power to intrude depends on the fact that the person insists on access. *Id.* at 630, 632.

Similarly, an inmate's family member has no constitutional right to contact visitation, including no First Amendment right of association. *Bazzetta v. McGinnis*, 124 F.3d 774, 779 (6th Cir. 1997).

Boles v. Tennessee Dept. of Correction, 2001 WL 840283, *3 (Tenn. Ct. App. 2001) (upholding policy imposing behavior requirements on children who are brought to visit incarcerated individuals).

The natural extension of this principle is that prison authorities have much greater leeway in conducting searches of visitors. Visitors can be subjected to some searches, such as a pat-down or a metal detector sweep, merely as a condition of visitation, absent any suspicion. However, because a strip and body cavity search is the most intrusive search possible, courts have attempted to balance the need for institutional security against the remaining privacy interests of visitors. Those courts that have examined the issue have concluded that even for strip and body cavity searches prison authorities need not secure a warrant or have probable cause. However, the residual privacy interests of visitors in being free from such an invasive search requires that prison authorities have at least a reasonable suspicion that the visitor is bearing contraband before conducting such a search.

Spear v. Sowders, 71 F.3d 626, 630 (6th Cir. 1995) (citations omitted).

In *Spear*, the Sixth Circuit observed that the law is clearly established that the Fourth Amendment requires reasonable suspicion before authorizing a body cavity search of a prison visitor. *Id.*

Reasonable suspicion does not mean evidence beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. Reasonable suspicion is not even equal to a finding of probable cause. Rather, reasonable suspicion requires only specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity might be in progress.

The Supreme Court has examined the definition of reasonable suspicion on several occasions. Each time, the Court has made it clear that "[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is *less reliable* than that required to show probable cause."

Id. at 631, *citing Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301 (1990) (emphasis added). *Accord State v. Putt*, 955 S.W.2d 640, 646 (Tenn. Crim. App. 1997) (We take this opportunity to note that had the defendant been subjected to a strip search or a body cavity search, our analysis would not be the same. A reasonable

suspicion standard generally applies to these types of searches and nothing in this opinion shall be construed to hold otherwise.) (citations omitted). *But see Laughter v. Kay*, 986 F.Supp. 1362, 1374 (D. Utah 1997) (Due to the level of intrusiveness, "manual body cavity search" must be based upon the more stringent "probable cause" standard, rather than "reasonable suspicion" standard.).

It is important to note that, while a strip search or a body cavity search of a visitor can be sustained based upon a reasonable suspicion alone, the person to be subjected to such an invasive search must be given the opportunity to depart. *Spear* at 632. **Moreover, pursuant to state regulations, probable cause must be established in order to do a strip or body cavity search of a visitor.** Rules of the Tennessee Corrections Institute, Rule 1400-1-.11 (8).

It has been held, however, that vehicle searches on prison property are constitutional under the state and federal constitutions despite the fact that they are conducted without a warrant, probable cause, or reasonable suspicion. *State v. Putt*, 955 S.W.2d 640, 646 (Tenn. Crim. App. 1997). In *Putt*, the Court noted that people entering a correctional facility have a lesser expectation of privacy, that the state has a substantial interest in keeping drugs out of prisons, and that searching all incoming cars was a sufficiently reasonable method of preventing drugs from entering the facility. *Id.* at 645-646. Moreover, the court held that, based upon the facts of the case, the denial of the visitor's request to leave was not a violation of her constitutional rights. *Id.* at 647. *See also Neumeyer v. Beard*, 421 F.3d 210, 216 (3d Cir. 2005) (holding that prison policy of subjecting prison visitors' vehicles to random searches is reasonable, supportable as a special needs search, and hence constitutional despite the lack of individualized suspicion).

Subjecting a prison visitor to a noninvasive swab search using an ion spectrometer to test for drug residue is not a per se violation of the visitor's Fourth Amendment right to be free from unreasonable searches when balanced against the state's interest in keeping drugs out of prisons. *Gray v. Bruce*, 26 Fed.Appx. 819, 823 (10th Cir. 2001).

Regulations that require visitors to identify themselves are not unconstitutional. *State v. Jackson*, 812 N.E.2d 1002, 1005 (Ohio App. 2004) ("This court finds that a regulation that requires prison visitors to identify themselves is, for security reasons, a reasonable regulation."). *See also Floumoy v. Fairman*, 897 F.Supp. 350, 352 (N.D. Ill. 1995) (finding policy requiring visitors to produce proper identification was reasonably related to the need to maintain internal security at the jail, unquestionably a legitimate governmental objective)

Prison administrators can enact regulations that restrict the number of visitors an inmate can have for purposes of maintaining institutional security. *Kikumura v. Hurley*, 242 F.3d 950, 957 (10th Cir. 2001) (finding that a prison regulation allowing pastoral visits only when the prisoner initiated the request and only when the clergy member was from the inmate's faith group was reasonably related to legitimate penological goals).

Telephone Use

Pursuant to state regulations the jail must have a policy and procedure providing reasonable private access to a telephone for the prisoners. The policy and procedure must be in writing and posted so as to be conspicuous to the prisoners and must set forth any limitations. At a minimum, the procedure must include (1) the hours during which telephone access will generally be provided, (2) a statement regarding the privacy of telephone communications, and (3) a statement that limitations will be imposed to ensure that charges for the call are billed correctly. Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(4).

An inmate has no constitutional right to telephone use, *Griffin v. Cleaver*, 2005 WL 1200532, *6 (D. Conn. 2005), nor does he have a constitutional right to make private telephone calls. *Cook v. Hills*, 3 Fed.Appx. 393, *1 (6th Cir. 2001). See also *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) (concluding that **prisoners have no entitlement to unlimited use of a telephone**); *Benzel v. Grammer*, 869 F.2d 1105 (8th Cir. 1989) (same); *Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982) (A jail inmate in maximum security has no right to unlimited telephone use.); *Frazier v. Coughlin*, 81 F.3d 313, 317-318 (2d Cir. 1996) (holding that 30-day loss of recreation, commissary privileges, packages and telephone use did not state a cognizable claim for denial of due process).

Jail officials have the right to limit an inmate's access to phone calls “to the extent that such limitations are designed to achieve legitimate penological interests.” *Leslie v. Sullivan*, 2000 WL 34227530, *7 (W.D. Wis. 2000). “Prisoners are not entitled to unlimited visits or inexpensive phone calls to their family members under the Constitution.” *Id.* See also *Martin v. Tyson*, 845 F.2d 1451, 1458 (7th Cir. 1988) (per curiam) (upholding policy limiting pretrial detainee's telephone access to every other day); *Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996) (upholding policy limiting use to preapproved calling list of at most 10 people); *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) (upholding policy limiting use to preapproved list of at most 30 people); *Benzel v. Grammer*, 869 F.2d 1105, 1108-09 (8th Cir. 1989) (upholding policy limiting use by inmates in disciplinary segregation to preapproved list of at most three people).

An inmate's “right to telephone access, if any, is subject to rational limitations based upon legitimate security and administrative interests of the penal institution. ‘The exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny for unreasonable restrictions.’” *Arney v. Simmons*, 26 F.Supp.2d 1288, 1293 (D. Kan. 1998) (upholding restrictions placed on inmates' telephone access, including 10-person telephone call lists modified at 120-day intervals, monitoring of telephone calls, prohibition on international calls from inmate telephones, and prohibition on inclusion of public officials on call lists) (citations omitted).

In *Spurlock v. Simmons*, 88 F.Supp.2d 1189 (D. Kan. 2000), the court held that limiting a hearing-impaired inmate to two 30-minute telephone calls per week on a special facility TDD telephone, while permitting other inmates unlimited access to the inmate telephone

system, did not violate the due process clause, *id.* at 1193, and did not violate the deaf inmate's equal protection rights. *Id.* at 1194. Further, the court found that prison officials did not discriminate against the deaf inmate in violation of the Americans with Disabilities Act (ADA) or the Rehabilitation Act. The court found that, as a matter of law, the plaintiff had meaningful access to a telephone. *Id.* at 1195-1196. See also *Hansen v. Rimel*, 104 F.3d 189 (8th Cir.1997) (finding no equal protection violation for failure to provide special telephone to disabled inmate).

In *Boriboune v. Litscher*, 91 Fed.Appx. 498, 499-500 (7th Cir. 2003), the Seventh Circuit Court of Appeals upheld a prison policy prohibiting inmates from communicating on the telephone in a language other than English without first receiving approval. The court found that the prisons' policy was reasonably related to its interest in maintaining security, which is a legitimate penological concern. See also *Sisneros v. Nix*, 884 F.Supp. 1313 (S.D. Iowa 1995) (finding regulation requiring mail to and from prisoners be in English language did not violate prisoner's First Amendment rights or his 14th Amendment Equal Protection rights).

Monitoring Inmate Telephone Conversations.

The monitoring of inmate telephone calls is common in jails in Tennessee. Noting that the Fourth Amendment to the United States Constitution protects persons from unreasonable searches and seizures in places in which they have a reasonable expectation of privacy, the Tennessee Court of Criminal Appeals has held that **a person does not have a reasonable expectation of privacy on a jailhouse telephone.** *State v. Erwin*, 2001 WL 314340, *6 (Tenn. Crim. App. 2001), citing *State v. Hutchison*, 1987 WL 14331, at *5-6 (Tenn. Crim. App. 1987); *State v. Rudolph Munn*, 1999 WL 177341, at *12 (Tenn. Crim. App. 1999), *perm. app. granted*, (Tenn. 1999).

Inmates have no constitutional privacy right to unmonitored nonprivileged telephone calls from a correctional facility. *Washington v. Meachum*, 680 A.2d 262, 275 (Conn. 1996). "No such right has previously been found to exist in any jurisdiction in the country under either the federal constitution or any state constitution...." *Id.*

The courts applying the federal constitution have consistently concluded that whatever limited privacy rights inmates retain do not include a right to make unmonitored, non-privileged telephone calls. *United States v. Workman*, 80 F.3d 688, 694 (2d Cir. 1996) ("[o]nly a single participant in a conversation need agree to the monitoring in order to satisfy the requirements of the Fourth Amendment" and inmate use of prison telephone with knowledge of monitoring practice constitutes such agreement); *United States v. Sababu*, 891 F.2d 1308, 1329 (7th Cir. 1989) (outsider who telephones inmate has no reasonable expectation that conversation will be private because "[i]n prison, official surveillance has traditionally been the order of the day"); *United States v. Willoughby*, 860 F.2d 15, 20-21 (2d Cir. 1988); *United States v. Amen*, 831 F.2d 373, 379-80 (2d Cir. 1987), *cert. denied sub nom, Abbamonte v. United States*, 485 U.S. 1021, 108 S.Ct. 1573, 99 L.Ed.2d 889

(1988); *United States v. Paul*, 614 F.2d 115 (6th Cir. 1980); *United States v. Clark*, 651 F.Supp. 76, 81 (M.D. Pa. 1986) (distinguishing monitoring of public telephone booth from monitoring of jailhouse telephone on grounds that there is no reasonable expectation of privacy in jailhouse conversation); *Teat v. State*, 636 So.2d 697, 699 (Ala. Crim. App. 1993) ("there is no reasonable expectation of privacy in the telephone conversations of inmates at penal institutions"); *State v. Fox*, 493 N.W.2d 829, 832 (Iowa 1992) (no fourth amendment violation even though inmate not specifically notified of monitoring).

In cases in which other state courts have applied the independent provisions of their state constitutions to privacy claims pertaining specifically to prison telephone conversations, those courts unanimously have found that the monitoring or taping of such conversations does not violate the implicit or explicit privacy protections of their respective state constitutions. *People v. Myles*, 62 Ill.App.3d 931, 936, 20 Ill.Dec. 64, 379 N.E.2d 897 (1978) (no reasonable expectation of privacy in jailhouse conversations, despite explicit privacy provision in state constitution, because "[a] phone maintained in a jail for prisoner use shares none of the attributes of privacy of a home or automobile or even a public phone booth"); *State v. Fischer*, 270 N.W.2d 345, 354 (N. Dak. 1978) ("parties to a jailhouse conversation usually have no reasonable expectation of privacy due to the security needs of maintaining order and of limiting the introduction of contraband, such as drugs, into the jail" unless deceptive actions of law enforcement officials provide such reasonable expectation).

Id. at 276. See also *United States v. Balon*, 384 F.3d 38, 44 (2d Cir. 2004) ("[M]onitoring of telephone communications does not offend the Fourth Amendment because prisoners have 'no reasonable expectation of privacy.'" (citations omitted); *United States v. Gangi*, 57 Fed.Appx. 809, 815 (10th Cir. 2003) ("We agree with the Ninth Circuit that 'any expectation of privacy in outbound calls from prison is not objectively reasonable and that the Fourth Amendment is therefore not triggered by the routine taping of such calls.'" (citations omitted); *United States v. Workman*, 80 F.3d 688, 694 (2d Cir. 1996) ("[T]he interception of calls from inmates to noninmates does not violate the privacy rights of the noninmates.") (citations omitted).

Monitoring and recording inmate telephone conversations does not, generally, violate the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22. Title III generally forbids the intentional interception of telephone calls when done without court-ordered authorization. Under the "consent" exception, 18 U.S.C. § 2511(2)(c), law enforcement personnel may lawfully intercept telephone calls where one of the parties to the communication has given prior consent to such interception. Courts have held that consent may be either express or implied. Additionally, courts have held that under certain circumstances, prisoners are deemed to have given their consent for purposes of Title III to the interception of their calls on institutional telephones.

In *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021, 108 S.Ct. 1573, 99 L.Ed.2d 889 (1988), the Second Circuit Court of Appeals held that **inmates impliedly consented to have their telephone conversations monitored where they had received notice of the surveillance and nevertheless used the prison telephones.** *Id.* at 378-379. In *Amen*, the notice consisted of federal prison regulations clearly indicating that inmate telephone calls were subject to monitoring, an orientation lecture in which the monitoring and taping system was discussed, an informational handbook received by every inmate describing the system, and signs near the telephones notifying inmates of the monitoring.

In *United States v. Workman*, 80 F.3d 688 (2d Cir. 1996), prior to trial, the defendants moved to suppress recordings made by prison officials of defendant Green's incriminating conversations on the prison telephone system. The defendants contended that these recordings were made in violation of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-22 ("Title III"). *Id.* at 692. The court held that the combination of signs, written in English and Spanish, near each telephone in the prison notifying inmates of the monitoring program, an orientation handbook that provided further notice of the telephone monitoring program, and state regulations that provided public notice that prisoner calls were subject to monitoring and recording were sufficient to find that Green impliedly consented to the surveillance. *Id.* at 693-694. *See also United States v. Corona-Chavez*, 328 F.3d 974, 978 (8th Cir. 2003) (finding implied consent where an inmate chose to proceed with a phone call after receiving notice of recording); *United States v. Hammond*, 286 F.3d 189, 192 (4th Cir. 2002) (same); *United States v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000) (same); *United States v. Van Poyck*, 77 F.3d 285, 292 (9th Cir. 1996) (same).

Under the "law enforcement" exception, 18 U.S.C. § 2510(5)(a), oral communications may be intercepted by investigative and law enforcement officers acting in the ordinary course of their duties. *United States v. Van Poyck*, 77 F.3d 285, 291-292 (9th Cir. 1996). Finding that the law enforcement exception applied to the Los Angeles Metropolitan Detention Center's routine taping policy, the court noted that the "MDC is a law enforcement agency whose employees tape all outbound inmate telephone calls; interception of these calls would appear to be in the ordinary course of their duties." *Id.* *See also United States v. Hammond*, 286 F.3d 189, 192 (4th Cir. 2002) (The law enforcement exception rendered the recording of prisoner's telephone conversations permissible where the facility was acting pursuant to its well-known policies in the ordinary course of its duties in taping the calls.); *United States v. Feekes*, 879 F.2d 1562, 1565-1566 (7th Cir. 1989) (finding law enforcement exception was clearly satisfied where federal prison regulations authorized the tape recording of all prisoner calls, except to prisoners' lawyers, and inmate's calls were recorded in accordance with routine practice, which was the "ordinary course" for the officers who supervised the monitoring system); *United States v. Paul*, 614 F.2d 115, 117 (6th Cir.), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980) (finding that the law enforcement exception applied where the monitoring took place within the ordinary course of the correctional officers' duties).

Access to the Courts and Attorneys.

“The Supreme Court of the United States recognizes the existence of a constitutional right of access to the courts and has identified the sources of the right of access in the prisoner context as the Due Process Clause, the Equal Protection Clause, and the First Amendment.” *Phifer v. Tennessee Bd. of Parole*, 2002 WL 31443204, *10 (Tenn. Ct. App. 2002) (citations omitted). “The right to meaningful access to the courts ensures that prison officials may not erect unreasonable barriers to prevent prisoners from pursuing all types of legal matters.” *Id.*, (citations omitted).

“Although the exact contours of this right are somewhat obscure, the Supreme Court has not extended the right to encompass more than the ability to prepare and transmit a necessary legal document to a court. A prisoner must show an actual injury to prevail on an access-to-the-courts claim.” *Breshears v. Brown*, 150 Fed.Appx. 323, 325 (5th Cir. 2005) (citations omitted).

While a First Amendment right to access to the courts clearly exists, no claim for interference with this right exists unless plaintiff alleges that defendants prevented him from filing a nonfrivolous legal claim challenging his conviction. The plaintiff must allege that he has suffered an actual injury to state a claim. The plaintiff must allege that a nonfrivolous claim was lost or rejected, or that the presentation of such a claim is currently being prevented. *Clark v. Corrections Corporation of America*, 113 Fed.Appx. 65, 67-68 (6th Cir. 2004) (citations omitted).

Access to the Courts.

The landmark case in the area of a prisoner's right of access to the courts is *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

In *Bounds*, the Supreme Court noted that prisoners must be afforded meaningful access in their criminal trials, on their appeals as of right, and in their habeas and civil rights actions. In holding that the right to affirmative assistance applies in these contexts, the Supreme Court explained “we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights.... Habeas corpus and civil rights actions are of 'fundamental importance ... in our constitutional scheme' because they directly protect our most valued rights.”

Phifer v. Tennessee Bd. of Parole, 2002 WL 31443204, *10 (Tenn. Ct. App. 2002).

However, since the United States Supreme Court decided *Bounds*, the scope of the right of access to the courts “has been the subject of further litigation which has served to limit and define the types of litigation to which the [right] applies.” *Id.* The Sixth Circuit Court of Appeals has held that it would be “an unwarranted extension of the right of access” to require states to affirmatively assist prisoners “on civil matters arising under state law.”

John L. v. Adams, 969 F.2d 228, 235-236 (6th Cir. 1992). And, in *Knop v. Johnson*, 977 F.2d 996, 1009 (6th Cir. 1992), the court held that **the right of access to the courts requires affirmative assistance for inmates "only in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration."**

This view was subsequently adopted by the United States Supreme Court: *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration. *Lewis v. Casey*, 518 U.S. 343, 355, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

Reinholtz v. Campbell, 64 F.Supp.2d 721, 730 (W.D. Tenn. 1999). See *Courtemanche v. Gregels*, 79 Fed.Appx. 115, 117 (6th Cir. 2003) ("However, a prisoner's right of access to the courts is limited to direct criminal appeals, habeas corpus applications, and civil rights claims challenging the conditions of confinement.").

The Court in *Lewis* also found that *Bounds* did not create any independent right of access to legal materials. The Court specifically found that *Bounds* did not establish a right to a law library or to legal assistance, but that "[t]he right that *Bounds* acknowledged was the (already well-established) right to access to the courts." 518 U.S. at 350, 116 S.Ct. at 2179. Meaningful access to the courts is the touchstone. It is the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts that is protected, not "the capability of turning pages in a law library." 518 U.S. at 356-57, 116 S.Ct. 2182.

Phifer v. Tennessee Bd. of Parole, 2002 WL 31443204, *11 (Tenn. Ct. App. 2002) (footnote omitted). See also *Benjamin v. Kerik*, 102 F.Supp.2d 157, 162 (S.D. N.Y. 2000) ("The *Lewis* Court repudiated the expansive understanding of its prior decision in *Bounds v. Smith*, and held that prisoners do not have a freestanding right to law libraries or legal assistance.") (citations omitted).

"Although prisoners maintain a right of access to the courts, they do not have the right of access to a law library." *Jackson v. Wiley*, 352 F.Supp.2d 666, 679 (E.D. Va. 2004) citing *Strickler v. Waters*, 989 F.2d 1375, 1385 (4th Cir. 1993). An inmate is not denied his right of access to the courts simply because a jail's law library is inadequate or because an inmate's access to that library has been restricted in some way. *Id.* Access to a jail's law library may be restricted during lockdown where inmates have access to other forms of legal advice. *Id.* at 680, citing *Johnson v. Williams*, 768 F.Supp. 1161 (E.D. Va. 1991).

“States have a duty to provide inmates with *either* an attorney or access to law libraries to prepare for trial. States need not provide both law libraries and advisors.” *Id.*

“There is no constitutional right to any particular number of hours in the law library.” *Thomas v. Campbell*, 12 Fed.Appx. 295, 297 (6th Cir. 2001), *citing Walker v. Mintzes*, 771 F.2d 920, 932 (6th Cir. 1985). *See also Davidson v. Edwards*, 816 F.2d 679, 679 (6th Cir. 1987) (Table) (“Restricted access to the library is not a per se denial of access to the courts. Rather, access to the library need only be reasonable and adequate.”).

The Tenth Circuit Court of Appeals has held that the “availability of law libraries is only one of many constitutionally acceptable methods of assuring meaningful access to the courts, and pretrial detainees are not entitled to law library usage if other available means of access to court exist.” *United States v. Cooper*, 375 F.3d 1041, 1051 (10th Cir. 2004). “It is well established that provision of legal counsel is a constitutionally acceptable alternative to a prisoner’s demand to access a law library.” *Id.* at 1051-1052. The choice among various methods of guaranteeing access to the courts lies with prison administrators, not inmates or the courts. *Ishaaq v. Compton*, 900 F.Supp. 935, 941 (W.D. Tenn. 1995).

An inmate who has court-appointed counsel on direct appeal has no constitutional right of access to a law library in preparing his defense. *Caraballo v. Federal Bureau of Prisons*, 124 Fed.Appx. 284, 285 (5th Cir. 2005) (citation omitted). *See also United States v. Manthey*, 92 Fed.Appx. 291, 297 (6th Cir. 2004) (same). Moreover, “many federal circuit courts have held that a prisoner who knowingly and voluntarily waives appointed representation by counsel in a criminal proceeding is not entitled to access to a law library.” *Degrate v. Godwin*, 84 F.3d 768, 768-69 (5th Cir. 1996) (citing cases).

An inmate’s right of access to the courts is not violated merely because his attorney refuses to accept collect phone calls. *United States v. Manthey*, 92 Fed.Appx. 291, 297 (6th Cir. 2004).

A prisoner’s right of access to the courts includes the right to receive legal advice from other prisoners only when it is a necessary “means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.” *Pendleton v. Mills*, 73 S.W.3d 115, 124 n. 10 (Tenn. Ct. App. 2001), *citing Shaw v. Murphy*, 532 U.S. 223, 231 n. 3, 121 S.Ct. 1475, 1480 n. 3, 149 L.Ed.2d 420 (2001); *Bounds v. Smith*, 430 U.S. 817, 825, 97 S.Ct. 1491, 1496, 52 L.Ed.2d 72 (1977). However, “an inmate does not have an independent legal right to help other prisoners with their legal claims.” *Thaddeus-X v. Blatter*, 175 F.3d 378, 395 (6th Cir. 1999) (citations omitted). “Rather, a ‘jailhouse lawyer’s’ right to assist another prisoner is wholly derivative of that prisoner’s right of access to the courts; prison officials may prohibit or limit jailhouse lawyering unless doing so interferes with an inmate’s ability to present his grievances to a court.” *Id.* *See also King v. Zamiara*, 150 Fed.Appx. 485, 492 (6th Cir. 2005) (“[A]n inmate engages in protected activity by providing legal assistance when his assistance is *necessary* to provide another inmate with constitutionally-protected access to the courts.”).

An inmate's right of access to the courts "does not encompass a requirement that prison officials provide a prisoner with free, unlimited access to photocopies." *Logue v. Chatham County Detention Center*, 152 Fed.Appx. 781, 784 (11th Cir. 2005). In *Logue*, the inmate alleged that jail officials violated his right to access to the courts based on the denial of his requests for multiple photocopies of supporting exhibits, including lengthy transcripts, for his use in an unrelated habeas corpus proceeding. The Eleventh Circuit Court of Appeals upheld the district court's dismissal of Logue's claim because Logue failed to allege an *actual injury* by showing that the denial of the photocopies actually impeded a nonfrivolous claim. The court stated: "Here, Logue did not assert that the California court rejected his habeas petition because of the missing attachments and, thus, we discern no actual injury giving rise to a violation of his access to the courts." *Id.* See also *Miller v. Donald*, 132 Fed.Appx. 270, 272 (11th Cir. 2005) (finding prison officials did not deny inmate his right to access the courts by refusing his request that they provide him with free photocopies of legal documents he was required to serve on defendants in a civil rights action before a California federal court where the inmate failed to allege that the California federal court would not accept service of, or that he was unable to produce, hand-copied duplicates).

Likewise, in *Courtemanche v. Gregels*, 79 Fed.Appx. 115, 117 (6th Cir. 2003), the Sixth Circuit Court of Appeals recognized that "the right of access does not include a per se right to photocopies in whatever amount a prisoner requests." "[T]he right of access to the courts is not unrestricted and does not mean that an inmate must be afforded unlimited litigation resources." *Thomas v. Rochell*, 47 Fed.Appx. 315, 317 (6th Cir. 2002). See also *Negron v. Golder*, 111 P.3d 538, 544 (Colo. App. 2004) ("There is no constitutional right to photocopy services."); *Walters v. Thompson*, 615 F.Supp. 330, 340 (N.D. Ill. 1985) (Inmates are not entitled to unlimited free photocopying as a matter of right.); *Jones v. Franzen*, 697 F.2d 801, 803 (7th Cir. 1983) ("broad as the constitutional concept of liberty is, it does not include the right to Xerox").

Access to Counsel.

Pursuant to state regulations, the jail must have a written policy providing that prisoners will be allowed to have confidential access to their attorneys and their authorized representatives at any reasonable hour. Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(6).

"Access to counsel is not only a right under the Sixth Amendment, but is one means of insuring access to the courts." *Arney v. Simmons*, 26 F.Supp.2d 1288, 1296 (D. Kan. 1998) (citations omitted). The opportunity to communicate privately with an attorney is an important part of meaningful access to the courts. *Dreher v. Sielaff*, 636 F.2d 1141, 1143 (7th Cir.1980). "However, the Sixth Amendment does not require in all instances full and unfettered contact between an inmate and counsel." *Arney*, 26 F.Supp.2d at 1296. "The constitutionally relevant benchmark is *meaningful*, not total or unlimited, access." *Campbell v. Miller*, 787 F.2d 217, 226 (7th Cir.), *cert. denied*, 479 U.S. 1019, 107 S.Ct. 673, 93 L.Ed.2d 724 (1986) (emphasis in original).

Prison officials have the authority to impose reasonable regulations and conditions regarding attorney visits, so long as they do not interfere with an inmate's communication with his attorney. *Boyd v. Anderson*, 265 F.Supp.2d 952, 969 (N.D. Ind. 2003) (citations omitted). “The extent to which that right is burdened by a particular regulation or practice must be weighed against the legitimate interests of penal administration and the proper regard that judges should give to the expertise and discretionary authority of correctional officials.” *Procurier v. Martinez*, 416 U.S. 396, 420, 94 S.Ct. 1800, 1814-1815, 40 L.Ed.2d 224 (1974). See *Department of Corrections v. Superior Court*, 131 Cal.App.3d 245, 250-255 (Cal. App. 1 Dist. 1982) (upholding termination of personal contact visits with attorney and substitution of specified noncontact visits as reasonable and necessary in the interest of institutional security and public protection). *But see Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) (holding that a prisoner's right of access to the courts includes contact visitation with his counsel).

A 24-hour notice requirement prior to legal visitation does not violate an inmate's right to access to counsel. *Campbell v. Miller*, 787 F.2d 217, 226-227 (7th Cir. 1986) (“Despite these restrictions, attorneys may visit inmates four days a week. That provides inmates with a reasonable opportunity to receive professional legal assistance.”).

While prisoners have a right to meet with their attorney, they do not have a right to meet as a group with an attorney. *Boyd v. Anderson*, 265 F.Supp.2d 952, 969 (N.D. Ind. 2003) (citations omitted).

County jail inmates who wish to consult with an attorney must be provided with a reasonable degree of privacy. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 310 (S.D. Ala. 1980), citing *Jones v. Diamond*, 594 F.2d 997, 1024 (5th Cir. 1979); *Ahrens v. Thomas*, 434 F.Supp. 873, 898 (W.D. Mo. 1977). See also *Owens-El v. Robinson*, 442 F.Supp. 1368, 1389 (W.D. Pa. 1978) (finding that the attorney visiting room, while occasionally overcrowded, was sufficient to permit attorneys to consult with their clients and to properly prepare a defense, and therefore did not violate inmates' constitutional rights).

Telephone Calls to Attorneys.

Inmates must be permitted telephone access to contact the courts and their attorneys under certain circumstances. *Green v. Nadeau*, 70 P.3d 574, 578 (Colo. App. 2003). **However, some reasonable restrictions on inmates' ability to access counsel by telephone does not deny inmates "their constitutional right to access the courts and counsel."** *Mullins v. Churchill*, 616 N.W.2d 764, 770 (Minn. App. 2000) (upholding policies regulating inmate use of telephones that required inmates to provide attorney's name and telephone number and explanation of why inmate could not contact attorney by mail). The right to counsel under the federal Constitution is the right to counsel's effective assistance, and not the right to perfect representation or unlimited access to counsel. The right to confer with counsel does not include the right to confer by telephone with counsel as frequently as the inmate or the attorney desires. *Washington v. Meachum*, 680 A.2d

262, 282 (Conn. 1996). See also *Aswegan v. Henry*, 981 F.2d 313, 314 (8th Cir. 1992) (stating "[a]lthough prisoners have a constitutional right of meaningful access to the courts, prisoners do not have a right to any particular means of access, including unlimited telephone use") (citations omitted).

The federal courts have had a few opportunities to deal specifically with the question of restrictions placed upon telephone communications between attorneys and prisoners. In *Williams v. ICC Committee*, 812 F.Supp. 1029 (N.D. Cal. 1992), for example, the court said that an inmate could state a claim only if he could demonstrate that the phone was his only avenue for meaningful access to his lawyer because he was unable to contact the lawyer by mail, or was denied visits from his lawyer. In another case, *Bellamy v. McMickens*, 692 F.Supp. 205 (S.D. N.Y. 1988), the court ruled that a prisoner's civil rights were not violated simply because he could not telephone his attorney whenever he wanted, but was subject to delays imposed by prison regulations.

Hall v. McLesky, 83 S.W.3d 752, 759 (Tenn. Ct. App. 2001). In *Hall*, the court held that the temporary interruption of telephone service to an inmate's attorney did not prejudice the inmate such that he was deprived of his constitutional right to meaningful access to the courts, and thus, the inmate could not invoke the protections of 42 U.S.C. § 1983. The court found that the restriction imposed upon the inmate's access to his attorney was of limited scope and duration and was related to a legitimate regulatory purpose on the part of prison administration. *Id.*

In *Ishaaq v. Compton*, 900 F.Supp. 935, 941 (W.D. Tenn. 1995), the court found that denying a convicted inmate's request to make a telephone call to his attorney, on the ground that the inmate lacked sufficient money in his trust fund account, did not deny the inmate access to the courts in violation of the First Amendment and could not be the basis for a § 1983 civil rights claim where the inmate failed to demonstrate actual interference.

"The essence of this right is, however, the access itself, not the convenience of the access. Convenience is not a right of constitutional magnitude. Any inconvenience an inmate experiences in handling a lawsuit is merely 'part of the penalty that criminal offenders pay for their offenses against society.'" *Id.* at 941, (citations omitted).

"The choice among various methods of guaranteeing access to the courts lies with prison administrators, not inmates or the courts." *Id.*, citing *Knop v. Johnson*, 977 F.2d 996, 1008 (6th Cir. 1992). "The alternative avenues open to state authorities to protect a prisoner's right of access to the courts are precisely that – alternatives. The choice between alternatives lies with the state. A prisoner who chooses not to avail himself of the alternative provided has no basis – constitutional or otherwise – for complaint." *Id.* See also *Love v. Summit County*, 776 F.2d 908, 914 (10th Cir. 1985) ("In addition, the state, not the inmate, has the right to choose among constitutionally adequate alternatives.").

Limited access to attorney telephone calls is not a constitutional violation as long as inmates can communicate with their counsel in writing or in person. *Ingalls v. Florio*, 968 F.Supp. 193, 203-204 (D. N.J. 1997). See also *Pino v. Dalsheim*, 558 F.Supp. 673, 675 (S.D. N.Y. 1983) (unlimited personal and mail communication with attorney constitutionally sufficient because state is not required to provide best manner of access). Policies requiring inmates to obtain prior written authorization to telephone their attorneys and limiting those calls to one per week have been found reasonable in light of the inmates' ability to correspond with attorneys through mail and during prison visits. *Robbins v. South*, 595 F.Supp. 785, 789-790 (D. Mont. 1984).

