

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

_____)	
HARRIET DELORES CLEVELAND,)	
)	
Plaintiff,)	
)	
vs.)	Case No: 2:13-cv-732- MHT-TFM
CITY OF MONTGOMERY, et al.,)	
)	
Defendants.)	
_____)	
MARKIS ANTWUAN WATTS,)	
)	
Plaintiff,)	
)	
vs.)	Case No: 2:13-cv-733-MHT-TFM
CITY OF MONTGOMERY, et al.)	
)	
Defendants.)	
_____)	

AMENDED JOINT MOTION FOR ENTRY OF AGREED SETTLEMENT ORDER

1. Plaintiffs allege that they were illegally jailed for their inability to pay outstanding fines, fees, and costs in the Montgomery Municipal Court, in violation of the Fourteenth and Sixth Amendment to the U.S. Constitution, sections 1, 6, and 22 of the Alabama Constitution, and Rule 26.11 of the Alabama Rules of Criminal Procedure.

2. Defendants City of Montgomery (“City”), Municipal Court Judge Hayes, and Municipal Court Judge Westry deny Plaintiffs’ allegations, including that the City has any control over, or responsibility for, the Municipal Court Judges’ exercise of their judicial functions, the rulings of the Judges, or the procedures utilized in the Montgomery Municipal Court.

3. All Parties agree that, under the current status of the law, the constitutional principles set out in *Bearden v. Georgia*, 461 U.S. 660 (1983), regarding incarceration for non-payment; and *Turner v. Rogers*, 131 S. Ct. 2507 (2011), regarding notice apply in Municipal Court proceedings, and, to the extent applicable in a particular case, the Judges of the Montgomery Municipal Court are legally required to follow them.

4. Defendants represent that the Judges of the Municipal Court of Montgomery, Alabama, in their official capacities, have implemented Judicial Procedures of the Municipal Court of the City of Montgomery for Indigent Defendants and Nonpayment (hereinafter “Judicial Procedures”) effective one week from the date of entry of this Court’s Order granting this motion, to determine whether a person may be incarcerated for non-payment of fines, costs, and restitution. A copy of the Judicial Procedures is attached as Exhibit A, and all Parties agree that the Judicial Procedures facially comply with the requirements of the Fourteenth and Sixth Amendments of the U.S. Constitution, sections 1, 6, and 22 of the Alabama Constitution, and Rule 26.11 of the Alabama Rules of Criminal Procedure regarding incarceration for nonpayment of fines, costs and restitution.

5. Plaintiffs’ claim for attorney’s fees has been resolved between the Parties.

6. Entry of the order requested herein will resolve all disputes between the Parties complained of in the above-styled cases, and all claims that could arise out of the events of August 2013 at issue in these cases.

7. The Parties request that the Court enter an order which:

a. Declares that, under the current status of the law, the constitutional principles set out in *Bearden v. Georgia*, 461 U.S. 660 (1983), regarding incarceration for non-payment; and *Turner v. Rogers*, 131 S. Ct. 2507 (2011), regarding notice, and, to the extent

applicable in a particular case, the Judges of the Montgomery Municipal Court are legally required to follow them;

b. Declares that the Judicial Procedures attached as Exhibit A facially comply with the constitutional principles set out in *Bearden v. Georgia*, 461 U.S. 660 (1983), regarding incarceration for non-payment; and *Turner v. Rogers*, 131 S. Ct. 2507 (2011), regarding notice;

c. Declares that the Judicial Procedures attached as Exhibit A facially comply with the requirements of the Fourteenth and Sixth Amendments to the U.S. Constitution, sections 1, 6, and 22 of the Alabama Constitution, and Rule 26.11 of the Alabama Rules of Criminal Procedure; and

d. Provide that entry of the requested Order shall constitute a final resolution as to all claims in the above-styled cases.

Respectfully submitted,

s/ Samuel Brooke

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s/ Jason C. Paulk _____

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date the foregoing was filed through the Court's CM/ECF filing system, and that by virtue of this filing notice will be sent electronically to all counsel of record.

Dated: September 12, 2014

/s/ Samuel Brooke

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INDIGENT DEFENDANTS AND NONPAYMENT**
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BASIC PREMISES:

