Spring 2015 | Volume 10 | Issue 2
Tennessee Journal of Law and Policy 215

ARTICLE

TWELVE ANGRY HOURS: IMPROVING DOMESTIC VIOLENCE HOLDS IN TENNESSEE WITHOUT RISK OF VIOLATING THE CONSTITUTION

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I. Introduction

Tennessee law currently provides that individuals who have been arrested for certain domestic violence offenses "shall not be released within twelve (12) hours of arrest if the magistrate or other official duly authorized to release the offender finds that the offender is a threat to the alleged victim."[2] However, Tennessee law also provides an exception to this "12-hour hold" requirement that permits judges to grant the early release of alleged domestic violence offenders under either of two circumstances.[3] Specifically, Tenn. Code Ann. § 40-11-150 states that even if a magistrate or duly authorized official finds an arrestee to be a threat to an alleged victim, a judge or magistrate "may . . . release the accused in less than twelve (12) hours if the official determines that sufficient time has or will have elapsed for the victim to be protected."[4]

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[2] TENN. CODE ANN. § 40-11-150(h)(1) (2012); TENN. CODE ANN. § 40-11-150(k)(1) (2012).

[3] *Id.*

[4] *Id.*

In June of 2014, public outcry erupted over the propriety of allowing judges to waive Section 150's 12-hour hold requirement following an especially high profile incident of domestic violence in Nashville. On June 8, 2014, David Chase—a prominent local contractor—was arrested for assaulting his then-girlfriend after allegedly dragging her out of his apartment by her hair.[5] Following Mr. Chase's arrest, Judicial Commissioner Steve Holzapfel found that Mr. Chase posed a threat to the safety of his girlfriend, and he imposed the 12-hour hold compelled by Section 150 as a result.[6]

Less than three hours later, however—and Commissioner Holzapfel's finding of dangerousness notwithstanding—General Sessions Judge Casey Moreland directed Commissioner Holzapfel to release Mr. Chase. Judge Moreland's decision to order Mr. Chase's release was apparently based on information provided to him during an ex-parte phone call from Mr. Chase's attorney, who was both a "social friend"[7] of Judge Moreland as well

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[5] Adam Tamburin and Tony Gonzales, *Nashville Contractor Charged in Second Domestic Assault After Judge Waived 'Cooling-Off' Rule*, THE TENNESSEAN, (June 11, 2014 9:40 AM), http://www.tennessean.com/story/news/crime/2014/06/11/nashville-contractor-charged-two-domestic-assaults-judge-waived-cooling-rule/10328783/; Staff Report, *David A. Chase Assault Case Timeline*, THE TENNESSEAN, (June 19, 2014 9:21 AM), http://www.tennessean.com/story/news/crime/2014/06/19/david-chase-timeline/10848327/.

[6] *Id.*

[7] Tennessee Administrative Office of the Courts, *BOARD OF JUDICIAL CONDUCT REPRIMANDS DAVIDSON COUNTY GENERAL SESSIONS JUDGE CASEY MORELAND,* (October 22, 2014), http://www.tsc.state.tn.us/press/2014/10/22/board-judicial-conduct-reprimands-davi

as a political contributor to his reelection campaign.[8] Shortly after his release, Mr. Chase allegedly returned to his apartment, began "throwing [his girlfriend] around," and then pinned her to a bed and choked her, exclaiming: "You ruined my life. I'm going to kill you, I'm going to throw you out the balcony."[9]

Mr. Chase was ultimately rearrested the following day on charges of aggravated assault by strangulation, interference with a 911 call, and vandalism.[10] Additionally, several months later, Judge Moreland was publicly reprimanded by the Board of Judicial Conduct for failing to "comply with the law," for failing to "promote public confidence in the judiciary," and for "abus[ing] the prestige of his office."[11]

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dson-county-general-sessions-judge-casey. Chris Craft, *October 22, 2014 Letter to The Honorable Casey Moreland, TN. BD. OF JUDICIAL CONDUCT* (Oct. 22, 2014), *available at* http://www.tsc.state.tn.us/sites/default/files/docs/morelandpublic.pdf.

[8] Adam Tamburin, *Senators File Complaint Against Judge Casey Moreland*, THE TENNESSEAN, (July 12, 2014 1:56 AM), http://www.tennessean.com/story/news/crime/2014/07/11/senators-file-complaint-judge-caseymoreland/12535059/.

[9] Tamburin and Gonzales, *supra* note 5.

[10] *See* Staff Report, *supra* note 5.

[11] *See generally supra* note 5*;* Tony Gonzalez, *Judge Casey Moreland Reprimanded by State Judicial Board*; THE TENNESSEAN (Oct. 24, 2014), http://www.tennessean.com/story/news/crime/2014/10/23/judge-casey-morelandreprimanded-state-judicial-board/17772843/.

The outcry following what came to be known as "the David Chase incident" [12] was immediate and unreserved.[13] Citizens were apoplectic. Media outlets in Nashville and across the state covered the story day after day. Demands for Judge Moreland's resignation reached a fever pitch.[14] And calls for legislative reform came shortly

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[12] Steven Hale, *Here's Chief Anderson's 2005 Memo on Domestic Violence Concerns*, THE NASHVILLE SCENE (June 17, 2014), http://www.nashvillescene.com/pitw/archivees/2014/06/17/heres-chief-andersons-2005-memo-on-domestic-violence-concerns.

[13] Adam Tamburn and Anita Wadhwani, *Police Chief Slams Judge for Role in Assault 'Fiasco'*, THE TENNESSEAN (June 18, 2014), http://www.tennessean.com/story/news/crime/2014/06/17/police-chief-slams-judge-role-assault-fiasco/10682387/; Adam Tamburin, *Senators File Complaint Against Judge Casey Moreland*, THE TENNESSEAN (July 12, 2014), http://www.tennessean.com/story/news/crime/2014/07/11/senators-file-complaint-judge-caseymoreland/12535059/.

[14] Frank Daniels III, *Judge Moreland Should Resign. Now.*,THE TENNESSEAN (June 21, 2014), http://www.tennessean.com/story/opinion/columnists/frankdaniels/2014/06/19/jugde-moreland-resign-now/10877125/; Michael Cass, *Megan Barry Calls on Judge Casey Moreland to Resign*, THE TENNESSEAN (June 18, 2014), http://www.tennessean.com/story/news/politics/2014/06/18/megan-barry-calls-judge-casey-moreland-resign/10760299/; Steven Hale, *Council Members to Call for Judge Casey Moreland's Resignation (Updated)*, THE NASHVILLE SCENE (June 19, 2014),http://www.nashvillescene.com/pitw/archives/2014/06/19/council-members-to-call-for-judge-casey-morelands-resignation.

thereafter, with Democrats and Republicans alike[15]—as well as both the Governor of Tennessee[16] and the Speaker of the Tennessee House of Representatives[17]—professing the view that 12-hour holds should be mandatory in all cases following domestic violence arrests with no exceptions permitted for any reason.

Motivated by the public's understandable outrage following the David Chase incident, two amendments to Section 150 have already been drafted in anticipation of the 2015 legislative session that would divest the judiciary of all discretion over 12-hour holds following certain domestic violence arrests.[18] The immediate effect of these amendments would be to "require abuse suspects to remain in jail for 12 hours following an arrest, with no exceptions."[19] According to one legislator and attorney who supports these proposed changes: "This is a very simple

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[15] Anita Wadhwani, *Lawmakers Pledge to Strengthen Domestic Violence Law*, THE TENNESSEAN (June 19, 2014), http://www.tennessean.com/story/news/crime/2014/06/19/lawmakers-pledge-strengthen-domestic-violence-law/10890503/.

[16] Chas Sisk and Walter F. Roche, *Haslam Backs 12-Hour Wait in Domestic Violence Cases*, THE TENNESSEAN (June 23, 2014), http://www.tennessean.com/story/news/politics/2014/06/23/haslam-backs-hour-wait-domestic-violence-cases/11278845/.

