COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2020-SC-000107

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

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

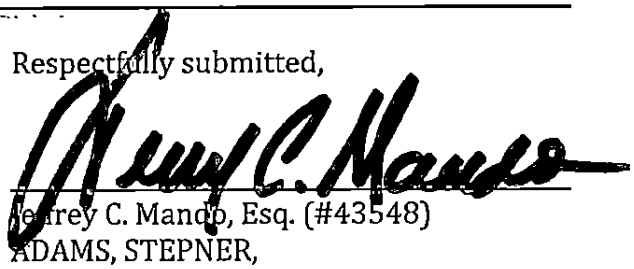
v.

ON APPEAL FROM CLARK CIRCUIT COURT
CASE NO. 17-CI-00067

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

BRIEF OF APPELLEES

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellees' Brief was served this 9 day of December, 2020 upon: Hon. Jean C. Logue, Judge, Clark Circuit Court, 17 Cleveland Avenue, Winchester, KY 40392; Daniel Cameron, Esq., Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Gregory A. Belzley, Esq. Belzley, Bathurst & Bentley, P.O. Box 278, Prospect, KY 40059; and, Matt Boyd, Esq., Boyd Law Office, 156 East Main Street, Suite 220, Lexington, KY 40507. I further certify that the record was not withdrawn for purposes of the preparation and filing of this Brief.

Jeffrey C. Mando, Esq.

INTRODUCTION

County jails provide housing, meals and medical services to persons in their custody regardless of their guilt or innocence. County jailers must accept individuals brought to them under arrest by law enforcement and they can only release individuals based on court Orders. For their services, jailers can impose and collect fees authorized by KRS 441.265 to partially offset the costs of confinement. The statute is not punitive and there is nothing illegal or inherently unfair about imposing fees for services rendered to persons in custody. Neither the Kentucky Constitution, the Kentucky Revised Statutes or common law require a refund of those fees if the person is found innocent. Clark County and Jailer Frank Doyle are not liable on Jones' claims when they only imposed and collected fees consistent with KRS 441.265.

COUNTERSTATEMENT REGARDING ORAL ARGUMENT

Clark County and Jailer Frank Doyle respectfully request that the Court hear oral argument. The issues presented on appeal are important to Counties and Jailers throughout Kentucky. Oral argument will assist the Court in understanding the history of this litigation and its import in deciding the issues on appeal.

STATEMENT OF POINT AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

David Jones was arrested and booked into the Clark County Detention Center ("CCDC") on October 26, 2013. (R.A. 49)

Pursuant to KRS 441.265(2), the CCDC charged Jones a booking fee of $35.00, a $10.00 per diem for each day of his confinement, a $5.00 fee for the hygiene packet he received upon booking, and $2.69 for each indigent kit[1] he received during his confinement. (R.A. 50 – 74) Since Jones did not have any cash at the time of his booking, the CCDC did not collect anything from him upon his booking; instead, these amounts were noted as charges against his canteen account as he incurred them. (R.A. 50 – 74)

Jones posted bond and was released from the CCDC on December 15, 2014. (R.A. 75) At the time of his release, he had accrued $4,008.85 in fees for per diem charges for the cost of his incarceration and indigent packets. (R.A. 76 – 77) Jones paid $20.00 toward the debt, but refused to pay any more on advice of counsel. The Clark Circuit Court dismissed the criminal charges against Jones without prejudice on April 2, 2015, three and a half months *after* his release. (R.A. 78)

On November 30, 2015, Jones filed a class action Complaint in the United States District Court for the Eastern District of Kentucky against Clark County and Clark County Jailer Frank Doyle in his individual capacity. (R.A. 79 – 88) He alleged that the policy of billing him fees to recover the costs of his incarceration when his criminal charges were dismissed violates the Fourth and Fourteenth Amendments to

[1] An indigent kit refills basic hygiene supplies that are included in the original hygiene packet but depleted over time.

the U.S. Constitution. (*Id.*) In addition, he alleged that billing him these costs when his criminal charges were dismissed was negligent or grossly negligent; constituted a conspiracy to deprive him of his property; amounted to a conversion of his property; and, was evidence of fraud. He demanded class certification and sought restitution of his $20.00, a declaration that KRS 441.265 violated the Kentucky Constitution, attorney fees and costs. (*Id.*)

In a sound and well-reasoned Opinion, the federal district court dismissed Jones' Fourth and Fourteenth Amendment claims on the merits, and dismissed his pendent state-law claims without prejudice. *Jones v. Clark County*, 2016 U.S. Dist. LEXIS 31975 (E.D.Ky.). (See Appendix 1) The Sixth Circuit affirmed that decision. *Jones v. Clark County*, 666 Fed. Appx. 483 (6th Cir. 2016). (See Appendix 2)

Jones re-filed his state law claims in the Clark Circuit Court, asserting that billing inmates whose criminal charges have been dismissed for the costs of their incarceration violates Sections 1, 2, 10 and 17 of the Kentucky Constitution, and that such billing constitutes negligence or gross negligence, a conspiracy, conversion, and fraud. As he did in federal court, Jones sought class certification, restitution of his $20.00, and a declaratory judgment that Clark County cannot collect the remaining approximately $3,980.00 and that KRS 441.265 violates the Kentucky Constitution. (R.A. 1 – 10)

After the parties completed discovery, the Clark Circuit Court granted summary judgment in favor of Clark County and Doyle, holding that billing and collecting fees from inmates pursuant to KRS 441.265 does not violate the Kentucky Constitution. (R.A. 272 – 277) The Circuit Court also ruled that Jones could not

recover under any of his tort theories because those theories depended on the misguided assumption that billing and collecting fees from inmates pursuant to KRS 441.265 was unlawful, and because Clark County was entitled to sovereign immunity. (*Id.*)

The Kentucky Court of Appeals issued a thoughtful Opinion affirming the Clark Circuit Court's decision. Relying on solid precedent and the statutory definition of "prisoner" in KRS 441.005(3)(a), the Court rejected Jones' argument that KRS 441.265 only permits a county jail to assess fees against persons who have been convicted of crimes. (Opinion, p. 7 – 12) The Court also rejected Jones' argument that a county jail violates Sections 1, 2, 10 and/or 17 of the Kentucky Constitution when it keeps money it has collected from an "innocent" person, noting that Jones had failed to set forth any specific arguments to support his claims, and adopting the trial court's detailed analysis on those claims. (Opinion, p. 12 – 14) Finally, the Court rejected Jones' argument that booking and per diem fees violate the "fundamentally American presumption of innocence," noting that the case law Jones relied on is distinguishable. (Opinion, p. 15)

Thereafter, Jones moved this Court to accept discretionary review, which this Court granted.

ARGUMENT

I. BECAUSE THEY ARE NOT PUNITIVE, THE BOOKING AND PER DIEM FEES DO NOT IMPLICATE THE PRESUMPTION OF INNOCENCE

It is well-settled that the Due Process Clause prohibits pretrial detainees, who are presumed innocent of the crimes for which they have been charged, from being subjected to conditions that amount to punishment. *Bell v. Wolfish*, 441 U.S. 520 (1979). However, not every condition or restriction imposed during pretrial detention amounts to punishment in the constitutional sense. *Id.* at 537. Instead, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. *Id.* at 539.

Against that backdrop, the booking and per diem fees CCDC charges to inmates like Jones are not punitive.

First, the government has legitimate interests that stem from its need to manage the facility in which the individual is detained, including the ability to offset the costs associated with housing inmates by collecting fees from inmates. *Id.* at 546 – 547; *see also Sickles v. Campbell County*, 501 F.3d 726 (6th Cir. 2007) (government has a "substantial" interest in sharing the costs of incarceration with incarcerants); *Slade v. Hampton Roads Jail*, 407 F.3d 243 (4th Cir. 2005) (jail has a "legitimate interest in attempting to defray the costs of a prisoner's keep"); *Mickelson v. County of Ramsey*, 823 F.3d 918 (8th Cir. 2016) (county has a "substantial" interest in collecting booking fees because doing so allows county to manage the costs of serving and policing the community).

Second, the booking and per diem fees charged by the CCDC to inmates like Jones under KRS 441.265 merely "reimburse the county for expenses incurred" that are attributable to the inmate's confinement – expenses for consumables, such as "room and board" and "actual charges for medical and dental treatment" the inmate receives while incarcerated. *See* KRS 441.265(2)(a). Such charges are not imposed because of an inmate's guilt, but because an inmate – whether ultimately found guilty or not – consumes food, medical and other services while in jail.

In fact, many courts – including the courts in two cases that Jones relies on – specifically hold that fees intended to recover the costs of goods and services consumed by an inmate while that inmate is incarcerated are *not* punitive. For example, in a case Jones cites, the Eastern District of Wisconsin ruled that a $20.00 per day "lock up fee" intended to defray the cost of housing people at the jail did not amount to the unconstitutional punishment of pretrial detainees. *Barnes v. Brown County*, 2013 U.S. Dist. LEXIS 47613 (E.D. Wisc.). And, in another case Jones cites, the Northern District of Ohio concluded that a "pay-to-stay" program adopted by the Lucas County Jail "was adopted to recoup the costs of incarceration, and not as a means of punishment." *Berry v. Lucas County Bd. of Commissioners*, 2010 U.S. Dist. LEXIS 9756 (N.D.Ohio).

Other courts have reached similar conclusions. *E.g., Carson v. Mulvihill*, 488 Fed. Appx. 554 (3rd Cir. 2012) (holding that a $50.00 per month "user fee" for room and board did not violate a prisoner's Due Process right to be free from punishment until proven guilty because "such fees are not punishment ... the fees can hardly be called fines when they merely represent partial reimbursement of the prisoner's daily

cost of maintenance, something he or she would be expected to pay on the outside"); *Tillman v. Lebanon County Correctional Facility*, 221 F.3d 410 (3rd Cir. 2000) (fee of $10 per day for housing costs was not punitive); *Hohsfield v. Polhemus*, 2012 U.S. Dist. LEXIS 23073 (D.N.J.) (fees charged to cover an inmate's daily living expenses are not punitive); *Thelen v. Schneider*, 2016 U.S. Dist. LEXIS 32289 (S.D.Ill.) (holding that the assessment of a nominal charge for medical services is not punitive, but is, rather, a method of recouping a small part of the cost of providing medical care to prisoners, for which they would likely be charged a much greater fee in the outside world); *Morris v. Livingston*, 739 F.3d 740 (5th Cir. 2014) (rejecting inmate's argument that a fee for health care services was an *ex post facto* punishment); *Johnson v. Ozmint*, 2006 U.S. Dist. LEXIS 46529 (D.S.C.) (charging an inmate for medical services and for room and board is "clearly not punitive").

