No. _____

In The

Supreme Court of the United States

◆

GARY FIELDS
Petitioner

vs

HENRY COUNTY, TENNESSEE
Respondent.

◆

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED FOR REVIEW

Respondent Henry County, as is common in the State of Tennessee and across the United States, has a system of setting bail where the arresting police officer or a court clerk always admits the person arrested to bail based on a preset bond schedule that only allows bail to be a monetary amount or where the arresting police officer denies bail in contravention of state law.

Two questions are presented for review:

1. Whether bail is excessive under the 8th Amendment to the U.S. Constitution when it is set by the arresting police officer pursuant to a county policy and practice and based on a preset bond schedule and without regard to an individualized assessment of the arrested person's likelihood to appear in court or be a danger if released pretrial.

2. Whether the procedural due process clause of the 14th Amendment to the U.S. Constitution protects a person's right, under state constitution and statutes, to be admitted to bail based on statutory factors predictive of risk of flight as a liberty interest that cannot be denied arbitrarily.

PARTIES

The parties to this action are set forth in the caption of the case.

Petitioner Gary Fields was the appellant in the court below. Respondent Henry County, Tennessee was the appellee in the court below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gary Fields respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on December 10, 2012.

OPINIONS BELOW

The December 10, 2012, opinion of the court of appeals is reported at 701 F.3d 180 (6th Cir. 2012) and is set out at pp. 1a-14a of the Appendix. The September 30, 2011, opinion of the district court, which is not officially reported, is set out at pp. 15a-35a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on December 10, 2012. No petition for rehearing was filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The 8th Amendment to the United States Constitution provides, in pertinent part, that "[e]xcessive bail shall not be required."

2. The 14th Amendment to the United States Constitution provides, in pertinent part:

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The Tennessee Constitution, § 1, Art. 15, provides that "all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great."

4. The Tennessee Release from Custody and Bail Reform Act of 1978 is codified at Tennessee Code Annotated 40-11-101 through 40-11-144. The specific provisions of the Tennessee Bail Reform Act are too lengthy to set out here and are included, along with other applicable parts of the Tennessee Code, in Appendix C at pp. 36a-54a.

STATEMENT OF THE CASE

The question presented in this case is whether Respondent Henry County's policies of automatically detaining domestic-assault defendants without bail in violation of state law and using a preset bond schedule to determine bail where bail is always a monetary amount and applied to the arrestee by the arresting police officer, violates the United States Constitution.

On December 11, 2008, a warrant was issued for Gary Fields' arrest based on allegations made by his wife for an offense of domestic assault, a Class A Misdemeanor. (R. 4-4: Certified Copy of Arrest Warrant, at 2). The warrant was issued by a Henry County Judicial Commissioner. (*Id.*, at 3) who was on duty at the time.

At the time, all domestic assault affidavits of complaint were prepared without a bail amount and the arrestee was held without bail until brought before a General Sessions Court judge. (R. 29-2: Henry County's Supplemental Response to Fields' First Set of Interrogatories, ¶23, at 1). In accordance with this policy, the arresting officer, Michelle Brewer, who prepared the affidavit of complaint, inserted the annotation "W/O", meaning "without", on the bond amount line on the affidavit of complaint form. *Id.* (See also, R. 4-4: Certified Copy of Arrest Warrant, at 2; R. 29-3: Deposition of Lt. Dean, at 61).

On December 12, 2008, a Friday, after Fields suspected that a warrant had issued for his arrest, he asked a Henry County Constable what he needed to do. The Constable told him that because of the time line, if he turned himself in he would have to wait in jail until the following Tuesday and be held without bail. (R. 29-4, Affidavit of Gary Fields, ¶3). Later, the Constable called him back and told him not to wait too long or he might miss the timing and end up sitting in jail until the following Thursday. (*Id.*, ¶4). Fields decided to turn himself in that Monday. (*Id.*, ¶5).

Monday, December 15, 2008, Fields rode to the jail with the Constable while his wife followed in another car. (*Id*., ¶6). During booking, he asked about the ability to make bail and the booking officer told him that he would not be given that opportunity because of the charge. (*Id*.) Fields then asked specifically to see a magistrate and was sent to see the sheriff instead. (*Id*.)

Before Sheriff Belew, Fields explained that he had done his research and knew that he should be allowed to post bail and again demanded to see a magistrate. (*Id*., ¶7). Sheriff Belew responded that they did not have magistrates (which was untrue, although they are called judicial commissioners). The Sheriff then went to talk to Fields' wife and told her what he had said. Fields was then led to his jail cell. (*Id*., ¶8).

At no time was Fields ever presented to a judicial commissioner or magistrate or anyone else for examination and determination of pretrial release prior to being taken to General Sessions court the next day, a Tuesday. (*Id*., ¶9). He was not questioned as to any of the statutory factors by anyone because "his bail was already set and the nature of his charge required that he be detained for twelve hours." [1] (R. 29-1, Henry County's Response to Fields' First Set of Interrogatories, ¶24). No one would have known about his ties to the community merely by reviewing information available on county computers (*Id*., ¶10) but Sheriff Belew would have known about his family ties because Fields' grandfather had been the

[1] This was an erroneous but common application of the law. See T.C.A. § 40-11-150. (App. 46a).

sheriff in the 1960's and his picture hangs on the wall of the Sheriff's Department. (*Id*., ¶11).

