

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
**SECOND FLOOR CORDELL HULL BUILDING**  
**425 FIFTH AVENUE NORTH**  
**NASHVILLE, TENNESSEE 37243-0488**

February 15, 2000

Opinion No. 00-021

Constitutionality of Public Chapter 128

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**QUESTIONS**

1. May a defendant charged with misdemeanor assault in a domestic violence case be released upon a pre-set bond schedule set by the general sessions or criminal court judges which schedule is kept at the jail? If the answer is “no,” then in a county which has such pre-set bonds for violent, but not domestic offenders, is holding persons accused of misdemeanor domestic assault without bond a violation of equal protection or due process?
2. Does Public Chapter 128 (1999) mandate that an individual bond determination be made within 12 hours of arrest for domestic violence?
3. Does holding a misdemeanor arrestee without bond for more than 48 hours, because of the absence of a magistrate to set bond, violate the United States and Tennessee Constitutions?

**OPINIONS**

1. A defendant who is arrested for any criminal offense defined in Title 39, Chapter 13, in which the alleged victim of the offense is a family or household member as defined in Tenn. Code Ann. §36-3-601 shall not be released on bond within 12 hours of such arrest, whether by “pre-set bond schedule” or otherwise, unless a determination has been made by a magistrate, or other authorized official, that he is not a threat to the alleged victim.
2. No, Public Chapter 128 does not mandate that an individual bond determination be made within 12 hours.
3. Yes, holding a defendant for more than 48 hours without bond because of the absence of a magistrate to make a probable cause determination, absent a bona fide emergency or other extraordinary circumstance, violates the United States Constitution.

## ANALYSIS

Public Chapter 128 provides in pertinent part:

Tennessee Code Annotated §40-11-150, is amended by adding the following as a new, appropriately designated subsection:

Any offender arrested for any criminal offense defined in Title 39, Chapter 13, in which the alleged victim is a family or household member shall not be released within twelve (12) hours of such arrest if the magistrate or other official duly authorized to release such offender finds that such offender is a threat to alleged victim. Such official may, however, release the accused in less than twelve (12) hours if the official determines that sufficient time has or will have elapsed for the victim to be protected.

1. Based on the language of Public Chapter 128, a defendant charged with a criminal offense defined in Title 39, Chapter 13, in which the alleged victim is a family or household member, may not be released within 12 hours of his arrest absent a determination by a magistrate, or other authorized individual, that the offender is not a threat to the alleged victim. Therefore, a defendant may not be released upon a “pre-set bond schedule” within 12 hours unless such a finding is made.<sup>1</sup> If the defendant is not able to be released within 12 hours on a “pre-set bond schedule” because of the absence of a magistrate or other authorized person to make a finding regarding the threat posed by the offender, he may be released after the 12 hours has elapsed. Holding defendants charged with domestic violence for 12 hours prior to releasing them on bond does not violate equal protection and is otherwise constitutionally permissible. *See* Op. Tenn. Atty. Gen. No. 97-069 (May 12, 1997) (copy attached).

2. Public Chapter 128 does not mandate that an initial appearance hearing be held within 12 hours. It only requires that a magistrate or other authorized official determine whether the offender is a threat to the alleged victim if an initial appearance hearing is held within 12 hours.

3. The Fourth Amendment requires that a judicial determination of probable cause must be made within 48 hours of arrest, absent a bona fide emergency or other extraordinary circumstance. *County of Riverside v. McLaughlin*, 500 U.S. 44, 114 L.Ed.2d 49, 111 S.Ct. 1161 (1991). Therefore, holding a defendant without bond for more than 48 hours because of the absence

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<sup>1</sup>This office was not asked, nor does it take a position herein, whether “pre-set bond schedules” comply with the mandates of the “Release from Custody and Bail Reform Act of 1978,” Tenn. Code Ann. § 40-11-101 *et seq.*

of a magistrate to preside at the defendant's initial appearance hearing violates the constitution.<sup>2</sup>

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<sup>2</sup>Nothing in Public Chapter 128 contemplates holding an offender for more than 48 hours without setting bond or making a probable cause determination.