In *Cacicio v. Secretary of Public Safety*, 665 N.E.2d 85, 92 (Mass. 1996), the Massachusetts Supreme Court held that regulations that placed time limits on attorney telephone calls and prohibited toll-free calls did not violate an inmate's right to effective assistance of counsel, where the inmate was permitted to make unmonitored telephone calls to five separate attorneys on the inmate's calling list as well as three legal services organizations. The court found that these limitations, "when viewed in conjunction with an inmate's ability to use the mails and have visits, provide sufficient access to attorneys." Cf. *Beyah v. Putman*, 885 F.Supp. 371, 374 (N.D. N.Y. 1995) (Prison officials can restrict inmates' access to counsel by telephone as long as the inmates have some other avenue of access.); *Bellamy v. McMickens*, 692 F.Supp. 205, 214 (S.D. N.Y. 1988) (Although prisoners have a right to gain access to counsel from prison, they have no right to unlimited telephone calls and "restrictions on inmates' access to counsel via the telephone may be permitted as long as prisoners have some manner of access to counsel.").

In *Tucker v. Randall*, 948 F.2d 388, 390-391 (7th Cir. 1991), the Seventh Circuit Court of Appeals noted that in certain circumstances, denying a pretrial detainee access to a telephone for four days after his arrest may violate the Constitution. The court stated that the Sixth Amendment right to counsel would be implicated if a pretrial detainee was not allowed to talk to his lawyer for the entire four-day period. However, in *United States v. Manthey*, 92 Fed.Appx. 291, 297 (6th Cir. 2004), the Sixth Circuit Court of Appeals stated that the failure of a pretrial detainee's attorney to accept collect telephone calls does not violate the inmate's due process right of access to the courts when the inmate has the assistance of an attorney during the course of his criminal trial.

In *Carter v. O'Sullivan*, 924 F.Supp. 903, 911 (C.D. Ill. 1996), the district court found that a 19-day delay in contacting a convicted state inmate's attorney, after the inmate refused to put the attorney on his call list, did not deprive the inmate of the reasonable opportunity to communicate with his attorney. The court further found that the inmate was unable to show any prejudice to pending or contemplated litigation, which is a requirement for liability under 42 U.S.C. § 1983.

Providing telephone access to counsel is clearly one appropriate way to guarantee an inmate an opportunity to have his or her legal claims, both civil and criminal, properly framed and brought before a court of competent jurisdiction. However, this is only one of several ways of assuring inmates the opportunity to present their legal claims to the courts. Reasonable access to a law library within the correctional facility, consultation with

attorneys or their representatives through the mails and personal visits, and consultation with attorneys over the telephone within facility guidelines are all valid methods of ensuring that inmates are not denied the access to the courts. *Washington v. Meachum*, 680 A.2d 262, 285 (Conn. 1996) (citations omitted).

Monitoring Telephone Calls to Attorneys.

In *Massey v. Wheeler*, 221 F.3d 1030, 1036 (7th Cir. 2000), **the Seventh Circuit Court of Appeals noted the importance of unmonitored communication between attorneys and inmates but stated that the court could find no cases that establish a right to unrestricted and unlimited private telephone calls.**

In *Robinson v. Gunja*, 92 Fed.Appx. 624, 626-627 (10th Cir. 2004), the Tenth Circuit Court of Appeals upheld the dismissal of a pretrial detainee's claim that his Fourth Amendment rights were violated when prison officials monitored his telephone calls to attorneys and paralegals. Robinson failed to follow prison regulations, which required inmates to submit a request to make unmonitored legal telephone calls. The court found that because Robinson was using the inmate telephone system, which was clearly subject to monitoring, he had no reasonable expectation of privacy and his rights were not violated. The court also found that, because calls placed on the inmate telephone system were subject to recording and monitoring, the district court properly dismissed Robinson's Fifth and Sixth Amendment claims.

The legality of monitoring inmate calls to an attorney is not settled. It has been held that the presence of a custodial officer when prisoners place or receive a phone call is constitutionally objectionable. See *Moore v. Janing*, 427 F.Supp. 567, 576 (D. Neb.1976). It has also been held that prison officials may tape a prisoner's telephone conversations with an attorney if such taping does not substantially affect the prisoner's right to confer with counsel. *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991).

Arney v. Simmons, 26 F.Supp.2d 1288, 1296 (D. Kan. 1998) (finding that the automatic monitoring of attorney calls on "facility phones" presented no constitutional infringement where inmates were allowed to make unlimited nonmonitored calls on "inmate phones").

Prison Litigation Reform Act.

"The Prison Litigation Reform Act requires prisoners bringing actions concerning prison conditions under 42 U.S.C. § 1983 or other federal law to exhaust all available administrative remedies before suing in federal court. When a prisoner fails to exhaust his administrative remedies before filing a civil rights complaint, dismissal of the complaint is appropriate." *Young v. Martin*, 83 Fed.Appx. 107 (6th Cir. 2003) (citations omitted). See also *Williams v. Luttrell*, 99 Fed.Appx. 705 (6th Cir. 2004) (holding pro se pretrial detainee failed to exhaust his administrative remedies, as required under the PLRA, in his § 1983 action against county jail officials alleging that he was subjected to unconstitutional conditions of confinement and excessive use of force, where the detainee specifically

stated in his complaint that he did not file any grievances related to his claims); *Jones v. Warren County*, 67 Fed.Appx. 909 (6th Cir. 2003) (holding that the district court properly dismissed pro se inmate's § 1983 claim against the county and two jail employees for failure to exhaust his administrative remedies under the PLRA); *Atman v. Hutchison*, 57 Fed.Appx. 642 (6th Cir. 2003) (holding federal pretrial detainee at county jail could not bring § 1983 lawsuit challenging interference with his legal mail where he failed to comply with the exhaustion requirement of the PLRA).

The PLRA provides in pertinent part that:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). In *Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002), the Supreme Court held that the PLRA's exhaustion requirement "applies to all prisoners seeking redress for prison circumstances or occurrences," *id.* at 520, 122 S.Ct. 983, irrespective of whether those conditions are general to all prisoners or affect only one prisoner in particular, *see id.* at 532, 122 S.Ct. 983. Previously, in *Booth v. Churner*, 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001), the Supreme Court noted that the PLRA required exhaustion if available administrative process had the ability to provide "some relief for the *action* complained of" (emphasis added), even if grievance procedures could not provide the relief sought, *id.* at 738-39, 121 S.Ct. 1819. If no administrative remedies are available, however, then the PLRA does not require exhaustion. *Id.* at 736 n. 4, 121 S.Ct. 1819 ("Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust."); *see also Mojias v. Johnson*, 351 F.3d 606, 609 (2d Cir. 2003) ("[The PLRA] clearly does not require a prisoner to exhaust administrative remedies that do not address the subject matter of his complaint." (internal quotation marks and citation omitted)).

Handberry v. Thompson, 436 F.3d 52, 58-59 (2d Cir. 2006).

Before the district court may adjudicate any claim set forth in a prisoner's complaint, it must determine that the plaintiff has complied with this exhaustion requirement. Not only is a prisoner-plaintiff required to exhaust as to each defendant, he must show that he has exhausted every claim presented in his complaint. If a prisoner fails to show that he has exhausted his administrative remedies, his complaint is subject to *sua sponte* dismissal.

McCullough v. Barnes, 2005 WL 2704878, *2 (M.D. Tenn. 2005) (citations omitted).

To establish that he has exhausted his administrative remedies, a prisoner-plaintiff must show that he presented his grievance(s) "through one complete round" of the established grievance process. A prisoner does not exhaust available administrative remedies when he files a grievance but "d[oes] not appeal the denial of that complaint to the highest possible administrative level." Neither may a prisoner abandon the process before completion and then claim that he exhausted his remedies, or that it is now futile for him to do so.

Id., (citations omitted).

The plaintiff-prisoner has the burden of proving that a grievance has been fully exhausted, *Baxter v. Rose*, 305 F.3d 486, 488 (6th Cir. 2002), and the prisoner must attach documentation to the complaint as proof. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). Exhaustion is not jurisdictional; it is mandatory, *Wyatt v. Leonard*, 193 F.3d 876, 879 (6th Cir. 1999), even if proceeding through the administrative system would be "futile." *Hartsfield v. Vidor*, 199 F.3d 305, 308-10 (6th Cir. 1999).

Bey v. Johnson, 407 F.3d 801, 805 (6th Cir. 2005) (holding that the PLRA requires a complete dismissal of a prisoner's complaint when that prisoner alleges both exhausted and unexhausted claims). See also *Boyd v. Corrections Corp. of America*, 380 F.3d 989, 995 (6th Cir. 2004) ([A] prisoner-plaintiff may bear his pleading burden either "by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describ[ing] with specificity the administrative proceeding and its outcome.").

If the jail has no grievance procedure, the exhaustion requirement of the PLRA will be excused. *Rancher v. Franklin County*, 122 Fed.Appx. 240 (6th Cir. 2005).

Travel Restrictions.

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail may permit any such inmate housed therein to leave this state unless such travel is approved by the sentencing court, the inmate is in need of emergency medical treatment available only in another state, or there is a death or medical emergency in the inmate's immediate family. T.C.A. § 41-2-148(c).

Furloughs.

In any case in which a defendant has been sentenced to a local jail or workhouse or is at a local jail or workhouse subject to the provisions of T.C.A. § 40-35-212, the sentencing court shall have jurisdiction to grant a furlough for any medical, penological, rehabilitative or humane reason, upon conditions to be set by the sentencing court. This section applies to convictions under T.C.A. § 55-10-401

(DUI/DWI) after the mandatory minimum sentences have been served. T.C.A. § 40-35-316(a).

The sentencing court shall have no authority to grant a furlough to a defendant pursuant to the authority of T.C.A. § 40-35-316(a) for the purpose of allowing the defendant to work unless the defendant is held to and meets all of the eligibility and supervision requirements, testing standards and other criteria imposed by or pursuant to state law. T.C.A. § 40-35-316(b).

In *State v. Moss*, 2000 WL 246227 (Tenn. Crim. App. 2000) the defendant appealed an order entered by the trial court requiring that he be reincarcerated to serve the remainder of his 120-day jail sentence after the trial court had granted the defendant a medical furlough at the request of the sheriff.

The facts of this case are not in controversy. The defendant reported to the Anderson County Jail on April 17, 1998, to serve his 120-day sentence. Within approximately two weeks, he suffered a severe attack of appendicitis. The sheriff, without prior notice to the State, the defendant, or defense counsel, contacted a judge who granted a furlough based on a medical emergency. The only written record of the granting of a furlough was a notation attached to the jail docket. A guard accompanied the defendant to the hospital where, once the defendant's condition was diagnosed and the need for surgery determined, the guard left the hospital. The defendant successfully underwent an appendectomy and was released approximately one week later. The defendant was not contacted by anyone from the jail or any other official concerning the furlough or any particular date for his return to jail. The defendant went home, continued to recuperate, and started a new job.

Some months later, the defendant told his probation officer that he had served only twelve days of his 120-day sentence. The probation officer relayed this information to the prosecutor. Consequently, a hearing was held to determine the defendant's status. An order to serve sentence was issued by the trial court on November 30, 1998, requiring that the defendant be reincarcerated to serve the remaining days of his sentence. The trial court allowed credit for the seven days the defendant was hospitalized.

Id.

On appeal, the defendant presented the following two issues: (1) whether reincarceration of the defendant was fundamentally unfair; and (2) whether the state of Tennessee was responsible for payment of the defendant's medical bills while on furlough for an emergency appendectomy.

Addressing the first issue, the Court of Criminal Appeals noted that, pursuant to T.C.A. § 40-35-316(a), the trial court has jurisdiction to grant furloughs for "any medical, penological, rehabilitative or humane reason" and that the defendant had been placed on medical

furlough because of a life-threatening medical emergency. The defendant argued that the following defects in the validity of the furlough granted by the trial court amounted to a waiver of the government's right to reincarcerate him: (1) He did not request the furlough; (2) no furlough order was ever entered; (3) his attorney was not notified; and (4) the real reason for the furlough was for the county to avoid financial liability.

The court concluded that the sheriff's actions in seeking an emergency furlough for the defendant, even if, as the defendant had alleged, was for the purpose of avoiding financial liability for the defendant's medical expenses, were far from being so affirmatively improper or grossly negligent that it would be an affront to justice to require the defendant to serve a legal sentence in the face of such actions. Accordingly, as to the first issue, the court affirmed the order of the trial court instructing the defendant to return to the Anderson County jail to serve the remainder of his mandatory 120-day sentence.

With respect to the second issue, the court noted that the issue of the county's liability for the defendant's medical expenses was not properly before the court. As to the state's liability, the court found that the state was not liable for the defendant's medical expenses because the defendant was not serving a sentence in the Tennessee Department of Correction but was sentenced to the county jail for a misdemeanor conviction.

Likewise, in *State v. Chapman*, 977 S.W.2d 122 (Tenn. Crim. App. 1997), the Court of Criminal Appeals held that the reincarceration of the defendant to serve the remainder of her 10 day sentence was not fundamentally unfair and thus did not violate the defendant's due process rights where the sheriff had released her from custody to receive necessary medical attention, unavailable in his county, because of her premature labor and birth of her child.

On December 1, 1995, the defendant reported to the Carroll County Jail and began serving her sentence at 6:00 p.m. On her third day of confinement, December 4, 1995, the defendant began showing signs of labor at approximately 1:00 a.m. The jailer and a deputy transported the defendant to Methodist Hospital in McKenzie, Tennessee, at 3:40 a.m. The hospital determined that the defendant had to be transported to a hospital in Jackson, Tennessee, because the baby was in breech. At 4:55 a.m., the Carroll County Sheriff's Department released the defendant from custody. The defendant was then transported to the hospital in Jackson, apparently by ambulance.

On January 8, 1996, the state made an oral motion to grant the defendant a medical furlough. Over the objection of the defendant's trial counsel, the trial court granted the state's motion, stating that "this was a matter, I think, that was addressed to the Court.... And I said she could be released under these medical conditions. There should have been an order to that effect." Because the defendant was not present at the hearing, the trial court continued the case to February 14, 1996, to determine when the defendant could begin serving the remainder of her sentence. On January 24, 1996, the

trial court entered an order granting the defendant a medical furlough as of December 4, 1995, finding that it was necessary to release her from jail at 4:55 a.m. due to premature labor.

Id. at 124.

Affirming the trial court's order denying the defendant's motion to declare her sentence served, the Court of Criminal Appeals held that the "sheriff's actions in releasing the defendant to receive necessary medical attention, unavailable in his county, is not 'so affirmatively wrong ... that it would be unequivocally inconsistent with 'fundamental principles of liberty and justice' to require' the defendant to complete her sentence." *Id.* at 126 (citations omitted).

In addition to her due process argument, the defendant argued that she was entitled to the application of the doctrine of credit for time at liberty so as to have her sentence to confinement deemed completed. The court, however, held that the doctrine does not apply under Tennessee law nor would it under the circumstances in this case. *Id.* at 126-127.

In any event, we do not believe the doctrine would require relief under the circumstances in this case. At the time of sentencing, the trial court stated that a furlough would be granted to the defendant for medical purposes, a furlough authorized by law. See T.C.A. §§ 40-35-316 and 41-2-128.

The defendant's initial hospitalization, necessary for the birth of her child, was under the Carroll County Sheriff's custody. At that time, the parties were notified of the need to send the defendant to a better-equipped hospital in another county because the fetus was in the breech position. Needless to say, this was an emergency medical situation with time being of the essence.

With this medical emergency, the sheriff's legal options were limited. Under T.C.A. § 41-4-121(a), the sheriff has legal authority to convey a prisoner to the nearest sufficient jail, including in another county, if his or her jail is insufficient for the safekeeping of a prisoner. In this sense, the inability of the county to supply immediate medical needs might fall into this category. In reality, though, the defendant was already in, and would remain in, the hands of medical personnel and a physical transfer of the defendant to another jail was impossible. Otherwise, the sheriff was left with the choice of seeking judicial order for a furlough or other release for medical purposes. See, e.g., T.C.A. §§ 40-35-316 and 41-2-128. Obviously, an early morning telephone call by the sheriff's office to the trial court would have resulted in a furlough authorization.

However, we do not believe that the failure to get specific furlough authorization from the trial court at the time of the defendant's "release" from the sheriff's custody reflects "negligence" in the release because of the medical emergency at hand. Rather, it was a release of necessity to save the

defendant's and her child's lives. Also, with the defendant being aware that the trial court would grant her a furlough for medical purposes, but not for an extended time with the child, we do not see how she could reasonably expect or consider her time of confinement to continue running after her release.

Thus, she would not be entitled to credit for time at liberty.

Id. at 127. See also *State v. Cardwell*, 1993 WL 231750 (Tenn. Crim. App. 1993) (affirming the trial court finding that appellant had violated the conditions of his probation by leaving the state and county without permission and by exceeding the limitations placed on his medical furlough).

Jailer's Fees.

The county legislative body of each county has the authority to pass a resolution fixing the amount of jailers' fees that may be applied to misdemeanor prisoners. The rate fixed shall apply to such prisoners confined in the county jail or county workhouse or workhouses, but not meeting the conditions required for a state subsidy under Title 41, Chapter 8. T.C.A. § 8-26-105(a). A sample resolution is included in the appendix.

Sheriffs and jailers must make written statements of account, properly proven and sworn to, for the keeping of prisoners, specifying distinctly each item and the amount due for each item. T.C.A. § 41-4-129.

The fees of jailers is taxed separately from the general bills of costs of criminal cases. All state costs must be properly proved and sworn to before the clerk of the criminal or circuit court of the county and certified by the clerk for payment. T.C.A. § 41-4-131.

Jailer's fees for county prisoners shall be referred monthly to the county mayor for inspection, who shall audit the fees and cause the clerk to issue a warrant for the amount allowed. T.C.A. § 41-4-136.

Contracting to House State Prisoners.

No county is required to house convicted felons sentenced to more than one year of continuous confinement unless the county, through the authority of its county legislative body, has chosen to contract with the Department of Correction for the purpose of housing certain felons. The department promulgates rules for requirements and procedures for contracting. T.C.A. § 41-8-106(a).

Counties may contract, in writing, with the state or with other counties for responsibility of correctional populations. T.C.A. § 41-8-106(b).

Reimbursement for Keeping State Prisoners.

Pursuant to T.C.A. § 8-26-106, upon adoption by the county legislative body of a resolution fixing jailers' fees, it is made the duty of the county clerk to promptly transmit to the judicial cost accountant a certified copy of the resolution. The judicial cost accountant shall allow jailers' fees for that particular county for state prisoners at the amount fixed by the resolution on the same terms as the county according to the provisions of T.C.A. § 8-26-105.

However, pursuant to T.C.A. § 8-26-105(b), in lieu of the reimbursement for jailers' fees allowed in T.C.A. § 8-26-106, **the state now provides a subsidy pursuant to Title 41, Chapter 8.** Pursuant to T.C.A. § 8-26-105(c), references in other sections of the code to jailers' fees for state prisoners specified in T.C.A. § 8-26-105 are deemed to be references to the subsidies specified in T.C.A. § 41-8-106.

As defined in T.C.A. § 41-8-103(12), the "subsidy" referred to in T.C.A. §§ 8-26-105(b) and 41-8-106 means that amount of money paid by the state to a county in accordance with T.C.A. § 41-8-106. **Subsidies paid to counties pursuant to Title 41, Chapter 8, is the only compensation from the state to which counties are entitled for housing state prisoners and are in lieu of the fees allowed in T.C.A. § 8-26-106 or any other section of the code.** T.C.A. § 41-8-106(e).

Counties are reimbursed for housing convicted felons pursuant to the general appropriations act and according to rules and regulations for determining reasonable allowable costs as promulgated by the Department of Correction, in consultation with the comptroller of the treasury. The department is authorized to include capital costs within the meaning of reasonable allowable costs. Such capital costs may include, but are not limited to, debt service. T.C.A. § 41-8-106(c)(1).

Pursuant to T.C.A. § 41-8-106(g)(1), **the Department of Correction is required to take into its custody all convicted felons from any county that had not contracted with the state** as authorized by T.C.A. § 41-8-106(b). The department is not required to take actual physical custody of any such felons until 14 days after the department has received all certified sentencing documents from the clerk of the sentencing court.

The commissioner of correction is authorized to compensate any county that has not contracted with the state as authorized by T.C.A. § 41-8-106(b) for such county's reasonable, allowable cost of housing such felons. The rate of this compensation to the noncontracting counties is determined by and is subject to the level of funding authorized in the appropriations bill. However, the commissioner may not compensate any county that fails or refuses to promptly transfer actual physical custody of an inmate to the Department of Correction after being requested by the department in writing to do so for each day or portion of a day that such county fails to transfer the inmate. The written notice shall include the date it intends to take custody of the inmate for transfer to the department. The notice shall be given as soon as practicable before such transfer date. T.C.A. § 41-8-106(g)(2).

County Jail Inspectors

The county legislative body may, at its January term each year, appoint three householders or freeholders, residents of the county, of lawful age, to act as jail inspectors for the ensuing year, or the court may appoint such inspectors at any other time to act for a shorter period. The county mayor is an *ex officio* inspector of the jail in each county. T.C.A. § 41-4-116(a) and (b).

It is the duty of the inspectors appointed to:

- (1) Visit and examine the county jail at least once each month;
- (2) Make rules and regulations to preserve the health and decorum of the prisoners;
- (3) Decide all disputes between the jailer and the prisoners;
- (4) Provide for the restraint by ironing or segregation of prisoners who offer violence to fellow prisoners or to the jailer or the jailer's assistants, or for attempting to break jail; and
- (5) Make a report at each meeting of the county legislative body of the state and condition of the prisoners and the jail.

T.C.A. § 41-4-116(c).

The county commission may not appoint commission members as jail inspectors under T.C.A. § 41-4-116. Op. Tenn. Atty. Gen. No. 04-070 (April 21, 2004).

Jail inspectors do not have the authority to audit or otherwise inquire into the use of county drug funds held under T.C.A. §§ 39-17-328 or 39-17-420. Op. Tenn. Atty. Gen. No. 04-070 (April 21, 2004).

In *Connell v. Davidson County Judge*, 39 Tenn. 189 (1858), the Tennessee Supreme Court held that “[t]he power conferred upon Jail Inspectors, to ‘make rules and regulations for the preservation of the health and decorum of the prisoners,’ is confined to general sanitary and police regulations. It does not authorize them to charge the county with physicians' bills for medical attention to the prisoners.”

The attorney general has opined that the appointed jail inspectors must exercise their powers consistently with other applicable provisions of state law. For example, any rules made by these inspectors must be consistent with standards adopted by the Tennessee Corrections Institute under T.C.A. § 41-4-140 to the extent that statute applies to the county jail. Furthermore, the county legislative body may not expand the jail inspectors' duties beyond those in the statute and consistent with other state laws. Op. Tenn. Atty. Gen. No. 99-153 (August 16, 1999).

The attorney general has opined that whenever the jail inspectors convene to make a decision or to deliberate toward a decision, their gathering is a meeting subject to the notice and other requirements of the Open Meetings Act. At the same time, on-site inspections of the jail, whether the inspectors conduct them alone or with one another, would ordinarily not be meetings subject to the Open Meetings Act so long as the inspectors do not, in conjunction with the inspection, deliberate toward a decision. Op. Tenn. Atty. Gen. No. 04-070 (April 21, 2004).

Tennessee Corrections Institute

Purposes and Duties.

The Tennessee Corrections Institute shall:

- (1) Train correctional personnel in the methods of delivering correctional services in municipal, county and metropolitan jurisdictions;
- (2) Evaluate correctional programs in municipal, county and metropolitan jurisdictions;
- (3) Conduct studies and research in the area of corrections and criminal justice in order to make recommendations to the governor, the commissioner of correction and the General Assembly; and
- (4) Inspect all local penal institutions, jails, workhouses or any other local correctional facility in accordance with T.C.A. § 41-4-140.

T.C.A. § 41-7-103.

Board of Control.

The correctional services programs of the Tennessee Corrections Institute are under the direction of its Board of Control. The board shall consist of the governor or the governor's designee, the commissioner of correction, the chairs of the departments of criminal justice at Tennessee State University and Middle Tennessee State University, an employee of the Department of Correction appointed by the governor, and two sheriffs appointed by the governor, one from a county with a population of 200,000 or more and one from a county with a population of less than 200,000. T.C.A. § 41-7-105.

Standards.

The Tennessee Corrections Institute has the power and duty to:

- (1) Establish minimum standards for local jails, lock-ups, and workhouses, including, but not limited to, standards for physical facilities and standards for correctional programs of treatment, education and rehabilitation of inmates,

and standards for the safekeeping, health and welfare of inmates. The standards established by the Tennessee Corrections Institute must approximate, insofar as possible, those standards established by the Inspector of Jails, Federal Bureau of Prisons, and by the American Correctional Association's Manual of Correctional Standards, or such other similar publications as the Institute may deem necessary;

(2) Establish guidelines for the security of local jails, lock-ups, and workhouses for the purpose of protecting the public from criminals and suspected criminals by making such facilities more secure and thereby reducing the chances that a member of the public or a facility employee will be killed or injured during an escape attempt or while an inmate is fleeing from law enforcement officials following an escape;

(3) Inspect all local jails, lock-ups, workhouses and detention facilities at least once a year and publish the results of such inspections. Inspections must be based on the established standards mentioned above; and

(4) Have full authority to establish and enforce procedures to ensure compliance with the standards set out above so as to ensure the welfare of all persons committed to such institutions. Failure on the part of the county to maintain the standards established under T.C.A. § 41-4-140 must be reported by the Board of Control of the Institute to the commissioner of correction, sheriff, judge, or mayor, as appropriate, in the county in which the jail or penal institution is located. This report must specify the deficiencies and departures from the standards and order their correction.

T.C.A. § 41-4-140(a).

If, after inspection of a local correctional facility as provided in T.C.A. § 41-4-140(a)(3), the facility is determined not to be in compliance with the minimum standards, the Board of Control or any of its authorized staff may grant the facility an extension not to exceed 60 days for the purpose of making such improvements as are necessary to bring the facility into compliance with the minimum standards. During the period of the extension, the facility shall maintain the same certification status as it had prior to the most recent inspection. No additional extensions may be granted, and the certification status given a facility upon reinspection shall be the facility's status until the next annual inspection. T.C.A. § 41-4-140(b)(1).

No local currently certified facility shall be decertified if that local government has submitted a plan within 60 days of the initial annual inspection that is reasonably expected to eliminate fixed ratio deficiencies in that facility and cause the facility to remain certified. T.C.A. § 41-4-140(d).

No local correctional facility shall be denied a certificate of compliance with the minimum standards for the sole purpose of calculating the level of reimbursement upon the certified or not certified determination, if the sole cause is based on overcrowding because of prisoners sentenced to the Department of Correction whose commitments are delayed pursuant to Title 41, Chapter 1, Part 5, or pursuant to a federal court order when such prisoners are being held by a county pending such commitment. T.C.A. § 41-4-140(b)(2).

The total number of prisoners awaiting transfer to the Department of Correction penal system shall be discounted from any computations used to determine compliance with standards used by the Tennessee Corrections Institute if the governor has invoked the power of delayed intake pursuant to § 41-1-504(a)(2) or if a federal or state court has delayed intake into the department penal system, or both. T.C.A. § 41-4-140(e).

Compliance.

The attorney general has opined that a jail is not necessarily unconstitutionally overcrowded simply because it houses more inmates than its Tennessee Corrections Institute (TCI) capacity. Op. Tenn. Atty. Gen. 89-65 (April 28, 1989) (citing *Feliciano v. Barcelo*, 497 F.Supp. 14, 35 (D.P.R.1979)). It is clear that TCI and American Correctional Association (ACA) standards do not establish the constitutional standard. Id. (Citing *Grubbs v. Bradley*, 552 F.Supp. 1052, 1124 (M.D. Tenn. 1982). See also Op. Tenn. Atty. Gen. 02-015 (February 6, 2002) (same).

It is important to note that the Constitution does not require the county to operate the jail in accordance with criminological doctrine or to employ only experts in its management. See *Grubbs v. Bradley*, 552 F.Supp. 1052, 1124 (D.C. Tenn. 1982). "And, while guidelines of professional organizations such as the American Correctional Association represent desirable goals for penal institutions, neither they nor the opinions of experts can be regarded as establishing constitutional minima." *Id.* Likewise, a lack of compliance with Tennessee Corrections Institute requirements does not mandate a finding of a constitutional violation. *Bradford v. Gardner*, 578 F.Supp. 382, 384 (E.D. Tenn. 1984). See also *Jones v. Mankin*, 1989 WL 44924, *7 (Tenn. Ct. App. 1989) ("While we find the Tennessee Corrections Institute's staffing recommendations interesting and helpful, they do not provide a basis to conclude that the sheriff is not able to operate the jail with his existing staff.").

Although violations of state minimum standards or the county's policies regarding operation of the jail may constitute negligence, violations of state law do not constitute deliberate indifference. *Davis v. Fentress County Tennessee*, 6 Fed.Appx. 243, 250 (6th Cir. 2001). See also *Roberts v. City of Troy*, 773 F.2d 720, 726 (6th Cir. 1985), citing *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984) ("The mere failure to comply with a state regulation is not a constitutional violation.").

CHAPTER 6

WORKHOUSES

Workhouse Act of 1891

While the sheriff is, of right, entitled to the custody of the jail for the safekeeping of prisoners awaiting trial, transfer, or execution, etc., this will not prevent the county court from declaring the jail a county workhouse for the confinement of prisoners who are under sentence therein, provided the jail is of sufficient capacity to accommodate both classes of prisoners, or may be made so by additions thereto. While the jail is so jointly occupied, workhouse prisoners will be under the control of the superintendent, who will provide for them as required in this act, but all other prisoners will be committed to the care and custody of the sheriff. *State v. Cummins*, 42 S.W. 880 (Tenn. 1897).

Workhouses Authorized

The Counties, through their county legislative bodies, are authorized and empowered to establish, construct and maintain portable, movable or stationary workhouses, as the legislative bodies may, in their discretion and wisdom, deem advisable for the best interest of the county. Prisoners receiving workhouse sentences by the circuit or criminal court of the county shall be sentenced to the workhouse as may be provided by the county legislative body. T.C.A. § 41-2-101(a).

The county legislative body may provide lands, buildings and articles of any kind as may be necessary for a workhouse for the county. T.C.A. § 41-2-101(b).

Pursuant to T.C.A. §§ 41-2-101(a), 41-2-101(c), and 41-2-103, counties have the authority to establish, construct and maintain portable or moving workhouses for the convenience of working prisoners upon the public highways and in working out their sentences in any labor assigned them. T.C.A. § 41-2-101(c).

Jail as Workhouse

In any county not having provided a separate workhouse, the county legislative body may declare its jail to be a workhouse if, in the opinion of the members of the county legislative body, the jail is of sufficient capacity and suitable for the purpose. From and after such declaration the jail shall be known as, and shall be, the county workhouse, and the county shall have thereafter the benefit of all laws in the state applying to workhouses. T.C.A. § 41-2-102. Whenever the jail has been declared a workhouse, the sheriff shall be *ex officio* the superintendent of the workhouse. T.C.A. § 41-2-108.

Board of Workhouse Commissioners

When the county has established a separate workhouse, or the jail has been declared a workhouse, the county legislative body shall elect four competent persons, who, in conjunction with the county mayor, shall be known as the board of workhouse commissioners, of which the county mayor shall be, *ex officio*, chair of the board. T.C.A. § 41-2-104(a). Pursuant to the common law, county commissioners may not elect themselves to the board of workhouse commissioners. *State ex rel. v. Thompson*, 395, 246 S.W.2d 59 (Tenn. 1952) (Under the common law it is a violation of public policy for an appointing body to confer office upon one of its own members.). See *also* Op. Tenn. Atty. Gen. No. 04-070 (April 21, 2004) (A local legislative body cannot elect or appoint one of its own members to an office over which it has the power of election or appointment.); Op. Tenn. Atty. Gen. No. 98-004 (January 5, 1998); Op. Tenn. Atty. Gen. No. U92-129 (December 14, 1992); Op. Tenn. Atty. Gen. No. 88-166 (September 9, 1986).

Two of the workhouse commissioners shall serve for the term of one year and two for the term of two years; and annually thereafter, on the first Monday in January, the county legislative body shall elect two workhouse commissioners for the term of two years, and all vacancies shall be filled by like election for the unexpired term of the workhouse commissioner whose place is to be supplied. T.C.A. § 41-2-104(b).

Workhouse commissioners shall take an oath faithfully to discharge and perform the duties of their office, which oath shall be filed with the county clerk, and a record of the same made on the minutes of the county legislative body; and they shall appoint one of their number secretary. T.C.A. § 41-2-104(c). The board of workhouse commissioners shall each receive such compensation as may be fixed by the county legislative body to be paid quarterly upon warrant of the executive. T.C.A. § 41-2-104(g).

Duties and Powers.

Where a separate workhouse has been established, the workhouse commissioners shall have charge, supervision and control of the workhouse in all of its departments, the convicts, the appointment or selection of a superintendent of the workhouse, all necessary guards and other employees, the discharging thereof at any time, in the discretion of the workhouse commissioners, and generally to regulate and control that department of the county's business. T.C.A. § 41-2-104(d).

Three members of the board shall constitute a quorum for the transaction of business. The board of workhouse commissioners shall:

- (1) Meet once each month, and more often if necessary, to transact business, at the office of the county mayor;
- (2) Keep, in a well-bound book to be furnished by the county, full and complete minutes of their proceedings;

(3) Examine all accounts submitted to them by the superintendent, approve the accounts if found correct, and enter them on their minutes, showing from whom supplies were furnished and for what purpose and the amount. The chair and secretary shall sign the accounts and deliver them to the county mayor, who shall issue a warrant for their payment and keep a record of the accounts, designating to whom issued and for what purpose and shall preserve the vouchers; and

(4) Visit and inspect the workhouse prisoners, where at work, as often as necessary.

