IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

JAMES WILLIAM ROSE and JENNIE ADAMS ROSE,	§	
Petitioners-Appellees,	§	
v.	§	Case: M2022-01261-COA-R3-CV
PATRICK M. MALONE,	§	Williamson County Chancery Court Case No.: 19CV-48249
Respondent-Appellant.	§	

APPELLANT PATRICK M. MALONE'S AMENDED[1] EMERGENCY TENN. R. APP. P. 8(a) MOTION FOR REVIEW OF CATEGORICALLY ILLEGAL DENIAL OF BAIL

I. INTRODUCTION

"A person convicted of a misdemeanor has a right to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case." Tenn. R. Crim. P. 32(d)(1). Further, under Tenn. R. Crim. P. 42(b)(3), an "alleged contemner is entitled to admission to bail as provided in these rules." *Id.*

These unambiguous rules notwithstanding, the Williamson County Chancery Court has denied the Appellant bail and incarcerated him pending appeal of his misdemeanor contempt convictions. This is clear

[1] An earlier version of this motion was filed before the Appellant had received the transcript of the June 9, 2023 hearing on his *Motion to Set Bail Pending Appeal.* That transcript now having been received, this motion is being refiled as amended.

error. *See Weissfeld v. Weissfeld*, No. E200400134COAR3CV, 2004 WL 2070979, at *5 (Tenn. Ct. App. Sept. 16, 2004) ("the cited rules mandate that there be a timely setting of bail upon a criminal contempt conviction and the trial court's failure to do so in this case constituted further procedural error."). Thus, pursuant to Tenn. R. App. P. 8(a), Mr. Malone respectfully moves this Court for review of the Williamson County Chancery Court's categorically illegal denial of bail. *See id.* ("Review may be had at any time before an appeal of any conviction by filing a motion for review in the Court of Criminal Appeals or, if an appeal is pending, by filing a motion for review in the appellate court to which the appeal has been taken.").

For the reasons detailed below, Judge Binkley's orders incarcerating Mr. Malone before judgment and denying him bail pending appeal are flagrantly and categorically illegal. As a result, this Court should:

(1) Reverse the Trial Court's denial of bail with instructions that Mr. Malone be released pending his posting of bail in an amount specified by this Court, but not to exceed $30,000.00, and stay further trial court proceedings; and

(2) Remand with instructions that this matter be reassigned to a different trial judge.

II. ARGUMENT

A. Rule 8(a) permits this Court's review of this motion.

Tennessee Rule of Appellate Procedure 8(a), governing release in criminal cases, provides for immediate appellate review of orders regarding the conditions of a defendant's release. *See id.* Under Tenn.

R. App. P. 8(a), "[r]eview may be had at any time before an appeal of any conviction by filing a motion for review in the Court of Criminal Appeals or, if an appeal is pending, by filing a motion for review **in the appellate court to which the appeal has been taken**." *See id.* (emphasis added). Because such an appeal "has been taken" to this Court, *see id.*, review is proper here.

"Rule 8's purpose is to ensure 'the expeditious review of release orders.'" *See State v. Branham*, No. E2013-00638-CCA-R3CD, 2014 WL 869552, at *6 (Tenn. Crim. App. Mar. 4, 2014) (quoting Tenn. R. App. P. 8(a) Advisory Comm'n Cmts). "Not only is Rule 8 designed to expedite review of release orders, but our supreme court has said that it also is the 'only effective remedy' for 'addressing unsatisfactory release orders....'" *Id.* (quoting *State v. Melson*, 638 S.W.2d 342, 358 (Tenn.1982)). With this context in mind, the Appellant—who is illicitly incarcerated without bond—humbly asks that this Court adjudicate this motion "expeditious[ly]." *Id.*

B. <u>The required Rule 8 materials are appended to this Motion.</u>

Rule 8(a) provides that a motion for review:

> [S]hall be accompanied by a copy of the motion filed in the trial court, any answer in opposition thereto, and the trial court's written statement of reasons, and shall state: (1) the court that entered the order, (2) the date of the order, (3) the crime or crimes charged or of which defendant was convicted, (4) the amount of bail or other conditions of release, (5) the arguments supporting the motion, and (6) the relief sought.

See id.

In compliance with this rule, the Appellant's motion for review filed

in the trial court is attached as **Ex. 1**. Attached as **Ex. 2** is the Appellees' answer in opposition thereto, which includes the statement that:

> Grandparents do not dispute that this Court has authority to set bail pursuant to Tenn. Code Ann. § 40-11-113(A)(1). Grandparents also do not dispute that charges of criminal contempt are misdemeanors and, therefore, Tenn. R. Crim. Pro. 32(d)(1) applies: "A person convicted of a misdemeanor has a right to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case."

