IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

SHARNALLE MITCHELL, et al. Plaintiffs, v. THE CITY OF MONTGOMERY, et al, Defendants.	)	Case No. 2: 14-cv-186-MHT

NOTICE OF WILLFUL VIOLATION OF COURT ORDER

The Complaint in this case described the modern debtors' prison run by the City of Montgomery. *See* Doc. 26 & Exhibits 1-34. The conduct of the City and its employees, agents, and judges prior to the filing of this lawsuit was disgraceful.

Although this Court entered an order on November 17, 2014, requiring the City and four of its municipal judges to refrain from jailing people because of their poverty and to take a number of actions to ensure that such conduct did not occur again, the City and at least one of its judges have recently committed flagrant and repeated violations of this Court's order.

The Plaintiffs continue to conduct an investigation with the assistance of counsel for the City and may seek limited court-ordered discovery prior to making a decision concerning whether to file a Motion to Show Cause Why the Defendants Should Not Be Held in Civil Contempt if the Plaintiffs are unable to obtain the relevant information from the Defendants. Nonetheless, as explained *infra*, the Plaintiffs file this Notice pursuant to their obligation as officers of the Court to notify this Court of the willful violation of its order so that the Court can take whatever action it deems appropriate, if any, under Fed. R. Crim. P. 42.

II. Background

A. The Old System

For years, in assembly line fashion, the City of Montgomery locked human beings in cages to sit out their debts, solely because they were poor and without any of the process required by federal and state law. The City made millions of dollars in profits by demanding payment from desperate family and friends, threatening them that their loved ones would be jailed and kept in jail if they did not bring money down to the clerk's office immediately. Once locked in jail, debtors who could not pay that ransom or who did not know anyone who could pay it for them were coerced into performing janitorial labor for the City to "work off" their debts. *But see* 18 U.S.C. § 1589 (making it a federal felony to obtain labor through the threat of physical restraint). The scheme was an assault on the United States Constitution and on the basic humanity of the City's poor. *See generally*, Doc. 26.

B. The Preliminary Injunction

On May 1, 2014, this Court heard uncontroverted evidence that the City of Montgomery had been jailing some of its poorest people for debts to the City without providing any of the simple process that the United States Constitution and Alabama law require.[1] Judge Fuller issued an order granting preliminary injunctive relief to protect three of the initial Plaintiffs from further unlawful treatment by the City until the City could demonstrate a debt-collection plan that complied with the law. *See* Doc. 18. He also ordered City officials to appear in person before this Court to explain the City's policies and procedures. *Id*.

Almost immediately after this Court's clear statement to the City, the City resumed the same unlawful conduct. In the days after the May 1 order of this Court, the City repeatedly

[1] Three of the Plaintiffs sought injunctive relief based on the City's failure to conduct any inquiry into their ability to pay prior to jailing them for non-payment. *See* Doc. 2. After a Response by the City defending its policies and practices, Doc. 14,[1] a Reply by the Plaintiffs, Doc. 15, and oral argument before this Court on May 1, 2014, Judge Fuller found that the City's failure to conduct such an inquiry or consider alternatives to incarceration prior to jailing the Plaintiffs likely violated their constitutional rights and threatened them with irreparable harm. *See* Doc. 18.

locked in its jail impoverished people for debts in proceedings that continued to violate *Bearden*, *Turner*, *Tucker*, Rule 26.11, and the spirit of this Court's oral statements and written order. *See generally* Doc. 2 (citing cases); Doc. 15 (same). The City again forced people to "sit out" their debts at the City's rate of $50 per day without any inquiry into their ability to pay. In short, nothing changed. While this Court's initial Order pertained only to Ms. Mitchell, Mr. Brown, and Mr. Williams, the City's return to practices that this Court condemned just days after this Court condemned them was, at best, a troubling reflection of the City's indifference to the law.

