April 2, 2021

Judge Chuck Cerny
Judge Geoffrey P. Emery
Judge Patricia Hall Long
Judge Andrew Jackson, VI
Judge Tony W. Stansberry
Magistrate Christopher Rowe
Magistrate Ray Jenkins
Magistrate Dustin Dunham
Magistrate Robert Cole
Magistrate Sharon Frankenberg
Judicial Clerk Esther L. Roberts
Knox County General Sessions Court
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Knoxville, TN 37902

Tom Spangler
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Knox County Commission
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Knoxville, TN372( )]TJ ( )Tj EMC /P <</MCID236 >>
a person's pretrial freedom does not depend on their access

- Representation by defense counsel, *see id.* at *13 ("Simply put, an arrestee has a right to representation at a bail hearing or at an initial appearance hearing that also constitutes a bail hearing.");

- An opportunity to present evidence and cross-examine the government's witnesses, *see id.* at *11;

- An inquiry into, and factual findings that address, the arrestee's ability to pay, *see id.* at *12;

- Meaningful consideration of "alternative conditions of release[,]" *id.*; and

- Findings made in writing or, "at a minimum," verbally on the record regarding the g(a)2(g(b)(n)l(a)1ty3(1 ta)1(i6(p1(rnmu)y002 Tc ib-1 o)2(t (mm61(l)5(ten)(mi2(ghin)2l(mm2(g

appearances do so electronically, with the arrestee remaining in jail and the magistrates appearing via Skype from the basement of the Knox County courthouse.[8]

A detained person charged with a misdemeanor will either appear before the magistrate through video conference from the jail or in person the following morning before a General Sessions Court judge.

All the hallmarks of a constitutionally adequate bail hearing are absent from the initial appearance and—except in unusual circumstances—bail is not reviewed at all:

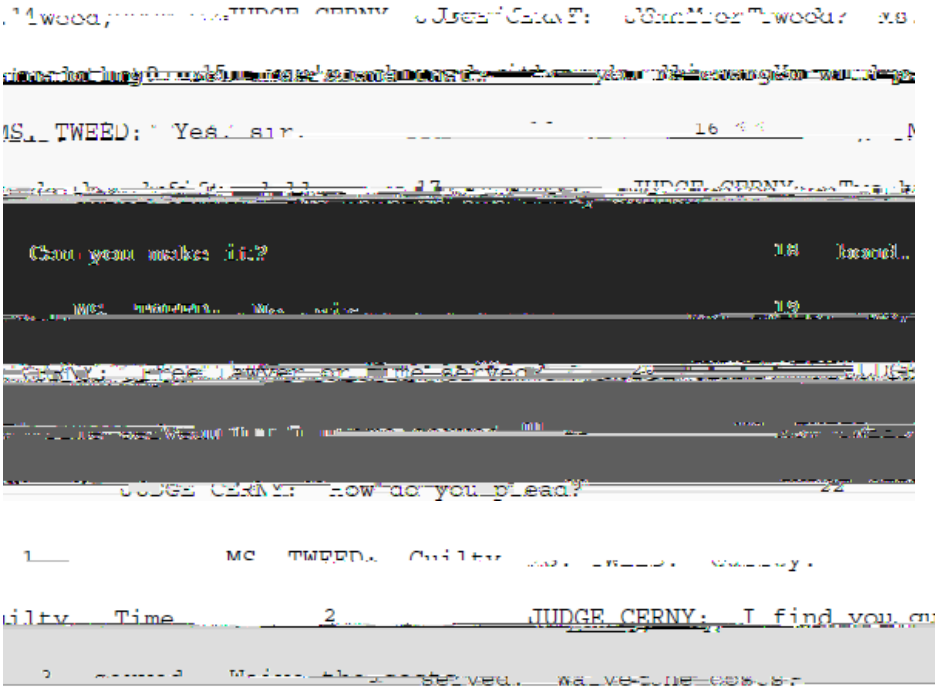
- The arrestee is not represented by counsel;
- There is no opportunity to present or confront evidence;
- No inquiry—or findings—are made about the arrestee's ability to pay money bail or the suitability of alternative conditions of release;
- Magistrates and the General Sessions Court judges do not satisfy a clear and convincing evidentiary standard when setting conditions of release; and
- Findings are not made in writing—or on the record—about why particular conditions of release are required or why alternative conditions are inadequate.