See id. at 2. A transcript of the Williamson County Chancery Court's statement of reasons, given by verbal order that has not yet been reduced to a written order as of the filing of this motion, is attached as **Ex. 3**. In full, the reason why Judge Binkley denied Mr. Malone bail was recounted as follows:

> Based upon all those statements, based upon the facts presented in this case, I understand the factors that have to be completed here. But I've got to think of everything that's happened in this case. And I've got to think about the facts of this case and what Mr. Malone's own conduct has taught me; that he has no respect for court orders; that under the facts of this case and his on personal conduct and his own personal decisions, he must at some time own up to that it's my fault. I did this. No one else.
>
> I doubt he'll do that. I wish he would. That would help, but he hasn't.
>
> **So I see no reason at all why bond should be set in this case. So I'm not setting a bond.**

Id. at 1:2–19 (emphasis added).

The Appellant additionally challenges the Williamson County Chancery Court's decision to put in effect the sentence that is the subject

of the Appellant's current appeal in this Court, Case No. M2022-01261-COA-R3-CV. The Williamson County Chancery Court's statement of reasons putting that sentence into effect is attached as **Ex. 4** at 229:9–17. *See also* 231:5–6 ("that sentence is being imposed today. Let's take him away, please, sir."). That decision, too, has not yet been reduced to a written order, and the Appellees have been invited to prepare the trial court's order for it at some later date. Thus, despite ordering Mr. Malone jailed in the interim (where he has been "since May 17, 2023[,]" *see* **Ex. 2** at 2), the Williamson County Chancery Court has not yet entered written orders to date as to either its June 9, 2023 denial of bail pending release, or its May 17, 2023 order altering the conditions of the Appellant's release, or even as to Mr. Malone's May 17, 2023 convictions themselves. However, the Williamson County Chancery Court verbally issued the orders challenged by this Motion on June 9, 2023 and May 17, 2023, respectively. *See* **Ex. 3**; **Ex. 4** at 229:9–17, 231:5–60

The Appellant has been charged/convicted with a total of 35 counts of misdemeanor across two different trials. The first 23 counts are pending appeal in this case. The additional 12 counts were tried on May 17, 2023, *see generally* **Ex. 4**, but they have not yet resulted in the trial court entering a written order formalizing the Appellant's convictions.

As to the first twenty-three misdemeanor contempt counts now pending review in this Court: the trial court had granted Mr. Malone release on $30,000.00 bail pending his appeal of his convictions. *See* **Ex. 2** at 1 ("Mr. Malone's bail, pending appeal, was set at $30,000."). The trial court has since put his appealed sentence into effect, though. *See*

Ex. 4 at 231:5–6. The Appellant notes that Mr. Malone's appealed sentence for those counts, in particular, is also unsustainable and vulnerable to complete reversal on appeal due to the Trial Court's clear failure to apply correct legal standards in multiple respects. *See generally* Amended Pr. Br. of Appellant, at 86–96.

As to the twelve subsequent misdemeanor contempt counts—which have yet even to result in any formal conviction entered by written order—the Williamson County Chancery Court has outright denied Mr. Malone bail pending appeal and ordered him incarcerated pending appeal. *See* **Ex. 3**. Mr. Malone has accordingly "been incarcerated since May 17, 2023." *See* **Ex. 2** at 2.

C. <u>The Appellant is entitled to bail.</u>

The twelve misdemeanor contempt counts tried at Mr. Malone's May 17, 2023 contempt trial have not yet been formalized by written order. Thus, he has not yet even been formally convicted of them, because no judgment has entered and "[i]t is well settled that trial courts speak through their written orders, not through oral statements contained in transcripts." *Elvis Presley Enterprises, Inc. v. City of Memphis*, 620 S.W.3d 318, 324 n.6 (Tenn. 2021) (citing *Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015)). *See also State v. Albright*, No. M2016-01217-CCA-R3-CD, 2017 WL 2179955, at *7 (Tenn. Crim. App. May 16, 2017), *aff'd*, 564 S.W.3d 809 (Tenn. 2018) (citing *Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015)); *State v. McCulloch*, No. E202100404CCAR3CD, 2022 WL 2348568, at *12 (Tenn. Crim. App. June 29, 2022) ("'[T]rial courts speak through their written orders,' and

to the extent that the trial court's oral findings may conflict with its written order, we will focus our review on the written order.") (cleaned up). With this context in mind, Mr. Malone is entitled to bail under Tenn. R. Crim. P. 42(b)(3) as a still-"alleged contemnor" who "is entitled to admission to bail as provided in these rules." *Id.* *Cf.* Tenn. Const. art. I, § 15 ("all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great."); Tenn. Code Ann. § 40-11-102 ("Before trial, all defendants shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. After conviction, defendants are bailable as provided by § 40-11-113, § 40-11-143 or both.").