The U.S. Supreme Court's decision in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), which Jones also hangs his hat on, does not compel a different result. In *Nelson*, the Court ruled that due process requires the return of funds that were taken from persons as *punitive measures* due to their convictions, once their convictions were overturned. When the plaintiffs in that case were convicted, Colorado courts ordered them to pay money to a victims' compensation fund and to a fund that supported witnesses and law enforcement. When the plaintiffs' convictions were overturned on appeal, it is not surprising, then, that the court ordered the state to refund the monies collected as punitive measures. Since the fees collected by the CCDC pursuant to KRS 441.265 are not punitive, *Nelson* is completely inapposite, as the Court of Appeals correctly concluded. (Opinion, p. 15)

Similarly, the cases that Jones cites for the proposition that "federal courts have held that monies confiscated from arrestees during their incarceration must be returned in the event of their innocence" do not actually support his position. (Appellant's Brief, p. 5) In *Mickelson*, for example, the court actually upheld a jail's practice of deducting a booking fee from cash on an inmate's person at the time of booking against an argument that the practice violated Due Process. *Mickelson v. County of Ramsey*, 2014 U.S. Dist. LEXIS 118777 (D. Minn.), affirmed 823 F.3d 918 (8th Cir. 2016). While the district court in that case noted that the jail's policy allowed for a refund of the booking fee in the event charges were dismissed, neither it nor the Eighth Circuit ruled that a refund was *constitutionally required*. The same is true of *Barnes, supra*, and *Berry, supra*. The remaining cases Jones cites in support of that proposition – *Telink, Inc. v. U.S.*, 24 F.3d 42 (9th Cir. 1994), *Dececco v. U.S.*, 485 F.2d 372 (1st Cir. 1973), and *U.S. v. Rothstein*, 187 F. 268 (7th Cir. 1911) – have nothing to do with booking fees, per diem fees, or any other similar fee charged to an inmate for the purpose of recouping the costs of his incarceration, and therefore do not support Jones' argument. Rather, *Telink, Dececco*, and *Rothstein*, all involved fines, which are, by nature, punitive.

Because the statutorily authorized booking and per diem fees imposed by the CCDC are not punitive, they do not violate the due process prohibition on punishment before an adjudication of guilt.

II. KRS 441.265 SPECIFICALLY AUTHORIZED THE MANNER IN WHICH THE CCDC ASSESSED AND COLLECTED FEES FROM JONES

Jones contends that Clark County and Doyle violated KRS 441.265 when they charged him for booking and per diem fees associated with his incarceration, even

though the criminal charges against him were dismissed. (R.A. 1 – 10; Appellant's Brief, p. 5 – 12) As the lower courts correctly ruled, that argument lacks merit.

The CCDC's policy of charging inmates to offset the costs of their incarceration does not, in and of itself, violate KRS 441.265. The statute affords a county jailer the discretion to adopt a prisoner fee and expense reimbursement policy, indicating that a county jailer "may" do so, with the approval of the county's fiscal court. KRS 441.265(2)(a). The Clark County Fiscal Court approved the CCDC's policy.

More specifically, charging Jones booking and per diem fees does not violate KRS 441.265. The statute specifically provides that a jail's policy "may include, but not be limited to, the following: an administrative processing or *booking fee*; a *per diem* for room and board of not more than fifty dollars ($50.00) per day or the actual per diem cost, whichever is less, for the entire period of time the prisoner is confined to the jail; actual charges for medical and dental treatment; and reimbursement for county property damaged or any injury caused by the prisoner while confined to the jail." KRS 441.265(2)(a).

Likewise, the Detention Center's deduction and collection of a small portion of Jones' fees from his canteen account does not violate KRS 441.265. The statute affords a county jailer the discretion to deduct fees from the inmate's canteen account. KRS 441.265(5) ("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 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.") The fact that the Detention Center deducted a small

portion of Jones' fees from his canteen account and billed him for the unpaid fees does not violate KRS 441.265. The statute affords a county jailer the discretion to bill and attempt to collect any unpaid fees after the inmate is released. KRS 441.265(3) ("The jailer or his designee may bill and attempt to collect any amount owed which remains unpaid.").

To the extent Jones argues that KRS 441.265 does not permit the imposition of fees on inmates who are not ultimately convicted of a crime, that argument also fails. KRS 441.265 authorizes jails to charges fees to their "prisoners." KRS 441.005, which provides the definitions for all of Chapter 441 of the Kentucky Revised Statutes, defines "prisoner" to mean "any person confined in jail pursuant to any code, ordinance, law, or statute of any unit of government and who is: (a) *Charged with* or convicted of an offense; or (b) Held for extradition or as a material witness; or (c) Confined for any other reason." Thus, KRS 441.265 specifically contemplates that persons who are confined in jail and who have been charged with, but not yet convicted of, a crime, will be subject to the fees that KRS 441.265 authorizes.

Jones' contention that KRS 441.265 prohibits the imposition of fees on persons who are not ultimately convicted of a crime ignores the statutory definition of "prisoner." To adopt his argument would require insertion of the term "convicted" before the word "prisoner" throughout KRS 441.265. That, of course, would fly in the face of the rules of statutory construction. *Beckham v. Bd. of Educ.*, 873 S.W.2d 575 (Ky. 1994) ("We are not at liberty to add or subtract from the legislative enactment nor discovery meaning not reasonably ascertainable from the language used."); *Peter Garrett Gunsmith, Inc. v. City of Dayton,* 98 S.W.3d 517 (Ky. App. 2002) ("a court may

not insert language to arrive at a meaning different from that created by the stated language in a statute.").

Jones argues that it is a violation of KRS 441.265 to collect fees from inmates who have yet to be convicted because Section 1 of that statute refers to "the sentencing court." (Appellant's Brief, p. 12) His argument is contrived and inconsistent with the interpretations adopted by several other courts as well as the principles of statutory construction in Kentucky. For these exact reasons, the federal district court rejected Jones' argument in this case. (R.A. 89 – 97) (See Appendix 1)

Jones' insistence that KRS 441.265 applies only to convicted prisoners is premised on an interpretation which elevates one section of the statute over all of the others, in contradiction of Kentucky's rules of statutory construction. As the Kentucky Supreme Court recently declared, these rules require construing courts to give effect to the **whole** statute based on the words actually used by the legislature: "In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, 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." *Livingood v. Transfreight, LLC*, 467 S.W.3d 249, 256 (Ky. 2015) (quoting *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011).

KRS 441.265 does not state that its provisions apply only to convicted prisoners. Nor is it 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 billing and automatic deduction of fees for incarceration without reference to the result in the underlying criminal case. 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' restrictive interpretation of KRS 441.265 does not permit it to be "harmonized" with other related statutes. To the contrary, the interpretation he offers contradicts the definition of "prisoner" in KRS 441.005 – a statute that Jones does not even acknowledge in his brief. That statute explicitly defines a "prisoner" to include people like Jones, who are merely "charged with" a criminal offense. KRS 441.005(3)(a). For this very reason, the federal district court rejected Jones' interpretation of KRS 441.265, because it essentially nullified this portion of the definition of "prisoner" in KRS 441.005(3)(a) and rendered it meaningless. *Jones v. Clark County,* 2016 U.S. Dist. LEXIS 31975 (E.D.Ky.). (See Appendix 1) This is precisely what courts must avoid in construing Kentucky statutes. *Pearce v. Univ. of Louisville,* 448 S.W.3d 746, 769 (Ky. 2014) ("[W]e are similarly required to give effect to all statements of the legislature and not presume any word to be meaningless.")

Since Jones' tortured interpretation of KRS 441.265 runs afoul of tried and true canons of statutory construction, the federal district court in this case wisely rejected it. Its decision was supported by precedent from both the Sixth Circuit and federal district courts sitting in Kentucky, which hold that fees under KRS 441.265 may be billed and collected automatically upon booking and that an order of the sentencing court is not required in every case. *Sickles v. Campbell County,* 501 F.3d 726 (6th Cir.

2007) (affirming district court decision holding that KRS 441.265 permits automatic deduction of fees from inmate account without an order from the sentencing court); *Sickles v. Campbell County,* 439 F.Supp.2d 751 (E.D.Ky. 2006) (KRS 441.265 and KRS 441.005 "contemplate imposition of the fees whether or not the inmate is ever sentenced."); *Cole v. Warren County,* 2012 U.S. Dist. LEXIS 74670, at *15 (W.D.Ky.).

In his Brief, Jones makes no effort to address these well-reasoned cases. The only support he offers for his argument is two inapposite Kentucky decisions and two inapplicable statutes. (Appellant's Brief, p. 7 – 8)

First, Jones points to *Commonwealth v. Wright,* 415 S.W.3d 606 (Ky. 2013), a decision which interprets KRS 533.020, a statute relating to probation and conditional discharge. (Appellant's Brief, p. 8-9) While Jones attempts to analogize the result in *Wright* to the present case, his effort fails. Based on the plain language in KRS 533.020, the Court in *Wright* held that the period of time in which a court can enter an order relating to probation or conditional discharge could not be automatically extended because the statute explicitly required a "duly entered court order." There is no parallel between that case and this one because KRS 441.265 uses no such words or any words even remotely similar. Thus, the fact that a court order and hearing were required in *Wright* is not shocking at all since the Legislature used the appropriate language to require such a result. On the other hand, since there is no language requiring a "duly entered court order" in KRS 441.265, action by the sentencing court is not, as Jones contends, required.