After this Court's preliminary injunction ruling, the Plaintiffs repeatedly requested that the City cease its unconstitutional behavior. For weeks, the City refused.[2] Indeed, a City prosecutor declared in municipal court that he had not read *Bearden*, had not read *Turner*, and that he did not intend to. *See* Doc. 34 at 5.[3] Ultimately, after the City hired outside counsel, it

[2] At a hearing on this matter, the Plaintiffs would offer proof of the following examples: This Court issued its Order on the evening of Thursday, May 1, 2014. Two business days later, on Monday May 5, 2014, while obtaining records from a window clerk at the City court, a representative of the Plaintiffs overheard a different window clerk telling a woman that, if she did not bring nearly $200 to the court the next day, the City would jail her. (In subsequent proceedings, counsel for the Plaintiffs represented the woman pro bono, and she was found to be indigent.) This conversation led to an immediate investigation after which the Plaintiffs learned that a number of people had been jailed by the City in cursory proceedings without any *Bearden* inquiry that morning. The proceedings were materially indistinguishable from the proceedings described in the Preliminary Injunction hearing: no inquiry was made into the inmates' ability to pay or alternatives to incarceration before they were jailed. Indeed, in a cruel twist, the City judge affirmatively cut off inmates when inmates tried to explain their poverty, refusing to let them be heard even on that basic question and jailing them immediately for non-payment. Four of the people illegally jailed by the City that morning became named Plaintiffs in this case: Kendrick Maull, Tamara Dudley, Demetri Colvin, and Risko McDaniel

The City judge then told *relatives* of those inmates that the person would not be released from City jail unless the *relatives* could produce enough money to pay some of their debts. *But see* Doc. 15 at 19 n.14 (citing cases holding such a practice unlawful). Each person was returned to the jail immediately when the relatives stated that they also did not have enough money to satisfy the City. Mr. Maull's family was so frightened that he would not survive in the City jail with inmates who had actually committed crimes, that they raised enough money from multiple family members to get him released that night, on his second day in jail. Ms. Dudley was not so lucky—her family was so impoverished that it could not raise enough money to release her. She was held until counsel for the Plaintiffs secured her release later in the week by filling a Notice of Appeal *in forma pauperis*—a request that was actually *granted* after counsel submitted the standard state-issued Affidavit of Substantial Hardship describing her indigence. Ironically, as soon as the City bothered to examine her circumstances, Ms. Dudley was found unable to pay the costs of an appeal (as was Mr. Colvin), and she was therefore released pending her appeal of the order jailing her.

[3] Perhaps even more troubling are the events of May 6, 2014. On that date, the City convened hearings to reconsider the jailing of named Plaintiffs Tequila Ballard and Thomas Ellis at the request of undersigned counsel. Ms. Ballard, a single mother of four children living in poverty, was ordered by the City to serve 99 days in the City jail for non-

released several dozen debtors from its jail on a single day in May 2014 and promised in writing to cease jailing people until it had submitted new procedures to be approved by this Court.

C. The November 17 Order

. On November 17, 2014, after the parties had negotiated a new set of procedures to be implemented to guard against the abuses that pervaded the City's scheme, this Court issued an order requiring the City to comply with those procedures. Doc. 51; Doc. 51-1.

Among other important procedures in the settlement agreement, the City was ordered to comply with the following provisions:

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payment of debts from traffic tickets. The City made no inquiry into her ability to pay prior to jailing her in a cursory hearing at which she was not represented by an attorney. She had been languishing in the City jail since March 22, 2014. *See* Doc. 26 at 11. Mr. Ellis, a 57-year-old disabled stroke victim, was similarly jailed without any inquiry into his ability to pay and had been confined in the City jail for non-payment of debts since April 17, 2014. *See* Doc. 26 at 12.

Counsel had alerted the City Attorney's office to the unlawful jailing and continued illegal detention of Tequila Ballard and Thomas Ellis over two weeks prior to May 6, but the City continued to confine them. After this Court's preliminary injunction ruling, when the City finally set their cases for a reconsideration hearing, the result was a highly irregular legal proceeding.