[17] TN Press Release Center, *House Speaker Proposes Making 12-Hour Domestic Abuse 'Cooling-Off Period' Mandatory*, TN REPORT (June 19, 2014), http://tnreport.com/2014/06/19/house-speaker-proposes-making-12-hour-domestic-abuse-cooling-period-mandatory/.

[18] *Id.*

[19] *Id.* ("The legislation will require abuse suspects to remain in jail for 12 hours following an arrest, with no exceptions.").

change to the law, but it will protect countless victims who have been abused and then potentially subjected to their attacker again before the 12 hour cooling off period."[20]

While the goals underlying the proposed amendments to Section 150 are noble, it is worth nothing that similar policies in other jurisdictions have drawn substantial criticism from legal scholars. One Memphis law professor, for example, has opined that "[i]t is doubtful whether . . . extended warrantless detention of [domestic violence] suspects . . . would pass constitutional muster," describing such policies as "unnecessarily prolonging the pretrial detention of persons presumed innocent under the law, based on a categorical assumption that all persons accused of [domestic violence] represent a public safety threat." [21] Even so, the vital constitutional concerns implicated by the proposed amendments to Section 150 have—to this point—gone largely unrecognized.

For obvious reasons, advocating in favor of a less ambitious attempt to improve a law aimed at curbing domestic violence is unlikely to be politically popular now or at any point in the future. That fact notwithstanding, however, a law divesting the judiciary of its authority to waive or decline to impose a 12-hour hold in domestic violence cases under any circumstances for any reason would likely be struck down as an unconstitutional abridgement of the Tennessee Constitution's separation of powers doctrine. Additionally, for the reasons detailed below, such a change may not be able to withstand constitutional scrutiny for several other reasons either. As a result, the legislature should retain TENN. CODE ANN. § 40-11-150's requirement that judges must find that a

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[20] *Id.*

[21] *See* Steven J. Mulroy, *"Hold" On: The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 CASE W. RES. L. REV. 815, 862 (2013).

domestic violence arrestee poses a threat to an alleged victim prior to imposing a 12-hour hold, but the legislature should also strengthen Section 150 by removing the exception that currently allows judges to lift domestic violence holds if they determine that "sufficient time has or will have elapsed for the victim to be protected."[22]

II. Potential Policy Problems with Mandatory Holds

Several examples shed light on why it would be problematic—as a policy matter—for the legislature to impose a mandatory hold on all domestic violence arrestees that brooks no exceptions under any circumstances, and that contemplates no judicial discretion of any kind for any reason. Consider, for example, a situation in which police are alerted to a domestic violence incident but given an incorrect address—resulting in the erroneous arrest of an individual who is not, in fact, suspected of having committed any crime at all. Even if the error is discovered immediately, the proposed amendments to Section 150 would still require that the arrested individual remain in jail for a minimum of twelve hours—with no exception available to remedy the acknowledged law enforcement mistake. Such a problem could quickly and easily be resolved under current law, whereas the proposed amendments to Section 150 would dramatically exacerbate it.

Alternatively, consider another somewhat frequent scenario in domestic violence cases: a situation in which two family members are arguing loudly enough to be heard by concerned neighbors, but where no violence, threat of violence, or other issue justifying law enforcement's concern has taken place. Under such circumstances, if

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[22] TENN. CODE ANN. § 40-11-150(h)(1) (2012); TENN. CODE ANN. § 40-11-150(k)(1) (2012).

police are called to investigate the incident, the investigating officers are frequently under pressure—due to an official departmental policy or otherwise—to make an arrest, even if both parties are adamant that law enforcement's involvement is neither welcome nor necessary.[23] Such "mandatory arrest" policies can result in highly unfortunate consequences,[24] such as the mother who agrees to be arrested in place of her son because she does not want him to have a criminal record. Furthermore, in the non-trivial number of cases in which two individuals are arrested simultaneously and each is held for twelve hours (which can, and sometimes does, result in young children or infants being left unsupervised for dangerously long periods of time), or in situations in which one individual is arrested for an alleged domestic violence incident that occurred weeks, months, or even years in the past, it is unclear whether the goals underlying the legislature's push for a mandatory "cooling down" period are even implicated.

Finally, and perhaps most importantly, it is crucial to understand that the legal system is often used for retaliatory purposes by well-resourced batterers.[25] Toward

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[23] *See, e.g.*, Daniel G. Saunders, *The Tendency to Arrest Victims of Domestic Violence*, 10 JOURNAL OF INTERPERSONAL VIOLENCE 147 (1995) ("the adoption of mandatory arrest policies may exacerbate officers' tendency to arrest victims."), *available at* http://deepblue.lib.umich.edu/bitstream/handle/2027.42/68953/10.1177_0886260595010002001.pdf?sequence=2&isAllowed=y; http://heinonline.org/HOL/LandingPage?handle=hein.journals/ajgsp2&div=9&id=&page=.

[24] *Id.*

[25] Antoinette Bonsignore, *Domestic Violence Survivors Battle Within the Courts: Confronting Retaliatory Litigation*, TRUTHOUT (June 22, 2012), http://truth-out.org/

this end, false allegations of domestic violence are possible and sometimes likely.[26] In total, just 16.4% of reported domestic violence incidents—and only 30.5% of domestic violence arrests—result in a conviction.[27] Moreover, victims of domestic violence are themselves arrested in an astounding 27% of reported domestic violence cases.[28] Without question, such statistics are indicative of serious systemic problems related to domestic violence prosecutions, but they provide cause for concern about the potentially high incidence of erroneous and retaliatory domestic violence arrests as well. Consequently, it is foreseeable that in at least some instances,[29] the proposed

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news/item/9915-domestic-violence-survivors-battle-within-the-courts-confronting-retaliatory-litigation.

[26] B.P Foster, *Analyzing The Costs And Effectiveness Of Governmental Policies: The Domestic Violence Example*, COST MANAGEMENT (May/June 2008), http://www.saveservices.org/downloads/Justice-Denied-DV-Arrest-Policies; http://www.saveservices.org/downloads/False-DV-Allegations-Cost-20-Billion.

[27] Joel H. Garner & Christopher D. Maxwell, *Prosecution and Conviction Rates for Intimate Partner Violence*, 34 CRIMINAL JUSTICE REVIEW Table 1-2 (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/236959.pdf.

[28] Mary Haviland *et al.*, *The Family Protection and Domestic Violence Intervention Act of 1995: Examining the Effects of Mandatory Arrest in New York City* (2001), *available at* http://www.connectnyc.org/cnyc_pdf/Mandatory_Arrest_Report.pdf.

[29] In general, a statement from a citizen is sufficient by itself to establish probable cause to make an arrest. State v. Williams, 193 S.W.3d 502, 507 (Tenn. 2006) ("[I]nformation provided by a citizen informant is presumed to be reliable."). This remains true even under circumstances when the individual providing the

revisions to Section 150 could actually be exploited by batterers or other individuals who "may have personal reasons for giving shaded or otherwise inaccurate information to law enforcement officials"[30] as a means of inflicting further harm upon those whom the law is intended to protect.[31] Under such circumstances, even if overwhelming evidence comes to light that a particular arrestee was actually a *victim* of domestic violence—rather than an abuser—if the proposed amendments to Section 150 were to become law, the error could not be remedied until at least twelve hours had elapsed.

Unfortunately, the above examples represent just a few of the many possible unintended policy consequences that a mandatory 12-hour hold policy could produce in practice and which the proposed amendments to Section 150 would prevent the judiciary from resolving. Even if a

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information necessary to establish probable cause is an estranged domestic relative or acquaintance of the person being arrested. *Id.* (citing United States v. Phillips, 727 F.2d 392 (5th Cir.1984) (finding probable cause under the totality of the circumstances where arrestee's wife "had recently quarreled with and left her husband"); Massachusetts v. Upton, 466 U.S. 727 (1984) (finding probable cause under the totality of circumstances analysis where information was provided by an estranged girlfriend); State v. Wilke, 55 Wash. App. 470 (1989) (finding probable cause under the two-prong Aguilar–Spinelli test where information was provided by the defendant's ex-wife); State v. Luleff, 729 S.W.2d 530 (Mo. Ct. App. 1987) (finding probable cause under the totality of circumstances analysis where information was provided by the defendant's estranged wife)).