Jones also champions *Jones v. Commonwealth,* 382 S.W.3d 22 (Ky. 2011). (Appellant's Brief, p. 7 – 8) While this decision at least mentions KRS 441.265, it does

not address the issue Jones raises here: whether booking fees may be collected automatically by county jail officials absent an order from the sentencing court. Instead, in *Jones,* the Court addressed only the scope of authority for the sentencing court in ordering the payment of booking fees under KRS 441.265(1). Because it was not called upon to do so, the Court did not consider how subsection 1 of KRS 441.265 interacted with the other provisions in the statute. Further, the court in *Jones* did not address how the definition of "prisoner" in KRS 441.005(3)(a) modified that meaning.

Jones also asserts that charging inmates fees when they have not yet been convicted is "irreconcilable" with KRS 532.352 and KRS 532.358. (Appellant's Brief, p. 12) Jones is wrong as wrong can be. While these statutes address the costs of incarceration, they do not purport to limit or restrict the scope of KRS 441.265. Although, like KRS 441.265(1), these statutes authorize sentencing courts to impose orders requiring inmates to pay for the costs of their incarceration, they do *not* limit the right of county jail officials to charge or collect fees under the other sections of KRS 441.265. The mere fact that a statute authorizes one entity to take an action does not deprive another entity from taking the same or similar action. Thus, an interpretation of KRS 441.265 that allows the collection of fees from inmates who have not yet been convicted can be easily reconciled with KRS 532.352 and KRS 532.358. For these reasons, Jones' interpretation of KRS 441.265 must be rejected.

Finally, relying on legislative history, Jones contends that KRS 441.265 was not intended to collect the costs of incarceration from inmates who are not convicted. (Appellant's Brief, p. 10 – 12) In doing so, Jones jumps the gun.

"Where a statute is unambiguous, there is no need to use extrinsic evidence of legislative intent and public policy." *Ky. Auth. v. Estate of Wise*, 2020 Ky. App. LEXIS 12, quoting *Lewis v. Jackson Energy Coop. Corp.*, 189 S.W.3d 87 (Ky. 2005). KRS 441.265 is unambiguous as to who is responsible for paying fees to reimburse a county for expenses incurred during his incarceration. KRS 441.265(1) provides: "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." Under KRS 441.005(3), the term "prisoner" includes "any person ... who is charged with ... an offense ...; or held for extradition or as a material witness; or confined for any other reason." Therefore, KRS 441.265 unambiguously allows jails to collect the costs of incarceration from persons who have not been convicted of a crime. And, since the statute is unambiguous, there is no need to resort to legislative history in interpreting its meaning.

For all of these reasons, there is no merit to Jones' assertion that Clark County and Doyle violated KRS 441.265 by collecting per diem or booking fees from inmates who have not yet been convicted.

III. CHARGING AND COLLECTING STATUTORILY AUTHORIZED BOOKING AND PER DIEM FEES DOES NOT VIOLATE THE KENTUCKY CONSTITUTION

Jones contends that charging him booking and per diem fees pursuant to KRS 441.265, even though he was never convicted, violates Sections 1(5), 2, 10 and 17 of the Kentucky Constitution. Below, Jones offered no analysis with respect to those provisions, electing instead to try and convince the Court that the scores of federal cases interpreting KRS 441.265 and similar statutes are inapplicable. Instead of constructing legal arguments for Jones, the Kentucky Court of Appeals reviewed the

circuit court's opinion ruling that KRS 441.265 did not violate Sections 1, 2, 10 or 17 of the Kentucky Constitution, affirmed the circuit court's opinion in that regard, and adopted the circuit court's reasoning wholesale. (Opinion, p. 13 – 14) Considering that Jones still offers no analysis regarding these constitutional provisions, his arguments should be rejected and the lower court's ruling should be upheld.

A. CHARGING JONES FEES DOES NOT VIOLATE KY. CONST. § 1(5)

In his Complaint, Jones asserted a cause of action under § 1(5) of the Kentucky Constitution, which protects the rights of citizens "to acquire and protect property." (R.A. 114 – 136) To the extent it guarantees such a right, § 1(5) is coextensive with the due process provisions of the United States Constitution. *Franklin v. Nat. Res. & Envtl. Protection Cab.*, 1989 Ky. App. LEXIS 46 (holding that Ky. Const. § 1(5) does not provide greater rights than does the U.S. Constitution).

The federal courts have already determined *in this case* that charging and billing inmates, like Jones, for the costs of their confinement – even when those inmates have not been convicted – does not violate the Fourteenth Amendment's Due Process Clause. *Jones v. Clark County*, 2016 U.S. Dist. LEXIS 31975 (E.D.Ky.). (See Appendix 1)

Since Jones' rights under § 1(5) are no greater than his rights under the Due Process Clause, and since the Due Process Clause does not support his claim, Jones has no claim under § 1(5).

B. CHARGING JONES FEES DOES NOT VIOLATE KY. CONST. § 2

Ky. Const. § 2 is interpreted to encompass the same due process interests reflected in the Fourteenth Amendment of the U.S. 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 some cases where the person is not ultimately convicted of a crime.** *See Harris v. Lexington-Fayette Urban Cty. Gov't,* 685 F. App'x 470 (6th Cir. 2017) (imposing a booking fee pursuant to KRS 441.265 on a person who is not ultimately convicted does not violate due process); *Jones v. Clark Cty.,* 666 F. App'x 483 (6th Cir. 2016) (holding that imposition of booking and per diem fees pursuant to KRS 441.265 on Jones did not violate due process, knowing that the charges against Jones had been dismissed); *Sickles v. Campbell County,* 439 F.Supp.2d 751 (E.D.Ky. 2006) (finding that withholding a portion of an inmate's canteen account funds to cover the costs of booking and room and board, without holding a deprivation hearing, did not violate due process); *Cole v. Warren County,* 2012 U.S. Dist. LEXIS 74670 (W.D.Ky.) (holding that § 441.265 "unambiguously permits" jails to "deduct[] [fees] from ... prisoners' property or inmate canteen accounts," even without an order from a sentencing court); *Martin v. Gregory,* No. 1:16-CV-P29-GNS, 2016 U.S. Dist. LEXIS 95318 (W.D.Ky.) (no due process violation in connection with imposition of fees on inmates). *See also Tillman, supra* (holding that predeprivation hearing was not necessary prior to assessing a $10.00 daily housing fee during inmate's incarceration, and that postdeprivation remedies satisfied due process); *Slade, supra* (no procedural due process violation when charges were deducted from pretrial detainee's account without holding predeprivation hearing); *Broussard v. Par. Of Orleans,* 318 F.3d 644

(5th Cir. 2003) (finding no due process violations as to bail fee statutes requiring arrestees to pay certain fees after posting bail); *Markadonatos v. Vill. of Woodridge,* 760 F.3d 545 (7th Cir. 2014) (although not reaching the due process merits, affirming the district court's dismissal of a § 1983 claim alleging due process violation stemming from the assessment of a $30.00 booking fee); *Hohsfield, supra* (holding that a booking fee and a $20.00 daily housing fee were not violative of due process); *Mickelson, supra* (finding that imposition of a $25.00 booking fee does not violate due process).

Because Section 2 of the Kentucky Constitution is interpreted to encompass the same due process and equal protection interests reflected in the Fourteenth Amendment to the U.S. Constitution, *Newkirk, supra,* it is not unconstitutional for the CCDC to charge Jones, and other similarly situated inmates, booking and per diem fees to recover the costs associated with their confinement.

C. CHARGING JONES FEES DOES NOT VIOLATE KY. CONST. § 10

A person's rights under Section 10 of the Kentucky Constitution are coextensive with his rights under the Fourth Amendment. *Colbert v. Com.,* 43 S.W.3d 777 (Ky. 2001) (with respect to rights in property interest, "Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment").

And, **a person has no Fourth Amendment rights in his canteen account while he is in jail.** *Harper v. Oldham Cty. Jail,* 2011 U.S. Dist. LEXIS 40353 (W.D.Ky.), quoting *Hudson v. Palmer,* 468 U.S. 517, 104 S. Ct. 3194 (1984) (plaintiff failed to state a cognizable claim under the Fourth Amendment with respect to the deduction of per

diem fees from an inmate account because "the exigencies of prison life authorize officials indefinitely to dispossess inmates of their possessions without specific reason, [such that] any losses that occur while the property is in official custody are simply not redressable by Fourth Amendment litigation."); *Smith v. Dennison,* 2010 U.S. Dist. LEXIS 45815 (W.D.Ky.) (no Fourth Amendment claim for a deduction from an inmate's account for hygiene items). *See also Jackson v. Hill,* 2012 U.S. Dist. LEXIS 128769 (M.D.Pa.) (claim premised on deduction of almost $500.00 for court costs was not cognizable under the Fourth Amendment); *Thieleman v. Cty. of Aransas,* 2010 U.S. Dist. LEXIS 14536 (S.D. Tex.) (dismissing claim that taking money from prisoner's account constitutes illegal seizure because plaintiff is in prison, and as such, he is no longer guaranteed the protections of the Fourth Amendment); *Gardner v. Rogers State Prison,* 2009 U.S. Dist. LEXIS 163 (S.D. Ga.) (no Fourth Amendment claim for $1.00 allegedly taken by the defendant warden from the plaintiff's inmate reserve balance account); *Hentz v. Ceniga,* 2009 U.S. Dist. LEXIS 16774 (D. Or.) (no Fourth Amendment claim for money frozen in an inmate's trust account); *Drakeford v. Thompson,* 2010 U.S. Dist. LEXIS 124857 (same).

Now that Jones is out of jail, his claim under § 10 fares no better. As Clark County and Doyle demonstrated in their federal court pleadings, the Fourth Amendment only applies to *actual* seizures of property. *Fox v. Van Oosterum,* 176 F.3d 342, 350 (6th Cir. 1999) (quoting *Soldal v. Cook County, Ill.,* 506 U.S. 56, 61 (1992) (holding that a "seizure" under the Fourth Amendment only occurs when "'there is some meaningful interference with an individual's possessory interests in that property.'"). Since Jones was released from jail on December 15, 2014, Clark County

and Doyle have done nothing more than *bill* him for the fees permitted under KRS 441.265. They have taken no steps to interfere with his possessory interests in his money or other property. In short, Jones' claim fails because there has not been a "seizure."