Misdemeanor defendants' initial appearances before the General Sessions Court Judges are particularly troubling. As a matter of practice, most General Sessions Judges do not review

with bail remaining as it was initially set, having no consideration given to their ability to pay or any alternative conditions of release.

Torres, 2020 WL 7706883, at *10.

Indeed, rather than evaluating a person's conditions of release, General Sessions Court judges routinely give misdemeanor defendants a choice between a public defender—and continued pretrial detention—or a guilty plea and time-served in jail. This violates the Sixth Amendment right to counsel that Judge Corker held is applicable to bail hearings. *Torres*, 2020 WL 7706883, at *13 ("Simply put, an arrestee has a right to representation at a bail hearing or at an initial appearance hearing that also constitutes a bail hearing."). The following exchange is typical:



Because of these practices, every year hundreds of people agree to uncounseled pleas simply to get out of jail:

"money bail has a negligible effect or, if anything, *increases* failures to appear."[10] A study conducted in Colorado found that, *regardless of the defendant's risk level*, "unsecured bonds offer the same likelihood of court appearance as do secured bonds."[11]

Nor does secured money bail make Knox County safer. Several studies demonstrate that even two or three days in pretrial detention increases the likelihood that person will commit additional crimes when released.[12] Over the long term, pretria(rs)1(o)2x]TJ 4s-1(f)-2(e7(mmi-2(t)3(i)(l)3(l

Detention on unaffordable money bail also increases the likelihood of conviction.[14] Studies

Amendment rights to a public trial, effective representation, and confrontation of witnesses. Though the COVID-19 pandemic has necessitated emergency use of video appearances for some court proceedings, General Sessions Magistrates were relying heavily on this technology prior to

V. Conclusion

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

MICHELLE TORRES, et al. Plaintiffs, vs. W. DOUGLAS COLLINS, et al. Defendants	)	2:20-CV-00026-DCLC

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiffs' Motion for a Preliminary Injunction [Doc. 5] and supporting memorandum [Doc. 26] claiming that Defendants' bail practices run afoul of the Fourteenth Amendment of the United States Constitution. Defendants have responded [Doc. 54] to which Plaintiffs have replied [Doc. 73, 84]. The parties have filed a joint stipulation of facts [Doc. 78] and agreed that an evidentiary hearing on the motion was not necessary and could be resolved on the pleadings. The matter is now ripe for adjudication.

This case involves the procedures Hamblen County, Tennessee, follows in setting bail for those charged with criminal offenses within its jurisdiction. Plaintiffs contend that these procedures, which do not include an individualized hearing, violate the Fourteenth Amendment of the Constitution and ask the Court to enter a preliminary injunction enjoining the sheriff from continuing to detain those for whom the minimum constitutional procedures have not been followed. Defendants contend its bail practices meet the constitutional minimums.

In determining whether to issue a preliminary injunction, the Court must consider four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;

(2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." Id. "When a party seeks a preliminary injunction on the basis of a potential constitutional violation," however, "'the likelihood of success on the merits often will be the determinative factor.'" City of Pontiac Retired Emps. Ass'n v. Schimmel, 751 F.3d 427, 430 (6th Cir. 2014)(order)(en banc)(per curiam)(citation omitted). In balancing these factors together and considering the constitutional issues involved, the Court finds the factor regarding Plaintiffs' likelihood of success on the merits determinative. In this case, the Court finds Plaintiffs will likely succeed on the merits of their constitutional claim and GRANTS Plaintiffs' Motion for a Preliminary Injunction as outlined herein.