T.C.A. § 41-2-104(e) and (f).

Quarterly Audit.

The board of workhouse commissioners shall, at the close of each quarter and at least two days before the meeting of the county legislative body, submit the book kept by the superintendent and the minute book of the board to the county mayor, for settlement and comparison with the audited account kept in the county mayor's office. If found correct, the county mayor shall endorse on such books "examined and approved" and sign the books officially. T.C.A. § 41-2-106.

Operation of Workhouse Under Control of County Mayor

As an alternative to a board of workhouse commissioners, any county may, upon the recommendation of the county mayor and a resolution passed by a two-thirds vote of the county legislative body, place the operation, supervision and control of the county workhouse under the administrative control of the county mayor. If a county chooses this alternative, the county mayor shall possess the same powers, duties and responsibilities as are provided by law for the board of workhouse commissioners. T.C.A. § 41-2-104(h)(1).

The provisions of T.C.A. § 41-2-104(h) shall not apply in any county having a population of not less than 319,625 nor more than 319,725 according to the 1980 federal census or any subsequent federal census. T.C.A. § 41-2-104(h)(2).

Operation of Workhouse Under Control of Sheriff

As a further alternative to a board of workhouse commissioners, any county may, upon recommendation by the county mayor and by resolution of the county legislative body, place the operation, supervision and control of the county workhouse under the administrative control of the county sheriff. Administrative control of the workhouse shall be subject to such terms and conditions as the county legislative body and the sheriff may agree. Notwithstanding any provisions of law to the contrary, the agreement between the county legislative body and the sheriff may provide for the payment of additional compensation to the sheriff for such services. If a county

chooses this further alternative, the sheriff shall possess the same powers, duties and responsibilities as are provided by law for the board of workhouse commissioners, unless otherwise provided by the agreement between the county legislative body and the sheriff. T.C.A. § 41-2-104(h)(1).

The provisions of T.C.A. § 41-2-104(h) shall not apply in any county having a population of not less than 319,625 nor more than 319,725 according to the 1980 federal census or any subsequent federal census. T.C.A. § 41-2-104(h)(2).

Workhouse Superintendent

Pursuant to T.C.A. § 41-2-107(a), **the board of workhouse commissioners appoints the superintendent of the workhouse.** The superintendent is appointed on the first Monday in January of every even-numbered year and hold office for two years, unless sooner suspended or removed, as provided in T.C.A. § 41-2-104(d).

The superintendent shall take an oath and give bond for the faithful discharge of such superintendent's duty with two or more approved sureties or an approved surety company in the sum of \$1,000, payable to the state for the use of the county, before the county mayor, which oath and bond shall be filed with the county clerk and record of the oath and bond made on the minutes of the county legislative body. T.C.A. § 41-2-107(b).

The salary of the superintendent shall be fixed by the workhouse commissioners and shall be paid quarterly on the warrant of the county mayor. T.C.A. § 41-2-107(c).

Sheriff as Superintendent

Whenever the jail in any county has been declared a workhouse, as provided in T.C.A. § 41-2-102, the sheriff shall be *ex officio* the superintendent of the workhouse. All persons liable to imprisonment for safekeeping, whether charged with felonies or misdemeanors, shall be confined therein, securely kept and properly cared for. T.C.A. § 41-2-108.

Accounts and Reports.

The superintendent is required by law to keep or cause to be kept in a well-bound book to be furnished by the county an account of all supplies, implements and tools purchased for the workhouse, keeping the account for supplies separate from implements and tools. T.C.A. § 41-2-110(a)(1).

When a purchase is made, the superintendent is required to obtain an itemized bill specifying from whom purchased, the kind and amount of the articles purchased, and the date. The superintendent must approve the bill, enter it on the books, and present it to the workhouse commissioners for their approval. T.C.A. § 41-2-110(a)(2) and (3).

The superintendent must make quarterly reports to the workhouse commissioners of the whole working system, the amount of the work done and its estimated value, the amount of current expenses for supplies and for tools and implements, and any other matter deemed necessary by the superintendent or ordered by the commissioners or the county legislative body. T.C.A. § 41-2-110(b).

Sentence to County Workhouse

It is the duty of the judges of the circuit or criminal courts, whenever prisoners are convicted of any offense for which they are confined in the workhouse, to sentence such prisoners to the workhouse of the county, portable, movable or stationary, as may be provided and established in the county. T.C.A. § 41-2-103.

In all cases where a person is by law liable to be imprisoned in the county jail for safekeeping or punishment, confinement in the workhouse, if one is provided, may, in the discretion of the court, be substituted. T.C.A. § 41-2-113.

Sentence to Hard Labor.

In all cases where a person is by law liable to be imprisoned in the county jail for punishment or for failure to pay a fine, such person shall be sentenced to be confined, and shall be confined at hard labor in the county workhouse until the expiration of the sentence of imprisonment or, subject to the limitations imposed by T.C.A. § 40-24-104 (Nonpayment of Fines), until the fine has been worked out, paid or secured to be paid. T.C.A. § 41-2-111(a).

All persons convicted of a felony, whose imprisonment has been by the jury commuted to imprisonment in the county jail, shall be compelled to work out the term of imprisonment at hard labor in the county workhouse in the county where convicted. T.C.A. § 40-23-105.

Fine Accompanying Sentence to Workhouse.

When any person is sentenced to the workhouse, the judge of the court trying the case shall fix the fine in each case against the prisoner at a sum equal to the state and county tax provided by law provided that a greater fine may be entered, in the discretion of the court. T.C.A. § 41-2-112.

Statement of Sentence.

A certified statement of the sentence of each prisoner shall be made out on printed blanks provided for the purpose and delivered to the superintendent of the workhouse, and also to the county mayor, by the clerk of the court trying the case, and shall specify:

- (1) The name of the convict;

- (2) Date of sentence;
- (3) Crime for which committed;
- (4) The term of imprisonment; and
- (5) The amount of fine and costs; and the superintendent and the county mayor shall enter the amount in a book provided by the county for that purpose.

T.C.A. § 41-2-116(a).

The superintendent shall also keep a record of the age, sex, complexion, color of hair and eyes and nationality of each convict. T.C.A. § 41-2-116(b).

Workhouse Sentence Beginning after Term in Penitentiary

When any convict is sentenced by the courts to serve a sentence in the county workhouse after a term of imprisonment in the penitentiary, the judge of the court shall, in the commitment to the penitentiary, cause this fact to appear, and shall direct the warden of the penitentiary to notify the superintendent of the workhouse of the time when the convict will be discharged. It is the warden's duty to deliver the convict up on the order of the superintendent. T.C.A. § 41-2-117.

Labor Prescribed for Workhouse Prisoners

The board of workhouse commissioners shall prescribe the kind of labor at which the prisoners shall be put provided that when practicable, they shall be worked on the county roads in preference to all other kinds of labor. T.C.A. § 41-2-105.

Convicted Prisoners.

Officials having responsibility for the custody and safekeeping of defendants may promulgate and enforce reasonable disciplinary rules and procedures requiring all able-bodied inmates to participate in work programs. Such rules and procedures may provide appropriate punishments for inmates who refuse to work, including, but not limited to, increasing the amount of time the defendant must serve in confinement or changing the conditions of the defendant's confinement, or both. Any such increase in the amount of time a defendant must serve for refusing to participate in a work program shall not exceed the sentence originally imposed by the court. T.C.A. § 40-35-317(b).

The legislature has clearly stated its intent to require able-bodied inmates to participate in work programs. Under T.C.A. § 40-35-317(b), officials in charge of county jails or workhouses may promulgate and enforce disciplinary rules requiring such work and punishing inmates refusing to work. Op. Tenn. Atty. Gen. No. 83-363 (August 15, 1983).

Pursuant to T.C.A. § 41-2-147(a), the sheriff or workhouse superintendent having responsibility for the custody of any person sentenced to a local workhouse pursuant to the provisions of T.C.A. § 40-35-302 (misdemeanor sentence), T.C.A. § 40-35-306 (split confinement), T.C.A. § 40-35-307 (probation coupled with periodic confinement) or T.C.A. § 40-35-314 (felon confined in local jail) shall, when such person has become eligible for work-related programs pursuant to such sections, be authorized to permit the person to perform any of the duties set out in T.C.A. § 41-2-123 or T.C.A. § 41-2-146.

Road Work.

All prisoners sentenced to the county workhouse under the provisions of T.C.A. § 40-23-104 (Sentence to Workhouse for Felony Term) or former T.C.A. § 40-35-311 shall be worked on the county roads under the supervision of the chief administrative officer of the county highway department when, in the opinion of such chief administrative officer, a sufficient number are available to pay the county for the necessary expense incurred for keeping and caring for them. Such prisoners may be used by municipalities within the county by mutual agreement between the county sheriff or superintendent of the county workhouse and the chief executive officer of the municipality. T.C.A. § 41-2-123(a).

When any prisoner has been sentenced to imprisonment in a county workhouse for a period not to exceed 11 months and 29 days, the superintendent of the county workhouse is authorized to permit the prisoner to work on the county roads or within municipalities within the county on roads, parks, public property, public easements or alongside public waterways up to a maximum of 50 feet from the shoreline. T.C.A. § 41-2-123(b)(1).

It is the duty of such prisoners to pick up and collect litter, trash and other miscellaneous items that are unsightly to the public and that have accumulated on the county roads. All prisoners participating in this work program shall be under the supervision of the superintendent of the county workhouse or the superintendent's representative. **Prisoners used by a municipality shall be supervised by representatives of the municipality.** The prisoners may be used by municipalities for such duties or manual labor as the municipality deems appropriate. T.C.A. § 41-2-123(b)(2).

Under state law, neither the state nor any municipality, county or political subdivision thereof, nor any employee or officer thereof, shall be liable to any person for the acts of any prisoner while on a work detail, or while being transported to or from a work detail, while attempting an escape from a work detail, or after escape from a work detail. T.C.A. § 41-2-123(d)(1).

Under state law, neither the state nor any municipality, county, or political subdivision thereof, nor any employee or officer thereof, shall be liable to any prisoner or prisoner's family for death or injuries received while on a work detail other than for medical treatment for the injury during the period of the prisoner's confinement. T.C.A. § 41-2-123(d)(2).

Jail Maintenance Work.

When any prisoner has been sentenced to imprisonment in a county workhouse or is serving time in the county workhouse pursuant to an agreement with the Department of Correction, the superintendent of the county workhouse is authorized to permit the prisoner to participate in work programs. T.C.A. § 41-2-146(a).

Litter Grant Program.

The commissioner of transportation is authorized to make grants to the several counties of the state, either through the office of sheriff or that of the county mayor or other appropriate official, for the purpose of funding programs to collect litter and trash along county, state and interstate roads and highways within the respective counties. Such grants may provide for the use of labor of prisoners sentenced to the county workhouse, and may fund expenses including, but not limited to, salaries, administration and the purchase, maintenance and operation of equipment. Not more than 10 percent of the funds awarded by a grant under T.C.A. § 41-2-123(c) shall be expended to advertise or promote a litter and trash collection program, and no part of such funds shall be used to purchase supplies, materials or equipment displaying the name or likeness of the administrator of such program or of any other individual. Local county officials and other recipients may submit applications outlining a plan for litter abatement that may include recycling programs to the Department of Transportation. All applications shall be subject to prior review and approval by the governor or designated agent. T.C.A. § 41-2-123(c).

Work Contracts with Other Counties.

Any county not desiring to work its workhouse prisoners may, through its county mayor and by direction of the county legislative body, contract with any other county for the custody and employment of such prisoners. The prisoners shall then be worked and guarded by the county contracting to take them, and shall be subject to any rules that may be established by the workhouse commissioners of such county. T.C.A. § 41-2-124.

Contracts with Department of Transportation.

The Tennessee Department of Transportation is authorized to enter into contracts with county officials charged by law to work workhouse prisoners in the construction and reconstruction of roads. The contract will allow credit to the county for the work of prisoners on state or federal roads as approved by TDOT or the appropriate federal department. T.C.A. § 41-2-125.

Sentence Reduction Credits.

Work performed by a prisoner under T.C.A. § 41-2-123(b) shall be credited toward reduction of the prisoner's sentence as follows: For each one day worked on the road by the prisoner, the prisoner's sentence shall be reduced by two days. T.C.A. § 41-2-123(b)(3). Work performed by a prisoner under T.C.A. § 41-2-146 shall be credited toward reduction of the prisoner's sentence as follows: For each one day worked on such duties by the prisoner, the sentence shall be reduced by two days. T.C.A. § 41-2-146(b). See *also* T.C.A. § 41-2-147 (Work performed by a prisoner under T.C.A. § 41-2-147 shall be credited toward reduction of such prisoner's sentence as follows: For each one day worked on such duties by the prisoner, the sentence shall be reduced by two days.); Op. Tenn. Atty. Gen. No. 03-125 (September 29, 2003).

Any prisoner receiving sentence credits under T.C.A. § 41-2-147 is not eligible for good time credits authorized by T.C.A. § 41-2-111. T.C.A. § 41-2-147(c).

FELONY OFFENDERS. Sentence reduction credits for good institutional behavior as authorized by T.C.A. § 41-21-236 shall likewise apply in accordance with the terms of T.C.A. § 41-21-236 and under the criteria, rules and regulations established by the Department of Correction to all felony offenders serving sentences of one or more years in local jails or workhouses and to all inmates serving time in county jails or workhouses because the inmate's commitment to the Department of Correction has been delayed due to invocation of the governor's emergency overcrowding powers or through an injunction from a federal court restricting the intake of inmates into the Department of Correction. When T.C.A. § 41-21-236 is applied to such offenders, references therein to "warden" are deemed references to the superintendent or jailer, as appropriate. Such felony offenders are not eligible to receive any other sentence credits for good institutional behavior provided that in addition to the sentence reduction credits for good institutional behavior as authorized by T.C.A. § 41-21-236, such felony offenders may receive any credits for which they are eligible under Title 41, Chapter 2, for work performed or satisfactory performance of job, educational or vocational programs. T.C.A. § 41-21-236(d).

With respect to sentence reduction credits, when a state inmate is serving a sentence in a county workhouse the superintendent or jailer is deemed to be a warden pursuant to T.C.A. § 41-21-236(d) and is, therefore, required to keep written records on a monthly basis of the sentence reduction credits a prisoner has earned. T.C.A. § 41-21-236(a)(3). Because prisoners may become ineligible to earn sentence reduction credits, see T.C.A. § 41-21-236(b)(7), and may also be deprived of sentence reduction credits they have already earned, see T.C.A. § 41-21-236(a)(5), (6), these records must reflect any actions that either render a prisoner ineligible to earn sentence credits or deprive a prisoner of previously earned sentence reduction credits. *Cooley v. May*, 2001 WL 1660830, *6 (Tenn. Ct. App. 2001).

“Although no statute or rule expressly requires a sheriff housing a state prisoner to send an accounting of a prisoner's sentence reduction credits to the Department of Correction, this obligation is a necessary part of T.C.A. § 41-21-236(a)(3). It would be nonsensical to allow state prisoners to earn sentence reduction credits while they are incarcerated in a county jail but then not to require a sheriff to inform the Department of Correction – the legal custodian of the prisoner – how many sentence reduction credits the prisoner had earned or forfeited on a monthly basis.” *Id.*

Good Time Credit.

Each prisoner who has been sentenced to the county workhouse for any period of time less than one year on either a misdemeanor or a felony, and who behaves uprightly, shall have deducted from the sentence imposed by the court time equal to one quarter of such sentence. In calculating the amount of good time credit earned, the one-quarter reduction shall apply to the entire sentence, including pretrial and post-trial confinement. Fractions of a day's credit for good time of one-half or more shall be considered a full day's credit. If any prisoner violates the rules and regulations of the workhouse or otherwise behaves improperly, the sheriff or superintendent of the workhouse may revoke all or any portion of such prisoner's good time credit provided that the prisoner is given a hearing in accordance with due process before a disciplinary review board and is found to have violated the rules and regulations of the institution. T.C.A. § 41-2-111(b).

Disciplinary Review Board.

Each county is required to have a disciplinary review board composed of six impartial members, one or more of whom may be members of the workhouse staff. The members of the disciplinary review board are appointed by the sheriff or the superintendent of the workhouse, subject to approval by the county legislative body. Members serve for a period of two years, except that appointments made to fill unexpired terms are for the period of such unexpired terms. No less than one and no more than three of the members of the disciplinary review board are required to transact the business authorized by law. Members of the board, while acting in good faith, shall not be subject to civil liability relative to the performance of duties delegated to the board by law. T.C.A. § 41-2-111(c).

The prisoner shall be given notice of the disciplinary hearing and shall have the right to call witnesses in the prisoner's behalf. The decisions of the disciplinary review board for workhouse inmates may be appealed to the sheriff or workhouse superintendent. T.C.A. § 41-2-111(d).

Except in Shelby County, the county legislative body is authorized to establish the rate of compensation for members of the disciplinary review board. T.C.A. § 41-2-111(c)(5).

Work Mandatory - Punishment for Refusing to Work.

Notwithstanding any other provision of law to the contrary, except as provided in T.C.A. § 41-2-150(b), any person sentenced to the county workhouse, for either a felony or misdemeanor conviction, in counties with programs whereby prisoners work either for pay or sentence reduction or both, shall be required to participate in such work programs during the period of incarceration. Any prisoner who refuses to participate in such programs when work is available shall have any sentence reduction credits received pursuant to the provisions of T.C.A. § 41-2-123 or T.C.A. § 41-2-146 reduced by two days of credit for each one day of refusal to work. Any prisoner who refuses to participate in such work programs who has not received any sentence reduction credits pursuant to such sections may be denied good time credit in accordance with the provisions of T.C.A. § 41-2-111(b), and may also be denied any other privileges given to inmates in good standing. T.C.A. § 41-2-150(a).

The only exceptions to the work requirements of T.C.A. § 41-2-150(a) shall be for those who, in the opinion of the workhouse superintendent, would present a security risk or a danger to the public if allowed to leave the confines of the workhouse, and those who, in the opinion of a licensed physician or licensed medical professional, should not perform such labor for medical reasons. T.C.A. § 41-2-150(b).

Pursuant to T.C.A. § 41-2-120(a), any prisoner refusing to work or becoming disorderly may be confined in solitary confinement or subjected to such other punishment, not inconsistent with humanity, as may be deemed necessary by the workhouse superintendent for the control of the prisoners, including reducing sentence credits pursuant to the procedure established in T.C.A. § 41-2-111. Such prisoners refusing to work, or while in solitary confinement, shall receive no credit for the time so spent. T.C.A. § 41-2-120(b).

Other Work Permitted.

Inmates housed in a county workhouse may voluntarily perform any labor on behalf of a charitable organization or a nonprofit corporation or a governmental entity. T.C.A. § 41-3-106(b)(2). See also T.C.A. § 41-2-148(b)(2); Op. Tenn. Atty. Gen. No. 03-075 (June 18, 2003).

Inmate Labor for Private Purposes Prohibited.

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county workhouse may employ, require or otherwise use any such inmate to perform labor that will or may result directly or indirectly in the sheriff's, jailer's or other person's personal gain, profit or benefit or in gain, profit or benefit to a business partially or wholly owned by the sheriff, jailer or other person. This prohibition applies regardless of whether the inmate is or is not compensated for

any such labor. T.C.A. § 41-2-148(a). See also Op. Tenn. Atty. Gen. No. 03-075 (June 18, 2003).

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county workhouse may permit any inmate to perform any labor for the gain, profit or benefit of a private citizen, or for-profit corporation, partnership or other business unless such labor is part of a court-approved work release program or unless the work release program operates under a commission established pursuant to T.C.A. § 41-2-134. T.C.A. § 41-2-148(b)(1). See also Op. Tenn. Atty. Gen. No. 03-125 (September 29, 2003).

Penalties.

Any sheriff, jailer or other person responsible for the custody of an inmate housed in a local facility who violates the provisions of T.C.A. § 41-2-148, upon the person's first such conviction therefor, commits a misdemeanor and shall be punished by a fine equal to the value of the services received from the inmate or inmates and imprisonment for not less than 30 days nor more than 11 months and 29 days. Upon a second or subsequent conviction for a violation of T.C.A. § 41-2-148, such sheriff, jailer or other person is guilty of a felony and shall be punished by a fine of not less than the value of the services received from the inmate or inmates nor more than \$5,000 and imprisonment for not less than one nor more than five years. If the person violating T.C.A. § 41-2-148 for the second or subsequent time is a public official, in addition to the punishment set out above, such person shall immediately forfeit such person's office and shall be forever barred from holding public office in this state. T.C.A. § 41-2-148(d)(1). See *In re Williams*, 987 S.W.2d 837 (Tenn. 1998).

Any private citizen, corporation, partnership or other business knowingly and willfully using inmate labor in violation of T.C.A. § 41-2-148(b) commits a Class A misdemeanor and, upon conviction, shall be punished by a fine of \$1,000 and by imprisonment for not more than 11 months and 29 days. Each day inmate labor is used in violation of T.C.A. § 41-2-148(b) constitutes a separate offense. T.C.A. § 41-2-148(d)(2).

Work Release

All counties, except Shelby County, are authorized to permit certain prisoners to leave the workhouse or jail during reasonable and necessary hours for occupational, scholastic or medical purposes as provided in T.C.A. §§ 41-2-127 - 41-2-132.

Shelby County is required to permit certain prisoners to leave the workhouse or jail during reasonable and necessary hours for occupational, scholastic or medical purposes as provided in T.C.A. §§ 41-2-127 - 41-2-132.

Misdemeanor Prisoners.

Upon the application of the superintendent of the workhouse, the board of workhouse commissioners, if there is one, otherwise the judge of the circuit court, criminal court or general sessions court having jurisdiction in the county, may by order direct the superintendent of the workhouse to permit a prisoner serving a misdemeanor sentence to leave the workhouse during necessary and reasonable hours for the purpose of working at the prisoner's employment, conducting the prisoner's own business or other self-employed occupation including, in the case of a woman, housekeeping and attending to the needs of her family, seeking employment, attending an educational institution or securing medical treatment. T.C.A. § 41-2-128(a).

Similarly, the judge of the circuit court, criminal court or general sessions court having jurisdiction in the county where the person is imprisoned may, upon application of the sheriff, enter a like order for the same purpose for jail prisoners. The order may be rescinded or modified at any time with or without notice to the prisoner. T.C.A. § 41-2-128(a).

Felony Prisoners.

Prisoners serving a felony sentence in the county workhouse may be allowed to leave the county workhouse during necessary and reasonable hours for occupational, scholastic or medical purposes. T.C.A. § 41-2-128(b).

Any individual serving a felony sentence based on a crime against person or property who has a previous sentence defined as a felony against person or property, as defined by the laws of the state of Tennessee or any other state of the United States or by the criminal statutes of the United States, shall not be eligible to apply for release from the county workhouse for occupational, scholastic or medical purposes. T.C.A. § 41-2-128(b).

DUI Offenders.

Notwithstanding the provisions of T.C.A. § 41-2-128, T.C.A. § 55-10-403(a)(1) or T.C.A. § 55-50-504(a)(2) to the contrary, **the judge may sentence persons convicted of a second violation of T.C.A. § 55-10-401 (driving under the influence of an intoxicant or drug) or T.C.A. § 55-50-504(a)(2) (driving while license cancelled, suspended or revoked), to the work release program established pursuant to T.C.A. § 41-2-128 if, prior to doing so, the following conditions have been met:**

- (1) An investigative report is completed and considered by the judge, with such report confirming the defendant's employment and the employer's willingness to participate in the work release program, including, but not limited to, reports to monitor the defendant's attendance, performance, and response to treatment;

(2) A plan acceptable to the judge is established to provide for monitoring the defendant's whereabouts while at or on the defendant's job; and

(3) The defendant agrees to defray, to the best of the defendant's ability, the cost of incarceration and treatment.

T.C.A. § 41-2-128(c)(1).

No person convicted of a second violation of T.C.A. § 55-10-401 (driving under the influence of an intoxicant or drug) that results in personal injury to, or the death of, another may be sentenced to a work release program. T.C.A. § 41-2-128(c)(2).

As a condition of participation in a work release program, the defendant must agree to be screened, at least daily, for the purpose of determining whether the person has consumed alcohol or illegal drugs. T.C.A. § 41-2-128(c)(3).

A defendant permitted to participate in a work release program pursuant to T.C.A. § 41-2-128 shall not be permitted to operate a motor vehicle while participating in the program and shall at all times remain in actual incarceration as provided by law when not actually at his or her place of employment or while being transported to or from his or her place of employment. T.C.A. § 41-2-128(c)(4).

At the time of sentencing, the judge shall cause the sentencing order to reflect the defendant's cost of incarceration and treatment and shall affix to the order, taking into consideration the defendant's ability to pay, the time and manner in which the costs are to be paid. The court shall enter the necessary orders requiring that the costs of incarceration and treatment be paid or secured including, but not limited to, orders of probation, which include as a condition thereof the payment of costs covered by T.C.A. § 41-2-128(c)(5). T.C.A. § 41-2-128(c)(5)(A).

When a defendant alleges that he or she is unable to pay pursuant to the terms set out by the order, the defendant may petition the court for modification as to the terms of payment. When it is determined that the defendant is unable to pay the entirety of the costs covered by T.C.A. § 41-2-128(c)(5) in the time and manner imposed by the court, any costs imposed against the defendant shall be pursuant to a schedule promulgated by the chief administrative officer of the county, or such officer's designee, with the schedule to be based upon the defendant's ability to pay the same. T.C.A. § 41-2-128(c)(5)(B). In promulgating the schedule governing costs and the amount to be paid by the defendant, the chief administrative officer of the county, or such officer's designee, shall consider the defendant's ability to pay and the disbursement schedule set forth in T.C.A. § 41-2-129, and shall incorporate payments ordered herein into the schedule. T.C.A. § 41-2-128(c)(5)(C). In no event shall a person be denied access to this program or be denied discharge from incarceration as a result of that person's inability to pay. T.C.A. § 41-2-128(c)(5)(D).

A county that permits a person convicted of a second offense violation of T.C.A. § 55-10-401 to be sentenced to a work release program must maintain records sufficient to allow an annual determination of whether such participation in any way diminishes the effectiveness of T.C.A. § 55-10-403(a)(1). T.C.A. § 41-2-128(c)(6).

On an annual basis, the county legislative body must conduct a public hearing to examine, monitor and evaluate the work release program operating under the authority of T.C.A. § 41-2-128(c) to ensure that all requirements of the law are being complied with and that the program is being operated in accordance with the law. As part of the public hearing, the county legislative body must discuss the program's effectiveness and compliance and hear the opinions of the public concerning the program. The county legislative body must give notice of the public hearing at least 30 days prior to the meeting. T.C.A. § 41-2-128(c)(7)(A). If the county legislative body finds through its public hearing or any other information the body may obtain that the work release program is being operated in compliance with the law, it shall so certify the program. Such certification shall be transmitted to all judges having jurisdiction over the offense of driving under the influence of an intoxicant in the county. T.C.A. § 41-2-128(c)(7)(B). If the county legislative body finds that a work release program is not being operated in compliance with the law, it shall not certify the program. Such failure of certification shall be transmitted to all judges having jurisdiction over the offense of driving under the influence of an intoxicant in the county. T.C.A. § 41-2-128(c)(7)(C).

Wages or Salary of Employed Prisoners - Cost for Boarding.

When a prisoner is employed for wages or salary, the superintendent of the workhouse collects the wages or salary or can require the prisoner to turn over the wages or salary when received. The superintendent of the workhouse must deposit the money in a trust checking account and must keep a ledger showing the status of the account of each prisoner. In the case of a jail prisoner, the sheriff shall collect the wages or salary of the prisoner or require the prisoner to turn over the wages or salary when received and shall perform the duties prescribed above. T.C.A. § 41-2-129(a).

Every prisoner gainfully employed is liable for the cost of the prisoner's board in the workhouse as fixed by the county board of workhouse commissioners. The superintendent of the workhouse shall charge the prisoner's account if the prisoner has one for such board. If the prisoner is gainfully self-employed the prisoner shall pay for such board, in default of which the prisoner's privilege under T.C.A. §§ 41-2-127 - 41-2-132 shall be automatically forfeited. If necessarily absent from the workhouse at a meal time, a prisoner shall at the prisoner's request be furnished with an adequate nourishing lunch to carry to work. If the workhouse food is furnished directly by the county, the superintendent of the workhouse shall account for and pay over such board payments to the county. T.C.A. § 41-2-129(b)(1) - (5).

The same provisions shall apply in the case of jail prisoners, except that the county legislative body shall have and exercise the duties and authority prescribed for the county board of workhouse commissioners in the case of workhouse prisoners, and the sheriff

shall have and exercise the duties and authority prescribed for the superintendent in the case of workhouse prisoners. T.C.A. § 41-2-129(b)(6).

By order of the county board of workhouse commissioners, or county legislative body if there is no county board of workhouse commissioners, or in the case of jail prisoners, the wages or salaries of employed prisoners shall be disbursed for the following purposes in the order stated:

- (1) The board of the prisoner;
- (2) Necessary travel expenses to and from work and other incidental expenses of the prisoner;
- (3) Support of the prisoner's dependents, if any, the amount to be determined by the local governing body of the county workhouse or by the county legislative body in the case of jail prisoners;
- (4) Payment of docket costs connected with the prisoner's commitment;
- (5) Payment either in full or ratably of the prisoner's obligations acknowledged by the prisoner in writing or that have been reduced to judgment; and
- (6) After deductions are made as set forth above, \$2, if there is at least a balance of \$2 in the account, shall be deducted each month from a prisoner's trust account for any month the prisoner is gainfully employed, to be applied to the county-operated victim's assistance program, if such a program exists in the county.

T.C.A. § 41-2-129(c).

Alternative Work Release Procedures.

As an alternative to the procedures described in T.C.A. § 41-2-129, subsections (a), (b) and (c), **the sentencing court may place a prisoner on work release subject to the terms and conditions that the sheriff and the sentencing court may agree upon.** T.C.A. § 41-2-129(d).

Employment of Prisoners in Another County.

The county board of workhouse commissioners, or the county legislative body if there is no county board of workhouse commissioners, may by order authorize the superintendent of the workhouse to arrange with another superintendent for employment of the prisoner in the other's county, and while so employed, to be in the other's custody but in other respects to be and continue subject to the commitment. T.C.A. § 41-2-130(a).

Likewise, the county legislative body may authorize the sheriff to arrange with the sheriff of another county, in the case of jail prisoners, for employment of any such prisoner in the other's county, to be in such sheriff's custody while so employed but in all other respects to be and continue subject to the commitment. T.C.A. § 41-2-130(b).

Grounds for Refusal to Release Prisoner.

The superintendent of a workhouse may refuse to permit a prisoner to exercise the privilege to leave the workhouse for any breach of discipline or other violation of workhouse regulations. Similarly, the sheriff may refuse to permit a prisoner to exercise the privilege to leave the jail for any breach of discipline or other violation of jail regulations. T.C.A. § 41-2-131.

Contracts with Other Governmental Agencies.

The superintendent of a workhouse is authorized, with the approval of the local governing body of the county workhouse, to jointly contract with any other governmental agency, whether federal, state, county or municipal, with regard to accepting prisoners in custody of such other governmental agency or agencies for purposes of participating in the work release program under the provisions of T.C.A. §§ 41-2-127 - 41-2-132. The sheriff is also authorized, with the approval of the county legislative body, to contract with another unit of government to accept prisoners in the custody of such government for the purpose of participating in the work release program. T.C.A. § 41-2-132.

Institution of Work Release Programs by Counties - Costs.

All counties in the state, except as set forth below, may institute a work release program in accordance with the provisions of Title 41, Chapter 2. T.C.A. § 41-2-133(a).

The provisions of T.C.A. § 41-2-133 do not apply to any county having a population of:

Not less than	Nor more than
14,400	14,500
19,500	19,600
20,200	20,300
28,000	28,100
30,400	30,500

according to the 1970 federal census or any subsequent federal census. T.C.A. § 41-2-133(b). As of 2006, the excepted counties include Bedford, Crockett, Dyer, Haywood, Lauderdale, and Tipton.

The state's share of the cost imposed on local governments by the work release program as instituted by T.C.A. § 41-2-132 are funded by the increase in state taxes apportioned by law to cities and counties that are not specifically earmarked for a particular purpose. T.C.A. § 41-2-133(c).

Work Release Commission.

Tennessee Code Annotated section 41-2-134(a) creates a commission in each county not excepted by T.C.A. § 41-2-133(b) with the authority to authorize prisoners to come under a work release program whenever any person has been committed to the workhouse or similar place of confinement and to approve educational programs established pursuant to T.C.A. § 41-2-145.

The commission as authorized in T.C.A. § 41-2-134 is authorized and empowered to permit prisoners to leave the workhouse during approved working hours to work at a place of employment and to earn a living to meet in whole or in part the cost of the prisoner's current financial obligations. The prisoner must return to the workhouse each day after work and may be released only for related rehabilitative purposes as recommended by the correctional/rehabilitation work release coordinator. T.C.A. § 41-2-134(b).

In Shelby and Davidson Counties, the commission shall be composed of not more than 12 members nor fewer than three members, who shall meet as three-member panels to review and approve applications for work release. In other counties, the commission shall be composed of three members. T.C.A. § 41-2-134(c)(1) and (c)(2).

In all counties:

- (1) The sheriff or workhouse superintendent shall appoint the members of the commission subject to the approval of the county legislative body;
- (2) Each member shall serve a four-year term; and
- (3) A person appointed to fill a vacancy shall serve for the remainder of the unexpired term.

