COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2020-SC-0107



**DAVID JONES, individually and on behalf of all others similarly situated,** **APPELLANT**

**v.**



**CLARK COUNTY, KENTUCKY and FRANK DOYLE, individually,** **APPELLEES**

APPEAL FROM COURT OF APPEALS OF KENTUCKY
ACTION NO. 2018-CA-001710-MR

# APPELLANT'S BRIEF

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2020, the foregoing was mailed via U.S. Mail to Jeffrey C. Mando, Adams, Stepner, Woltermann & Dusing, 40 W. Pike St., Covington, KY 41011; Hon. Jean C. Logue, Governor James Clark Judicial Center, 17 Cleveland Ave., Winchester, KY 40392; Daniel Cameron, Attorney General of Kentucky, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601; and Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

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## INTRODUCTION

The government can't punish people unless and until they are found guilty of the crimes they are alleged to have committed. Yet, Kentucky counties have for years routinely kept the money they confiscate from persons on admission to their jails -- allegedly to offset the costs of their confinement -- ***after*** the charges against such persons have been dismissed or they have been acquitted. This practice violates the plain language of KRS 441.265, and is an affront to the bedrock American principle that a citizen is presumed innocent until proven guilty.

## STATEMENT CONCERNING ORAL ARGUMENT

Plaintiff requests oral argument. The widespread practice of confiscating money in the possession of pretrial detainees to offset the costs of their confinement prior to any adjudication of their guilt was previously made the subject of a motion for discretionary review to this Court in *Cole, et al. v. Warren County, Kentucky, et al.*, 495 S.W.3d 712 (Ky. App. 2015), which was denied. But this case is the first before this Court to involve a pretrial detainee whose money was *kept* by the jail *after* the charges against him were dismissed. Fundamental liberties and the interpretation of a Kentucky statute are in issue in this appeal. Oral argument will assist the Court in clarifying the parties' positions, the relevant facts, and the principles at stake.

## STATEMENT OF POINTS AND AUTHORITIES

## STATEMENT OF THE CASE

The issue before the Court rests on undisputed facts. Plaintiff/Appellant David Jones was arrested and admitted to the Clark County Detention Center ("the Jail") in Winchester, Kentucky on October 26, 2013. On admission to the Jail, in keeping with a policy applied to all pretrial detainees, the Jail charged Mr. Jones a $35 booking fee, $10 for his first day's room and board, and $5 for a hygiene kit. The Jail then assessed Mr. Jones room and board charges for every day of the next 14 months he spent there; in December 2014, Mr. Jones' bond was reduced to an amount a relative could afford to post on his behalf and he was released. R. Vol. I, *Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibit A*, Little depo., pp. 7-8.

Depending on how much cash a pretrial detainee was carrying at the time of his admission to the Jail, the Jail would confiscate a certain amount and assign it to the costs of his confinement. *Id.*, pp. 8-11. The Jail would also deduct portions of subsequent deposits friends or family made to pretrial detainees' accounts, again, allegedly to offset the costs of confinement. *Id.*, pp. 13-20. The "Rec Payment" entries on Mr. Jones' Resident Account Statement show the amounts the Jail confiscated, either from Mr. Jones personally or from deposits made on his behalf, for the costs of his confinement. *Id.*, pp. 20; R. Vol. I, *Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibit B*, Resident Account Statement. By the time Mr. Jones was released from the Jail, it had confiscated $256.44 in his possession or deposited on his behalf.

On April 2, 2015, all the charges for which Mr. Jones had been incarcerated were unconditionally dismissed in their entirety.[1] But the Jail kept the $256.44 it had already

[1] Plaintiff was arrested after his IP address was identified as the potential download source of a 39-second video of child pornography. Everyone knows that IP addresses can be "hacked" for

confiscated from Mr. Jones and sent him a written demand for $4,000.00 more, allegedly for the remaining balance of the costs of his confinement. Mr. Jones paid $20.00 toward this asserted debt before contacting counsel, who advised that he pay no more.

Defendants continue to violate KRS 441.265 by keeping a $45 booking fee assessed against all pretrial detainees, regardless of their innocence; but at the present time, if the charges against an arrestee are dismissed, the arrestee is returned all the other money that was confiscated by Defendants to cover the detainee's costs of confinement. R. Vol. I, *Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibit C*, Doyle depo., pp. 8, 10-11, 19-20.

After discovery, the Circuit Court below summarily dismissed Plaintiff's claims in their entirety because Plaintiff was a "prisoner" as that term is used in KRS 441.265, and because it believed that the federal courts had found no constitutional violation in the practice made the subject of his Complaint. *Tab A*. On appeal, a divided panel of the Court of Appeals affirmed the summary dismissal of Mr. Jones' claims, relying on precedent that is clearly distinguishable from this case. In a spirited dissent, the Hon. Sara W. Combs rejected the majority's reasoning, recognized that this was a case of first impression, and implored this Court "to rectify this glaringly unjust state of affairs." *Tab B*, at 19.

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all sorts of illicit purposes, and the warrant for the search of Plaintiff's premises expressly conceded that he was not a "suspect." He was nonetheless arrested and incarcerated until his public defender was granted the funds necessary to hire a computer expert, who thoroughly examined the electronic devices seized at Plaintiff's residence and found no evidence of any wrongdoing. It turned out that Plaintiff's expert merely confirmed what the authorities themselves had already learned a year prior, but did not disclose to Plaintiff or his public defender. Plaintiff filed an action for malicious prosecution in federal court arising from his arrest, incarceration, and prosecution. The summary dismissal of that case has now been reversed, and is proceeding toward a trial scheduled to begin on January 4, 2021.

## ARGUMENT

### I. The Summary Judgment Standard.

> [T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor. [S]uch a judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.

*Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991); *see also Welch v. American Pub. Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999) (reiterating "impossibility" standard). However, when the interpretation of a statute is involved, this Court reviews the decision below *de novo*. *Artrip v. Noe*, 311 S.W.3d 229, 231 (Ky. 2010).

All arguments in this brief were made and preserved in the Circuit Court in Plaintiff's Response to Defendants' Motion for Summary Judgment. R. Vol. I, *Plaintiff's Response to Defendants' Motion for Summary Judgment.* The arguments were repeated in Mr. Jones' Brief to the Court of Appeals, and were therefore properly preserved for this Court's consideration.

### II. Confiscating *and Keeping* the Money of Innocent People to Offset the Costs of Their Confinement Violates the Fundamentally American Presumption of Innocence.

The presumption of innocence has been called "a general principle of our political morality,"[2] "a guardian angel,"[3] the "cornerstone of Anglo-Saxon justice,"[4] "a touchstone of American criminal jurisprudence,"[5] "the golden thread that runs throughout the criminal

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[2] William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 338 (1995) (quoting William Twining, *Rethinking Evidence: Exploratory Essays* 208 (1990)).

[3] Laufer, *supra*, at 338 (quoting James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 553 (1898)).

[4] Laufer, *supra*, at 338 (quoting Henry J. Abraham, *The Judicial Process* 96 (1993)).

[5] Laufer, *supra*, at 338 (quoting *People v. Layhew*, 548 N.E.2d 25, 27 (Ill. App. Ct. 1989)).

law,"[6] and the "focal point of any concept of due process."[7] This basic principle predates our nation's Founding, appearing in English common law, in writings from antiquity and even in the Old Testament.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the *foundation* of the administration of our criminal law." *Coffin v. U.S.*, 156 U.S. 432, 453 (1895) (emphasis added). Persons arrested for a criminal offense enjoy a presumption of innocence protecting their life, liberty, *and property*, until (a) they plead guilty to the offense or (b) their criminal culpability is proved beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 362 (1970); *Brinegar v. U.S.*, 338 U.S. 160, 174 (1949). In *Winship*, the Supreme Court declared the presumption of innocence a "bedrock" constitutional principle that must be observed throughout the American system of criminal justice. 397 U.S. at 363. Absent a plea or an adjudication of guilt, a person is presumed innocent and owes the state *nothing*.