Fields' wife was also available the entire time to be questioned about whether or not she considered him a danger to her if released as she had followed him to the jail and spoken with the Sheriff. She told Sheriff Belew that everything was fine and that they had been together since December 11 with no problems. (*Id*., ¶13).

Henry County Judicial Commissioners "sometimes question arrestees personally before setting a bail amount and sometimes receive background information concerning an arrestee from the arresting officer(s)." (R. 29-1, Henry County's Response to Fields' First Set of Interrogatories, ¶19). The overall policy of setting bail by Henry County was described as follows:

> Generally, a bail amount is set by the clerk of the court, or, if the clerk is not available, the general sessions judge, or, if the general sessions judge is not available, by a judicial commissioner. Bail is generally set while an arrestee is being processed into the Henry County jail. During the intake process, the arresting officer or intake officer telephones the clerk of the court. If the clerk is not available, then the general sessions judge is called. If neither the clerk or the judge is available, then a judicial commissioner is called. The clerk, judge, or

> commissioner obtains some background information concerning the arrestee and a bail amount is then set.

(R. 29-1, Def. Responses, ¶2).

Lt. Steven Dean was deposed as a 30(b)(6) witness on February 22, 2011. Lt. Dean also testified as to his own personal observations which included hearing phone calls made from the booking desk to have an arrestee's bond set. (R. 29-3, Deposition of Lt. Steven Dean, p.12). Lt. Dean testified that a person cannot be incarcerated at the Henry County jail without having a mittimus in their jail file. (R. 29-3: Dean Dep., p. 13). However, a mittimus is not normally generated until the arrestee goes before a judge. (R. 29-3: Dean Dep., p. 13). So an arrestee could stay in the jail from the date of arrest until whenever the next scheduled court date is, normally two days a week, on Tuesdays and Thursdays. (R. 29-3: Dean Dep., p. 14).

The normal process (at the time Lt. Dean's deposition was taken) is that when a person is arrested, the arresting officer will call the court clerk, Mike Wilson, to have bond set. (R. 29-3: Dean Dep., pp. 15, 17). Once the bond is set, they will put the arrestee on the telephone to make his or her call in order to make bond. (*Id*.) The amount of bond on the arrest report is put there by the arresting officer. (*Id*., p. 21). The call to the court clerk by the arresting officer is not made in a manner where the arrestee can listen, such as on a speaker phone. It is a call strictly between the arresting officer and the court clerk. (*Id*., p. 21). The arrestee is never put on

the phone with the court clerk. (*Id*., p. 28). Verifying that the amount of bond put on the arrest report by the arresting officer is actually the amount called for by the court clerk is never done. (*Id*., p. 22). The arresting officer could put down whatever bond he or she wanted despite what was set by the court clerk and there is no verification process. (*Id*.) Indeed, because of this lack of verification or independent process, the arresting officer, in actuality, has the full discretion to put down whatever bond he or she wants without regard to what the court clerk had ordered. If an arrestee is charged with more than one offense, there is still only one bond amount that is set. (*Id*., p. 23). However, if the charges are headed to two different courts, for example a probation violation warrant (headed to Criminal Court) and a new arrest warrant (headed to General Sessions Court), it is the police officer that decides and dictates that two separate bonds will be set. (*Id.*, p. 24).

When the police officer calls the clerk he or she will tell the clerk the name of the subject, the charge, the class of felony or misdemeanor and if the person is on probation or not. There is no other information that is provided. (*Id.*, p. 29). This includes lack of information about prior failures-to-appear or criminal record unless the arresting officer happened to be aware of this. (*Id*., p. 29). No information provided to the court clerk by the arresting officer is written down except for the name and the charge. (*Id*., p. 29-30).

As for domestic assaults, all individuals arrested on domestic assault charges are held

without bail/bond. (*Id*., p. 50-51). That was just the policy that Henry County followed per their General Sessions judge. (*Id*., p. 51). Presently (at least at the time of Lt. Dean's deposition), domestic assaults are "arraigned" at the booking desk and a bond is set at that time by a judicial commissioner who comes in twice a day. (*Id*., pp. 52-53). The bond is always a dollar amount and Lt. Dean has never seen anyone released on their own recognizance (ROR). (*Id*., pp. 53, 74). Lt. Dean did not know if the judicial commissioner ever did anything to determine if the person arrested is a risk to an alleged victim but the one time he actually observed the process nothing like this was done. (*Id*., pp. 54, 56). But if the commissioner asked any questions, it would be on an order form granting bail. (*Id*., at 54-55). Later, however, when shown the order form granting bail (R. 29-3, Form Order Granting Bail for Abuse Cases, Exhibit 3 to Deposition of Lt. Dean, p. 116) and there were no questions on the form, Lt. Dean stated, "Well, I would say it's not questions, it's just telling him what – him or her – what the guidelines are on – on them giving them bail." (R. 29-3, Dean Dep.. p. 56). All bail for other charged offenses is still determined by the court clerk. (*Id*., p. 55). Only if the court clerk cannot be located is there any attempt to locate a judicial commissioner. (*Id*., p. 85).