T.C.A. § 41-2-134(c)(3).

The commission shall meet weekly or at the call of the sheriff at the sheriff's office. T.C.A. § 41-2-134(d).

Jurisdiction of Sentencing Court.

The sentencing court has no authority to grant a furlough to a defendant pursuant to the authority of T.C.A. § 40-35-316(a) for the purpose of allowing a defendant to work unless the defendant is held to and meets all of the eligibility and supervision requirements, testing standards and other criteria imposed by or pursuant to state law. T.C.A. § 40-35-316(b).

Petition to Come Under the Work Release Program.

A prisoner desiring to come under the work release program must file a petition with the work release coordinator of the correctional/rehabilitation division. The petition must be joined in by the sheriff and concurred with by the superintendent and approved by the commission. T.C.A. § 41-2-135.

Grounds for Removal from Program.

Any prisoner placed under the work release program may be taken out of the program for just cause by the commission. In the event a prisoner is taken out of the work release program, the prisoner must remain in the workhouse and complete his or her sentence. T.C.A. § 41-2-136.

Penalty for Failure to Return from Work on Time.

In the event a prisoner placed under the work release program does not return to the workhouse at the time specified by the superintendent or the work release coordinator, such failure to return constitutes prima facie evidence of intent to escape, and the prisoner shall be subject to such penalties as are imposed or shall hereafter be imposed under the general law of the state for persons charged with the crime of escape. T.C.A. § 41-2-137.

Monthly Report to Sentencing Judge.

The superintendent of the workhouse must file a monthly report with respect to each prisoner placed under the work release program with the judge by whom the prisoner was sentenced advising the judge as to the conduct and financial achievement of the prisoner. T.C.A. § 41-2-138.

Liability of Participating Prisoners for Program Costs.

Any prisoner placed under the work release program who has been convicted of a misdemeanor must pay to the workhouse, for housing, board and administration of the program, the sum of not less than six dollars nor more than \$28 for each day the prisoner works away from the workhouse, in addition to any fine imposed by the court. The above amount shall be determined by the board of workhouse commissioners established by T.C.A. § 41-2-134 and in accordance with T.C.A. § 41-2-129(b)(1). T.C.A. § 41-2-139.

Rules and Regulations Governing Work Release Program.

The sheriff, the correctional/rehabilitation work release coordinator, and the superintendent of the workhouse must establish rules and regulations for the orderly operation of the work release program. The rules and regulations must be approved by the commission. A violation of any rules and regulations so promulgated shall constitute cause for the removal of the prisoner from the program under the provisions of T.C.A. § 41-2-136. T.C.A. § 41-2-141.

Transfer to Department of Correction

Whenever the sheriff or superintendent in charge of the county workhouse or penal farm determines that a prisoner who is convicted and sentenced to the workhouse or penal farm under T.C.A. § 40-23-104 (Sentence to Workhouse for Felony Term), T.C.A. § 40-35-314 (Confinement in Local Jail or Workhouse) or former T.C.A. § 40-35-311 proves to be a troublemaker or does not adjust to the proper operation of the workhouse or penal farm and creates a problem, the sheriff or superintendent may present to the court that ordered the prisoner confined in the county workhouse or penal farm for the term of such sentence a petition setting forth the reasons why, in such officer's opinion, an order should be entered transferring the prisoner from the county workhouse or penal farm to the Department of Correction. T.C.A. § 41-2-121(a).

A copy of the petition must be served upon the prisoner by the sheriff and the prisoner then brought before the court to show cause why the prisoner should not be transferred from the county workhouse or penal farm to the department to serve out the term in the department in conformity with the allegations and prayer of the petition before the court. If the judge of the court that ordered the prisoner confined in the county workhouse or penal farm for the term of such sentence is not immediately available due to death, illness, recess or any other reason, the petition may be presented to, and acted upon by, any other judge of a court of equal or concurrent jurisdiction. T.C.A. § 41-2-121(b).

Care of Workhouse Prisoners

It is the duty of the superintendent to:

- (1) Discharge each prisoner as soon as such prisoner's time is out or upon order of the board of commissioners;
- (2) See that prisoners are properly guarded to prevent escape;
- (3) See that they are kindly and humanely treated and properly provided with clothing, wholesome food properly cooked and prepared for eating three times a day when at work;
- (4) See that they are warmly and comfortably housed at night and in bad weather;
- (5) See that when sick they have proper medicine and medical treatment, and, in case of death, are decently buried; and
- (6) Keep the males separate from the females.

T.C.A. § 41-2-109.

Medical Care of Workhouse Prisoners.

The county health officer or jail physician is required to attend on all workhouse prisoners while they remain in the jail building, after sentence to the workhouse, and give them such medicine and medical treatment as may be necessary. By law, the health officer and physician receive no additional compensation for such services other than their regular salary. T.C.A. § 41-2-118(a). If the county does not have a health officer or jail physician, the county may contract for medical services with a private physician. T.C.A. § 41-2-118(b).

Transfer to State Psychiatric Hospital.

Whenever the sheriff or superintendent or other official in charge of the county workhouse or penal farm determines that a prisoner convicted and sentenced to the workhouse or penal farm requires hospitalization for treatment of a mental illness, the official may seek the admission of the prisoner to a state psychiatric hospital under T.C.A. § 33-6-201, Title 33, Chapter 6, Part 4 or Title 33, Chapter 6, Part 5. T.C.A. § 41-2-122(a).

A prisoner from a workhouse or penal farm who is admitted to a state psychiatric hospital under T.C.A. § 33-6-201, Title 33, Chapter 6, Part 4, or Title 33, Chapter 6, Part 5, shall be returned to the workhouse or penal farm when the superintendent of the hospital determines that the prisoner no longer meets the standards under which the prisoner was admitted or when continued hospitalization is no longer advisable or beneficial. T.C.A. § 41-2-122(b).

Reimbursement for State Inmate Medical Care.

The state is liable for expenses incurred from the emergency hospitalization and medical treatment rendered to any state prisoner incarcerated in a county jail or workhouse provided that the prisoner is admitted to the hospital. The sheriff of the county in which the state prisoner is incarcerated must file a petition with the criminal court committing the state prisoner to the county jail or workhouse attaching thereto a copy of the hospital bills of costs for the state prisoner. It is the duty of the court committing the state prisoner to the county jail or workhouse to examine bills of costs, and if the costs are proved, the court is required to certify the fact thereon and forward a copy to the judicial cost accountant. The expenses for emergency hospitalization and medical treatment are paid in the same manner as court costs. T.C.A. § 41-4-115(b).

The state is responsible for the transportation costs and cost of any guard necessary when a state prisoner is admitted to a hospital or requires follow-up treatment. Such reimbursement is to be made according to the procedures established by T.C.A. § 41-8-106, but shall be in addition to the per diem established in T.C.A. § 41-8-106. T.C.A. § 41-4-115(c).

If a defendant serving a felony sentence in a local workhouse develops medical problems that the local workhouse is not equipped to treat, the court has the authority to transfer the defendant to the Department of Correction. T.C.A. § 40-35-314(e).

Charging Inmates for Issued Items.

Any county may, by a resolution adopted by a two-thirds vote of the county legislative body, establish and implement a plan authorizing the workhouse superintendent to charge an inmate committed to the county workhouse a fee, not to exceed the actual cost, for items issued to the inmate upon each new admission to the county workhouse. T.C.A. § 41-4-142(a).

Additionally, any county may, by a resolution adopted by a two-thirds vote of its county legislative body, establish and implement a plan authorizing the workhouse superintendent to charge an inmate committed to the workhouse a nominal fee set by the county legislative body at the time of adoption for the following special services, when provided at the inmate's request:

- (1) Participation in GED or other scholastic testing for which the administering agency charges a fee for each test administered;
- (2) Escort by correctional officers to a hospital or other health care facility for the purpose of visiting an immediate family member who is a patient at such facility; or
- (3) Escort by correctional officers for the purpose of visiting a funeral home or church upon the death of an immediate family member.

T.C.A. § 41-4-142(b).

A plan adopted pursuant to T.C.A. § 41-4-142(a) or (b) may authorize the workhouse superintendent to deduct the amount from the inmate's workhouse trust account or any other account or fund established by or for the benefit of the inmate while incarcerated. Nothing in T.C.A. § 41-4-142 shall be construed as authorizing the workhouse superintendent to deny necessary clothing or hygiene items or to fail to provide the services specified in T.C.A. § 41-4-142(b) based on the inmate's inability to pay such fee or costs. T.C.A. § 41-4-142(c).

Jailer's Fees

The county legislative body of each county has the authority to pass a resolution fixing the amount of jailer's fees that may be applied to misdemeanor prisoners. The rate fixed shall apply to prisoners confined in the county jail or county workhouse or workhouses, but not meeting the conditions required for a state subsidy under Title 41, Chapter 8. T.C.A. § 8-26-105(a). A sample resolution is included in the appendix.

Reimbursement for Boarding State Prisoners.

The state is required to pay for the board of state prisoners in accordance with Title 41, Chapter 8. Within the time requirements of T.C.A. § 41-8-106, the number of prisoners held and bills for the same shall be made out and sworn to by the sheriff or workhouse superintendent and certified by the clerk. T.C.A. § 41-2-119(a) and (b).

Travel Restrictions

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county workhouse may permit any inmate housed therein to leave this state unless such travel is approved by the sentencing court, the inmate is in need of emergency medical treatment available only in another state, or there is a death or medical emergency in the inmate's immediate family. T.C.A. § 41-2-148(c).

CHAPTER 7

SERVICE OF CIVIL PROCESS

The purpose of this section is to provide a very general overview of Tennessee law regarding service of civil process, to examine a few of the most serious concerns in more detail, and, most importantly, to offer information that may help sheriffs avoid exposure to the legal pitfalls and liabilities that may arise if the sheriff or sheriff's officers fail to provide effective, sufficient service and return of service of civil process.

Definitions

The definitions below include commonly used terms related to service of process and are for the purposes of this chapter only. Most are condensed or simplified when compared to their meanings as "legal terms of art." Nearly all are found in *Black's Law Dictionary*, 7th Edition (1999), where they are more fully defined.

Action – Any judicial proceeding which, if conducted to the court's final decision, will result in a judgment or decree. See also, "Suit."

Attachment – The procedure whereby the court takes control of specific property that is located in the court's jurisdiction.

Body Attachment – Locally used language for "Body Execution." See below.

Body Execution – A court's order to take a named person into custody, most often to bring the person before the court to pay a debt. Locally known as a "body attachment," it is most often used when child support has not been paid as ordered.

Complaint – The pleading that initiates a civil action. It states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief, i.e., damages.

Decree – The judgment of a court of equity or chancery. See also, "Judgment."

Execution – The act of carrying out a court's order. Also, judicial enforcement of a money judgment, most often through seizure and sale of the judgment debtor's property.

Fieri Facias – Judicial writ directing the sheriff to satisfy a money judgment from the debtor's property. A form of execution usually referred to simply as an execution.

Foreign Judgment – Any judgment, decree, or order of a court of the United States or of any other court that is entitled to full faith and credit in Tennessee.

Garnishment – An order to a third party, such as an employer, to turn over a debtor's property (such as wages or bank accounts) held by the third party.

Indemnity Bond – A bond given by the plaintiff to protect the sheriff or other officer against all damages and costs in cases where there is a dispute regarding the title to the property upon which the sheriff is executing the levy.

Injunction – A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.

Instanter Subpoena – A writ commanding the person to whom it is directed to appear before the court immediately.

Judgment – The official decision of a court of law upon the rights and claims of the parties to an action.

Judgment Creditor – A person having a legal right to enforce execution of a judgment for a specific sum of money.

Judgment Debtor – A person against whom a money judgment has been entered but not yet satisfied.

Levy – The court ordered seizure and sale of real or personal property or the money obtained from the sale, usually in order to satisfy a judgment. See also, "Levy of execution."

Levy of Execution – See "Levy."

"Not Found" – A return of service that signifies the defendant is believed to have left the jurisdiction for another county, state or foreign country.

"Not to Be Found in My County" – The return used when an officer cannot locate the defendant yet has no information about whether the defendant has left the jurisdiction.

Process – The means by which a defendant in a civil action is compelled to appear in court or through which a court compels compliance with its directives.

Proof of Service – An officer's written statement of what has been done under the process issued from the court for service. If service was made, the return must identify the person served and describe how service was

accomplished. If process is returned unserved, the officer must state the reason service could not be effectuated. See also, "Return of Process."

Return of Process – See "Proof of Service."

Sale on Execution — The procedures whereby levied real or personal property is advertised and sold to satisfy a judgment. See *also*, "Sheriff's Sale."

Sheriff's Sale – See "Sale on Execution" above.

Subpoena – A writ that commands a person to appear before the court or other tribunal.

Subpoena Duces Tecum – A subpoena ordering the witness to appear and bring specified records or documents.

Suit – See "Action" above.

Summons – A writ or order commencing the plaintiff's action that directs the defendant to file an answer to the complaint and to appear in court.

Unlawful Detainer – The unjustified retention of real property by one who was there first lawfully, such as a tenant, but who then refuses to vacate the premises despite the termination of the lease and the landlord's demand for possession.

Writ – A court's written order commanding the addressee to do or refrain from doing some specified act.

Writ of Attachment – An order directing the sheriff to seize the defendant's property in order to satisfy a judgment.

Writ of Possession – A court's order directing an officer to take specified property out of the defendant's possession and deliver it to the plaintiff.

Writ of Restitution – A court's order to the sheriff, issued after a hearing, to remove the defendant (most often a tenant), by force if necessary, from the property and restore peaceful possession of the premises to the plaintiff (most often a landlord), and to make a return within 20 days of how the officer executed the writ.

Writ of Supersedeas – A writ or bond that suspends a judgment creditor's power to levy execution, usually pending appeal.

Sheriff's Duty to Serve Civil Process

If confronted with the impending loss of your home, bank account, or personal belongings, how hard would you work to neutralize the threat? This question is relevant because the statutory duty of care for executing civil process in Tennessee demands that the sheriff:

Use, in the execution of process, a degree of diligence exceeding that which a prudent person employs in such person's own affairs.

T.C.A. § 8-8-201(10) (emphasis added).

While a sheriff's responsibility to serve civil process is not nearly as exciting as criminal law enforcement, nor as fraught with constitutional complications as jail operations, it *is* the means by which representatives of the sheriff's office are most likely to have contact with members of the business community, landlords, public and private organizations, civil attorneys, and many government agencies. Professional, competent service and execution of process enhances the reputation of the sheriff's office.

Conversely, disobedience of the command of the process, whether by negligence, ignorance, or indifference, not only harms the agency's reputation but may lead to an award of money damages or findings of contempt of court against the sheriff or the sheriff's deputies. T.C.A. § 8-8-207. It should be kept in mind that in many cases the acts of the deputy on the sheriff's behalf are deemed to be equivalent to those of the sheriff. T.C.A. §§ 29-18-115(d)(1) and 29-20-205.

Sanctions and penalties for various missteps along the civil process pathway vary. The aggrieved party may recover full damages from the sheriff for the harm caused by failure to comply with the orders contained on the process. T.C.A. § 8-8-207. The law also provides for a \$125 penalty against a sheriff who fails to execute and make return of any process issued by a general sessions court or a court of record within the time frames specified by statute. T.C.A. § 25-3-105(a)(1) and (b)(1). A sheriff or deputy who neglects or refuses to execute any process governed by Title 29 of the Code, which governs detainers, *i.e.*, evictions, "shall forfeit \$250 to the party aggrieved . . ." T.C.A. § 28-18-116.

Congress has not laid down rules for service of process; hence, it is generally governed by state laws. *Amy v. City of Watertown*, 130 U.S. 301, 304, 9 S.Ct. 530, 531, 32 L.Ed. 946 (1889). The *Tennessee Code Annotated* and the Tennessee Rules of Civil Procedure set forth requirements for legally effective service of civil process. Title 8 of the Code enumerates the duties of the sheriff, but several other titles include further particulars for executing specific kinds of process. Among the Rules of Civil Procedure, Rule 4, "Process," Rule 54, "Judgments and Costs," and Rule 69, "Execution on Judgments," are most relevant to understanding legal mandates to the sheriff regarding civil matters.

Generally, effective service of process consists of a few seemingly simple steps:

- (1) Mark on all process the date it was received by the sheriff. T.C.A. § 8-8-201(a)(4); § 20-2-103(a).
- (2) Serve the process; execute all writs and other process legally issued and directed to the sheriff. T.C.A. § 8-8-201(a)(5)(A).
- (3) Make a timely, due return of the process, either personally or by a lawful deputy. T.C.A. § 8-8-201(a)(5)(A).

Judicial interpretation of the law surrounding service of process is generally well settled; many of the most cited cases reach back to Tennessee Supreme Court decisions from the 19th century.

However, the sheriff's job is complicated by several factors. On one hand, the Rules of Civil Procedure supply detailed guidance for effective service. On the other, our state Supreme Court has held that, where a statute dealing with a particular type of judicial action contains specific provisions for process and service, that method is permissible and may be followed in lieu of the Rules. *State Board of Education v. Cobb*, 557 S.W.2d 276 (Tenn. 1977). Since statutes regarding specific kinds of judicial actions are spread throughout a multitude of Tennessee Code titles, and different laws enacted at different times occasionally appear to conflict, compliance can become complicated.

The legal terms related to process and its service are generally a product of English laws dating back to the 17th and 18th centuries. The words themselves are often arcane, antiquated, and do not blend easily with modern vocabulary. What, for instance, might a citizen envision when advised that the sheriff has left the office to carry out a "body execution," or is off serving a "body attachment?" Fortunately, the legal expectation for carrying out that function is far less harsh than might be contemplated by a layperson.

Another impediment for the sheriff's staff is the occasional confusion among the counties caused by variations in local customs about what name a particular kind of process is actually called. For example, the judicial order called a "writ of restitution" in one county may be called a "writ of possession" in another, despite the fact that service, execution, and the results of those actions are exactly the same in both cases.

How a Dispute Becomes a Lawsuit: The Complaint and Summons

Problems related to the sheriff's civil process duties most often arise because the process was improperly served, not served at all, or reflected an insufficient or inaccurate return.

All civil actions, whether equitable or legal, are commenced by filing a complaint with the clerk of the appropriate court. Rules 3 and 4.01, Tenn. R. Civ. P. When the civil complaint, *i.e.*, lawsuit, is filed, the clerk issues the required summons "forthwith." As of

July 1, 2005, a summons must be served within 90 days of the date issued, a far more relaxed rule than the prior limit of 30 days.

The summons is extraordinarily important. It gives the person to whom it is directed notice that he or she is being sued, explains the time limit within which an answer to the complaint must be filed, and warns the defendant that a default judgment will be rendered in the plaintiff's favor if no answer is filed. Rule 4.03(1), Tenn. R. Civ. P. Clearly, the consequences can be grave if the return indicates that summons was properly served when in fact it was not.

Rule 4 of the Tennessee Rules of Civil Procedure contains nine subsections and two addendums detailing the specific requirements for serving summons under nearly every imaginable circumstance, including, but not limited to, serving defendants within and outside the state, minors, incompetents, partnerships, corporations, the state or a state agency, the county or a municipality. Rule 4 also dictates requirements for personal service and service by mail, and mandates who is eligible to accept service in each eventuality. As noted earlier, it is also important to know whether a state statute exists regarding the method and means of proper service since the statute overrides the rules of civil procedure.

Return of Service

The return is made by the deputy who serves the process. It is simply a written statement that constitutes proof of service or otherwise explains what was done under the process issued by the court for service. *David v. Reaves*, 75 Tenn. 585, 590 (1881). **The return must either indicate that the command of the process was fully carried out or honestly state the facts that prevented compliance.** *Eaken v. Boyd*, 37 Tenn. 204 (1857).

Returns are to be made in ink “or some other nonerasable material or fluid.” Failure to follow this directive does not invalidate the return, but any deputy who violates the statute commits a Class A misdemeanor and is liable to any person harmed by the violation. T.C.A. § 20-2-111.

An inaccurate, carelessly made, or untruthful return is a serious matter that can lead to a damaging outcome for the parties and for the officer who may be penalized monetarily or otherwise held liable for his or her breach of duty. **The return must identify the person served and describe the manner in which service was accomplished.** Rule 4.03, Tenn. R. Civ. P. If the officer alleges on the return that the defendant is a resident of the county evading service of process, there must be a showing that a “diligent inquiry” was conducted, or the return is subject to be found untrue. *Willshire v. Frees*, 201 S.W.2d 675, 184 Tenn. 523 (1947).

In addition to the above-mentioned penalties and liabilities, T.C.A. § 25-3-101 allows for a judgment by motion to be obtained by a plaintiff against the sheriff if the sheriff or his deputy:

- (1) Fail to make due and proper return of an execution;
- (2) Make a false or insufficient return; or,
- (3) Fail to pay over money collected on an execution.

The time limitations for service and return of process vary greatly depending on the nature of the process itself. Some, such as orders of protection, instanter subpoenas, and orders for child custody transfer, are to be carried out immediately. Other forms of process, such as summons, may allow as much as 90 days for service.

Clearly, multitudinous legal mandates exist regarding what constitutes sufficient service and return of civil process, be they found in state statutes, the rules of civil procedure, case law, opinions of the attorney general, or some other legal authority or treatise. Sheriffs can seek guidance from their county attorney or some other attorney to assist in efforts to strictly comply with those mandates, and procedural details will not be examined at great length here.

Avoiding Difficulties, Dilemmas, and Disasters

There are a number of limitations, boundaries, and prohibitions that, if respected, go a long way toward protecting sheriffs and deputies from legal liability, customer hostility, berating judges, indignant attorneys, public embarrassment, unnecessary confusion, and messy courtroom entanglements. Whether the sheriff's office serves 1,000 or 500,000 civil papers each year, it is the mistakes that invariably draw the most attention and are longest remembered. The list below is surely not all encompassing but contains a number of suggestions for avoiding the aforementioned unpleasant sorts of attention.

Keep It Simple.

Good faith efforts to ensure the integrity of the judicial process in matters not directly related to the sheriff's duties can become a very slippery slope. The sheriff's office may find itself dragged into a quagmire of confusion and controversy among the parties, the clerk's office, or the attorneys. The good news is the sheriff is not responsible for guaranteeing that the system work as it should. Read the process and follow the order to the sheriff contained thereon unless the order is illegal, too ambiguous to understand, or obviously erroneous. In those cases, the attorneys or clerk can be asked for clarification or a corrected order.

The sheriff "*must look alone to the mandate in his hands*. If the judgment awarding such mandate is void, that is a matter to be taken advantage of by the defendant in the execution, and it is no part of the duty of the sheriff to protect [the plaintiff]." *Perdue v. Dodd, et als.*, 69 Tenn. 710 (Tenn. 1878). See also *McCoy v. Dail*, 65 Tenn. 137 (Tenn. 1873); *State, to Use of Josiah Grigsby v. Manly et al.*, 79 Tenn. 636 (Tenn. 1883); and *Shaw v. Holmes*, 51 Tenn. 692 (Tenn. 871). In other words, the sheriff has no dog in the

judicial hunt, and “cannot know, nor is it his province to inquire, what arrangements have been made between the principal and his securities.”

Levy On Disputed Property.

There is an important exception to the statutory mandates that a sheriff obey the command of the process virtually without question. **When executing a levy, no sheriff is required to seize any property the title of which is disputed, or to sell the same after levy, unless the plaintiff will first give an indemnity bond and security to the officer.** The bond then protects the sheriff against all damages and costs in consequence of the levy or sale. T.C.A. § 26-3-104. Protection extends only to disputes based on the claim of a third party and does not include the defendant’s objections that the property is exempt from execution, the execution is void, and so forth. *Baker v. Agey*, 21 Tenn. 13 (1840); *Hunter v. Agee*, 24 Tenn. 57 (1844).

The most efficient way to address this issue is for the plaintiff’s attorney to sign the indemnity bond, which requires no fee, at the time the levy order is sought. The plaintiff cannot be required to give an indemnity bond in advance. However, if none is given and a dispute over ownership of the property arises when the deputy goes to execute the levy, the deputy should suspend further action until the bond is given.

In the meantime, the judgment debtor may use the delay to remove, transfer, or abscond with the property designated for levy. It is unlikely the sheriff can spare personnel to wait at the scene for a bond to be given that may never actually arrive. The simple form below, adopted from a form used in Chancery Court for Knox County, is found at 16 Tenn. Prac., Debtor-Creditor Law and Practice § 19.04 (2005). The sheriff can perhaps enlist cooperation from the clerk’s office to make it easily available to the plaintiff’s attorney at the location where the levy order is filed.

INDEMNITY BOND OF PLAINTIFF: T.C.A. § 26-3-104

We, the Attorney for the Judgment Creditor and Surety, indemnify the Sheriff of _____ County, Tennessee, and all the Sheriff’s Deputies, and all and every person aiding the Sheriff in the premises, from harm, loss, damages, costs, suits, judgments and executions, that may at any time arise or be brought against the Sheriff or any of them for the levy or sale and that we shall pay any judgment that may be obtained against the Sheriff or any of them by virtue of the levy or sale.

Surety

THIS DAY _____ OF _____, 20____.

Service of Civil Process – Warrantless Searches.

“The service of civil process does not authorize a warrantless search of private property.” *State of Tennessee v. Harris*, 919 S.W.2d 619, 625 (1995). Failing to respect that legal fact invites disaster on two fronts. First, suit may be filed in federal court alleging a violation of civil rights pursuant to 42 U.S.C. §1983. There is no cap on damages in such actions, and attorneys’ fees are awarded to the prevailing plaintiff in addition to damages. Second, evidence of criminal conduct discovered under such circumstances is inadmissible in court, allowing the offender to escape prosecution even for serious felony offenses. It is crucial to distinguish civil from criminal procedural rules here, and the ramifications for not doing so can be astonishingly harsh. For that reason, the limits on an officer’s authority to enter or remain on the property are examined more comprehensively below.

The parameters are inflexible; the rule of law is that an officer attempting to serve civil process is permitted to go anywhere on the premises a (well behaved) member of the general public might be expected to go and no further. *State v. Marcus Ellis*, No. 01C01-9001-CR 00021, slip op. at 4, 1990 WL 198876, (Tenn. Crim. App., Nashville, Dec. 12, 1990).

The obligation to serve process indisputably gives officers the right to approach a dwelling and knock on the door. After all, the sheriff is required to “go to the house or place of abode of every defendant against whom the sheriff has process, before returning on the same that the defendant is not to be found.” T.C.A. § 8-8-201(a)(8). An individual has no expectation of privacy in the area in front of his residence that leads from the street to the front door, and what an officer sees while standing on the sidewalk between the street and door is not protected. *State v. Baker*, 625 S.W.2d 724, 727 (Tenn. Crim. App. 1981).

However, the Fourth Amendment to the United States Constitution and Article I, Section 7, of the Tennessee Constitution protect a citizen of this state from unreasonable searches and seizures of his dwelling and the curtilage that adjoins the dwelling. *State v. Prier*, 725 S.W.2d 667, 671 (Tenn. 1987); *Welch v. State*, 154 Tenn. 60, 289 S.W. 510 (1926).

Therefore, any significant departure from an area where the public is impliedly invited “exceed[s] the scope of the implied invitation and intrude[s] upon a constitutionally protected expectation of privacy.” *Id.* (quoting *State v. Seagull*, 95 Wash.2d 898, 632 P.2d 44, 47 (Wash.1981) (en banc)). And, while an officer attempting to serve process does have the right to go to the intended recipient’s home or “place of abode,” the officer may not enter the home itself without consent. Op. Tenn. Atty. Gen. No. 01-148 (September 24, 2001).

If it is obvious that no one is home, the deputy is at liberty to await the arrival of the residents. The deputy is not authorized to peer in windows or prowl around private, occupied, or fenced property. In *Harris*, the court pointedly stated: “Moreover, nothing in the law justifies the sheriff’s proceeding down the lane behind a residence for over a hundred yards to serve civil process even if the sheriff had believed that Harris was ‘hiding’ from service.” *Harris*, 919 S.W.2d at 623. “Consequently, the warrantless search of

appellant's property and the resulting seizure of (over 100) marijuana plants was unconstitutional. Any statements made by appellants must likewise be suppressed.” *Id.* at 624-625.

Although it may represent the deputy’s diligence, or may simply be an innocent effort to determine whether the property is inhabited or abandoned, walking around the exterior of a dwelling or attempting to gaze inside a window constitutes a search, and, “[e]xcept in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.” *State v. Lakin*, 588 S.W.2d 544, 547 (Tenn. 1979) (quoting *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924)). Tennessee courts have consistently held that police entry upon private, occupied, fenced land without a warrant and absent exigent circumstances is unreasonable, and evidence obtained as a result of such a search must be suppressed. *State v. Prier*, 725 S.W.2d 667 (Tenn. 1987).

Never on Sunday.

The general rule is that civil process shall not be executed on Sunday. The exception to the rule is where it appears the parties to be sued are leaving the county or state or are about to remove themselves or their property beyond the court’s jurisdiction. T.C.A. §§ 20-2-104, 105, and 106. Other exceptions are orders of protection, T.C.A. § 36-3-601 *et seq.*, and a few other types of extraordinary process.

No Shopping Allowed.

No sheriff or deputy may purchase, either directly or indirectly, any property for sale under process of law, i.e., from a sheriff’s sale. Any such purchase shall be absolutely void. T.C.A. § 8-8-206. Interestingly enough, the prohibition applies to sheriffs but to no other law enforcement officers or agencies. Additionally, an officer cannot bid at his own execution sale even if the bid is placed purely for the benefit of a third party. *Chambers v. State*, 22 Tenn. 237 (1842).

Service of Process by an Employee of a Party Is Prohibited.

In any civil action where an officer is a salaried or commissioned employee of a party to the suit and serves a summons, writ, process or other proceeding, said officer commits a Class C misdemeanor. T.C.A. § 8-8-216. Any process served in a civil action in violation of the statute is void. T.C.A. § 8-8-217.

Witnesses and Parties.

Witnesses and parties to a suit cannot be served with any “writ, process, warrant, order, judgment, or decree in any civil cause” except as to a subpoena to testify as a witness while attending, going, or coming from the place of suit. T.C.A. § 24-2-105; *Hinkle v. Cravens*, 219 Tenn. 253 (1966). The privilege extends to corporate officers who come to testify as a witnesses, and they cannot be served with process in a suit against the

corporation. *Sewanee Coal, Coke & Land Co. v. W.W. Williams & Co*, 120 Tenn. 339, 107 S.W.2d 968 (1907) (A resident of another state or county, who has in good faith come to testify as a witness, is exempt from service of process for the commencement of a civil action, either against him in his individual capacity or against a corporation of which he is an officer or agent.).

The travel exemption allows one day for every 30 miles of travel, which illustrates the fact that the privilege has been in effect since 1794. The privilege holds even where the individual has come from a foreign jurisdiction. *Sofge v. Lowe*, 131 Tenn. 626 (1915); *Purnell v. Morton Live Stock Co.*, 156 Tenn. 383 (1928).

Serving a Company.

When serving a company by certified mail, the letter must be addressed to a specific corporate officer, a managing or general agent, or another agent authorized to receive service of process on the company's behalf. Service cannot be accomplished by merely mailing a copy of the summons and complaint to the company to be received along with the general mail sorted by lower-level employees. *Taylor v. Stanley Works*, 2002 WL 32058966 (E.D. Tenn. 2002); Fed. R. Civ. P. 4(h)(1).

Service of High-Risk Process

It is easy to be lulled into complacency when one spends months or years serving civil process without serious incident, so it is important to remember and honor the fact that several Tennessee sheriff's deputies have lost their lives or been seriously injured fulfilling that duty. Civil actions are not necessarily conducive to civilized conduct on the part of those involved, and an officer cannot afford to maintain a casual attitude when there is no way to know what waits on the other side of a closed door.

Although service of any kind of process can lead to confrontation, some kinds of legal disputes engender such fierce emotion that they are more likely to instigate irrational or violent reactions, especially from the respondent and the respondent's loved ones.

Child Custody Transfer Orders.

These orders are surely the most disturbing judicial orders deputies execute. They are often distressing for everyone present, including the officers charged with the duty to effect the transfer. **Custody transfer orders require the sheriff to take physical custody of a child and place that child in the hands of the party directed by the court.**

The transfer may be ordered pursuant to a judicial determination that the child has been abandoned or is subjected to or threatened with abuse. T.C.A. § 36-6-219(a). It may be initiated by an order for immediate physical custody, issued because the petitioner has properly registered a foreign decree, and the petition has been verified pursuant to T.C.A. §§ 36-6-229 through 234. Or, where a petition seeking enforcement of a custody determination is filed and the petitioner files a verified application, the court may issue a

warrant for immediate physical custody if the child is in imminent danger of serious physical harm or is about to be removed from Tennessee. T.C.A. § 36-6-235(a).

A warrant to take physical custody of a child is enforceable throughout the state and may authorize officers to enter private property to take custody. If required by exigent circumstances, officers may make a forcible entry at any hour. T.C.A. § 36-6-235(e). **The officer must serve the respondent with the petition, warrant, and order immediately after the child is taken into physical custody.** T.C.A. § 36-6-235(d).

Below are a few guidelines for facilitating child custody transfers that may help protect the child's physical and emotional safety while minimizing the problems likely to be encountered during the transfer process.

(1) Coordinate the transfer closely with the party taking physical custody in order to confirm the child's identity and make the transfer as quickly as reasonably possible. The person taking custody should wait nearby but out of the respondent's sight so as to avoid confrontation.

