

Case No: 11-6352

In the
United States Court of Appeals
For the Sixth Circuit

GARY FIELDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED

Plaintiff - Appellant

v.

HENRY COUNTY, TENNESSEE

Defendant - Appellee

On Appeal from the United States District Court
for the Western District of Tennessee Case No. 09-01267

BRIEF OF DEFENDANT - APPELLEE

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ORAL ARGUMENT REQUESTED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: _____ Case Name: _____

Name of counsel: _____

Pursuant to 6th Cir. R. 26.1, _____
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

CERTIFICATE OF SERVICE

I certify that on _____ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ _____

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellee Henry County, Tennessee agrees that oral argument would be of benefit in this matter for the reasons stated in Mr. Fields' brief.

STATEMENT OF THE ISSUES

1. Whether the Excessive Bail Clause of the Eighth Amendment is violated when an arrestee is detained without bail for less than 24 hours before a bail hearing is conducted.
2. Whether the Due Process Clause of the Fourteenth Amendment is violated when government officials are not in strict compliance with the Tennessee “Release from Custody and Bail Reform Act of 1978”, Tenn. Code Ann. §§40-11-101 *et seq.*

STATEMENT OF THE FACTS

Henry County agrees that the facts set forth in Fields’ brief are undisputed; however, extraneous facts that are not germane to the issues presented in this appeal are included. (*See* Appellant’s Br., pp. 14-22.) The district court’s order granting summary judgment concisely states the facts essential for this Court’s review, and is reprinted as follows:

On December 11, 2008, [Fields’] wife reported to Henry County authorities that her husband hit and choked her during an argument in their home. The Henry County Sheriff’s Office investigated Mrs. Fields’ allegations and found that she had a busted lip, red markings and bruising on her body. A warrant for [Fields’] arrest was issued the next day on a charge of domestic assault, a violation of Tennessee Code Annotated (“Tenn. Code Ann.”) §39-13-111. Fields learned of the warrant and self-reported to the Henry County Jail three days later on December 15, 2008. He was booked in at approximately 10:50 a.m.

Michelle Brewer, who was Fields' arresting officer, prepared his arrest warrant by writing "W/O" in the space on the affidavit of complaint's bond amount, meaning Fields' arrest was without bond. At the time of Fields' arrest, Henry County's policy was to prepare all affidavits of complaints in domestic assault cases without a bond amount. Domestic assault arrestees would then be held without bond until he or she was brought before a General Sessions Judge for a bond amount to be set. In accordance with this policy, [Fields] was held in the Henry County Jail until the following day. [Henry County] states that Fields was not presented to a judicial commissioner at the time of his arrest and booking "because his bail was already set and the nature of his charge required that he be detained for twelve hours."

On the morning of December 16, 2008, Fields appeared before the Henry County General Sessions Judge, who set bail at \$5,000 and imposed additional conditions due to the domestic violence nature of the charge as authorized by Tenn. Code Ann. §40-11-150. [Fields] agreed to attend twenty-eight weeks of domestic abuse counseling, and the General Sessions Judge re-set his case for a June 16, 2009 hearing. A workhouse mittimus was issued later that same day (December 16), and Fields was released on his own recognizance from the jail at 6:55 p.m. His domestic assault charge was ultimately dismissed on October 15, 2009.

(R.E. 42, Order Granting Summ. J., pp. 2-3) (internal record citations and footnote omitted).

SUMMARY OF THE ARGUMENT

This case is the first appeal presented from a series of federal actions posing systemic challenges to the bail setting practices of various Tennessee municipalities. (*See* Appellant's Br., pp. 32-46.) This series of cases has involved arrestees who challenged the amount of their bail and the process of how the bail amount was determined, or, as in the case of Fields, arrestees being detained

without bail before having a bail hearing. (Id.) In each of these cases, the arrestees alleged that the respective bail setting practices violated the Tennessee “Release from Custody and Bail Reform Act of 1978” (the “Bail Act”), Tenn. Code Ann. §§ 40-11-101 *et seq.*, by either failing to properly provide an individualized bail determination or by committing an arrestee to jail prior to providing a bail determination hearing. (Id.) Each of these arrestee-plaintiffs challenged the bail setting practices under the Eighth and Fourteenth Amendments to the United States Constitution. (Id.)

On the challenges presented through these eight various cases, three substantive decisions have been rendered by the district courts. (Id.) In all three decisions, the district courts found that the arrestee-plaintiffs, including Fields, failed to present cognizable Constitutional claims, and their claims were dismissed or summary judgment was granted in favor of the governmental entities. (Id.) These actions have failed to state claims under the United States Constitution because committing an arrestee to jail without bail prior to a bail hearing is not “excessive bail” as prohibited by the Eighth Amendment. The district courts also found that a government’s noncompliance with the Tennessee Bail Act does not give rise to a due process deprivation as prohibited by the Fourteenth Amendment.

This Court should affirm the district court’s grant of summary judgment to Henry County because Fields has failed to establish a deprivation of his federal

Constitutional rights. This conclusion is reached on two grounds. First, the Eighth Amendment is not offended by an arrestee being held without bail for a reasonable period of time before being provided a bail hearing. The Excessive Bail Clause is limited in nature and requires only that *when* a bail amount is set, the amount set not be greater than necessary to achieve the governmental goals sought to be achieved through bail. The Eighth Amendment does not require that a bail even be set and it certainly does not require, let alone contemplate, that an arrestee have a bail hearing following his arrest but prior to his being committed to jail.

Second, Fields also fails to state or establish a claim under the Fourteenth Amendment because any noncompliance with the Tennessee bail setting statutes associated with his arrest and detention was not a deprivation of his federal constitutional rights. Section 1983 only vindicates violations of federally created liberties, not state created rights. Therefore, to the extent that Mr. Fields may have been deprived of his Tennessee statutory rights under the Tennessee Bail Act, any such deprivation is not actionable under §1983.

ARGUMENT

Section 1983 states, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. §1983. “Section 1983 makes liable only those who, while acting under color of state law, deprive another of a right secured by the Constitution or federal law.” *Romanski v. Detroit Entm’t, L.L.C.*, 428 F.3d 629, 636 (6th Cir. 2005).

To establish a claim pursuant to §1983, a plaintiff must demonstrate two elements: “(1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that he was subjected or caused to be subjected to this deprivation by a person acting under color of state law.” *Gregory v. Shelby County*, 220 F.3d 433, 441 (6th Cir. 2000). Section 1983 “creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere.” *Gardenhire v. Schubert*, 205 F.3d 303, 310 (6th Cir. 2000).

The gravamen of Mr. Fields’ claim is that Henry County failed to comply with the procedural requirements of the Tennessee Bail Act when he was arrested and detained without bail for approximately twelve hours before being presented to a General Sessions Court judge who set his bail. While Mr. Fields’ claim presents questions of state law, he has instead couched his claim as alleged violations of the Excessive Bail Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Mr. Fields’ analysis of his alleged Constitutional deprivations has been rejected by all courts that have

considered his and similar claims, and this Court should also reject his claim for the same reasons.

I. Mr. Fields' Overnight Detention Without Bail Was Not An "Excessive Bail" As Prohibited By The Eighth Amendment.

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, addresses pretrial release by providing that "excessive bail shall not be required." U.S. Const. amend. VIII; *see Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008); *United States v. Salerno*, 481 U.S. 739, 752 (1987). The Excessive Bail Clause does not guarantee a right to bail, but it does guarantee that any bail imposed "not be 'excessive' in light of the perceived evil." *Salerno*, 481 U.S. at 754; *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951). "The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of a perceived evil." *Salerno*, 481 U.S. at 754. Determining whether bail is excessive requires a weighing of the Government's response against the harm it seeks to prevent. *Id.*

The district court rejected Mr. Fields' assertion that his being held without bond for approximately twelve hours before being presented to a general sessions judge for a bail determination amounted to "excessive bail." (R.E. 42, Order Granting Summ. J., p. 13). The district court stated:

In this case, [Fields] received the individualized bail determination that he desired when he appeared before the Henry County General Sessions Judge on December 16th. At that time, the judge found that

Fields “[was] a threat to the alleged victim or other family or household member,” “[was] a threat to the public safety,” but “[was] reasonably likely to appear in court.” Accordingly, she set the Plaintiff’s bail at \$5,000 and imposed additional conditions to protect the victim.

(R.E. 42, Order Granting Summ. J., p. 13) (internal record citation omitted).

Thus, Fields was provided a bail determination hearing in which the government articulated the perceived “evils” Fields presented, namely, that he was a threat to the alleged victim and to public safety. (Id.) However, the general sessions judge also noted that Fields was reasonably likely to appear in court, set a bail in the amount of \$5,000.00, and imposed other conditions of his release. (Id.; *see also* R.E. 4-6, Order Granting Bail.) The government provided Fields with an individualized bail determination, identified the government’s concerns with releasing him on bail, and set a bail amount and conditions that sought to strike a balance between Fields being able to post bail and protecting against the government’s concerns. Accordingly, the conditions of his release and the bail amount cannot be considered “excessive.”

Fields, however, focuses his argument not on the actual bail amount and the conditions of his bail but rather the bail setting process and timing of his bail hearing. (Appellant’s Br., pp. 64-70.) Specifically, Fields takes umbrage with the fact that as an arrestee charged with a domestic violence crime, it was the policy of Henry County to determine, prior to his arrest, that he would be held without bond

until a general sessions court judge set his bail. (Id.) He further argues that because the Tennessee Bail Act mandates that a bail determination examination be conducted before an arrestee is committed to jail, it must follow that this noncompliance with the Tennessee Bail Act amounted to excessive bail. (Id.)