This change in policy – from holding all domestic assault arrestees without bail until their next court date, to having the bail amount set by a judicial commissioner – changed fairly recently (*Id*., p. 62), sometime in February or March of 2010. (*Id*., at 86) Lt. Dean was told of the change by the Chief

Deputy who he believes received the change in policy from the judge. (*Id*., p. 62).

Those who are deemed to be "undocumented illegal immigrants" are held without bail for about 24 hours with the annotation "hold for ICE". (*Id*., p. 64-65). Jailers contact the ICE office by telephone to see if they are going to place a hold on the person. (*Id*., p. 64). Such a person will not be released even if they have the cash to post a bond until jailers hear back from ICE. (*Id*., p. 64). This policy only applies to Hispanics. (*Id*., p. 66). A person is determined to be Hispanic by their appearance. (*Id*., p. 66). That means, "dark skin, dark hair, most of the time, just based on – on how well they speak English." (*Id*., p. 66). An illegal alien from an Eastern European country with white skin and pretty good English has never been an issue before. (*Id*., p. 66). Even if a white person says they were born in a foreign country, ICE is not notified unless they have brown skin. (*Id*., p. 67).

On arrest warrants issued by another county where the person is arrested in Henry County, the warrant-issuing county is called for transport. (*Id*., p. 70). The arrestee is not presented to anyone for determination of bail. (*Id*.) This is done simply because the warrant is not a Henry County warrant. Lt. Dean did not know if there was any law requiring that the person be admitted to bail in the county of arrest. (*Id*., p. 71). In the ten years that Lt. Dean has been an officer, he has never received training on the setting of bail. (*Id*., p. 72). Under the prior system that had bond amounts set by a preset list, there was no charge that allowed an ROR release. (*Id*., p. 74).

Lt. Dean identified a memo dated August 22, 1997 that set the bail amounts based on the charged offense classification. (*Id*., p. 75; Exhibit 6 to Dean Dep., p. 117). The policy set out in the memo was in place when Lt. Dean started working there in September of 2000. (*Id*., p. 76). The memo was originally sent by then General Sessions Judge McAdams and later updated by the present General Sessions Judge Synder sometime after she became judge in 2006. (*Id*., pp. 76, 87). The bond amounts set in the memo were the actual amounts set from September 1997 up to some point where he was an employee at the sheriff's department. (*Id*., p. 77). Individuals who had their bonds set per this schedule would not be asked any questions attempting to determine whether they were likely to flee or a be a danger to society if released. (*Id*., pp. 77-78). The memo clearly sets out a policy of setting bail strictly based on the charged offense classification and nothing else. (*Id.*, p. 89). In February, 2001, another memo established another guideline for setting bail. (*Id*., p. 87: Exhibit 7 to Dean Dep., p. 118). This memo included a minimum amount of bail ($250) for underage possession and consumption "Per Judge". (*Id*., p. 97).

As for domestic assault charges, Lt. Dean believes the law requires a 12 hour hold before one can be released on bail. This is the policy followed by the Sheriff's Department. (*Id*., p. 95).

Petitioner Gary Fields filed his single count complaint on December 10, 2009 as a class action citing violations of the Eighth and Fourteenth Amendments to the U.S. Constitution under 42

U.S.C. § 1983 as it related to the practice of setting bail by Henry County, Tennessee judicial commissioners. (RE. 1: Complaint).

After some limited discovery, Henry County filed a motion for summary judgment (R. 4, Henry County's Motion for Summary Judgment) and a supplemental motion for summary judgment. (R. 28, Henry County's Supplement to Motion for Summary Judgment). Fields filed a response to the motion for summary judgment (R. 29, Fields's Response to Henry County's Motion for Summary Judgment).

The district court granted Henry County's motion for summary judgment. (R. 42, Order Granting Henry County's Motion for Summary Judgment). Judgment was entered in favor of the defendant, Henry County. (R. 43, Judgment in a Civil Case). Petitioner Fields filed a Notice of Appeal to the Sixth Circuit Court of Appeals (R. 44, Notice of Appeal) based on 28 U.S.C. § 1291.

On appeal, Respondent Henry County did "not dispute that Fields's detention resulted from a policy of automatically detaining domestic-assault defendants for a 12-hour period. Nor [did] it dispute that its policy was to set bail using a bond schedule." (App. 4a-5a). Indeed, the court of appeals held that "Henry County's policy violates T.C.A. § 40-11-150. See *Hopkins v. Bradley Cnty.*, 338 S.W.3d 529, 537 (Tenn. Ct. App. 2010)." (App. 4a, fn.2) After oral argument, the court of appeals affirmed the district court.

The Sixth Circuit held, first, that there "is nothing inherently wrong with bond schedules", which it defined as a "standardized bail amount based on the charge the defendant faces." (App. 6a). Quoting *Pugh v Rainwater*, 572 F.2d 1053 (5th Cir. 1978), the court of appeals held that "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting[] its requirements."