1. No defendant will be incarcerated for inability to pay any court-ordered monies, including fines, court costs or restitution. (Rule 26.11, Ala. R. Crim. P.).
2. A Public Defender will represent all defendants not otherwise represented by counsel at all compliance and indigence/ability-to-pay hearings. At said hearings, the judge will require that the Public Defender appear with the Defendant in front of the judge, and the Court will note the Public Defender's appearance in the record.
3. Procedures involving initial appearances at the window are applicable to those defendants appearing on or before the due date indicated on the Uniform Traffic Ticket and Complaint ("UTTC").
4. The granting of an initial sixty (60) day review will be afforded to all cases (new and old) as the procedures are implemented.
5. Form One (Payment of Fines and Costs) will be placed on the City of Montgomery website, displayed conspicuously in the Court and Lobby of the Municipal Court, and provided to defendants at their initial appearance if they are provided a compliance hearing along with Form Two (Order for Compliance Review).
6. The Court will use the current Federal Poverty Level ("FPL") chart when making an indigence determination, and there will be a presumption of indigence when a defendant is at or below 125% of the FPL subject to review of his or her assets.
7. The defendant will fill out an Affidavit of Substantial Hardship (Form C-10A) or any updated version of the same, and the inquiry relative to income and assets will follow from the information provided therein. A public Defender will be available to answer any questions about the form.
8. A defendant at 125% of FPL or below without substantial liquid assets available to pay the fines, costs, fees, or restitution will be deemed indigent. In determining whether a defendant has substantial liquid assets, the Court will not consider up to the first \$3,000 in personal property, and up to \$5,000 in home equity. A finding of substantial liquid assets cannot be based on the receipt of an Earned Income Tax Credit.
9. An indigent defendant will be given the option of either paying \$25.00 a month to pay off his fines, court costs, fees, and restitution or doing community service.
10. The Court retains the discretion to make credibility determinations relative to testimony and evidentiary submissions regarding income and assets and to question defendants relative to the same.
11. The ability of a defendant to pay who is not deemed indigent but who expresses an inability to pay his fines, costs, fees and restitution in full will be based on that defendant's: (i) disposable income, as reflected in the Affidavit of Substantial Hardship (Form C-10A) and as further clarified by questions raised in the indigence hearing, (ii) the defendant's assets, and (iii) the defendant's earning potential.
12. The community service hours' computation will be based on a minimum of \$10 credit for each hour of community service worked. The monthly requirements will be a minimum of eight (8) hours and a maximum of twenty-four (24) hours of community

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- service, provided, however, that the court may order more hours of monthly community service at the request of the defendant.
13. The court record shall contain an explanation of any determination of non-indigence.
 14. The Court or its designee will designate the entity with which the defendant assigned to community service must work, taking into account the needs of the City for community service, the needs of the other entities providing community service opportunities, and the defendant's needs.
 15. Defendants who do not initially pay in full are provided Forms One and Two attached hereto which provide notice regarding the procedures set out herein and defendants' rights.
 16. No person may be incarcerated for nonpayment in any case unless these procedures are followed.
 17. The payment of restitution as ordered by the court cannot be satisfied by the performance of community service, unless the restitution is owed to the City.
 18. The present language of Rule 19(C)(2) of the Rules of Judicial Administration authorizes an increase in the fine only when there is a failure to appear at the initial appearance (pre-judgment) on the ticket.
 19. After an initial ability to pay or indigence determination, a defendant's ability to pay may be re-assessed at subsequent compliance hearings based on changed circumstances or at the Court's discretion following the procedures set forth herein.
 20. No person unable to pay his or her fines and costs in full will be charged an additional fee for being placed on a payment plan unless affirmatively authorized by law.

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FIRST COURT APPEARANCE WITH ADJUDICATION OR PLEA OF GUILTY

1. Plea of guilty entered at the window (scheduled offenses only)
 - a. Obtain signature on Plea of Guilty/Waiver of Rights Form
 - b. Collection of scheduled fine and court costs
 - i. If paid in full, close case and issue receipt.
 - ii. If unable to pay on the same day, the defendant will be given an (approximate) sixty (60) day review by the Court at a compliance hearing (Forms One and Two provided).

2. Plea of guilty entered or adjudicated in Court (scheduled and non-scheduled offenses)
 - a. Judge orally receives guilty plea or adjudication of guilt
 - b. Imposition of Sentence (possible fine, court costs and jail sentence)
 - i. If it is determined that the conduct for which the defendant has been convicted warrants the imposition of a jail sentence, the sentence shall be carried out as directed by the Court. The imposition of a jail sentence will have nothing to do with a defendant's inability to pay the fines and court costs.
 - ii. If able to pay the fine and court costs on the same day, the defendant may be directed to the pay window or otherwise informed how to make payment. The full amount is paid and the case is closed.
 - iii. If the defendant tells the Court that he or she is unable to pay on the same day, the defendant will be given the following options and/or ordered as follows: placed on a payment plan and given a compliance hearing date; given an approximate sixty (60) day review by the Court at a compliance hearing; given an order to complete community service; or any other disposition deemed just and appropriate at the discretion of the Court, excluding incarceration. (Forms One and Two to be provided)
 - (a) It will not be a standard practice to hold an indigence /ability-to-pay hearing at this stage of the proceedings. However, the Court reserves the option to do so and, where the defendant is found indigent, to provide the defendant the option of the minimum payment plan or community service at this stage and to enter an order consistent with the option chosen.