This argument, however, has been rejected by several courts. In *Galen v. County of Los Angeles*, 477 F.3d 652 (9th Cir. 2007), the plaintiff's bail was enhanced due to law enforcement officials' concern that he posed a threat to the alleged victim of his crime. *Id.* at 656-57. Plaintiff alleged that the enhanced bail was excessive, in part, because government officials did not comply with the bail setting procedures established by California law by failing to hold a hearing in open court when it enhanced the bail amount. *See, Id.* Both the district court and Ninth Circuit rejected the plaintiff's argument. The Ninth Circuit stated:

The Commissioner's failure to hold a hearing in open court before enhancing [plaintiff's] bail and to state his reasons for the enhancement on the record, as required by California Penal Code section 1270.1, does not excuse [plaintiff] from his burden of demonstrating in this §1983 action that his bail was excessive. We will not assume that [plaintiff's] bail was excessive simply because the state failed to comply with a self-imposed procedural requirement, particularly where, as here, [plaintiff] never requested a hearing before the Commissioner or challenged his bail enhancement in any way before being released from custody. Nor do we accept Galen's argument that procedural violations of California bail law suffice to establish a deprivation of a federal right. Section 1983 requires [plaintiff] to demonstrate a violation of federal law, not state law.

Galen, 477 F.3d at 662.

Similarly, the United States District Court for the Middle District of Tennessee, relying on the *Galen* decision, rejected an argument identical to Fields' in *Tate v. Hartsville/Trousdale County*, 2010 U.S. Dist. LEXIS 109714 (M.D. Tenn. Oct. 14, 2010). In *Tate*, the plaintiff was arrested for a domestic violence crime and had a bail amount fixed at \$2,000.00, but was prohibited from posting bond for twelve hours due to the county's belief, based upon Tenn. Code Ann. §40-11-150(h)(1)-(2), that domestic violence arrestees could not be released on bail until after a twelve hour "cooling off" period had elapsed. *Tate*, 2010 U.S. Dist. LEXIS 109714, *1-8. The *Tate* plaintiff brought claims under the Eighth and Fourteenth Amendment arguing that his being held for twelve hours before being permitted to post bail was not based on an individualized assessment of his danger to the community and his risk of flight. *See, Id.* at *7-8.

The *Tate* court rejected the argument, in accordance with the *Galen* decision, that the government's noncompliance with the Tennessee Bail Act, in and of itself, was "excessive bail". *See, Id.* at *17-24. The court stated:

Yet even considering the specific Tennessee provisions in relation to the setting of Plaintiff's bail, the Court finds no genuine issue of material fact for trial on whether a violation of the Eighth or Fourteenth Amendment occurred. Plaintiff claims that, prior to bail being set, he was not examined (nor was an examination reduced to writing) by the Commissioner in violation of T.C.A. §§ 40-5-105. Even if true, this does not show that the bail imposed was excessive. *See, Galen v. County of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007)("The Commissioner's failure to hold a hearing in open court before enhancing [plaintiff's] bail and to state his reasons for the

enhancement on the record, as required by California Penal Code section 1270.1, does not excuse [plaintiff] from his burden of demonstrating in this §1983 action that his bail was excessive”). A court cannot “assume that plaintiff's bail was excessive simply because the state failed to comply with a self-imposed procedural requirement[.]” *Id.* Again, “Section 1983 requires [plaintiff] to demonstrate a violation of federal law, not state law.” *Id.*

Id. at *18-19.

Like both the *Galen* and *Tate* plaintiffs, Mr. Fields has yet to demonstrate how Henry County's alleged noncompliance with the procedures set forth in the Tennessee Bail Act resulted in the bail imposed in his case being “‘excessive’ in light of the perceived evil.” *Salerno*, 481 U.S. at 754. Without making a showing that the bail set in his case was a monetary amount greater than required to ensure his future appearances at court or that the conditions of his release were imposed in violation of a federal law, Fields simply fails to establish a claim under the Eighth Amendment's Excessive Bail Clause.

II. Any Alleged Noncompliance With The Tennessee Bail Act Does Not Give Rise To A Due Process Violation

The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV §1. Under this clause, the Supreme Court has recognized certain rights to be “implicit in the concept of ordered liberty,” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and has held that any state action infringing upon such rights is subject to strict judicial scrutiny. *Zablocki v. Redhail*,

434 U.S. 374, 388 (1978). The “general existence of a right to bail” is one such fundamental right. *Atkins v. Michigan*, 644 F.2d 543, 549 (6th Cir. 1981). Fields fails to establish that his due process rights, under either the substantive or procedural prongs, have been violated.

1. Mr. Fields’ Substantive Due Process Claim Is Encompassed By His Eighth Amendment Claim.

As an initial matter, it is unclear whether Mr. Fields asserts a claim under the substantive due process prong of the Fourteenth Amendment. To the extent he asserts such a claim, the Court should find that the Eighth Amendment pretermits any substantive due process claim concerning his bail. “[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision.” *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). Further, “[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992). In sum, a substantive due process claim is inappropriate if that claim is “covered” by another amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). Thus, Fields is unable to assert a cognizable substantive due process claim under the Fourteenth Amendment.

2. Any Alleged Violation Of The Procedural Requirements Of The Tennessee Bail Act Does Not Give Rise To A Procedural Due Process Claim.

Fields alleges that Henry County violated his procedural due process rights by failing to adhere to the bail setting procedures set forth in the Tennessee Bail Act. (R.E. 1, Compl., pp. 3-4, ¶¶ 14-16, 18.) The Sixth Circuit, however, has expressly held that violation of a state statute does not, in and of itself, give rise to a cause of action under §1983. *White v. Gerbitz*, 892 F.2d 457, 461 (6th Cir. 1989). Instead, a plaintiff must establish “that a defendant violated his federally protected rights under color of state law.” *Id.* Furthermore, as the *Tate* court stated, “[t]he Constitution does not require states to administer their laws correctly’ and ‘it is not appropriate for a federal court, hearing a case under §1983 to upbraid state officials for a supposed error of state law.’” *Tate*, 2010 U.S. Dist. LEXIS 109714, *20-21 (M.D. Tenn. Oct. 14, 2010) (quoting *Burgess v. Ryan*, 996 F.2d 180, 184 (7th Cir. 1993)).

Fields nonetheless contends that he suffered a substantial deprivation of rights without due process, because rights arising under the constitution or statutes of Tennessee are “protected liberty interests under the 14th Amendment due process clause that may not be taken away arbitrarily or in a discriminatory fashion.” (Appellant’s Br., p. 59.) “However, state procedures – even those mandated by state law – do not, in and of themselves, give rise to any rights

enforceable under §1983.” *Malmquist v. Metro. Gov’t of Nashville*, 2011 U.S. Dist. LEXIS 136696, *22 (M.D. Tenn. Nov. 29, 2011). “[State p]rocedural rights that do not require a particular substantive outcome are not liberty interests protected by the Fourteenth Amendment, even if the right is ‘mandatory.’” *Gibson v. McMurray*, 159 F.3d 230, 233 (6th Cir. 1998).

Fields’ reliance on the Tennessee Bail Act to create rights enforceable through a §1983 action is simply misplaced. The law of this Circuit is abundantly clear that a Fourteenth Amendment due process claim cannot be premised solely on a state actor’s noncompliance with a state statute. Thus, the Court should reject Field’s due process claim.

CONCLUSION

For these reasons, this Court should affirm the district court’s grant of summary judgment in this matter.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Rule 32 of the FEDERAL RULES OF APPELLATE PROCEDURE, the undersigned hereby certifies that

1. This brief complies with the type-volume requirement of Rule 32(a)(7)(B) in that it contains 3,292 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii); and
2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font in fourteen (14) point.

Pentecost & Glenn, PLLC

s/Jon A. York

JON A. YORK

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served upon opposing counsel and all counsel of record by electronic mail via the Court's electronic filing system.

DATE: This the 21ST day of February, 2012.

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**In the United States Court of Appeals
For the Sixth Circuit**

**Gary Fields, Individually and on behalf of
all other similarly situated**

v.

Case No: 11-6352

Henry County, Tennessee

**APPELLEE’S DESIGNATION OF RELEVANT DISTRICT COURT
DOCUMENTS**

Pursuant to Sixth Circuit Rules 28(e) and 30 Appellee hereby designates the following filings in the District Court’s records as items to be included in the appendix:

DESIGNATION OF APPENDIX CONTENTS

Description of Entry	Date	Record Entry No.
Docket Sheet	N/A	N/A
Complaint	12-10-09	1
Order Granting Bail	2-9-10	4-6
Order granting Summary Judgment	9-30-11	42

**In the United States Court of Appeals
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**Gary Fields, Individually and on behalf of
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v.

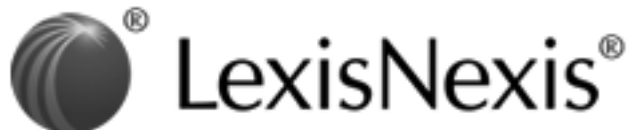
Case No: 11-6352

Henry County, Tennessee

ADDENDUM

Malmquist v. Metro. Gov't of Nashville, 2011 U.S. Dist. LEXIS 136696, *22
(M.D. Tenn. Nov. 29, 2011)

Tate v. Hartsville/Trousdale County, 2010 U.S. Dist. LEXIS 109714 (M.D. Tenn.
Oct. 14, 2010)



**SHEM AND MEREDITH MALMQUIST, Plaintiffs, v. METROPOLITAN
GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, TENNESSEE and
GERMANTOWN, TENNESSEE, Defendants.**

No. 3:10-cv-1014

**UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF
TENNESSEE, NASHVILLE DIVISION**

2011 U.S. Dist. LEXIS 136696

November 29, 2011, Decided

November 29, 2011, Filed

COUNSEL: [*1] For Shem Malmquist, Meredith Malmquist, Plaintiffs: Jerry Gonzalez, Jerry Gonzalez, PLC, Murfreesboro, TN.