I. FACTUAL BACKGROUND

The parties have filed a Joint Institu117ficn pw9.3ingo,1 Tw91gij.ac8c

arrest warrant [Doc. 78-1, ¶ 1]; Tenn. Code Ann. § 40-6-203.[1] Either the general sessions judge, Clerk West, or one of the judicial commissioners will set the initial bail and records that amount on the warrant at the time the warrant is sworn out by the officer. [Doc. 78-1, ¶¶ 2-3, 6]. Options for bail include release on recognizance, release on non-financial conditions, or release on secured financial conditions, commonly referred to as "money bail." Money bail is the release condition for the majority of those arrested in Hamblen County. Id. [at ¶ 5]. Although Tennessee law does not require it, for the majority of those arrested, secured financial conditions (aka "money bail") are set as bail. Id. [at ¶ 5]. This is done ex parte as the arrestee is not present. Id. [at ¶ 6].

Those who set the initial bail do not follow a schedule, rubric or other guidelines. Id. [at ¶ 7]. As a general matter, they also do not know whether the arrestee can afford the amount set. Id. [at ¶ 9]. Unless they have some experience with the arrestee, those who set bail typically will not know the arrestee's employment status, financial condition, family ties and relationships, or whether members of the community might vouch for the arrestee. Id. [at ¶ 11]. Notwithstanding that, it is not the intent of the general sessions judge for the arrestee to remain in jail when he sets the bail amount. Id. [at ¶ 13].

The arrestee has four options to satisfy secured financial conditions of release: personal surety, real estate, commercial surety company, or cash. Id. [at ¶ 14]. Arrestees who make the initial bail are released from custody. Those who do not make bail, remain detained in jail, until their initial appearance. Id. [at ¶ 19]. Initial appearances are held Mondays, Wednesdays, and

[1] Tenn R. Crim. P. 3 requires an Affidavit Of Complaint alleging that a person has committed an offense be "made on oath before a magistrate, a neutral and detached court clerk authorized by Rule 4 to make a probable cause determination." Tenn.R.Crim.P. 4 authorizes the issuance of an arrest warrant if the Affidavit of Complaint establishes "that there is probable cause to believe

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Fridays at 8:30 a.m., unless it falls on a holiday, the next initial appearance will be on the next scheduled date. [Id. at ¶ 20]. The general sessions judge or a judicial commissioner will preside over the initial appearances which are generally conducted by video conference between chambers and the jail and closed to the public. [Id. at ¶¶ 22, 24-25]. Unless they are held in open court, they are not on the record. [Id. at ¶ 26].

At the initial appearance, arrestees are advised of their charge, the initial amount of bail, and the scheduled date for the preliminary hearing, which must be set within 14 days of the arrest.[2] [Id. at ¶ 28]; [Doc. 78-1, ¶ 45]; Tenn.R.Crim.P. 5(c)(2)(A) and (d)(2). At this hearing, the arrestees may request the appointment of counsel. If so, they complete an affidavit of indigency, and the judicial officer appoints counsel if the arrestee qualifies. In addition to the affidavit of indigency, the presiding officer also has the arrest warrant, arrestee's rap sheet, criminal history, from Hamblen County, but does not have the arrestee's employment history, family ties and relationships in the community, or whether members of the community would vouch for the arrestee, unless the officer has some prior experience with the arrestee. [Id. at ¶¶ 29, 31]. The presiding officer does not make any findings on the record regarding the arrestee's ability to make a secured financial condition, the necessity for the initial bail, the necessity of detention, and adequacy of alternative conditions of release. [Id. at ¶ 33].

The general sessions judge does not revisit the initial bail amount at the hearing for the arrestee's initial appearance. [Id. at ¶ 35]. In fact, generally, the general sessions judge will not consider requests for bond modification at that time. [Id. at ¶ 35]. Notwithstanding that, sometimes

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[2] Prior to the filing of this lawsuit, the Clerk's office did not have an office procedure for informing the public defender's office of new appointments [Doc. 79, ¶ 10; Doc. 77, ¶6]. Typically, the public defender's office would call court staff to find out their new appointments each day [Doc. 77, ¶ 8]. However, public defenders now attend initial appearances on

THE COURT: I just want to make sure. This may be a co-defendant.

THE CLERK: Yeah, the (Off mic).

…

MS. TORRES: Yeah, I was in the car with someone.

THE COURT: Okay.

THE CLERK: We're going to look at April the 8th.

THE COURT: Are you going to make your bond?

MS. TORRES: No.

THE COURT: Can you make a bond?