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COURT APPEARANCE – COMPLIANCE REVIEW DATES

1. If the defendant does not appear (and the defendant has not received a continuance from the Court) a warrant will be issued.
2. The defendant must be given an opportunity to present evidence that the amount allegedly owed is not accurate or is not in fact owed if the Defendant believes that the amount is not correct.
3. If the defendant has not paid in full the Court will inquire as to the reasons for noncompliance, including whether the defendant has an inability to pay the amount then due. During this inquiry the Court will specifically ask questions pertaining to the defendant's ability or inability to pay the amount owed in full. One of the initial questions asked in connection with the ability to pay inquiry will be "Are you able to pay today?" or words to that effect.
4. If after inquiry by the Court, there is
 - a. No indication of inability to pay, the defendant may be placed on a payment plan by the Court; given another review date set as a compliance hearing (Forms One and Two provided); sentenced to serve time in jail (but not without an indigence/ability-to-pay hearing described below); or given any other disposition deemed just and appropriate at the discretion of the Court.
 - b. An indication of inability to pay
 - i. the defendant will be directed to a Public Defender to assist with the completion of an Affidavit of Substantial Hardship Form and any further paperwork the Court deems necessary;
 - ii. the Court will then hold a hearing at which the Public Defender will represent the defendant, and the Court will make an indigence/ability to pay determination taking into consideration any testimony, the Affidavit of Substantial Hardship, any other paperwork the Court deems necessary, and any documents submitted by the defendant. The defendant will be permitted to present evidence. If, after questioning (including questioning by the Court) and presentation of evidence, the defendant is
 - (a) determined to be at or below 125% of the Federal Poverty Level (FPL), the defendant will be determined to be indigent and unable to pay the fines, fees, court costs, and/or restitution in full at the Compliance Hearing, unless the defendant has substantial liquid assets with which he or she could satisfy the payments. In determining whether a defendant has substantial liquid assets, the Court will not consider up to the first \$3,000 in personal property,

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and up to \$5,000 in home equity. A finding of substantial liquid assets cannot be based on the receipt of an Earned Income Tax Credit.

- (b) determined to be above 125% of the FPL, the defendant will not receive a presumption of indigence, but the Court will still consider whether the defendant has the ability to pay based on the defendant's disposable income, liquid assets, and earning potential.
- iii. If the defendant is determined to be indigent or otherwise unable to pay the amount owed for fines, fees, court costs, and/or restitution in full as ordered, the Court:
- (a) may determine the defendant's ability to make payments based on that defendant's: (i) disposable income, as reflected in the Affidavit of Substantial Hardship and any other paperwork required by the Court, and as further clarified by answers to questions posed in the hearing, (ii) the defendant's assets, and (iii) the defendant's earning potential; order the defendant to make payments consistent therewith; and schedule a review at another compliance hearing (Forms One and Two provided). However the Court will not order a monthly payment in excess of \$25.00 for indigent defendants;
 - (b) may remit costs and fines;
 - (c) must (unless fines and costs are remitted in full) provide a defendant deemed indigent or otherwise unable to pay the \$25.00 minimum monthly payment, the option to complete community service (if physically able) in lieu of payment of costs and fines and schedule a review at another compliance hearing, provided that: (i) if a defendant who has previously been placed on a payment plan fails to make one or more payments, the Court may order said defendant to complete community service (if physically able) to satisfy his or her debt; and (ii) that community service will not be an option for satisfaction of amounts owed for restitution, unless restitution is owed to the City (Forms One and Two provided); and/or
 - (c) may order any other remedy deemed just and appropriate at the discretion of the Court, excluding incarceration.
- iv. If the defendant is determined in the indigence/ability-to-pay hearing to have had the ability to pay as ordered (including individuals previously placed on a payment plan), the Court may:

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- (a) place the defendant on a payment plan or modify the existing payment plan and schedule a review at another compliance hearing in approximately sixty days (60) (Forms One and Two provided);
 - (b) give the defendant another review date set as a compliance hearing (Forms One and Two provided);
 - (c) order the defendant to complete community service (if physically able) in lieu of payment of costs and fines and schedule a review at another compliance hearing (Forms One and Two provided);
 - (d) remit costs and fines;
 - (e) order the defendant to serve jail time with fines and costs reduced per day at an amount no less than that allowed by Ala. R. Crim. P. 26.11 (Public Defender present unless otherwise represented) if there is a finding of willful nonpayment provided that the days to which the defendant is sentenced do not exceed the number of days required to work off the amount then currently due and owing; and/or
 - (f) provide any other disposition deemed just and appropriate at the discretion of the Court.
5. If the defendant was ordered to do community service in lieu of paying, the Court may, upon the defendant's failure to comply, set a contempt hearing to determine if the defendant should be sanctioned. The Court will comply with the requirements of Ala. R. Crim. P. 33, including, but not limited to, providing notice, hearing, and written findings. The Court will remit additional fines and costs associated with any contempt conviction and will remit the original fines, fees, and costs in connection with any jail sentence given for contempt at the same rate as that provided defendants jailed pursuant to Ala. R. Crim. P. 26.11.