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For Germantown, Tennessee, Defendant: Robert M. Burns, LEAD ATTORNEY, Charles M. Harrod, Howell & Fisher, Nashville, TN.

JUDGES: JOHN S. BRYANT, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: JOHN S. BRYANT

OPINION

MEMORANDUM

By order entered April 11, 2011 (Docket Entry No. 26.), this civil action was reassigned to the docket of the magistrate judge for all further proceedings, pursuant to the consent of the parties. (Docket Entry No. 25.)

Plaintiffs Shem and Meredith Malmquist, residents of Germantown, Tennessee, filed this class action under 42 U.S.C. § 1983 and pursuant to Federal Rule of Civil Procedure 23 against the Metropolitan Government of Nashville and Davidson County, Tennessee, and against Germantown, Tennessee. (Docket Entry No. 1.) Plaintiffs seek both compensatory damages and injunctive relief. (Id.) Defendant Metropolitan Government of Nashville and Davidson County ("Metropolitan Government") has filed a motion to dismiss [*2] for failure to state a claim upon which relief can be granted. (Docket Entry No. 23.) Plaintiffs responded to this motion on April 28, 2011 (Docket Entry No. 33.), and defendant replied on May 10, 2011. (Docket Entry No. 37.)

As further explained below and by order entered contemporaneously herewith, defendant's motion to dismiss will be GRANTED.

I. Factual Background

Plaintiffs allege the following in support of their complaint.

On or about October 13, 2009, Shem Malmquist's ex-wife, Danielle Nicolosi, a Davidson County resident, swore out a warrant against plaintiffs Shem and Meredith Malmquist, alleging that the couple had sent her a letter

in October, 2008, threatening to have her killed unless she left Memphis - where she apparently lived at the time - and never came back. (Docket Entry No. 1 ¶ 6.) In response to Ms. Nicolosi's allegations, Nashville/Davidson County judicial commissioners issued arrest warrants for Shem and Meredith Malmquist for domestic assault and assault, respectively. (Id. ¶¶ 7-8.) On October 28, 2009, Germantown police executed the warrants and arrested the plaintiffs in their Germantown, Tennessee home. (Id. ¶ 9.) Officers then held the plaintiffs in the Germantown [*3] Police Department until Davidson County police deputies arrived on October 29, 2009, to transport the plaintiffs back to Davidson County. (Id. ¶ 16.)

Upon arrival in Davidson County, the plaintiffs were separately presented via video conference to a county judicial commissioner for bail hearings. (Id. ¶ 17.) Plaintiff Shem Malmquist went first, and the commissioner offered him a choice between posting bail of \$500 cash or \$1000 through a bail bond service. (Id.) Mr. Malmquist chose to post \$500 cash. (Id. ¶ 18.)

Plaintiff Meredith Malmquist then appeared via video conference before the same judicial commissioner, who offered her the same choice of \$500 cash or \$1000 through a bail bond service. (Id. ¶ 19.) After the commissioner informed her that Shem Malmquist had chosen the cash option, Meredith Malmquist elected to do the same. (Id.)

Shem Malmquist planned to post bail for himself and Meredith using his credit card. (Id. ¶¶ 22-23.) However, due to restrictions on the card, he was only able to use it once, to pay for Meredith's bail. (Id.) He then had to post his own bail through a bail bond service. (Id.)

Plaintiffs allege that the judicial commissioner never questioned either of them [*4] about the likelihood that they would flee or pose a danger to the community if released and never stated the reasons for the commissioner's bail determinations. (Id. ¶¶ 18-19, 21.) Plaintiffs further allege that judicial commissioners in Davidson County create no written record of the reasons for their bail determinations. (Id.)

The Metropolitan government ultimately dropped all charges against Shem and Meredith Malmquist. (Id. ¶ 25.)

Plaintiffs filed this complaint, alleging Eighth and

Fourteenth Amendment claims for excessive bail and deprivation of liberty without due process of law on October 27, 2010. (Docket Entry No. 1.)

II. Conclusions of Law

A. Standard of Review

In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), the court must view the complaint in the light most favorable to the plaintiff, accepting all well-pleaded factual allegations as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009). Although Federal Rule of Civil Procedure 8(a)(2) requires merely a "short and plain statement of the claim," the plaintiff must allege enough facts to make the claim plausible. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). [*5] He must plead well enough so that his complaint is more than a "formulaic recitation of a the elements of a cause of action." *Id.* at 555. "The factual allegations, assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007). Nevertheless, the court need not accept legal conclusions or unwarranted factual inferences as true, *Iqbal*, 129 S. Ct. at 1949-50; *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987), and a complaint containing mere legal conclusions alone will "not unlock the doors of discovery for a plaintiff." *Iqbal*, 129 S. Ct. at 1950.

B. Analysis of the Motion

Defendant Metropolitan Government seeks to dismiss plaintiff's complaint against it, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failing to state a claim upon which relief can be granted. (Docket Entry No. 23.) Specifically, defendant argues that plaintiffs' Eighth Amendment, substantive due process, and procedural due process claims all fail as a matter of law. (Id.) For the following reasons, the Court agrees with defendant's [*6] conclusions and finds that plaintiffs fail to state a claim upon which relief can be granted.

1. Eighth Amendment Claim

The Eighth Amendment establishes that "[e]xcessive

bail shall not be required." U.S. CONST. amend. VIII. While the Supreme Court has never explicitly found the Fourteenth Amendment to incorporate this prohibition against the states, it has assumed incorporation, *Schilb v. Kuebel*, 404 U.S. 357, 365, 92 S. Ct. 479, 30 L. Ed. 2d 502 (1971), and the Middle District of Tennessee has followed suit. *Tate v. Hartsville/Trousdale County*, 2010 U.S. Dist. LEXIS 109714, 2010 WL 4054141, 3:09-0201, *5 (M.D. Tenn. Oct. 14, 2010). The Court therefore assumes, without deciding, that defendant Metropolitan Government is bound by the requirements of the Bail Clause.

The first step in analyzing an excessive bail claim is determining what factor or factors make bail "excessive." Though case law on this question is limited, several Supreme Court decisions provide guidance. In *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951), the Court declared that the "function of bail is limited" and that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Id.* at 5. Standing alone, this [*7] language suggests that judicial officials may not consider any state interests other than assuring the accused's presence when setting bail. But the Court rejected such a narrow reading in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), specifically stating that judicial officials may pursue "other admittedly compelling interests through the regulation of pretrial release." *Id.* at 753. The Court further held that the *only* substantive limit of the Bail Clause "is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." *Id.* at 754. Of course, the problem with this rule is that it provides no meaningful guidance on *how* to quantify or balance these competing interests of the government and the individual. That is especially true in cases such as this one, where the governmental excess - if any - is comparatively minor. Compare Docket Entry No. 1 ¶ 23, plaintiffs made to post \$500 cash bail or \$1000 bond with *Starkey v. Swenson*, 370 F. Supp. 594, 596 (E.D. Mo. 1974) ("In effect, petitioner argues that fixing bail at \$60,000 constitutes an abuse of discretion.").

The Court of Appeals for the Fifth Circuit confronted this same problem [*8] in *Broussard v. Parish of Orleans*, 318 F.3d 644 (5th Cir. 2003). In that case, a class of plaintiffs challenged Louisiana's bail-fee statutes, which charged arrestees a nominal, fifteen dollar

administrative fee over and above the amount of bail required. *Id.* at 648-49. Plaintiffs alleged that this statute deprived them of their fundamental right not to be unreasonably inhibited from exercising bail and failed to advance a compelling state interest. *Id.* In analyzing plaintiffs' claim, the Court of Appeals noted that the case did not fit easily under the Salerno balancing test, as neither the government interest nor the claimed injury were significant. *Id.* at 651. Ultimately, the court rejected plaintiffs' excessive bail claim, noting:

Here, there is neither a compelling purpose nor a restriction on bail analogous to past instances. Rather there is a *largely theoretical, and effectively minimal*, constraint on an individual's substantial liberty interest in release. Nothing in these cases has suggested that a theoretically minor restriction imposed for less than a compelling purpose, constitutes "excessive" bail.

Id. at 651-52 (emphasis added).

While a \$500 bail/\$1000 bond is a greater [*9] financial burden than a \$15 administrative fee, the plaintiffs in this case are nonetheless similar to the plaintiffs in *Broussard*, in that they claim an infringement on their liberty that is largely theoretical and that did not meaningfully limit their ability to secure pretrial release.

Instead of focusing on the amount of bail they had to pay, plaintiffs argue that the Salerno balancing test *necessarily* requires a case-by-case, individualized bail determination for each arrestee. (Docket Entry No. 33 at 2-3.) They similarly argue that "requiring bail in an amount higher than that which is individually calculated to serve as an assurance of the presence of a particular person . . . is excessive *per se*." (Docket Entry No. 1 ¶ 38.) While plaintiffs do not frame their complaint in precisely these terms, they are effectively arguing that the Eighth Amendment - like the Fourteenth Amendment - provides both substantive and procedural protections and that defendant has violated plaintiffs' procedural excessive bail rights.