(2) Never send a lone officer to execute a warrant for physical custody. Ideally, the transfer should be facilitated by a team of no fewer than three officers. It may take two or more to restrain the respondent and at least one more to transport the child to the petitioner.

(3) Act quickly and efficiently. Officers should not allow the respondent to engage them in discussion or argument. While the respondent may consent to a peaceful surrender for the sake of the child, and negotiations to that end are desirable, they should be not be prolonged.

(4) If the child is to be transported in a sheriff's vehicle, he or she must be properly restrained by a seatbelt or in an age and size appropriate child safety seat.

(5) Young children may be consoled by a small stuffed animal, doll, or book. Officers should calmly reassure and comfort the child, who may appear calm while suffering severe emotional shock. Some agencies have found it helpful to use at least one female officer where available, as many children feel less threatened if there is a female presence.

Writs of Restitution.

Writs of restitution are commonly known as evictions; they are another kind of process that brings with it significant and inherent risks to officer and public safety during execution. They are also among the very few civil orders that mandate use of force, where necessary, to achieve service. T.C.A. § 29-18-127.

The sheriff has not obeyed or executed a writ of restitution until he or she delivers actual possession of the premises to the plaintiff and leaves the plaintiff in quiet possession. If the tenant does not yield possession peacefully, it is the officer's duty to remove him from the premises, and the writ is not executed until he does so. *Farnsworth v. Fowler*, 31 Tenn. 1, 55 Am. Dec. 718 (1851).

The officer executing the writ is responsible only for overseeing the procedure and keeping the peace until it is finished and the plaintiff is restored to peaceful possession. Officers should not act as the plaintiff's movers. Plaintiffs are responsible for the removal and storage of the tenant's belongings.

However, it is not uncommon for a plaintiff to direct that movers simply take the tenant's property to the edge of the roadway. In either case, there may be items removed from the premises that pose a hazard to public safety, e.g., weapons, incendiary devices, firearms, prescription medications or toxic chemicals. Such items should be inventoried, secured, and held for further disposition in accordance with law. Some items of obvious value, such as cash, should also be inventoried and secured.

Some articles or substances discovered during removal of the tenant's belongings, such as child pornography or controlled substances, may have criminal implications and must be dealt with accordingly.

The proliferation of methamphetamine labs is a relatively new danger confronted by those whose duty it is to oversee or carry out evictions. Officers should be acquainted with signs that such a lab is present so the appropriate authorities can be summoned to perform decontamination procedures.

Tenants faced with the execution of a writ of restitution sometimes become agitated, hostile or belligerent, and may call for reinforcements amongst their relatives and friends, whereupon the situation usually deteriorates rapidly. In such cases, it may be prudent for officers to withdraw to a safe distance until their own reinforcements arrive. Often the mere show of force effectively deters further disruption.

If tenants or other persons on the scene become threatening, assaultive, or otherwise engage in violent conduct, and efforts to encourage reasonableness are unsuccessful or clearly futile, the officer should not hesitate to use restraints or other force as required to stabilize the situation and restore safety and order.

Occasionally an officer arriving to execute a writ of restitution discovers an unattended child or adult occupants who are intoxicated, disabled, infirm, or mentally ill. **A person who cannot leave the premises safely, attend to his or her own needs, or avoid risk of serious harm if left unattended should never be abandoned.** If no responsible person is available to take charge of such an individual, the appropriate social services or other agency must be contacted for assistance. An officer who abandons an obviously incompetent individual who subsequently comes to serious harm may be found culpable for negligence.

While unrelated to public or officer safety, it is worth mention that a surprising number of actions filed related to writs of restitution arise because the deputies and plaintiff's movers enter the wrong residence and remove the property while the owner or occupant is away. Even if the property is put back in place undamaged and no locks, doors, or fixtures are broken in the process, this is an error with considerable tort liability and constitutional implications. A claim for damages by the indignant, embarrassed owner, whose constitutional rights to privacy and due process have been violated, is almost certain to follow.

Orders of Protection

"In America, early settlers held European attitudes towards women. Our law, based upon the old English common-law doctrines, explicitly permitted wife-beating for correctional purposes. However, certain restrictions did exist and the general trend in the young states was toward declaring wife-beating illegal. For instance, the common-law doctrine had been modified to allow the husband 'the right to whip his wife provided that he used a switch no bigger than his thumb' -- a rule of thumb, so to speak." Del Martin, *Battered Wives* Volcano Press, 1976, page 31.

Societal attitudes toward domestic violence have changed dramatically, and Tennessee laws related to it are modified almost yearly. Each revision has placed a greater burden on the law enforcement community to protect alleged victims, and the liability for failure to do so can be tremendous where an order of protection has been issued by the courts and served by the sheriff.

For law enforcement officers, domestic disputes and domestic violence are among the most difficult and dangerous situations to address. Some individuals seem to repeatedly manipulate the justice system for their own vindictive purposes, wasting valuable resources. Others petition the courts for protective orders, then fail to appear and testify, having returned to the alleged abuser. Officials may therefore become cynical and reluctant to take action.

However, in 2002, 3.1 percent of all male homicide victims and almost one-third of all female homicide victims in the United States were killed by a former or current "intimate partner." U.S. Department of Justice, Bureau of Justice Statistics, *"Homicide Trends in the U.S."* Domestic violence results in nearly 2 million injuries and 1,300 deaths nationwide each year. Centers for Disease Control and Prevention, National Center for Injury Prevention and Control; 2003. Additionally, there have been a number of cases, in Tennessee and other jurisdictions, in which domestic conflict culminated in the murder of the perpetrator's own or estranged partner's children.

Definitions.

For the purposes of this chapter, the following definitions will apply:

Petitioner — The victim; the plaintiff; “the person alleging domestic abuse, sexual assault or stalking in a petition for an order for protection.” T.C.A. § 36-3-601(6).

Respondent — The defendant; the perpetrator; “the person alleged to have abused, stalked or sexually assaulted another in a petition for an order for protection.” T.C.A. § 36-3-601(8).

Petition for Order of Protection — A standardized form filed with the court that provides relevant information about the petitioner, the respondent, their children, the domestic situation, and what events took place that led to the request for an order of protection. The petition asks that the court direct Respondent not to threaten, assault, contact, or stalk Petitioner.

Ex Parte Order of Protection — A temporary, emergency order issued when the court finds there is good cause to believe there is an immediate and present danger Petitioner will be victimized by Respondent. An ex parte order is issued immediately, without giving Respondent notice or an opportunity to be heard.

Order of Protection — An order issued after a hearing in which the court finds there is sufficient proof that Petitioner’s allegations of domestic abuse, stalking or sexual assault are true, and that Petitioner needs to be shielded by the law from the Respondent. The order is valid for a defined period, not to exceed one year. For purposes of this chapter, such orders will be called “standard orders of protection” or “standard protective orders.”

Sexual Assault Victim — Any person, *regardless of the relationship with the perpetrator*, who has been subjected to, threatened with, or placed in fear of any form of rape, including aggravated rape (T.C.A. § 39-13-502), rape (T.C.A. § 39-13-503), aggravated sexual battery (T.C.A. § 39-13-504), sexual battery (T.C.A. § 39-13-505), sexual battery by an authority figure (T.C.A. § 39-13-527), statutory rape (T.C.A. § 39-13-506), or rape of a child (T.C.A. §§ 39-13-522, 33-3-601(9)).

Stalking Victim — Any person, *regardless of the relationship with the perpetrator*, who has been subjected to, threatened with, or placed in fear of the offense of stalking. T.C.A. §§ 36-3-601(10), 39-17-315.

Legislative Intent.

In 1995, our legislature took the somewhat unusual step of codifying (enacting as part of the Tennessee Code) its intent regarding application of state statutes related to domestic abuse:

The purpose of this part is to recognize the seriousness of domestic abuse as a crime and to assure that the law provides a victim of domestic abuse with enhanced protection from domestic abuse. A further purpose of this chapter is to recognize that in the past law enforcement agencies have treated domestic abuse crimes differently than crimes resulting in the same harm but occurring between strangers. Thus, the general assembly intends that the official response to domestic abuse shall stress enforcing the laws to protect the victim and prevent further harm to the victim, and the official response shall communicate the attitude that violent behavior is not excused or tolerated.

T.C.A. § 36-3-618.

Parties Who May Petition for an Order of Protection.

With the exceptions added in 2005 to include sexual assault and stalking victims, state law requires that the petitioner have some past or present link of a domestic or familial nature with the respondent, though it may be indirect. The statute does not include acquaintances, neighbors, business associates and others who do not fall into the specified categories, which include:

- (1) Adults or minors who are current or former spouses;
- (2) Adults or minors who live together or who have lived together;
- (3) Adults or minors who are dating or who have dated or who have or had a sexual relationship; as used herein “dating” and “dated” do not include fraternization between two individuals in a business or social context;
- (4) Adults or minors related by blood or adoption;
- (5) Adults or minors who are related or were formerly related by marriage; or
- (6) Adult or minor children of a person in a relationship described above.

T.C.A. § 36-3-601(11)(A - F).

Venue: Where the Petition May Be Filed.

The petition may be filed in the county where the Respondent lives; or, in which the domestic abuse, stalking, or sexual assault happened; or, if the Respondent is not a Tennessee resident, in the county where the victim lives. T.C.A. § 36-3-602(c).

Ex Parte Protective Orders and Standard Orders of Protection.

An ex parte order is issued by the court without giving Respondent notice or an opportunity to tell his or her side of the story. It is a temporary order. There must be a hearing within 15 days after Respondent is served with the ex parte order. Respondent must be given at least five days notice of the hearing date. T.C.A. § 36-3-605.

If, at the hearing, the court finds by a preponderance of the evidence that the victim's allegations are true, the court can extend the order for up to one year. The victim can return each year to ask that the order be extended for another year. A new hearing is required for each extension. T.C.A. § 36-3-608.

Serving the Order.

Rules for serving ex parte and standard protective orders are identical, with one exception: To effect proper service, the deputy must:

- (1) Personally read the order to Respondent and leave a copy with him or her, or
- (2) If Respondent is not a Tennessee resident, the order can be served by mail on the appropriate secretary of state, who must then promptly send a certified copy to Respondent by registered or certified return receipt mail, along with written notice that service was so made. If Respondent refuses to accept delivery of the registered or certified mail, his or her refusal is the same as delivery and constitutes service.

T.C.A. § 20-2-215.

However, if Respondent was served with a copy of the petition, notice of hearing, and any ex parte order issued, and the court rules that the ex parte order be extended to a standard order of protection, *that* order shall be served by:

- (1) Delivering a copy of the order of protection to Respondent or Respondent's lawyer, or
- (2) By the clerk mailing it to Respondent's last known address. If the address "cannot be ascertained upon diligent inquiry," the certificate of service shall so state. Service by mail is complete upon mailing.

T.C.A. § 36-3-609(d); §§ 20-2-215, 216.

Because violating a protective order is now a crime rather than merely civil contempt, it is absolutely *essential* that the deputy serving the order comply with every detail of the rules of service. It is *never* acceptable to leave the order with a third party who promises to give it to the Respondent.

TCIC and NCIC – Entry into the Tennessee Crime Information System (TCIC) and Transmission of Information to the National Crime Information Center (NCIC).

Each time a court issues, modifies, or dismisses a protective order, the local law enforcement agency is to immediately enter the order, modification, or dismissal in the Tennessee Crime Information System “and take any necessary action to immediately transmit it to the National Crime Information Center.” T.C.A. § 36-3-609(e).

When an order is served, the entry is updated to include the court appearance date. If, at the time of the hearing, an ex parte order is extended into a standard protective order, the updated entry will include the order’s expiration date (usually one year from the date of the order), the judge’s name, and any additional relevant information, such as whether the order allows “social contact.”

“Social contact” is sometimes specified in the order, usually to allow Respondent to interact with Petitioner for the purpose of arranging visitation with minor children or other communication related to the welfare of the couple’s children. Orders that permit “social contact” are often later modified to prohibit all contact if the court finds Respondent is using that proviso as an excuse to further harass Petitioner.

Scope, Duration, and Enforceability of Protective Orders.

The order is valid and enforceable in any county in Tennessee. T.C.A. § 36-3-606(f).
It may:

- (1) Direct Respondent not to commit domestic abuse, stalk or sexually assault Petitioner or petitioner’s minor children;
- (2) Prohibit Respondent from calling, e-mailing, writing, or communicating with Petitioner, directly or indirectly;
- (3) Give Petitioner possession of the residence and evict the Respondent;
- (4) Require Respondent to provide suitable housing for Petitioner if respondent is the sole owner or lessee of the residence;
- (5) Award temporary custody of or establish temporary visitation rights with their minor children;
- (6) Award support to Petitioner if the parties are legally married and award child support for Respondent’s children; or
- (7) Require Respondent to get treatment or counseling for anger management or substance abuse.

T.C.A. § 36-3-606(a).

The Duty to Arrest a Respondent Who Violates an Order of Protection.

Law enforcement officers generally have considerable discretion about whether to make an arrest in a given situation and are usually protected from liability if the decision not to arrest results in harm to a member of the general public. However, **Tennessee does not allow officer discretion when it comes to arresting individuals who violate protective orders. Arrest is mandatory.**

Illustrating how inflexible state law is on the matter, the attorney general's office issued an opinion that "a law enforcement officer, having observed the commission of a felony, may choose not to arrest or charge the offending party, *except when the officer has probable cause to believe that a suspect has violated an order of protection.*" Op. Tenn. Atty. Gen. No. 01-119 (July 27, 2001).

In other words, while an officer has discretion to ignore a felony committed right before his or her eyes, that option does not exist if the misconduct violates a valid order of protection, regardless of whether it would otherwise constitute a misdemeanor, or no criminal offense at all. If Petitioner or Petitioner's property come to harm after an officer fails to arrest the violator, the county is subject to liability for damages. *Matthews v. Pickett County*, 996 S.W.2d 162 (Tenn. 1999); *Hudson v. Hudson*, 2005 WL 2253612 (W.D. Tenn. 2005).

On the other hand, if the law enforcement agency fails to notify TCIC and NCIC that an order has been dismissed or of its expiration date, and the former Respondent is wrongfully arrested, the prospect of legal liability again rears its ugly head. That is one of many reasons it is so important that such orders be correctly served and that modifications and other required information be correctly entered in the Tennessee and National Crime Information Systems.

An arrest for violating a protective order may be made *with or without* a warrant. A law enforcement officer shall arrest Respondent without a warrant if:

- (1) The violation took place in the officer's jurisdiction;
- (2) The officer reasonably believes Respondent has violated or is violating the order; and
- (3) The officer verifies that an order of protection is in effect, which can be through telephone/radio communication with the appropriate law enforcement department.

T.C.A. § 36-3-611(a)(1-3).

Even if Respondent is violating an ex parte order and not a standard order of protection, the officer is required to make an arrest, *but only if* Respondent “has been served with the ex parte order or otherwise has acquired actual knowledge of the order.” T.C.A. § 36-3-611(b). The term “actual knowledge” means Respondent has direct, clear knowledge of information that would lead a reasonable person to inquire further. *Black’s Law Dictionary, 7th Edition*. Otherwise, an ex parte order cannot be enforced by arrest.

Ex Parte Orders and “Actual Knowledge”.

Although an ex parte order is effective for only a matter of days, this is often the time during which emotions run high and violence or increased harassment are most likely to erupt. At what point is Respondent deemed to have actual knowledge? If the deputy reads the order to Respondent over the phone, is it in effect? What if the deputy gives oral notice of the order’s existence and requirements, but does not have a copy to give Respondent at that time? What is the deputy’s duty if, when serving an ex parte order, Petitioner is on the premises, and Respondent refuses to leave?

First, let us look the issue of “actual knowledge.” If the ex parte order has been personally served, Respondent, of course, has actual knowledge. If it has not, Respondent may be deemed to have actual knowledge when he is put on notice of its existence and general requirements by a law enforcement officer.

EXAMPLE: Officer Bob responds to a call and arrives at the scene to find Respondent Bubba duct-taping love notes all over Petitioner Patty’s front door. Patty advises Officer Bob she was granted an ex parte order of protection against Bubba, her former boyfriend, two hours earlier. Officer Bob calls his dispatcher and verifies that the judge did indeed issue an ex parte order, which has not yet been served. Officer Bob informs Bubba that the order has been issued and Bubba is to stay away from Patty until the hearing; and directs Bubba to leave the premises. Brimming with *actual knowledge*, Bubba stumbles off into the night to seek solace at his favorite bar.

Two hours later, Officer Bob is again called to Patty’s house, and there’s Bubba, drawing big red hearts on the vinyl siding. It is his house, and he insists on his right to decorate it. Anyway, no one has given him any piece of paper that says he can’t be in his own blankety-blank yard. At this point, Officer Bob arrests Bubba and hauls him away to jail. Of course, Officer Bob could and should have arrested Bubba on the *first* call *if* he had been able to verify the protective order was personally served on Bubba earlier that day.

Some officers are concerned when they serve an ex parte order of protection and realize Petitioner is on the premises. If Respondent has previously assaulted Petitioner, vandalized Petitioner’s property, or otherwise threatened or harmed Petitioner, it is foreseeable that Respondent may be at it again by the time the deputy reaches the end

of the driveway. The best practice is for the deputy to ensure Respondent is away from the premises before the deputy departs the scene. If, after the order is served, Respondent becomes belligerent or threatening, or refuses to leave, the order is being violated and the duty to arrest arises.

It is a crime, T.C.A. § 36-3-612(g), and contempt of court, T.C.A. § 36-3-610, to violate an order of protection, and Respondent may be found guilty of both. Op. Tenn. Atty. Gen. No. 05-183 (December 22, 2005).

A critical change in Tennessee law took effect July 1, 2005. Under the old law, a Respondent arrested for violating the protective order was charged with contempt, a civil offense that carries a penalty of only 10 days in jail and a \$50 fine. At the time of arrest, the magistrate set bond pending the hearing, which was to be conducted within 10 days, and Petitioner was required to appear and show cause why the contempt order should be issued. Of course, if Respondent committed a crime in the process of violating the protective order, e.g., burglary, vandalism, assault, he or she could be prosecuted for that criminal act.

As of July 1, 2005, a knowing violation of a protective order became a crime in and of itself, a Class A misdemeanor carrying a sentence of up to 11 months and 29 days in jail. Furthermore, the new law directs that such a sentence is to be consecutive to any other sentences resulting from the same factual allegations, unless the judge specifically directs otherwise. T.C.A. §36-3-612(g).

It is important to reiterate that the new criminal penalty applies only to orders of protection issued after a hearing, *not* to ex parte orders. Op. Tenn. Atty. Gen. No. 05-183 (December 22, 2005).

Once Respondent is arrested, the magistrate must consider certain factors and set conditions of release. Upon release, Respondent is given written notice of the conditions, which may include orders to stay away from Petitioner, not to possess or use alcohol, not to possess a firearm or other weapon, or other directives. T.C.A. §40-11-150(a-b). If a law enforcement officer later has probable cause to believe Respondent has violated any condition of release, the officer *shall* arrest Respondent, without a warrant, regardless of whether the officer actually witnessed Respondent committing the violation. T.C.A. §40-7-103(b).

Domestic Violence Victim Notification: Release of Defendant Before Trial.

An order of protection is a form of civil process. Violating the order can be a civil offense, a criminal offense, or both. Op. Tenn. Atty. Gen. No. 05-183 (December 22, 2005). **When releasing a defendant charged with domestic violence related offenses, including stalking, *violating an order of protection*, or any assaultive offense, the jailer is required to provide the victim with notice. The table below details the statutory requirements.** T.C.A. § 40-11-150(f-g).

Protected Victim	<u>Family or Household Member</u> (Includes current or ex-spouse; adult or minor who lives or has lived with defendant; adult or minor related/formerly related by blood/marriage; adult/minor dating/dated in past or having/had a sexual relationship; adult/minor child of anyone described above).
Who Notifies Victim of Release	Law enforcement agency with custody of Defendant <u>shall</u> initiate notification <u>whether or not</u> victim requests it.
Time Frame for Notification	Notification is to be made at the time of Defendant's release.
Measures Required to Contact Victim	"Use all reasonable means to immediately notify the victim."
Information to be Given to Victim	Notice that Defendant is being/has been released; address and phone # of nearest shelter and counseling center.
Delay Release Until Victim Notified?	Statute prohibits delay.
Other Duties	Send/give victim copy of conditions of release. Must also provide copy of the conditions to Defendant.
Hold Required Before Bail/Release	Twelve hours from time of arrest. Judge may order release in less time if he or she determines that sufficient time has, or will have, elapsed for the victim to be protected.

Mary Matthews v. Pickett County.

Mary Matthews v. Pickett County, 996 S.W.2d 162 (Tenn. 1999), is the most cited Tennessee case regarding liability for failure to arrest a Respondent who violates an order of protection.

The court held that an order of protection creates a special duty to protect the victim named on the order and that special duty includes protection of the victim's property. The complainant can win personal injury *and* property damages if the Petitioner shows that the deputies breached their duty to arrest the Respondent when the Respondent violated an order of protection, and that the Petitioner was harmed as a result.

The Public Duty Doctrine.

The **public duty doctrine** gives officers immunity for injuries caused by breach of a duty owed to the general public.

EXAMPLE: Officer Bob pulls over drunk driver and recognizes Buddy, who is only a few blocks from home. Officer Bob lets Buddy go on his promise to go straight home, but Buddy heads for another bar, running over Valerie

Victim on the way. Officer Bob clearly breached his duty to protect the public at large, but Valerie Victim will not win her lawsuit against Officer Bob or the county *because she was not a foreseeable victim*. When Officer Bob breached his duty to protect the public by failing to arrest Buddy, he did not know this *particular* Victim was a block away and could be harmed by his failure to act.

The public duty doctrine did not protect the officers in *Matthews* because the order was not issued to protect the public at large but *solely to protect Mary Matthews*, whose calls for help indicate she relied on the court's order to keep her safe from Winningham. Her reliance created a **special duty exception** to the public duty doctrine, an exception that applies when a public official undertakes to protect an individual, and that person relies on the official to do so.

The special duty exception creates a special relationship between the parties, in this case the government and Ms. Matthews. The officers had a duty protect her by arresting Winningham if there was reason to believe he had violated a valid order of protection. The court held that if the breach of that duty allowed Winningham freedom to burn down Ms. Matthews' house, the deputies and the county are liable for her harm.

The Tennessee Supreme Court makes it clear by this ruling that, if the government violates its special duty to safeguard a party named by an order of protection, and the individual is harmed as a result, compensation can be awarded for personal injury *and* property damage.

Sheriff's Fees for Service of Process

The sheriff is entitled to collect fees for performing various duties related to serving civil process, and they are specified in T.C.A. § 8-21-803(a)(1). Fees differ depending on factors such as the specific type of process and whether service was completed or merely attempted. It should be noted that the \$2 data processing services fee the sheriff is to collect must be "allocated by the sheriff's county for computerization, information systems and electronic records management costs of the sheriff's office." The funds are to be earmarked within the general fund and reserved for those purposes. T.C.A. § 8-21-901(a)(5)(B).

As of January 1, 2006, Tennessee's court clerks are permitted in many instances to collect costs in the form of a flat fee at the time services are requested. TCA § 8-21-401(a). Unfortunately, the legislature made no similar provisions for **county sheriffs, who are not permitted to demand fees in advance**, TCA § 8-21-102; § 8-21-901(a), and who, in some instances, are entitled to a fee for each *attempt* at services, as in the case of collecting money to satisfy a judgment under T.C.A. § 8-21-901(a)(2)(B)(I). Op. Tenn. Atty. Gen. No. 02-113 (October 10, 2002). A rare exception to the rule is where the process to be served is coming from another county. T.C.A. § 8-8-202.

Since clerks are charged with collecting and distributing fees, and sheriff's fees cannot be calculated or collected in advance, procedures under the new law may not be as streamlined for the clerks as anticipated.

Clerks maintain records of all sums of money they receive and disburse. TCA § 18-2-101(a). In all cases, the clerk prepares the bill of fees and costs. TCA §§ 8-21-104; 18-1-105(a)(4). Costs are part of the *final judgment* in a case. TCA § 20-12-101; Tenn. R. Civ. Pro. 69; Op. Tenn. Atty. Gen. Nos. 99-003 (January 19, 1999) and 02-072 (June 3, 2002).

Among other responsibilities, the clerk of a trial court is required to collect all costs incident to litigation, including sheriff's fees. Op. Tenn. Atty. Gen. No. 02-072 (June 3, 2002).

Additionally, when selling real or personal property, the clerk must "collect the sheriff's fee, plus the sheriff's fee for each additional defendant in proceedings to sell real estate." TCA § 8-21-401(i)(7). For receiving and paying over all taxes, fines, forfeitures, fees and penalties, the clerk is entitled to commissions that vary between 5 percent and 10 percent. TCA § 8-21-401(h).

The court decides whether to award costs and against whom. However, if costs *are* awarded and any money is received, the sheriff's fee ranks very high on the priority list. In cases where the amount collected is not enough even to pay the whole litigation tax and costs, the state tax should be paid before payment to officers and witnesses. Op. Tenn. Atty. Gen. No 92-10 (February 19, 1992), citing *State v. Stanley*, 71 Tenn. 524, 526 (1879). And in turn, payments of costs to officers of the court take priority over witness fees and other costs. *Id.*, citing *Locke v. McFalls*, 35 Tenn. 674 (1856); Op. Tenn. Atty. Gen. No. 80-286 (June 9, 1980).

Sheriffs may rightfully be concerned that since clerks can now collect their fees "up front" in many cases, there will be little incentive to pursue collection of sheriff's fees beyond one billing. However, motivation may be found in a state law captioned "Liability for Failure to Collect or Account," which holds that court clerks, county trustees, sheriffs and other officers who fail to collect "every fee" that "the county may be entitled to, and which, by the exercise of reasonable diligence could have been collected" is "individually liable to the county for the amount that should have been collected . . ." TCA § 8-22-105.

Tennessee Code Quick Reference for Service of Civil Process

Laws regarding service of process are found among several volumes of the Code, and this is by no means an exhaustive list. However, it may be useful as a starting point for further research.

T.C.A. § 8-8-201	Duties of the Sheriff
T.C.A. § 8-8-202	Advance Fees for Service of Out of County Process
T.C.A. § 8-8-207	Disobedience of Process
T.C.A. § 8-8-216	Service of Process by Employee Prohibited
T.C.A. § 8-21-901	Sheriff's Fees
T.C.A. § 8-22-105	Liability for Failure to Collect or Account
T.C.A. § 25-3-105	Penalties for Failure to Return Process
T.C.A. § 26-1-402	Duties of Executing Officer to Make Sufficient Return
T.C.A. § 26-3-104	Indemnity Bond of Plaintiff Where Title of Levied Property Is in Dispute
T.C.A. § 26-3-101 <i>et seq.</i>	Levy of Execution
T.C.A. § 26-3-117	Costs to Be Paid by Plaintiff for Transport/Storage of Levied Property
T.C.A. § 26-5-101 <i>et seq.</i>	Sale on Execution (Sheriff's Sale)
T.C.A. § 26-6-101 <i>et seq.</i>	Foreign Judgments and Their Authentication
T.C.A. § 29-15-114	Writ of Possession for Land in Ejectment Action
T.C.A. § 29-18-101 <i>et seq.</i>	Forcible Entry and Detainer (Evictions)
T.C.A. § 29-30-101 <i>et seq.</i>	Recovery of Personal Property
T.C.A. § 36-6-219	Child Custody - Temporary Emergency Jurisdiction and Order Enforcement
T.C.A. § 36-6-227	Child Custody - Recognition and Enforcement of Foreign Decrees

CHAPTER 8

SHERIFF'S FEES

Accounting for Fees

Sheriffs receive fees from the public for services they perform. However, pursuant to T.C.A. § 8-24-103(a)(2), **the sheriff must pay over to the trustee, on a monthly basis, all of the fees, commissions, and charges collected by the sheriff's office during the month.** Because the sheriff is no longer on the "fee system," it is the duty of the county legislative body to make the necessary appropriation and pay to the sheriff the authorized expenses fixed by law for the operation of the sheriff's office, direct from the county trustee in 12 equal monthly installments, irrespective of the fees earned by the sheriff. T.C.A. § 8-24-103(a)(1).

Specific Fees Authorized

Notwithstanding any other provision of law to the contrary, **the sheriff is entitled to demand and receive the respective fees for the following services where services are actually rendered:**

Service of Process.

(1) For serving any process except as otherwise provided in T.C.A. § 8-21-901 or other applicable law, whether issued by a clerk for a general sessions, criminal, circuit, chancery or any other court, the sheriff is entitled to the following fees, based on the manner in which process is served, for each item of process that must be served separately per person served:

(A) For service in person: \$20;

(B) For service by mail: \$10;

(C) For service by acceptance or consent or any other authorized method: \$10.

(2) For summoning jurors in any proceeding: \$5.

(3) For serving or delivering any other process or notice not related to a judicial proceeding and issued by an entity other than a court: \$10.

(4) For returning any service of process where the sheriff attempts service but is unsuccessful, the sheriff is only entitled to: \$7.

T.C.A. § 8-21-901(a)(1).

Original Process in Delinquent Tax Collection Proceedings.

The sheriff receives \$7.50 for serving all original processes in delinquent tax suits as costs to be taxed against each delinquent tax payer and the statutory fees for all other services performed by the sheriff. T.C.A. § 67-5-2410(c)(1).

Collection of Money; Returning, Transporting, Storing or Establishing Possession of Property.

(1) For a levy of an execution on property or levy of an attachment or other process to seize property for the purpose of securing satisfaction of a judgment yet to be rendered or for executing a writ of replevin or writ of possession: \$40.

(2) For collecting money to satisfy a judgment, whether by execution, fieri facias, garnishment or other process, in civil cases each time collection is attempted: \$20.

For purposes of the payment of fees for garnishments as provided above, all garnishments are deemed to be original garnishments and the sheriff or other person authorized by law to serve garnishments is entitled to the fee provided above for each such garnishment served.

(3) Whenever the sheriff provides for the storage or maintenance of property including, but not limited to, vehicles, livestock and farm and construction equipment that has been levied on by execution, attachment or other process, the sheriff is entitled to demand and receive a reasonable per day fee for such services. The sheriff is also entitled to demand and receive reimbursement for costs of transportation of such personal property to a suitable location for storage and maintenance when such action is necessary to secure such property. Any such fees for transportation, maintenance and storage shall be approved by the court issuing the execution, attachment or other process.

T.C.A. § 8-21-901(a)(2).

Arrest and Transportation of Prisoners, Bail Bond.

(1) For executing every capias, criminal warrant, summons or other leading process, making arrests in criminal cases and carrying to jail, prison or other place of incarceration and guarding defendant arrested by warrant involving taking custody of a defendant: \$40.

(2) For citation in lieu of arrest or criminal warrant not involving physical custody of a defendant: \$25.

(3) For every bail bond: \$5.

(4) If a sheriff is required to act as a guard to escort prisoners, the sheriff is entitled to a per mile fee equal to the mileage allowance granted federal employees. The fee shall be separate for each prisoner and computed on the distance actually traveled with the prisoner and shall be for no more than two guards. The fee shall apply only when the sheriff is required to transport a prisoner from county to county or from state to state. Similarly, the sheriff is entitled to the same mileage allowance when required to transport a prisoner to a hospital or other mental health facility in another county or state for a judicially ordered evaluation.

(5) When two or more criminal warrants are executed at the same time against the same individual, only one arrest fee is allowed when the fee is chargeable to the county or the state.

T.C.A. § 8-21-901(a)(3). See also T.C.A. § 40-9-127.

Security Services.

(1) For attending the grand jury or waiting in court: \$75 per day.

(2) For waiting with a sequestered jury: \$100 per day.

T.C.A. § 8-21-901(a)(4).

Data Processing Services.

(1) For data processing services: \$2.

The revenue from the two dollar data processing fee must be allocated by the sheriff's county for computerization, information systems and electronic records management costs of the sheriff's office. The funds must remain earmarked within the general fund and must be reserved for the purposes authorized by law at the end of each fiscal year. T.C.A. § 8-21-901(a)(5)(A) and (B).

Fees Limited.

Notwithstanding other provisions of this section to the contrary, any fee or mileage allowance permitted under this section, which is assessed against the state or which otherwise represents a cost to the state, shall be limited in amount to the fees allowable immediately prior to May 28, 1977. T.C.A. § 8-21-901(b).

Fees on Collection of Costs

Sheriffs and other collecting officers of this state are allowed the same fees for collecting and paying over costs as they are allowed by law for collecting other moneys. However, they are not allowed to charge or receive commissions on costs in their favor. T.C.A. § 8-21-902.

Judgments Paid after Execution Issued

The plaintiff in all judgments is liable to any sheriff for the commission on the amount so received if the plaintiff or the plaintiff's agent or attorney receives any or all of the judgment after an execution has been issued on the judgment and given into the officer's hands for collection. T.C.A. § 8-21-903.

Other Authorized Fees

Handgun Carry Permit Application Fingerprint Fee.

As part of the process of applying for a handgun carry permit, an applicant is required to provide two full sets of classifiable fingerprints at the time the application is filed with the Department of Safety. The applicant may have his or her fingerprints taken by the department at the time the application is submitted, or the applicant may have his/her fingerprints taken at any sheriff's office and submit the fingerprints to the department along with the application and other supporting documents. **The sheriff may charge a fee not to exceed five dollars for taking the applicant's fingerprints.** At the time an applicant's fingerprints are taken either by the department or a sheriff's office, the applicant is required to present a photo identification. If the person requesting fingerprinting is not the same person as the person whose picture appears on the photo identification, the department or sheriff must refuse to take the applicant's fingerprints. T.C.A. § 39-17-1351(d)(1).

