CASE NO. 11-6352

In The

United States Court of Appeals

For The Sixth Circuit

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GARY FIELDS
Plaintiff-Appellant,

VS

HENRY COUNTY, TENNESSEE
Defendant-Appellee.

◆

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
CASE NO. 1:09-01267

◆

APPELLANT'S REPLY BRIEF

◆

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I. INTRODUCTION

In its brief, the defendant attempts to restate the issues raised by the Plaintiff. As to the Eighth Amendment claim, Defendant Henry County restates the issue to be 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." (Appellee Brief, p. 1). But that is not the issue.

Under Plaintiff's Eighth Amendment claim, the amount of time Plaintiff was held before a bail hearing was conducted is not relevant to the analysis nor an accurate summary of the issue under the facts of this case. It is undisputed that Mr. Fields was *denied bail altogether* by Henry County without any hearing based on a *broad categorical assessment* of a likelihood to flee for *all* those arrested and charged with domestic assault. Mr. Fields' eligibility for bail was set by a *police officer* who wrote the warrant as "W/O", meaning "without bail". The only reason Mr. Fields was presented to a General Sessions Judge within 24 hours was because Mr. Fields knew beforehand that he would be held without bail as a matter of course based on his charged offense alone. He delayed turning himself in until the day before he knew a General Sessions Judge would be on the bench. Had Mr. Fields been apprehended or had he turned himself in as soon as he learned there

was a warrant for his arrest, he would have been held for *more* than 24 hours, denied bail as determined by a police officer, and before any appearance in court.

There is no evidence in the record that the General Sessions Judge made an individualized determination of Mr. Fields' risk of flight or danger to the community. Mr. Fields' Eighth Amendment claim is based on the undisputed fact that Henry County, through its judicial commissioners, police officers and/or jailers, summarily deny bail to anyone arrested on domestic assault based *solely* on the charged offense. Because the denial of bail is based *solely* on the charged offense, it cannot be "reasonably calculated" nor the "least amount necessary" to ensure *that* individual's appearance in court. There was no "calculation" at all. There was no reasonableness. There was no individualized assessment of Mr. Fields' likelihood to flee or be a danger to the victim if released. Therefore, it was excessive as that term has been defined and interpreted by the U.S. Supreme Court. The time period is simply not relevant to this analysis.

Second, Defendant has restated the 14th Amendment issue as whether the Due Process clause is "violated when government officials are not in strict compliance with" Tennessee law. The issue in this case is the arbitrariness of the bail procedure and bail determination in Henry County: it is not an issue of "strict" compliance or loose compliance. If State law grants an individual a *right* to bail

and sets out a substantive process which must be met before infringing on that right, then the 14th Amendment protects that right from *arbitrary* denial. The defendant offers no citation or other authority for the proposition that it is acceptable under the Due Process Clause to loosely (that is, not "strict[ly]") comply with a right established by operation of state law.

Simply put, if a person has a particular right to liberty afforded by State law, then Henry County may not restrict, deny or impinge on that right arbitrarily without violating the 14th Amendment.

II. THE FACTS SET OUT BY THE DISTRICT COURT ARE NOT SUPPORTED BY THE RECORD.

Defendant, for the most part, does not dispute the facts as set out in Plaintiff's brief. (Appellee Brief, p. 1) But Henry County claims that some facts set out by Mr. Fields are not "essential" and quotes the findings of fact made by the District Court. [1] Yet, the District Court's recitation of the facts is erroneous.

The District Court, for example, found that Mr. 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." (R.E. 42, Order Granting Summary

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[1] Henry County complains that extraneous facts not germane to the issues presented in this appeal are included. (Appellee Brief, p. 1) Defendant, however, does not state which facts included in Plaintiff's brief it believes are "extraneous [and] not germane..." The suggestion is that any facts not included in the District Court memorandum are extraneous and not germane to the issues. Plaintiff disagrees.