> Indeed, bond schedules are aimed at making sure that defendants who are accused of similar crimes receive similar bonds. See, e.g., *Stack [v Boyle*, 342 U.S. 1, 5 (1951] (noting that a relevant factor in applying the Clause is whether the defendant received as bond a sum "much higher than that usually imposed for offenses with like penalties"). The bond schedule represents an assessment of what bail amount would ensure the appearance of the average defendant facing such a charge. The schedules are therefore aimed at assuring the presence of a defendant. See *id.* ("[T]he fixing of bail for any individual defendant must be based upon *standards relevant* to the purpose of assuring the presence of that defendant." (emphasis added)). Thus, the mere use of a schedule does not itself pose a constitutional problem under the Eighth Amendment. See, e.g., *Glenn v. City of Columbus*, 75 F. App'x 983 (5th Cir. 2003) (citing *Pugh*, 572

> F.2d at 1057); see also *Terrell v. City of El Paso*, 481 F. Supp. 2d 757, 766 (W.D. Tex. 2007) (reporting that "exhaustive research" of challenges to bond schedules under § 1983 yielded no cases where a bond schedule was found unconstitutional under the Excessive Bail Clause).

(App. 6a-7a). Petitioner contends that this is a misreading of *Stack* because bail based on an "average" defendant is not, and cannot logically be, based on standards relevant to the particular defendant under consideration.

The court of appeals then went on to misconstrue the argument Mr. Fields was making. As the court summarized the argument, "Fields fails to point to any inherent problem with the dollar amount set in his case. He does not claim it was excessive either relative to the crime he was charged with or based on the particular facts of his case." To the contrary, Fields most certainly claimed that his *denial of bail by a police officer*, as a matter of Henry County policy, was excessive because it *was not based on the particular facts of his case*. That is, it was not *individually based on his particular likelihood to flee or on his particular danger to the alleged victim if released.* It was, instead, based purely on the charged offense as decided by the arresting police officer pursuant to a county policy. Mr. Fields dollar amount was not set until the next day by a General Sessions judge and that setting of bail was also based on the charged offense alone.

The Sixth Circuit also stated that Mr. Fields did "not claim that his bail was much higher than normal for such charges or that the judge relied upon impermissible factors." (App. 7a). Again, to the contrary, Mr. Fields complained that he was not granted any bail at all and that the *police officer* who set his bail, pursuant to a county policy (*not* a "judge"), did not *rely on any factors whatsoever*. In fact, bail was denied before Fields was even arrested.

Finally, the court of appeals concluded, as to Mr. Fields' 8th Amendment claim that he was entitled to "'particularized examination' before having his bond set", that "nothing in the Eighth Amendment requires a particular type of 'process' or examination" (citing *Galen v County of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007). (App. 8a).

In *Galen*, the plaintiff alleged that his $1,000,000 bail was excessive in violation of the Eighth Amendment. The 9th Circuit affirmed the dismissal of his claim because "he failed to adduce evidence of the reason for or motive behind the Commissioner's enhancement of bail." *Galen*, at 659. Thus, the dismissal was supported on the basis of a lack of evidence not any substantive constitutional analysis.

As for Mr. Fields' claim that the automatic 12-hour hold without bail set by the arresting police officer was a denial of bail, the court of appeals held that the "Eighth Amendment's protections address the amount of bail, not the timing. There is no constitutional right to speedy bail." Yet again, Mr. Fields' claim was misconstrued. Mr. Fields did not

complain of not having a "speedy bail" nor of the "timing" of his bail. His chief complaint, under the 8th Amendment, was that he was *denied* bail by an *arresting police officer* pursuant to a county policy that based the denial on the charged offense alone and *not on a particularized assessment of his likelihood to flee or be a danger to the alleged victim if released*. Had state law and the constitutionally mandated individualized assessment of flight been followed, he may have been released earlier or not. That is not the point. But he was entitled to be admitted to bail on his own individual characteristics, not the "average" arrestee charged with domestic assault.

Next, as to the due process claims, the court of appeals held that the state statutes requiring an examination by a magistrate or a judicial commissioner for the purpose of setting bail and allowing a 12-hour hold without bail ***if*** an arrestee is determined to be a risk to an alleged victim did not create a liberty interest that is protected by the 14th Amendment due process clause. This opinion was based on the holding that the various state statutes at issue here did not place "'substantive limitations on official conduct' by using 'explicitly mandatory language in connection with requiring specific substantive predicates'" and the state laws did not "require[] a specific outcome if those 'substantive predicates are met.'" (App. 9a).

The two state statutes that formed the basis of this liberty interest claim, according to the court, were "(1) his right to be examined by a judicial commissioner before being committed to jail and (2)

his right to be examined in a bail hearing." (App. 10a). But, the court of appeals concluded, these "putative interests are not liberty interests at all. These state-law rights promise only a particular type of hearing, not a specific outcome." (App. 10a).