This principle was recently reaffirmed by the United States Supreme Court. In *Nelson v. Colorado*, 581 U.S. ___, 137 S.Ct. 1249 (2017), the Supreme Court held that the state "may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions." *Id.*, at 1256. The Supreme Court went on to hold that Colorado had to return money it had confiscated from a prisoner after his conviction was vacated on appeal and the state elected to not retry the charges, saying: "Absent conviction of a crime, one is presumed innocent." *Id.*, at 1252.

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[6] Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 Hastings L. J. 457, 457 (1988-1989) (citations omitted) (quoting Rupert Cross, *The Golden Thread of the English Criminal Law: The Burden of Proof* 2 (1976)).

[7] Sundby, *supra*, at 457 (quoting Sandra Hertzberg & Carmela Zammuto, *The Protection of Human Rights in the Criminal Process Under International Instruments and National Constitutions* 16 (1981)).

For these reasons, the practices in issue in this appeal have never passed constitutional muster. Time and again, federal courts have held that monies confiscated from arrestees during their incarceration must be returned in the event of their innocence. *See Mickelson v. County of Ramsey*, 2014 WL 4232284, *7 (D. Minn. Aug. 26, 2014); *Barnes v. Brown County*, 2013 WL 1314015, *3-4 (E.D. Wis. Mar. 30, 2013); *Berry v. Lucas County Board of Commissioners*, 2010 WL 480981, *2 (N.D. Ohio, Feb. 4, 2010); *Telink, Inc. v. U.S.*, 24 F.3d 42, 47 (9th Cir. 1994) (wrongly-paid fines should be automatically refunded); *DeCecco v. U.S.*, 485 F.2d 372, 373-74 (1st Cir. 1973) (fine refunded after conviction reversed); *U.S. v. Rothstein,* 187 F. 268, 269 (7th Cir. 1911) (reversal of conviction warrants restitution of fine paid). And it makes no difference whether such monies are characterized as "fines," "fees," "costs," "surcharges," "assessments," or "restitution." *U.S. v. U.S. Coin and Currency*, 401 U.S. 715, 718 (1971).

## III. The Decisions Below Violate the Plain Language of KRS 441.265.

### A. KRS 441.265 allows a county to keep only the money of a *sentenced* prisoner.

There is only one Kentucky statute that speaks to the issue before the Court, and it makes clear that a person has no obligation to reimburse a county jail their costs of confinement unless they are convicted of a crime and ***sentenced***. When it comes to the payment of jail fees, the presumption of innocence in Kentucky is safeguarded by KRS 441.265, which unambiguously provides in relevant part:

> (1) ***A prisoner in a county jail shall be required by the sentencing court to reimburse the county for expenses incurred by reason of the prisoner's confinement as set out in this section, except for good cause shown.***
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> (2) (a) ***The jailer may adopt, with the approval of the county's governing body, a prisoner fee and expense reimbursement policy,*** which

may include, but not be limited to, the following:

1. An administrative processing or booking fee;
2. A per diem for room and board of not more than fifty dollars ($50) per day or the actual per diem cost, whichever is less, for the entire period of time the prisoner is confined to the jail;
3. Actual charges for medical and dental treatment; and
4. Reimbursement for county property damaged or any injury caused by the prisoner while confined to the jail.

(b) Rates charged may be adjusted in accordance with the fee and expense reimbursement policy based upon the ability of the prisoner confined to the jail to pay, giving consideration to any legal obligation of the prisoner to support a spouse, minor children, or other dependents. The prisoner's interest in any jointly owned property and the income, assets, earnings, or other property owned by the prisoner's spouse or family shall not be used to determine a prisoner's ability to pay.

(3) ***The jailer or his designee may bill and attempt to collect any amount owed which remains unpaid.*** The governing body of the county may, upon the advice of the jailer, contract with one (1) or more public agencies or private vendors to perform this billing and collection. Within twelve (12) months after the date of the prisoner's release from confinement, the county attorney, jailer, or the jailer's designee, may file a civil action to seek reimbursement from that prisoner for any amount owed which remains unpaid.

* * *

(5) ***The governing body of the county may require a prisoner who is confined in the county jail to pay a reasonable fee, not exceeding actual cost, for any medical treatment or service received by the prisoner.*** However, no prisoner confined in the jail shall be denied any necessary medical care because of inability to pay.

(6) ***Payment of any required fees may be automatically deducted from the prisoner's property or canteen account.*** If the prisoner has no funds in his account, a deduction may be made creating a negative balance. If funds become available or if the prisoner reenters the jail at a later date, the fees may be deducted from the prisoner's property or canteen account.

(Emphasis added).

The Circuit Court concluded that a "prisoner" under the statute could include detainees like Mr. Jones who were incarcerated awaiting trial, and as to whom no adjudication of guilt or innocence had been made. *Tab A,* p. 3. Mr. Jones is willing to

concede, for purposes of argument, that monies of pretrial detainees can be confiscated or deducted from their inmate accounts while awaiting an adjudication of their guilt. But that does not mean that the monies of innocent persons like Mr. Jones can be ***kept.***

What is key about KRS 441.265 is not its use of the term "prisoner," on which the Circuit Court focused below, but the obvious condition precedent of an order of ***a sentencing court*** before a prisoner's confiscated money can be ***kept.*** As the Circuit Court acknowledged, "[c]ourts are required to give effect to all statements of the legislature and may not presume any word used in a statute to be meaningless." *Tab A,* p. 3, citing *Pearce v. Univ. of Louisville*, 448 S.W.3d 746 (Ky. 2014). But in its decision below, the Circuit Court effectively ruled that the statute's reference to "a sentencing court" *was* meaningless in light of paragraphs 2, 3, and 6 of the statute. There is nothing in paragraphs 2 or 3 of the statute that render meaningless the primacy of the sentencing court afforded in paragraph 1, and the reference to "required fees" in paragraph 6 can only mean those fees required to be reimbursed by the sentencing court in paragraph 1. The statute plainly attaches no reimbursement obligation to anyone other than a *sentenced prisoner*, and grants no right to counties, except for medical expenses, to seize and keep cash in the possession of innocent persons like Mr. Jones who ultimately were not "sentenced" to anything.

KRS 441.265(1) further permits the sentencing court, for good cause shown, to waive reimbursement of costs of confinement entirely. In *Jones v. Commonwealth*, 382 S.W.3d 22, 27 (Ky. 2011), this Court made clear that an action of the sentencing court must precede any action taken by a county under KRS 441.265, saying:

> KRS 441.265 has its own provisions for accommodating the needs of impoverished inmates. The judge may decline to impose the fee 'for good cause shown,' which, in some circumstances, could include the inability to pay. Plus, in setting the rate to be charged, the jailer is directed to consider

> 'the ability of the prisoner confined to the jail to pay, giving consideration to any legal obligation of the prisoner to support a spouse, minor children, or other dependents.' KRS 441.265(2)(b); see also KRS 534.045(2) (noting with regard to a similar fee for misdemeanors, "In determining whether a reimbursement fee as described in subsection (1) of this section is to be assessed, and in establishing the amount of the fee, the court shall consider evidence relevant to the prisoner's ability to pay the fee . . . .').

Surely, if a judge declined to impose a reimbursement obligation under KRS 441.265, the county could not keep the money it had already confiscated from the prisoner for that purpose. Otherwise, the discretion and the due process afforded the sentencing court by KRS 441.265 would be rendered – again -- meaningless. KRS 441.265 and this Court's decision in *Jones* make clear that a county's decision to *keep* the money it has confiscated from an inmate depends upon, first, an adjudication of guilt and, second, an order of the sentencing court.

**B. The decisions below violate the rules of statutory construction.**

In *Commonwealth v. Wright*, 415 S.W.3d 606 (Ky. 2013), the Commonwealth argued that where a probationer had failed to satisfy a requirement that he make restitution to the victims of his crime, KRS 533.020(4) operated to *automatically* extend any probationary period previously fixed by a trial court until the restitution obligation was paid in full -- very similar to Defendants' argument in this case that certain fees can be *automatically* be charged a pretrial detainee regardless of their innocence of the offense for which they are incarcerated.