MS. TORRES: I very seriously doubt it.

THE COURT: All right. We'll appoint the public defender to represent you. You just may have to deal with it.

THE CLERK: March the 4th at 1.

THE COURT: March

THE COURT: Okay. The bond is still where it …

[Doc. 71-7, pg. 13-14]. On February 24, 2020, a third-party organization paid her bail, and Ms. Torres was released from jail [Doc. 78-1, ¶ 84].

Ms. Johnson-Loveday is a 49-year-old woman, who was arrested on February 11, 2020 for Driving Under the Influence, second offense, Driving on a Revoked License, and Violation of Implied Consent [Doc. 78-1, ¶¶ 86-87]. She was held at the Hamblen County Jail on $6,000 bail, with an additional requirement of an alcohol monitoring bracelet [Doc. 78-1, ¶ 88]. Ms. Johnson-Loveday was unable to pay her bail and bracelet fee [Doc. 78-1, ¶ 89]. Her initial appearance was held on February 14, 2020 before a judicial commissioner via video conference with no record of this proceeding [Doc. 78-1, ¶ 90]. At the hearing, she was found indigent and appointed counsel [Doc. 78-1, ¶ 90]. Her preliminary hearing was set for March 3, 2020 [Doc. 78-1, ¶ 91]. On February 25, 2020, a third-party organization paid her bail and bracelet fee, and Ms. Johnson-Loveday was released from jail [Doc. 78-1, ¶ 92].

Ms. Cameron is a 36-year old woman, who was arrested on February 15, 2020 on Schedule II, III, and IV drug violations, Possession Of Drug Paraphernalia, and Theft [Doc. 78-1, ¶ 94]. Her bail was set at $32,000 [Doc. 78-1, ¶¶ 94-95]. She was unable to pay her bail [Doc. 78-1, ¶ 96]. Her initial appearance was held on February 17, 2020 before Judge Collins [Doc. 78-1, ¶ 96-97]. At the hearing, she was found indigent and appointed counsel [Doc. 78-1, ¶ 97]. The following colloquy then occurred

THE COURT: Do you understand that's what they've charged you with?

MS. CAMERON: Yes

THE COURT: Okay. That's a $2,000 bond.

MS. CAMERON: And I…

II. ANALYSIS

A. Introduction

Plaintiffs allege that Defendants "routinely impose money bail without any consideration of or findings about an individual's financial circumstances," which results in wealth-based detention of indigent individuals. [Doc. 26, pg. 13]. Plaintiffs also allege that Defendants deny arrestees any opportunity to timely contest their bond [Doc. 26, pg. 2]. As a result, individuals are detained for days or weeks before given the opportunity to present an argument for a lowered bail amount. Plaintiffs argue that Defendants violate both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Plaintiffs also claim that "Defendants violate individuals' Sixth Amendment rights by failing to provide counsel at initial appearance." [Doc. 26, pg. 11]. They request the Court "order Defendant Garnigan [Sheriff of Hamblen County] to release Plaintiffs unless they are provided constitutionally adequate procedures." [Doc. 26, pg. 39]. Defendants oppose the motion, arguing that Defendants' procedures are constitutional, and that any injunction would excessively burden Defendants. They state that "Plaintiffs are essentially requesting an overhaul of the entire criminal system." [Doc. 54, pg. 5].

As an initial matter, where an individual is arrested without a warrant, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." Gerstein v. Pugh, 420 U.S. 103, 113-14, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). "Once that suspect is in custody, however, 'the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.'" Cox v. City of Jackson, Tennessee, 811 F. App'x 284, 286 (6th Cir. 2020)(quoting Gerstein, 420 U.S. at 114). The Sixth Circuit noted that at this stage "whatever procedure a State adopts, 'it must provide a fair and

(5th Cir. 1978). This Court also does not find the pleadings require an analysis under the Eighth Amendment of the United States Constitution. Plaintiffs did not raise an Eighth Amendment claim and, in this case, Plaintiffs challenge "not the amount and conditions of bail per se, but the process by which those terms are set, which [they allege]…invidiously discriminates against the indigent." Walker, 901 F.3d at 1259.[3]

B. Equal Protection Challenge to Hamblen County's bail setting practice

Plaintiffs allege that Hamblen County's bail setting practice violates the Fourteenth Amendment's Equal Protection Clause. U.S. Const. amend. XIV, sec. 1. Specifically, Plaintiffs claim that Hamblen County detained them solely as a result of their indigency, which they claim violates the principles established in Bearden. For the reasons that follow, this Court does not agree that Defendants detained Plaintiffs based solely on their inability to pay bail nor does it find Bearden controlling on these facts.