[30] United States v. Flynn, 664 F.2d 1296, 1303 (5th Cir. 1982).

[31] Haviland, *supra* note 28.

mandatory 12-hour hold policy were to be enacted, however, the possibility that such a policy would nonetheless be foreclosed as a constitutional matter provides serious cause for concern as well.

III. The Constitutional Implications of Proposed Changes

The practical effect of the proposed amendments to Section 150 would be to divest judges of any discretion to release individuals who have been arrested for certain domestic violence offenses within twelve hours of their arrest.[32] Consequently, all individuals who are arrested for one or more of these offenses would be required to spend at least twelve hours in jail, with no exceptions to the "12-hour hold" requirement permitted for any reason. Such a policy would stand in sharp contrast to existing law, which requires judges to make a specific finding that an alleged offender "is a threat to the alleged victim" prior to imposing a 12-hour hold,[33] and which also permits a hold to be lifted by a judge before twelve hours have elapsed "if the official determines that sufficient time has or will have elapsed for the victim to be protected."[34]

Although seemingly minor at first glance, these proposed changes implicate at least four major constitutional issues: (1) the Tennessee Constitution's separation of powers doctrine; (2) the right to bail under the Tennessee Constitution; (3) the right to be free from unreasonable seizures under both the federal and Tennessee Constitutions; and, (4) the federal and state constitutional right to due process of law. Of note, at least one local

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[32] *TN Press Release Center*, *supra* note 17.
[33] TENN. CODE ANN. § 40-11-150(h)(1) (2012); TENN. CODE ANN. § 40-11-150(k)(1) (2012).
[34] *Id.*

practitioner has also expressed the additional concern that "a mandatory twelve-hour hold could be viewed as a punishment, thus triggering double jeopardy protections and requiring dismissal of the charge."[35] Although this concern is probably unfounded,[36] the four remaining issues

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[35] *See* Ben Raybin, *What is Tennessee's Domestic Violence "Cooling Off" Period?*, HOLLINS RAYBIN WEISSMAN CRIMINAL LAW BLOG (June 20, 2014), http://www.hollinslegal.com/2014/06/20/cooling-off-period/.

[36] Because the pre-trial confinement compelled by TENN. CODE ANN. § 40-11-150 is imposed for the legitimate governmental purpose of protecting domestic violence victims, such detention does not qualify as punishment for double jeopardy purposes. *See, e.g.*, State v. Jones, 130 So.3d 1 (La. App. 2013) (holding that cooling-off hold prior to admitting defendant to bail after domestic abuse arrest did not violate double jeopardy.) As the U.S. Supreme Court has explained: "Absent a showing of an express intent to punish on the part of the State," whether a detention qualifies as punishment "generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." Schall v. Martin, 467 U.S. 253, 269 (1984). *See also* Doe v. Norris, 751 S.W.2d 834, 839 (Tenn. 1988) ("In determining whether . . . confinement . . . is punishment, [a] Court must decide whether the confinement is imposed for the purpose of punishment or whether it is an incident of a legitimate governmental purpose. Where . . . no showing of an express intent to punish is made, that determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.") (citing Bell v. Wolfish, 441 U.S. 520, 538

pose legitimate constitutional concerns that merit serious consideration. Of these four issues, the one that is most likely to derail the proposed amendments to Section 150 is the separation of powers doctrine.

A. The Separation of Powers Doctrine

1. Judicial Supremacy Concerning Judicial Functions

The Tennessee Supreme Court has long been firm in holding that "[i]t is an imperative duty of the judicial department of government to protect its jurisdiction at the

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(1979)); State v. Pennington, 952 S.W.2d 420, 423 (Tenn. 1997) (holding that post-arrest detention of suspected drunk drivers serves "a remedial purpose, not a punitive one," and therefore does not preclude subsequent prosecution under double jeopardy principles); State v. Coolidge, 915 S.W.2d 820, 823 (Tenn. Crim. App. 1995) ("if the state action is remedial and not intended to inflict punishment as a means of vindicating public justice, the double jeopardy clause serves as no protection"), overruled on other grounds by State v. Troutman, 979 S.W.2d 271 (Tenn. 1998); United States v. Grisanti, 4 F.3d 173, 175 (2d Cir. 1993) (holding that because "bail revocation hearing [i]s not 'essentially criminal,' . . . pretrial detention was not punishment, [and Defendant] has not twice been put in jeopardy."). This "alternative purpose" standard is satisfied by Section 150. *See* Hopkins v. Bradley Cnty., 338 S.W.3d 529, 536 (Tenn. Ct. App. 2010) ("It is clear, based on reading Tenn. Code Ann. § 40–11–150 in its entirety, that it was the intent of the General Assembly to protect the victims of domestic abuse from additional abuse when the offender is taken into custody.").

boundaries of power fixed by the Constitution."[37] The fundamental rule established by the Tennessee Constitution's separation of powers doctrine is that: "If the power is judicial in character, the legislature is expressly prohibited from exercising it."[38] Based on recent precedent from the Tennessee Supreme Court, the essential question to be answered with respect to the proposed amendments to Section 150 is as follows: Does divesting the judiciary of the power to determine whether to release an individual within the first twelve hours of an arrest "frustrate or interfere with the adjudicative function of Tennessee courts"?[39] Because the proposed amendments to Section 150 would have the effect of precluding judicial review and suspending enforcement of the writ of habeas corpus within the first twelve hours of a defendant's arrest—and because they would also preclude the release of a warrantless arrestee even under circumstances in which a judge has determined that there was not probable cause to support a defendant's arrest in the first place—the answer to this question is likely to be "yes."

The Tennessee Supreme Court's most thorough examination of the separation of powers doctrine is found in the 2001 case, State v. Mallard.[40] *Mallard*'s primary holding was that "the legislature [has] no constitutional authority to enact rules . . . that strike at the very heart of a

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[37] State v. Mallard, 40 S.W.3d 473, 482 (Tenn. 1991) (quoting State ex rel. Shepherd v. Nebraska Equal Opportunity Comm'n, 557 N.W.2d 684, 693 (Neb. 1997)) (alterations omitted).

[38] *Id.* at 483 (quoting People v. Jackson, 371 N.E.2d 602, 604 (Ill. 1977)).

[39] State v. McCoy, No. M2013-00912-SC-R11CD, 2014 WL 6725695, at *7 (Tenn. Dec. 1, 2014).