The Middle District of Tennessee considered this exact issue in *Tate v. Hartsville/Trousdale County*, *supra*, 2010 U.S. Dist. LEXIS 109714, 2010 WL 4054141, 3:09-0201 (M.D. Tenn. Oct. 14, 2010), and its [*10]

opinion is instructive. In Tate, much like in the present case, a criminal suspect challenged his bail determination on grounds that he was never properly examined by the judicial commissioner. 2010 U.S. Dist. LEXIS 109714, [WL] at *2-*3. In analyzing the plaintiff's claim, this court determined that failure to examine the suspect prior to setting bail "does not show that the bail imposed was excessive." 2010 U.S. Dist. LEXIS 109714, [WL] at *7. The court further noted that it could not "assume that plaintiff's bail was excessive simply because the state failed to comply with some self-imposed procedural requirement." Id. (quoting Galen v. County of Los Angeles, 477 F.3d 652, 662 (9th Cir. 2007)). The plaintiff in Tate did "not seriously dispute the notion that his own bond amount was not excessive," 2010 U.S. Dist. LEXIS 109714, [WL] at *5, and he therefore failed to present a viable Eighth Amendment argument. Although the bail issue in Tate came to the district court on a motion for summary judgment, rather than a motion to dismiss, the Court finds its reasoning to be sound and its legal conclusions applicable to the facts alleged by plaintiffs here, presumed true for these purposes.

Like the plaintiffs in Tate, Shem and Meredith Malmquist do not assert that defendant set [*11] their bail at a *substantively* unreasonable amount. Instead, they claim that defendant's procedures were completely arbitrary, "based on some mysterious rule of thumb" (Docket Entry No. 1 ¶ 18.), and that the bail determination was therefore "excessive *per se*." (Id. ¶ 38.) However, to make out a § 1983 claim for a Bail Clause violation, the plaintiff must show more than some generalized procedural defect; he must allege that *his own* bail was actually excessive. The language of Stack supports this view. Specifically, the Supreme Court concluded that "[i]f 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." 342 U.S. at 6 (emphasis supplied). This conditional language suggests that an excessive bail claim can never be purely procedural. The bail amount must, at a minimum, be "greater than that" usually set for a particular offense.

Plaintiffs make no such allegation.¹ Instead, they draw the Court's attention to a Ninth Circuit decision, United States v. Scott, (Docket Entry [*12] No. 33 at 3-4.) where the court stated that for some minor

infractions, when flight by the defendant would be "irrational," bail serves no purpose and "any amount of bail may be excessive." 450 F.3d 863, 867 n.5 (9th Cir. 2006). Scott, however, is inapposite. The case addressed the constitutionality of forcing a defendant to consent to random police searches as a condition of his release, addressing monetary bail only tangentially and in dicta contained within a footnote. Id. at 865-67, n.5. Furthermore, the court's example for when any amount of bail would be unconstitutional was a "minor traffic infraction." Id. at 867 n.5.

1 In fact, statistics the plaintiffs cite in their complaint appear to undermine their excessive bail claim. They assert that in Nashville/Davidson County, between October 2009 and April 2010, approximately 50% of individuals arrested for domestic assault-fear of bodily injury had bail set at \$1500 or less. (Docket Entry No. 1 ¶ 26.) During the same period, roughly 37% of individuals arrested for assault-non domestic -fear of bodily injury had bail set at \$1500 or less. (Id.) Based on these statistics, plaintiffs' bail - set at \$500 cash or \$1000 bond - does not [*13] appear out of the ordinary.

Shem and Meredith Malmquist were not charged with minor traffic infractions; they were charged with domestic assault and assault, respectively. (Id. ¶¶ 7-8.) Plaintiffs do not assert that requiring bail is *inherently* unconstitutional for these offenses. Nor do they assert that their own \$500 cash bail and \$1000 bond were excessive in relation to the charges against them. Instead, they seek to establish excessive bail from defendant's allegedly deficient procedures. (Docket Entry No. 1 ¶ 38.)

In line with Tate, the Court finds that these allegations fail to state an Eighth Amendment claim of excessive bail. See also Mastrian v Hedman, 326 F.2d 708, 711 (8th Cir. 1964) ("Bail in the sum of \$100,000 on a first degree murder charge is not, as petitioner contends, necessarily arbitrary or discriminatory in his situation because it is more in amount than the trial court generally has required in murder cases.").

Accordingly, the Court finds that defendant's motion to dismiss plaintiffs' Eighth Amendment claims is well taken. Because the Court finds plaintiffs' pleading of this claim insufficient as a matter of law, there is no need to address defendant's argument [*14] that plaintiff's Eighth

Amendment claim would fail on the merits. (Docket Entry No. 24 at 8.)

2. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV § 1. Under this clause, the Supreme Court has recognized certain rights to be "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937), and has held that any state action infringing upon such rights is subject to strict judicial scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978). It is not disputed that the "general existence of a right to bail" is one such fundamental right. *Atkins v. Michigan*, 644 F.2d 543, 549 (6th Cir. 1981).

Plaintiffs allege that defendant, "by instituting and approving a system where bail is set based on something other than the statutory elements or an individualized determination of the need for bail," has arbitrarily and unconstitutionally infringed their liberty. (Docket Entry No. 1 ¶ 29.)

At the outset, plaintiffs and defendant vigorously dispute whether substantive due process under the Fourteenth Amendment provides any [*15] ground for relief independent of the Eighth Amendment protection against excessive bail. (Docket Entry No. 24 at 9; Docket Entry No. 33 at 15-16.) Defendant draws the Court's attention to *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997), where the Supreme Court stated that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision." *Id.* at 272 n.7. Relying on this language, defendant asserts that plaintiffs' claims fall under the aegis of the Eighth Amendment and are therefore "not cognizable under a substantive due process theory." (Docket Entry No. 24 at 9.)

Plaintiffs counter that the defendant has "take[n] a rule of law declared under a certain context and spread it beyond its contours to another context beyond the border of the original ruling." (Docket Entry No. 33 at 16.) They note that *Lanier* only addressed the overlap issue briefly, in a footnote near the end of the opinion, *Lanier* 520 U.S. at 272 n.7, citing to the excessive force case *Graham v.*

Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). *Graham*, in turn, discussed only the Eighth Amendment prohibition [*16] against cruel and unusual punishment, *not* the prohibition against excessive bail. *Id.* at 394. Plaintiffs conclude from this chain of authority that *Lanier* was never meant to govern excessive bail cases, and that plaintiffs may therefore pursue their claims under both Eighth Amendment and substantive due process theories.

This Court cannot agree. While plaintiffs may be correct to read *Graham* narrowly, it was the United States Supreme Court, rather than the defendant in this case, that chose to adopt a broader constitutional rule. In *Collins v. City of Harker Heights, Texas*, the Supreme Court declared that "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). Similarly, in *County of Sacramento v. Lewis*, the Supreme Court - citing both *Graham* and *Lanier* - held that a plaintiff's substantive due process claim is inappropriate if that claim is "covered" by another amendment. 523 U.S. 833, 843, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). The *Lewis* Court approvingly quoted the language from *Lanier* that "if a constitutional claim is covered by a specific [*17] constitutional provision, *such as* the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision." *Id.* (quoting *Lanier*, 520 U.S. at 272 n.7) (emphasis supplied). While plaintiffs are correct that none of these decisions expressly address the relationship between substantive due process and the Excessive Bail Clause, the language of the opinions suggests that the rule is meant to be applied broadly, rather than restricted to the realm of excessive force and cruel and unusual punishment. The question, then, is whether the Eighth Amendment fully "covers" plaintiffs' substantive due process claim, or whether the alleged acts of the Metropolitan Government infringed on any other fundamental rights.

Plaintiffs assert that defendant's actions violate their fundamental right to bail pending trial. They cite *Puertas v. Michigan Department of Corrections*, 88 F. Supp. 2d 775, 781 (E.D. Mich. 2000) for the existence of this right, and then ask, "How can it be any more clear than this?" (Docket Entry No. 33 at 16.) But plaintiffs' confidence is

misplaced. Puertas addressed the outright *denial* of bail, not the setting of *excessive* bail. *Id.* Similarly, [*18] in *Atkins v. Michigan* - a decision the Puertas court cited heavily - the Sixth Circuit held that "if [a defendant's] liberty is to be *denied*, it must be done pursuant to an adjudicatory procedure that does not violate the standards for due process established by the fourteenth amendment." 644 F.2d 543, 550 (6th Cir. 1981) (emphasis supplied).

Here, plaintiffs conflate two distinct rights governed by distinct constitutional provisions. There is broad agreement that the arbitrary *denial* of bail and requiring the detention of suspects pending trial is a deprivation of liberty redressible under the Fourteenth Amendment. *Id.* at 548; see also *Mastrian v. Hedman*, 326 F.2d 708, 710 (8th Cir. 1964) ("[I]t is inherent in our American concept of liberty that a right to bail shall generally exist."). There is also some support for the idea that bail, under certain circumstances, might be set so far above what a defendant can afford that it constitutes the effective denial of pretrial release. See *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) ("[W]e accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.").

Plaintiffs, [*19] however, make no such claim. According to plaintiffs' own complaint, the Metropolitan Government allowed Shem and Meredith Malmquist to post bail and then released them. (Docket Entry No. 1 ¶¶ 18-19, 23-24.) Plaintiffs cannot make out a claim for arbitrary denial of bail under the Fourteenth Amendment for the simple reason that *they were never denied bail*. The Court therefore agrees with defendant that plaintiffs' substantive claims fall under the aegis of the Eighth Amendment Excessive Bail Clause, and finds that defendant's motion to dismiss plaintiffs' substantive due process claim is well taken.