But this Court disagreed. First, the Court reviewed what it called "Principles of Statutory Construction":

> [W]e recognize the following principles of statutory construction. Where no specific definition is provided for terms contained in a statute, it is fundamental that "words of a statute shall be construed according to their common and approved usage .... In addition, the courts have a duty to accord

> statutory language its literal meaning unless to do so would lead to an absurd or wholly unreasonable result." Our ultimate goal when reviewing and applying statutes is to give effect to the intent of the General Assembly. We derive that intent from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes. We also presume that the General Assembly did not intend an absurd statute *or an unconstitutional one*.

*Id.*, at 608-09 (citations omitted; emphasis added); see also *Commonwealth Natural Res. & Envtl. Prot. Cabinet v. Kentec Coal Co.*, 177 S.W.3d 718, 724 (Ky. 2005) (statutes to be construed "to comport with constitutional limitations," quoting *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 571 (1973)). With these principles in mind, the Court then specified its reasons for rejecting the Commonwealth's argument:

> An examination of th[e] text [of the statute] discloses the following essential points. First, the period of probation must be *"fixed by the trial court."*

*Id.*, at 610 (emphasis in original). This is comparable to KRS 441.265(1)'s requirement of an order of a "sentencing court." The Court continued:

> Next, the section provides that the period of probation "at any time may be extended or shortened by duly entered court order[.]" Obviously, "at any time" presupposes a time during which the trial court has jurisdiction over the case since a *"duly* entered court order" means an order entered "in [a] proper manner; in accordance with legal requirements." Black's Law Dictionary (9th ed. 2009). .... We construe this provision of the statute as permitting the trial court to extend or shorten probation *prior* to final discharge, so long as the modification is memorialized by a duly entered court order.
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> * * *
>
> The statute's requirement that a probationary period may be extended only by a duly entered order should be sufficient to disprove the Commonwealth's theory. However, in addition to that, it is an essential element of the text that an extension of time beyond five years is permissible only when the additional time is *"necessary* to complete restitution." KRS 533.020(4) (emphasis added). By implication, a determination of necessity

> is a prerequisite to any extension beyond five years. *Because such a factual determination falls uniquely within the trial court's purview, it follows that the phrase anticipates that the determination of whether additional time beyond five years period is necessary must be addressed by the trial court* as a factual finding either (1) when it initially fixes probation at the time of the final judgment, or (2) later, if it becomes *necessary* to extend the probationary period in order to assure that the defendant's restitution obligation is satisfied.

*Id.*, at 610-11 (emphasis added; footnotes omitted). This is akin to the discretion afforded the sentencing court in KRS 441.265(1) to relieve a sentenced prisoner of the burden of the costs of his confinement "for good cause shown." Finally, the Court said:

> The text [of the statute] does not bear the Commonwealth's interpretation that the legislature intended an automatic extension of probation any and all times a probationer's restitution has not been completed before the expiration of his probationary sentence. *The only extensions mentioned in the statute require a "duly entered court order," which by necessary implication requires the action of a judge.*

*Id.*, at 611 (emphasis added). Likewise, there is no mechanism in KRS 441.265 for "requiring" reimbursement of a prisoner's costs of confinement other than an order of a sentencing court.

**C. The decisions below ignore the statute's legislative history.**

KRS 441.265 is unambiguous. But even if it was ambiguous, the legislative history of the statute demonstrates conclusively that the General Assembly never intended to give counties the power to keep money their jails had confiscated from innocent persons.

KRS 446.130 provides that where there exists "a latent or patent ambiguity" in a statute, "reference may be had to the Acts of the General Assembly from which the sections are indicated to have been derived, for the purpose of . . . resolving the ambiguity." Reference to a statute's legislative history also encompasses an analysis of amendments to the statute, what the amendments were intended to change in the original bill, and their

significance. *Lexington-Fayette Urban County Government v. Johnson*, 280 S.W.3d 31, 34 (Ky. 2009); *Burke v. Stephenson*, 305 S. 305 S.W.2d 926, 928-29 (Ky. 1957).

KRS 441.265 was passed in the 2000 Legislative Session as Senate Bill 332. The original version of Senate Bill 332 provided that "[a] prisoner in a county jail may be required *by the county's governing body* to reimburse the county for expenses incurred by reason of the prisoner's confinement as set out in this section. R. Vol. I, *Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibit E*, Senate Bill 332 (original). But the bill was subsequently modified by two critically-important floor amendments. Senate Floor Amendment 1 proposed that "the sentencing court" replace each of three references to "the governing body of the county" in what became subsections (1), (2), and (3) of KRS 441.265. R. Vol. I, *Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibit F* (First Floor Amendment). The second floor amendment included an additional safeguard that permitted the sentencing court to waive reimbursement of costs of confinement "for good cause shown," and resulted in the present language of KRS 441.265(1): "[a] prisoner in a county jail shall be required *by the sentencing court* to reimburse the county for expenses incurred by reason of the prisoner's confinement as set out in this section, *except for good cause shown*." R. Vol. I, *Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibit G* (Second Floor Amendment).

The General Assembly, which voted unanimously to pass Senate Bill 332 with these two amendments, clearly shifted the authority to require an individual prisoner to reimburse the county, granted by the original version of the bill to the county's governing body, ***to the sentencing court***, which was additionally vested with the authority, "for good

cause shown," to waive reimbursement entirely. By this change, Kentucky's legislature clearly intended to afford innocent prisoners protection from a blanket imposition of such charges by county government.

**D. The decisions below ignore the meaning of "sentencing court" used in other statutes.**

The decisions below are also irreconcilable with the primacy given the "sentencing court" in two other Kentucky statutes that address reimbursement of costs of confinement. KRS 532.352, entitled "Reimbursement for costs of incarceration," provides:

> (1) ***The sentencing court*** may order a person who is sentenced to a term of incarceration for any non-status juvenile offense, moving traffic violation, criminal violation, misdemeanor, or Class D felony offense to reimburse the state or local government for the costs of his incarceration. The reimbursements paid under this subsection shall be credited to the local government sinking fund.
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> (2) ***The sentencing court*** shall determine the amount of incarceration costs to be paid based on the following factors:
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> (a) The actual per diem, per person, cost of incarceration;
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> (b) The cost of medical services provided to a prisoner less any copayment paid by the prisoner; and
>
> (c) The prisoner's ability to pay all or part of his incarceration costs.
>
> (3) Reimbursement of incarceration costs shall be paid by the defendant directly to the jailer in the amount specified by ***written order of the court.***

(Emphasis added). Another statute, KRS 532.358, provides that "[a]ny prisoner who has completed his sentence in a county or regional jail ... shall, from the day incarceration ceases and within the time and amount designated by ***the sentencing court***, pay ... reimbursement for his incarceration to the state or local government ..., in addition to any other monetary and community service sanctions imposed by ***the sentencing court.*** (Emphasis added).

## IV. The Decisions Below Violate Sections 1, 2, 10, and 17 of the Kentucky Constitution.

### A. The authorities on which courts relied below are inapplicable to this case.

The Courts below based their opinions that the challenged practice did not offend Sections 1, 2, 10, and 17 of the Kentucky Constitution on precedent that simply does not address or apply to the circumstances of this case.

The issue in *Cole v. Warren County*, 495 S.W.3d 712 (Ky. App. 2015), was whether a county jail could confiscate money from a pretrial detainee *during* their incarceration without an order of a sentencing court, not whether a jail could *keep* the money after the charges against such person had been dismissed or the person had been acquitted of such charges.

The Sixth Circuit's unreported decisions in this case (*Jones v. Clark Cty., et al.*, 666 F. App'x 483 (6th Cir. 2016)) and in *Harris v. Lexington Fayette Urban Cty. Gov't, et al.*, 685 F. App'x 470 (6th Cir. 2017), were limited to the question of whether the plaintiffs were afforded sufficient *procedural* due process to challenge the confiscation of their property; neither addressed the right of a Kentucky jail to *keep* money it withheld absent an adjudication of guilt. To the contrary, the defendants in *Harris* claimed they'd refunded all of the money they'd confiscated from the prisoner.