[40] *Mallard*, 40 S.W.3d at 480-83 (Tenn. 2001).

court's exercise of judicial power."[41] As the *Mallard* court explained:

> Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state[.] . . . Furthermore, because the power to control the practice and procedure of the courts is inherent in the judiciary and necessary to engage in the complete performance of the judicial function, this power cannot be constitutionally exercised by any other branch of government. In this area, the court is supreme in fact as well as in name.[42]

Applying this reasoning, the *Mallard* court explained unequivocally that "any legislative enactment that . . . impairs the independent operation of the judicial branch of government . . . can[not] be permitted to stand."[43]

Both in *Mallard* and in subsequent cases, the Tennessee Supreme Court has characterized the separation of powers inquiry in slightly different ways, generally asking whether a legislative enactment "strike[s] at the very heart of a court's exercise of judicial power"[44] or otherwise "impairs the independent operation of the judicial branch of

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[41] *Id.* at 483.
[42] *Id.* at 480-81.
[43] *Id.* at 483.
[44] *Id.*

government."[45] Most recently, however, in the December 2014 case, State v. McCoy, the Tennessee Supreme Court framed the inquiry as whether a particular law "frustrate[s] or interfere[s] with the adjudicative function of Tennessee courts."[46] Furthermore, the Tennessee Supreme Court has explained that "[w]hile it is sometimes difficult to practically ascertain where Article II, section 2 draws the line, the distinction may be simply stated as that between cooperation and coercion."[47]

2. Judicial Deference to the Legislature

Despite the Tennessee Supreme Court's avowed adherence to the principle of separation of powers, it is worth noting that the judiciary customarily defers even to legislative enactments that regulate practices and procedures of the judiciary if such laws: "(1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court."[48] Because "comity and cooperation among the branches of government are beneficial to all," the court has explained, "such practices are desired and ought to be nurtured and maintained."[49] Thus, "purely out of considerations of inter-branch comity . . . judges will lean over backward to avoid encroaching on the legislative branch's power."[50]

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[45] *Id.*
[46] *McCoy*, 2014 WL 6725695, at *7.
[47] *Mallard*, 40 S.W.3d at 481-82.
[48] *Id.* at 481.
[49] *Id.*
[50] *Id.* at 482 (quoting Anderson Cnty. Quarterly Court v. Judges of the 28th Judicial District, 579 S.W.2d 875, 878 (Tenn. Ct. App. 1978)).

The January 2014 case, Bush v. State,[51] provides a particularly lucid example of the judiciary "lean[ing] over backward" to accommodate the state legislature.[52] *Bush* involved a direct conflict between the courts and the legislature over when a new rule of criminal procedure must be applied retroactively to old cases. In Meadows v. State, the Tennessee Supreme Court had held that "a new state constitutional rule is to be retroactively applied to a claim for post-conviction relief if the new rule materially enhances the integrity and reliability of the fact finding process of the trial."[53] Two years later, however, the legislature enacted the Post-Conviction Procedure Act, which called for an entirely different retroactivity rule. Specifically, rather than using *Meadows*'s "materially enhances the integrity and reliability of the fact finding process" standard, the Post-Conviction Procedure Act instead stated that: "A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule . . . requires the observance of fairness safeguards that are implicit in the concept of ordered liberty."[54]

Thus, the question raised in *Bush* was whether the judiciary's retroactivity standard or the legislature's retroactivity standard would be used going forward to determine when a new rule of constitutional criminal procedure would be applied retroactively.[55] Faced with this question, the Tennessee Supreme Court not only "lean[ed] over backward" to avoid encroaching on the legislative branch's power,"[56] but arguably performed Olympic-level

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[51] Bush v. State, 428 S.W.3d 1, 16 (Tenn. 2014).
[52] *Mallard*, 40 S.W.3d at 482.
[53] Meadows v. State, 849 S.W.2d 748, 755 (Tenn. 1993).
[54] TENN. CODE ANN. § 40-30-122 (1995).
[55] *Bush*, 428 S.W.3d 1.
[56] *Mallard*, 40 S.W.3d at 482.

judicial gymnastics. First, the *Bush* court deferred entirely to the state legislature's retroactivity rule, holding that:

> …because Tenn. Code Ann. § 40–30–122 is an integral part of a purely statutory remedy created by the General Assembly and because its reach does not extend beyond the Post–Conviction Procedure Act, we hold that the retroactivity of new constitutional rules in post-conviction proceedings should henceforth be determined using Tenn. Code Ann. § 40–30–122.[57]

Next, the court went even a step further. Rather than applying the comparatively broad retroactivity standard that had in fact been included in the Post-Conviction Procedure Act, the *Bush* court instead held that an even narrower *third* standard—which the court summarily concluded that the legislature must have "intended" to enact based upon a pair of confused statements made by the bill's House sponsor nineteen years earlier—would henceforth govern retroactivity law in Tennessee.[58] In light of such precedent, it stands to reason

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[57] *Bush*, 428 S.W.3d at 16.

[58] *See Bush*, 428 S.W.3d at 19-20. Unfortunately, this result is not easily explained. It is black-letter law that "courts must 'presume that the legislature says in a statute what it means and means in a statute what it says there.'" *See* Gleaves v. Checker Cab Transit Corp., 15 S.W.3d 799, 803 (Tenn. 2000) (quoting BellSouth Telecomms., Inc. v.

that judicial deference to legislative enactments will play a vital role in determining whether the legislature has unlawfully encroached upon the judicial power with respect to the proposed amendments to Section 150 as well.

3. Application to the Proposed Amendments to TENN. CODE ANN. § 40-11-150

Although the Tennessee Supreme Court has acknowledged that "it is sometimes difficult to practically ascertain where Article II, section 2 draws the line" between legislative and judicial power, the legislature unquestionably oversteps its bounds when it crosses the line "between cooperation and coercion." [59] Several considerations support the conclusion that the proposed amendments to Section 150 satisfy this standard. Specifically, by eliminating judicial review and effectively suspending judicial enforcement of the writ of habeas corpus within the first twelve hours of a defendant's arrest, the proposed amendments force judges to permit the

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Greer, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997)). Thus, "[i]t is not for the courts to alter or amend a statute." *Id.* A court "certainly may not supply a provision no matter how confident [it is] of what the Legislature would do if it were to reconsider today." West v. Schofield, No. M2014-00320-COA-R9CV, 2014 WL 4815957, at *9 (Tenn. Ct. App. Sept. 29, 2014), appeal granted (Oct. 21, 2014), quoting MacMillan v. Director, Div. of Taxation, 434 A.2d 620, 621 (N.J. Super. Ct. App. Div. 1981). Stated differently: "Where a statute is plain and explicit in its meaning, and its enactment within the legislative competency, the duty of the courts is simple and obvious, namely, to say *sic lex scripta*, and obey it." Miller v. Childress, 21 Tenn. 320, 321-22 (1841).

[59] *Mallard*, 40 S.W.3d at 481-82.

extended detention of domestic violence arrestees in all cases—even if they conclude that such arrests are unlawful due to the absence of probable cause.[60] Moreover, because the proposed amendments to Section 150 completely restructure the existing framework that applies to pre-trial detention,[61] the judiciary's interest in promoting inter-branch comity is unlikely to carry the day. Thus, notwithstanding the strong presumption of constitutionality accorded to legislative enactments,[62] it seems likely that the judiciary will ultimately conclude that the proposed amendments to Section 150 unconstitutionally "frustrate or interfere with the adjudicative function of Tennessee courts."[63]

The most persuasive argument against the constitutionality of the proposed amendments is that they would significantly frustrate judicial review of the legality of a defendant's confinement by forcing even unwilling

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[60] In order to be lawful, an arrest must be supported by probable cause. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause[.]"). *See also* State v. Crutcher, 989 S.W.2d 295, 300 (Tenn. 1999) ("custodial arrest[] is justified upon a showing of probable cause to believe that a crime has been committed, and that the suspect of the investigation committed that crime.").

[61] *Id.* at 483.

[62] *See, e.g.,* Waters v. Farr, 291 S.W.3d 873, 882 (Tenn. 2009) ("[The judiciary's] charge is to uphold the constitutionality of a statute wherever possible. In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional.") (internal citation omitted).

[63] *McCoy*, 2014 WL 6725695, at *7.

judges to permit an arrestee's continued detention for a minimum of twelve hours. Crucially, however, the right to challenge the legitimacy of one's confinement at the hands of the state—in other words, the writ of habeas corpus—is perhaps the most fundamental individual right that exists under either the federal or state Constitutions.[64] Known historically as "the Great Writ," the writ of habeas corpus affords anyone who has been incarcerated an immediate judicial mechanism "for challenging all forms of detention . . . [that] requires the detaining authority to justify the detention of the subject or to release him."[65] The judiciary alone is vested with the authority to vindicate a defendant's claim for release under the Great Writ, and its practical value lies in the fact that it is available in nearly all circumstances to anyone who is incarcerated at any time.[66] As the Tennessee Supreme Court recently explained in May v. Carlton, "the essential purpose of a writ of habeas

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[64] TENN. CONST. art. I, § 15 ("the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.").