D. CHARGING JONES FEES DOES NOT VIOLATE KY. CONST. § 17

Jones contends that charging him fees to recover the costs of his incarceration violates Ky. Const. § 17, which prohibits excessive fines and cruel punishment. In light of the virtually identical language of the Eighth Amendment and Section 17, Kentucky courts construe those provisions as providing the same protections. *Turpin v. Com.,* 350 S.W.3d 444 (Ky. 2011); *Farris v. Com.,* 2012 Ky. App. Unpub. LEXIS 246.

As the federal district court for the Western District noted in *Hooks v. Kentucky,* 2016 U.S. Dist. LEXIS 103238 (W.D.Ky.), courts have generally held that charging inmates for room and board to defray costs of incarceration fails to state an actionable constitutional claim under the Eighth Amendment Excessive Fines Clause. *See also Harper, supra* (holding no Eighth Amendment violation where jail deducted $30.00 per diem from plaintiffs' canteen account); *Adams v. Hardin Cty. Det. Ctr.,* 2016 U.S. Dist. LEXIS 63888 (W.D.Ky.) (charging inmates for room and board to defray costs of incarceration fails to state an actionable constitutional claim under the Eighth Amendment Excessive Fines Clause); *Kuhbander v. Blue,* 2016 U.S. Dist. LEXIS 12027 (W.D.Ky.) (charging inmates fees only violates the Eighth Amendment if the provisions of services to inmates is conditioned upon payment of fees); *Waters v. Bass,* 304 F. Supp. 2d 802 (E.D. Va. 2004) (the imposition of a room and board fee amounts to neither cruel nor unusual punishment under the Eighth Amendment).

Below, Jones attempted to distinguish these cases on the basis that "not one of the cases cited by Defendants ... involved a plaintiff whose charges had been dismissed." That is because, by definition, the Eighth Amendment only applies to persons who have been convicted. *Ray v. Michelle*, No. 15-5963, 2016 U.S. App. LEXIS 23849 (6th Cir.) (noting that the Eighth Amendment applies to convicts and the Fourteenth Amendment applies to pretrial detainees). Thus, no plaintiff could ever state a claim under the Eighth Amendment if he had not been convicted. Since Jones was not convicted, he does *not* have any rights under the Eighth Amendment.

Based on this jurisprudence, imposing fees on an inmate pursuant to KRS 441.265 does not violate the Eighth Amendment. And, because Ky. Const. § 17 provides the same protections as the Eighth Amendment, imposing fees on an inmate pursuant to KRS 441.265 does not violate § 17 of the Kentucky Constitution.

E. JONES HAS NO CAUSE OF ACTION FOR DAMAGES FOR A VIOLATION OF THE KENTUCKY CONSTITUTION

Assuming *arguendo* that the CCDC's charging and billing Jones fees in an effort to recover a portion of the costs of his confinement violates a provision of the Kentucky Constitution, Jones nonetheless fails to state a viable claim for damages.

There is no cause of action for money damages for an alleged violation of the state Constitution, including an alleged violation of Ky. Const. § 10, which forbids unreasonable searches and seizures. *St. Luke Hospital, Inc. v. Straub,* 354 S.W.3d 529 (Ky. 2011). In fact, in *Straub,* the Kentucky Supreme Court refused to identify the appropriate statute of limitations for a claim premised on a violation of Ky. Const. § 10 for the very reason that no such claim is recognized under Kentucky law. *Id.* ("In light of our decision that KRS 446.070 does not create a private cause of action for

alleged violations of the state constitution and our decision to reinstate the judgment of the trial court, we do not need to reach a decision as to: (1) whether a one year statute of limitations bars claims [arising out of the state Constitution that were] not raised in federal court....")

Therefore, assuming *arguendo* Clark County and Doyle violated Jones' rights under the Kentucky Constitution by billing him for the charges he incurred while confined, Jones does not have a cause of action for damages to enforce those rights. The lower courts, therefore, correctly held that they were entitled to summary judgment.

IV. IMMUNITY PRECLUDES CLARK COUNTY FROM HAVING TO REFUND ANY FEES JONES PAID

It would be futile to issue a declaration requiring Clark County to refund Jones the amount Clark County has already collected from him to offset the costs of housing him as an inmate because Clark County is immune from liability for such a refund.

Sovereign immunity is a common law doctrine, a "bedrock component" of American government, which prohibits claims "against the government treasury absent the consent of the sovereign." *Beshear v. Haydon Bridge Co.*, 416 S.W.3d 280 (Ky. 2013), citing *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790 (Ky. 2009). Sovereign immunity is both broad and exacting and if the sovereign has not waived immunity or consented to suit, an injunction is foreclosed in most circumstances. *Id.*

A state entity is immune from complying with a declaratory judgment if the declaratory judgment impinges on the revenue or property of the state. *Com. v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013) (In "subsequent or

contemporaneous actions to enforce declared rights, the immunity issue could be relevant if the revenue or property of the state would be affected."); *Beshear, supra* (a monetary award pursuant to a declaratory judgment may be precluded by immunity if it is to be paid from "public coffers or, as it is sometimes denominated, the public purse").

In *Beshear*, the state had, for a period of ten years, transferred funds from the Workers' Compensation Benefit Reserve Fund (BRF) to the General Fund and the Department of Mines and Minerals. As part of an action against the state, the trial court declared that such transfers violated Section 51 of the Kentucky Constitution. In addition, the trial court ordered "retroactive injunctive relief" that would have required the state to return any and all monies that had been transferred from the BRF to the General Fund. The state appealed, arguing that retroactive injunctive relief was a pretext for ignoring sovereign immunity. The Kentucky Supreme Court ultimately sided with the state, holding that "the retroactive injunctive relief sought by Plaintiffs would require the Commonwealth to withdraw monies from the General Fund, an action the Commonwealth has not consented to through waiver of sovereign immunity. ... All of these retroactive orders impinge on sovereign immunity because they require monetary relief that can only be satisfied by draws on a state's treasury." *Id.* at 294.

Similarly, the refund Jones seeks would require Clark County to draw on public funds in direct conflict with its sovereign immunity.

V. THE LOWER COURTS CORRECTLY RULED THAT CLARK COUNTY AND DOYLE WERE ENTITLED TO SUMMARY JUDGMENT ON JONES' TORT CLAIMS

The lower courts also correctly ruled that Clark County and Doyle were entitled to summary judgment on the tort claims Jones asserted in Counts III (negligence), IV (conversion), VI (fraud), and VII unjust enrichment) of the Complaint.

First, Jones' tort claims were premised on the theory that Clark County and Doyle violated KRS 441.265 by collecting fees from him. Since the statute authorized the imposition and collection of the fees, and the courts have repeatedly upheld the constitutionality of the statute, Jones' tort claims necessarily fail.

Second, and assuming *arguendo* that Jones could establish the elements of the state-law tort claims asserted in his Complaint, Clark County is entitled to sovereign immunity. It is well-settled that a county is an arm of state government, and that, as such, it is entitled to sovereign immunity from tort liability. *Coppage Construction Co. v. SD1,* 459 S.W.3d 855 (Ky. 2015).

Finally, assuming *arguendo* that Jones could establish the elements of any of the state-law tort claims in his Complaint, Frank Doyle, in his individual capacity, has no liability, as the lower courts correctly ruled.

Doyle took office as Clark County Jailer on January 5, 2019, *after* Jones' December 15, 2014 release on bond. (R.A. 75) Therefore, Doyle was not personally involved in billing Jones for fees incurred during his confinement. As such, Jones has no basis for asserting tort claims against him in his individual capacity

In addition, even if he had been the Clark County Jailer when Jones was billed fees to offset the costs of his confinement, Doyle is entitled to qualified official

immunity. When sued in their individual capacities, public officers and employees enjoy qualified official immunity, which affords them protection from damages liability for good faith judgment calls made in a legally uncertain environment. *Yanero v. Davis,* 65 S.W.3d 510 (Ky. 2001). A public officer is entitled to qualified official immunity for discretionary acts or functions, made in good faith, and within the scope of the employee's authority. *Id.*

Qualified official immunity applies where the act performed by the official or employee is one that is discretionary in nature. *Haney v. Monskey,* 311 S.W.3d 235, 240 (Ky. 2010). Conversely, an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act. *Yanero,* 65 S.W.3d at 522.

A discretionary act or function is one that involves "the exercise of discretion and judgment, or personal deliberation, decision and judgment [.]" *Rowan County v. Sloas,* 201 S.W.3d 469, 477 (Ky. 2006). In addition, a discretionary act necessarily requires the exercise of reason in the adaption of a means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine which way it shall be performed. *Sloas,* 201 S.W.3d at 447 (citing *Collins v. Commonwealth of Ky. Nat'l Res. & Envtl. Prot. Cabinet,* 10 S.W.3d 122, 125 (Ky. 1999).

A ministerial duty, on the other hand, is "one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts."

Sloas, 201 S.W.3d at 478 (citing *Yanero,* 65 S.W.3d at 522). For instance, enforcement of a known rule is a ministerial duty. *Sloas,* 201 S.W.3d at 478 (citing *Yanero,* 65 S.W.3d at 529).

Under this analytical framework, the only way Doyle could be deprived of qualified official immunity from liability for Jones' claim would be if he violated some mandate of KRS 441.265 that established an "absolute, certain and imperative" duty. He did not.

KRS 441.265 does not contain any mandates. Instead, it affords a county jailer the discretion to adopt, or not, a prisoner fee and expense reimbursement policy, indicating that a county jailer "may" do so, with the approval of the county's fiscal court. KRS 441.265(2)(a).

The statute also affords a county jailer the discretion – if he decides to adopt such a policy – to determine what types of fees and expenses to include in the policy, stating that the policy "may include, but not be limited to, the following: an administrative processing or booking fee; a per diem for room and board of not more than fifty dollars ($50.00) per day or the actual per diem cost, whichever is less, for the entire period of time the prisoner is confined to jail; actual charges for medical and dental treatment; and, reimbursement for county property damaged or any injury caused by the prisoner while confined to the jail." KRS 441.265(2)(a).