Range Fee.

Sheriffs are authorized by statute to open their shooting ranges for public use when the range is not being used by the sheriff's personnel. The sheriff may charge a reasonable fee for persons or organizations using the range and may require users to make improvements to the range. T.C.A. § 38-8-116.

Sexual Offender and Violent Sexual Offender Administrative Fee.

Each year during the month of March, violent sexual offenders are required to pay an administrative fee, not to exceed \$100. Sexual offenders pay the administrative fee during their annual reporting period. This fee is to be retained by the sheriff to be used to purchase equipment, to defray personnel and maintenance costs, or any other expenses incurred as a result of the implementation of the "Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004." Violent sexual offenders and sexual offenders who reside in nursing homes and assisted living

facilities and offenders committed to mental health institutions or continuously confined to home or health care facilities due to mental or physical disabilities are exempt from the in-person reporting and administrative fee requirement. T.C.A. § 40-39-204(b) and (c).

Jailers' Fees

Misdemeanant Prisoners.

The county legislative body of each county has the authority to pass a resolution fixing the amount of jailers' fees that may be applied to misdemeanor prisoners. The rate fixed shall apply to such prisoners confined in the county jail or county workhouse or workhouses but not meeting the conditions required for a state subsidy under Title 41, Chapter 8. T.C.A. § 8-26-105(a). A sample resolution is included in the appendix.

Sheriffs and jailers must make written statements of account, properly proven and sworn to, for the keeping of prisoners, specifying distinctly each item and the amount due for each item. T.C.A. § 41-4-129.

Jailer's fees are taxed separately from the general bills of costs of criminal cases. All state costs must be properly proved and sworn to before the clerk of the criminal or circuit court of the county and certified by the clerk for payment. T.C.A. § 41-4-131.

Jailer's fees for county prisoners shall be referred monthly to the county mayor for inspection, who shall audit the fees and cause the clerk to issue a warrant for the amount allowed. T.C.A. § 41-4-136.

Federal Prisoners.

The jailer is liable for failing to receive and safely keep all persons delivered under the authority of the United States, to the like pains and penalties as for similar failures in the case of persons committed under authority of the state. However, **the marshal or person delivering such prisoner under authority of the United States is liable to the jailer for fees and the subsistence of the prisoner while so confined, which shall be the same as provided by law for prisoners committed under authority of the state.** The jailer will also collect from the marshal 50 cents a month for each prisoner, under the resolution of the first Congress, and pay the same to the county trustee forthwith, to be accounted for by the trustee as other county funds. T.C.A. § 41-4-105.

Inmate Copay.

Any county may, by resolution adopted by a two-thirds vote of the county legislative body, establish and implement a plan authorizing the county jail administrator to charge an inmate in the county jail a copay amount for any medical care, treatment, pharmacy services or substance abuse treatment by a licensed provider provided

to the inmate by the county. A county adopting a copay plan must establish the amount the inmate is required to pay for each service provided. However, an inmate who cannot pay the copay amount established by the plan cannot be denied medical care, treatment, pharmacy services or substance abuse treatment by a licensed provider. T.C.A. § 41-4-115(d).

If an inmate cannot pay the copay amount established by a plan adopted pursuant to T.C.A. § 41-4-115(d), the plan may authorize the jail administrator to deduct the copay amount from the inmate's commissary account or any other account or fund established by or for the benefit of the inmate while incarcerated. T.C.A. § 41-4-115(e).

Fees for Issued Items.

Any county may, by a resolution adopted by a two-thirds vote of the county legislative body, establish and implement a plan authorizing the jail administrator to charge an inmate committed to the county jail a fee, not to exceed the actual cost, for items issued to the inmate upon each new admission to the county jail. T.C.A. § 41-4-142(a).

Additionally, any county may, by a resolution adopted by a two-thirds vote of its county legislative body, establish and implement a plan authorizing the jail administrator to charge an inmate committed to the jail a nominal fee set by the county legislative body at the time of adoption for the following special services, when provided at the inmate's request:

- (1) Participation in GED or other scholastic testing for which the administering agency charges a fee for each test administered;
- (2) Escort by correctional officers to a hospital or other healthcare facility for the purpose of visiting an immediate family member who is a patient at such facility; or
- (3) Escort by correctional officers for the purpose of visiting a funeral home or church upon the death of an immediate family member.

T.C.A. § 41-4-142(b).

A plan adopted pursuant to T.C.A. § 41-4-142(a) or (b) may authorize the jail administrator to deduct the amount from the inmate's jail trust account or any other account or fund established by or for the benefit of the inmate while incarcerated. Nothing in T.C.A. § 41-4-142 shall be construed as authorizing the jail administrator to deny necessary clothing or hygiene items or to fail to provide the services specified in T.C.A. § 41-4-142(b) based on the inmate's inability to pay such fee or costs. T.C.A. § 41-4-142(c).

CHAPTER 9

FINANCIAL STRUCTURE OF COUNTY GOVERNMENT

Financial structure on the county level is generally organized around each local official and the revenues and expenses of each of these offices, which operate separately within the framework of the county financial structure as a whole. The trustee acts as the county banker and handles receipts and disbursements, the latter of which must be authorized by the county legislative body according to statutes enacted by the General Assembly and decisions rendered by the state courts. **No county funds may be expended unless authorized (or “appropriated”) by the county legislative body.** T.C.A. § 5-9-401. This appropriation procedure is a phase of the annual budgeting process, which begins in January and usually ends in July with the approval of the budget.

The day-to-day expenses relating to personnel, supplies, materials, utilities, contracted services, upkeep of facilities, and similar costs of providing county services are referred to as current operating expenses. To pay for these expenses the county collects fees authorized by statute, levies and collects taxes, and receives revenues from the state and federal governments. Like a business, the county has income (referred to as revenues) and expenses. Also like a business, the county's financial management involves budgeting, accounting, purchasing, payroll, cash flow, and related areas. Unlike a business, a county has very limited implied powers. It must operate strictly by the express provisions of the law in carrying out these functions. There are three types of state laws applicable to the county financial function: (1) general laws, (2) general laws with local option application, and (3) private acts for a specific county. Also, the general law provides for county charters and metropolitan government charters to structure financial management in the counties that have adopted these charters.

Sheriffs, upon entering office, should become familiar with the laws and regulations governing financial management in their particular county, as these laws and rules vary considerably from county to county.

Financial Management Under the General Law

Unless a county has elected to operate under a general law with local option application, has adopted a private act passed by the General Assembly, or is operating under a county charter or metropolitan government charter, the county must manage its finances in accordance with the general laws for all counties. General laws provide guidance in the areas of budgeting, accounting, purchasing, and investment of temporarily idle county cash funds.

Budgeting.

Under general laws each county office is required to prepare and submit a budget to the county mayor on or before April 1 of each year, or on another date specified by the county legislative body. T.C.A. § 5-9-402. This budget should provide the county legislative body with an estimate of the funds required by each county office during the coming fiscal year. T.C.A. § 5-9-402.

The county legislative body will review the budgets submitted by each office and combine them into one county budget, and approve a budget for the fiscal year which begins July 1 and ends June 30. The law requires that the proposed annual operating budget be published in a newspaper of general circulation in the county no later than five days after the budget is presented to the county legislative body if the newspaper is published daily. If such newspaper is published less often than daily, then it must be published in the first edition for which the deadline for such publication falls after the budget is presented to the county legislative body. A county may also publish the proposed annual operating budget on the county's Internet Web site, which will be accessible to the public on the day the budget is presented to the county legislative body. The budget cannot be adopted until at least 10 days after publication. The annual operating budget must contain a budgetary comparison for the following four governmental funds: general, highway/public works, general purpose school fund, and debt service. T.C.A. § 5-8-507. The sheriff's operating budget is a part of the general fund budget. The comptroller of the treasury prescribes the required form of the county budget. T.C.A. § 5-9-403.

The county budget, as approved by the county legislative body, is the guide for determining the appropriation of all county operating funds for county offices, departments, and agencies. T.C.A. § 5-9-401. The budget format has major categories for each office or service, with line items for salaries, supplies, and other expenses under each major category. This format is commonly referred to as a "line item" budget. In this budget the county may appropriate funds for specific purposes as prescribed by state law. See T.C.A. §§ 5-9-101 through 5-9-112 (and other code sections specifying other purposes). Also, the county legislative body is generally considered to have the authority to amend, reduce, or add to the budget submitted by county offices, except for the education department budget, which must be approved or rejected as a whole. The county legislative body may not make transfers between the major funds, such as school, highway, general, and debt service, but it may make budget amendments within funds during the course of the fiscal year. T.C.A. § 5-9-407. In some counties, approval of line item amendment requests by department heads is made by the budget committee under authority granted in the annual budget resolution.

A county may receive charitable contributions for the general fund. If funds are given subject to certain conditions as to their use, the county legislative body must approve acceptance of the gift and it must be used for such purposes. If funds are restricted, the money is placed in the county general fund and appropriated according to normal budgetary process. If the gift is of personal or real property that is subsequently sold by the

county, the revenue from such sale must be deposited in the general fund. T.C.A. § 5-8-101.

A county legislative body may prepare and adopt a biennial budget for such departments of the county as are authorized for the particular county by the comptroller of the treasury's state director of local finance; however, such biennial budgets may not be used until changes are made to existing county charters, private acts or resolutions that require annual budgets. T.C.A. § 4-3-305.

Accounting.

The state comptroller of the treasury, with the approval of the governor, is required to devise a modern and effective bookkeeping and accounting system to be used by all county officials and agencies handling the revenues of the state or its political subdivisions, and is to prescribe the minimum standards required under that system. T.C.A. § 5-8-501. Each county and agency of the county is required to meet these standards; if it fails to do so, the county is obligated to pay the actual cost of auditing above the standard fee prescribed in T.C.A. § 9-3-210. T.C.A. §§ 5-8-502, 5-8-503. **Each county official must file an annual financial report for the fiscal year ending June 30 with the county mayor and the county clerk, who provides copies to members of the county legislative body.** The comptroller of the treasury prescribes the required form of the financial report. T.C.A. § 5-8-505. There is no longer a publication requirement for these financial reports.

There are also some specific statutorily required accounting procedures for certain county offices and departments.

Purchasing.

The laws regarding purchasing for county governments are not uniform. There are many state laws of general application, as well as several local option laws discussed later in this chapter, that may apply. A table listing the purchasing laws under which each county operates is included in the appendix.

County Purchasing Law of 1983.

The County Purchasing Law of 1983, T.C.A. § 5-14-201 et seq., applies to purchases by authorized officials using county funds unless the county operates under a county or metropolitan government charter or has adopted the County Purchasing Law of 1957 or the County Financial Management System of 1981. Also, this general law does not apply to counties with private acts if the private act provides for public advertising and competitive bidding for purchases over \$5,000 or a lesser amount.

Pursuant to T.C.A. § 5-14-204, all purchases and leases or lease-purchase agreements made under the County Purchasing Law of 1983 must be made or entered into only after public advertisement and competitive bidding, except for:

- (1) Purchases costing less than \$5,000;

- (2) Goods or services that may not be procured by competitive means because of the existence of a single source or because of a proprietary product;
- (3) Supplies, materials or equipment needed in an emergency situation, subject to reporting requirements of the county legislative body and the county mayor;
- (4) Leases or lease-purchase agreements requiring payments of less than \$5,000 per year; and
- (5) Fuel and fuel products purchased in the open market by governmental bodies.

County legislative bodies may by resolution lower the dollar amount over which competitive bids are required and may also adopt regulations providing procedures for implementing this act.

Other Purchasing Laws.

The County Purchasing Law of 1957, found in T.C.A. §§ 5-14-101 through 5-14-116, may be adopted by the voters in a referendum or by a two-thirds vote of the county legislative body. This act is one of the three companion Fiscal Control Acts of 1957 discussed later in this chapter.

The County Financial Management System of 1981, also discussed later in this chapter, is found in T.C.A. §§ 5-21-101 through 5-21-129. This system also must be approved by a two-thirds vote of the county legislative body or a majority of the voters in order to be effective in any county. T.C.A. § 5-21-126. This law provides for a consolidated financial management system to administer the finances of all county funds that are handled through the office of the trustee, including purchasing procedures.

Counties with populations over 150,000 are authorized to make purchases under \$10,000 without competitive bids or proposals, but these counties may retain their present competitive bidding requirements or establish different limits by private act or charter provision. T.C.A. § 12-3-1007.

County governments may use pricing discounts obtained by the National Association of Counties (NACo) Purchasing Alliance by considering the NACo price in the same manner as a formal bid or informal quotation under the county's bidding laws. T.C.A. § 12-3-1008. The Tennessee Department of General Services (TDGS) may upon request, purchase supplies and equipment for any county. Counties may purchase under the provisions of contracts or price agreements entered into by TDGS without public advertisement and competitive bidding. Also, county governments may purchase goods, except motor vehicles, under federal General Services Administration (GSA) contracts to the extent permitted by federal law or regulations. T.C.A. § 12-3-1001.

County governments may distribute solicitations and receive bids, proposals and other offers electronically but cannot require small or minority-owned businesses to receive or respond electronically. T.C.A. § 12-3-704. Counties, municipalities, utility districts and other local governments may participate in cooperative purchasing agreements for procuring supplies, services or construction. T.C.A. § 12-3-1009.

The procurement of professional services, such as architectural and engineering services and financial advisory services, is governed by T.C.A. § 12-4-106. There are many other statutes that are not discussed here but that may affect the manner in which purchases of particular goods and services are to be made. These statutes are scattered throughout the *Tennessee Code Annotated*, depending upon the subject area. There are, for example, several statutes dealing with bidding in connection with construction contracts that appear in Title 62 of the *Tennessee Code Annotated*. Purchasing matters should be carefully reviewed, and county attorneys should be consulted with regard to compliance with the requirements of all applicable statutes.

Financial Management Under General Law With Local Option Application

As the financial structure of counties grew more complex and cash flow increased, many counties considered the general laws vague and incomplete. Furthermore, the management of county finances under the general law is a fragmented system in which each county office makes purchases without issuing purchase orders and maintains separate accounting records. Under this system it is difficult to manage the cash flow for investing funds and to properly determine the county financial condition. To compensate for these deficiencies the General Assembly passed the Fiscal Control Acts in 1957, the County Financial Management System in 1981, and the Local Option Budgeting Law in 1993. Although these are general laws, they apply only to counties in which they have been approved by a two-thirds vote of the county legislative body. A table listing the budgeting act under which each county operates is included in the appendix.

The primary reasons for these acts were to (1) better use business management techniques, (2) consolidate and establish a uniform financial system, (3) improve utilization of county resources, (4) provide for the employment of a trained technician in finance, and (5) improve county financial information.

Local Option Budgeting Law of 1993.

This act, codified at T.C.A. §§ 5-12-201 through 5-12-217, provides an optional budgeting procedure for all county offices that are funded from county appropriations. It may be adopted by a two-thirds vote of the county legislative body.

The primary thrust of this legislation is to provide a system through which a county may develop a consolidated budget for all county appropriations, adopt a tax rate and appropriation resolution to fund that budget, and specify a deadline by which these actions must be taken. In brief outline, this procedure begins no later than February 1 of each year when the county mayor distributes to each county office budget forms upon which to

submit a proposed budget. T.C.A. § 5-12-206. Additionally, the county mayor furnishes estimated revenue information to the departments of education and highways, based upon the assessor's estimation of property valuation. T.C.A. § 5-12-207. Along with their proposed budgets, those two departments then submit a form tax rate resolution showing how much property tax they are requesting to fund their budgets. The proposed budgets are then consolidated and submitted to the county legislative body on or before June 1. The statute specifies procedures for resolving disputes and for amending the budget. T.C.A. §§ 5-12-209, 5-12-212, 5-12-213.

This act can work in conjunction with either of the other two local option budget laws (discussed below) or with private acts. The only portion of this budgeting plan that cannot be superseded by other general law or private act adopted by the county is found in T.C.A. § 5-12-210. This section requires that the county legislative body adopt a budget, tax rate, and appropriation resolution no later than July 31 for that fiscal year beginning on the first day of July. The county legislative body can adopt the budget as proposed by the office heads or as consolidated by the county mayor or budget committee. If the budget is not adopted before the beginning of the fiscal year on July 1, then the county operates on a monthly allotment, based upon the preceding year's budget, during the month of July. If the budget still is not adopted by August 15, then the portion of the budget proposed by the department of education, together with any modifications agreed upon by the board of education, will become effective by operation of law. T.C.A. § 5-12-210. This provision also includes the property tax rate and appropriation that the education department has proposed to fund its budget. The operating budget for the remainder of the county offices, excluding education, is the consolidated budget, including proposed amendments, which was submitted by the county mayor or the budget committee. This budget, together with the proposed tax rate and appropriation measures required to fund it, also becomes effective by operation of law. Finally, the act requires a balanced budget and contains provisions for adjustments if unanticipated circumstances are likely to result in a budget surplus or deficit. T.C.A. §§ 5-12-215 through 5-12-217. Procedures for amending a budget in effect are described in T.C.A. §§ 5-12-212, -213.

County Financial Management System of 1981.

This act is found in T.C.A. §§ 5-21-101 through 5-21-129 and provides for the consolidation of financial functions and the establishment of a financial management system for all county funds handled by the county trustee. (Fee and commission accounts of fee offices are not handled by the county trustee and, therefore, are not included under the act.) The system is similar to that found in the 1957 acts; however, under this plan the county operates under one act rather than three. **This system must be approved by a two-thirds vote of the county legislative body or a majority of the voters in order to be effective in any county.** T.C.A. § 5-21-126.

Under the County Financial Management System of 1981, a finance department is created to administer the finances of the county for all funds handled by the trustee, in conformity with generally accepted principles of governmental accounting and rules and regulations established by the state comptroller of the treasury, state commissioner of education, and

state law. T.C.A. § 5-21-103. Unlike the 1957 laws, this program includes the management of school funds just like all other county funds, although the commissioner of education may remove the school department if records are not properly maintained in a timely manner. T.C.A. § 5-21-124.

This system requires a county financial management committee consisting of the county mayor, supervisor of highways, superintendent of education (director of schools), and four members elected by the county legislative body. These latter four need not be members of the board of county commissioners, but they may be. T.C.A. § 5-21-104(b). The committee establishes policies, procedures, and regulations to implement a sound, efficient county financial system. T.C.A. § 5-21-104(e). Additionally the county legislative body, by resolution, may create special committees or may authorize the financial management committee to assume any or all of the following functions: (1) budgeting, (2) investment, and (3) purchasing. T.C.A. § 5-21-105.

The county financial management committee appoints a director of finance. Minimum requirements for this position include a bachelor of science degree with at least 18 quarter hours in accounting, although the committee may select a person with two years of acceptable experience in a related position. T.C.A. § 5-21-106. The compensation of the director is established by the committee subject to the approval of the county legislative body. T.C.A. § 5-21-106(c). The director oversees the operation of the department of finance and installs and maintains a purchasing, payroll, budgeting, accounting, and cash management system for the county. T.C.A. § 5-21-107. The director must have a blanket bond of at least \$50,000 for the faithful performance of the director's duties. T.C.A. § 5-21-109.

The department of finance, under the supervision of the director and subject to the policies and regulations of the county financial management committee, is responsible for the following areas:

- (1) Budgeting (T.C.A. §§ 5-21-110 through 5-21-114);
- (2) Accounting fiscal procedures (T.C.A. §§ 5-21-115 through 5-21-116);
- (3) Payroll account (T.C.A. § 5-21-117);
- (4) Purchasing (T.C.A. §§ 5-21-118 through 5-21-120);
- (5) Conflict of interest - improper gifts (T.C.A. § 5-21-121); and
- (6) Compensation of committee members (T.C.A. § 5-21-122).

This system is to be installed within 13 months, beginning on July 1 of the fiscal year after its adoption and completed by August 1 of the second fiscal year. T.C.A. § 5-21-127.

Fiscal Control Acts of 1957.

The Fiscal Control Acts of 1957, found in T.C.A. §§ 5-12-101 through 5-14-116, were intended to provide a means for counties to consolidate functions, establish uniform financial procedures, and incorporate business practices into the management of county finances. They are divided into three separate acts: budgeting, accounting, and purchasing. **A county may enact any or all of the three acts**; however, it is difficult to implement fewer than all three acts because each refers to certain provisions of the others. **These acts, either individually or together, are adopted by a two-thirds vote of the county legislative body or by a majority public vote in a referendum.**

If these acts are adopted, all funds managed by the county mayor and the highway supervisor are automatically covered by them. School funds may be placed under the management of these acts only if the state commissioner of education approves the transfer. T.C.A. § 5-13-110.

County Budgeting Law of 1957.

This act is found in T.C.A. §§ 5-12-101 through 5-12-114. If adopted by a county, it provides for a budget committee made up of five members who include the county mayor as well as four other members appointed by the county mayor and confirmed by the county legislative body. The four appointed members may be members of the county legislative body but are not required to be. The county mayor serves as chairperson of this committee. T.C.A. § 5-12-104. The budget committee performs all duties prescribed by law for the budgeting process, including preparation and control. T.C.A. §§ 5-12-104, 5-12-106, and 5-12-107. Each year while the budget is under consideration, a synopsis of the proposed budget and property tax rate are to be published in a newspaper of general circulation. T.C.A. § 5-12-108. Then the director of accounts and budgets (appointed under T.C.A. § 5-13-103 of the County Fiscal Procedure Law, discussed below) prepares a monthly report showing the condition of the budget and submits this report to the county mayor and the county legislative body. T.C.A. § 5-12-111.

County Fiscal Procedure Law of 1957.

This act, found in T.C.A. §§ 5-13-101 through 5-13-111, pertains to accounting for county funds. If this act is adopted by a county, the county mayor, subject to approval by the county legislative body, appoints a director of accounts and budgets (DAB). T.C.A. § 5-13-103(a). The DAB must be qualified by training and experience in the field of accounting to perform the duties of the office. The salary of the DAB cannot be in excess of those salaries allowed county officials in accordance with T.C.A. §§ 8-24-101 and 8-24-102. T.C.A. § 5-13-103(d). The duties and responsibilities of the DAB are established by the county mayor, T.C.A. § 5-13-103(e), and delineated in T.C.A. § 5-13-105. The corporate surety bond for the DAB cannot be less than \$10,000 nor more than \$25,000. T.C.A. § 5-13-103(c).

The DAB administers a centralized system of accounting and fiscal procedure for the county. T.C.A. § 5-13-104. The DAB also has the duty to verify all claims against the county and to prepare and sign disbursement warrants only after a careful pre-audit of all invoices and verification by the county official receiving the merchandise. T.C.A. §§ 5-13-105 through 5-13-107. At the end of each month the DAB prepares a comprehensive report of all revenues and expenditures of the county and presents it to the county legislative body. T.C.A. § 5-13-105(f).

County Purchasing Law of 1957.

This act is found in T.C.A. §§ 5-14-101 through 5-14-116. If adopted, it establishes procedures for county purchasing. Under this act the county mayor appoints a purchasing agent, subject to the approval of the county legislative body. The purchasing agent must be qualified by training and experience to perform the required duties. T.C.A. § 5-14-103. The person appointed as purchasing agent must have a corporate surety bond of not less than \$10,000 nor more than \$25,000. The salary is not to be in excess of amounts paid to other county officials as prescribed in T.C.A. §§ 8-24-101 and 8-24-102. T.C.A. § 5-14-103(d). The director of accounts and budgets may also serve as the purchasing agent. The primary duties of the purchasing agent are to (1) purchase all supplies, materials, equipment, and contractual services, (2) arrange for rental of all machinery, buildings, and equipment, (3) transfer materials, supplies, and equipment between county departments, and (4) supervise the central storeroom. T.C.A. §§ 5-14-105, 5-14-107, 5-14-108.

A county purchasing commission is also established, consisting of the county mayor and four other members appointed by the county mayor and approved by the county legislative body. T.C.A. § 5-14-106(b). The primary duties of the commission are to establish policies and regulations for making purchases and contracts. T.C.A. § 5-14-106(d).

Competitive bids are required for the following transactions: all purchases of and contracts for supplies, materials, equipment, and contractual services; all contracts for the lease or rental of equipment; and all sales of county-owned property that is surplus, obsolete, or unusable. Certain contracts and purchased items are exempt from this requirement, such as professional service contracts and purchases of fuel and perishable commodities. T.C.A. § 5-14-108.

Except for emergencies, purchases and contracts are not awarded unless first certified by the director of accounts and budgets or other county official or employee in charge of the central accounting records. This certification insures that the unencumbered balance in the appropriation is sufficient to cover the expense. T.C.A. § 5-14-109. Each purchase order or contract issued or executed must be evidenced by a written order signed by the purchasing agent. T.C.A. § 5-14-111. The county is liable for the payment of all purchases made in accordance with the provisions of this act. T.C.A. § 5-14-113.

Neither the purchasing agent, members of the purchasing commission, county legislative body, nor other officials of the county may be financially interested or have any personal beneficial interest, either directly or indirectly, in any contract or purchase order. T.C.A. § 5-14-114.

Financial Management Under Private Acts

Many counties have adopted private acts passed by the General Assembly that provide procedures for budgeting and purchasing. These acts apply only to the county named in the private act, and many of these acts have not been revised or updated for a number of years. Private acts of this nature should be written so that they will not conflict with the general law. If the private act is in conflict with a general law, the courts will generally hold it unconstitutional, or the state attorney general will issue an opinion that the private act is unconstitutional or constitutionally suspect under Article XI, Section 8, of the Tennessee Constitution. See, e.g., *Algee v. State ex rel. Makin*, 290 S.W.2d 869 (Tenn. 1956); Op. Tenn. Atty. Gen. 87-98 (May 29, 1987).

Local Government Modernization Act of 2005

The Local Government Modernization Act of 2005 directs the comptroller of the treasury to determine those local governments that are in noncompliance with the accounting and reporting model for financial statement presentation established by the governmental accounting standards board (GASB) in statement 34. Governments not in compliance must submit an implementation work plan to the comptroller on a date set by the comptroller. For counties, the county mayor will serve as the primary person with responsibility for the work plan's development and implementation, which must not be later than June 30, 2008. If a local government fails to submit a work plan by the date set by the comptroller, then the comptroller will provide assistance to the local government to develop a work plan within 60 days of the date the plan should have been filed.

If the local government fails to implement GASB standards by June 30, 2008, then penalties and restrictions will be imposed on the local government. These penalties will include withdrawal of eligibility for economic and community development grants, reduction of the bank excise tax and Hall income tax revenues (not to exceed 5 percent of the total amount due in any fiscal year), until the local government is in compliance. If a school system fails to comply, then it will not be eligible for certain state funded education grants as determined by the comptroller and the commissioner of education. If a county highway department fails to comply, then the comptroller and the commissioner of revenue shall determine the amount of the reduction of monthly state gasoline tax proceeds going to the county. The amounts of gasoline tax proceeds reduced will be held in reserve and allocated to the county upon the county becoming compliant as determined by the comptroller.

The comptroller will provide a list of professional firms to the local government not in compliance with GASB standards to assist in the work plan. The local government must provide funds for the cost of this assistance.

The comptroller will review and evaluate the financial management system in those county governments not in compliance with GASB standards by June 30, 2008. The comptroller will then make a recommendation to the county legislative body on how to improve the system to facilitate compliance. The county legislative body has 90 days from receiving the recommendation to take action on it.

Local governments are encouraged to form an audit committee, and the comptroller may require it if a local government is not in compliance with GASB standards by June 30, 2008, or has recurring findings or material weakness in internal control for three or more consecutive years.

Checks

County officials are authorized under T.C.A. § 9-1-108 to receive checks or money orders made payable to the appropriate county officer in payment of any public taxes, licenses, fines, fees or other moneys collected. A county official or employee authorized to receive checks or similar sight orders cannot require or encourage the drawer of the check or order to make the check or order payable to a personal name, as opposed to the name of the government or agency or the official's name and title. T.C.A. § 9-1-117.

If a check or money order is not duly paid, the person by whom the check or money order was tendered remains liable for all taxes, licenses, fees or other obligations and all penalties and interest to the same extent as if the check or money order had not been tendered. In addition to any other penalties provided by law, if a check or money order is not paid, upon written notice and demand sent by the official, the person who tendered the check or money order is required to pay a penalty of 1 percent of the amount of the check or money order, except that if the check or money order is under \$2,000 the penalty is \$20 or the amount of the check, whichever is less. T.C.A. § 9-1-109. Additionally, a handling charge may be assessed against the maker or drawer of the check with insufficient funds in an amount up to \$30. T.C.A. § 47-29-102.

Persons who knowingly tender a worthless check in payment of any fee, fine, taxes, or other obligation to a governmental entity may be criminally prosecuted under Tennessee's worthless check law, T.C.A. § 39-14-121. Criminal fees in worthless check prosecutions are set out in T.C.A. § 40-3-204. Before commencing a criminal prosecution in a bad check case, the county officer who has received a bad check may apply to the clerk of the court of general criminal jurisdiction in the county where the offense occurred for participation in the bad check restitution program under T.C.A. § 40-3-203. The official completes an application form and pays a fee of \$10. The clerk forwards the form to the district attorney general, who sends a letter to the last known address of the violator stating that unless the amount of the check plus the application fee and a handling charge of \$10 is paid to the holder of the check within 15 days, a criminal prosecution may be commenced. The application fee is forwarded by the clerk to the county trustee with the clerk retaining \$5 as a fee for handling. If the violator does not pay the check and is ultimately convicted of a criminal charge, any order directing the defendant to pay the holder the amount due on the check shall also direct the defendant to reimburse the application fee paid as well as to pay

to the holder a handling fee of \$10. All of these criminal fees are in addition to the fees provided in other statutes. T.C.A. § 40-3-210.

Credit Cards

County officials or entities may (but are not required to) receive payment by credit card or debit card for any public taxes, licenses, fines, fees or other monies collected. The entity or official collecting payment by credit or debit card must collect a processing fee in an amount equal to the fee charged by the third-party processor for processing the payment but not exceeding 5 percent of the amount of the payment. The amount or percentage of the processing fee must be stated on the notice sent to the person owing the tax, fine, fee or other money. This processing fee may be waived, however, with approval of the county legislative body. T.C.A. § 9-1-108(c). If payment is not honored by the credit card company or the entity upon which a debit card payment is drawn, the county entity or official may collect a service charge in the same amount charged for the collection of a check drawn on an account with insufficient funds. T.C.A. § 9-1-108(c)(4).

In credit or debit card transactions, no more than the last five digits of the card number may be printed on the receipt. T.C.A. § 47-18-126.

Disposition of Surplus County Property

Generally, the county legislative body may by resolution direct the sale and conveyance of county real property and personal property other than school property. T.C.A. § 5-7-101. However, in counties operating pursuant to the County Purchasing Law of 1957, property that is declared surplus, obsolete or unusable must be disposed of by the purchasing agent either by sale at auction or by competitive bid, excepting books and other material in general circulation at a county public library. T.C.A. 5-14-108(o). In counties operating under the County Financial Management System of 1981, the director of finance has the responsibility for the public sale of all surplus materials, equipment, buildings and land. T.C.A. § 5-21-118. The county board of education has the authority to determine the sale or transfer of county school property, both real and personal. Surplus school personal property valued at \$250 or more is sold to the highest bidder unless sold or transferred to a local government. The county board of education may transfer surplus real property to the county or to a municipality within the county without sale or competitive bidding. T.C.A. §§ 49-6-2006, 49-6-2007.

A recent law, 2005 Chapter 336, has enhanced the authority of county legislative bodies and boards of education regarding disposition of property to other public entities without sale or competitive bidding beyond the statutes noted above. This statute authorizes an agreement between the governing bodies of public agencies to allow the conveyance or transfer of property, real or personal, if the public agency or agencies receiving the conveyance or transfer uses the property for a public purpose. This new provision may be used without declaring property surplus, and it supersedes any contrary requirements in any other general law or private act. T.C.A. § 12-9-110.

Auditing

In Tennessee, the records of all local governments must be audited annually. T.C.A. § 9-3-211. The state comptroller of the treasury through the Division of County Audit is given the authority to establish accounting standards (T.C.A. §§ 5-8-501, 9-3-212(b)) and auditing standards. T.C.A. § 9-3-212(b). The county legislative body contracts with a certified public accountant or the state Division of County Audit to make the annual audit. T.C.A. § 9-3-212. However, the county must receive approval of a private auditor from the Division of County Audit and comply with other requirements of that office. The contract cost to use the state Department of Audit is 22.5 cents for each person in the county based on the most recent federal census. T.C.A. § 9-3-210. Regardless of who performs the audit, a certified copy of it must be submitted to the state comptroller. T.C.A. § 9-3-213. In the event state-shared funds are misappropriated or misused, the state is authorized to withhold state funds for the amount misused. Also, the state may collect on the individual official's surety bond if the misused funds result from that official's unlawful or dishonest acts. T.C.A. §§ 9-3-301, 9-3-302.

If a public servant, with intent to deceive knowingly misrepresents information to an auditor, this action constitutes a class C misdemeanor. T.C.A. § 39-16-407.

CHAPTER 10

LIABILITY ASPECTS OF COUNTY GOVERNMENT

Liability exposure, both personal liability exposure for county officials and county liability exposure, is a topic of great importance to county governments due to the ever-increasing number of lawsuits being filed and the corresponding rise in insurance costs. Both tort and non-tort liability can be extremely costly to county officials and employees, as well as to counties as a whole. This chapter will discuss tort and non-tort liability, including certain immunity provisions of law. Liability associated with personnel, one of the fastest growing areas, will also be mentioned briefly.