[65] *See* ALAN DERSHOWITZ, FINDING, FRAMING, AND HANGING JEFFERSON: A LOST LETTER, A REMARKABLE DISCOVERY, AND THE FIRST AMENDMENT IN AN AGE OF TERRORISM, 172-73 (2007).

[66] TENN. CONST. ART. I, § 15 ("the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it."); Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993) ("a writ of habeas corpus may be brought at any time while the petitioner is incarcerated, to contest a void judgment or an illegal confinement.").

corpus is to subject imprisonment or any other restraint on liberty, for whatever cause, to judicial scrutiny."[67]

The United States Constitution, the Tennessee Constitution, and the Tennessee Rules of Criminal Procedure all separately afford arrestees an additional form of pre-trial judicial review of their arrests as well.[68] Both individually and collectively, each mandates that all arrests either be approved in advance by a judicial warrant or else promptly reviewed by a neutral and detached magistrate after a defendant has been taken into custody.[69] The express purpose of such requirements, of course, is to place a robust and upfront judicial check on the abuse of executive power. However, such a goal is substantially undermined by permitting—and, in fact, mandating—an extended period of detention for anyone who is arrested on suspicion of having committed a domestic violence offense when the defendant's arrest is based exclusively on a probable cause determination made by law enforcement.[70]

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[67] May v. Carlton, 245 S.W.3d 340, 346 (Tenn. 2008).

[68] Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991); State v. Huddleston, 924 S.W.2d 666, 673 (Tenn. 1996). TENN. R. CRIM. P. 5(a) ("Any person arrested—except upon a capias pursuant to an indictment or presentment—shall be taken without unnecessary delay before the nearest appropriate magistrate[.]").

[69] *Id.*

[70] As the United States Supreme Court has explained:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from

In light of these vital constitutional considerations, the conclusion that the proposed amendments to Section 150 would substantially "frustrate or interfere with the adjudicative function of Tennessee courts"[71] seems almost unavoidable. The amendments plainly suspend judicial review within the first twelve hours of domestic violence arrests. Moreover, even if judicial review were to occur within the first twelve hours of a defendant's arrest, divesting judges of any authority to release domestic violence arrestees would effectively suspend judicial enforcement of the writ of habeas corpus.[72] Furthermore, in direct violation of both federal and state constitutional mandates requiring that arrests be supported by probable cause,[73] the proposed amendments to Section 150 would preclude judges from releasing a defendant before twelve hours have elapsed even if a judge determines that probable cause did not exist to justify the defendant's arrest in the first place.

> evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

[71] *McCoy*, 2014 WL 6725695, at *7.

[72] TENN. CONST. art. I, § 15 ("the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.").

[73] *See supra* note 61.

Given the historical importance of the judiciary's ability to adjudicate and ensure the legitimacy of a defendant's confinement at the hands of the state, legislatively mandating that judges permit the extended detention of domestic violence arrestees under such circumstances represents a profound and substantial encroachment upon a quintessential and sovereign judicial function. As a result, it is difficult to imagine how such a law could not be deemed to be an unconstitutionally coercive[74] legislative attempt to "frustrate or interfere with the adjudicative function of Tennessee courts,"[75] and the proposed amendments would likely be invalidated accordingly.

B. The right to bail under the Tennessee Constitution

Article I, § 15 of the Tennessee Constitution provides: "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great."[76] The practical effect of Article I, § 15 is to create an affirmative right to bail for all non-capital offenses. Of note, the right to bail is considered so fundamental in Tennessee that even a defendant who has already been afforded bail but defaulted on his first bail bond must *still* be afforded access to bail.[77] Additionally, no exceptions are carved out for considerations of potential danger to victims, although such considerations certainly affect the amount at which bail is set. For these reasons, the Tennessee Constitution affords arrestees a markedly broader right to bail than is guaranteed by the federal

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[74] *Mallard*, 40 S.W.3d at 481-82.
[75] *McCoy*, 2014 WL 6725695, at *7.
[76] TENN. CONST. art. I, § 15.
[77] Wallace v. State, 245 S.W.2d 192 (Tenn. 1952).

Constitution, since "the Eighth Amendment does not mandate bail in all cases."[78]

Due to the fundamental importance of the right to bail under the Tennessee Constitution, a colorable claim can be made that the proposed amendments to Section 150 violate the Tennessee Constitution because they would suspend a defendant's right to bail for a minimum of twelve hours. Of note, however, courts have thus far rejected similar arguments when considering challenges brought under the federal Constitution. Reasoning that the Eighth Amendment addresses only "the amount of bail, not the timing,"[79] such claims have previously failed to curry judicial favor.[80] Importantly, at least one federal court has

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[78] Fields v. Henry Cnty., Tenn., 701 F.3d 180, 183-84 (6th Cir. 2012) *cert. denied*, 133 S. Ct. 2036 (2013) (citing United States v. Salerno, 481 U.S. 739, 753–54 (1987)).

[79] *See Fields*, 701 F.3d at 185 ("[Defendant] also claims that the 12–hour holding period was a 'denial of bail.' Not so. The Eighth Amendment's protections address the amount of bail, not the timing.") (internal citation omitted), (citing Collins v. Ainsworth, 382 F.3d 529, 545 (5th Cir. 2004) ("There is no right to post bail within 24 hours of arrest.")); Woods v. City of Michigan City, 940 F.2d 275, 283 (7th Cir. 1991) (Will, D.J., concurring) ("Nothing in the eighth amendment, however, guarantees instant release for misdemeanors or any other offense.").

[80] Hopkins v. Bradley Cnty., 338 S.W.3d 529, 539 (Tenn. Ct. App. 2010) ("being held for twelve hours before being released on bail does not automatically constitute a constitutional violation.") (citing Turner v. City of Taylor, 412 F.3d 629, 639 (6th Cir. 2005) (city's "official policy of holding domestic violence arrestees for a minimum period of 20 hours unless arraigned and released by the court" is not unconstitutional); Lund v. Hennepin Cnty., 427 F.3d 1123, 1126–28 (8th Cir. 2005) (holding that no violation of

opined that the Tennessee Constitution does not afford defendants "a specific right to post bail within a particular time frame," either.[81]

In light of the authority referenced above, if Tennessee courts adopted the reasoning of the federal courts that have examined this issue, the proposed amendments to Section 150 would not be invalidated on the basis that they violate Article I, § 15. That said, however, it is worth noting that the reasoning of the above-cited cases lacks any explicit limiting principle, and thus may be subject to future reconsideration.[82] Put differently: if the

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due process occurred where defendant was held for twelve hours after judge ordered that defendant could be released with no bail); Collins v. Ainsworth, 382 F.3d 529, 545 (5th Cir. 2004) ("There is no right to post bail within 24 hours of arrest")). *See also* Campbell v. Johnson, 2006 WL 3408177, at *3 (N.D. Fla. 2006) ("[the defendant] has . . . failed to state a basis for a substantive Due Process claim, that is, that he has a fundamental right to access the bail system once bail has been set by the releasing authority, since courts have held that access to the bail system once an individual is found eligible for bail does not constitute a fundamental right, and government limitations on access to the bail system need only be reasonable.") (citing Broussard v. Parish of Orleans, 318 F.3d 644, 651 (5th Cir. 2003)).

[81] *See Fields*, 701 F.3d at 184, n. 1 ("While Tennessee grants criminal defendants a general 'right to bail pending trial' . . . it does not grant defendants a specific right to post bail within a particular time frame[.]") (citations omitted).