3. Procedural Due Process

Plaintiffs' procedural due process claim fails for much the same reason as its substantive due process claim.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the Supreme Court noted that procedural due process "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." *Id.* at 332. Plaintiffs assert

that because of the Metropolitan Government's actions, plaintiffs "had their Constitutional rights against the setting of excessive bail and against having their liberty deprived without due process of law violated." (Docket [*20] Entry No. 1 ¶ 39.) However, for the reasons described above, the Court concludes that plaintiffs' bail was *not* excessive and that plaintiffs were *not* deprived of their physical liberty. In the absence of any infringement on these substantive rights, plaintiffs cannot, as a matter of law, make out a § 1983 claim for violation of procedural due process. See *Monk v. Huston*, 340 F.3d 279, 282-83 (5th Cir. 2003) ("The constitutional right to due process is not, however, an abstract right to hearings conducted according to fair procedural rules. Rather, it is the right not to be deprived of life, liberty, or property without such procedural protections.").

Plaintiffs allege that the Metropolitan Government violated their procedural due process rights by failing to adhere to Tennessee state statutes governing bail and pretrial release. (Docket Entry No. 1 ¶¶ 30, 35; Docket Entry No. 33 at 19-20.) However, this circuit has expressly held that violation of a state statute does not, in and of itself, give rise to a cause of action under §1983. *White by Swafford v. Gerbitz*, 892 F.2d 457, 461 (6th Cir. 1989). Instead, a plaintiff must establish "that a defendant violated his *federally* protected [*21] rights under color of state law." *Id.* Furthermore, as this court noted in *Tate*, "[t]he Constitution does not require states to administer their laws correctly' and 'it is not appropriate for a federal court, hearing a case under §1983 to upbraid state officials for a supposed error of state law.'" 2010 U.S. Dist. LEXIS 109714, 2010 WL 4054141, *8 (M.D. Tenn. Oct. 14, 2010) (quoting *Burgess v. Ryan*, 996 F.2d 180, 184 (7th Cir. 1993)).

However, plaintiffs contend that they have suffered a substantial deprivation of rights without due process, since rights arising under the constitution or statutes of Tennessee are "protected liberty interests under the 14th Amendment due process clause that may not be taken away arbitrarily or in a discriminatory fashion." (Docket Entry No. 33 at 9.) Plaintiff is correct that states "may, under some circumstances create liberty interests which are protected by the Due Process Clause." *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995); see also *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 462, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989) ("[T]he most common manner in which a State creates a liberty interest is by establishing

substantive predicates to govern official decisionmaking, and, further, by mandating the outcome [*22] to be reached upon a finding that the relevant criteria have been met." (internal quotations omitted)). However, state *procedures* - even those mandated by state law - do not, in and of themselves, give rise to any rights enforceable under § 1983. As the Sixth Circuit noted in *Gibson v. McMurray*, "[state p]rocedural rights that do not require a particular substantive outcome are not liberty interests protected by the Fourteenth Amendment, even if the right is 'mandatory.'" 159 F.3d 230, 233 (6th Cir. 1998).

Plaintiffs allege that their state-created liberty interest arises from T.C.A. §§ 40-5-101, 40-5-103, and 40-11-114 through 40-11-118. The fifth chapter of Title 40, pertaining to "Magistrates and Judicial Commissioners," states in pertinent part as follows:

40-5-103. Examination required before commitment. - No person can be committed to prison for any criminal matter until examination thereof is first had before some magistrate.

40-5-105. Disposition by magistrate. - The magistrate is required to reduce the examination of the accused to writing, if the accused submits to an examination, and also all the evidence adduced on both sides, and is authorized to discharge, bail, or commit [*23] the accused and to take all necessary recognizances to enforce the appearance of the defendant, the prosecutor or witnesses at the proper court.

Plaintiffs argue that these provisions apply to all arrestees, including those such as themselves, who were not denied bail and committed to prison, but were only held temporarily for purposes of making their initial appearance before the county commissioner. The Court finds this argument rebutted by the plain language of § 40-5-103, which only requires an examination reduced to writing prior to *jailing* the arrestee. See also *Tenn. R. Crim. P. 5.1(b)*. Following their initial appearance before a magistrate, plaintiffs here were admitted to bail, not committed to jail. Their temporary detention for reasons attendant to their transport, appearance before the commissioner, and posting of bail, is not a committal to

prison for purposes of these statutes. E.g., *Wynn v. State*, 181 Tenn. 325, 181 S.W. 2d 332, 334 (Tenn. 1944). Moreover, it does not appear from the complaint that the case against plaintiffs proceeded to the preliminary examination stage, where probable cause to believe the arrestee committed the charged offense is determined and the criminal defendant [*24] is "either release[d] . . . pursuant to applicable law or commit[ted] . . . to jail by a written order." *Tenn. R. Crim. P. 5.1(b)*. Rather, under *Tennessee Rule of Criminal Procedure 5*, the proceedings described in the complaint were initial appearances before a magistrate, conducted by audio-visual device as authorized under *Rule 43(e)*.² "Nothing in the Rules of Criminal Procedure or the state or federal constitutions prohibit a temporary incarceration of a person arrested [with or] without a warrant prior to the initial appearance," provided that the initial appearance takes place "without unnecessary delay." *Tenn. Op. Att'y Gen. No. 91-84*, 1991 Tenn. AG LEXIS 94, 1991 WL 535160, at *1 (Sept. 20, 1991).

² *Rule 5(a)(1)(A)*, in pertinent part, provides that "Any person arrested . . . shall be taken without unnecessary delay before the nearest appropriate magistrate of the county from which the arrest warrant issued[.]" To the extent that this procedure conflicts with plaintiffs' right as out-of-county arrestees to be admitted to bail in the county of arrest, see *Tenn. R. Crim. P. 4(d)*, the Court finds that such matters of procedure do not give rise to any protected liberty interest implicating plaintiff's federal [*25] due process rights.

As further support for their assertion that a written record must be made of their bail setting, plaintiffs cite *T.C.A. § 40-11-114*, which provides, in pertinent part:

Bail, when not given in open court, is given by a **written undertaking**, containing the conditions of release, the agreement of the defendant to appear in the court having jurisdiction of the offense as directed by the court and/or an amount to be paid for nonappearance, **signed by the defendant**, and if made under § 40-11-122(2), signed also by court-approved and sufficient surety or sureties. The written undertaking must be approved by the officer taking it.

(Emphasis in plaintiffs' brief). However, this section does not refer to any writing required of the magistrate upon the setting of bail, but instead describes the writing that is required to effect bail of a criminal defendant when bail is not made upon a recognizance in open court.

Plaintiffs further argue that, under §§ 40-11-115 through 40-11-117, "[t]he *default* is release on one's own recognizance and bail may be required *only absent a showing* that conditions on a release on recognizance will reasonably assure the appearance of the defendant as [*26] required." (Docket Entry No. 33 at 8 (quoting T.C.A. § 40-11-117)) (emphasis in plaintiffs' brief). While release on personal recognizance may well be the presumptive form of release under this statutory scheme, plaintiffs' citation of § 40-11-117 is misleading. The statute provides, in full, as follows:

40-11-117. Bail security required. -

Absent a showing that conditions on a release on recognizance will reasonably assure the appearance of the defendant as required, the magistrate shall, in lieu of the conditions of release set out in § 40-11-115 or § 40-11-116, require bail to be given.

This section does not limit the magistrate's discretion in deciding when bail "may" be required as plaintiffs assert, but mandates that bail shall be ordered given unless other, nonpecuniary conditions on the release from confinement are shown to be reasonably certain to assure the defendant's appearance at trial. There was no such showing in plaintiffs' case, albeit because there was allegedly no inquiry into their suitability for release on recognizance. While such lack of inquiry may be inconsistent with the spirit of §§ 40-11-115 through 40-11-117, the letter of the law does not mandate that arrestees [*27] be released on recognizance absent a showing that only payment of bail will assure their attendance at trial. In fact, statutory language suggests the inverse. See T.C.A. § 40-11-115(a) ("Any person charged with a bailable offense **may**, before a magistrate authorized to admit the person to bail, be ordered released pending trial on the person's personal recognizance.") (emphasis supplied); § 40-11-116 ("If a defendant does not qualify for a release upon recognizance under § 40-11-115, then the magistrate shall impose the least onerous conditions reasonably likely to assure the

defendant's appearance in court. . . . including, but not limited to, the deposit of bail."); § 40-11-117 ("Absent a showing that conditions on a release on recognizance will reasonably assure the appearance of the defendant as required, the magistrate shall . . . require bail to be given."). The Court finds that the implication or presumption from these statutes that release on personal recognizance should be considered and rejected before bail is required to be given is not sufficient to create a liberty interest protected under the Due Process Clause of the Fourteenth Amendment. See *Kentucky Dep't of Corr. v. Thompson*, supra.

Finally, [*28] the Court notes that plaintiffs' interpretation of Tennessee Attorney General Opinion 05-018, 2005 Tenn. AG LEXIS 18 - cited for the proposition that a magistrate's "use of a 'pre-set bond schedule' is specifically prohibited" (Docket Entry No. 33 at 7.) - is not supported by the language of that opinion. The actual opinion states that Tennessee's statutory scheme requires an individual determination of bond by a magistrate, judge, or, in limited circumstances, the court clerk. Accordingly, the opinion states that, where arrests are made at times when a judge or clerk is not readily available (such as on nights and weekends), a *jailer* may not utilize a pre-set bond schedule published by judges in the jurisdiction, but must instead hold the arrestee pending the judge or clerk's availability. 2005 Tenn. AG LEXIS 18, 2005 WL 436219, at *1-2. The Court finds no authority in this Attorney General opinion or elsewhere in state law for any blanket prohibition against a magistrate beginning the bail determination process with a default amount corresponding to the particular charge of arrest - or ending with that same amount - when setting bail in the exercise of his or her discretion, according to the factors and directives set out in T.C.A. § 40-11-118. [*29] Therefore, plaintiffs cannot claim a constitutional deprivation for the manner in which defendant set their bail in this case. See *Tate*, 2010 U.S. Dist. LEXIS 109714, 2010 WL 4054141, at *7.