Although Section 10 of Kentucky's Constitution may not apply to an inmate's account *during* his incarceration (Appendix, *Order*, p. 4), Mr. Jones and others in his situation are no longer incarcerated, and the courts failed to address the more than $250 confiscated from Mr. Jones during his incarceration which still has not been returned and remains unlawfully "seized." For that reason, any reliance upon *Harper v. Oldham County*

*Jail*, 2011 U.S. Dist LEXIS 40353 (W.D.Ky. May 23, 2011) and *Hudson v. Palmer*, 468 U.S. 517 (1984), which involved incarcerated inmates, is misplaced.

*Ray v. Michelle*, 2016 U.S. App. LEXIS 23849 (6th Cir. September 9, 2016), the case on which the Circuit Court relied in dismissing Mr. Jones' claims under Section 17 of Kentucky's Constitution, dealt with the Eighth Amendment's prohibition of cruel and unusual punishment of prisoners, not its prohibition against excessive fines which is the issue in this case. In a recent opinion, the United States Supreme Court made clear that the history of the Eighth Amendment's excessive fines clause was not a protection afforded only to "prisoners," and was enforceable against the states through the Fourteenth Amendment's due process clause. *Timbs v. Indiana*, 586 U.S. ___, 139 S. Ct. 682, 686-87 (2019).

**B. Federal authority in fact supports Appellant's position.**

When the federal courts have addressed the right of the state to keep money confiscated from innocent persons, their decisions support Mr. Jones' arguments, not those of the Courts below.

In *Mickelson v. County of Ramsey*, 2014 WL 4232284 (D. Minn. Aug. 26, 2014), a Minnesota statute provided for a $25 booking fee to offset the costs associated with housing inmates. *Id.* at *1. The court upheld the constitutionality of the statute because ***pretrial detainees received a full refund of the fee in the form of a check or prepaid debit card if they were not charged, if they were acquitted, or if the charges against them were dismissed.*** *Id.* at *7 (emphasis added).

Similarly, in *Barnes v. Brown County*, 2013 WL 1314015 (E.D. Wis. Mar. 30, 2013), a Wisconsin statute provided for seizure of a per-diem reimbursement of $20/day.

*Id.* at *1. Under the statute, the county could seek "[f]rom each person who is or was a prisoner, not more than the actual per-day cost of maintaining that prisoner, as set by the county board by ordinance, for the entire period of time that the person is or was confined in the jail, including any period of pretrial detention." *Id.* As in Mr. Jones' case, the jail could bill for the expenses during a prisoner's incarceration or could commence a civil action to obtain a judgment for the expenses after the prisoner's release. *Id.* The court upheld the policy because ***"the county returned the money collected if a detainee was acquitted."*** *Id.* at *3-4 (emphasis added).

In *Berry v. Lucas County Board of Commissioners*, 2010 WL 480981 (N.D. Ohio, Feb. 4, 2010), an Ohio jail seized a $100 booking fee from plaintiff from funds in his possession when he was incarcerated on disorderly conduct charges. *Berry*, 2010 WL 480981 at *2. The court found no violation of plaintiff's due process rights because the ***plaintiff was free to "seek a return of [his] deposit" by "provid[ing] legal verification that all charges have been dismissed or you have been found innocent on all charges."*** *Id.*

Finally, in 2017, the Supreme Court held that the government "may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions." *Nelson v. Colorado*, *supra* (emphasis in original). The Supreme Court in *Nelson* held that Colorado had to return money it had confiscated from a prisoner after his conviction was vacated on appeal and the state elected to not retry the charges. Said the Court: "Absent conviction of a crime, one is presumed innocent." 137 S.Ct. at 1252.

**V. Appellant is Entitled to Recover on His Claims for Negligence/Gross Negligence, Conspiracy, Conversion, Unjust Enrichment, and Restitution.**

The decisions below that Defendants are not liable to Mr. Jones for

negligence/gross negligence, unjust enrichment, or restitution because they did not violate KRS 441.265 were erroneous for all the reasons argued above.

## VI. Clark County Has No Right to Keep Money It Takes from Innocent Persons in Violation of KRS. 441.265.[8]

In *Madison Cty. Fiscal Court v. Kentucky Labor Cabinet*, 352 S.W.3d 572 (Ky. 2011), this Court held that a county had no sovereign immunity from liability for withholding wages in violation of KRS 337.060(1). The Court held that the General Assembly had waived counties' sovereign immunity from liability for violation of the statute by the enactment of the statute itself, saying: "A statute directing a governmental unit to pay its employees in a prescribed manner necessarily and overwhelmingly implies a waiver of immunity from liability to the employees for non-payment." The outcome should be no different where, as here, a statute gives a county no authority to confiscate *and keep* monies in the possession of innocent persons. Both instances involve a violation of statute, and both involve money that rightfully belonged to a citizen of the Commonwealth and never belonged to the county.

## VII. Defendant Doyle is Not Entitled to Qualified Official Immunity.

Clark County Jailer Frank Doyle was sued in his individual capacity, not his official capacity. A public official enjoys no qualified official immunity where he has violated a statute or a constitutional right. *Yanero v. Davis*, 65 S.W.3d 510, 523 (Ky. 2001). KRS 446.070 also specifically provides, "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

---

[8] Appellant does not understand the relevance of *Coppage Construction Co. v. Sanitation Dist No. 1*, 459 S.W.3d 855 (Ky. 2015), which the Circuit Court cited in support of its decision that the County and its Jailer have no responsibility for returning Appellant's money.

## CONCLUSION

In their request for oral argument before the Court of Appeals, Defendants stated that their "ability to maintain and finance jails depends on" their ability to charge everyone admitted to their jail a booking fee and a per diem to cover "food and lodging." That puts the issue squarely before this Court: **In Kentucky, does the bedrock American principle of a presumption of innocence take second place to the desire to fill county coffers?**

It has until now.

The practices at issue in this appeal reflect a conscious decision by Kentucky counties to balance their budgets on the backs of their most vulnerable citizens, and with a conscious disregard of their right to a presumption of innocence. For people like Mr. Jones, practices like these can often cause impoverishment, a spiral of debt, marginalization from society, homelessness, unnecessary incarceration, and an inability to contribute to the tax base and to society at large. "Fines and fees create large financial and human costs, all of which are disproportionately borne by the poor." Council of Economic Advisors, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor* 1 (Dec. 2015), https://www.whitehouse.gov/sites/default/ files/page/files/1215 _cea_fine_fee_bail_issue_brief.pdf. As the Civil Rights Division of the U.S. Department of Justice recently explained, "[T]he harm caused by [unlawful fines and fees] can be profound. Individuals may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posting no danger to the community; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape." *U.S. Dep't of Justice, Dear Colleague Letter Regarding Law Enforcement Fees and Fines* (March 14, 2016), https://www.justice.gov/crt/file/832461/ download. "It is not unusual

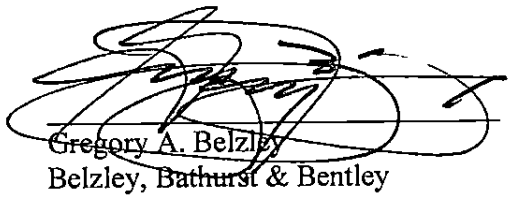
for debtors . . . to sacrifice food, clothing, utilities, sanitary home repairs, and other basic necessities of life in order to scrape together money to pay off their [legal financial obligations] in order to avoid imprisonment." Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595, 1657 (2015) (internal quotations omitted).

The Justices of this Honorable Court know full well the percentage of criminal defendants in Kentucky who cannot afford counsel. Judges are unlikely to impose upon sentenced citizens the burden of reimbursing a county the costs of their confinement when it could mean that they will be unable to pay rent, buy food for their children, or afford medication. Counties know this, so they get it while they can. Practices like these have understandably eroded peoples' faith in our government generally, and in our system of criminal justice in particular.

Defendants can point to no constitutional or statutory authority that would accommodate their practice, and it must be stopped. Now.