The City prosecutor (who is a private attorney contracted by the City to pursue debt collection and other cases in City court) refused to explain, prior to Ms. Ballard's hearing, why the City sought to keep her in jail at the hearing and why he had declared that Ms. Ballard was "not indigent" even though she clearly fell significantly below state statutory indigency standards. At the hearing, the City judge refused to let Ms. Ballard put on evidence with respect to her indigence or ability to pay. She was returned to the City jail having not even been given the opportunity to establish her inability to pay—the critical legal question that necessitated the hearing in the first place—or to be heard on any other relevant issue. By that point, she had spent 45 days in the City's jail away from her four children, one of whom is disabled and all of whom depended on her.

Mr. Ellis, whose only income was his disability benefits, appeared after Ms. Ballard. Mr. Ellis has difficulty talking and being understood since his stroke, and he was clearly out of sorts and confused in the courtroom on May 6. He did not know what day or what month it was, and he could not remember when he had been put in the City jail. He repeatedly stammered and slurred his words. The City prosecutor frequently smiled to the courtroom audience and mocked Mr. Ellis's confusion over what day it was and how long he had been jailed. Mr. Ellis was visibly uncomfortable and disoriented, turning away from the prosecutor and shielding his face. At one point during this humiliation, Mr. Ellis reported that his rent expenses were lower than had been stated on the Affidavit of Substantial Hardship filled out by counsel while Mr. Ellis was handcuffed at the City jail. Instead of exploring the situation, examining Mr. Ellis's circumstances, or making any findings concerning ability to pay given that Mr. Ellis survived on disability income, the City ordered Mr. Ellis returned to the jail to continue serving out his debts. He had been sitting in the City jail for 19 days at that point. It was after that hearing that the City prosecutor announced that he had not read the Supreme Court decisions of *Bearden v. Georgia* and *Turner v. Rogers* and that he "[did not] intend to."

After the hearings on May 6, 2014, counsel for the Plaintiffs notified the City Attorney of the Plaintiffs' intent to take further action to obtain the immediate release of Ms. Ballard and Mr. Ellis given what had occurred in the City courtroom on May 6. The next day, the City "sua sponte" released each of them along with an order for them to make monthly payments of $50 per month beginning June 1, 2014.

- "No defendant will be incarcerated for inability to pay any court-ordered monies, including fines, court costs or restitution." Doc. 51-1 at 11.
- "No person may be incarcerated for nonpayment in any case unless these procedures are followed." Doc. 51-1 at 12.
- "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." Doc. 51-1 at 14.
- Any defendant unable to pay on the date of adjudication "will be given" a variety of options "excluding" being jailed for nonpayment. Doc. 51-1 at 13.
- "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." Doc. 51-1 at 11.
- The judge shall "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." Doc. 51-1 at 17.
- To audio record all indigence and compliance hearings at which a person's ability to pay is determined.
- To keep the courtroom unlocked and open except in the even that it is "necessary" to "secure" the courtroom to keep the doors locked for a limited period of time not to exceed 10 minutes. Doc. 51 at ¶ 4.
- "To notify Plaintiffs' Counsel by email within twelve hours of any Municipal Court defendant's being placed in jail for nonpayment of a fine, costs or restitution." Doc. 51-1 at 3.

All of these procedures were designed to prevent the City from again jailing a person because he or she could not make a payment and to enable efficient monitoring of the City's compliance with that order.

III. The March 13, 2015, Violations of this Court's Order

On March 13, 2015, a group of more than 10 people arrived at the City municipal court shortly after 8:00 a.m. The group was met by a City police officer. The officer informed the group that they were late, that the courtroom was locked, that they would not be allowed entry to the courtroom, and that they would be fined $50. The officer then informed the group of individuals that they would be jailed for a day if they did not have $50 to pay the City. Then,

without an attorney present, the officer ordered the people to sign a piece of paper purporting to admit to the late time that they had arrived.

The officer then refused to allow the people entry into the courtroom. After some time, at approximately 8:30 a.m. and about 15 minutes after many of them had arrived, the officer unlocked the door and let them into the courtroom. A different courtroom bailiff told the group that they would have to pay $50 or be jailed for one night if they did not have the money.