The statute affords a county jailer the discretion to adjust the fees based upon the ability of a particular inmate to pay them. KRS 441.265(2)(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 ...").

The statute further affords a county jailer the discretion to bill and attempt to collect any unpaid fees after the inmate is released. KRS 441.265(3) ("The jailer or his designee may bill and attempt to collect any amount owed which remains unpaid.").

Finally, the statute further affords a county jailer the discretion to deduct fees from the inmate's canteen account. KRS 441.265(5) ("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.").

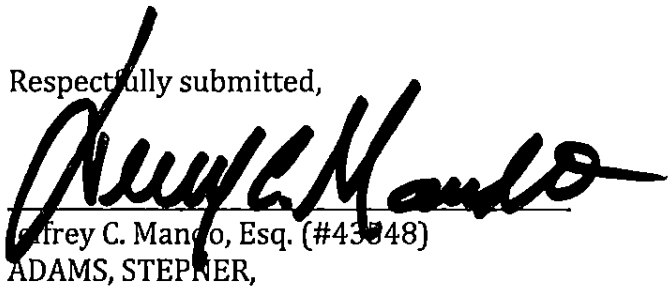
To the extent Jones attempts to find a mandate in the statute *not* to charge fees to an inmate whose criminal charges have been dismissed, he is tilting at windmills. KRS 441.265(1) provides: "A prisoner in a county jail shall be required by the sentencing court to reimburse the county for expenses incurred by reason of the prisoner's confinement as set out in this section, except for good cause shown." That provision does not prohibit that jailer from doing anything. As the Sixth Circuit keenly observed: "[T]o say that a sentencing court must do one thing ... is not to say that another government entity (the county jail) may not do another ... ." *Sickles v. Campbell Cty.*, 501 F.3d 726 (6th Cir. 2007).

Because Doyle was not personally involved in assessing the fees Jones incurred while incarcerated and since he acted within his discretionary capacity in enforcing the Detention Center's policy for the recovery of fees from inmates, he is entitled to qualified official immunity.

CONCLUSION

For all of these reasons, Appellees, Clark County, and Clark County Jailer Frank Doyle, in his individual capacity, respectfully request that this Court affirm the decisions of the lower courts.

Respectfully submitted,



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APPENDIX

1. *Jones v. Clark County,* 2016 U.S. Dist. LEXIS 31975 (E.D.Ky.)

2. *Jones v. Clark County,* 666 Fed. Appx. 483 (6th Cir. 2016)

TAB 1

Jones v. Clark Cnty.

United States District Court for the Eastern District of Kentucky, Central Division

March 11, 2016, Decided; March 11, 2016, Filed

Action No. 5:15-cv-350-JMH

Reporter
2016 U S Dist. LEXIS 31975 *; 2016 WL 1050743

DAVID JONES, Plaintiff, v. CLARK COUNTY, KENTUCKY, et al., Defendants.

Subsequent History: Affirmed by *Jones v. Clark County, 666 Fed Appx. 483, 2016 U.S. App LEXIS 22995 (6th Cir.), 2016 FED App. 684N (6th Cir.) (6th Cir. Ky , Dec. 19, 2016)*

Related proceeding at *Jones v. Clark County, 2019 Ky. App. Unpub. LEXIS 908 (Ky. Ct App., Feb. 7, 2019)*

Core Terms

jail, confined, inmate, incarceration, reimbursement, jailer, sentencing court, allegations, deprivation, rights, costs, substantive due process, state law claim, violations, automatic, innocence, billing, motion to dismiss, per diem, charging, designee, canteen

Counsel: **[*1]** For David Jones, Individually and on behalf of all persons similarly situated, Plaintiff: Camille Bathurst, Gregory Allen Belzley, LEAD ATTORNEYS, Belzley Bathurst, Attorneys, Prospect, KY, Matthew Wayne Boyd, LEAD ATTORNEY, Boyd Law Office, PSC, Lexington, KY.

For Clark County, Kentucky, Frank Doyle, Individually, Defendants: Jeffrey C. Mando, Adams, Stepner, Woltermann & Dusing, PLLC, Covington, KY.

Judges: Joseph M. Hood, Senior United States District Judge.

Opinion by: Joseph M. Hood

Opinion

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motion to dismiss of Defendants, Clark County, Kentucky and Frank Doyle. [DE 4] Plaintiff having filed a response [DE 5], and Defendants having replied in further support of their motion [DE 8], this matter is ripe for decision. For the following reasons, the Court will grant Defendants' motion to dismiss.

I.

Plaintiff brings this putative class action complaint against Defendants Clark County, Kentucky and Clark County Jailer, Frank Doyle, individually, on behalf of all persons who, while incarcerated in the Clark County Detention Center (the "Jail"), were wrongfully assessed fees for their incarceration without due process of law. Plaintiff alleges that charging **[*2]** persons admitted to the Jail for the costs of their incarceration without an order of a sentencing court, including those individuals who are subsequently proven innocent, violates *KRS 441.265* and the due process rights of Plaintiff and putative class members under the *Fourteenth Amendment of the United States Constitution*. Plaintiff asserts state law claims for conspiracy, negligence, conversion, fraud, and violations of the Kentucky Constitution Plaintiff also seeks a declaration that *KRS 441.265* is unconstitutional and a return of all monies paid to Defendants

APPENDIX 1

Plaintiff Jones avers that he was arrested and admitted to the Jail on October 26, 2013, where he remained incarcerated until his release on December 15, 2014. Plaintiff further maintains that on April 2, 2015, the charges for which he was incarcerated were dismissed upon Plaintiff proving his innocence. After being released from the Jail, Plaintiff states that he received a written demand from the Jail to pay in excess of $4,000.00 in fees relating to his incarceration in the Jail. Plaintiff alleges that, to date, he has paid $20.00 of the bill, but on the advice of counsel, refuses to pay the remaining balance.

Defendants move to dismiss Plaintiff's claims in their entirety pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for failure **[*3]** to state a claim upon which relief may be granted.

II.

A motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* tests the sufficiency of the plaintiff's complaint. If the plaintiff fails to state a claim upon which relief can be granted, a court may grant the motion to dismiss. *Fed R. Civ. P. 12(b)(6)*. *Rule 8(a)(2)* states that, at a minimum, a pleading should contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ P. 8(a)(2)* In *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Supreme Court explained that in order to survive a *Rule 12(b)(6)*, a complaint need not contain "detailed factual allegations," but must present something more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action's elements will not do." *Id. at 555*.

Although a court must accept as true all of the well-pleaded factual allegations contained in the complaint, *Ashcroft v. Iqbal, 556 U.S 662, 678, 129 S. Ct. 1937, 173 L. Ed 2d 868 (2009)* (citing *Twombly, 550 U S. at 570*), courts are not bound to accept conclusory allegations as true. *Twombly, 550 U S. at 555* (citing *Papasan v. Allain, 478 U.S. 265, 106 S Ct. 2932, 92 L Ed. 2d 209 (1986)*). The factual allegations in a complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly, 550 U.S. at 555-56* (citations omitted). Under this standard, only a claim which is "plausible on its face" will survive dismissal. *Id at 570*; *Tam Travel, Inc. v. Delta Airlines, Inc., 583 F.3d 896, 903 (6th Cir. 2009)*. "A **[*4]** claim is plausible when it contains facts that allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct." *Ashcroft, 556 U.S. at 678*. If it appears beyond doubt that the plaintiff's complaint does not state facts sufficient to "state a claim to relief that is plausible on its face," then the claims must be dismissed. *Twombly, 550 U.S. 544 at 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929*; *Weisbarth v. Geauga Park Dist., 499 F.3d 538, 542 (6th Cir. 2007)*.

III.

42 U.S.C. § 1983 Claims

In his Complaint, Plaintiff asserts claims under *42 U.S.C. § 1983* for alleged violations of his *Fourteenth Amendment* rights under the United States Constitution.[1] *Section 1983* provides a private cause of action against those who, under color of state law, violate a right secured by the Constitution or laws of the United States *42 U.S.C. § 1983*. A plaintiff may bring a *§ 1983* claim against persons in their individual or official capacity, or against a governmental entity. *Kentucky v. Graham, 473 U.S. 159, 168, 105 S. Ct 3099, 87 L. Ed. 2d 114 (1985)*

To establish a procedural due process claim under *42 U.S.C § 1983*, a plaintiff must establish that: (1) he was deprived of a life, liberty or property interest secured by the *Fourteenth Amendment to the United States Constitution* by the state, and (2) the state did not afford adequate procedural rights **[*5]** prior to the deprivation of the protected interest. *U.S Const. amend. XIV*, *see also Ky Dept. of Corr. v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)*; *Hahn v. Star Bank, 190 F.3d 708, 716 (6th Cir. 1999)*. Absent either element, the *§ 1983* claim fails. *Thompson, 490 U.S. at 460*.

The law is clear that individuals have a property interest in their own money. *Bd. of Regents of State Colls. v Roth, 408 U.S. 564, 571-73, 92 S. Ct. 2701, 33 L Ed. 2d 548 (1972)*. Thus, assuming Plaintiff has been deprived of his money,[2] as a threshold matter, Plaintiff

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[1] Because Plaintiff does not object to the dismissal of his *Fourth Amendment* claim, *see* Plaintiff's Response to Defendants' Motion to Dismiss at 1, the Court declines to address this claim and will dismiss it accordingly.