**FOR THE FOREGOING REASONS,** Plaintiffs respectfully request that the decisions below be, in all respects, **REVERSED**, and that judgment be entered for Mr. Jones' as a matter of law, and that this case be remanded for further proceedings.

Respectfully submitted,



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# APPENDIX

## Tab A -- Circuit Court Summary Judgment

## Tab B – Court of Appeals Opinion Affirming

# TAB A

**COMMONWEALTH OF KENTUCKY**
**CLARK CIRCUIT COURT**
**DIVISION II**
**CASE NO. 17-CI-00067**

**DAVID JONES** **PLAINTIFF**

**v.**

**CLARK COUNTY, KY, *et al.*** **DEFENDANTS**

---

**ORDER**

---

This matter is before the Court on Defendants' Motion for Summary Judgment. The motion has been fully briefed; oral argument has been held; and, the Court is in all other ways sufficiently apprised of the material facts and applicable law. For the reasons set forth herein, the Court concludes that there are no genuine issues as to any material facts and grants judgment as a matter of law in favor of the Defendants on all of Plaintiff's claims.

KRS 441.265 provides, in relevant part:

> (1) A prisoner in a county jail shall be required by the sentencing court to reimburse the county for expenses incurred by reason of the prisoner's confinement as set out in this section, except for good cause shown."
>
> (2) (a) The jailer may adopt, with the approval of the county's governing body, a prisoner fee and expense reimbursement policy, which may include, but not be limited to, the following: 1. An administrative processing or booking fee; 2. A per diem for room and board of not more than fifty dollars ($50) per day or the actual per diem cost, whichever is less, for the entire period of time the prisoner is confined to the jail; 3. Actual charges for medical and dental treatment; and 4. Reimbursement for county property damaged or any injury caused by the prisoner while confined to the jail. ... .
>
> (3) The jailer or his designee may bill and attempt to collect any amount owed which remains unpaid. ...
>
> * * *

> (6) Payment of any required fees may be automatically deducted from the prisoner's property or canteen account. If the prisoner has no funds in his account, a deduction may be made creating a negative balance. If funds become available or if the prisoner reenters the jail at a later date, the fees may be deducted from the prisoner's property or canteen account.
>
> (7) Prior to the prisoner's release, the jailer or his designee may work with the confined prisoner to create a reimbursement plan to be implemented upon the prisoner's release. At the end of the prisoner's incarceration, the prisoner shall be presented with a billing statement produced by the jailer or designee. After the prisoner's release, the jailer or his designee may, after negotiation with the prisoner, release the prisoner from all or part of the prisoner's repayment obligation if the jailer believes that the prisoner will be unable to pay the full amount due.
>
> ***

Pursuant to KRS 441.265, and during the time of Plaintiff's incarceration, the Clark County Detention Center ("the jail") charged inmates a one-time booking fee of $35.00, a fee of $10.00 for each day the inmate is housed at the jail; $5.00 for the inmate's first hygiene kit; and $2.69 for each refill of the hygiene kit the inmate receives while he is housed at the jail.

Plaintiff, David Jones, was arrested and housed in the jail from October 26, 2013 to December 15, 2014 before he was released on bond. Ultimately the criminal charge against him was dismissed on April 2, 2015. At the time of his release from the jail, Jones had incurred a total of $4,008.85 in accumulated fees. Jones paid $20.00 toward the debt, but refused to pay any additional amount. The jail has not taken any legal action to collect the fees incurred.

Jones sued Clark County and Clark County Jailer Frank Doyle[1], asserting that KRS 441.265 does not authorize the collection of fees from inmates who have not been convicted; that it was unconstitutional under Sections 1, 2, 10 and 17 of the Kentucky Constitutions to collect fees from inmates who have not been convicted; and, that the collection of fees from inmates who have not been convicted constitutes negligence, gross negligence, conspiracy, conversion and fraud.

Having reviewed the statute and governing case law, the Court concludes that KRS 441.265 authorizes jails to assess and collect fees from inmates who have not been convicted. KRS 441.265 does not states that its provisions apply only to convicted prisoners. In addition, it is not reasonable to assume that the reference in KRS 441.265(1) to "the sentencing court" intended such a limitation, since KRS 441.265(2), (3), and (6) permit jails to bill and automatically deduct fees for incarceration without reference to the result in the underlying criminal case. Thus, construed as a whole, application of KRS 441.265 is not limited to prisoners who were convicted of the offense for which they were incarcerated.

Moreover, Jones' interpretation of KRS 441.265 cannot be reconciled with the statutory definition of "prisoner" in KRS 441.005(3)(a). KRS 441.265(1) provides that "prisoners" may be charged the fees specified in the remainder of that statute and KRS 441.005(3)(a) defines "prisoner" to include persons who are merely "charged with" a crime. Courts are required to give effect to all statements of the legislature and may not presume any word used in a statute to be meaningless. *Pearce v. Univ. of Louisville*, 448 S.W.3d 746 (Ky. 2014). Interpreting "prisoner" in KRS 441.265 not to include persons who

[1] This action follows the dismissal of Jones' federal court action. *See Jones v. Clark Cty.*, 666 F. App'x 483 (6th Cir. 2016).

are "charged with" but not convicted of a crime would, in effect, negate KRS 441.005(3)(a), which defines "prisoner" to include persons who are "charged with" a crime.

The Court also concludes that the collection of fees from inmates who have not been convicted does not violate Sections 1, 2, 10 or 17 of the Kentucky Constitution. While Section 1(5) protects the rights of citizens "to acquire and protect property," this provision is coextensive with the due process provisions of the United States Constitution. *Franklin v. Nat. Res. & Envtl. Protection Cab.*, 1989 Ky. App. LEXIS 46. The federal courts have already determined in this case that charging and billing inmates for the costs of their confinement when those inmates have not been convicted does not violate the Fourteenth Amendment's Due Process Clause. *See Jones v. Clark Cty.*, 666 F. App'x 483 (6th Cir. 2016).

Likewise, Section 2 of the Kentucky Constitution is interpreted to encompass the same due process interests reflected in the Fourteenth Amendment of the United States Constitution. *Com. v. Newkirk*, 2014 Ky. App. Unpub. LEXIS 1048, citing *Com., Nat. Res. & Envtl. Protection Cab. v. Kentec Coal Co.*, 177 S.W.3d 718 (Ky. 2005). Federal courts have already determined that billing an inmate for fees pursuant to state statutes that allow for the recovery of the costs of incarcerating him does not violate the Fourteenth Amendment, even in cases where the person is not ultimately convicted of a crime. *See, e.g. Harris v. Lexington-Fayette Urban Co. Govt.*, 685 Fed. Appx. 470 (6th Cir. 2017); *Jones, supra.*

A person's rights under Section 10 of the Kentucky Constitution are coextensive with his rights under the Fourth Amendment of the United States Constitution. *Colbert v. Com.*, 43 S.W.3d 777 (Ky. 2001). A person has no Fourth Amendment rights in his canteen account while he is in jail. *Harper v. Oldham County Jail*, 2011 U.S. Dist. LEXIS 40353 (W.D.Ky.), quoting *Hudson v. Palmer*, 468 U.S. 517 (1984). Consequently, Defendants did

not violate Jones' rights under Section 10 of the Kentucky Constitution to debit his canteen account to offset the costs of his incarceration while he was in the jail.

Section 17 of the Kentucky Constitution affords the same protections as the Eighth Amendment to the United States Constitution, *Turpin v. Com.*, 350 S.W.3d 444 (Ky. 2011), which only applies to convicted persons. *Ray v. Michelle*, 2016 U.S. App. LEXIS 23849 (6th Cir.). Since Jones was not convicted, he does not have any rights under the Eighth Amendment or under Section 17 of the Kentucky Constitution.

Finally, the Court concludes that Jones has not established the elements of any of his tort claims, most of which depended on his argument – which the Court rejects for the reasons previously set forth herein – that Defendants had no right under KRS 441.265 to collect fees from him. In addition, Clark County and Frank Doyle in his capacity as Clark County Jailer, are, of course, immune from tort liability. *Coppage Construction v. Sanitation District No. 1*, 459 SW3d 855 (Ky. 2015).