Judgment, pp 2-3) There is absolutely nothing in the record to support the District Court's statement that Mr. Fields' bail or conditions of release was set as authorized by T.C.A. 40-11-150 (which further makes reference to T.C.A. 40-11-118). The District Court did not cite to where in the record it found that these statutes were complied with. There are no "findings made on the record" (as required by T.C.A. 40-11-150(b)) nor any evidence that the General Sessions Judge who changed the bail from "W/O" to $5000 did so by going through the mandatory factors required by T.C.A. 40-11-118 (also as required by T.C.A. 40-11-150(a)). Indeed, the District Court went on to find that "the Plaintiff 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 Henry County General Sessions judge found that Mr. Fields '[was] a threat to the alleged victim or other family or household member,' and '[was] a threat to the public safety,' but '[was] reasonably likely to appear in court.'" (R.E. 42, Order Granting Summary Judgment, p. 13). The only citation given by the District Court in support of this finding of fact was to "D.E. 4-6" which is a boilerplate, check in the block, order "Granting Bail For Abuse Cases". (R.E. 4-6, Exhibit C to Defendant's Motion for Summary Judgment, p. 2) Again, there was absolutely no evidence in the record that this bail determination was an "individualized bail determination" as found by the District Court.

Finally, it is irrelevant what the General Sessions Judge did the following day or the next week or the next month. The undisputed fact remains that a Henry County law enforcement officer determined that Mr. Fields would be denied bail based *solely on the charged offense* and *not* on any individualized assessment of his particular likelihood to flee or be a danger to the alleged victim if released, consistent with the undisputed policy of Defendant Henry County.

III. THE ANTECEDENT DISTRICT COURT CASES CHALLENGING THE COMMON ARBITRARINESS OF TENNESSEE COUNTIES IN SETTING BAIL NEVER CHALLENGED THE AMOUNT OF THE BAIL.

Defendant states in its summary that the series of federal cases challenging the system of setting bail as practiced by various Tennessee municipalities "involved arrestees who challenged the amount of their bail..." (Appellee Brief, p2). This is incorrect. Not a single other case involving the system of setting bail in any other county (all of which were brought by the undersigned counsel) dealt with a plaintiff who challenged the "amount" of his or her bail. Each case challenged the process for setting bail based on a pre-existing list of bail amounts or based on some rule-of-thumb for setting bail that was applied generally and not on an individualized assessment of that person's likelihood to flee or be a danger if released.

IV. A RIGHT CREATED BY STATE LAW IS SECURED BY THE U.S. CONSTITUTION AGAINST ARBITRARY VIOLATION.

Defendant argues that "Section 1983 only vindicates violations of federally created liberties, not state created rights." (Appellee Brief, Summary of Argument, p4) This is a statement soundly refuted by clear Sixth Circuit and U.S. Supreme Court authority. (See *infra.*)

42 U.S.C. 1983 clearly states that any citizen deprived of "any rights... *secured* by the Constitution and laws, shall be liable...." (emphasis added). A state-created right is most assuredly "secured by the Constitution", in particular, the Due Process Clause of the 14th Amendment, against arbitrary infringement. As stated in Plaintiff's principal brief, both the Sixth Circuit and the U.S. Supreme Court have spoken on the matter and have held that "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources - the Due Process Clause and

the laws and regulations of the State." *Doe v. Sullivan County*, 956 F.2d 545, 556 (6th Cir. 1992). A "liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies.") *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S. Ct. 2384, 2393 (2005). If a liberty interest arises from an expectation, interest or right created by state law or policies, then it is protected by the 14th Amendment. If it is protected by the 14th Amendment, then it is logically "secured" by the Constitution since the 14th Amendment is part of the Constitution.

Defendant's argument that state-created rights are not secured by the U.S. Constitution and, therefore, not actionable under 42 U.S.C. 1983, is simply not correct.

V. THERE IS MORE THAN ONE SUBSTANTIVE LIMITATION TO BAIL UNDER THE EIGHTH AMENDMENT.

Defendant next argues that 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." (Appellee Brief, p 6) Defendant cites *United States v. Salerno*, 481 U.S. 739, 754 (1987), in support of this proposition. *Salerno* was decided 36 years after *Stack v Boyle,* 342 U.S. 1 (1951) and did not overrule or overturn the principle holding of *Stack*, that "[b]ail set at a figure higher than an amount *reasonably calculated* to fulfill this purpose [assurance of the presence of the accused] is 'excessive' under the Eighth Amendment." *Stack*, at 5 (emphasis added).

A substantive limitation of the Bail Clause, as stated by the *Stack* court, is that bail must be "reasonably calculated". If it is not reasonably calculated, it is "excessive" – regardless of the amount. Indeed, the "perceived evil" of *Salerno* must necessarily come before any "reasonable calculation" of bail and, according

to *Stack*, must be based on an individualized assessment of that evil. "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Stack*, at 5. Therefore, there are at least three – not one – substantive limitations to bail under the Eighth Amendment applicable in this case:

1. Bail must be fixed based upon some standards;
2. The "standards" must be "relevant" to assuring the presence of *that particular* defendant. In other words, not general in nature; and
3. The proposed conditions of release or bail must be measured against a "perceived evil", that is, the likelihood that the individual will not appear for court or be a danger to a victim or the public if released.