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MISCELLANEOUS PROCEDURES

In addition, the Judges of the Court will:

1. provide notice of a compliance hearing, as set out in these procedures, to all defendants on a Judicial Correction Services payment plan or contract as of June 2014;
2. treat probationers as set out in the above procedures if and when probation is subject to revocation for nonpayment of fines, costs, fees or restitution;
3. treat those who are currently on payment plans as set out in the above procedures;
4. have the Public Defender inform any defendant not otherwise represented by counsel of his or her appellate rights and provide said defendant Form 3 should he or she be sentenced to jail for failure to pay fines, costs, fees or restitution;
5. instruct the clerks to provide defendants who have failed to appear as required by their UTTC (uniform traffic ticket and complaint) with a license reinstatement letter (if the Court has notified the Alabama Department of Public Safety of the failure to appear) upon the defendant's first voluntary appearance at a compliance hearing or upon full payment of costs, fines, fees or restitution, whichever occurs first; and
6. permit a defendant who has failed to appear at his or her initial appearance date for a scheduled traffic offense and who is subject to an arrest warrant for the same, to appear at the window at the Court and *not* be arrested on that warrant but instead to be provided a compliance hearing date; and
7. instruct the clerks that no warrant for failure to appear shall be confirmed unless it is supported in the Court's file by notification from the Court or notification in a charging instrument which notification provides a specific date and time for a court hearing.

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FORM ONE

Payment of Fines and Costs

If at any time you cannot pay your fines and costs as ordered by the Court, you may go before the Court at your Compliance Hearing to discuss your financial situation, to ask that the Court's Order be changed (for example, to ask that you pay less) and/or to explain why you are unable to pay. The time and date of your Compliance Hearing before the Court will be provided to you in a Court Order given to you.

If you indicate that you are unable to pay your fines and costs, the Court will order you to complete an Affidavit of Substantial Hardship and other forms as deemed necessary, and may inquire about your finances, to include but not be limited to: income, expenses (i.e. rent, childcare, utilities, food, clothing, medical condition/bills, transportation, etc.), bank accounts, and other assets. In some circumstances, the Court may also inquire about your efforts to obtain the money to pay, including your job skills and efforts to apply for jobs. You should present any documents that you have to the Court during this inquiry. If you cannot afford an attorney, the Court will provide a Public Defender to represent you.

Based on your income, you may be ordered to perform community service or be placed on a monthly payment plan. You will be given a Compliance Hearing date to return to Court for the Judge to review your particular case(s). Your appearance at this Compliance Hearing is mandatory.

You cannot be put in jail solely for your inability to pay your fines and costs, or for nonperformance of community service, unless you willfully failed to pay or to perform the community service ordered despite having the ability to do so.

You may pay the full amount you owe at any time in accordance with the Court's Order, and at that point you will not have to continue to make payments, finish your community service, or appear at your next scheduled Compliance Hearing. You may contact the Court or inquire at a Municipal Court pay window if you would like to obtain your balance owed.

If the Court determines that you have a disability, illness, or other circumstances that would prevent you from performing community service, you will not be required to perform community service.

In summary, after you have been ordered by the Court to pay your fines and court costs or to perform community service, you will be given a Compliance Hearing date to come back to Court to review your case(s). **This hearing is mandatory.** Even if you are unable to pay all of your fines and costs or complete the hours ordered before that date, you must attend. At this Hearing, you will have the opportunity to explain to the Court why you have not complied with the Court's Order(s) and present evidence. You could be put in jail only if the Court determines that you willfully violated the Court's Order. **If you do not appear at your Compliance Hearing, a warrant will be issued for your arrest.**

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FORM TWO

Municipal Court
City of Montgomery
320 North Ripley Street
Montgomery, AL 36104

ORDER SETTING HEARING FOR COMPLIANCE REVIEW
IN THE MUNICIPAL COURT OF MONTGOMERY, ALABAMA
MUNICIPALITY OF MONTGOMERY
V.
ADULT NWS TEST JR, DEFENDANT

To the Defendant of the Case listed below:

<u>Case#</u>	<u>Officer</u>	<u>Attorney</u>	<u>Balance Due</u>	<u>Court Date-Hearing</u>
1999CRA999999	Jane Roe		\$332.00	Friday, August 31, 2012
THEFT OF PROPERTY 3				8:00 am

If your address changes, you shall provide notification to the court immediately.

You must attend the court hearing on the date and time referenced above unless you have paid in full your fines and court costs or completed and submitted proof of completed community service.

Your ability to pay is a critical issue in this hearing. If you are unable due to no fault of your own to pay the court costs and fines or to perform community service as ordered by the Court by the above referenced date, you may testify at this hearing and should bring with you any records to help explain the reasons for your nonpayment or nonperformance to include, but not limited to, pay stubs, utility bills, expenses, federal and state tax returns, medical bills, documents evidencing any medical condition, any evidence of efforts to gain employment, etc. If you cannot afford an attorney, a Public Defender will be provided to assist and represent you.

If, at the time of the hearing, you have failed to pay the full court costs, fines, fees or restitution ordered by the Court or have failed to meet the requirements of your payment plan, you may be sentenced to jail after the hearing for failure to pay, but only if you are found to have had the ability to pay. If you have previously been ordered to perform community service and have failed to perform community service as ordered by the Court and are found to have had the ability to do so, you may be held in contempt of court only after notice and a hearing.

If you are on probation, your probation can also be revoked and you may be jailed for failing to comply with the other terms of your probation.