[82] *See generally* The Immigrant Legal Resource Center and Ozment Law, MOTIONS TO SUPPRESS PROTECTING THE CONSTITUTIONAL RIGHTS OF IMMIGRANTS IN REMOVAL PROCEEDINGS, § 6.9: INTERFERENCE WITH RIGHT TO BAIL

constitutional provisions guaranteeing defendants access to bail only address "the amount of bail, not the timing,"[83] then what would prevent a jurisdiction from lawfully delaying a defendant's bail determination for a day, or a week, or a year? Furthermore, given that Article I, § 15 affords defendants a broader right to bail than the Eighth Amendment, there is ultimately no way to be certain that Tennessee courts would adopt the reasoning of federal courts when interpreting the scope of the right to bail guaranteed by the Tennessee Constitution.

C. The Right to be Free from Unreasonable Seizures

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants

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(2d ed. 2013) (characterizing the right to bail as a series of four separate rights that includes: [1] "the right to have bail set"; [2] "the federal constitutional mandate that bail not be excessive"; [3] "the right to post bail after is has been set"; and [4] "the right to be released from detention upon paying it."). *Cf. Fields*, 701 F.3d at 186 ("An expectation of release may qualify as a constitutionally protected liberty interest.") (citing Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 12 (1979) ("[T]he expectancy of release provided in this statute is entitled to some measure of constitutional protection.")).

[83] *Id.* at 185.

> shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[84]

Similarly, Article I, § 7 of the Tennessee Constitution states:

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.[85]

Both the U.S. Supreme Court and the Tennessee Supreme Court have long held that unreasonably delaying a warrantless arrestee's opportunity to receive a judicial determination of probable cause implicates a citizen's

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[84] U.S. CONST., amend. IV.
[85] TENN. CONST., art. I, § 7.

constitutional right to be free from unreasonable seizures.[86] Thus, even if defendants cannot assert a constitutional right to a timely bail determination under the Eighth Amendment or Article I, § 15 of the Tennessee Constitution, there is reason to believe that the Fourth Amendment or Article I, § 7 provides this right instead.[87]

Helpfully, both state and federal courts have provided guidance on this very question. Specifically, in 2010, the Tennessee Court of Appeals favorably quoted the following passage of a decision from the U.S. District Court for the Middle District of Tennessee, stating:

> The U.S. Supreme Court has recognized that probable cause decisions must be made promptly, but has also recognized that states should be given enough time to combine such hearings with other preliminary procedures, including bail determinations. Thus, in *County of Riverside v. McLaughlin*, the Supreme Court held that jurisdictions which provide probable cause hearings within forty-eight hours will generally be

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[86] *See* Gerstein v. Pugh, 420 U.S. 103; Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991); State v. Huddleston, 924 S.W.2d 666, 673 (Tenn. 1996). The Fourth Amendment is applicable to the states through the Fourteenth Amendment to the United States Constitution. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961); State v. Bridges, 963 S.W.2d 487, 490 n. 2 (Tenn. 1997).

[87] *Id.*

> immune from systemic challenges. The clear import of *McLaughlin,* then, is that a bail hearing held within 48 hours of a warrantless arrest is also presumptively constitutional—if indeed the Constitution speaks to that issue.
>
> Given that a bail hearing may be delayed up to forty-eight hours absent some improper motive, the Court finds that a 12–hour delay in releasing Plaintiff in this case did not amount to a constitutional deprivation.[88]

This persuasive precedent offers a strong indication that a reviewing court would hold that the proposed amendments to Section 150 comport with the requirements of the Fourth Amendment even though the amendments would delay a defendant's bail hearing for a minimum of twelve hours. Crucially, however, there are two major problems with relying on the above authority in support of the amendments' constitutionality.

First, the Tennessee Supreme Court has repeatedly held that Article I, § 7 of the Tennessee Constitution affords defendants greater protection than the Fourth

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[88] *Hopkins*, 338 S.W.3d at 538-39 (quoting Tate v. Hartsville/Trousdale Cnty., No. 3:09-0201, 2010 WL 4054141, at *8 (M.D. Tenn. Oct. 14, 2010) (internal citations and quotations omitted)).

Amendment provides,[89] and given the fundamental importance of the right to bail under the Tennessee Constitution,[90] mandating that domestic violence arrestees be subjected to extended pre-trial detention for the express purpose of delaying their bail hearings may be precisely the sort of situation that would merit greater protection under Article I, § 7. Thus, even if the proposed amendments to Section 150 were held to satisfy the minimum requirements of the Fourth Amendment, it is possible that they would still be unable to satisfy the "greater . . . protections [afforded] to the citizens of this State . . . under article I, § 7 of the Tennessee Constitution."[91]

Second, there is a glaring omission and likely fatal flaw within the reasoning cited above. Specifically, the U.S. Supreme Court's decision in *McLaughlin*—which held that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement" of the Fourth Amendment—was expressly based on the "inevitable" and "often unavoidable" administrative delays of an overly burdened criminal justice system.[92] As the *McLaughlin* court explained:

> [S]ome delays are inevitable. . . . Records will have to be reviewed, charging

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[89] *See*, *e.g.*, State v. Randolph, 74 S.W.3d 330, 337 (Tenn. 2002); Planned Parenthood of Middle Tennessee v. Sundquist, 38 S.W.3d 1, 15 (Tenn. 2000); State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989); Drinkard v. State, 584 S.W.2d 650, 653 (Tenn. 1979); State v. Lakin, 588 S.W.2d 544, 548 (Tenn. 1979).

[90] *See supra* Section III-B

[91] *Randolph*, 74 S.W.3d at 335.

[92] *McLaughlin*, 500 U.S. 44 at 56.

> documents drafted, appearance of counsel arranged, and appropriate bail determined. On weekends, when the number of arrests is often higher and available resources tend to be limited, arraignments may get pushed back even further. In our view, the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system. . . .
>
> Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.[93]

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[93] *Id.* at 56-57.

Toward this end, and in an effort to prevent law enforcement from abusing pre-trial detentions, the *McLaughlin* court offered three specific examples of delays that are categorically impermissible within the first forty-eight hours of a defendant's arrest, explaining:

> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are [1] delays for the purpose of gathering additional evidence to justify the arrest, [2] a delay motivated by ill will against the arrested individual, or [3] delay for delay's sake.[94]

Thus, if *McLaughlin* provides the framework for determining the point by which defendants must be afforded a bail determination, then the major problem with the proposed amendments to Section 150 is that they would not cause a defendant's bail hearing to be delayed for "inevitable" and "often unavoidable" administrative

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[94] *Id.* at 56.

reasons.[95] Instead, they mandate delaying a defendant's bail hearing for intentional and administratively unnecessary reasons. Given that *McLaughlin* should properly be read to prohibit any intentional and administratively unnecessary delays to a warrantless arrestee's judicial probable cause hearing,[96] there is strong reason to be concerned that a statutorily mandated delay in a defendant's bail determination would not be able to withstand constitutional scrutiny under the Fourth Amendment.

D. The Right to Due Process

Both the federal Constitution and the Tennessee Constitution afford defendants a fundamental right to due process of law.[97] Under each, a governmental deprivation

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[95] *Id.* at 56-57.

[96] *See* Daniel A. Horwitz, *The First 48: Ending the Use of Categorically Unconstitutional Investigative Holds In Violation of County of Riverside v. McLaughlin*, 45 U. MEM. L. REV. 519, 539 (2015) ("the Fourth Amendment categorically prohibits law enforcement from deliberately delaying a defendant's *Gerstein* hearing for any administratively unnecessary reason[.]"). *See also* Mark J. Goldberg, *Weighing Society's Need for Effective Law Enforcement Against an Individual's Right to Liberty: Swinney v. State and the Forty-Eight Hour Rule*, 24 MISS. C. L. REV. 73, 106 (2004) ("[T]here is no common rationale shared among the examples of impermissible delays [in *McLaughlin*]. . . . Consequently, if an individual can show that their [sic] judicial determination of probable cause was intentionally delayed for a purpose not relating to circumstances beyond law enforcement's control, a Fourth Amendment violation should be declared.").