The court of appeals also relied on a Tennessee Supreme Court case, *Wynn v State*, 181 Tenn. 325, 181 S.W. 2d 332, 334 (Tenn. 1944), to explain that a "'temporary holding or arrest for examination purposes' lasting 36 hours is 'not a commital [sic] to prison within the spirit of' the predecessor to § 40-5-103." (App. 11a-12a). In *Wynn*, the Tennessee Supreme Court considered a case of "Negroes" who claimed they were whipped and tortured over a 36 hour period to get a confession and they argued that their confession was inadmissible. They were tortured while being held "for investigation" or for "examination purposes". Despite the defendants' assertions that they had been tortured, the Court ruled that there was no "evidence" of such torture. In rejecting the statutory language at the time regarding committal to prison only after an examination by a magistrate, the *Wynn* court cited another case, *Ashcraft v State*, that had no citation and was "unreported" and that had been reversed by this United States Supreme Court (citing to an incorrect citation of 88 L.Ed. 858, which does not exist). The U.S. Supreme Court had reversed the unreported Tennessee Supreme Court case in *Ashcraft v State*, 322 U.S. 143, 88 L.Ed. 1192 (1944), because the confessions were coerced and therefore inadmissible. Not only is the Tennessee Supreme Court case of *Ashcraft v State*, on which the *Wynn* court based its decision, unreported and

therefore improperly relied upon but it had been reversed two months prior by the U.S. Supreme Court. The *Wynn* Court went on to simply state, without any citation to authority or other analysis, that a temporary "holding or arrest" for the purpose of examination was "not a committal to prison within the spirit of our statute." From where the Wynn court derived the "spirit" of the statute without so much as any discussion of legislative intent was never revealed and remains a mystery.

More importantly the case of *Wynn v State* and even the unreported case of *Ashcraft v State* (both decided in 1944) came about before the Tennessee Release from Custody and Bail Reform Act of 1978 and cannot be applied to the totality of the legislative intent as represented by the entire scheme of the act. Those cases are simply unreliable in determining the legislative intent behind the Act that requires an examination before a magistrate prior to committal to jail. Taken as a whole, the Release from Custody and Bail Reform Act of 1978 clearly intends a system where an arrested person is taken without delay to a magistrate with the duty to set bail after examination and before being put in jail. Thus, the Bail Reform Act *does* create a liberty interest which may not be denied arbitrarily and without due process of law.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF VITAL IMPORTANCE TO THE CRIMINAL LAW THAT IS IN NEED OF CLARIFICATION.

This Court has granted certiorari in the past where a question was important to the criminal law, *United States v MacDonald*, 435 U.S. 850, 853 (1978), and this Court's holding in *Stack v Boyle*, 342 U.S. 1 (1951) cries for clarification. There are a number of reported and unreported cases that examine the setting of bail but occasions "to apply *Stack v. Boyle* have been few..." *Cherek v United States*, 767 F.2d 335, 337 (7th Cir. 1985).

When bail is denied based on arbitrary, non-individualized or unknown criteria and when all bail is of a monetary nature, "the courts render themselves subject to the suspicion that, as suggested by Mr. Justice Jackson in the *Stack* case, the amount has been fixed, "not as a reasonable assurance of their presence at the trial, but also as an assurance that they would remain in jail." *Spector v United States*, 193 F.2d 1002, 1005 (9th Cir. 1952) (quoting *Stack*, 342 U.S. at 10). Justice Jackson's impression of the matter was that "[t]here seems reason to believe that this may have been the spirit to which the courts below have yielded, and it is contrary to the whole policy and philosophy of bail." *Stack v. Boyle*, 342 U.S. at 10.

To infer from the charged offense of domestic assault alone that a person is a likely threat to the

alleged victim and therefore subject to a statutory 12-hour holding period is no different than inferring "from the indictment alone" that one is a flight risk, an inference disallowed in *Stack*. ("To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act." *Stack*, at 6. Although this particular quote speaks of an "unusually **high** amount", an outright denial of bail such that the arrestee cannot obtain his liberty is no different than an unusually high amount that an arrestee cannot afford. The end result is the same - the arrestee stays in jail.

By contrast, the federal Bail Reform Act of 1984, 18 U.S.C. § 3141, *et seq.*, requires a judicial officer to determine whether an arrestee shall be detained because of a danger that person may pose to others if released. § 3142(f) provides the "arrestee with a number of procedural safeguards" including the safeguard that a judicial officer must "state his findings of fact in writing § 3142(i), and support his conclusion with 'clear and convincing evidence,' § 3142(f)." *United States v Salerno*, 481 U.S. 739 (1987). However, the

> judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and

> seriousness of the danger posed by the suspect's release. § 3142(g). Should a judicial officer order detention, the detainee is entitled to expedited appellate review of the detention order. §§ 3145(b), (c).

Id, at 742-743.

The Tennessee Bail Reform Act of 1978 is almost identical. Like the federal act, under the Tennessee Act "the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination." *Salerno*, at 751. The two federal and state acts also provide almost identical procedures in that the "judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender..." *Id.*, at 751-752. (*Cf.* T.C.A. § 40-11-115 and T.C.A. § 40-11-118 "Factors considered", App. 40a). Finally, both Acts require that the "judicial officer must include written findings of fact and a written statement of reasons for a decision to detain." *Id.*, at 752. (*Cf.*, 18 U.S.C. 3142(f) with T.C.A. § 40-11-114). These provisions have been called "extensive safeguards", "procedural protections" (*Salerno*, at 752), and "procedural safeguards" (*Salerno*, at 755) that are sufficient to "repel a facial challenge" to the constitutionality of the restraint of liberty protected by both the substantive and procedural due process elements of

the Fifth Amendment. But how are these "safeguards" protective at all if they are summarily ignored? To be sure, the Tennessee Bail Reform Act, on its face, comports with due process requirements. The problem is that local jurisdictions, such as Henry County, summarily ignore the "procedural safeguards" built into the Act.