If you believe the "Balance Due" amount is incorrect, you may request a balance history (both fines/fees/costs added and payments received) from a Clerk at the Window in the Municipal Court. If you still believe the "Balance Due" amount is incorrect you may discuss it with the

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Clerk at the Window. You may also discuss it with the Public Defender, and raise it with the Judge.

**IF YOU FAIL TO ATTEND COURT ON THE DATE REFERENCED ABOVE, A
WARRANT WILL BE ISSUED AND ADDITIONAL CHARGES MAY BE INITIATED.**

May 22, 2012

Municipal Court Judge

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FORM THREE

Notice of Appeal Rights

You have a right to appeal the decision of the Montgomery Municipal Court. If you file an appeal, the Montgomery County Circuit Court will review your case.

Under Alabama law, you have 14 days from the date of your trial/hearing in which to file your appeal. If you wish to file an appeal, you should tell your Municipal Court attorney or the public defender that you wish to file an appeal and you may speak to the Public Defender about how to do so.

When you file an appeal, you ordinarily must file an appeal bond. The amount of the appeal bond varies, depending upon the particular offense. If you cannot afford the cost of an appeal bond, you have a right to have a hearing before the judge for the judge to decide if you do not have to file an appeal bond and can file your appeal for free. You must fill out an affidavit of substantial hardship if you have not already done so.

If you are in jail and file an appeal, you will be released from jail once your appeal bond is posted with the court or when the Court determines that no bond is required.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

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vs.	Case No: 2:13-cv-732- MHT-TFM)
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**JOINT BRIEF IN SUPPORT OF THE PARTIES’
AMENDED JOINT MOTION FOR ENTRY OF AGREED SETTLEMENT ORDER**

During a telephone conference held on September 3, 2014, the Parties offered to submit an amended motion and briefing to provide background information and support for the relief requested. As explained below, the Court may enter the declarations requested by the parties and resolve the cases with a final judgment order.

CASE ALLEGATIONS

Plaintiffs Harriet Cleveland and Markis Watts allege that they were both given tickets, were sentenced to pay fines and costs on said tickets, failed to pay the fines and costs, and were jailed in the Montgomery Municipal Court in August, 2013. Plaintiffs were given credit for each

day of incarceration, at a rate of \$50 per day, to pay off their outstanding fines. Cleveland First Am. Compl. ¶¶ 5, 34 (No. 2:13-cv-732, ECF No. 10); Watts First Am. Compl. ¶¶ 17, 26 (No. 2:13-cv-733, ECF No. 9). Plaintiffs alleged that Defendants Municipal Court Judge Westry and Chief Judge Hayes violated the Fourteenth Amendment and Sixth Amendment to the U.S. Constitution, as well as Article I Sections 1, 6, and 22 of the Alabama Constitution and Rule 26.11 of the Alabama Rules of Criminal Procedure, by jailing them without conducting an indigency determination, as required by *Bearden v. Georgia*, 461 U.S. 660 (1983); by failing to provide meaningful notice in advance of the hearing where they were ordered incarcerated, as required by *Turner v. Rogers*, 131 S. Ct. 2507 (2011); and by failing to provide an attorney to represent them in these hearings. Cleveland First Am. Compl. ¶¶ 43–55; Watts First Am. Compl. ¶¶ 35–47. Plaintiffs alleged that these violations were part of a policy and practice by the Defendants Westry and Hayes as well as Defendant City of Montgomery. Cleveland First Am. Compl. ¶¶ 34–42; Watts First Am. Compl. ¶¶ 26–34. Defendants dispute these factual allegations.

CASE PROCEDURAL HISTORY

While in custody in the Montgomery Municipal Jail, Plaintiffs filed petitions for writ of certiorari, or in the alternative, writs of mandamus, in state court, which Defendants removed to federal court. *See* Notice of Removal (*Cleveland*, No. 2:13-cv-732, ECF No. 1; *Watts*, No. 2:13-cv-733, ECF No. 1). Plaintiffs then filed first amended complaints seeking declaratory relief and attorneys' fees and costs, Defendants answered, and the matters were consolidated. First Am. Compls. (*Cleveland*, No. 2:13-cv-732, ECF No. 10; *Watts*, No. 2:13-cv-733, ECF No. 9); Order

Consolidating Cases (ECF No. 13);¹ Answer (ECF No. 15). Defendants agreed to stay the orders of incarceration and collection of all amounts owed by Plaintiffs during the course of this federal litigation.

The Parties commenced discovery. While that continued, the case *Mitchell v. City of Montgomery*, No. 2:14-cv-186, was filed. The *Mitchell* case raises similar claims to the instant cases, but additionally sought injunctive relief and monetary damages. In the *Mitchell* case a preliminary injunction order was entered, in which the Court enjoined the City of Montgomery from collecting fees from the *Mitchell* plaintiffs, and ordered the City of Montgomery to

submit to the Court a comprehensive plan listing the current or proposed policies and procedures the City follows or intends to follow in making future determinations of an individual's ability to pay, the policies and procedures the City follows or intends to follow in making future determinations as to reasons for an individual's failure to pay, the policies and procedures the City follows or intends to follow in making future determinations of any alternative measures of punishment other than imprisonment for the non-payment of fines, and the policies and procedures the City follows or intends to follow in making future determinations of whether these alternative measures are adequate to meet the City's interests in punishing and deterring the non-payment of fines, which shall comply with all applicable federal and state laws and the Alabama Rules of Criminal Procedure.