In light of the foregoing, the Court finds that plaintiffs' claim that the Metropolitan Government failed to observe Tennessee law in setting their bail fails to state a claim under the Fourteenth Amendment on which relief can be granted.

Accordingly, the Court concludes that defendant's motion to dismiss plaintiffs' procedural due process claim is well taken.

2011 U.S. Dist. LEXIS 136696, *29

III. Conclusion

In light of the foregoing, defendant Metropolitan Government of Nashville/Davidson County's motion to dismiss shall be GRANTED, and the claims against it DISMISSED. An appropriate order will enter.

ENTERED this 29th day of November, 2011.

/s/

JOHN S. BRYANT

UNITED STATES MAGISTRATE JUDGE



**WILLIAM TATE, individually and on behalf of all others similarly situated,
Plaintiff, v. HARTSVILLE/TROUSDALE COUNTY, Defendant.**

Case No. 3:09-0201

**UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF
TENNESSEE, NASHVILLE DIVISION**

2010 U.S. Dist. LEXIS 109714

October 14, 2010, Filed

SUBSEQUENT HISTORY: Motion granted by, Claim dismissed by, Motion to strike denied by, As moot Tate v. Hartsville/Trousdale County, 2010 U.S. Dist. LEXIS 124457 (M.D. Tenn., Nov. 22, 2010)

PRIOR HISTORY: Tate v. Hartsville/Trousdale County, 2009 U.S. Dist. LEXIS 108675 (M.D. Tenn., Nov. 20, 2009)

COUNSEL: [*1] For William Tate, Individually and on behalf of all others similarly situated, Plaintiff: Jerry Gonzalez, LEAD ATTORNEY, Jerry Gonzalez, PLC, Murfreesboro, TN.

For Hartsville/Trousdale County, Defendant: Heather C. Stewart, Mary B. Ferrara, LEAD ATTORNEYS, Farrar & Bates, Nashville, TN.

JUDGES: Todd J. Campbell, United States District Judge.

OPINION BY: Todd J. Campbell

OPINION

MEMORANDUM

This is a class action under 42 U.S.C. § 1983 in which Plaintiff William Tate alleges that the process for

setting bail in Hartsville/Trousdale County Tennessee violates the Eighth and Fourteenth Amendments to the United States Constitution. Pending before the Court are several motions filed by Defendant, including a "Motion for Summary Judgment" (Docket No. 57), a "Motion to Deem Statements of Undisputed Facts to be Undisputed for Purposes of Motion" (Docket No. 75), a "Motion to Strike Table[s] I-V" (Docket No. 77), and a "Motion to Decertify Class" (Docket No. 80).

IFACTUAL BACKGROUND AND PROCEDURAL POSTURE

This litigation arose after Plaintiff was arrested on March 10, 2008, in Trousdale County on aggravated and domestic assault charges. The arrest warrant was issued by Charles Puckett ("Puckett") who, along with David Freeman [*2] ("Freeman"), serves as a Judicial Commissioner for Trousdale County.

Neither Commissioner Puckett nor Commissioner Freeman has a law degree - the former is a local barber, and the latter is retired from the Trousdale County Board of Education. Nevertheless, both Commissioners received on the job training for the performance of their official duties, and both attend annual seminars presented by the Judicial Commissioners Association of Tennessee.

According to both Commissioners, numerous factors are considered in determining whether bail should be set

in Hartsville/Trousdale County and, if so, in what amount. The factors which they take into consideration include (1) the name of the suspect; (2) his or her residential address; (3) his or her length at current residence; (4) whether he or she owns or rents property; (5) whether he or she is employed, where he or she is employed, and the length of time employed in his or her current position; (6) the nature and severity of the charged offense; (7) his or her prior criminal record; and (8) other factors deemed pertinent, including the safety of the victim and community in general, and the individual's family ties in the county. None of the [*3] factors is controlling and other factors may be considered, such as whether the Judicial Commissioner knows the individual personally and considers him or her to be trustworthy.

Also according to Commissioners Puckett and Freeman, in an effort to properly consider the relevant factors, they generally meet and talk to the individual defendant before setting bail. However, that is not always possible and sometimes the Commissioners look to their own personal knowledge about the individual, the individual's past criminal record, and other sources.

On March 10, 2008, Commissioner Puckett was summoned to City Hall to meet with Patrick Green ("Green"), Plaintiff's stepson, about a possible assault. Green told Commissioner Puckett that Plaintiff had struck him on the back of the leg with a piece of PVC pipe. After listening to Green, Commissioner Puckett determined there was probable cause for Plaintiff's arrest on aggravated and domestic assault charges and issued an arrest warrant.

After Plaintiff was taken into custody and brought to the county jail, Commissioner Puckett went to the booking room and spoke with Plaintiff. What occurred during the course of that conversation (and possibly a [*4] second conversation) is the subject of some dispute.

While Commissioner Puckett does not remember much about his encounter with Plaintiff, he remembers that he briefly saw Plaintiff in the booking room, left the booking room to secure a form, and returned to the booking room to continue his conversation with Plaintiff. Commissioner Puckett recalls that Plaintiff was sarcastic in his remarks, but, that notwithstanding, he was sure that he would have asked Plaintiff such things as how long he lived at his address, whether he owned the residence or was renting, where he worked and for how long, and other questions which would have provided some insight

into whether Plaintiff was a flight risk. (Puckett Depo. Vol. II at 112). Commissioner Puckett also claims that he reviewed Plaintiff's criminal history before setting bail. (Id. at 117).

For his part, Plaintiff admits seeing the Commissioner briefly. However, and unlike other occasions after he had been arrested, Plaintiff claims that Commissioner Puckett did not ask him any questions relevant to the issue of bail, such as where Plaintiff lived and how long he lived at his residence. Instead, Plaintiff asserts the amount of bail was pre-determined [*5] as evidenced by the fact that he was informed about the amount of his bail when he was arrested. At the jail, he was only asked questions by the jailers relevant to booking, i.e., his name, address, and date of birth. (Pf. Depo. at 102, 104-05).

At the time of his arrest, Plaintiff had been unemployed for two years. He moved from Littlestown, Pennsylvania to Tennessee in 2003. When he moved to Tennessee, Plaintiff first lived in Bon Aqua for a few months, moved to Murfreesboro and lived there for approximately a month, moved to Spring Hill and lived there for approximately two years, and finally ended up living in Trousdale County at some point in 2007. He and his wife purchased a residence in Trousdale County, although Plaintiff cannot recall how much the house was purchased for, or the amount of his monthly mortgage payments. Plaintiff owns no other real property in Trousdale County.

Plaintiff's arrest on March 10, 2008 was not his first. Sometime in the mid-1990's, Plaintiff was arrested in Westminster, Maryland, for assaulting a state trooper. In 2001 he was arrested in Littlestown, Pennsylvania and charged with rape, involuntary deviant sexual intercourse, aggravated indecent assault, [*6] indecent assault, and corruption of a minor. That same year, he was arrested there for criminal trespass. In 2006, Plaintiff was arrested in Maury County, Tennessee, for assaulting Green, his stepson.

For allegedly assaulting Green in March 2008, Commissioner Puckett set Plaintiff's bail at \$2,000. Because the charges included domestic assault, Plaintiff was prohibited from posting bond for approximately 12 hours. Commissioner Puckett believed that those arrested on domestic assault charges were to be placed on a 12-hour hold which serves as a "cooling-down" period. However, Commissioner Puckett also believed that the

time could be lessened in the Commissioner's discretion and, if it was, the Commissioner was to make a notation in the record as to the reasons for the shorter period. (Puckett Depo. Vol. II at 121). Within twelve hours of being formally booked, Plaintiff posted bail and was released from the county jail.

In Trousdale County, if a defendant is dissatisfied with the failure to set bail or the amount of his bail, he or she may request a bail reduction hearing in General Sessions Court before Judge Kenny Linville. Judge Linville regularly holds court in Trousdale County every [*7] Monday, Thursday and Friday, but is available more frequently if necessary. Despite the bond hearing review process, Plaintiff never requested a bond hearing in the General Sessions Court.

Based upon the foregoing, Plaintiff filed suit "pursuant to 42 U.S.C. §1983 and the common and statutory laws of the State of Tennessee to redress the violation by Defendant of Plaintiff's rights secured by the Eighth and Fourteenth Amendments to the United States Constitution and applicable provisions of the Tennessee Constitution, that is, Plaintiff's right to have bail set on an individualized basis and narrowly tailored to address the issue of likelihood to flee and danger to the community if released." (Complaint ¶ 1).¹ On November 20, 2009, the Court entered an Order granting Plaintiff's request for class certification and, in accordance with Fed. R. Civ. P.23(c)(1), certified "a class of those persons who, since March 3, 2008, have been, are, or will be presented to a Hartsville/Trousdale County judicial commissioner for the setting of bail," with the class issue being "whether there is a practice, pattern or policy within Hartsville/Trousdale County of unconstitutionally and arbitrarily setting [*8] bail." (Docket No. 41 at 1, footnote omitted).

1 While Plaintiff's Complaint mentions the "common and statutory laws" of Tennessee, as well as the Tennessee Constitution, he has made clear that he is asserting no self-standing state law claim and that "the complaint has one count and it clearly labels it as an action under 42 U.S.C. § 1983." (Docket No. 37 at 1). In light of that representation, Defendant's "Motion to Dismiss State Claims" (Docket Entry No. 29) was denied as moot. (Docket No. 38).