Independent of the fact that Mr. Malone is not yet even formally convicted of the charges for which he has been incarcerated without bail, Mr. Malone is separately entitled to bail pending his appeal of those to-be-entered convictions. "A person convicted of a misdemeanor has a right to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case." Tenn. R. Crim. P. 32(d)(1). This Court has also explained repeatedly that a trial court's violation of this rule is grounds for reversal. As this Court explained in *McLean v. McLean*, No. E2008-02796-COA-R3-CV, 2010 WL 2160752, at *4 (Tenn. Ct. App. May 28, 2010), for example:

> In *Weissfeld v. Weissfeld*, No. E2004–00134–COA–R3–CV, 2004 WL 2070979 (Tenn.Ct.App.E.S., Sept. 16, 2004), we determined "that the cited rules mandate that there be a timely setting of bail upon a criminal contempt conviction and the trial court's failure to do so in this case constituted further procedural error." 2004 WL 2070979, at *5.

Id. Indeed, this Court has observed that the right to bail pending appeal in a criminal contempt case is so important that it may be raised by this Court *sua sponte*. *Weissfeld*, 2004 WL 2070979, at *5 ("Although we are aware that Ms. Weissfeld did not raise the trial court's failure to set bail as an issue in this appeal, we are compelled to raise this issue in our discretion under authority of Tenn. R.App. P. 13(b).").

Put simply: Tenn. R. Crim. P. 32(d)(1) provides that: "A person convicted of a misdemeanor has a right to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case." *Id.* Mr. Malone, for his part, is a person who has been convicted of misdemeanor contempt convictions that are either currently pending direct appellate review, *see* Case: M2022-01261-COA-R3-CV, or that are about to be so pending. Accordingly, Mr. Malone has "**a right** to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case[,]" *see* Tenn. R. Crim. P. 32(d)(1) (emphasis added), which right the Trial Court has unceremoniously violated.

The Williamson County Chancery Court erred by putting Mr. Malone's earlier, pending-appeal sentence into effect, too. For one thing, a timely appeal having been perfected, the trial court lacks any jurisdiction to interfere with a sentence that is pending review in this Court until this Court's mandate issues. *See, e.g., First Am. Tr. Co. v. Franklin-Murray Dev. Co., L.P.*, 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001) ("An appellate court retains jurisdiction over a case until its mandate returns the case to the trial court. . . . Orders entered by a trial court

after it loses jurisdiction are nullities."). For another, Mr. Malone has **a right** either to bail or to be released on recognizance pending the outcome of his appealed contempt convictions in this case. *See* Tenn. R. Crim. P. 32(d)(1). Accordingly, the Williamson County Chancery Court may not lawfully put Mr. Malone's earlier, pending-appeal sentence of incarceration into effect without bail, either.

Notably, the Appellees themselves effectively conceded all of these facts. *See* **Ex. 2** at 2 ("Grandparents do not dispute that this Court has authority to set bail pursuant to Tenn. Code Ann. § 40-11-113(A)(1). Grandparents also do not dispute that charges of criminal contempt are misdemeanors and, therefore, Tenn. R. Crim. Pro. 32(d)(1) applies: "A person convicted of a misdemeanor has a right to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case."). Even so, extrapolating from a case in which a defendant who had been released on bail had her bail rescinded under Tennessee's bail revocation statute after "a Knox County grand jury issued a nineteen-count presentment against the defendant, charging her with multiple crimes, including attempted first degree murder, employing a firearm during the commission of a dangerous felony, attempted especially aggravated robbery, attempted carjacking, and aggravated assault[,]" *see State v. Burgins*, 464 S.W.3d 298, 301 (Tenn. 2015), the Appellees have insisted that the right to bail "is not absolute and can be forfeited." *See* **Ex. 2** at 2.

This is nonsense, for several reasons.

First, Tennessee's bail revocation statute has no application here.