The conflict arises, in part, by two apparently contradictory statements in this Court's opinion in *Stack*.

The first guidance regarding excessive bail states:

> Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. **Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment.** Since the function of bail is limited, the fixing of bail for any **individual defendant** must be based upon standards relevant to the purpose of assuring the presence of **that defendant**. The traditional standards as expressed in the Federal Rules of Criminal Procedure **are to be**

> **applied in each case to each defendant**.

Stack, at 5 (emphasis added).

The second statement follows the first:

> If bail in an amount greater than that **usually fixed for serious charges of crimes** is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved. In the absence of such a showing, we are of the opinion that the fixing of bail before trial in these cases cannot be squared with the statutory and constitutional standards for admission to bail.

Stack, at 6 (emphasis added).

On the one hand, this Court seems to be emphasizing that bail must be affixed based on a process where the amount is "reasonably calculated" for the purpose of assuring *that particular defendant* will appear in court when demanded. On the other hand, this Court seems to also be saying that bail is not excessive unless it is higher than "usually" fixed for that charge, suggesting that bail based on the charged offense is acceptable. The former is based on an individual likelihood to flee or be a danger if released and the latter is based on what is usual and

customary for that charged offense without regard to the individual.

Of course, this begs the question posed: Must bail be based on an individualized assessment of likelihood to flee or be a danger if released or can it be based on the "average" bail set for that charge without regard to the individual and his likelihood to flee at all.

The Sixth Circuit in *Fields* clearly held that bail set on a preset schedule and based on the "average defendant" is acceptable and consistent with the holding in *Stack,* based, of course, on the selective quoting of the second part of the *Stack* opinion. Yet, the Sixth Circuit has also held that "pre-trial denial of bail without a statement of reasons is a violation of the Fourteenth Amendment." *Puertas v. Michigan Dep't of Corrections*, 88 F. Supp. 2d 775, 780 (D. Mich. 2000) (citing *Atkins v Michigan*, 644 F.2d 543, 550 (6th Cir. 1981)).

The custom of setting bail based on a preset list that considers only the charged offense is customary in Tennessee and prevalent throughout the United States. See, e.g., *Staley v Wilson County, Tennessee*, U.S. District Court for the Middle District of Tennessee, Case No. 3:04-1127 (J. Trauger), *Jones v Rutherford County, Tennessee*, U.S. District Court for the Middle District of Tennessee, Case No. 3:08-00782 (J. Echols), *Painter v McNairy County, Tennessee*, U.S. District Court for the Western District of Tennessee, Case No. 1:09-01099 (J. Breen), *Tate v Hartsville/Trousdale County,*

Tennessee, U.S. District Court for the Middle District of Tennessee, Case No. 3:09-0201 (J. Campbell), *Holman v Macon County, Tennessee*, U.S. District Court for the Middle District of Tennessee, Case No. 2:10-0036 (J. Campbell), *Malmquist v Metropolitan Government of Nashville and Davidson County*, U.S. District Court for the Middle District of Tennessee, Case No. 3:10-01014 (Mag. J. Bryant), *Robertson v Bedford County, Tennessee*, U.S. District Court for the Eastern District of Tennessee, Case No. 1:10-00320 (J. Mattice). As expressed by David Raybin, the Tennessee scholar on criminal law, "[t]he nature of the crime appears to be the major consideration in present bond hearings." (Raybin, David Louis, 9 Raybin, Criminal Practice and Procedure, §4:6, p. 123 (West 8th Edition, 1985)).

This has been an issue percolating in the lower courts since at least 1954 when Professor Caleb Foote first brought the issue to light. (Foote, Caleb. "Compelling Appearance in Court: Administration of Bail in Philadelphia," University of Pennsylvania Law Review, June 1954). (See also, Lindsey Carlson, “Bail Schedules: A Violation of Judicial Discretion?”, 26 Crim. Just. 12, Spring 2011, at 13.)

> Despite the clear legal emphasis on the importance of individualized bail determinations, many US jurisdictions have nevertheless adopted a particular device that represents the antithesis of bail fixed according to the personal characteristics and circumstances of each defendant: the bail schedule. ...

> Bail schedules are used in a variety of ways, and have been adopted in jurisdictions all over the United States. In a recently conducted poll, nearly 64 percent of respondent counties indicated that their jurisdiction uses bail schedules.

(*Id.*, at 13-14).

Foote (1954) concluded, after examining the bail setting process in place in Philadelphia, that "the administrative problems created by the large volume of cases in which bail must be set necessitates the creation of a standard which can be easily and rapidly applied." The result was a system that used the "nature of the offense" as the "basic standard which guide[d] the decision as to the amount to be set". (Foote 1954, pp. 1034-35). "[T]his determination on the basis of the nature of the offense 'seems to apply an abstract generality as the norm of decision, without consideration of the particular facts and circumstances disclosed' in the individual case". *United States ex rel. Rubinstein v Mulcahy*, 155 F.2d 1002, 1005 (2nd Cir. 1946).