[97] *See* U.S. CONST. amend. XIV, § 1 (". . . nor shall any State deprive any person of life, liberty, or property,

of a constitutionally-protected liberty interest implicates the guarantees of due process.[98] Without question, incarceration qualifies as a deprivation of such an interest.[99]

In defining the contours of the Due Process clause, the U.S. Supreme Court has instructed that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[100] Even so, however, the Supreme Court has also explained that the requirements of due process are "flexible and call[] for such procedural protections as the particular situation demands."[101] In determining what process is due in a given situation, the U.S. Supreme Court instructed in the seminal case, Mathews v. Eldridge, that:

> "[T]he specific dictates of due process generally require[] consideration of three distinct factors: First, the private interest that will

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without due process of law[.]"); TENN. CONST. art. I, § 8 ("[N]o man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.").

[98] *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

[99] *See, e.g.*, United States v. Salerno, 481 U.S. 750 (1987). *See also* State v. Thompson, 508 S.E.2d 277, 287 (N.C. 1998) ("In considering the first factor articulated in both *Mathews* and *Mallen*, it is beyond question that the private interest at stake, liberty, is a fundamental right.").

[100] *Mathews*, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[101] *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

> be affected by the official action; second, 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 [third], the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[102]

Subsequently, however, the Supreme Court "slightly reformulated these factors for use in assessing the permissibility of post-deprivation process delay,"[103] stating:

> In determining how long a delay is justified in affording a post-[deprivation] hearing and decision, it is appropriate to examine [1] the importance of the private interest and the harm to this interest occasioned by delay; [2] the justification offered by the Government for delay and its relation to the underlying governmental interest; and [3] the

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[102] *Id.* at 335.
[103] *Thompson*, 508 S.E.2d at 286.

> likelihood that the interim decision may have been mistaken.[104]

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[104] FDIC v. Mallen, 486 U.S. 230, 242 (1988). The U.S. Court of Appeals for the Fourth Circuit speculated that:

> Presumably, this refinement was undertaken out of recognition of the awkwardness of a literal application of the *Mathews* factors in this context. Where the question is not whether there will be post-deprivation review, but the timeliness of such review, it is not meaningful to inquire, as it is in the typical procedural due process context, whether the procedure sought—sooner review—would reduce the likelihood of an erroneous deprivation. The deprivation has already occurred, it is understood that there will be judicial review, and the deprivation, even if in error, cannot be "undone" by sooner judicial review. At most, the risk of an extended erroneous deprivation could be reduced. The more relevant questions therefore are the harm to the private

The first factor of *Mathews* and *Mallen* compels consideration of the private interest at stake. Here, the proposed amendments to Section 150 implicate the liberty of a presumptively innocent individual. The significance of this liberty interest is not subject to reasonable disagreement, as the incarceration of a presumptively innocent individual for any period of time is a serious constitutional matter.[105] Toward this end, the U.S. Supreme Court has taken at face value the notion that "[e]veryone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail."[106] "Pretrial confinement," the U.S. Supreme Court has observed, may "imperil [a]

> interests that will be occasioned by the delay in review and the state's justifications for the delay.

Jordan ex rel. Jordan v. Jackson, 15 F.3d 333, 345 (4th Cir. 1994) (internal citations omitted).

[105] Youngberg v. Romeo, 457 U.S. 307, 316 (1982) ("liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action") (quoting Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part). *Cf.* Schall v. Martin, 467 U.S. 253, 265 (1984) (holding that a juvenile's "interest in freedom from institutional restraints, even for [a] brief time . . . is undoubtedly substantial[.]").

[106] *McLaughlin*, 500 U.S. at 58.

suspect's job, interrupt his source of income, and impair his family relationships."[107]

Additionally, following the U.S. Supreme Court's 2012 decision in Florence v. Board of Chosen Freeholders of County of Burlington, arrestees may even be forced to submit to the dehumanizing requirement that they "expose their body cavities for visual inspection as a part of a [warrantless] strip search" without any individualized basis for suspicion.[108] This notwithstanding, however, the magnitude of the deprivation at stake is tempered substantially by the fact that the 12-hour hold mandated by the proposed amendments to Section 150 is only meant to be temporary in nature. Taken together, on balance this factor weighs against the constitutionality of the proposed amendments to Section 150.

The second set of factors to be considered—under *Mathews*, "the risk of an erroneous deprivation of liberty through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and under *Mallen*, "the likelihood that the interim decision may have been mistaken"—is mixed. In order to trigger an arrest at all, either a law enforcement officer or a member of the judiciary must first determine that there is probable cause to believe that a defendant has committed a criminal offense.[109] This requirement provides a built-in procedural

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[107] *Id.* (citing RONALD L. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 32-91 (1965); LEWIS KATZ, JUSTICE IS THE CRIME 51-62 (1972)).

[108] *See generally* Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 132 S. Ct. 1510, 1516, (2012) (quoting Bell v. Wolfish, 441 U.S. 520 (1979)).

[109] *See, e.g.,* Maryland v. Pringle, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the

safeguard that reduces the risk of an erroneous deprivation of liberty, which weighs in favor of the constitutionality of the proposed amendments.

In most cases, however, the probable cause determination necessary to effect an arrest will be made exclusively by law enforcement, rather than pre-approved by a judge. With this in mind, the U.S. Supreme Court has cautioned that: "[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is . . . [that] inferences [must] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[110] This unfortunate reality tempers the value of this procedural safeguard significantly.

Furthermore, there are several valuable and easily-administered procedural safeguards that could be added to supplement the proposed amendments to Section 150 in order to reduce the likelihood of an erroneous deprivation of liberty. Incidentally, however, these procedural safeguards are precisely those portions of the law that the proposed amendments to Section 150 seek to excise. For example, requiring individualized judicial fact-finding that an arrestee poses a threat to his or her alleged victim before the arrestee is subjected to a 12-hour hold is probably the single most effective way to reduce the likelihood of an erroneous deprivation of liberty. Additionally, the likelihood of an erroneous deprivation of liberty could be reduced even further by increasing the standard of proof required to support a judicial finding that "the offender is a

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arrest is supported by probable cause."). *See also supra* note 61.

[110] *See Gerstein*, 420 U.S. at 112-13 (quoting Johnson v. United States, 333 U.S. 10, 13-14 (1948)).

threat to the alleged victim,"[111] since the likelihood of an erroneous deprivation of liberty necessarily decreases as the required standard of proof increases. The proposed amendments to Section 150, however, would do away with the law's existing judicial fact-finding requirement entirely, effectively creating an irrebuttable presumption of dangerousness in all cases.[112] These concerns pose serious

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[111] Interestingly, TENN. CODE ANN. § 40-11-150 does not specify what standard of proof is necessary to support this finding. However, a colorable claim can be made that anything short of a "clear and convincing evidence" standard would not comport with due process. *See* Addington v. Texas, 441 U.S. 418, 431 (1979) (holding that "the preponderance standard falls short of meeting the demands of due process" with respect to involuntary civil commitment proceedings and that a "clear and convincing evidence" standard is the minimum level of proof required). Conversely, where, as here, the deprivation is limited in time and based on a reasonable legislative determination that domestic violence arrestees pose a heightened threat to victims in the period immediately following an arrest. *See infra* notes 114-15, this requirement of judicial fact-finding may yield. *See, e.g.*, State v. Atkinson, 755 So. 2d 842, 844 (Fla. Dist. Ct. App. 2000) (approving statutorily mandated eight-hour detention of apparently drunk drivers, notwithstanding absence of judicial fact-finding requirement, and analogizing such detentions "to the detention of persons under quarantine orders wherein a threat is posed to the public health and safety.").

[112] TENN. CODE ANN. § 40-11-150(h)(1); TENN. CODE ANN. § 40-11-150(k)(1).

constitutional problems[113] that, on balance, weigh against the constitutionality of the proposed amendments as well.