Mr. Fields, as with every other plaintiff in the other bail cases brought against Tennessee counties, did not and does not dispute that the government has a duty to set bail in light of a perceived evil. Rather, he argues that the perceived evil, if any, must be particular as to *him* or *his* likelihood to flee or harm someone if released and not based on the charged offense alone and derived from some arbitrary schedule.

The case of *Galen v County of Los Angeles*, 477 F.3d 652 (9th Cir. 2007) (cited by Defendant (Appellee Brief, p8), is consistent with the holdings of *Stack* and *Salerno*. In *Galen*, the 9th Circuit held that simply because the plaintiff's bail was set without a hearing in *open court*, as required by state law, it was not excessive. Under the facts of that case, the bail was actually enhanced based on an *individualized assessment* of Mr. Galen's likelihood to harm his fiancee that was

fact specific as to him. The court correctly found that state law procedures do not deal with excessiveness of bail under the Eighth Amendment. [2]

Here, Plaintiff does not claim a violation of the Eighth Amendment because Henry County arbitrarily violated a right given to him by state law or that it did not comply with state law. (This argument is raised under the 14th Amendment). Mr. Fields was denied bail without consideration of his individual likelihood to flee but instead based on a broad, generalized category. Regardless of the dollar amount or whether it was set at an open court hearing, Plaintiff's bail was not based on a reasonable calculation of his individualized likelihood to flee or be a danger, unlike in *Galen*, where the bail was enhanced precisely *because of* an *individualized assessment of Mr. Galen's likelihood to harm the victim*. Defendant attempts to conflate the Eighth Amendment claim with the 14th Amendment claim. The Eighth Amendment issue could not be simpler – Was bail set (i.e. "reasonably calculated") based on an individualized assessment of the plaintiff's likelihood to flee or be a danger if released. If the answer is yes, then there is no Eighth Amendment violation. If the answer is no, then there is a violation and the case should be remanded.

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[2] This point is important because Defendant Henry County cites to *Galen* under a heading of its brief that involves the Eighth Amendment claim but refers to Plaintiff Field's argument that Henry County violated a liberty interest given to him under the state-law Tennessee Bail Act (which is actually a 14th Amendment claim). (Appellee Brief, p8) Although Mr. Galen brought his §1983 claim under *both* "Eighth, and Fourteenth Amendment violations allegedly resulting from the bail enhancement" (*Galen*, at 657), all "claims except the Eighth Amendment excessive bail claim were dismissed" by the district court below. *Id.* Thus, the only claim reviewed by the 9th Circuit was the Eighth Amendment claim that was based, according to Mr. Galen, on the defendant not following a requirement under state law. This is different than the claim pled by Mr. Fields. (See Appellate Brief, Summary of Argument).

It is undisputed that Henry County summarily denies bail (or "W/O", meaning "without bail") based *solely* on the charged offense in domestic assault cases, like it did for Mr. Fields. It is undisputed that Henry County denies bail to those with brown skin and limited English ability solely based on those two characteristics. It is also undisputed that bail is set by calling the Court Clerk and obtaining a bail amount based solely on the charged offense, written down, without supervision, by the arresting officer. There is absolutely nothing in the record that could reasonably support any contrary conclusion of the facts. This practice and policy cannot – through even the broadest stretch of the imagination – be a practice where the "perceived evil" is measured as to a particular individual and bail set by a "reasonable calculation" as to that individual.

Since bail is not "reasonably calculated" to address a "perceived evil" that is "relevant" to the particular individual under arrest, it is excessive under the Eighth Amendment. [3]

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[3] With all due respect to Defendant and its counsel, the reference to the "Tennessee Bail Act" in regards to the Eighth Amendment claim fundamentally misunderstands the claim. (See Appellee Brief, p10, "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 being 'excessive' in light of the perceived evil.") Mr. Fields' Eighth Amendment claim has nothing to do with the Tennessee Bail Act. This claim is based on the undisputed fact that bail was and is still denied to individuals arrested by Henry County based solely on the charged offense and not on any reasonable calculation of their individual likelihood to not appear for court.