A tort suit is a civil action based on a violation of a duty imposed by law. A tort can be the result of an intentional act or a negligent act. An action can be both a tort and a crime as, for instance, an assault could result in both criminal liability and civil liability. The plaintiff who claims to have suffered a tort must show an act, intentional or negligent, that violates a duty imposed by law, generally the standard of care an ordinary person would exercise in like circumstances, and damages resulting from the breach of duty. The violation of duty can be through misfeasance (the improper doing of an act) or by nonfeasance (omitting to do an act).

Tennessee Governmental Tort Liability Act

In years prior to 1973, Tennessee counties were protected under the state's sovereign immunity for governmental acts but were liable for damages resulting from proprietary activities. Governmental acts were activities that were peculiar to governments or activities only governments could provide, such as police protection, fire protection, education, or tax collection. Proprietary activities were those that could be provided by private as well as governmental entities, such as water and sewer service, electrical service, and mass transit.

In 1973, the Tennessee General Assembly enacted the Tennessee Governmental Tort Liability Act, T.C.A. § 29-20-101 *et seq.*, which provides that counties are immune under state law from all suits arising out of their activities, regardless of whether the activities are governmental or proprietary, unless immunity is specifically removed by statute. T.C.A. § 29-20-201. **This immunity does not extend to liability under federal law; conduct that is immune under state law can still give rise to a cause of action under federal law.**

County immunity is removed (*i.e.*, the county can be sued) for injuries arising from the:

- (1) Negligent operation of a motor vehicle;
- (2) Negligent construction or maintenance of streets, alleys, sidewalks or highways, including traffic control devices;

(3) Negligent construction or maintenance of a public building, structure, dam, reservoir or other public improvement owned and controlled by the governmental entity;

(4) Negligent acts or omissions by a county employee acting within the scope of employment, with exceptions noted below.

T.C.A. §§ 29-20-202 through 29-20-205.

Exceptions to the areas in which the county's immunity is removed (in other words, the county is immune from suit) include claims arising from:

(1) The exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

(2) False imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of privacy, or civil rights;

(3) Issuing, denying, suspending, or revoking, or failing to refuse to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization;

(4) Failing to inspect or negligently inspecting any property;

(5) Instituting or prosecuting any judicial or administrative proceeding;

(6) Negligent or intentional misrepresentation;

(7) Riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances; or

(8) Assessing, levying or collecting taxes.

T.C.A. § 29-20-205.

Because a county can act only through its officers and employees, it is important to determine whose action or inaction will trigger potential county liability and the application of the Tennessee Governmental Tort Liability Act. Elected and appointed officials and members of boards, agencies and commissions are easily identifiable representatives of the county. A person who is not an elected or appointed official or a member of a board, agency or commission will be considered a county employee *only if* the court specifically finds that all of the following elements exist:

(1) The county selected and engaged the person in question to perform services;

(2) The county is liable for compensation for the performance of such services and the person receives all compensation directly from the county's payroll department;

(3) The person receives the same benefits as all other county employees, including retirement benefits and eligibility to participate in insurance programs;

(4) The person acts under the control and direction of the county not only as to the result to be accomplished but as to the means and details by which the result is accomplished; and

(5) The person is entitled to the same job protection system and rules, such as civil service or grievance procedures, as other county employees.

T.C.A. § 29-20-107.

A regular member of a county voluntary or auxiliary firefighting, police or emergency assistance organization is considered to be a county employee without regard to the elements listed above. T.C.A. § 29-20-107(d). The county cannot extend immunity to independent contractors or other persons or entities by contract. T.C.A. § 29-20-107(c).

Before a county may be held liable for damages, the court must first determine that the employee's or employees' act or acts were negligent and the proximate cause of plaintiff's injury, that the employee or employees acted within the scope of their employment, and that none of the exceptions listed in T.C.A. § 29-20-205 apply to the facts before the court. T.C.A. § 29-20-310.

The immunity granted to governmental entities under T.C.A. § 29-20-205 does not extend to officers and employees of that governmental entity in their individual capacities. However, limited immunity is granted to county officials and employees under T.C.A. § 29-20-310. In cases where the county cannot be held liable, the individual county officials and employees may be held liable but only up to the liability limits established in the Tennessee Governmental Tort Liability Act. T.C.A. § 29-20-310(c). When the case is one where the county can be held liable, the official or employee can be held liable only for that part of a judgment that exceeds the county's liability limits under the act. T.C.A. § 29-20-310(b). **Willful, malicious, or criminal acts, or acts committed for personal gain, do not fall under the personal liability protective provisions of the Tennessee Governmental Tort Liability Act** (nor do medical malpractice actions brought against a healthcare provider). T.C.A. § 29-20-310.

By statute, some county officials and employees are declared immune from suit for their activities on behalf of the county. Members of county boards, commissions, agencies, authorities, and other governing bodies created by public or private act, whether compensated or not, are absolutely immune from suit (under state law) arising from the conduct of the entity's affairs. This immunity is removed only when the conduct is wilful,

wanton, or grossly negligent. T.C.A. § 29-20-201. Similarly, emergency communications district boards and their board members are immune (under state law) from any claim, complaint or suit of any nature that relates to or arises from the conduct of the board's affairs, except in cases of gross negligence by the board or its members. T.C.A. § 29-20-108.

The county may elect to insure or indemnify its employees for claims for which the county is immune. However, the indemnification may not exceed the liability limits established in T.C.A. § 29-20-403, except in causes of action in which the county employees' liability is not limited by the legislature. T.C.A. § 29-20-310(d). The county also may elect to insure or indemnify its volunteers. T.C.A. § 29-20-310(e).

No judgment or award rendered against a county may exceed the minimum amounts of insurance coverage for death, bodily injury and property damage liability specified in T.C.A. § 29-20-403 unless the county has secured insurance coverage in excess of the minimum requirements, and the judgment or award may not exceed the limit provided in the insurance policy. T.C.A. § 29-20-311.

Whenever a county or other governmental entity is found liable under the Governmental Tort Liability Act for any injury arising out of the provision of emergency services under any mutual aid or similar agreement, the governmental entity benefitting from the provision of services may pay any judgment or award against the provider unless otherwise provided in the agreement, up to the limits of the Governmental Tort Liability Act. 2005 Public Chapter 264.

The county may create and maintain a reserve or special fund to pay claims against it. Any two or more counties may enter into an agreement for joint or cooperative action to pool their financial and administrative resources to provide risk management, insurance, reinsurance, self-insurance for liabilities created under this act, workers' compensation, unemployment compensation, and motor vehicle insurance. T.C.A. § 29-20-401.

In 2001 the General Assembly enacted amendments to the limits of liability under the Tennessee Governmental Tort Liability Act. For actions arising on or after July 1, 2002, but before July 1, 2007, the liability limits are as follows:

Type of Claim	Limit
Bodily injury or death of any one person in any one accident, occurrence or act	\$250,000
Bodily injury or death of all persons in any one accident, occurrence or act	\$600,000
Injury to or destruction of property of others in any one accident	\$ 85,000

For actions arising after July 1, 2007, the liability limits will be as follows:

Type of Claim	Limit
Bodily injury or death of any one person in any one accident, occurrence or act	\$300,000
Bodily injury or death of all persons in any one accident, occurrence or act	\$700,000
Injury to or destruction of property of others in any one accident	\$ 100,000

T.C.A. § 29-20-403.

These limits do not apply to federal civil rights actions in state or federal courts. Suit must be commenced within 12 months after the cause of action arises. T.C.A. § 29-20-305. However, the one-year statute of limitations may be extended when claims involve persons under legal disabilities (incompetence, minor) or when the injured party has reasonably failed to discover the cause of action against the county, county officials, or employees.

The county or its insurer shall not be held liable for any claim arising under state law for which the county is immune under the act unless the county has expressly waived such immunity. The county or its insurer shall not be held liable for any judgment in excess of the limits of liability set forth in T.C.A. § 29-20-403 unless the county has expressly waived such limits. T.C.A. § 29-20-404. **However, the act does not prohibit or limit a county from purchasing an insurance policy or contract in such amounts as it deems proper for liabilities that may arise under federal law.** T.C.A. § 29-20-404.

The county may insure any or all of its employees against all or any part of their liability for injury or damage resulting from a negligent act or omission. The expenditure is deemed a public purpose and may be paid from funds derived from the tax levy authorized in T.C.A. § 29-20-402. T.C.A. § 29-20-406.

Any sheriff or group of sheriffs may purchase insurance or enter into an agreement to insure such sheriff and any or all employees against all or any part of their personal liability for injury or damages arising as a result of the act or omission of the sheriff or employee. T.C.A. § 29-20-406.

Counties, school districts, public hospitals, and other listed entities must file an annual report regarding their tort liability activities for the previous year with the office of the state treasurer beginning on March 30, 2001, and every year thereafter for a period of three years. The form is to be prescribed by the state treasurer. T.C.A. § 29-20-110.

Liability for Personnel Matters

Important employment law considerations include hiring, compensation, benefits, termination, retirement, the federal Fair Labor Standards Act (FLSA), the federal Family and Medical Leave Act (FMLA), right-to-know statutes, reserve service, jury service, the Occupational Safety and Health Act, the Equal Pay Act, the Immigration Control Act, the insurance provisions of the Consolidated Omnibus Budget Reduction Act (COBRA), FICA and FIT withholdings, and maternity leave.

An employer must refrain from retaliating or firing based on the employee's exercise of a protected constitutional right, *i.e.*, freedom of speech, or statutory right, *i.e.*, workers' compensation. Discriminatory motives should be avoided in every employment aspect. Under state and federal law, an employer may not discriminate against an employee or a potential employee based upon race, color, sex, religion, national origin, age or disability (including infectious, contagious or similarly transmittable diseases). Further, any form of sexual harassment is illegal. An individual may file a discrimination complaint with the Equal Employment Opportunity Commission (EEOC) or the Tennessee Human Rights Commission (THRC).

Specifically, an employer may not fire an employee solely for (1) refusing to participate or remain silent about illegal activities, or (2) using an agricultural product not regulated by the alcoholic beverage commission that is not otherwise prohibited by law, *i.e.*, smoking, if the employee follows the employer's guidelines regarding the use of the product while at work. T.C.A. § 50-1-304. Further, the First Amendment to the United States Constitution prohibits dismissals of certain types of governmental employees based on their political affiliation. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64 (1990). Whether party affiliation is an appropriate requirement for the effective performance of the public office depends on whether the job requires trust and confidentiality. *Williams v. City of River Rouge*, 909 F.2d 151, 155 (6th Cir. 1990). “[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, “[p]ublic officials are expected to be aware of clearly established law governing their conduct.” *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir.) 1991., *cert. denied*, 112 S.Ct. 187 (1991).

Other Non-Tort Liability

The limitations of the Tennessee Governmental Tort Liability Act do not apply to many types of state and federal court actions. For example, in state court, actions for workers' compensation, breach of contract, inverse condemnation, and other common law and statutory violations may be the basis of a non-tort action.

Breach of Contract.

If a county enters into a contract and then breaches, the county is responsible for damages. The extent of liability depends upon the contract's terms and damages suffered by the parties. If an official does not have actual authority to enter into a contract, the court may require the individual to specifically perform the contract.

Other Actions.

Lawsuits may be brought against the county if law enforcement and other court personnel engage in illegal behavior affecting search and seizure, voting rights, arrest, discriminatory enforcement of statutes, unlawful force. These actions may be brought in federal court under the federal Civil Rights Act, 42 U.S.C. § 1983, or in state court under the same federal statute or common law. *Poling v. Goins*, 713 S.W. 2d 305 (Tenn. 1986).

Damages are not recoverable for antitrust violations from any local government or official or employee acting in an official capacity. 15 U.S.C. § 35. In addition, damages are not recoverable for antitrust violations in any claim against a person based on any official action directed by the county or official or employee acting in an official capacity. 15 U.S.C. § 36. However, counties should be careful in restricting competition through granting exclusive franchises, making referrals to attorneys or lending institutions, or granting access to records.

A substantial amount of litigation involves county employees and other matters such as injuries to students during school hours, operating a county vehicle, county health department matters, failure to make necessary repairs on county roads, the existence of a dangerous condition, or the absence of a safety device. County officials should seek advice from the county attorney when questions arise with liability implications.

CHAPTER 11

COUNTY RECORDS

Open Records Requirement

All county records must be open for personal inspection by any citizen of Tennessee during business hours of the various county offices. County officials in charge of these records may not refuse the right of any citizen to inspect them unless another statute specifically provides otherwise (T.C.A. § 10-7-503) or they are included in the list of specific records that are to be kept confidential under T.C.A. § 10-7-504 or some other legal authority. A citizen denied access to a public record is entitled to file a petition for inspection, either in the chancery court of the county in which the records are located or in any other court of that county having equity jurisdiction. The county official denying access to the record has the burden of proof to justify the reason for nondisclosure. If the court directs disclosure, the county official shall not be held criminally or civilly liable for the release of the records, nor shall he or she be responsible for any damages caused by the release of the information. If the refusal to disclose the record is willful, the court may assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the county official. T.C.A. § 10-7-505.

For county governments, one of the most significant recent additions to the class of records that are confidential came in an amendment to T.C.A. § 10-7-504 that passed in 1999 to protect certain information regarding state, county, municipal and other public employees. **An employee's unpublished telephone numbers, bank account information, Social Security number, driver's license information (except where driving is a part of the employee's job) and similar information for the employee's family and household members are confidential.** Where this confidential information is part of a file or document that would otherwise be public information, such information shall be redacted if possible so that the public may still have access to the nonconfidential portion of the file or document.

Storage and Disposition of County Records

In recognition of the problems that counties encounter with records disposition, the General Assembly has created statutory procedures for storing and disposing of county records. T.C.A. § 10-7-401 *et seq.* **Records management is an important function of each county office.** Some records must be permanently preserved and made available for public use because of their administrative, legal, fiscal, or historical value. Other records, lacking these qualities, are considered of temporary value. The Records Retention Schedule for the Office of the Sheriff is included in the appendix.

County Public Records Commission.

Each county is required to establish a county public records commission composed of at least six members, including a member of the county legislative body, a judge of a county court of record, and a genealogist, all appointed by the county mayor and confirmed by the county legislative body. The county clerk (or his or her designee), county register, county historian and county archivist (if the county has such a position) are *ex officio* members. This commission has the authority to promulgate reasonable rules and regulations pertaining to the making, filing, storage, exhibiting, and copying of records. T.C.A. § 10-7-401. **Questions regarding the storage, retention, or destruction of county records may be addressed to the county public records commission.** For more information on the county public records commission and its operation consult the CTAS manual entitled *Records Management for County Governments*.

That manual also contains schedules of retention and disposition for records of each county office as required by T.C.A. § 10-7-404. By using these records disposition guides, officials may, with the approval of the public records commission, appropriately schedule records for destruction, thus avoiding the expense and inconvenience of keeping obsolete records as well as making space available for current and permanent value records. However, both temporary value records and paper original copies of permanent records must generally have the approval of the county public records commission before they can be destroyed. The law does allow destruction of original paper versions of a permanent record if they can be successfully reproduced onto another medium that still allows for permanent preservation of the record, such as microfilm. T.C.A. §§ 10-7-404, 10-7-406, 10-7-413.

Computer Records Storage Requirements.

Any information required to be kept as a record by any government official may be maintained on computer storage media instead of bound books or paper records if the following conditions are met:

- (1) The information is available for public inspection, unless it is a confidential record according to law;
- (2) Due care is taken to maintain any information that is a public record during the time required by law for retention;
- (3) All daily data generated and stored within the computer system is copied to computer storage media daily, and newly created computer storage media that are more than one week old shall be stored at a location other than at the building in which the original is maintained; and
- (4) The official can provide a paper copy of the information when needed or requested by a member of the public.

T.C.A. § 10-7-121.

Also, upon the promulgation of proper rules by the secretary of state, county officers may destroy or archive elsewhere, as appropriate, original paper records upon reproduction onto computer storage media such as CD-ROM disks after following certain procedures and standards and having the destruction or record transfer approved by the county public records commission and/or the state library and archives. T.C.A. § 10-7-404.

Remote Electronic Access to County Records

Each county official has the authority to provide computer access and remote electronic access for inquiry only to information contained in the records of the office that are maintained on computer storage media in that office, during and after regular business hours. However, remote electronic access to confidential records is prohibited. The official may charge a fee to users of information provided through remote electronic access, but the fees must in a reasonable amount determined to recover the cost of providing this service and no more. The cost to be recovered must not include the cost of electronic storage or maintenance of the records. Any such fee must be uniformly applied. The official offering remote electronic access must file with the comptroller of the treasury a statement describing the equipment, software and procedures used to ensure that this access will not allow a user to alter or impair the records. This statement must be filed 30 days before offering the service unless the official has implemented such a system before June 28, 1997. T.C.A. § 10-7-123.

Uniform Electronic Transactions Act

In 2001, the state legislature enacted the Uniform Electronic Transactions Act. T.C.A. §§ 47-10-101 through 47-10-123. The law applies to electronic records and electronic signatures relating to a “transaction” sent or received after the effective date of the act except the following:

- (1) Transactions governed by the law regarding wills, codicils or testamentary trusts; and,
- (2) Transactions covered by the Uniform Commercial Code, Title 47, Chapters 1-9, except for waivers and renunciations under T.C.A. § 47-1-107, the statute of frauds for certain personal property transfers under T.C.A. § 47-1-206 and Chapters 2 and 2A covering sales and leases.

T.C.A. §§ 47-10-103 and 47-10-104.

The act does not require a record or signature to be created, sent, generated, etc., in electronic format and applies only to transactions where all parties have agreed to conduct the transaction electronically, but it does provide broad authorization for the use of electronic records and signatures. T.C.A. § 47-10-105. The act provides that if the law requires a record or signature to be in writing, an electronic record or signature

satisfies the requirement (T.C.A. § 47-10-107). However, the law also provides that if a law other than this act requires a record to be posted or displayed in a certain manner, to be sent, communicated or transmitted by a specified method, or to contain information that is formatted in a certain manner, then the record must be posted, displayed, sent, communicated or transmitted in accordance with that law. T.C.A. § 47-10-108(b). Similarly, if a law requires a record to be retained, the requirement is satisfied by keeping it electronically if the electronic record accurately reflects the information in the record and if the electronic record remains accessible for later reference. T.C.A. § 47-10-112. One provision of the act notably states that the act does not preclude a governmental agency of this state (which is defined to include county governments) from specifying additional requirements for the retention of a record subject to the agency's jurisdiction. T.C.A. § 47-10-112(g). The act provides that evidence of a record may not be excluded solely because it is in electronic form. T.C.A. § 47-10-113. The act sets presumptions for determining time and place of sending and receipt of an electronic record, especially for automated transactions. T.C.A. § 47-10-115.

The creation and retention of electronic records and conversion of written records by governmental agencies is addressed in T.C.A. § 47-10-117. Pursuant to this section, the Information Systems Council (ISC) determines whether, and the extent to which, the state or any of its agencies will create and retain electronic records and convert written records to electronic records. T.C.A. § 47-10-117(a). Subject to the "interoperability" provisions of T.C.A. § 47-10-120, officials of counties and municipalities and other political subdivisions shall determine for themselves whether, and the extent to which, they will create and retain electronic records and convert written records to electronic records. T.C.A. § 47-10-117(b). Those officials can also determine whether, and the extent to which, the governmental agency will send and accept electronic records and signatures to and from other persons. T.C.A. § 47-10-118(a). To the extent that any governmental agency chooses to do this, the Information Systems Council may establish certain rules and regulations governing the process. T.C.A. § 47-10-118(b). **Local government officials who choose to send and receive electronic records that contain electronic signatures, must file certain documentation with the comptroller prior to offering such service as well as provide a post-implementation review.** T.C.A. § 47-10-119. The provisions of this act serve as a substitute for the former provisions of Title 5, Chapter 24, The Electronic Commerce Act of 2000, which was repealed by the Uniform Electronic Transactions Act. This act became effective on July 1, 2001.

Geographic Information Systems Records

In 2000, the General Assembly also passed Public Chapter 868 to authorize counties to charge increased fees to people purchasing copies of a certain type of record for commercial purposes. Under the new law all state and local governments maintaining geographic information systems (GIS) are authorized to charge enhanced fees for reproductions of public records that have commercial value and include a computer generated map or similar geographic data. Prior to the passage of this act, local governments could charge only for the actual costs of reproduction of such data (usually a minimal charge for the costs of the computer disk or other copying media) unless they

were in one of five counties designated by narrow population classes that had specific authorization to charge higher fees under the law. Under T.C.A. § 10-7-506(c), local government entities that have the primary responsibility for maintaining a GIS system can also include annual maintenance costs and a portion of the overall development costs of the GIS system in the fees charged to users who want to purchase a copy of the information for commercial use. If the system is maintained by the county, the county legislative body establishes the fees. If the GIS is maintained by a utility, the board of directors establishes the fees. Two groups are exempt from the higher fees: individuals who request a copy of the information for nonbusiness purposes and members of the news media who request the information for news-gathering purposes. These exempt parties will be charged only the actual costs of reproducing the data. The development costs that may be recovered by fees charged to commercial users are capped at 10 percent of the total development costs unless some additional steps are taken. For local governments, the local legislative body and the state Information Systems Council must approve a business plan that explains and justifies the need for additional cost recovery above 10 percent. Even with the approval of such a plan, development cost recovery cannot exceed 20 percent. However, these limits do not apply to annual maintenance costs, which may be fully recovered in the fees charged to commercial users. The recovery of development costs of a system is subject to audit by the comptroller of the treasury. Once the allowable portion of the development costs of the system have been recovered by the additional fees charged to commercial users, then the fees must be reduced to cover only the costs of maintaining the data and ensuring that it is accurate, complete and current for the life of the system.

APPENDIX

OATHS OF OFFICE

Sheriffs and deputy sheriffs are required to take an oath of office that actually consists of two oaths: the **constitutional oath and an oath for the office of sheriff (Tenn. Const. Art. X, Sec. 1)**.

Sheriffs take the following oath according to T.C.A. § 8-8-104:

I do solemnly swear that I will perform with fidelity the duties of the office to which I have been elected, and which I am about to assume. I do solemnly swear to support the constitutions of Tennessee and the United States and to faithfully perform the duties of the office of sheriff for _____ County, Tennessee. I further swear that I have not promised or given, nor will I give any fee, gift, gratuity, or reward for this office or for aid in procuring this office; that I will not take any fee, gift, or bribe, or gratuity for returning any person as a juror or for making any false return of any process and that I will faithfully execute the office of sheriff to the best of my knowledge and ability, agreeably to law.

Deputy sheriffs take an oath similar to the sheriff (according to T.C.A. § 8-18-112) as follows:

I do solemnly swear that I will perform with fidelity the duties of the office to which I have been appointed, and which I am about to assume. I do solemnly swear to support the constitutions of Tennessee and the United States and to faithfully perform the duties of the office of deputy sheriff for _____ County, Tennessee. I further swear that I have not promised or given, nor will I give any fee, gift, gratuity, or reward for this office or for aid in procuring this office; that I will not take any fee, gift, or bribe, or gratuity for returning any person as a juror or for making any false return of any process and that I will faithfully execute the office of deputy sheriff to the best of my knowledge and ability, agreeably to law.

**LETTER OF AGREEMENT
COMPENSATION OF EMPLOYEES
_____ COUNTY, TENNESSEE**

Pursuant to Tennessee Code Annotated, Section 8-20-101, this agreement by and between _____ and _____
(Official/Office) (County Mayor)

is for the purpose of establishing the number of employees and the authorized salaries for the _____.
(Office)

The parties named herein have agreed and do hereby enter into this agreement according to the provisions set forth herein:

A. The term of this agreement will be from _____ to _____
(Beginning Date)
(Ending Date)

B. In order to ensure the efficient operation of the office, it is agreed that the official is authorized to employ the following employees at salaries not to exceed the specified amounts:

Number of Employees in Job Classification _____	Job Classification _____	Annual Salary for Each Employee in Job Classification Not to Exceed _____

C. It is further agreed that part-time help may be employed at a rate of up to \$_____ an hour with a total cost not to exceed \$_____ for the term of this agreement.

D. The parties agree to the following special provisions: _____

_____.

E. It is further agreed that in no event shall the amount of this agreement exceed \$_____.

In witness whereof, the parties have set their signatures.

_____ OFFICIAL	_____ DATE
_____ COUNTY MAYOR	_____ DATE

SPECIAL OVERTIME RULES FOR LAW ENFORCEMENT EMPLOYEES

The Fair Labor Standards Act (FLSA) contains a provision that allows the establishment of longer work periods of not fewer than seven days nor more than 28 days for public safety employees of state and local governments. This partial exemption from the overtime provisions of the FLSA is often referred to as the “7(k)” exemption or the “tour of duty” rules. The regulations for this somewhat complicated procedure are found in 29 C.F.R. part 553, subpart C.

The regulations establish the maximum allowable nonovertime hours as 171 hours per 28-day period for law enforcement officers. For tours of duty of fewer than 28 days, the maximum allowable nonovertime hours of work during the tour of duty must bear the same ratio as 171 hours to 28 days for law enforcement personnel (6.1 hours per day).

For local governments who wish to use the “tour of duty” option, the maximum number of allowable hours in work periods of particular lengths before overtime compensation must be paid to law enforcement personnel for additional hours are set out in the following table:

Work Period (days)	Maximum Hours – Law Enforcement
28.....	171
27.....	165
26.....	159
25.....	153
24.....	147
23.....	140
22.....	134
21.....	128
20.....	122
19.....	116
18.....	110
17.....	104
16.....	98
15.....	92
14.....	86
13.....	79
12.....	73
11.....	67
10.....	61
9.....	55
8.....	49
7.....	43

For a detailed discussion of the requirements of the FLSA, consult the CTAS publication entitled *Legal Aspects of Personnel Management* (2006).

SAMPLE RESOLUTION TO FIX JAILER'S FEE

RESOLUTION NO. ____

RESOLUTION TO FIX THE JAILER'S FEE OF _____ COUNTY

WHEREAS, *Tennessee Code Annotated*, Section 8-26-105, authorizes county legislative bodies to pass a resolution fixing the amount of jailer's fees that may be applied to misdemeanor prisoners for each 24-hour period the prisoner is confined to the local facility (jail or workhouse) and,

WHEREAS, the county legislative body of _____ County is desirous that it be fully compensated for the housing of misdemeanor prisoners.

NOW, THEREFORE, BE IT RESOLVED by the county legislative body of _____ County, meeting this ____ day of _____, 20__, that:

SECTION 1. The jailer's fee for _____ County is hereby fixed at _____ dollars (\$____) per misdemeanor prisoner per 24-hour period of confinement in the county jail or county workhouse.

SECTION 2. The jailer's fee herein fixed shall be collected by the clerk of the appropriate court as a part of the fines and costs imposed in each misdemeanor case upon a finding of guilt.

SECTION 3. A copy of this Resolution shall be transmitted to each clerk of court hearing criminal matters in _____ County and shall be spread upon the minutes of this meeting by the county clerk.

SECTION 4. This resolution shall take effect upon adoption, the general welfare requiring it.

Adopted this ____ day of _____, 20__.

APPROVED:

County Mayor

ATTEST:

County Clerk

**TABLE OF PURCHASING LAWS
FOR TENNESSEE COUNTY GOVERNMENTS**

COUNTY	GENERAL	HIGHWAY	SCHOOLS
ANDERSON	1957	1957	1957
BEDFORD	1945 Priv. Act Ch. 357	1975 Priv. Act Ch. 30/ CUHL	49-2-203
BENTON	1939 Priv. Act Ch. 541	1943 Priv. Act Ch. 250/ CUHL	49-2-203
BLED SOE	1983	1941 Priv. Act Ch. 153/ CUHL	49-2-203
BLOUNT	1981	1981	1981
BRADLEY	1951 Priv. Act Ch. 313	1947 Priv. Act Ch. 354/ CUHL	49-2-203
CAMPBELL	1981	1981	1981
CANNON	1983	1933 Priv. Act Ch. 788/ CUHL	49-2-203
CARROLL	1975 Priv. Act Ch. 23	1975 Priv. Act Ch. 23/ 1986 Priv. Act Ch. 148	1975 Priv. Act Ch. 23/ 49-2-203
CARTER	1981	1981	1981
CHEATHAM	1933 Priv. Act Ch. 250/ 1983	1933 Priv. Act Ch. 250/ 1945 Priv. Act Ch. 309/ CUHL	49-2-203
CHESTER	1983	1951 Priv. Act Ch. 68/ CUHL	49-2-203

CLAIBORNE	1983	1943 Priv. Act Ch. 436/ CUHL	49-2-203
CLAY	1983	1951 Priv. Act Ch. 565/ CUHL	49-2-203
COCKE	1957	1957	49-2-203
COFFEE	1957	1971 Priv. Act Ch. 8/ CUHL	49-2-203
CROCKETT	1937 Priv. Act Ch. 806/ 1983	1937 Priv. Act Ch. 806/ 1933 Priv. Act Ch. 826/ CUHL	1937 Priv. Act Ch. 806/ 49-2-203
CUMBERLAND	1981	1981	1981
DAVIDSON	Metro Charter	Metro Charter	Metro Charter
DECATUR	1983	CUHL	49-2-203
DEKALB	1979 Priv. Act Ch. 63	1979 Priv. Act Ch. 63/ CUHL	1979 Priv. Act Ch. 63/ 49-2-203
DICKSON	1951 Priv. Act Ch. 16	1951 Priv. Act Ch. 16/ 1985 Priv. Act Ch. 53/ CUHL	1951 Priv. Act Ch. 16/ 49-2-203
DYER	1983	1929 Priv. Act Ch. 421/ CUHL	49-2-203
FAYETTE	1983	1974 Priv. Act Ch. 234/ CUHL	49-2-203
FENTRESS	1981	1981	1981
FRANKLIN	1981	1981	1981

GIBSON	1983	1929 Priv. Act Ch. 111/ CUHL	49-2-203
GILES	1983	1939 Priv. Act Ch. 415/ CUHL	49-2-203
GRAINGER	1983	1980 Priv. Act Ch. 232/ CUHL	49-2-203
GREENE	1957	1957	49-2-203
GRUNDY	1983	1939 Priv. Act Ch. 435/ CUHL	49-2-203
HAMBLEN	1983	1949 Priv. Act Ch. 313/ CUHL	49-2-203
HAMILTON	1983 Priv. Act Ch. 90	1983 Priv. Act Ch. 90	1983 Priv. Act Ch. 90/ 49-2-203
HANCOCK	1983	1941 Priv. Act Ch. 149/ CUHL	49-2-203
HARDEMAN	1989 Priv. Act Ch. 90	1989 Priv. Act Ch. 90	1989 Priv. Act Ch. 90/ 49-2-203
HARDIN	1983	1929 Priv. Act Ch. 113/ CUHL	49-2-203
HAWKINS	1957 Priv. Act Ch. 256	1957 Priv. Act Ch. 256	1957 Priv. Act Ch. 256/ 49-2-203
HAYWOOD	1983	1963 Priv. Act Ch. 129/ CUHL	49-2-203
HENDERSON	1981	1981	1981
HENRY	1983 Priv. Act Ch. 137/ 1983	CUHL	49-2-203

HICKMAN	1981	1981	1981
HOUSTON	1983	1945 Priv. Act Ch. 366	49-2-203
HUMPHREYS	1983	1935 Priv. Act Ch. 634/ CUHL	49-2-203
JACKSON	1983	1951 Priv. Act Ch. 111/ CUHL	49-2-203
JEFFERSON	1983	1929 Priv. Act Ch. 477/ CUHL	49-2-203
JOHNSON	1957	1957	49-2-203
KNOX	1980 Priv. Act Ch. 286 (county charter)	1980 Priv. Act Ch. 286/ CUHL	1980 Priv. Act Ch. 286/ 49-2-203
LAKE	1983	1980 Priv. Act Ch. 262/ CUHL	49-2-203
LAUDERDALE	1983	1929 Priv. Act Ch. 304/ CUHL	49-2-203
LAWRENCE	1957	1957	49-2-203
LEWIS	1983	1937 Priv. Act Ch. 395	49-2-203
LINCOLN	1981	1981	1981
LOUDON	1957	1957	1957
MCMINN	1981	1981	1981

MCNAIRY	1990 Priv. Act Ch. 171	CUHL	49-2-203
MACON	1937 Priv. Act Ch. 161/ 1983	1965 Priv. Act Ch. 234/ CUHL	49-2-203
MADISON	1981	1981	1981
MARION	1983	1933 Priv. Act Ch. 24/ CUHL	49-2-203
MARSHALL	1965 Priv. Act. Ch. 69/ 1983	1965 Priv. Act Ch. 69/ 1955 Priv. Act Ch. 238/ CUHL	49-2-203
MAURY	1957	1957	49-2-203
MEIGS	1949 Priv. Act Ch. 403	1949 Priv. Act Ch. 403/ CUHL	1949 Priv. Act Ch. 403/ 49-2-203
MONROE	1981	1981	1981
MONTGOMERY	1957	1957	49-2-203
MOORE	Metro Charter	Metro Charter	Metro Charter
MORGAN	1981	1981	1981
OBION	1983	CUHL	49-2-203
OVERTON	1957	1957	49-2-203
PERRY	1983	1977 Priv. Act Ch. 18/ CUHL	49-2-203

PICKETT	1983	1957 Priv. Act Ch. 104/ CUHL	49-2-203
POLK	1957	1957	49-2-203
PUTNAM	1981 Priv. Act Ch. 63	1989 Priv. Act Ch. 122/ CUHL	49-2-203
RHEA	1981	1981	1981
ROANE	1957	1957	1933 Priv. Act Ch. 477/ 49-2-203 (schools informally use 1957)
ROBERTSON	1981	1981	1981
RUTHERFORD	1943 Priv. Act Ch. 421	1951 Priv. Act Ch. 55/ CUHL	49-2-203
SCOTT	1981	1981	1981
SEQUATCHIE	1947 Priv. Act Ch. 750	1947 Priv. Act Ch. 750/ 1953 Priv. Act Ch. 575/ CUHL	49-2-203
SEVIER	1983	1969 Priv. Act Ch. 133/ CUHL	49-2-203
SHELBY	1974 Priv. Act Ch. 260	1974 Priv. Act Ch. 260	1974 Priv. Act Ch. 260/ 49-2-203
SMITH	1983	CUHL	49-2-203
STEWART	1983	1951 Priv. Act Ch. 171	49-2-203
SULLIVAN	1947 Priv. Act Ch. 261	1947 Priv. Act Ch. 261/ CUHL	1947 Priv. Act Ch. 261/ 49-2-203

SUMNER	2002 Priv. Act Ch. 113	2002 Priv. Act Ch. 113	2002 Priv. Act Ch. 113
TIPTON	1941 Priv. Act Ch. 518	1973 Priv. Act Ch. 114	49-2-203
TROUSDALE	Metro Charter	Metro Charter	Metro Charter
UNICOI	1983	1949 Priv. Act Ch. 678/ CUHL	49-2-203
UNION	1983	1943 Priv. Act Ch. 154/ CUHL	49-2-203
VAN BUREN	1983	1951 Priv. Act Ch. 460/ 1986 Priv. Act Ch. 111/ CUHL	49-2-203
WARREN	1951 Priv. Act Ch. 16	1951 Priv. Act Ch. 16/ 1959 Priv. Act Ch. 61/ CUHL	49-2-203
WASHINGTON	1957	1957	49-2-203
WAYNE	1983	1941 Priv. Act Ch. 32/ CUHL	49-2-203
WEAKLEY	1981	1981	1981
WHITE	1981	1981	1981
WILLIAMSON	1957	1957	49-2-203
WILSON	1981	1981	49-2-203

COUNTY BUDGET LAWS¹

Charters

Shelby	Charter
Knox	Charter
Davidson	Metro Charter
Moore	Metro Charter
Trousdale	Metro Charter

1957 Act

Anderson	Schools Included
Cheatham	Schools Excluded
Cocke	Schools Excluded
Greene	Schools Excluded
Johnson	Schools Included
Lawrence	Schools Excluded
Loudon	Schools Included
Montgomery	Schools Excluded
Overton	Schools Excluded
Polk	Schools Excluded
Roane	Schools Included
Sullivan	Schools Excluded
Washington	Schools Excluded
Williamson (with 1990 Budget Law)	Schools Excluded

Private Acts

Benton
Bradley
Dyer
Gibson
Grainger
Hamilton
Hardeman
Henry
Marshall
Maury
McNairy
Meigs
Rutherford
Sumner

1981 Act

Blount
Campbell
Carter
Cumberland
Fentress
Franklin
Henderson
Hickman
Lincoln
McMinn
Madison
Monroe
Morgan
Rhea
Robertson
Scott
Weakley
White
Wilson

1993 Law

Decatur
DeKalb
Hardin

¹All other counties are under general law budgeting provisions.