At the outset, "[t]o state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" Ctr. for Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365, 379 (6th Cir. 2011)(quoting Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich., 470 F. 3d 286, 299 (6th Cir. 2006)). The Court must consider whether Hamblen County's bail practices treat Plaintiffs disparately as compared to similarly situated individuals.

In this case, Plaintiffs contend Hamblen County sets bail in a way that results in wealth-

[3] This Court assumes the Fourteenth Amendment incorporates the bail clause of the Eighth Amendment making it applicable to the states and therefore to Defendants in this case. See Baker v. McCollan, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2694 n. 3, 61 L.Ed.2d 433 (1979); Schilb v. Kuebel, 404 U.S. 357, 365, 92 S.Ct. 479, 484, 30 L.Ed.2d 502 (1971).

based detention. To be sure, a government can run afoul of the Fourteenth Amendment when making wealth-based distinctions. For example, in *Griffin v. Illinois*, 351 U.S. 12 (1956), the Supreme Court held that Illinois violated the Equal Protection Clause by not providing trial transcripts to indigent criminal defendants who needed them to file their appeal. 351 U.S. at 13. In *Williams v. Illinois*, 399 U.S. 235 (1970), the Supreme Court examined a state practice of continuing to imprison defendants who had not paid fines and court costs regardless of whether that imprisonment exceeded the maximum period of incarceration for the underlying criminal offense. It found that practice to constitute "impermissible discrimination that rests on the ability to pay." Id. at 241. It struck down that practice, holding that a court may not "subject a certain class of convicted [indigent] defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." Id. at 242. But in *Williams*, the Supreme Court recognized that "an indigent … may be imprisoned for a longer time than a non-indigent convicted of the same offense" and that, in and of itself, did not violate the Equal Protection Clause. Id. at 243. In other words, the Supreme Court held that the Constitution does not require that "two persons convicted of the same offense receive identical sentences" but it does require the statutory ceiling "be the same for all defendants irrespective of their economic status." Id. at 243-244.

Likewise, the Supreme Court found unconstitutional a state's practice of incarcerating indigent defendants who could not pay their fines accrued from traffic offenses. *Tate v. Short*, 401 U.S. 395, 398 (1971). It found that the state was subjecting the defendants "to imprisonment solely because of [their] indigency." Id. And, finally, in *Bearden*, the Supreme Court refused to permit a state to revoke probation of an indigent probationer based solely on a non-willful failure to pay a fine or restitution.

In this case, Plaintiffs have not presented any evidence that Hamblen County's bail

practices are discriminatory or result in the disparate treatment of the indigent. The parties

"custom and practice [that] result[s] in detainment solely due to a person's indigency because the financial conditions for release [were] based on predetermined amounts beyond a person's ability to pay and without any 'meaningful consideration of other possible alternatives.'" O'Donnell, 892 F.3d at 161 (citations omitted). The court found that the only difference between individuals with the same bail amounts was their ability to pay. Thus, those who could pay were released while those who could not pay were not released.

The facts in O'Donnell are not the facts here. In this case, unlike in O'Donnell, there is no evidence to suggest that Hamblen County sets the same bail amount for the same charge for any two arrestees, especially where the individual setting bail has personal knowledge of an arrestee. Moreover, the record in O'Donnell established that Harris County's practices evinced a "discriminatory purpose" which was evidenced by "numerous, sufficiently supported factual findings." Id. The parties stipulated here that it was not the judge's intention that bail would be unaffordable, and the defendant remain in jail. [78-1, at ¶ 13]. Indeed, unlike in O'Donnell, the record in this case does not establish that Hamblen County is detaining individuals based only on their indigency. In addition to the detention of the indigent, also detained are those who are not indigent and still cannot afford bail. For example, if two arrestees are charged with the same violent crime and receive the same bail amount, it is possible that neither could afford to pay bail even if one was not indigent.[4] Finding no discrimination based on wealth or disparate treatment of similarly situated individuals under the facts presented, the Court finds no violation of the Equal Protection Clause. The Court will now turn to the issue of Plaintiffs' due process claim.