The third set of factors to be considered—the government's interest in and justification for imposing a 12-hour hold and the law's relation to this interest—weighs heavily in favor of the proposed amendments. To start, the "cooling off" period compelled by Section 150 would directly further at least two governmental interests. First, such a hold would provide immediate intervention to prevent violent recidivism during what is believed to be an especially heightened period of danger. [114] Second, detaining domestic violence arrestees for a minimum of twelve hours would allow victims a sufficient and defined period of time to get to safety and to obtain legal protection—such as a restraining order—against their alleged abusers.[115]

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[113] *See, e.g.*, Steven J. Mulroy, *"Hold" On: The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 CASE W. RES. L. REV. 815, 862 (2013).

[114] Hyunkag Cho and Dina J. Wilke, *Does Police Intervention in Intimate Partner Violence Work? Estimating the Impact of Batterer Arrest in Reducing Revictimization*, 11 ADVANCES IN SOCIAL WORK 283-85 (2010) (citing Sherman & Berk, 1984 (concluding that arresting a batterer and detaining him overnight is the most effective law enforcement policy to prevent recidivism)). *See also In re* Conard, 944 S.W.2d 191, 201 (Mo. 1997) ("In many instances there are valid reasons for keeping an individual in jail for the twenty hours allowed by [state law]. This is so especially in instances of domestic abuse when continued violence is a threat.").

[115] *See, e.g.*, State v. Kapela, 82 Haw. 381, 391, 922 P.2d 994, 1004 (Haw. Ct. App. 1996) (citing legislative history stating that "when we talked about a cooling[-]off period and we provided twelve hours for a cooling[-]off period, it

These governmental interests are indisputably compelling. As the Supreme Court has explained: "The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted." [116] Additionally, "society's interest in crime prevention is at its greatest" where "the [g]overnment musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community."[117] Of note, preventive detentions much more extensive than twelve hours have also been upheld by the Supreme Court in other contexts,[118] albeit with the crucial additional caveat that the requirements necessary to justify the detentions in those cases carried much more robust procedural safeguards than those contemplated by the proposed amendments to Section 150.[119] Assuming that

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was to give Daddy a chance to cool down a little bit, get his head together so when he comes home, he doesn't hit Mama anymore. Now, truly, we as a society are beginning to recognize that the cooling[-]off period isn't just for Daddy to cool down. The cooling[-]off period is necessary so that the woman can get a temporary restraining order to keep him away from her so he doesn't continue beating her and the kids. It's necessary for her to get legal counsel. It's necessary for her to find alternative shelters instead of going into the homeless environment.").

[116] *Schall*, 467 U.S. at 264 (citing De Veau v. Braisted, 363 U.S. 144, 155 (1960)).

[117] United States v. Salerno, 481 U.S. 739, 750 (1987).

[118] *See, e.g.*, *Schall*, 467 U.S. 253 (pretrial detention of juvenile detainees); Youngberg v. Romeo, 457 U.S. 307 (1982) (detention of involuntarily committed mental patients); *See also* Gary H. v. Hegstrom, 831 F.2d 1430 (9th Cir.1987) (detention of juveniles).

[119] *Schall*, 467 U.S. 253. For example, required a specific and individualized judicial finding that there was "a

Tennessee courts will defer to the legislature's conclusion that arresting alleged batterers and detaining them for a minimum period of twelve hours is an effective way to protect victims of domestic violence,[120] the government's vital interest in preventing recidivism and affording domestic violence victims a minimum period of time to get themselves to safety cannot realistically be doubted.

Considering these factors together, whether the proposed amendments pose a due process problem is an extremely close question. The liberty interest at stake is vitally important, and the absence of any individualized judicial determination of dangerousness to safeguard this interest is highly problematic. So, too, is the requirement that all people arrested for certain domestic violence offenses must be subjected to a 12-hour hold no matter the circumstances. Furthermore, each of these procedural omissions can be improved considerably without adding much in the way of administrative or fiscal burdens.[121] Even so, however, the state's interest in domestic violence prevention is similarly compelling, and this interest is at its zenith under circumstances when an arrestee poses a heightened risk of violent recidivism.[122] Taken together, and relying substantially on the rule that statutes carry a

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'serious risk' that the [detainee], if released, would commit a crime prior to his next court appearance" unless the hold were implemented. 467 U.S. at 278. The procedure involved also required "notice, a hearing, and a statement of facts and reasons . . . prior to any detention." *Id.* at 277.

[120] *See supra* notes 114-15.

[121] *See, e.g., Thompson*, 508 S.E.2d at 288 ("providing a domestic-violence arrestee with a pretrial-release hearing before the first available judge . . . would involve little or no expense to the State.").

[122] *Salerno*, 481 U.S. at 750.

strong presumption of constitutionality,[123] it seems probable—although far from a guarantee—that Tennessee courts would hold that the proposed amendments to Section 150 satisfy due process.

IV. The Solution

Although the proposed amendments to Section 150 will face substantial constitutional obstacles if enacted, a middle-ground solution is available that would go a long way toward alleviating the constitutional concerns presented above. Specifically, the current version of Section 150 could be strengthened considerably by simply removing the exception permitting judges to lift domestic violence holds if they determine that "sufficient time has or will have elapsed for the victim to be protected."[124]

If the exception permitting judges to lift domestic violence holds under circumstances when they have determined that "sufficient time has or will have elapsed for the victim to be protected"[125] were removed—and if the current requirement that a "magistrate or other official duly authorized to release the offender find[] that the offender is a threat to the alleged victim" as a precondition to imposing any hold were retained[126]—then this updated version of TENN. CODE ANN. § 40-11-150 would likely be able to

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[123] *See Waters*, 291 S.W.3d at 882 ("[The judiciary's] charge is to uphold the constitutionality of a statute wherever possible. In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional.") (internal citation omitted).

[124] TENN. CODE ANN. § 40-11-150(h)(1) (2012); TENN. CODE ANN. § 40-11-150(k)(1) (2012).

[125] *Id.*

[126] *Id.*

overcome each of the aforementioned constitutional obstacles. First, by maintaining near-immediate judicial review of domestic violence arrests, such a change would completely avoid any legislative encroachment on the judicial function, sidestepping entirely the law's most daunting constitutional hurdle.[127] Moreover, both a temporary denial of bail and a temporary judicial hold—even one intentionally created by statute—would be made eminently more reasonable following a judicial determination that an alleged batterer was both arrested legitimately and poses an immediate threat to his or her victim.[128] Finally, preserving the requirement that a judge make an individualized determination of dangerousness as a precondition to imposing a hold would avoid the most troubling due process concerns raised by the proposed amendment to Section 150 by reducing erroneous deprivations of freedom and by retaining an essential judicial check on potential missteps made by law enforcement.

Most importantly, however, such a change would finally end the highly questionable practice of releasing domestic violence arrestees based on nothing more than judicial speculation that "sufficient time has or will have elapsed for the victim to be protected."[129] This reform would also go a long way toward preventing the premature

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[127] *See supra* Section III-A.

[128] *See supra* Sections III-B and III-C. Of note, the U.S. Supreme Court has also expressly authorized jurisdictions to delay an arrestee's probable cause hearing for the purpose of preparing for "combination" proceedings that combine both a probable cause determination and other pre-trial proceedings that occur early in the pretrial process. *See McLaughlin*, 500 U.S. at 58.

[129] TENN. CODE ANN. § 40-11-150(h)(1) (2012); TENN. CODE ANN. § 40-11-150(k)(1) (2012).

release of batterers resulting from either poor judgment or judicial misconduct—as apparently occurred in the David Chase incident—which prompted the demand for policy reform in the first place. In sum, although the legislature should retain Tenn. Code Ann. § 40-11-150's requirement that judges must find that a domestic violence arrestee poses a threat to an alleged victim prior to imposing a 12-hour hold, the legislature should still strengthen Section 150 by removing the exception allowing judges to lift domestic violence holds if they determine that "sufficient time has or will have elapsed for the victim to be protected."[130]

[130] *Id.*