Mitchell Order ¶¶ 1–2 (No. 2:14-cv-186, ECF No. 18). The Court further provided a briefing schedule and set a hearing to evaluate the constitutionality of the comprehensive plan. *Id.* ¶¶ 3–4.

Plaintiffs Cleveland and Watts obtained permission to participate in briefing and the proposed hearing regarding the comprehensive plan contemplated in the *Mitchell* Order. *See* Order (ECF No. 35). The *Mitchell*, *Cleveland*, and *Watts* Parties then agreed to engage in a private mediation to attempt to develop a comprehensive plan to which all Parties could agree

¹ Docket entries for everything including and after the Order Consolidating Cases are based on the lead case, *Cleveland*, No. 2:13-cv-732.

would facially satisfy the relevant constitutional requirements. (*See* ECF Nos. 44, 45, 49). As a result of the mediation and related negotiations, the *Mitchell, Cleveland, and Watts* Parties agreed upon a set of procedures that they believe facially comply with the federal and Alabama Constitution, as well as applicable Alabama state law and rules of procedure. Those procedures are attached as Exhibit A to the amended motion.

DECLARATIONS REQUESTED IN THE AMENDED MOTION

The parties request that the Court issue certain declarations under 28 U.S.C. § 2201 to resolve disputes between the Parties as to what would constitute facially legally permissible Municipal Court proceedings.² Upon the issuance of such declarations, all disputes between the Parties arising out of the claims in this case will be resolved, and the Court can issue a final judgment.

First Declaration Related to Constitutional Principles

The Parties first ask the Court to declare that:

under the current status of the law, the constitutional principles set out in *Bearden v. Georgia*, 461 U.S. 660 (1983), regarding incarceration for non-payment; and *Turner v. Rogers*, 131 S. Ct. 2507 (2011), regarding notice, and, to the extent applicable in a particular case, the Judges of the Montgomery Municipal Court are legally required to follow them.

Am. Joint Mot. ¶ 6.a. Each of these concepts—incarceration for non-payment and notice—are discussed below.

First, In *Bearden v. Georgia*, 461 U.S. 660 (1983), the Supreme Court held:

[T]hat in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and

² The Parties seek a ruling only as to what is *facially* required during Municipal Court proceedings, and whether the proposed procedures are *facially* constitutional. The actual implementation of the procedures may hypothetically raise new issues but those hypothetical issues are not presently at issue between the Parties.

sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Id. at 672–73. The Supreme Court explained that “alternate measures of punishment” that could satisfy the State’s interest in punishment and deterrence could include “extend[ing] the time for making payments, or reduc[ing] the fine, or direct[ing] that the probationer perform some form of labor or public service in lieu of the fine.” *Id.* at 672.

Alabama courts have explained that, “in accordance with *Bearden v. Georgia*,” courts must inquire into the reasons for any failure to pay and make specific determinations and findings, including findings “supported by the evidence that the defendant willfully refused to pay; that he failed to make sufficient bona fide efforts to pay; or, in the event of a showing of sufficient efforts to pay, that alternative measures to punish and deter are inadequate.” *Snipes v. State*, 521 So.2d 89, 90–91 (Ala. Crim. App. 1986).

The Parties agree, and seek a declaration from the Court, that these standards articulated in *Bearden* apply to the Montgomery Municipal Court when that court is considering whether to incarcerate someone who has not paid their fines and costs.

Second, in *Turner v. Rogers*, 131 S. Ct. 2507, 2511 (2011), the Supreme Court held that the due process clause requires procedural safeguards in cases involving a potential for incarceration for nonpayment. The Court went on to note that one, non-exclusive, way in which these procedural safeguards can be satisfied is by:

- (1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding;
- (2) the use of a form (or the equivalent) to elicit relevant

financial information from him; (3) an opportunity at the hearing for him to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay.

Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011). *Turner* also suggested that alternate provisions other than the four identified above may also satisfy the procedural safeguards required by the due process clause. *Id.* at 2519–20.

The Parties agree, and seek a declaration from the Court, that the general principles articulated in *Turner* apply to the Montgomery Municipal Court when that court is considering whether to incarcerate someone who has not paid their fines and costs.

The Parties thus respectfully ask that the Court enter the requested First Declaration Related to Constitutional Principles to resolve any dispute between the Parties regarding whether these principles apply to the Montgomery Municipal Court when it is considering whether to incarcerate a person who has not paid his or her fines and costs, as Plaintiffs allege occurred to them in August 2013, and as Plaintiffs allege could happen to them again in the future absent such a declaration.

Second Declaration Related to Judicial Procedures and Federal Caselaw

The Parties next ask the Court to declare that:

the Judicial Procedures attached as Exhibit A facially comply with the constitutional principles set out in *Bearden v. Georgia*, 461 U.S. 660 (1983), regarding incarceration for non-payment; and *Turner v. Rogers*, 131 S. Ct. 2507 (2011), regarding notice.