[2] In other similar cases involving the constitutionality of jail fees

must plead an underlying constitutional violation to state a claim for relief pursuant to *§ 1983*, that is, that the state did not afford adequate procedural rights prior to the deprivation of his protected interest. Therefore, the initial question before the Court is whether charging inmates a fee for their incarceration without an order from a sentencing court, as Plaintiff alleges is required by *KRS 441.265*, and even though an inmate later proves his innocence, amounts to a violation of procedural due process under the *Fourteenth Amendment*. *KRS 441.265* provides in its entirety as follows:

> Required reimbursement by prisoner of costs of confinement, local policy of fee and expense rates, billing and collection methods.
>
> (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, **[*6]** 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 **[*7]** 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.
>
> (4) Any fees or reimbursement received under this section shall be forwarded to the county treasurer for placement in the jail's budget.
>
> (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.
>
> (7) Prior to **[*8]** 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.
>
> (8) No per diem shall be charged to any prisoner who is required to pay a work release fee pursuant to *KRS 439.179*, a prisoner that has been ordered to pay a reimbursement fee by the court pursuant to *KRS 534 045*, or that the Department of

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within the Sixth Circuit, the fees were automatically deducted from the inmates' canteen accounts. *Hodge v Grayson Cty., No 4 07-cv-P60-M, 2008 U S. Dist LEXIS 32295 (W D Ky. Apr 17, 2008)*; **[*9]** *Harper v. Oldham Cty., No 3 10-cv-P735-S, 2011 U S Dist. LEXIS 40353, 2011 WL 1399771 (W D Ky. Apr. 13, 2011)*; *Whitaker v. Thornton*, No. 3:13-cv-P859-M, 2014 WL 585323 (W.D Ky. Feb. 14, 2014); *Cole v. Warren Cty , No. 1:11-CV-00189, 2012 U.S Dist LEXIS 74670, 2012 WL 1950419 (W.D. Ky. May 30, 2012)*. Here, unlike in the previously cited cases, Jones was billed after his release rather than automatically debited while incarcerated.

> Corrections is financially responsible for housing.
>
> (9) No medical reimbursement, except that provided for in KRS 441.045, shall be charged to any prisoner that the Department of Corrections is financially responsible for housing.

The precise question before the Court was examined and answered in the negative by Judge Bertelsman in *Sickles v. Campbell County*, which decision the Sixth Circuit affirmed. *Sickles v Campbell Cty., 439 F. Supp. 2d 751, 755 (E.D. Ky. 2006) aff'd, 501 F.3d 726 (6th Cir. 2007)*. In *Sickles*, the money that pretrial detainees had on their person was confiscated upon detention and placed in canteen accounts, in addition to any money provided by relatives or friends, and the canteen accounts were debited a fee for booking and a per diem fee for housing. *Sickles, 439 F. Supp. 2d at 755*. Looking to *KRS 441.265(6)* (which provides for the automatic deduction of fees from a prisoner's account) and the definition of "prisoner" in *KRS 441.005(3)(c)*[3] (which includes not just convicted individuals, but any person confined and charged with an offense), Judge Bertelsman held that "the correct reading of [*KRS 441.265*] is that the fees may be imposed as soon as the prisoner is booked into the jail and may be periodically deducted from the prisoner's account as provided by local regulation." *Sickles, 439 F. Supp. 2d at 755*. The Court further concluded **[*10]** that "[s]ince the statute is valid, the inmate owes fees that begin to accrue immediately upon his or her being booked into the jail " *Id.* The reference to "sentencing court" in *KRS 441.265(1)*, according to Judge Bertelsman, is to allow the court to impose a judgment for any deficiency at sentencing which was not defrayed by automatic deduction. *Id.*

On appeal, the Sixth Circuit affirmed the district court's decision, stating as follows:

> May a municipal jail, consistent with the *Due Process Clause of the Fourteenth Amendment*, withhold a portion of an inmate's canteen-account in order to cover the costs of booking, room and board without providing the inmate with a hearing before it withholds the money. Yes, we hold, and accordingly we affirm the district court's rejection of this claim and two others.

Sickles v Campbell County, 501 F. 3d 726, 728 (6th Cir. 2007). Analyzing the jail's practice of imposing fees in light of the *Mathews v Eldridge* balancing test,[4] the Sixth Circuit explained that a predeprivation hearing was not required because **[*11]** (1) the private interests at stake are "small in absolute and relative terms"; (2) the risk of erroneous deprivation is minor; (3) the potential benefits of additional safeguards,[5] including a predeprivation hearing, are few; and (4) the government's interests — sharing the costs of incarceration and further offender accountability — are substantial *Id. at 731* (citing *Mathews, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)*).

The Court finds that none of the *Mathews v. Eldridge* factors **[*12]** as applied here distinguish Plaintiff's case from *Sickles* As to the first prong of *Mathews*, Plaintiff argues that the amount of money at stake exceeds the amount at issue in *Sickles*. However, Plaintiff has only been deprived of the $20.00 he has paid to Defendants, which is comparable to the amount of money at stake in *Sickles. Sickles, 501 F.3d at 730* There is no allegation that Defendants have taken any additional action to collect the remaining balance from Plaintiff other than sending him the initial bill.

Looking to the second prong, as in *Sickles*, there is a minor risk of erroneous deprivation as the withholding of funds involves elementary accounting with little risk of error. *Id at 730-31*. As Plaintiff alleges, the Jail's incarceration fee policy is non-discretionary as it applies to all persons confined in the Jail. Moreover, because

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[3] "Prisoner" is defined as "any person confined in jail pursuant to any code, ordinance, law, or statute of any unit of government and who is: (a) Charged with or convicted of an offense, or (b) Held for extradition or as a material witness; or (c) Confined for any other reason." *KRS § 441.005(3)*

[4] In considering a due process claim, the Supreme Court has outlined three factors that courts must balance when determining what procedural process is owed, and when that process is due: (1) the private interest that will be affected by the official action, [2] the risk of an erroneous deprivation of such interest through the procedures used, 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 319, 96 S Ct. 893, 47 L. Ed. 2d 18 (1976)*

[5] The grievance procedures available in *Sickles* included the fact that the inmates had notice of the collection fee procedures and of the inmates' rules and rights. *Sickles, 439 F. Supp 2d 751 (E D Ky 2006) aff'd, 501 F.3d 726 (6th Cir 2007)*.

Plaintiff was billed after being released, the risk of erroneous deprivation is arguably less than in *Sickles* where the plaintiffs were automatically debited while confined The Court also finds the process set forth in KRS 441.265(3), which states that counties may file a civil action against a released prisoner to collect any amount owed which remains unpaid, to constitute an adequate safeguard given **[*13]** the nature and weight of the private interests at stake. An additional protection, per KRS 441.265(7), is the opportunity for prisoners to negotiate with the jailer to be released from all or part of the repayment obligation, exist. Notably, as in *Sickles*, there is no allegation by Plaintiff that he challenged his repayment obligation through these grievance procedures nor an allegation that these procedures would be ineffective in protecting his due process rights *Id. at 731*; *Parratt v. Taylor, 451 U.S. 527, 543-44, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), rev'd on other grounds by Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)*. As to the third *Mathews* factor — the government's interest — this Court finds, as others have found, that the government's interest in "sharing the costs of incarceration" and furthering offender accountability ... are substantial." *Sickles, 501 F.3d at 732*.

Plaintiff argues his case is distinguishable from *Sickles* on the basis that he has proven his innocence, yet was billed for incarceration fees, whereas in *Sickles*, there is no indication whether any of the plaintiffs therein were subsequently found guilty or innocent. However, the Sixth Circuit addressed and rejected this argument in *Sickles* when it stated "to say that a sentencing court must do one thing (requiring reimbursement even after the inmate's release) is not to say **[*14]** that another government entity (the county jail) may not do another (collecting room-and-board fees from inmates while they remain in jail)." *Sickles, 501 F. 3d at 732*. In other words, as this Court explained, "[i]f *subsection (6) of [KRS 441.265]* (which permits the fees to be "automatically deducted from the prisoner's property or canteen account,") is to be given any meaning, imposition of the fees cannot be delayed until sentencing. [. .] [T]he statutes contemplate imposition of the fees whether or not the inmate is ever sentenced." *Sickles, 439 F. Supp 2d at 755*. Thus, if automatic collection of fees can occur without regard to the inmate being sentenced pursuant to *Sickles*, an inmate's conviction is not a prerequisite to the charging and imposing of fees under *KRS 441 265*. For this reason, Plaintiff's attempt to distinguish his case from *Sickles* fails. Without any contrary support for Plaintiff's interpretation of *KRS 441.265*, this Court finds *Sickles* to be controlling. *Sickles, 439 F. Supp. 2d 751 (E.D. Ky 2006) aff'd, 501 F 3d 726 (6th Cir. 2007)*.[6]

The Court also finds persuasive the decisions of the United States District Court for the Western District of Kentucky, which have followed *Sickles* and agreed that the billing and collection of fees pursuant to *KRS 441.265* does not violate the *Due Process Clause* when analyzing nearly identical claims to those raised in the instant case. *See Hodge v. Grayson Cty., No. 4:07-cv-P60, 2008 U S. Dist LEXIS 32295 (W.D. Ky. Apr. 17, 2008)*; *Harper v. Oldham Cty , No 3.10-cv-P735, 2011 U.S. Dist. LEXIS 40353, 2011 WL 1399771 (W.D. Ky. Apr. 13, 2011)*; *Whitaker v. Thornton, No. 3:13-cv-P859, 2014 U.S. Dist. LEXIS 18865, 2014 WL 585323 (W.D. Ky. Feb. 14, 2014)*; *Cole v. Warren Cty., No. 1:11-CV-00189, 2012 U S. Dist LEXIS 74670, 2012 WL 1950419 (W.D. Ky. May 30, 2012)*.[7] For the same reasons stated above with respect to *Sickles*, the Court rejects Plaintiff's argument that these cases are inapplicable because the majority of the plaintiffs therein were convicted inmates. In *Harper*, the Western District of Kentucky explicitly recognized that **[*16]** one plaintiff was a pretrial detainee while the other was a convicted inmate, but proceeded to make no further distinction in its analysis regarding conviction status and ultimately concluded that "the case law in this circuit is clear that the Oldham County Jail was not required to provide Plaintiffs with a predeprivation hearing before assessing

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[6] In further support of their argument that the order of a sentencing court is not required to impose fees on an inmate pursuant to *KRS 441.265*, Defendants cite *Cole v Warren Cty , 2015 Ky. App LEXIS 157 (Ky. App Nov. 13, 2015)*, wherein the Court of Appeals of Kentucky interpreted *KRS 441.265* "unambiguously permits the exact practice used by the [Warren County Jail]" of automatically deducting fees **[*15]** without the order from a sentencing court. However, recognizing that this decision is currently being appealed and, therefore, has not been conclusively ruled on by the Kentucky Supreme Court, we give some weight, rather than controlling weight, to the Court of Appeals decision. *Rutherford v. Columbia Gas, 575 F 3d 616, 620 (6th Cir. 2009)*. The Court also looks to the decisions of the federal courts within the Sixth Circuit cited herein to help predict how the state's highest court will interpret *KRS 441.265*. *Id.*

[7] The Court also notes that the Third and Fourth Circuits have held that the collection of fees from arrestees without a predeprivation hearing does not violate due process. *See Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410 (3d Cir. 2000)*, *Slade v Hampton Roads Reg'l Jail, 407 F.3d 243 (4th Cir. 2005)*.

the per diem fees. As such, their *Fourteenth Amendment* procedural due process rights were not violated." *Harper,2011 U.S. Dist. LEXIS 40353, 2011 WL 1399771 at *6*. The Sixth Circuit affirmed, acknowledging plaintiff's argument that jail fees should not apply to a pretrial detainee who had not been convicted of an offense, but failing to find plaintiff's conviction status as a distinguishing factor from *Sickles. Harper v. Oldham Cty. Jail, 2011 U.S. App. LEXIS 26511 (6th Cir. Dec. 15, 2011)*.