Mr. Malone's bail has not been revoked; instead, he has had bail denied and had his sentence put into effect notwithstanding having posted bail. Further, no such revocation has ever been sought or granted, which is an essential precondition to revocation. *See* Tenn. Code Ann. § 40-11-143 ("A motion for a change in bail or other conditions of release shall be by written motion, served upon opposing counsel or upon the defendant personally if the defendant is not represented by counsel, within a time reasonable under the circumstances before the hearing on the motion.").

Second, Mr. Malone has been *denied* bail, in the first instance, to which he is entitled as a matter of right for misdemeanor convictions that have not even entered yet. Thus, bail revocation is not even theoretically at issue here as to the convictions for which he has been denied bail outright.

Third, Tennessee's bail revocation statute is primarily concerned with subsequent indictments or convictions of "felony" offenses, *see* Tenn. Code Ann. § 40-11-113(a)(4), (b), (c). As applied to misdemeanor criminal contempt convictions, it would also conflict with the judiciary's rules—and Tenn. Const. art. I, § 15—in a manner that would trigger a constitutional conflict if applied. *See* Tenn. R. Crim. P. 32(d)(1) ("A person convicted of a misdemeanor has a right to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case."). This Court need not wade into such a conflict, though, since bail has not been revoked at all, and since the Appellees have not even attempted to comply with the revocation statute as noted above. *See State v. Taylor*, 70 S.W.3d 717, 720 (Tenn. 2002) ("courts do not decide constitutional questions unless resolution is absolutely

necessary to determining the issues in the case and adjudicating the rights of the parties.").

For all of these reasons, Mr. Malone's right to bail stands, and he is entitled to have it set.

D. Relief sought.

1. THIS COURT SHOULD SET THE APPELLANT'S BAIL.

This Court should reverse the Trial Court's denial of bail, set the Appellant's bail, and stay further trial court proceedings pending appeal, as it has done under similar circumstances before. *See, e.g., McLean*, 2010 WL 2160752, at *4 ("Pursuant to Tenn. R.Crim. P. 42(b)(3), we found Mother's 'Emergency Motion to Set Appeal Bond' to be well taken. It was ordered that upon Mother furnishing bail in the amount of $5,000 in a satisfactory form, she was to be immediately released on bail pending final determination of her appeal."). *See also* **Ex. 5** at 1–2 ("Appellant argues that under the Tennessee Rules of Criminal Procedure, she is entitled to setting of bail or release upon her own recognizance as a matter of right as to her convictions for criminal contempt. We agree. *See* Tenn. R. Crim. P. 42(b)(3). We find Appellant's motion to be well taken, and it is GRANTED. Therefore, it is ORDERED that upon Appellant furnishing bail in the amount of $5,000 in a satisfactory form, Appellant is to be immediately released on bail pending final determination of her appeal now before this Court. **All proceedings in the Trial Court related to the Trial Court's findings of criminal contempt by Appellant are stayed pending disposition by this Court of this appeal.**") (emphasis added).

Further, the $30,000 bond that the Appellant initially posted

pending appeal has already proven sufficient to secure Mr. Malone's attendance at trial, where he appeared to be tried for twelve additional contempt charges as recently as May 17, 2023. *See* **Ex. 2** at 1 ("Mr. Malone's bail, pending appeal, was set at $30,000."); **Ex. 4** (trial transcript). Thus, this Court should order Mr. Malone released on bail in an amount not to exceed $30,000.00 pending the final determination of his current and forthcoming appeals.

2. THIS COURT SHOULD REASSIGN THIS CASE ON REMAND.

This Court should also remand with instructions that this matter be reassigned to a different trial court judge. "[A]ppellate courts are charged with a special responsibility to see that the contempt power is not abused." *State v. Wood*, 91 S.W.3d 769, 776 (Tenn. Ct. App. 2002). Here, a trial court judge who has flagrantly disregarded Mr. Malone's right to bail pending appeal (and who comes with something of a history[2])—who has also displayed overt animosity toward Mr. Malone, including in his lawless bail ruling, *see* **Ex. 2** at 15–16—has abused it spectacularly.