RECORDS RETENTION SCHEDULE FOR THE SHERIFF'S OFFICE

The records included in this schedule are only those specific to the office of the county sheriff. Records that may be kept in the same format by several county offices (such as employment records, purchasing records, etc.) have not been included here. To a certain extent, the records kept by county offices vary from county to county in either the format of record kept, the name given to the record or the frequency of its occurrence. The fact that a certain record is listed in this schedule does not necessarily indicate that you should have it in your office. It may be a format for record keeping that was never used in your county, or you may keep the record under a different name. If you have records in your office that are not listed in this schedule by name, check the descriptions of the records to see if we may have called it by a different term. If you still cannot locate any entry relative to the record, contact us at the County Technical Assistance Service for guidance in determining the proper disposition of the record and so that we can make note of that record's existence to include it in future revisions of this manual.

Retention Schedule for the Office of the Sheriff		
Description of Record	Retention Period	Legal Authority/Rationale
12-001 Accident Reports — Motor vehicle accident reports giving location of accident, persons and vehicles involved, time of accident, injured, witnesses, diagram of accident, and condition of persons involved.	Retain four years, then destroy.	Record may be used in litigation. Period based on three-year statute of limitations for actions for injuries to personal property plus one year for overlap (T.C.A. § 28-3-105).
12-002 Armory Records — Records regarding acquisitions, requisitions, check-ins, etc.	Retain for 10 years.	Keep in case of potential liability.
12-003 Arrest Records (and Case Files) — Includes offense and incident reports. Information in records of arrest such as name, alias, address, date and time of offense, date of birth, age, place of birth, description, place of arrest, charge, disposition at time of arrest, warrant number, name of court, accomplices, vehicle information, arresting officer, remarks, signature of arresting officer. Includes arrest report and indexes citation in lieu of arrest form.	If the subject is found "not guilty," then original arrest records should be retained until the records are microfilmed. If subject is convicted, retain original until the exhaustion of all appeals or termination of probation or sentence; further, the originals are not to be destroyed thereafter until microfilmed. Destroy originals or microfilm copies of arrest records on verification of death or its reasonable presumption (<i>i.e.</i> , 100 years after birth of subject). Arrest index card should remain active until the death of the subject.	Retention period necessary for continuing investigative purposes and based on life of individual.

Retention Schedule for the Office of the Sheriff		
Description of Record	Retention Period	Legal Authority/Rationale
12-004 Board Bills — Bills for boarding prisoners showing date of commitment, name of prisoner, number of days for which board is charged, and rate per day.	Retain five years, then destroy.	Kept for audit purposes (T.C.A. § 10-7-404(a)).
12-005 Case Files — Copies of all pertinent records of whatever nature relevant to a particular case under or pending investigation, accumulated in a single file by the investigator or agency to facilitate the investigation or prosecution of offenders. May include copies of complaint report; offense report; supplementary report; missing person/runaway report; arrest report; citation-in-lieu of arrest; property receipt; vehicle tow slip; statement form; accident report; other relevant reports; relevant photo or drawing.	Retention same as Arrest Record, above, except Missing Person/Runaway Records are not to be destroyed if needed by juvenile authorities and destruction should not violate National Crime Information Center (NCIC) requirements.	See Arrest Record, above.
12-006 Cash Journal — Summary of all receipts and disbursements in the department. See also Receipt for Property Returned to Inmates Upon Release, below.	Retain 10 years, then eligible for destruction.	Comptroller's office considers this record important for demonstrating patterns in investigations of misappropriation of funds (T.C.A. § 10-7-404(a)).
12-007 Complaint/Incident Reports (Citizen) — Show name and address of person reporting offense, file and case number, place of occurrence, investigating officer, time, date, how report was made, and officer assigned to the case. May include dispatcher cards regarding calls. This includes Complaint, Incident, Offense, Supplementary, Missing Person, and Runaway Reports (individual and collective).	If record is unrelated to a felony or other case under investigation, retain original five years if microfilmed. Original or microfilm may be destroyed upon verification of death or its reasonable presumption (<i>i.e.</i> , 100 years after birth of subject). If record is related to a felony or other case under investigation, follow schedule for Arrest Records (Case Files), above.	Retention period based on life of suspect.
12-008 Fingerprinting Records	Death of subject or reasonable presumption of death, <i>i.e.</i> , 100 years. Note: See T.C.A. § 37-1-155 regarding treatment of fingerprint records of juveniles.	Retention period based on life of subject.

Retention Schedule for the Office of the Sheriff		
Description of Record	Retention Period	Legal Authority/Rationale
12-009 Identification Files — Records kept for identification purposes including fingerprints, photographs, measurements, descriptions, outline pictures, and other available information.	Death of subject or reasonable presumption of death, <i>i.e.</i> , 100 years.	Retention period based on life of subject.
12-010 Inmate Census Records — Records and documentation on number of inmates in detention facilities and movement and transportation of inmates. Includes sign-out logs, official census, count reports, booking logs, etc. Does not include Inmate/Prisoner Register listed below.	Keep for five years, then destroy.	Records are used for development of board bill and other reports. Keep for audit purposes on recommendation of comptroller (T.C.A. § 10-7-404(a)).
12-011 Inmate Conduct Records — Incident and disciplinary reports, logs, hearing summaries, appellate board findings, reports on use of force/restraint, and related records.	Retain 10 years, then destroy.	Retention period based on maximum period of time record may be needed in case of litigation discovery requests.
12-012 Inmate Financial Records — Financial record of prisoners committed to the workhouse showing name of prisoner, date and length of commitment, amounts received, itemization of costs, balance, amount and date of final disposition of account, and remarks. Note: This does not include receipts for property returned at time of release. See separate listing for that record series, below.	Retain five years, then destroy.	Retention period based on likely period of time for grievance and reasonable period for operational use of the record.
12-013 Inmate Grievance Records — Records regarding inmate grievances. Includes actual grievance, replies and responses to grievance and any investigative files. See also Internal Investigations below for related record.	Retain 10 years, then destroy.	Retention period based on maximum period of time record may be needed in case of litigation discovery requests.
12-014 Inmate Medical Records — Medical files maintained on prisoners showing inmate's physical condition on admission, during confinement, and at discharge. The record shall indicate all medical orders issued by the jail physician and any other medical personnel who are responsible for rendering medical services. Keep in a separate file from other inmate records. See also Psychological Evaluations of Inmates, below.	Retain for a period of five years after the prisoner's release or 10 years, whichever is greater, then eligible for destruction.	Retention period based on standard for medical records found in T.C.A. § 68-11-305 and requirement in Tennessee Corrections Institute Rule 1400-1-.13(12).

Retention Schedule for the Office of the Sheriff		
Description of Record	Retention Period	Legal Authority/Rationale
12-015 Inmate Registers (Jail Registers) — Record of all prisoners committed to the county jail showing name of prisoner, offense charged, by whom charge brought, record of process, date of commitment, and date released; may also show age, sex, complexion, color of hair, and color of eyes of prisoner. Record may be computerized now. Ensure electronic files comply with EDP standards and maintain indefinitely.	Permanent record. Hard copy backup of electronic files is strongly recommended.	See Tennessee Corrections Institute Rule 1400-1-.14.
12-016 Inmate Visitation Records — Records documenting persons making visits to specific inmates or to the jail facility. Includes visitation logs and other similar records.	Retain three years.	Keep for operational purposes in case an incident arises.
12-017 Internal Investigation Records — Records of investigations resulting from a complaint against an employee of the sheriff's office. Includes notification of complaint, investigative files, any associated medical records, and any written decisions, orders, or disciplinary actions. Maintain security and confidentiality of files.	Keep for term of employment of officer or 10 years, whichever is longer.	Record retains significance in personnel decisions, promotion, dismissal, <i>etc.</i> , and for defense of litigation.
12-018 Judgment Orders (a.k.a. Statement of Sentence) and Release Orders — A certified statement of the sentence of each prisoner in workhouse specifying the name of the convict, date of the sentence, crime for which committed, the term of imprisonment, the amount of fines and costs, record of the convict's identifying information. Release orders are nonjudicial orders that may authorize release.	Retain for five years, then destroy.	Records used for classification purposes and for work release evaluations and in developing board bills, cost determinations, <i>etc.</i>
12-019 Missing Person/Runaway Records	Refer to schedule for Arrest Record (Case files) above.	See Arrest Record, above.
12-020 Mittimus (Committal Records) — Commitments to jail showing name of person committed, offense charged, name of prosecutor, amount of bail, date, and signature of judicial officer.	Retain five years, then destroy.	Record may be used as backup documentation for board bill and cost summaries.

Retention Schedule for the Office of the Sheriff		
Description of Record	Retention Period	Legal Authority/Rationale
12-021 Pawnbroker's Records of Transactions — Copy of record of pawn transactions forwarded by the pawnbroker to the sheriff pursuant to T.C.A. § 45-6-210.	Retain four years, then destroy.	Retention based on statute of limitations for most theft prosecutions (T.C.A. §§ 40-2-101 and 40-35-110).
12-022 Personnel Records	See separate retention schedule for employment records in this manual.	
12-023 Processes Served, Record of — Record of warrants, capiases, summonses, and other papers served.	Retain three years after last entry, then destroy.	Kept for audit purposes. Nonfinancial (T.C.A. § 10-7-404(a)).
12-024 Records of Psychological Evaluations of Inmates — Any records regarding abnormal behavior of inmates, staff response to behavior, judicial orders for screening and treatment, referrals to psychological services, orders for placements in mental health facilities, etc. See also Prisoner Medical Records.	Retain 10 years, then eligible for destruction.	Psychological records are kept longer than medical records because of a stronger relationship to inmate conduct records, which have a 10-year retention schedule.
12-025 Radio Logs — A record of radio calls giving time called, car or station calling, car or station called, car location, nature of call, and acknowledgment.	Retain three years, then destroy unless pending legal action.	Retention period based on likely time of complaint or legal action.
12-026 Receipt Books (General) — Duplicate receipts, showing from whom received, reason for payment, amount received, and date. Note: See separate schedule for Receipt for Property Returned to Inmates, below.	Retain five years after issuance of last receipt, then destroy.	Keep for audit purposes (T.C.A. § 10-7-404(a)).
12-027 Receipt for Property Returned to Inmates on Release — Receipt required to be signed by inmates upon release from detention facilities for property, valuables and cash returned at the time of release. All items shall be inventoried on the receipt and witnessed by the releasing officer.	Retain five years after creation, then destroy.	Retention period based on comptroller's requirements pursuant to T.C.A. § 10-7-404(a).
12-028 Reports of Jail Inspections — Files regarding inspections of detention facilities. Includes any inspection made to monitor conditions of safety, security and sanitation in detention facilities and maintenance work orders.	Retain three years, then destroy.	Based on American Correctional Association accreditation/re-accreditation cycle.

Retention Schedule for the Office of the Sheriff		
Description of Record	Retention Period	Legal Authority/Rationale
12-029 Report of Trustees — Report on trustees and other prisoners receiving sentence reduction credit, showing name of trusty, dates, and time labored.	Retain 10 years, then destroy.	Used in determination of release in case of transfers, etc.
12-030 Sheriff's Sales, Records of — Records relating to sales and auctions conducted by the sheriff for forfeited property, property seized under execution, and any other property the sheriff is authorized or directed to sell.	Retain records of sales of personal property five years, then destroy. Retain records of real property sales permanently.	For personal property sales, retention period based on recommendations of the comptroller as authorized by T.C.A. § 10-7-404(a). Records of real property sales may impact land title and property rights indefinitely and should be retained as long as possible in case questions of ownership arise.
12-031 Training Records — Records of participation in training programs, sign-in sheets, lesson plans, videotapes, certifications, etc.	Keep records regarding training for 10 years or for career of officer where information is kept in personnel file. If the training is required by OSHA, retain 30 years.	Records useful in determining employment and promotion decisions and for continuing education program. Also vital record in defending lawsuits against department alleging improper actions of employees.
12-032 Vehicle Maintenance Records — Record of repairs, service, etc. related to county-owned vehicles.	Retain five years or life of vehicle, whichever is longer.	Keep for management purposes.
12-033 Vouchers — Copies of vouchers presented by the sheriff for the payment of expenses incurred in operating the workhouse, patrol, salaries, etc.	Retain five years, then destroy.	Keep for audit purposes based on the comptroller's recommendations (T.C.A. § 10-7-404(a)).
12-034 Workhouse Commission Minutes — Record of business transacted at meetings of the workhouse commission.	Permanent record.	Actions recorded in minutes are effective until superceded or rescinded. Also keep for historical purposes.
12-035 Workhouse Docket	See schedule for Prisoner Registers, above.	
12-036 Workhouse Expenses, Record of — An account of all supplies, implements, tools, etc., purchased for the workhouse and a separate account for supplies.	Retain five years, then destroy.	Keep for audit purposes based on the comptroller's recommendations (T.C.A. § 10-7-404(a)).

Retention Schedule for the Office of the Sheriff		
Description of Record	Retention Period	Legal Authority/Rationale
12-037 Work Release Financial Records — Records documenting receipt and disbursement of funds associated with the Work Release program.	Retain 10 years, then eligible for destruction.	Retention period based on 10-year statute of limitations for actions on sheriff's bonds and actions for misappropriation of funds (T.C.A. § 28-3-110).
OBSOLETE RECORDS		
12-038 Weapons, Permits to Purchase — Letters or forms giving persons permission to purchase weapons. Records of weapons permitting, registry of weapon owners, etc.	Sheriffs no longer permit handgun owners. Federal statutes prohibit maintaining registries of gun owners. 18 U.S.C.A. § 922(s)(6)(B)(i). All records related to these activities should be destroyed.	

Employment Records

Included in this schedule are all those records related to employment that an office may keep. This schedule applies to all county offices, except where a specific exception is listed in the retention schedule for that office. To a certain extent, the records kept by county offices vary from county to county in either the format of record kept, the name given to the record or the frequency of its occurrence. There are many different listings in this schedule that contain the same information. Generally, the information does not have to be kept in those separate formats, it simply has to be present somewhere in the records of the office. The fact that a certain record is listed in this schedule does not necessarily indicate that you should have it in your office. It may be a format for recordkeeping that was never used in your county, or you may keep the record under a different name. If you have records in your office that are not listed in this schedule by name, check the descriptions of the records to see if we may have called it by a different term. If you still cannot locate any entry relative to the record, contact us at the County Technical Assistance Service for guidance in determining the proper disposition of the record and so that we can make note of that record's existence to include it in future revisions of this manual. Most of the legal requirements for employment-record retention come from federal laws and regulations that are cited under the legal authority for the individual record.

DO NOT PANIC! If you read through this schedule and it appears that there are far more records required than you have, that may not be the case. The presentation of this retention schedule is somewhat different than the other schedules in this manual. The records series listed in this schedule are arranged to a certain degree according to the laws that require the record. When accessing a personnel file, you may look at the same information for a number of different purposes. For that reason, this listing is organized more on the basis of the purpose for keeping the information in a file than on a description of the file itself. Many of the listings in this schedule will be satisfied by a single record in your office. For example, there are several listings for payroll records. There are payroll

records kept for Age Discrimination Act purposes, payroll records for FLSA purposes, payroll records for Title VII purposes, etc. You do not have to keep separate payroll records for these different purposes. Keep one set of records for the longest period required by any of those acts.

Retention Schedule for Employment Records—All Offices		
Description of Record	Retention Period	Legal Authority/Rationale
16-001 Advertisements Regarding Job Openings, Promotions, Training Programs or Overtime Work	Retain five years.	28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i> , 124 S.Ct. 1836(May 3, 2004).
16-002 Age Records	Retain three years.	Fair Labor Standards Act (29 CFR 516); Age Discrimination in Employment Act (29 CFR 1627.3).
16-003 Americans with Disability Act — Employer Records	Retain two years.	Same retention requirements as the Civil Rights Act of 1964 as Amended, Title VII of the Civil Rights Act (29 CFR 1602.31).
16-004 Applications, resumes or other replies to job advertisements, including temporary positions	Retain five years from date record was made or human resources action is taken, whichever is later.	28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i> , 124 S.Ct. 1836(May 3, 2004).
<p>16-005 Bloodborne Pathogens/Infectious Material Standard — Protects employees who may be occupationally exposed to blood or other infections materials.</p> <ul style="list-style-type: none"> • Written exposure control plan. • Medical records. • Training records. • Employee exposure records. 	<p>See below for individual items.</p> <p>Not specified — keep current and available to workers.</p> <p>Term of employment + 30 yrs.</p> <p>Three years.</p> <p>Retain 30 years.</p>	Occupational Safety and Health Act; (29 CFR 1910.1020 and 1910.1030).
16-006 Citizenship or Authorization to Work — Immigration and Naturalization Services Form I-9 (employment eligibility verification form) for all employees hired after November 6, 1986.	Three years from date of hire or one year after separation, whichever is later. (Minimum of three years.)	Immigration Reform Control Act (8 CFR 274A.2).

Retention Schedule for Employment Records—All Offices		
Description of Record	Retention Period	Legal Authority/Rationale
16-007 Contracts, Employment — Contracts between city and employees or independent contractors.	Retain seven years after termination of employment or contract.	Based on statute of limitations for breach of contract plus one year. T.C.A. § 28-3-109.
16-008 Demotion records	Five years.	28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i> , 124 S.Ct. 1836(May 3, 2004).
16-009 Discrimination or Enforcement Charges — Personnel records relevant to charge of discrimination or enforcement against employer, including records relating to charging party and to all other employees holding positions similar or sought after, such as application forms or performance documentation.	Until final disposition of charge or action.	Age Discrimination in Employment Act (29 CFR 1627.3(b)(3)). Title VI of the Civil Rights Act (29 CFR 1602.31). Executive Order 11246.
<p>16-010 Drug Testing Records — (As required by United States Department of Transportation).</p> <p><u>Category One Records</u> Breath alcohol test with results of .02 or higher; positive controlled substance tests; documentation of refusals to test; calibration documentation; evaluation and referrals; copy of calendar year summary —</p> <p><u>Category Two Records</u> Information on the alcohol and controlled substances collection process —</p> <p><u>Category Three Records</u> Negative and canceled controlled test results; alcohol test results of less than .02 concentration —</p> <p><u>Category Four Records</u> Information on education and training.</p>	<p>See below for the different types of records.</p> <p>Five years.</p> <p>Two Years.</p> <p>One Year.</p> <p>Two years after the individual receiving training ceases to perform those functions.</p>	<p>Omnibus Transportation Employee Testing Act of 1991; Federal Highway Administration Department of Transportation Motor Carrier Safety Regulations</p> <p>49 CFR 382.401.</p>
16-011 EEOC Information — Records kept by local governments. Any political subdivision with 15 or more employees must keep records and information that are necessary for completing Report EEO-4 (Local Government Information Reports) regardless of whether or not the jurisdiction is required to file a report.	Retain two years from the date of the making of the record or the personnel action involved, whichever occurs later.	29 CFR 1602.31.

Retention Schedule for Employment Records—All Offices		
Description of Record	Retention Period	Legal Authority/Rationale
16-012 Employee Earnings Records — Record of annual earnings for employees. The portion of the record that needs to be kept for the life of the employee needs only to be a statement of annual earnings as a backup for retirement or Social Security purposes.	Keep office record for three years. After this time, microfilm or archive record and keep for 70 years.	Age Discrimination in Employment Act (29 CFR 1627.3); Fair Labor Standards Act (29 CFR 516.5). Retention period of 70 years is due to retirement concerns and is based on approximate lifespan of employee. May destroy earlier if employee and any potential claimants are deceased.
16-013 Employer Information Report — For political jurisdictions with 100 or more employees, and other jurisdictions with 15 or more employees from whom the commission requests an EEO-4 report, a copy EEO-4 Form (Employer Information Report) must be kept.	Retain a copy of the most recent version of the report must at the central office for three years.	Title VII of the Civil Rights Act (29 CFR 1602.32).
16-014 Employment Tax Records	Four years after due date.	Internal Revenue Code (26 CFR 31.6001-1).
16-015 Family and Medical Leave Act (FMLA) Records — Employer Records Regarding Leave Under FMLA for all employees. For more information regarding what records must be kept, see 29 CFR 825.500 or the CTAS publication <i>The Family and Medical Leave Act—A Guide for Local Governments</i> .	Three years.	Family and Medical Leave Act (29 CFR 825.500).
16-016 Garnishment Documents	Federal garnishment laws are enforced under the FLSA. Keep for three-years.	Fair Labor Standards Act (29 CFR 516.5).
16-017 Group Health Insurance Coverage After Certain Qualifying Events — Employers need records showing that covered employees and their spouses and dependents: <ul style="list-style-type: none"> • Have received written notice of continuing group health insurance and COBRA rights and • Whether the employee, spouse, and dependents elected or rejected coverage. 	Retain seven years.	Internal Revenue Code (26 CFR 54.4980B).

Retention Schedule for Employment Records—All Offices		
Description of Record	Retention Period	Legal Authority/Rationale
<p>16-018 Hazard Communications (Hazardous Materials Exposure Records) — Records of any personal or environmental monitoring of exposure to hazardous materials. Records of “significant adverse reactions” to health or the environment that may indicate “long-lasting or irreversible damage,” “partial or complete impairment of bodily functions,” “impairment of normal activities which is experienced each time an individual is exposed.” Records must contain original allegation; abstract of allegation, including name and address of site that received allegation, date allegation received, implicated substance, description of alleged health effects, results of any self-initiated investigation of allegation and copies of any other required reports relating to allegation.</p>	<p>Thirty years for records of significant adverse reactions to employee’s health; five years for all other allegations, including environmental charges; 30 years for employee health-related allegations arising from any employment related exposure.</p>	<p>40 CFR 717.15.</p>
<p>16-019 Hiring Records</p>	<p>Retain five years from date records are made or personnel action is taken, whichever is later.</p>	<p>28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i>, 124 S.Ct. 1836(May 3, 2004).</p>
<p>16-020 Insurance/Retirement Plans</p> <ul style="list-style-type: none"> Benefit plan descriptions Supporting documentation for all required plan descriptions and any reports required to be filed under ERISA including vouchers, worksheets, receipts, and applicable resolutions. 	<p>Keep while plan or system is in effect, plus one year after termination of the plan.</p> <p>Retain not less than six years after filing date of documents.</p>	<p>Age Discrimination in Employment Act (29 CFR 1627.3(b)(2)).</p> <p>Employee Retirement Income Security Act (29 CFR 2520.101-1 through 2520.104(b)-30)).</p>
<p>16-021 Layoff Selection</p>	<p>Retain five years from date record made or personnel action taken.</p>	<p>28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i>, 124 S.Ct.1836 (May 3, 2004).</p>
<p>16-022 Material Safety Data Sheets (MSDS)</p> <ul style="list-style-type: none"> Employers must have MSDS on file for each hazardous chemical they use and ensure copies are readily accessible to employees in their work area. Employer must keep records of chemicals used, where they were used, when they were used and for how long. 	<p>No specific time — must be maintained in a current fashion.</p> <p>Retain 30 years.</p>	<p>Occupational Safety and Health Act (29 CFR 1910.1020(d)(1)(ii)(B)).</p> <p>Occupational Safety and Health Act (29 CFR 1910.1020(d)(1)(ii)(B)).</p>

Retention Schedule for Employment Records—All Offices		
Description of Record	Retention Period	Legal Authority/Rationale
16-023 Military Leave Records	Retain seven years.	Uniform Services Employment and Re-Employment Rights Act (5 CFR 1208). Note: retention period not specified by regulations. The service limit on the time an employee may spend on active duty and still be eligible for re-employment can be up to five years.
16-024 Occupational Injuries and Illness Records <ul style="list-style-type: none"> • <i>Log and Summary of Work Related Injuries and Illnesses—OSHA Form 300.</i> • <i>Summary of Work Related Injuries and Illnesses—OSHA Form 300A</i> • <i>Injury and Illness Incident Report OSHA Form 301 (effective January 1, 2002)</i> <p>These forms and reports provide details on each recordable injury and illness. These records are required whether or not there are injuries.</p>	<p>Retain five years following the end of the year to which records relate.</p> <p>Retain five years following the end of the year to which records relate.</p> <p>Retain five years.</p>	Occupational Safety and Health Act (29 CFR 1904).
16-025 Older Workers Benefit Protection Act — Employer Records — Same employer record retention requirements as under the ADEA. Waivers of ADEA rights.	<p>Retain three years.</p> <p>Retaining waivers as a permanent record is recommended.</p>	Age Discrimination in Employment Act (29 CFR 1627.3, 29 CFR 1601.30). Retaining waivers will assure that record is available for defense of litigation in discrimination actions.
16-026 Payroll Records — Additions or Deductions from Records Paid — All records used by the employer in determining additions to or deductions from wages paid.	Retain five years.	28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i> 124 S.Ct. 1836 (May 3, 2004).
16-027 Payroll Records for Age Discrimination in Employment Act Purposes — Payroll or other records containing each employee's name, address, date of birth, occupation, rate of pay and compensation earned per week.	Retain five years.	28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i> 124 S.Ct. 1836 (May 3, 2004).

Retention Schedule for Employment Records—All Offices

Description of Record	Retention Period	Legal Authority/Rationale
<p>16-028 Payroll Records for FLSA - Exempt and Non-exempt Employees — Basic time and wage records for employee: name in full of employee; identifying number or symbol, if such is used on payroll records; home address, including ZIP code; date of birth if under 19 years of age; sex and occupation; time of day and day of week on which employee's work week begins if this varies between employees — otherwise a single notation for the entire establishment will suffice; total wages paid each pay period; dates of payment and pay period covered; hours worked; rate of pay; records of overtime and comp time hours worked and premiums paid; records of any additions to or deductions from wages.</p>	Retain five years.	28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i> 124 S.Ct. 1836 (May 3, 2004).
<p>16-029 Payroll Records for Title VII Purposes — Records regarding promotion, demotion, rates of pay or other terms of compensation.</p>	Retain five years.	28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i> 124 S.Ct. 1836 (May 3, 2004).
<p>16-030 Payroll Records — Records regarding basis for determining wage levels — These are additional records, outside of the scope of those records that must be kept under the FLSA, which an employer may keep in the regular course of business operations that relate to the payment of wages, wage rates, job evaluations, job descriptions, merit systems, seniority systems, collective bargaining agreements, description of practices, <i>etc.</i></p>	Any such records that explain the basis for payment of any wage differential to employees of the opposite sex in the same establishment must be kept for two years.	Equal Pay Act (29 CFR 1620.32).
<p>16-031 Personnel Files—File for each employee tracking pay, benefits, performance evaluations, personnel actions and employee's hiring and termination.</p>	Retain for seven years after termination. Note: Retain medical records separately in confidential file for 30 years after termination including exposure records.	Based on five-year statute of limitations for personnel actions plus two years and OSHA; (20 CFR 1910.1020(d)(1)).

Retention Schedule for Employment Records—All Offices		
Description of Record	Retention Period	Legal Authority/Rationale
16-032 Personnel Policies — Policies of the office regarding leave, benefits, procedures, etc. Certain policies are required by law under T.C.A. § 5-23-101, <i>et. seq.</i> Additional policies would be optional.	Retain current copy of any effective policies of the office. For policies required under T.C.A. § 5-23-101, a copy of all policies is filed permanently with the county clerk, so it is not necessary to keep copies of policies that are no longer effective. For any optional policies that are no longer effective, kept seven years after the policy is terminated.	T.C.A. § 5-23-101, <i>et. seq.</i> Statute of Limitations, T.C.A. § 28-3-109.
16-033 Physical/Medical Records — Results of physical examinations considered in connection with personnel action.	One year, but see next entry.	Age Discrimination in Employment Act (29 CFR 1627.3).
16-034 Physical/Medical Records Under FMLA — Records and documents including an FMLA leave request relating to medical certifications, recertification or medical histories of employees, or employee's family members. These records must be maintained in separate files/records and be treated as confidential medical records.	Three years.	Family Medical Leave Act (29 CFR 825.500).
16-035 Physical/Medical Records under OSHA — Complete and accurate records of all medical examinations required by OSHA.	Duration of employment, plus 30 years unless a specific OSHA standard provides a different time period.	Occupational Safety and Health Act (29 CFR 1910.1020).
16-036 Promotion Records or Notices	Retain five years.	28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i> 124 S.Ct. 1836 (May 3, 2004).
16-037 Seniority or Merit Rating Systems	Retain five years.	28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i> 124 S.Ct. 1836 (May 3, 2004).
16-038 Termination Records	Retain five years.	28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i> 124 S.Ct. 1836 (May 3, 2004).

Retention Schedule for Employment Records—All Offices		
Description of Record	Retention Period	Legal Authority/Rationale
16-039 Transfer Records	Retain five years.	28 U.S.C. § 1658; <i>Jones v. R.R. Donnelley & Sons Co.</i> 124 S.Ct. 1836 (May 3, 2004).
16-040 Travel Authorizations	Retain five years after creation of record.	Kept for audit purposes.
16-041 W-2s and 941s — Copies of standard IRS forms for annual wage and tax statements, W-2 and 941.	Retain seven years.	Keep in case of tax fraud investigation by the IRS.
16-042 W-4s — Withholding allowance certificates	Retain five years after superseded or upon separation of employee.	Keep for audit purposes.
16-043 Wage Rate Tables — All tables or schedules (from their last effective date) of the employer that provide rates used in computing straight-time earnings, wages, or salary or overtime pay computation.	Three years.	Fair Labor Standards Act (29 CFR 516.6) requires two-year retention, but the Department of Labor can request records going back three years.

REMEMBER – All county records, including temporary value records, must not be destroyed unless approved by the county public records commission.



CTAS

County Technical
Assistance Service

*In cooperation with the Tennessee County
Services Association and the County Officials
Association of Tennessee*

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The university does not discriminate on the basis of race, sex, or disability in its education programs and activities pursuant to the requirements of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA) of 1990.

Inquiries and charges of violation concerning Title VI, Title IX, Section 504, ADA or the Age Discrimination in Employment Act (ADEA) or any of the other above referenced policies should be directed to the Office of Equity and Diversity (OED), 1840 Melrose Avenue, Knoxville, TN 37996-3560, telephone (865) 974-2498 (V/TTY available) or 974-2440. Requests for accommodation of a disability should be directed to the ADA Coordinator at the UTK Office of Human Resources, 600 Henley Street, Knoxville, TN 37996-4125.

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