There being no dispute as to the material facts and Defendants having demonstrated their entitlement to judgment as a matter of law, their Motion for Summary Judgment be and is hereby GRANTED.

This is a final and appealable Order and there is no just cause for delay.

**SO ORDERED** this 31st day of October, 2018

Hon. Jean C. Logue
Judge, Clark Circuit Court

**CLERK'S CERTIFICATION**

This is to certify that a true and correct copy of the foregoing Order was served via U.S. Mail on this _____ day of October, 2018, upon the following:

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CLERK, CLARK CIRCUIT COURT

# TAB B

RENDERED: FEBRUARY 14, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

**OPINION RENDERED ON FEBRUARY 7, 2020 WITHDRAWN**

# Commonwealth of Kentucky

# Court of Appeals

NO. 2018-CA-001710-MR

DAVID JONES, INDIVIDUALLY;
AND DAVID JONES, ON BEHALF
OF ALL PERSONS
SIMILARLY SITUATED — APPELLANTS

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 17-CI-00067

CLARK COUNTY, KENTUCKY;
AND FRANK DOYLE, INDIVIDUALLY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: David Jones, individually and on behalf of all persons similarly situated, brings this appeal from a November 1, 2018, order of the Clark

Circuit Court granting summary judgment to Clark County, Kentucky, and Frank Doyle, individually, (collectively referred to as appellees) on Jones' claims. We affirm.

Jones was arrested and incarcerated on October 26, 2013, in the Clark County Detention Center. While in the detention center, Jones was charged a $35 booking fee and $10 fee for each day of his confinement. Jones was incarcerated for approximately fourteen months and was released on December 15, 2014, after posting bond. All charges against Jones were ultimately dismissed. Subsequently, Jones received a bill totaling $4,008.85 for fees associated with his incarceration at the detention center. Jones submitted a one-time payment of $20.

Jones then filed an action against Clark County, Kentucky, and Frank Doyle, Clark County Jailer, in the United States District Court for the Eastern District of Kentucky. Therein, Jones alleged that the assessed fees for his incarceration violated Kentucky Revised Statutes (KRS) 441.265 and the due process clause of the Fourteenth Amendment of the United States Constitution. Jones also raised various claims under state law. Clark County and Doyle thereafter filed a motion to dismiss.

In *Jones v. Clark County*, Action No. 5:15-CV-350-JMH, 2016 WL 1050743 (E.D. Ky. March 11, 2016), the federal district court determined that no

violations of the due process clause occurred citing to *Sickles v. Campbell County*, 501 F.3d 726 (6th Cir. 2007). The district court dismissed Jones' claims.

Jones then appealed to the United States Court of Appeals for the Sixth Circuit. In *Jones v. Clark County*, 666 F. App'x 483 (6th Cir. 2016), the Sixth Circuit concluded that the due process clause presented no impediment to the assessed incarceration fees:

> Jones's procedural due process rights have not been violated. The only action taken by the defendants to get Jones's money was to bill for it and accept partial payment. This is not a case in which the state has confiscated or converted property, such as property in the prisoner's pockets, or amounts sent to him by friends, or Social Security checks sent to him. Instead Jones was merely billed. We are pointed to no authority identifying a procedural due process right not to be *billed* by the government for amounts that the billed person contends he does not owe. The billed party, after all, still possesses and owns the money until some further process is imposed upon him.
>
> Stated in doctrinal terms, Jones does not have a property interest in not being billed. The bill from Clark County, on its own, has not deprived Jones of a protected property interest. A protected property interest is "defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Jones points to no source of law that entitles him to enjoy his money unfettered by government bills, correct or incorrect. An erroneously high bill from the government, without more, does not

deprive the bill's recipient of a protected property interest; the IRS does not deprive a taxpayer of protected property interest every time it erroneously bills the taxpayer for more unpaid taxes than is due. Jones's procedural due process claim thus fails at the outset.

Even if the process of billing and receiving partial payment could be thought of as a deprivation of a property interest, such a deprivation is inherently protected by process. In this case, process inheres in the action the government takes to get payment of the bill. The prisoner can refuse to pay the bill, leaving the burden on the jailer, who "may file a civil action to seek reimbursement from that prisoner for any amount owed which remains unpaid." KRS 441.265(3). In such a suit the defendant can raise all the state or federal issues he wants to challenge his liability. In jail-reimbursement cases, in addition, a prisoner can "negotiat[e]" with the jailer, and the jailer may "release the prisoner from all or part of the prisoner's repayment obligation if the jailer believes that the prisoner will be unable to pay the full amount due." KRS 441.265(7).

Formally analyzed under the three-factor *Eldridge* test for what process is due, Jones's argument fails. We balance "[1] the private interest that will be affected by the official action; . . . [2] the risk of an erroneous deprivation . . . and the probable value, if any, of additional or substitute procedural safeguards; and . . . [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. at 335, 96 S. Ct. 893.

Balancing those factors, Jones was not due much process. In *Sickles*, this court balanced the factors for a different aspect of this same pay-for-your-own-incarceration regime—the aspect that allows Kentucky's

county jailers automatically to withhold a portion of transfers into prisoners' canteen accounts, which contain funds that the prisoners can use at the commissary, without the order of a sentencing court. *See Sickles*, 501 F.3d at 728–29. We concluded that only minimal process was due and that Kentucky's pay-for-your-own-incarceration statute did not violate due process. *See id.* at 731. The same conclusion is required here.

First, the private interest at stake is minimal. Jones was merely billed for the reimbursement. No property was seized. The lack of a clearly defined property interest in the first place suggests that the property interest is minimal. Second, any risk of an erroneous deprivation is minor and, as the district court suggested, less than the risk in *Sickles*. *Jones*, 2016 WL 1050743, at *4. In *Sickles*, we assessed the risk of an erroneous deprivation when the county automatically withholds a portion of transfers into prisoners' accounts. We reasoned that the withholding "involves elementary accounting that has little risk of error and is non-discretionary." *Sickles*, 501 F.3d at 730. Here, too, elementary accounting determines Jones's bill—a simple multiplication of the per diem rate and the number of days spent in prison before formal charges. Here, too, the bill is non-discretionary—as the district court explained, "it applies to all persons confined in the Jail." *Jones*, 2016 WL 1050743, at *4. Furthermore, here, the risk of deprivation is diminished by process that the Kentucky statute provides to Jones, but did not provide to Sickles, as indicated above. Third, the government's interest in being able to proceed by billing is huge. It is hard to imagine how a government can obtain funds allegedly owed to it without being able to send a bill. Moreover, it would be paradoxical to hold that process should precede a bill. Due process at its core involves adequate notice, and a bill at its essence provides notice of a debt. It would not make sense to require notice before sending a notice.

*Id.* at 486-87. The Court declined to exercise jurisdiction on Jones' state law claims.

On February 3, 2017, Jones filed a Class Action Complaint against appellees in the Clark Circuit Court. Jones alleged that he:

> [B]rings this action as a class action pursuant to Rule 23.01, *et seq.* of the Kentucky Rules of Civil Procedure. This class consists of all persons admitted to, incarcerated in, or released from the Jail who have had their cash confiscated and kept by Defendants, or have been billed by Defendants, for the costs of their confinement when the charges for which they were incarcerated were subsequently dismissed.

Complaint at 3. In particular, Jones claimed that KRS 441.265 did not permit the assessment of incarceration fees when all charges against a prisoner had been dismissed. Additionally, Jones maintained that the assessment of such fees violated Sections 1, 2, 10, and 17 of the Kentucky Constitution. Jones further alleged that appellees were negligently engaged in a conspiracy and improperly converted Jones' property. He also sought damages based upon the claims of unjust enrichment and restitution.