VI. PLAINTIFF'S FOURTEENTH AMENDMENT DUE PROCESS CLAIMS ARE NOT ENCOMPASSED BY THE EIGHTH AMENDMENT.

Defendant argues that Plaintiff's 14th Amendment Due Process Claim is encompassed by the Eighth Amendment and so analysis under the 14th is "pretermit[ted]". (Appellee Brief, p11) Defendant fails to cite to any authority on point or explain why Sixth Circuit cases dealing with bail analyze the arbitrary denial of bail under the 14th Amendment and not the Eighth (showing that when analyzing the arbitrary denial of bail, the 14th Amendment is *not* pretermitted).

In *Atkins v Michigan*, the Sixth Circuit held that the plaintiff's claim based on arbitrary denial of bail was analyzed under the 14th Amendment, not the Eighth:

> Atkins and the court below have focused upon the fourteenth amendment, arguing that the Court of Appeals behaved arbitrarily and capriciously in the manner in which it revoked bail, in violation of Atkins' right to due process of law. **Thus although this issue concerns the right to liberty on bail pending trial, this is not an eighth amendment case**. ... The crucial considerations in the present case are that "inherent in our American concept of liberty" is the general existence of the right to bail, *Mastrian v. Hedman*, 326 F.2d 708, 710 (8th Cir. 1964), and that if bail is denied, the denial must not violate the procedural standards developed from the due process clause. *Id.* at 711; *United States ex rel. Shakur v. Comm'r of Corrections*, 303 F.Supp. 303 (S.D.N.Y.), *aff'd*, 418 F.2d 243 (2d Cir. 1969), *cert. denied*, 397 U.S. 999, 90 S.Ct. 1144, 25 L.Ed.2d 408 (1970). **Atkins' liberty interest is sufficiently urgent that as a matter of due process it cannot be denied without the application of a reasonably clear legal standard and the statement of a rational basis for the denial.**

Atkins v. Michigan, 644 F.2d 543, 549 (6th Cir. 1981) (emphasis added).

Nor do any of the three cases cited by Defendant support its argument. None of the three cases cited, *United States v Lanier*, *Collins v City of Harper Heights*,

and *County of Sacramento v Lewis*, have anything to do with bail. It appears that the defendant plucked general language from cases dealing with distinctly different issues. The Eighth Amendment does not even have a due process clause and no court has ever inferred that it did. Similarly, no court has ever held that the Eighth Amendment protects a state-created right from arbitrary violation, that the Eighth Amendment involves protected liberty interests or that the failure to state the reasons for denying bail violate the Eighth Amendment. (See, e.g., *Puertas v. Michigan Dep't of Corrections*, 88 F. Supp. 2d 775, 780 (D. Mich. 2000), holding that pre-trial denial of bail without a statement of reasons is a violation of the *Fourteenth Amendment*.)

This argument is without merit, unsupported by citation to authority on point, and should be rejected.

VII. PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIM IS COGNIZABLE.

Finally, Defendant argues that its failure to "strictly" follow the procedural aspects of Tennessee's Bail Reform Act do not rise to a procedural due process claim. [4] In support, Defendant cites to *Gibson v McMurray*, 159 F.3d 230 (6th Cir. 1998) for the rule that "[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.'" In *Gibson*, the plaintiff claimed a violation of his *Fourth* Amendment rights when a city attorney pre-signed a warrant form against him before submitting the warrant for review by a magistrate. The plaintiff cited to a state law that held that a "magistrate shall not issue a

[4] It is not just that Henry County does not "strictly" follow the procedural aspects of the Bail Reform Act – it doesn't even come close.

warrant for a minor offense unless an authorization in writing allowing the issuance of the warrant is filed with the magistrate and signed by the prosecuting attorney....” *Id.*, at 233, fn 2. *Gibson* is not on point because the statute at issue in that case did not address the pre-signing of the forms nor provide any specific outcome for failure to comply with it.

In *Pusey v. City of Youngstown*, 11 F. 3d 652 (6th Cir. 1993) (cited by *Gibson v McMurray* above), the Sixth Circuit outlined the following steps in analyzing procedural due process claims.

> "We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State, the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 1908, 104 L.Ed.2d 506 (1989) (citations omitted). Liberty interests derive from both the Due Process Clause itself and the laws of the states. *Id.* ... To determine if state law establishes a protected liberty interest we must closely examine the state's statutes and regulations. To establish a liberty interest, the state law must use "`explicitly mandatory language,' in connection with the establishment of `specified substantive predicates' to limit discretion" of those to whom the statutory duty applies. *Id.* at 463, 109 S.Ct. at 1910. "[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 to be reached upon a finding that the relevant criteria have been met.*" *Id.* at 462, 109 S.Ct. at 1909.