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[4] "Any government benefit or dispensation can be framed in artificially narrow fashion to transform a diminishment into total deprivation. If such narrowing is permissible, then any wealth-based equal protection claim becomes valid so long as the plaintiff frames his interest in a cramped enough style." Walker v. City of Calhoun, Ga., 901 F.3d 1245, 1264 (11th Cir. 2018), cert. denied sub nom. Walker v. City of Calhoun, Ga., 139 S. Ct. 1446, 203 L. Ed. 2d 681 (2019).

C. Due Process Challenge to Hamblen County's bail practices

Plaintiffs allege Defendants violated their right to due process under the Fourteenth Amendment of the United States Constitution. Plaintiffs correctly contend that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Foucha v. Louisiana, 504 U.S. 71, 80 (1992). In that same way, fairness of the relations between the state and a criminal defendant is a Due Process Clause issue. Bearden, 461 U.S. at 665. The Due Process Clause provides for both substantive due process protections and procedural due process protections. Plaintiffs allege Hamblen County's bail practices violate both.

1. Substantive Due Process

"[T]he Fourteenth Amendment 'forbids the government to infringe "fundamental" liberty interests..., no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). "[T]he Due Process Clause bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Foucha, 504 U.S. at 80 (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)). This guarantee, commonly referred to as substantive due process, requires the government action that infringes upon a fundamental right to be narrowly tailored to serve a compelling governmental interest. Glucksberg, 521 U.S. at 721 (citing Reno, 507 U.S. at 302).

In United States v. Salerno, the Supreme Court noted the "general rule … that the government may not detain a person prior to a judgment of guilt in a criminal trial" unless the detention satisfies a heightened standard of scrutiny. It noted the government's interest in that case to be "both legitimate and compelling." United States v. Salerno, 481 U.S. 739, 750 (citing

De Veau v. Braisted, 363 U.S. 144, 155 (1960)). "On the other side of the scale, of course, is the individual's strong interest in liberty."

have personal knowledge of the arrestee, but the Court has no evidence as to how frequently repeat offenders are arrested such that they would be familiar to the person setting bail. It is also unknown whether the person setting bail has any personal knowledge of Plaintiffs in this case. Assuming the judge hears bail modification requests at the Initial appearance hearings, the transcripts from those hearings that have been provided to the Court demonstrate a complete lack of any meaningful individualized hearing.

For example, Plaintiff Torres was arrested on February 15, 2020 and had her Initial appearance hearing on February 17, 2020. She was charged with Manufacturing, Sale and Delivery of Schedule II Methamphetamine, and Schedule VI and Possession of Schedule II, III, and Possession of Drug Paraphernalia. Her initial bail was set at $75,000. The court found her indigent and appointed her counsel. [Id. at ¶¶ 77-85]. Based on the transcript, the following colloquy occurred between the general sessions judge and Torres:

THE COURT: Are you going to make your bond?

MS. TORRES: No.

THE COURT: Can you make bond?

MS. TORRES: I very seriously doubt it.

THE COURT: All right. We'll appoint the public defender to represent you. You just may have to deal with it.

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MS. TORRES Is there any way I can get it lowered—my bond lowered so I can at least try?

THE COURT: But you told me you couldn't make the bond.

MS. TORRES: I mean I can try. That's all I can do.

THE COURT: Does she get another…

MS. TORRES: Yes, I have a case. I just got out.

THE COURT: I'm going to leave your bond where it is. You got another case another drug case pending?

MS. TORRES: Yes. And I just got out.

THE COURT: Okay. The bond is still where it…

THE COURT: It will be $32,000 for both cases. I'll appoint a public defender to represent you. And we'll set your cases for hearing on--

[71-7, at pg. 6-8].