An appellate court "may . . . order reassignment of a case to a different judge in the exercise of the court's inherent power to administer the system of appeals and remand." *Culbertson v. Culbertson*, 455 S.W.3d 107, 157 (Tenn. Ct. App. 2014) (cleaned up). Reassignment may

[2] *See Chase v. Stewart*, No. M2018-01991-COA-R3-CV, 2021 WL 402565, at *1 (Tenn. Ct. App. Feb. 4, 2021), *reh'g denied* (Mar. 16, 2021), *appeal denied, not for citation* (Aug. 6, 2021) ("Because the judge's comments provide a reasonable basis for questioning his impartiality, we reverse the denial of the motion to recuse. And because retroactive recusal is appropriate, we also vacate the contempt and damages orders.").

be warranted where it "is advisable to maintain the appearance of justice[.]" *Rudd v. Rudd*, No. W2011-01007-COA-R3CV, 2011 WL 6777030, at *7 (Tenn. Ct. App. Dec. 22, 2011). It is also warranted in "'the rare case'" where a judge "will not follow the requisite standards and procedures in rendering a decision . . . ." *Biggs v. Town of Nolensville*, No. M2021-00397-COA-R3-CV, 2022 WL 41117, at *6 (Tenn. Ct. App. Jan. 5, 2022) (quoting *Rudd*, 2011 WL 6777030, at *7).

As relevant here, Tenn. R. Crim. P. 32(d)(1) provides with unmistakable clarity that: "A person convicted of a misdemeanor has a right to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case." *Id.* This Court has similarly been clear that this right is, in fact, a right. *See Weissfeld*, 2004 WL 2070979, at *5.

To ensure that Mr. Malone is punished before he can complete his appeal of convictions, though, Judge Binkley has disregarded this Court's clear and unambiguous jurisprudence and, due to his unhidden animosity toward Mr. Malone, *see* **Ex. 3** at 7–16, declared without reference to the governing law that: "I see no reason at all why bond should be set in this case. So I'm not setting a bond." *Id.* at 17–19. Worse: Judge Binkley has taken this approach to ensure pre-appeal punishment for contempt charges *that he explicitly pre-judged*. *See, e.g.,* R. at 198 (February 22, 2022 pretrial order stating that Father "is in criminal contempt of the Court for failure to obey its previous Orders."); R. at 203 (Mar. 15, 2022 pretrial order stating that Father "is in criminal contempt of the Court for failure to obey its previous Orders."); R. at 232

(Apr. 15, 2022 pretrial order stating that Father "is in civil contempt of the Court for failure to obey its previous Orders."); R. at 305 ("the Court finds that Father has been ignoring its Orders and that his behavior is beyond the pale.").

Individually, either of those problematic determinations—Judge Binkley's denial of bail despite Mr. Malone's right to it and his prejudgment of the charges against Mr. Malone—might not warrant reassignment. In combination, though, they call the integrity of the judicial process into serious doubt.

"[T]o avoid the public appearance of partiality[,]" *see Alley v. State*, 882 S.W.2d 810, 823 (Tenn. Crim. App. 1994), the Court of Criminal Appeals has on several occasions ordered reassignment to a different judge under such circumstances. *See, e.g., id.*; *State v. Jones,* No. M2002-00738-CCA-R9CO, 2003 WL 1562088, at *4 (Tenn. Crim. App. Mar. 26, 2003) ("we hold that pursuant to the mandates of *Alley v. State*, 882 S.W.2d 810 (Tenn.Crim.App.1994), the trial judge in this case should be recused from presiding over any further proceedings in this matter, and that upon remand, the case shall be transferred to another judge for further proceedings consistent with this opinion."); *Knowles v. State*, No. W201800739CCAR3PC, 2020 WL 2614672, at *9 (Tenn. Crim. App. May 22, 2020) ("We also conclude that the post-conviction court judge who previously heard this matter must be recused from hearing further proceedings in this case. We believe that the tenor and tone of some of the comments by the post-conviction court indicated its hostility against Petitioner."). This Court should do the same here. *Cf. Beaman v. Beaman*, No. M2018-01651-COA-T10B-CV, 2018 WL 5099778, at *12, n.8

(Tenn. Ct. App. Oct. 19, 2018) (emphasizing appellate courts' "discretion to waive the deficiencies in order to reach the merits" of a valid recusal claim, and ordering reassignment upon remand) (collecting cases). Thus, in addition to setting bail, this Court should remand with instructions that this matter be reassigned to another judge.

III. CONCLUSION

This Court should reverse the Williamson County Chancery Court's denial of bail, set the Appellant's bail, and stay further trial court proceedings pending appeal, as it has done in similar cases. *See* **Ex. 5**. This Court should also remand with instructions that this matter be reassigned to a different trial court judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 11th day of June, 2023, a copy of the foregoing was served via the Court's electronic filing system, via email, and/or via USPS mail, postage prepaid, to the following parties:

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