Foote found, further, that at the "appellate level, cases dealing with excessive bail have involved amounts 'greater than usually fixed' for similar offenses." (Foote 1954, p. 1035). The prevalence of relying principally on the charged offense for determining an amount to set as bail and using a "usual" amount fixed for that offense, however, necessarily begged the question of where this

amount came from such that it became a “usual” or “average” amount.

The rationale of this reliance on the nature of the offense charged as the standard to guide bail determination may be that as the severity of the crime and possible punishment increases, the defendant, having more to fear, becomes more likely to jump bail. Even if this was well founded, there was no indication of how the range of bail "usually fixed" for a given offense had been established, and within Philadelphia there was a striking difference between the bail usually set in state courts and that usually set in federal courts for comparable offenses. (Foote 1954, p. 1035) Indeed, the "usual amount set" for a particular offense has to start somewhere and absent any empirical study of what amount is no more than necessary to address and deter a risk of nonappearance as to a particular individual, this "usual amount" likely comes from thin air and then gets repeated as an “average”.

Thus, relying on the language in *Stack* regarding the amount “usually fixed” for that particular charge allows a jurisdiction to simply make up an amount out of thin air, apply it with regularity and without regard to individual characteristics predictive of likelihood to flee, and then, in a classic boot-strap argument, claim that the bail is consistent with the amount “usually fixed”. By extension, then, as done by Respondent Henry County, as long as the amount is equal to that “usually fixed”, it does not call for an impartial and detached magistrate to set the bail at all and it can

be set, instead, by the arresting police officer. This is exactly what happened to Gary Fields.

This issue cries for clarification because the language in *Stack* allows a court to selectively choose which part of the opinion to hang its hat on. The first, requiring an individualized assessment of likelihood to flee, or the second, requiring only that bail is equal to that "usually fixed" for the charged offense alone. Hundreds of thousands of pretrial detainees await an answer and Mr. Fields, on his own account and on behalf of all others similarly situated, begs the Court for resolution of this issue.

II. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH OTHER CIRCUITS AND WITH THE STATE OF TENNESSEE.

Petitioner Gary Fields was denied bail as a matter of policy based on the charged offense alone and otherwise subjected to a system of bail that revolved around the setting of bail as a monetary yoke. Respondent Henry County did not and does not deny this.

In Tennessee Attorney General Opinion No. 05-018, 2005 WL 436219 (Tenn.A.G.), the Office of the Attorney General of Tennessee concluded that, given

> the factors to be considered in setting the amount of bond and the fact that, before trial, all defendants shall be bailable by sufficient sureties, except for

> capital offenses where the proof is evident or the presumption great, it is the opinion of this office that a defendant is entitled to an individual determination of bond whether the arrest is a warrantless arrest, arrest pursuant to a warrant, or an arrest pursuant to a capias or attachment.

Therefore, it went on, T.C.A. § 40-11-105(a)(1) "does not authorize a jailer to release a defendant based upon a 'pre-set bond schedule' published by the judges in the jurisdiction."

Despite this on-point decision by the Tennessee Attorney General and in direct contravention of it, the Sixth Circuit in this case held that there is nothing inherently wrong with bond schedules that set out standardized bail amounts based on the charged offense. Utilization of a master bond schedule, it decided, provides a speedy and convenient release for those who have no difficulty in meeting its requirements and are aimed at making sure that defendants who are accused of similar crimes receive similar bonds. But what about those who *do* have difficulty or those, like Fields, who are denied bail completely based only n the bond schedule?

In *United States ex rel. Rubinstein v Mulcahy*, 155 F.2d 1002 (2nd Cir. 1946), the court of appeals considered the case of a defendant where bail was originally set at $20,000 and increased to $500,000 thereafter on motion of the government. Although the defendant actually received a bail hearing, the

instructions of the court of appeals are in conflict with the Sixth Circuit's acceptance of bond schedules in *Fields*.

> The reasonableness of the amount is to be determined by properly striking a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary restraint before conviction under the circumstances surrounding **each particular accused**. *Moore v. Aderhold, Warde*n, 10 Cir., 108 F.2d 729, 731; *Connley v. United States*, 9 Cir., 41 F.2d 49, 50; *Bennett v. United State*s, 5 Cir., 36 F.2d 475. Consideration should be given to the seriousness of the crime charged, the past record and recent action **of the accused** as bearing upon **his good faith** in appearing for trial and **his financial ability** to procure bail. See *United States v. Motlow*, 7 Cir., 10 F.2d 657, 659; *Barrett v. United States*, 6 Cir., 4 F.2d 317.

Id., at 1004 (emphasis added). The court remanded with instructions to "fix reasonable bail to insure the relator's appearance in the criminal proceedings. If no additional facts are shown, such bail need not be in excess of $ 50,000." *Id.* The dissent had difficulty with this limitation on remand, saying "I am particularly doubtful of the direction in substance for bail not to exceed $50,000, because this, too, seems to apply an abstract generality as the norm of decision,

without consideration of the particular facts and circumstances disclosed as to this petitioner." *Id.*, at 1005.