There is no indication from this stipulated record that anyone was pursuing a particular interest in protecting the public or ensuring a criminal defendant's appearance at trial when they set bail initially or at the initial appearance hearing. The District Attorney was not called upon to raise any concerns she had about the need for the bond to be set at that amount. Although there is a generally recognized interest in protecting the public and ensuring court appearances, those interests are only a starting point and not a substitute for an actual inquiry and weighing of interests and factors in addressing bail issues. Moreover, substantive due process requires that the court must restrict its abridgment of

At this point, the general sessions judge knows the arrestee is indigent and has appointed an attorney. He conducts no individualized hearing on the arrestee's bail conditions and instead leaves them detained under the same bail conditions that were set ex parte until he recalls the case for a preliminary hearing. The record is silent on whether he ever addressed bail at that point. This refusal to address bail violates Plaintiffs' substantive due process rights. "[T]he court imposing detention upon an indigent defendant must expressly consider and make findings of fact on the record regarding the defendant's ability to pay the bail amount imposed and whether non-monetary alternatives could serve the same purposes as bail." Hill v. Hall, No. 3:19-CV-00452, 2019 WL 4928915, at *13 (M.D. Tenn. Oct. 7, 2019)(citing numerous cases holding that the Due Process requires an inquiry into the arrestee's ability to pay and the consideration of alternative conditions of release).

There simply is nothing to indicate that Defendants have narrowly tailored the option of pretrial detention in any applicable way. Nor has the government demonstrated how its interest is compelling vis-à-vis each individual Plaintiff. Rather than conducting an individualized hearing where the court would consider the various interests of both the state and the individual, the court simply leap frogs over the bail hearing and schedules a preliminary hearing that very well may be 14 days later. The effect of this is to leave an arrestee in jail with bail remaining as it was initially set, having no consideration given to their ability to pay or any alternative conditions of release.[7] And this is true for all arrestees, regardless of their ability to pay.

For purposes of substantive due process, "the question is whether the trial court's order of

[7] In fact, the Eighth Amendment prohibits "excessive bail" and that term means "[b]ail set at a figure higher than an amount reasonably calculated to" provide "adequate assurance that he will stand trial and submit to sentence if found guilty." Stack v. Boyle, 342 U.S. 1, 5 (1951). A court cannot determine whether a particular bail is excessive without some individualized considerations.

determine whether a protected property or liberty interest exists and then determine what procedures are required to protect that interest." Johnston-Taylor v. Gannon, 907 F.3d 1577, 1581 (6th Cir. 1990); see also Warren, 411 F.3d at 708 ("Only after a plaintiff has met the burden of demonstrating that he possessed a protected property or liberty interest and was deprived of that interest will the court consider whether the process provided the plaintiff in conjunction with the deprivation, or lack thereof, violated his rights to due process.")(citing Hamilton v. Myers, 281 F.3d 520, 529 (6th Cir. 2002)).

As previously stated, Plaintiffs allege Defendants failed to provide adequate procedural safeguards before depriving them of their fundamental right to liberty by way of pretrial detention. "The liberty interest at stake is actual liberty—the right of a person who has not been convicted of a crime to be free from detention prior to trial. There is no dispute that this is a fundamental liberty interest protected by the Due Process clause, for purposes of both procedural and substantive due process." Hill, 2019 WL 4928915, at *9 (citing United States v. Watson, 475 F. App'x 598, 601 (6th Cir. 2012) ("Pretrial detention violates the Fifth Amendment when it amounts to 'punishment of the detainee.'') (quoting Bell v. Wolfish, 441 U.S. 520,535 (1979)). Plaintiffs are deprived of that fundamental right to liberty when they are confined to jail prior to their criminal trial without a hearing that takes into account their individualized circumstances.

This leads the Court to the next inquiry and that is whether the procedures implemented by Hamblen County are constitutionally sufficient. A review of the stipulations reveal that the process followed in Hamblen County fails the minimum constitutional standards that must be followed in making bail determinations – "an individualized hearing of which [the arrestee] had adequate

hearing allowing the introduction and discussion of competing pretrial detention issues, a court cannot satisfy procedural due process and Defendants do so in this case.