Appellees filed an answer and, thereafter, a motion for summary judgment. Appellees argued that the assessed fees were authorized under KRS 441.265 and did not violate the Kentucky Constitution. Jones responded by arguing that under KRS 441.265, such fees could only be assessed by a sentencing

court and not by the detention center. Moreover, Jones maintained that the assessed fees violated Sections 1, 2, 10, and 17 of the Kentucky Constitution. As a result, Jones also asserted he was entitled to damages upon the claims of negligence, conspiracy, conversion, unjust enrichment, and restitution.

By order entered November 1, 2018, the circuit court granted summary judgment in favor of Clark County and Doyle. The circuit court determined that KRS 441.265 permitted the detention center to assess $4,008.85 in fees and that no provision of the Kentucky Constitution was violated. This appeal follows.

To begin, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Id.* Our review proceeds accordingly.

Jones contends that the circuit court erroneously rendered summary judgment in favor of Clark County and Doyle. Jones initially maintains the circuit court improperly interpreted KRS 441.265 as permitting the detention center to assess fees in the absence of an order from the "sentencing court." Jones' Brief at 5. Jones believes KRS 441.265 mandates that "an order of a sentencing court" is required "before a prisoner's confiscated money can be kept." Jones' Brief at 5.

KRS 441.265 reads, in part:

(1) A prisoner in a county jail shall be required by the sentencing court to reimburse the county for expenses incurred by reason of the prisoner's confinement as set out in this section, except for good cause shown.

(2) (a) The jailer may adopt, with the approval of the county's governing body, a prisoner fee and expense reimbursement policy, which may include, but not be limited to, the following:

1. An administrative processing or booking fee;

2. A per diem for room and board of not more than fifty dollars ($50) per day or the actual per diem cost, whichever is less, for the entire period of time the prisoner is confined to the jail;

3. Actual charges for medical and dental treatment; and

4. Reimbursement for county property damaged or any injury caused by the prisoner while confined to the jail.

(b) Rates charged may be adjusted in accordance with the fee and expense reimbursement policy based upon the ability of the prisoner confined to the jail to pay, giving consideration to any legal obligation of the prisoner to support a spouse, minor children, or other dependents. The prisoner's interest in any jointly owned property and the income, assets, earnings, or other property owned by the prisoner's spouse or family shall not be used to determine a prisoner's ability to pay.

(3) The jailer or his designee may bill and attempt to collect any amount owed which remains unpaid. The

> governing body of the county may, upon the advice of the jailer, contract with one (1) or more public agencies or private vendors to perform this billing and collection. Within twelve (12) months after the date of the prisoner's release from confinement, the county attorney, jailer, or the jailer's designee, may file a civil action to seek reimbursement from that prisoner for any amount owed which remains unpaid.
>
> . . . .
>
> (6) Payment of any required fees may be automatically deducted from the prisoner's property or canteen account. If the prisoner has no funds in his account, a deduction may be made creating a negative balance. If funds become available or if the prisoner reenters the jail at a later date, the fees may be deducted from the prisoner's property or canteen account.
>
> (7) Prior to the prisoner's release, the jailer or his designee may work with the confined prisoner to create a reimbursement plan to be implemented upon the prisoner's release. At the end of the prisoner's incarceration, the prisoner shall be presented with a billing statement produced by the jailer or designee. After the prisoner's release, the jailer or his designee may, after negotiation with the prisoner, release the prisoner from all or part of the prisoner's repayment obligation if the jailer believes that the prisoner will be unable to pay the full amount due.

And, KRS 441.005(3)(a) defines "prisoner" as "any person confined in jail pursuant to any code, ordinance, law, or statute of any unit of government and who is . . . [c]harged with or convicted of an offense."

The proper interpretation of KRS 441.265 was addressed by this Court in *Cole v. Warren County*, 495 S.W.3d 712 (Ky. App. 2015).[1] Therein, appellants argued that the Warren County Jail violated KRS 441.265 by confiscating money and checks made payable to prisoners upon booking and by utilizing these funds to pay assessed fees associated with incarceration. Appellants believed that KRS 441.265 required an order from the sentencing court before the fees could be assessed by the jail. The Court of Appeals concluded otherwise:

> [W]e will address the trial court's interpretation of KRS 441.265. The appellants allege that the Jail's procedure of confiscating and keeping cash and checks without an order from a sentencing court violates Kentucky law, specifically, KRS 441.265. KRS 441.265(1) states: "[a] prisoner in a county jail shall be required by the sentencing court to reimburse the county for expenses incurred by reason of the prisoner's confinement as set out in this section, except for good cause shown." The trial court found that given the use of the word "reimburse," KRS 441.265(1) provides a method for repayment of fees past due to the Jail, rather than permission for the automatic charging of fees upon incarceration. Further, the trial court acknowledged that qualifying the particular court as "sentencing" implies that Section 1 applies to convicted inmates. Hence, the trial court held that a sentencing court's order is not required when the inmate has the funds to pay the required fees available—such an order is only necessary when the prisoner still owes fees at the time of his sentencing.

[1] The Kentucky Supreme Court denied discretionary review of this decision.

> We agree with the trial court's interpretation of KRS 441.265. The language of the statute is unambiguous, and seems clearly intended to provide a means for county jails to automatically deduct required fees when the inmate has the funds available.
>
> . . . .
>
> KRS 441.265(6) states:
>
> > [p]ayment of any required fees may be automatically deducted from the prisoner's property or canteen account. If the prisoner has no funds in his account, a deduction may be made creating a negative balance. If funds become available or if the prisoner reenters the jail at a later date, the fees may be deducted from the prisoner's property or canteen account[.]
>
> When KRS 441.265(1) is read in conjunction with KRS 441.265(6), we believe the statute unambiguously permits the exact practice used by the Jail. Required fees may automatically be deducted from the prisoners' property or inmate canteen accounts, and if a negative balance is created, KRS 441.265(1) permits a sentencing court to order a prisoner to reimburse the Jail. Thus, we disagree with the appellants' contentions that the trial court wrongly interpreted the statute and that the Jail's practice violates KRS 441.265(1).

*Cole*, 495 S.W.3d at 717-18 (footnote omitted). Of particular import, the Court of Appeals held that KRS 441.265 permitted the jail to automatically assess fees and deduct the amount of those fees from prisoners' property, including canteen

accounts. The Court further opined that if a prisoner owed fees at the time of sentencing, the sentencing court could order the prisoner to reimburse the jail.

The Court of Appeals' interpretation of KRS 441.265 is buttressed by the definition of "prisoner" contained in KRS 441.005(3)(a). Thereunder, a prisoner is anyone confined in a jail and "charged with" an offense. KRS 441.005(3)(a). As KRS 441.265 repeatedly utilizes the term "prisoner," it is clear that the provisions of KRS 441.265 were clearly intended to apply to prisoners, like Jones, who are incarcerated upon criminal charges but not convicted thereof.

Additionally, it must be pointed out that the jailer is statutorily empowered to "bill and attempt to collect any amount owed which remains unpaid" per KRS 441.265(3).[2] And, the jailer's ability to bill and collect unpaid fees is not contingent upon an order from a sentencing court. Rather, this authority exists by statute independent of the court.

Considering the plain language of KRS 441.265, the interpretation by the Court in *Cole*, 495 S.W.3d 712,[3] and the definition of prisoner contained in KRS 441.005(3)(a), we are bound by both statute and precedent to reach the conclusion that a jail or detention center may assess fees associated with

---

[2] The Clark County Detention Center is not pursuing collection of the outstanding fees against David Jones.

[3] A majority of this panel concurs that *Cole v. Warren County*, 495 S.W.3d 712 (Ky. App. 2016) is controlling and declines to seek *en banc* review per Supreme Court Rule 1.030(7)(d).

incarceration against a prisoner who is only charged with a crime and without an order from a sentencing court.

Jones next alleges that KRS 441.265 violates Sections 1, 2, 10, and 17 of the Kentucky Constitution. Jones generally argues that it is unconstitutional for the state to collect and keep monies from an innocent person. Jones cites to a plethora of cases; however, Jones fails to set forth any specific arguments as to how KRS 441.265 violates the above cited sections of the Kentucky Constitution. Jones even fails to set forth the language of these sections. As an appellate court, we will not construct legal arguments for a party.