The position of the Sixth Circuit, therefore, is in direct conflict with the First Circuit and with the State of Tennessee. According to the Sixth Circuit Court of Appeals, money bail for everyone based on a predetermined list without an individualized assessment of likelihood to flee is acceptable. According to the Attorney General of Tennessee, a system of money bail based on a "preset bond schedule" is specifically prohibited. In the First Circuit, bail must be set based on the circumstances surrounding each particular accused. See also, Antibau & Rich, Modern Constitutional Law, 2d Ed. (West) 1997. ("A schedule of fees based only upon the offense charged, applied equally to both rich and poor, would be unconstitutional.")

In *United States v. Leathers*, 412 F.2d 169, 170 (D.C. Cir. 1969), the court all but stated that money bonds were improper in the absence of nonfinancial restrictions.

> Because we find that in the two cases before us sufficient attention has not been given toward fashioning programs of release based upon nonfinancial restrictions rather than unreachable money bonds, we remand these cases to the District Court for consideration of those minimal nonfinancial conditions of release which

> will "*assure the appearance of the person as required.*" (emphasis ours).

Id., 412 F.2d at 173. This, too, is in conflict with the Sixth Circuit's opinion.

In *United States v. Cook*, 442 F.2d 723, 725 (D.C. Cir. 1970), the court remanded for reconsideration a $100,000 surety bond stating that "the court that decides this matter is entitled to consider appellant's suggestion on the size of the bond."

In *Feeley v Sampson*, 570 F.2d 364 (1st Cir. 1978), the First Circuit held that a "detainee will have received due process in the form of some kind of probable cause determination and a bail hearing." *Id.*, at 369, fn. 4. This requirement of a hearing would seem opposed to the concept of a pretrial bond schedule with no hearing.

Contrast, as well, the Fifth Circuit's *en banc* opinion vacating an earlier appellate ruling holding that Florida's system of money bail violated the Equal Protection clause because it failed to first consider non-monetary restrictions. *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (*en banc*).

The evils of a system of setting bail that is based predominately or purely on money based on a preset list without regard to an individual's likelihood to flee or to an individual's financial ability to pay should be obvious. A police officer, for example, wishing to punish an arrested person can pick and choose what charges to place against the

individual such that the bail would be higher than otherwise required. If the preset list shows, for example, a $500 bail for disorderly conduct and a $500 bail for resisting arrest, an officer would have the power to charge a person with only disorderly conduct, knowing the bail will be $500. If the arrestee disrespects the officer, he or she could then add resisting arrest, effectively doubling the bail amount at the discretion of the arresting officer. .

A preset list also negates the need of examination and discretion by an impartial and detached magistrate. "The first fixing of bail, whether by a commissioner . . . or by the court upon arraignment after indictment . . . is a serious exercise of judicial discretion." *Stack*, 342 U.S. at 11. As this case illustrates, where Gary Fields had his bail denied by a police officer without ever seeing a magistrate, a preset bail schedule allows law enforcement to control the entire process without judicial oversight until perhaps days or weeks later.

As Carlson (2011), *supra*, pointed out,

> bail schedules are so prevalent because most courts have come to embrace money as their primary and singular condition of pretrial release. According to the latest report from the State Court Processing Statistics program, a project that analyzes the processing of felony defendants in the 75 most populous American counties, courts have set money bail for the overwhelming majority of felony

> defendants since 1998. (Bureau of Justice Statistics, U.S. Dep't of Justice, Bulletin No. 228944, Felony Defendants in Large Urban Counties, 2006 (2010)). ... Although the United States is now one of only two countries in the world to permit pretrial release through for-profit third parties, this practice is widespread in nearly all of the states. (See F.E. Devine, Commercial Bail Bonding: A Comparison of Common Law Alternatives (Praeger 1991).

Carlson (2011), at 14-15.

According to Carlson, at least two state supreme courts have invalidated preset bond schedules. In *Clark v. Hall*, 53 P.3d 416 (2002), the Oklahoma Court of Criminal Appeals (the highest appellate court for criminal cases) held that a state statute requiring a $15,000 bail amount for soliciting a prostitute violated the due process protections of the Oklahoma Constitution. The court held that the law "sets bail at a predetermined, nondiscretionary amount and disallows oral recognizance bonds under any circumstances." (*Id*. at 4). In *Pelekai v. White*, 861 P.2d 1205 (1993), the Supreme Court of Hawaii held that a trial judge abused her discretion when she rigidly followed a bail schedule without also considering the statutorily mandated relevant personal characteristics of the defendant.

Even the American Bar Association disagrees with the Sixth Circuit's ruling, holding that "[f]inancial conditions should be the result of an

individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge." (ABA Standard 10-5.3 (e) at 110).

Thus, the idea of whether a preset bond or bail schedule based on only the charged offense comports with constitutional requirements is not well settled across the various circuits and state supreme courts and is in need of resolution.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

In the alternative, the Attorney General of Tennessee should be invited to file a brief in this case expressing the views of the State of Tennessee.

Respectfully submitted,

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APPENDIX