The Sixth Circuit has also addressed Tennessee bail procedures. Fields v. Henry County, Tenn, 701 F.3d 180, 185 (6th Cir. 2012). In Fields, the defendant was charged with domestic violence which required, under certain circumstances, a 12-hour period of detention, or "cooling off" period. The county used a bail schedule to set the amount of the money bail in his case. Fields did not claim he could not afford bail or that there was "any inherent problem with the dollar amount set in his case." Id. at 184. He also did not claim it was excessive as "based on the particular

held that "the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." Rothgery v. Gillespie Cty., 554 U.S. 191, 194 (2008); See also, Michigan v. Jackson, 475 U.S. 625, 629 (1986); Brewer v. Williams, 430 U.S. 387, 398-399 (1977). Restrictions are imposed on one's liberty at bail hearings.

In Hamblen County, bail is set when the arrest warrant is issued. [Doc. 78-1, at ¶ 2]. The first time arrestees go before a judge or judicial commissioner after arrest is at the initial appearance hearing, which generally is within 48 hours of arrest. [Id. at ¶¶ 18-21]. At this hearing, based upon the transcripts provided by Plaintiffs, either the judge or judicial commissioner informs the arrestee of the pending charge, considers the need for appointed counsel, and asks if the arrestee can make bail (in cases where the arrestee has not yet made bail).[11] To the extent this initial appearance serves also as a bail hearing, which from the record it does, the Sixth Amendment right to counsel is implicated. Rothgery v. Gillespie Cty., Tex., 554 U.S. 191, 194 (2008)("This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty").

The Hamblen County court appointed counsel at the initial appearance/bail hearing for each Plaintiff except Plaintiff Johnson-Lovejoy. [Doc. 78-1, at ¶¶ 81, 97, 110]. The parties' stipulate that it is customary for the Hamblen County court to examine an arrestee's affidavit of indigency, appoint counsel, and have counsel present at the initial appearance hearing when bail is discussed. Id. at 36. Where that occurs, there is no Sixth Amendment violation. Regarding

[11] Plaintiffs have only provided the transcripts of the initial appearance hearings involving Plaintiff Torres and Plaintiff Cannon. The parties have stipulated that the initial appearance hearings generally follow the same pattern. [Doc. 78-1, at ¶ 36]

Plaintiff Johnson-Lovejoy, ¶ 90 of the parties' Joint Stipulations indicates that the Hamblen County court found her indigent for the purposes of appointing counsel but she "was not represented by counsel during the proceeding." This is a violation of the Sixth Amendment. Simply put, an arrestee has a right to representation at a bail hearing or at an initial appearance hearing that also constitutes a bail hearing.

E. Security Requirement

Fed.R.Civ.P. 65(c) typically requires the moving party to post security to protect the other party, if the Court later finds that it was wrongfully enjoined. Defendants request that the Court impose the security requirement to offset the economic hardship of the imposed injunction, should the Court later find that they were wrongfully enjoined [Doc. 54, pgs. 24-25]. However, a court may waive the security at its discretion. *See Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 714 F.3d 424, 431 (6th Cir. 2013). As the Plaintiffs are indigent, the Court declines to impose a bond in this case.

III. CONCLUSION

Plaintiffs' Motion for Preliminary Injunction is **GRANTED**. Because all Plaintiffs in the case have been released on bail, this Preliminary Injunction is prospective only. Further this order is limited in scope. It does not pertain to criminal defendants who are charged with a capital offense, or who are detained as a result of indictment, or who are detained on probation violations, or whose release has otherwise been revoked after a hearing. Accordingly, pursuant to Fed.R.Civ.P. 65, it is **ORDERED** that Defendant Esco Jarnigan, Sheriff of Hamblen County, is enjoined from detaining any criminal defendant arrested on an arrest warrant who, after having bail set in an *ex parte* fashion by the Defendants authorized by law to set bail for cases pending in Hamblen County general sessions court, is being detained without having had an individualized

hearing within a reasonable period of time consistent with the Due Process Clause requirements as outlined in this Order.

SO ORDERED:

s/ Clifton L. Corker
United States District Judge

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