As alleged in the Complaint, Plaintiff was a "prisoner" within the definition of *KRS 441 005(3)* (i.e. a "person confined in jail pursuant to any code, ordinance, law, or statute of any unit of government" who was "(a) charged with an offense" or "(c) confined for any other reason"), therefore, this Court holds that it was not unconstitutional to impose fees **[*17]** on Plaintiff without the order of a sentencing court and despite the fact that he later proved his innocence For all of the reasons stated above, Plaintiff's *§ 1983* claim for the alleged violation of his *Fourteenth Amendment* rights fails to state a claim upon which relief may be granted, and accordingly, Plaintiff's *§ 1983* claim will be dismissed.

Interpretation of KRS 441.265

Plaintiff alleges that Defendants have misconstrued and violated *KRS 441.265* by, in part, not requiring the order of a sentencing court before imposing fees on a prisoner. Plaintiff argues that the Court must look to the statute's legislative history, which would reveal that the statute "was amended prior to its enactment specifically to reposit such power in the sentencing court " [DE 5 at 3]. As discussed herein, the Court disagrees with Plaintiff's interpretation that *KRS 441.265* is ambiguous, therefore, it would be improper to refer to the legislative history of the statute. *Sickles*, in addition to other persuasive precedent within the Sixth Circuit, with which this Court agrees, hold that the order of a sentencing court is not required by *KRS 441.265*. *Sickles, 439 F. Supp. 2d 751, 755 (E.D. Ky. 2006) aff'd, 501 F.3d 726 (6th Cir. 2007)*; *Hodge, 2008 U S Dist. LEXIS 32295 (W.D. Ky. Apr. 17, 2008)*, *Harper, 2011 U.S Dist LEXIS 40353, 2011 WL 1399771 (W.D Ky Apr. 13, 2011)*; *Whitaker, 2014 U.S. Dist LEXIS 18865, 2014 WL 585323 (W.D. Ky. Feb. 14, 2014)*; *Cole, 2012 U.S. Dist. LEXIS 7467, 2012 WL 1950419 (W.D. Ky. May 30, 2012)*. Nevertheless, even if Defendants were misapplying and violating *KRS 441.265*, because the misapplication does not **[*18]** result in a violation of Plaintiff's due process rights, Plaintiff may not prevail on his *§ 1983* claim. *Hodge, 2008 U.S. Dist LEXIS 32295, 2008 WL 1805505, at *4* (citing *Sickles, 501 F.3d at 732*).

Substantive Due Process

To the extent Plaintiff may also be alleging a substantive due process violation, he must assert either the "denial of a right, privilege, or immunity secured by the Constitution or federal statute other than [a] procedural claim," or an official act which "shocks the conscience." *Mertik v. Blalock, 983 F.2d 1353, 1367-68 (6th Cir. 1993)*. Conduct that violates substantive due process is "'conduct intended to injure in some way unjustifiable by any government interest.'" *Mitchell v. McNeil, 487 F.3d 374, 377 (6th Cir. 2007)* (quoting *Cty. of Sacramento v. Lewis, 523 U.S. 833, 849, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)*). The "shocks the conscience" standard is difficult to satisfy, as noted in *Lewis, supra, 523 U.S. at 846* (internal citation omitted) "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" If the government action does not shock the conscience, that action does not violate substantive due process so long as it is rationally related to a legitimate state interest *Valot v. Southeast Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1228 (6th Cir. 1993)*.

Because Plaintiff pleads no facts that rise to the level of a substantive due process violation, that is, Defendants' action in collecting jail fees does not "shock the conscience," and because recouping costs from inmates is a legitimate state interest, **[*19]** any claim alleging a substantive due process violation is hereby dismissed.

State Law Claims

Plaintiff has also alleged state law claims against Defendants for negligence (Count II), civil conspiracy (Count III), conversion (Count IV), fraud (Count V), restitution in equity (Count VI), and violations of the Kentucky Constitution (Count VII). Defendants contend that because Plaintiff's claims pursuant to *42 U.S.C. § 1983* fail to state a claim upon which relief may be granted, this Court should decline jurisdiction over Plaintiff's state law claims pursuant to *28 U.S.C. §1367(c)*.

Section 1367(c) of Title 28 of the United States Code provides, in pertinent part, as follows: "The district courts may decline to exercise supplemental jurisdiction

over a claim ... if ... the district court has dismissed all claims over which it has original jurisdiction." *28 U.S.C. § 1367(c)(3)*. Here, given that the remaining claims are state law claims, and that this case is in its infancy, the Court finds that the balance of judicial economy, convenience, fairness, and comity direct the Court to decline to exercise supplemental jurisdiction over Plaintiff's state law claims. Accordingly, Plaintiffs' pendent state-law claims will be dismissed without prejudice.

Declaratory Judgment and Injunctive Relief

In his ninth **[*20]** cause of action, Plaintiff seeks a declaratory judgment and injunction enjoining Defendants from "any further pursuit of policies, procedures, customs or practices which resulted in persons being charged for the costs of their confinement absent an order of a sentencing court requiring that they reimburse the county for expenses incurred by reason of such person's confinement." [DE 1 at 9]. Since Plaintiff has not adequately pleaded his substantive claims as set forth above, the court has no basis upon which to issue declaratory relief, and therefore, Plaintiff's claim seeking a declaratory judgment is dismissed. *Int'l Ass'n of Machinists & Aerospace Workers v. Tennessee Valley Auth., 108 F.3d 658, 668 (6th Cir. 1997)*. Similarly, because Plaintiff cannot establish that in the absence of an injunction, he or anyone else will suffer irreparable harm with no remedy at law, an injunction is not appropriate here.

Conclusion

For the reasons articulated above, Plaintiff has failed to state a claim upon which relief may be granted. Accordingly, **IT IS HEREBY ORDERED** that:

(1) Defendants' Motion to Dismiss [DE 4] is **GRANTED**;

(2) All claims alleged in the Complaint [DE 1] against all Defendants are **DISMISSED WITH PREJUDICE**;

(3) All pending motions or requests for relief are **DENIED AS MOOT**;

(4) All deadlines **[*21]** and scheduled proceedings are **CONTINUED GENERALLY**;

(5) That the Clerk shall **STRIKE THIS MATTER FROM THE ACTIVE DOCKET**;

(6) That this Order is a **FINAL AND APPEALABLE ORDER** and **THERE IS NO JUST CAUSE FOR DELAY.**

This the 11th day of March, 2016.

Signed By:

/s/ Joseph M. Hood

Joseph M. Hood

Senior U.S. District Judge

End of Document

TAB 2

Jones v. Clark County

United States Court of Appeals for the Sixth Circuit

December 19, 2016, Filed

File Name: 16a0684n.06

No. 16-5295

Reporter
666 Fed Appx. 483 *; 2016 U.S. App. LEXIS 22995 **, 2016 FED App 0684N (6th Cir.)

DAVID JONES, Individually and on behalf of all persons similarly situated, Plaintiff-Appellant, v. CLARK COUNTY, KENTUCKY; FRANK DOYLE, Individually, Defendants-Appellees.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: **[**1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

Jones v. Clark Cnty., 2016 U.S. Dist. LEXIS 31975 (E.D. Ky., Mar. 11, 2016)

Core Terms

billed, deprivation, district court, incarceration, jailing, jailer, due process right, protected property interest, sentencing court, reimbursement, costs

Case Summary

Overview
ISSUE: A federal procedural due process challenge to the practice of Kentucky jailers of sending a bill for incarceration costs to jailed prisoners who have subsequently been discharged without any sentence: HOLDINGS: [1]-Appellant's procedural due process rights had not been violated. The only action taken by defendants to get his money was to bill for it and accept partial payment; [2]-Appellant did not have a property interest in not being billed; [3]-Even if the process of billing and receiving partial payment could be thought of as a deprivation of a property interest, such a deprivation was inherently protected by process; [4]-Balancing the Eldridge factors, he was not due much process. In Sickles, the court concluded that only minimal process was due and that Kentucky's pay-for-your-own-incarceration statute did not violate due process, and the same conclusion was required here.

Outcome
The district court's judgment was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Postconviction

APPENDIX 2

Proceedings > Imprisonment

HN1[] Postconviction Proceedings, Imprisonment

Kentucky's pay-for-your-own-incarceration statute generally requires prisoners to reimburse the jailing county for the costs of their incarceration. Ky. Rev. Stat. Ann. § 441.265. Ordinarily, the prisoners "shall be required" to do so "by the sentencing court." Ky Rev Stat. Ann. § 441 265(1). But the jailing county may compel at least a part of that reimbursement without a sentencing court's order, because the jailing county may "automatically deduct" funds "from the prisoner's property or canteen account" to ensure payment of the fees. Ky Rev. Stat. Ann. § 441.265(6). Not all prisoners have to pay for their incarceration. Prisoners do not pay if "the Department of Corrections is financially responsible for housing" the prisoner, Ky. Rev. Stat Ann § 441.265(8), and the Department of Corrections appears to be financially responsible for housing "prisoners charged with or convicted of violations of state law," Ky. Rev. Stat. Ann. § 441.206(1), (2). Convicted and indicted prisoners, therefore, appear not to be billed for their incarceration. Merely arrested prisoners, who fail to post bond and are incarcerated, may be billed after release, even if all charges against them are later dismissed, leaving them with no convictions and no sentences.