II. DISCUSSION

A. Motion to Deem Statement of Facts Undisputed (Docket No. 75)

As required by Local Rule 56.01(b), Defendant filed a concise statement of facts, set forth in numbered paragraphs, which it deemed to be undisputed for purposes of its motion for summary judgment. In response, Plaintiff admitted many of the stated facts, but disputed those facts set forth in paragraphs 17-18, 20, 22-26 and 34. Defendant now moves to have the facts set forth in those paragraphs deemed admitted because, in disputing many of those facts, Plaintiff merely references a section of his brief and, when he does specifically cite to the record, those citations do not show that the facts set forth by Defendant [*9] are incorrect.

Local Rule 56.01(c) provides that where a party disputes a fact set forth by an opponent in support of a motion for summary judgment, the non-moving party must "demonstrat[e] that the fact is disputed . . . by specific citation to the record." L.R. 56.01(c).

It is unnecessary to rule upon Defendant's request that the statements contained in paragraphs 17-18, 20, 22-26 and 34 of its Statement of Undisputed Facts be deemed undisputed. Even construing the relevant and supported facts in Plaintiff's favor, it is clear that Defendant is entitled to summary judgment on the specific claim asserted by Plaintiff. The Motion to Deem Statement of Facts Undisputed (Docket No. 75) will be denied as moot.

B. Motion to Strike Table[s] I-V (Docket No. 77)

In response to Defendant's Motion for Summary Judgment, Plaintiff filed an Appendix which included five tables which purport to summarize mittimus issued by Commissioners Puckett and Freeman. The tables include lists of mittimuses with holds "for out-of-county-warrants" (Table I), "FTA or failure to appear"(Table II), and "for violation of probation or capias" (Table III), as well as lists of "DUI sorted by bond amount" (Table IV), [*10] and "PI sorted by bond amount" (Table V). Defendant moves to strike these tables on the grounds that both the tables and underlying data have not been authenticated or shown to be admissible, and that the tables "are replete with numerous errors, misstatements, and information which simply do[] not appear in the mittimuses which they purport to 'summarize.'" (Docket Entry No. 78 at 6).

The tables were supplied in an effort to defeat Defendant's Motion for Summary Judgment. However, and as explained below, they are not relevant to the issue of whether Plaintiff suffered a constitutional deprivation, but instead go to the alleged mistreatment of other members of the class. As such, the Motion to Strike will be taken under advisement. Because the tables may have some bearing in relation to the unnamed class members' claims, the Court will consider the Motion to Strike when it rules on the Motion to Decertify.

C. Motion for Summary Judgment (Docket No. 57)

1. Standard of Review

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to [*11] judgment as a matter of law." Fed.R.Civ.P. 56(c). In deciding a motion for summary judgment, the Court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 466 (6th Cir. 2003); *Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 432 (6th Cir. 2002).

2. Legal Analysis

As indicated, Plaintiff brings this case solely pursuant to 42 U.S.C. § 1983 for alleged constitutional violations by Hartsville/Trousdale County in the setting of bail. Section 1983 is intended to provide a remedy against actions by states which deprive people of their federal rights, that is, it "does not confer substantive rights but merely provides a means to vindicate rights conferred by the Constitution or laws of the United States." *Aldini v. Johnson*, 609 F.3d 858, 864 (6th Cir. 2010). To prevail on his Section 1983 claim, Plaintiff must prove that Defendant acted under color of state law and that the offending conduct deprived him of a right secured by federal law. *League of Women Voters v. Brunner*, 548 F.3d 463, 475 (6th Cir. 2008).

Here, there is no dispute as to the color of state law element, and the sole question is [*12] whether Plaintiff was deprived of a right secured by federal law when his bail was set by Commissioner Puckett. Plaintiff claims that his federal rights under the Eighth and Fourteenth Amendments were violated.

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Although it has not definitively decided the matter, the United States Supreme Court has assumed that the "excessive bail" provision of the Eighth Amendment is applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment. *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).

The Excessive Bail Clause does not guarantee a right to bail, but it does guarantee that any bail imposed "not be 'excessive' in light of the perceived evil." *United States v. Salerno*, 481 U.S. 739, 754, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). Perceived evils include the risk of flight and the possible harm to the public. *Id.* at 754-55.

In this case, Defendant argues it is entitled to summary judgment on Plaintiff's claim primarily because the amount of the bond - \$2,000 - was not excessive under the Eighth Amendment. [*13] Plaintiff does not seriously dispute the notion that the actual bond amount was not excessive, but instead argues that Defendant "just doesn't get it" (Docket No. 70 at 2) because he is challenging the system and process of setting bail in Hartsville/Trousdale County, and not whether a particular bond amount is excessive.

Because he claims to be challenging the "conditions" of bail, Plaintiff does not focus on the specific issue of whether his own constitutional rights were violated. Instead, he discusses bail generally under federal law, and the bail requirements set forth in Tennessee statutes. In doing so, Plaintiff mistakenly assumes that as class representative he need not establish the validity of his own claim. Indeed, Plaintiff argues that to be entitled to summary judgment, "Defendant has the burden of showing that there does not exist a material fact in dispute as to any class member, not just as to Plaintiff Tate." (Docket No. 70 at 4)(emphasis in original).

In support of his position, Plaintiff relies on cases such as *Brunet v. Columbus*, 1 F.3d 390 (6th Cir. 1993) and *Wiesmueller v. Kosobucki*, 513 F.3d 784 (7th Cir. 2008). Those cases, however, are inapposite because they [*14] dealt with situations where the claims of the class representative or the individual seeking to represent a class became moot. In such situations, "the *suit* is not moot unless the claims of *all* unnamed class members are

moot," and even though "[t]he named plaintiff who no longer has a stake may not be a suitable class representative, . . . that is not a matter of jurisdiction and would not disqualify him from continuing as class representative until a more suitable member of the class was found to replace him." *Wiesmueller*, 513 F.3d at 786 (italics in original); see, *Brunet*, 1 F.3d at 399 (italics added)("the mootness of the named plaintiff's claim does not moot the action, *if* a controversy between any class member and the defendant exists").

"A plaintiff who brings a class action presents two separate issues for judicial resolution." *U.S. Parole Comm. v. Geraghty*, 445 U.S. 388, 401, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980). "One is the claim on the merits; the other is the claim that he is entitled to represent a class." *Id.* Therefore, a class representative must establish that he or she suffered injury as a result of the unlawful practices of a defendant, otherwise he or she is in "no [*15] position to mount a classwide attack[.]" *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977). This is because "[t]he Article III standing requirements apply equally to class actions" and the class representative must allege and ultimately prove "an individual, personal injury in order to seek relief on behalf of himself or any other member of the class." *Sutton v. St. Jude Medical S.C., Inc.*, 419 F.3d 568, 570 (6th Cir. 2005); see, *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2004)(citation omitted)("[I]n class actions, the named representatives must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent").

Turning to the merits of Plaintiff's individual claims, "to determine whether bail is excessive, [a court] must compare the terms of the bail against the interest the government seeks to protect." *Cambell v. Johnson*, 586 F.3d 835, 842 (11th Cir. 2009)(citing, *Salerno*, 481 U.S. at 754). Here, the terms of the bail (\$2,000) was indisputably imposed to ensure Plaintiff's attendance, which is a legitimate [*16] reason for imposing bail. *Stack v. Boyle*, 342 U.S. 1, 4-5, 72 S. Ct. 1, 96 L. Ed. 3 (1951)("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial" and, "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").

As indicated, instead of focusing on the validity of his own claim, Plaintiff summarizes what he views to be the general principles regarding the setting of bail and specific provisions of Tennessee law and claims that Defendant's practices violate the same. According to Plaintiff, "under Tennessee law: 1. All arrestees are entitled to bail, even those arrested for violations of conditions of bail previously set (Failure to Appear or *capias* warrants); 2. Persons arrested on out-of-county warrants are entitled to bail in the allowance of bail in county of arrest in the same manner as anyone else arrested in that county; 3. No one can be committed to the jail until an examination for the purpose of determining the need for bail is done by a magistrate; 4. Bail cannot be restricted in form, such as cash bond or other type; 5. The 12-hour [*17] "hold" on domestic assault arrests may only be implemented after a determination that the alleged victim is in danger. . . ; 6. There is no statutory authority for a judge to tell a judicial commissioner how to do his job or set other conditions or rules for setting bail; 7. A judicial commissioner must set bail . . . ; 8. The reasons for bail must be reduced to writing; 9. The default release is release on recognizance (ROR) . . . ; 10. A pre-set bond schedule is specifically prohibited." (Docket No. 70 at 12-13, footnote omitted).

Some of the foregoing factors which Plaintiff relies upon are not relevant to the specific issue of whether Plaintiff suffered an injury or harm by virtue of Defendant's conduct. He was not arrested on an out-of-county, failure to appear, or *capias* warrant, and he was given bail.

Plaintiff has specifically stated that he is not making any state law claims and that his case is brought solely under 42 U.S.C. § 1983. However, Section 1983 "does not provide relief for a violation of state law." See, *Michael v. Ghee*, 498 F.3d 372, 374 (6th Cir. 2007); *Huron v. Valley Hosp.*, 887 F.2d 710, 714 (6th Cir. 1989). This is because states are "'free to enact laws that are [*18] more protective of individual rights than the United States Constitution'" and "'a mere violation of such a state law will not establish a proper claim under § 1983.'" *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995)(citation omitted).