Id., at 656 (emphasis in original). The *Pusey* court then rejected the plaintiff’s claim of a procedural due process violation based on Ohio’s victim rights statute (requiring a victim to be notified of the date, time and place of trial or plea) because the law did not provide a victim any "legitimate claim of entitlement." *Id.* It only provided the victim with a right to notice but did not provide how a victim’s

presence or statement would or should affect the outcome of the trial or plea hearing.

A. There Exists a Liberty Interest Which Was Interfered by Henry County.

As held by *Pusey*, to establish a liberty interest, the state law must use explicitly mandatory language, in connection with the establishment of specified substantive predicates to limit discretion of those to whom the statutory duty applies. The types of interests that constitute "liberty" for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than "an abstract need or desire," *Board of Regents of State Colleges v. Roth*, 408 U. S. 564, 577 (1972), and must be based on more than "a unilateral hope". *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458, 465 (1981). These interests have consistently been held to include those interests created by state law, such as an interest in parole (*Board of Pardons v. Allen*, 482 U. S. 369 (1987)), in good-time credits (*Wolff v. McDonnell*, 418 U. S. 539 (1974) (holding that due process protected inmates from arbitrary loss of statutory right to credits), and in freedom from involuntary transfer to a mental hospital (*Vitek v. Jones*, 445 U. S. 480 (1980)). Stated simply, "a State creates a protected liberty interest by placing substantive limitations on official discretion." *Olim v. Wakinekona*, 461 U. S. 238, 249 (1983).

Tennessee law provides such a substantive limitation on the discretion that a judicial commissioner may exercise in determining pretrial release by creating a presumption of a right to be released on one's own recognizance (ROR) unless and until the statutory factors are considered and the magistrate determines that there is some risk of flight. The default, under state law, is release on one's own recognizance and bail may be required "[a]bsent a showing that conditions on a release on recognizance will reasonably assure the appearance of the defendant as

required... ." T.C.A. 40-11-117 (absent this showing, the "magistrate ***shall*** ... require bail to be given." (emphasis added)) Thus, failure to "examine" a defendant to determine if the default should *not* apply, as required by T.C.A. 40-5-103, results in the presumption of ROR and the discretion of the magistrate is therefore limited to releasing the defendant on his or her own recognizance. [5] Nowhere does the Bail Reform Act allow a judicial commissioner to outright deny bail nor to defer the decision to another judicial officer. It most certainly does not allow a Court Clerk to set bail, as Henry County routinely does, if a magistrate is available (as they always are to determine probable cause) nor does it allow a police officer to write down the bail without oversight, as occurred with Mr. Fields.

Similarly, a defendant charged with domestic assault *may* be held for up to 12 hours *if and only if* the magistrate makes a determination that release on bail prior to 12 hours would result in a risk of injury to the alleged victim. T.C.A. 40-11-150(h)(1). As with the presumption of ROR release, absent the determination that release prior to 12 hours would result in some risk, the defendant is entitled to be released ROR or on reasonably calculated bail *before* 12 hours have expired. *Cf. Board of Pardons v. Allen*, 482 U. S. 369, 381 (1987) (parole granted unless certain standards met, even though the decision is "'necessarily subjective . . . and predictive'"). The relevant bail statutes also provide "specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow...", *Hewitt v Helms*, 459 U.S. 460, 471-472 (1983), in that they provide a presumptive liberty outcome that can only be overcome upon a specific finding of risk as to that

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[5] "No person can be committed to prison for any criminal matter until examination thereof is first had before some magistrate." T.C.A. 40-5-103.

individual. *Cf. Greenholtz v. Nebraska Penal Inmates*, 442 U. S. 1, 12 (1979) (statute providing that board "shall order" release unless one of four specified conditions is found); *Kentucky Dept. of Corrections v Thompson*, 490 U.S. 465, 463 (1989) (holding that substantive predicates existed to guide decionmaker where state procedures provided that a prison visitor "may be excluded" when officials find reasonable grounds to believe that the "visitor's presence in the institution would constitute a clear and probable danger..." but no liberty interest because the statute was not mandatory by using the word "may".)