Constitutional Law > .. > Fundamental Rights > Procedural Due Process > Scope of Protection

HN2[] Procedural Due Process, Scope of Protection

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.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN3[] Procedural Due Process, Scope of Protection

According to the three-factor Eldridge test for what process is due, the court balances (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.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN4[] Procedural Due Process, Scope of Protection

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.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN5[] Protection of Rights, Section 1983 Actions

Although 42 U S C.S § 1983 provides the citizen with an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN6[] Reviewability of Lower Court Decisions, Preservation for Review

Generally speaking, a party does not preserve an argument by raising it for the first time at oral argument.

Counsel: For DAVID JONES, Individually and on behalf of all persons similarly situated, Plaintiff - Appellant: Gregory A. Belzley, Prospect, KY.

For CLARK COUNTY, KENTUCKY, FRANK DOYLE, Individually, Defendant - Appellee: Jeffrey C. Mando,

Adams, Stepner, Woltermann & Dusing, Covington, KY.

Judges: BEFORE: MERRITT, ROGERS, and KETHLEDGE, Circuit Judges.

Opinion by: ROGERS

Opinion

[*484] ROGERS, Circuit Judge. This case presents a federal procedural due process challenge to the practice of Kentucky jailers of sending a bill for incarceration costs to jailed prisoners who have subsequently been discharged without any sentence. After arrest, David Jones was admitted to the Clark County Detention Center. He spent fourteen months in jail, then left, and, five months thereafter, the accusations against him were dismissed. Clark County then billed Jones $4,000 for the costs of his incarceration. Jones paid $20, stopped paying, and sued Clark County and its jailor, asserting *§ 1983* and state claims both individually and on behalf of a class The district court dismissed the federal claim and declined to exercise supplemental jurisdiction over the state **[**2]** claims. Jones appeals, arguing once again that he has been deprived of procedural due process by the County and the County Jailor. Because Kentucky allowed Jones to challenge the bill by refusing to pay it, Jones's procedural due process rights have not been violated. We do not have before us the separate question of whether federal substantive due process principles permit the state to legislate the reimbursement obligation for which Jones was billed.

HN1[↑] Kentucky's pay-for-your-own-incarceration statute generally requires prisoners to reimburse the jailing county for the costs of their incarceration. *KRS 441.265*. Ordinarily, the prisoners "shall be required" to do so "by the sentencing court " *KRS 441.265(1)*. But the jailing county may compel at least a part of that reimbursement without a sentencing court's order, because the jailing county may "automatically **[*485]** deduct[]" funds "from the prisoner's property or canteen account" to ensure payment of the fees *KRS 441.265(6)*. Not all prisoners have to pay for their incarceration. Prisoners do not pay if "the Department of Corrections is financially responsible for housing" the prisoner, *KRS 441 265(8)*, and the Department of Corrections appears to be financially responsible for housing "prisoners **[**3]** charged with or convicted of violations of state law," *KRS 441.206(1)—(2)*. Convicted and indicted prisoners, therefore, appear not to be billed for their incarceration. Merely arrested prisoners, who fail to post bond and are incarcerated, may be billed after release, even if all charges against them are later dismissed, leaving them with no convictions and no sentences.[1]

Here, accepting as true all of its well-pleaded factual allegations, Jones's complaint sets out the following facts. On October 26, 2013, David Jones was "arrested and admitted" to the Clark County Detention Center. He stayed there until December 15, 2014. On April 2, 2015, the accusations against Jones were dropped "because [Jones] proved he was entirely innocent of such offenses." After his release, Jones received a bill from the Clark County Detention Center to pay "more than $4,000 for the costs of his confinement." Jones initially paid $20; he then stopped paying, on his counsel's advice.

The complaint does not plead why Jones was arrested or what Jones's bail was, if any. It also does not plead when, and with what, Kentucky formally charged Jones, before dismissing those charges. Thus the complaint does not allege that Jones **[**4]** was billed for incarceration when Kentucky gave Jones no option but to stay in jail; Jones may have been incarcerated because he was allowed, but failed, to post bond.

Jones sued Clark County and Frank Doyle, the Clark County Jailer, both individually and on behalf of all persons who were deprived of their property without due process of law when the Clark County Detention Center billed them for the costs of their incarceration without an order of a sentencing court. The complaint alleged that requiring prisoners to pay for their own incarceration,

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[1]While a Kentucky court has approved the automatic withholdings from non-sentenced prisoners as consistent with Kentucky law, *see Cole v. Warren County, 495 S W 3d 712 (Ky. Ct App. 2016)*, and while this court has approved that practice as consistent with the *Due Process Clause of the Fourteenth Amendment to the U S. Constitution*, *see Sickles v Campbell Cty., 501 F.3d 726 (6th Cir 2007)*, no court appears to have addressed the lawfulness of billing a released prisoner who was never convicted or sentenced, and whose charges were ultimately dismissed.

where no trial court has convicted the prisoners and no sentencing court has ordered the payments, violated Kentucky law and the *Fourth* and *Fourteenth Amendments of the U.S Constitution*. The complaint also asserted various state-law claims of conspiracy, negligence, conversion, fraud, and violations of the Kentucky Constitution.

Defendants Clark County and Boyle moved to dismiss all claims As a part of that motion, the defendants argued that Jones had not alleged a viable claim of violation of the *Fourth Amendment*. Jones responded, opposing the motion to dismiss, but "not object[ing]" to the dismissal of his *Fourth Amendment* claims.

The district court granted the motion to dismiss, dismissing the federal claims with prejudice, and **[**5]** dismissing the state claims without prejudice. *Jones v. Clark Cty , No. 5:15-cv-350-JMH, 2016 U.S. Dist. LEXIS 31975, 2016 WL 1050743 (E.D. Ky. Mar 11, 2016)*. Recognizing that Jones had not objected to the dismissal of his *Fourth Amendment* claim, *Jones, 2016 U.S. Dist. LEXIS 31975, 2016 WL 1050743, at *2 n.1*, the district court analyzed **[*486]** only whether Jones's due process rights under the *Fourteenth Amendment* had been violated, *see 2016 U.S Dist. LEXIS 31975, [WL] at *2*. In the context of Jones's *§ 1983* claim, then, the two issues were whether Jones was deprived of a protected property interest and whether Kentucky had failed to provide adequate process for that deprivation. *Id.* (citing *Ky. Dep't of Corr v Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)*). Assuming that Jones had a property interest in the $20 of which he was deprived, *id.* (citing *Bd. of Regents of State Colls. v Roth, 408 U.S. 564, 571-73, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)*), the district court concluded that Jones's due process rights had not been violated under the *Mathews v. Eldridge* balancing test, *2016 U.S Dist. LEXIS 31975, [WL] at *2-*6*.

In conducting the *Mathews v. Eldridge* balancing test, the district court relied heavily on this court's opinion in *Sickles v. Campbell Cty., 501 F.3d 726 (6th Cir. 2007)*. In *Sickles*, this court considered whether Kentucky had violated prisoners' due process rights when it withheld a portion of the transfers by friends and families into the prisoners' canteen accounts, which contained funds that the prisoners could use to purchase goods from the commissary, without an order of a sentencing court. *See Sickles, 501 F.3d at 728-29*. After balancing the factors that the panel **[**6]** identified in *Mathews v. Eldridge*, we concluded that no predeprivation hearing was required for the withholdings. *Sickles, 501 F.3d at 731*. Here, the district court found that that analysis controlled this case, because Jones raised no successful grounds on which to distinguish Sickles. *Jones, 2016 U.S. Dist LEXIS 31975, 2016 WL 1050743, at *4*.

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 *HN2*[↑] protected property interest is "defined by existing rules or understandings that **[**7]** 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)*. **[*487]** In such a suit the defendant can raise all the state or federal issues he wants to challenge his liability. In **[**8]** 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 HN3[↑] 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*.

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 **[**9]** 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 U.S. Dist. LEXIS 31975, 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 U S Dist. LEXIS 31975, 2016 WL 1050743, at *4*. Furthermore, here, the risk of deprivation is diminished by process that the Kentucky statute provides to Jones, but did **[**10]** 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. HN4[↑] 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.

We do not address the other argument that Jones makes at length on appeal: that he has no obligation to pay under Kentucky's pay-for-your-own-incarceration statute, once it has been determined that he will not be sentenced.[2] This is presented as a state-law issue rather than as a federal issue. The district court below declined to exercise supplemental jurisdiction over Jones's state law claims under *28 U.S.C. § 1367*. We interpret this ruling as extending **[*488]** to claims based on the scope of the Kentucky statute, notwithstanding the district court's discussion of the issue as part of its due process analysis *See Jones, 2016 U.S Dist. LEXIS 31975, 2016 WL 1050743, at *6*. Declining to exercise jurisdiction over the state law issues was appropriate HN5[↑] "Although *[§ 1983]* provides the citizen with an **[**11]** effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law." *Collins v. City of Harker Heights, 503 U.S. 115, 119, 112 S Ct. 1061, 117 L Ed 2d 261 (1992)*. We take no position on the state law issue. If the state were to sue to enforce the obligation, Jones could still contend that the Kentucky statute does not require him to pay. Counsel for the defendants in this case, however, at oral argument disavowed any further efforts to obtain the $4,000 beyond the $20 already received.

The judgment of the district court is affirmed.

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[2] Jones declined to argue on appeal in this case—at least until oral argument—that federal substantive due process requires that result. Any such argument is implicit at most in his briefing. HN6[↑] "Generally speaking[,] . . a party does not preserve an argument by raising it for the first time at oral argument." *United States v Huntington National Bank, 574 F.3d 329, 331 (6th Cir. 2009)*.