Yet even considering the specific Tennessee provisions in relation to the setting of Plaintiff's bail, the Court finds no genuine issue of material fact for trial on whether a violation of the Eighth or Fourteenth

Amendment occurred. Plaintiff claims that, prior to bail being set, he was not examined (nor was an examination reduced to writing) by the Commissioner in violation of T.C.A. §§ 40-5-105. Even if true, this does not show that the bail imposed was excessive. See, *Galen v. County of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007) ("The Commissioner's failure to hold a hearing in open court before enhancing [plaintiff's] bail and to state his reasons for the enhancement on the record, as required by California Penal Code section 1270.1, does not excuse [plaintiff] from his burden of demonstrating in this § 1983 action that his bail was excessive"). A court cannot "assume that plaintiff's bail was excessive simply because the state failed to comply [*19] with a self-imposed procedural requirement[.]" *Id.* Again, "Section 1983 requires [plaintiff] to demonstrate a violation of federal law, not state law." *Id.*

Nor does the fact that the bail was allegedly preset, standing alone, amount to a constitutional deprivation. See, *Glenn v. City of Columbus*, 75 Fed. Appx. 983, 2003 WL 21766538 at *1 (5th Cir. 2003) (use of bond schedule does not violate the Excessive Bail or Due Process clauses); *Terrell v. City of El Paso*, 481 F.Supp.2d 757, 766 (W.D. Tex. 2007) ("Exhaustive research regarding the constitutionality of bond schedules in § 1983 cases" reveals "only one case where a federal court found the use of a bond schedule to be unconstitutional"). Instead, to survive summary judgment, Plaintiff must link how the allegedly preset amount "necessarily result[ed] in an excessive amount of bail," and "merely concluding it was improperly set is not sufficient." *Terrell*, 481 F.Supp.2d at 766.

Plaintiff also claims that his constitutional rights were violated because he was held 12 hours after booking before he was allowed to post bond. This was because, as Commissioner Puckett explained at his deposition, the Commissioner believed that state law automatically required [*20] that those arrested on domestic assault charges be held for 12 hours, unless the Commissioner determined that such a "cooling-off" period was unnecessary.

Plaintiff argues Commissioner Puckett's interpretation of the law was backwards because the relevant Tennessee statute provides:

(1) Any offender arrested for . . . [domestic abuse] . . . shall not be released

within twelve (12) hours of arrest, if the magistrate or other official duly authorized to release the offender finds that the offender is a threat to the alleged victim. The 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.

(2) The written findings must be attached to the warrant and shall be preserved as a permanent part of the record. The arresting officer shall make official note of the time of the arrest in order to establish the beginning of the twelve-hour period provided for in this subsection.

T.C.A. § 40-11-150(h)(1)-(2). However, whether Commissioner Puckett properly understood the statute is not outcome determinative since "[t]he Constitution does not require states to administer their laws [*21] correctly" and "it is not appropriate for a federal court, hearing a case under § 1983, to upbraid state officials for a supposed error of state law." *Burgess v. Ryan*, 996 F.2d 180, 184 (7th Cir. 1993) (collecting cases). After all, "[b]unders in the implementation of state law are inevitable; state courts provide the remedy." *Id.*

So, the Court returns to the question of whether Plaintiff's federal rights were violated when he was held for twelve hours. The Supreme Court has recognized that probable cause decisions must be made promptly, but has also recognized that states should be given enough time to combine such hearings with other preliminary procedures, including bail determinations. Thus, in *City of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991), the Supreme Court held that jurisdictions which provide probable cause hearings within forty-eight hours will generally be "immune from systemic challenges." *Id.* at 55. "The clear import of *McLaughlin*, then, is that a bail hearing held within 48 hours of a warrantless arrest is also presumptively constitutional - if indeed the Constitution speaks to that issue." *Holder v. Town of Newton*, 2010 U.S. Dist. LEXIS 9160, 2010 WL 432357 at *10-11 (D.N.H. 2010).

Given [*22] that a bail hearing may be delayed up to forty-eight hours absent some improper motive, the Court

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finds that a 12-hour delay in releasing Plaintiff in this case did not amount to a constitutional deprivation. At most, Plaintiff has shown Commissioner Puckett allegedly to be negligent in his understanding of Tennessee law, but "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). Moreover, being held for twelve hours before being released on bail does not automatically constitute a constitutional violation. See, *Turner v. City of Taylor*, 412 F.3d 629, 639 (6th Cir. 2005)(city's "official policy of holding domestic violence arrestees for a minimum period of 20 hours unless arraigned and released by the court" is not unconstitutional); *Lund v. Hennepin County*, 427 F.3d 1123, 1126-28 (8th Cir. 2005)(no due process violation where defendant was held for twelve hours after judge ordered that defendant could be released with no bail); *Collins v. Ainsworth*, 382 F.3d 529, 545 (5th Cir. 2004)("There is no right to post bail within 24 hours of arrest"); [*23] *Holder*, 2010 U.S. Dist. LEXIS 9160, 2010 WL 432357 at *11 (where nine hours passed between defendant's arrest and subsequent release, that was "well within the 48-hour window [of McLaughlin] and thus presumptively constitutional").

In light of the above, the Court determines that Plaintiff has failed to establish a triable issue on his claims that Defendant violated his rights under the Eighth or Fourteenth Amendments. It does not follow, as Defendant asserts, however, that this case must be dismissed in its entirety at this juncture.

Because a designated class has a status apart from that of the class representative, dismissal of the class representative claims "does not inexorably require dismissal of the class action," nor is the Court required to consider the unnamed class members' potential claims in the abstract. *Smook v. Minnehaha County*, 457 F.3d 806, 815 (8th Cir. 2006). Instead, the better course is to dismiss the class representative's meritless claims and consider substituting a class representative who can show injury. *Id.*; see, *McAnaney v. Asotria Finan. Corp.*, 2007 U.S. Dist. LEXIS 67552, 2007 WL 2702348 at *13 (E.D.N.Y. 2007)(fact that plaintiffs' "claims are no longer viable does not make the suit moot or necessarily undermine [*24] the claims of the remaining class members" and "favored" procedure is not to decertify the class but to "afford[] plaintiffs' counsel a reasonable

period of time for the substitution or intervention of a new class representative"); *Martinez-Mendoza v. Champion Int'l. Corp.*, 340 F.3d 1200, 1216 (11th Cir. 2003)(even where district court granted summary judgment on class representatives' claims, court should have addressed class certification issue and determined whether named plaintiff was qualified to serve as class representative and, if not, "whether a member of the class is willing and qualified to serve as class representative"); *Whitlock v. Johnson*, 153 F.3d 380, 384 (7th Cir. 1998)(where class was certified, trial court properly refused to decertify class and instead sought to substitute class representative, even though named representative's claim failed on the merits). This procedure seems particularly appropriate here because Defendant has moved to decertify the class and a possible substitution can be considered in conjunction with that motion.

D.Motion to Decertify Class(Docket No. 80)

Defendant has filed a Motion to Decertify Class in which it reasserts many of the same [*25] arguments that were raised in opposition to the initial request for class certification. However, because the named Plaintiff's claims will be dismissed, and because the parties have completed discovery, the Court finds it prudent to revisit the class certification issue. Accordingly, the parties shall file supplemental briefs by November 1, 2010 on the Motion to Decertify Class, at which time the Court will also consider whether there exists a suitable class representative to prosecute this action.

III.CONCLUSION

On the basis of the foregoing, Defendant's "Motion for Summary Judgment" (Docket No. 57) will be granted and Plaintiff's claims will be dismissed. Defendant's "Motion to Deem Statements of Undisputed Facts to be Undisputed for Purposes of Motion" (Docket No. 75) will be denied. Defendant's "Motion to Strike Table[s] I-V" (Docket No. 77) is taken under advisement. By November 1, 2010, the parties shall file supplemental briefs on Defendant's "Motion to Decertify Class" (Docket No. 80), and whether there is a suitable class representative who can be substituted for Plaintiff William Tate, and whether the Tables submitted by Plaintiff should be stricken.

By contemporaneous Order [*26] the trial in this case is continued to June 7, 2011 at 9:00 a.m. The pretrial conference is rescheduled for May 20, 2011 at 2:30 p.m.

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/s/ Todd J. Campbell

Todd J. Campbell

United States District Judge

ORDER

For the reasons set forth in the accompanying Memorandum, the court hereby rules as follows:

(1) Defendant's "Motion for Summary Judgment" (Docket No. 57) is hereby GRANTED and Plaintiff William Tate's claims are hereby DISMISSED WITH PREJUDICE;

(2) Defendant's "Motion to Deem Statements of Undisputed Facts to be Undisputed for Purposes of Motion" (Docket No. 75) is hereby DENIED AS MOOT; and

(3) In light of this Order, the parties shall file supplemental briefs by November 1, 2010 on Defendant's "Motion to Decertify Class" (Docket No. 80). The court will then consider the request to decertify, whether there

is a suitable substitute to serve as a class representative in this case, and whether the Tables filed by Plaintiff should be stricken.

Further, and in light of the foregoing rulings, Plaintiff's "Motion for Extension of Time in Which to File Response" (Docket No. 82) is hereby GRANTED insofar as he seeks an extension of time to file a response to Defendant's Motion to Decertify and [*27] Motion to Strike Tables. Plaintiff's request for additional time to respond to Defendant's Motion to Deem Facts Undisputed is hereby DENIED AS MOOT.

By contemporaneous Order, the trial is continued to June 7, 2011 at 9:00 a.m. The pretrial conference is rescheduled for May 20, 2011 at 2:30 p.m.

It is so Ordered.

/s/ Todd J. Campbell

Todd J. Campbell

United States District Judge