Also, unlike *Gibson*, where the state supreme court had never declared the victims rights law to afford a victim any "rights", the Tennessee Supreme Court has declared that a person is "entitled to bail as a matter of right..." *State v Wallace*, 193 Tenn. 182, 186, 245 S.W.2d 192, 193 (1952).

B. The Procedures Attendant upon That Deprivation Were Constitutionally Insufficient.

Next, the Court must examine if the "the process ... satisfied the minimum requirements of the Due Process Clause." *Hewitt*, at 472. In *Gerstein v. Pugh*, 420 U. S. 103 (1975), the Court considered what process was due in the context of a challenge to the pretrial detainment of persons suspected of criminal acts. The Court held that States must "provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty," and that "this determination must be made by a judicial officer either before or promptly after arrest." *Id.*, at 125. The Supreme Court rejected the suggestion that an adversary proceeding, accompanied by traditional trial-type rights, was required, but instead permitted an informal proceeding designed to determine whether probable cause existed to believe that the detained person had committed a crime. *Id.*, at 119-123.

Even in the prison context, as compared to pretrial, the U.S. Supreme Court has held that "an informal, nonadversary evidentiary review is sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him. An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." *Hewitt*, at 476 (emphasis added).

At its core, the "protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Panetti v Quarterman*, 551 U.S. 930, 949 (2007). This means an "opportunity to be heard". *Id.* A State "'should have substantial leeway to determine what process best balances the various interests at stake" once it has met the "'basic requirements'" required by due process." But "these basic requirements include an opportunity to submit 'evidence and argument ... .'" *Id.*, at 949-50 (quoting *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) dealing with procedural due process in the context of a competency hearing).

The State of Tennessee has adopted legislation that comports with this fairness and notice requirement through the Bail Reform Act. T.C.A. 40-5-103 specifically mandates that no "person can be committed to prison for any criminal matter until examination thereof is first had before some magistrate." [6] An "examination" is an "investigation by a magistrate of a person who has been charged with crime and arrested, or of the facts and circumstances which are

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[6] Title 40 (Criminal Procedure), Chapter 5 (Magistrates and Judicial Commissioners), Part 1 (Examination Before Magistrates).

alleged to have attended the crime, in order to ascertain whether there is sufficient ground to hold him to bail for his trial by the proper court." Black's Law Dictionary (6th Ed.) A defendant arrested and held to answer for any bailable offense also is "entitled to be admitted to bail by the committing magistrate." That would be the magistrate who signs the mittimus committing the person to the custody of the sheriff.

In violation of that statute and of the procedural due process prong of the 14th Amendment, Henry County refuses to provide notice and a fair opportunity to be heard on the issue of eligibility for release on one's own recognizance (ROR), on the statutory factors to be considered in determining bail, and on whether one is a risk to a victim in a domestic assault charge. This is undisputed. Instead, in Henry County, the arresting officer telephones the clerk of court (who is not a magistrate, although judicial magistrates are on duty), reads the charged offense with nothing more, and receives a dollar amount of bail over the telephone. The defendant is *never* given the opportunity to plead his case why he should be released on his own recognizance or on any factors related to his likelihood to flee. Nor is he ever given notice of what factors can be considered before deciding on eligibility for ROR release or release on bail.

Because the defendant is never given notice of how his bail is to be set and is never given the opportunity to be heard on the question of pretrial release, and because his right to be admitted to bail is a fundamental liberty interest provided by the Tennessee Constitution, Tennessee statute, and the Tennessee Supreme Court, Henry County's procedure attendant to its systematic denial of bail to those charged with domestic assault and its systematic setting of bail based on the charged offense alone, is constitutionally deficient.

The Tennessee Bail Reform Act procedures not only afford an expectation that the Tennessee Supreme Court has declared a "right", but the procedures substantively limit the discretion of any magistrate considering bail and dictates the outcome by setting presumptions and default provisions. Because the Bail Reform Act provides for notice and an opportunity to be heard on the issue of pretrial release and because Henry County arbitrarily denies notice and an opportunity to be heard, Defendant has violated the procedural due process prong of the 14th Amendment.

CONCLUSION

For the reasons contained herein, the judgment below should be reversed and the case reinstated for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 5263 words (using WordPerfect Word Count), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Jerry Gonzalez

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered by the Court's Electronic Notice System to Jon A. York and Brandon O. Gibson, Attorneys for Defendant Henry County, TN, 106 Stonebridge Blvd, Jackson, TN 38305, on this the 9th day of March, 2012.

/s/ Jerry Gonzalez