Nonetheless, we have reviewed the circuit court's opinion upon whether KRS 441.265 violates Sections 1, 2, 10, and 17 of the Kentucky Constitution and adopt its erudite analysis herein:

> The Court also concludes that the collection of fees from inmates who have not been convicted does not violate Sections 1, 2, 10 or 17 of the Kentucky Constitution. While Section 1(5) protects the rights of citizens "to acquire and protect property," this provision is coextensive with the due process provisions of the United States Constitution. *Franklin v. Nat. Res. & Envtl. Protection Cab.*, 1989 Ky. App. LEXIS 46. The federal courts have already determined in this case that charging and billing inmates for the costs of their confinement when those inmates have not been convicted does not violate the Fourteenth Amendment's Due Process Clause. *See Jones v. Clark Cty.*, 666 F. App'x 483 (6th Cir. 2016).

> Likewise, Section 2 of the Kentucky Constitution is interpreted to encompass the same due process interests reflected in the Fourteenth Amendment of the United States Constitution. *Com. v. Newkirk*, 2014 Ky. App. Unpub. LEXIS 1048, citing *Com., Nat. Res. & Envtl. Protection Cab. v. Kentec Coal Co.*, 177 S.W.3d 718 (Ky. 2005). Federal courts have already determined that billing an inmate for fees pursuant to state statutes that allow for the recovery of the costs of incarcerating him does not violate the Fourteenth Amendment, even in cases where the person is not ultimately convicted of a crime. *See, e.g., Harris v. Lexington-Fayette Urban Co. Govt.*, 685 F. App'x 470 (6th Cir. 2017); *Jones, supra.*
>
> A person's rights under Section 10 of the Kentucky Constitution are coextensive with his rights under the Fourth Amendment of the United States Constitution. *Colbert v.Com.*, 43 S.W.3d 777 (Ky. 2001). A person has no Fourth Amendment rights in his canteen account while he is in jail. *Harper v. Oldham County Jail*, 2011 U.S. Dist. LEXIS 40353 (W.D. Ky.), quoting *Hudson v. Palmer*, 468 U.S. 517 (1984). Consequently, Defendants did not violate Jones' rights under Section 10 of the Kentucky Constitution to debit his canteen account to offset the costs of his incarceration while he was in the jail.
>
> Section 17 of the Kentucky Constitution affords the same protections as the Eighth Amendment to the United States Constitution, *Turpin v. Com.*, 350 S.W.3d 444 (Ky. 2011), which only applies to convicted persons. *Ray v. Michelle*, 2016 U.S. App. LEXIS 23849 (6th Cir.). Since Jones was not convicted, he does not have any rights under the Eighth Amendment or under Section 17 of the Kentucky Constitution.

November 1, 2018, Order at 4-5. Consequently, we conclude that Jones failed to demonstrate a violation of Sections 1, 2, 10, or 17 of the Kentucky Constitution.

Jones also argues that the assessed incarceration fees violates the "fundamentally American presumption of innocence." Jones' Brief at 3. Jones particularly maintains that "[a]bsent a plea or an adjudication of guilt, a person is presumed innocent and owes the state nothing." Jones Brief at 3. Jones relies upon *Nelson v .Colorado*, 137 S. Ct. 1249 (2017) for support. Jones maintains that the United States Supreme Court ordered the state of Colorado "to return money it had confiscated from a prisoner after his conviction was vacated on appeal and the state elected to not retry the charges." Jones' Brief at 3.

We view *Nelson*, 137 S. Ct. 1249 as distinguishable. In *Nelson*, appellant was ordered to pay after conviction sums to a victim compensation fund, a victims' and witnesses' assistance law enforcement fund, court costs, restitution, and a time payment fee. *People v. Nelson*, 362 P.3d 1070, 1072-75 (Colo. 2015) *overruled by Nelson*, 137 S. Ct. 1249.[4] The time payment fee was imposed each year that appellant had not fully paid the sums ordered by the court. As such, it is clear that *Nelson*, 137 S. Ct. 1249 did not involve incarceration fees, as in this case. We, thus, reject Jones' contention of error.

We view any remaining allegations of error as moot or without merit.

[4] The holding in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) looked to the refund of costs, fees, and restitution to defendants whose convictions had been reversed or vacated. The incarceration fees assessed in our case were not dependent upon a conviction.

In sum, we are of the opinion that the circuit court properly rendered summary judgment in favor of appellees.

For the foregoing reasons, the order of the Clark Circuit Court is affirmed.

JONES, JUDGE, CONCURS.

COMBS, JUDGE DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: After careful deliberation, and upon consideration of the very fine oral arguments presented by both sides in this case, I file this dissent.

The majority opinion relies principally on *Cole v. Warren County*, 495 S.W.3d 712 (Ky. App. 2015). In *Cole*, county jail inmates challenged the taking of monies from jail inmate accounts (including the confiscation and cashing of unendorsed checks payable to the inmates) as an offset for the expenses of confinement. This Court upheld the practice.

In the case before us, the same statute is at issue; namely, KRS 441.265. However, Jones argues that this case is distinguishable on its facts from *Cole* and, therefore, that we are **not bound by** the precedent of *Cole*. While it is a close call, I am persuaded that this case both limits and requires a new look at KRS 441.265 based on the different set of facts and issues alleged.

The issue is one of first impression and fundamental fairness: whether Jones could be billed for the cost of his incarceration when the charges underlying his confinement were later dismissed. After fourteen months in jail, **all charges** against him were dismissed. Nonetheless, he received a bill for $4008.85. His federal claim failed because the 6th Circuit Court of Appeals did not believe that he had a due process right to be free from unjust billing. He then filed a claim in state court and invoked the literal language of KRS 441.265 in support of his claim. That statute provides in mandatory language as follows:

> (1) A prisoner in a county jail shall **be required by the sentencing court** to reimburse the county for expenses incurred by reason of the prisoner's confinement as set out in this section, except for good cause shown.

(Emphasis added.)

The statutory language is clear and unambiguous on its face. A **sentencing court** alone is vested with jurisdiction to order payment for lodging in the county jail, and no such order was ever entered – or apparently even sought – to authorize the charge of over $4000 in this case. Instead, the county, though its jailer and/or designee, **assumed** the right, *sua sponte*, to become in effect a collection agency without the requisite, mandatory order of the court. The amount at issue is not *de minimis*; if Jones had stolen that sum of money, he would have been chargeable with a felony.

I am wholly persuaded that the Clark County Jail was bound by the literal terms of the very statute upon which it relies in pursuing this money.

The issue is not the taking of funds from a prisoner's inmate account as an off-set against expenses as was the case in *Cole.* Rather, the issue before us is whether a person erroneously jailed can face prospectively a huge sum of debt for the time spent incarcerated when the very dismissal of those charges underscored the error of his confinement in the first place. The reasoning is circular and the result is both ridiculous and unjust.

The ramifications are numerous and ponderous. A person unjustly jailed – upon his release – can look forward to becoming an instant debtor through no fault of his own. His ability to support himself or his family would be compromised – as would be his credit rating. The debt would arguably be subject to garnishment against his wages or a debt to be charged against his estate in the event of his death. He would be subject as well to the psychological pain of the anxiety arising from the prospect of how to pay what may be for him an insurmountable debt.

Although the circuit passed off as "*de minimis*" any right to be free from receiving an unjust bill, I would submit that the Kentucky Constitution at Section 2 ensures us all of the right to be free from the fearsome results of the exercise of arbitrary power. Indeed, among the Four Freedoms etched in history

by President Franklin D. Roosevelt, addressing the economic uncertainties flowing from the Great Depression, was the right of "Freedom from Fear." (Address to Congress, January 6, 1941, setting forth the Four Freedoms underlying our democracy: freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear).

Finally, and perhaps most importantly, Clark County can never reimburse Jones for the lost months of his life during which he was deprived of his liberty – truly a non-compensable damage. Absent a judicial decree, it should **not** be permitted to add to his damage the debt for the time unjustly spent it its jail.

I would implore the Supreme Court or the General Assembly to rectify this glaringly unjust state of affairs.

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