Am. Joint Mot. ¶ 6.b. The Parties agree that the Judicial Procedures agreed upon by the Parties facially comply with the cited requirements regarding incarceration for non-payment, and notice. Each is discussed below.

First, the requirements of *Bearden v. Georgia* are satisfied. Prior to incarcerating anyone for non-payment, the Procedures require the municipal court judge to ask if the person has the

ability to pay. *See* Ex. A at 4 ¶ 3. If, at a compliance hearing, a defendant expresses an inability to pay, the court will hold a hearing to make a determination of that person's ability to make payments and ascertain whether the person is indigent. *See id.* at 4–5. The defendant may present evidence or testimony at this hearing. *Id.* at 4 ¶ 4.b.ii. The court will order an individual to serve jail time only after making an express finding of willful nonpayment. *Id.* at 6 ¶ 4.b.iv.e. The Procedures also include alternates to incarceration to provide punishment and deterrence, including the option of payment plans, delaying payments owed, remitting costs and fines, providing community service, or any other remedy deemed just and appropriate. *Id.* at 5 ¶ 4.b.iii, 6 ¶ 4.b.iv.

Thus, because the Procedures require an actual finding of willful nonpayment before any person can be incarcerated for non-payment, and because the Procedures authorize alternatives to incarceration as needed to permit Defendants to fulfill their legitimate interest in punishing defendants who cannot afford to pay, the Parties believe, and ask the Court to declare, that the Procedures facially comply with *Bearden v. Georgia*.

Second, the Judicial Procedures agreed upon by the Parties facially comply with the right to notice required by due process as articulated in *Turner v. Rogers*. The Procedures provide notice to individuals that their ability to pay is a critical issue in the proceeding, both by an initial inquiry by the municipal court judge, *see* Ex. A. at 4 ¶ 3, and by providing a notice of rights form, *id.* at 8. An affidavit of substantial hardship form is used to elicit relevant financial information, *id.* at 4–5 ¶¶ 4.b.i–iii, and the defendant may present evidence or testimony at this hearing, *id.* at 4 ¶ 4.b.ii.

Thus, because the Procedures require notice that the ability to pay is a critical issue, both orally by the municipal court judge and in writing before the hearing, and because the Procedures

require use of a form to elicit relevant financial information, and because the Procedures state explicitly that the defendant may present evidence, the Parties believe, and ask the Court to declare, that the Procedures facially comply with *Turner v. Rogers*.

**Third Declaration Related to Judicial Procedures and
Constitutional and State Law Provisions**

The Parties next ask the Court to declare that:

the Judicial Procedures attached as Exhibit A facially comply with the requirements of the Fourteenth and Sixth Amendments to the U.S. Constitution, sections 1, 6, and 22 of the Alabama Constitution, and Rule 26.11 of the Alabama Rules of Criminal Procedure.

Am. Joint Mot. ¶ 6.c.

The cases cited in the Amended Motion set out the general principles of the Fourteenth Amendments to the U.S. Constitution. Thus, by providing the opportunity for a hearing on ability to pay before incarceration, by requiring a finding of willful nonpayment, and by providing all defendants with notice that the ability to pay is relevant and with a form that solicits relevant financial information, the Procedures facially comply with these constitutional provisions.

The Judicial Procedures also comply with the Sixth Amendment right to counsel. The Municipal Court will provide counsel at each compliance hearing or indigence determination. *See* Ex. A at 1 ¶ 2 (“A Public Defender will represent all defendants not otherwise represented by counsel at all compliance and indigence/ability-to-pay hearings. At said hearings, the judge will require that the Public Defender appear with the Defendant in front of the judge, and the Court will note the Public Defender’s appearance in the record.”); *see also id.* at 4 ¶ 4.b.i, ii; 6 ¶ 4.b.iv.e. The Municipal Court will also provide counsel, in accordance with Rule 33 of the Alabama Rules of Criminal Procedure, for any contempt proceedings initiated for those who fail

to complete community service. *See id.* at 6 ¶ 5; Ala. R. Crim. P. 33.3(d); 6.1(a). Defendants do not concede that this is necessarily actually required by the Sixth Amendment, but all Parties agree that by providing counsel, the Judicial Procedures do facially comply with the Sixth Amendment.

For the same reasons explained above, the Judicial Procedures also necessarily facially comply with the corresponding provisions of the Alabama Constitution. Alabama courts have interpreted the State Constitution to provide equivalent rights to equal protection, due process, and right to counsel. *See State v. Adams*, 91 So. 3d 724, 738 (Ala. Crim. App. 2010) (interpreting equal protection clause of Alabama Constitution); *Ex parte Shelton*, 851 So.2d 96, 100 (Ala. 2000) (actual imprisonment relevant standard to determine whether right to counsel violated); *Vest v. Vest*, 978 So. 2d 759, 763 n.1 (Ala. Civ. App. 2006) (“Alabama courts have likened the due-process provision of Ala. Const. of 1901, Art. 1, § 13, to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.”); *see also* Committee Comments, Ala. R. Crim. P. 6.1 (explaining right to counsel under federal and state constitutions as applicable in Alabama state courts).

Furthermore, Rule 26.11 of the Alabama Rules of Criminal Procedure was meant to establish procedures “consistent with the United States Supreme Court’s holding in *Tate v. Short*.”³ Committee Comments, Ala. R. Crim. P. 26.11. Under Rule 26.11, “If the defendant cannot pay the costs, fine, and/or restitution immediately after pronouncement of the sentence as preferred, the court may permit payment of the costs, fine, and/or restitution, at some later date, or in specified installments.” Ala. R. Crim. P. 26.11(d). If a defendant fails to pay within the

³ *See Tate v. Short*, 401 U.S. 395, 398 (1971) (“[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.”).

specified time, Ala. R. Crim. P. 26.11(f), the Court may inquire into the reasons for nonpayment and impose remedies, including reducing the amount owed, continuing or modifying the schedule of payments, ordering an employer to withhold a portion of wages, releasing defendant from the obligation, or incarcerating the defendant. *Id.* 26.11(g), (h). “Incarceration should be employed only after the court has examined the reasons for nonpayment,” including “consideration of the defendant’s situation, means, and conduct with regard to the nonpayment of the fine and/or restitution.” *Id.* 26.11(i)(1). “In no case shall an indigent defendant be incarcerated for inability to pay a fine or court costs or restitution.” *Id.* 26.11(i)(2).

Defendants do not concede that the judges of the Municipal Court ever “immediately” or “automatically” incarcerated criminal defendants who did not pay fines and costs or that the judges of the Municipal Court incarcerated the Plaintiffs or any other criminal defendants because they were unable to pay fines and costs. Defendants further deny that any of them violated Rule 26.11 or *Tate, supra*, and Defendants submit that it was the practice of the Municipal Court judges generally to give individuals appearing there time to pay fines and costs.

Nevertheless, the new Judicial Procedures comply with these state and federal requirements. As explained above, these procedures facially satisfy the due process and equal protection clauses by requiring a hearing and a determination of a person’s ability to pay and an express finding of willful nonpayment before ordering jail time. *See* Ex. A at 4–6. The plan also provides the judges with the options, including incarceration and other alternatives, available under Rule 26.11(h). *Id.* at 5 ¶ 4.b.iii, 6 ¶ 4.b.iv.

* * *

With the above declarations, the Parties submit that all disputes between them raised in these actions will be resolved. The Parties thus respectfully ask the Court to enter the requested declarations, and to further enter a final judgment as to all claims in the above-styled cases.

s/ Samuel Brooke

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date the foregoing was filed through the Court's CM/ECF filing system, and that by virtue of this filing notice will be sent electronically to all counsel of record.

Dated: September 12, 2014

/s/ Samuel Brooke

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

<hr/>)
HARRIET DELORES CLEVELAND,)
)
Plaintiff,)
)
vs.)
	Case No: 2:13-cv-732- MHT-TFM)
)
CITY OF MONTGOMERY, et al.,)
)
Defendants.)
)
<hr/>)
MARKIS ANTWUAN WATTS,)
)
Plaintiff,)
)
vs.)
	Case No: 2:13-cv-733- MHT-TFM)
)
CITY OF MONTGOMERY, et al.)
)
Defendants.)
)
<hr/>)

[PROPOSED]

ORDER

The Court having considered the Amended Joint Motion for Entry of Agreed Settlement Order, **ORDERS** as follows:

1. The Amended Joint Motion for Entry of an Agreed Settlement Order is **GRANTED.**

2. The Court hereby **DECLARES** that, under the current status of the law, the constitutional principles set out in *Bearden v. Georgia*, 461 U.S. 660 (1983) regarding incarceration for non-payment; and *Turner v. Rogers*, 131 S. Ct. 2507 (2011), regarding notice,

apply in Municipal Court proceedings, and, to the extent applicable in a particular case, the Judges of the Montgomery Municipal Court are legally required to follow them.

3. The Court hereby **DECLARES** that the procedures attached as Exhibit A to the Amended Joint Motion for Entry of an Agreed Settlement Order facially comply with the constitutional principles set out in *Bearden v. Georgia*, 461 U.S. 660 (1983) regarding incarceration for non-payment; and *Turner v. Rogers*, 131 S. Ct. 2507 (2011), regarding notice.

4. The Court hereby **DECLARES** that the procedures attached as Exhibit A to the Amended Joint Motion for Entry of an Agreed Settlement Order facially comply with the requirements of the Fourteenth and Sixth Amendments to the U.S. Constitution, sections 1, 6, and 22 of the Alabama Constitution, and Rule 26.11 of the Alabama Rules of Criminal Procedure.

6. This Order constitutes a final resolution of all claims at issue in these cases.

Done this ____ day of _____, 2014

UNITED STATES DISTRICT JUDGE

General Information

Court	United States District Court for the Middle District of Alabama; United States District Court for the Middle District of Alabama
Federal Nature of Suit	Civil Rights - Other[440]
Docket Number	2:13-cv-00732
Status	CLOSED