Judge Darron Hendley then ordered the group to stand near a wall and assessed $50 fines to the individuals in summary fashion one person at a time. No formal process was followed prior to the assessment of what the group was told was a "fine." Judge Hendley then jailed at least two of these people when they could not immediately pay the $50 fine. None of them was appointed a lawyer.[4]

Counsel for the Plaintiffs was alerted to the situation through one of the members of the group threatened by City officers with jail if they could not pay. This person was known to City employees as a person involved in federal court litigation against the City relating to these issues. Instead of being fined and jailed as the City officers had done to other individuals in the group, that person was removed from the courtroom and told that she had been in that line against the wall as a mistake.

After an urgent inquiry by undersigned counsel, counsel for Judge Hendley and counsel for the City investigated the situation and admitted in writing that two people were taken into City custody when they could not immediately pay $50 and that no indigence or ability to pay hearing was conducted to determine whether the individuals could pay what appears to have

[4] None of those fined or taken into custody when they could not pay were informed of their appellate rights after conviction as required by the Court order.

been the issuance of a summary fine for criminal contempt.[5] The Defendants also admitted that no attorney was provided for those jailed. The Defendants represented that Judge Hendley was the only City judge who had engaged in that behavior. The Defendants took what they describe as immediate action to release from custody the sole person who remained confined. The Defendants have assured the Plaintiffs that they have changed their policies and have promised that no one will be jailed again in the future for the inability to pay a $50 fine. Of course, that is the promise that the Plaintiffs had already secured with the entry of this Court's order.

Counsel for the Defendants subsequently provided to undersigned counsel the names of 23 individuals fined and threatened with jail by Judge Hendley pursuant to his policy on various occasions since the entry of this Court's order, as well as and the names of the two people taken into custody on March 13. The City has also agreed to refund their fines, and Judge Hendley has resigned to be effective within 90 days.

However, a number of other questions remain concerning how this could have happened on numerous occasions and regarding the City's policies and practices surrounding the March 13 incident or similar incidents, including how many people have been subjected to such unlawful summary contempt proceedings (the City has also now admitted that many other people are routinely being found in criminal contempt by the other City judges on a daily basis for being late without following any of the procedures required my Alabama and federal law, *see supra*

[5] Judge Hendley's conduct violates state and federal law mandating due process prior to findings of criminal contempt. The Defendants argued to undersigned counsel that Judge Hendley was adjudicating the people for criminal contempt pursuant to his "inherent authority" to hold them in contempt for violating a court order to arrive at 8:00 a.m., although he followed none of the statutory or constitutional provisions required in criminal contempt cases. *See* Ala. R. Crim. Pro. 33.1; 33.3; Ala. Code § 12-14-31; *see also, e.g.*, *United States v. KS & W Offshore Eng'g, Inc*., 932 F.2d 906, 909-10 (11th Cir. 1991) (reversing contempt judgment for a lawyer who arrived late to court and holding that the use of summary contempt procedures for late arrivals was not appropriate and that such procedures are reserved for contumacious conduct observed by a judge in the courtroom).

note 5), threatened with jail for non-payment by City officers and bailiffs, barred from the courtroom, and denied counsel.

Indeed, after representing for over two weeks that the above-related events constituted the extent of their unlawful behavior, counsel for the Defendants informed counsel for the Plaintiffs in writing on the eve of the Plaintiffs filing this Notice to alert this Court about the March 13 violations that Judge Hendley and City officers had openly enforced this policy since at least December 30, 2014, and that Defendant Hendley and City employees had taken into custody at least four additional people when they could not afford to pay a $50 fine for being late that had been summarily imposed. The Defendants therefore admitted that the misconduct in violation of the Court order had been occurring for four months, and the Defendants violated the Court order to notify undersigned counsel within 12 hours of any person being jailed for non-payment and to provide a certification to the City jail administrator that the federal court order had been complied with prior to jailing. Counsel for the Plaintiffs has not yet been provided the names or contact information for these additional individuals but expects to receive that information.

In all, the Defendants have now admitted in writing to violating this Court's order in numerous ways on multiple occasions, including by taking into custody six human beings when they could not afford immediately to pay a mere $50 fine.

IV. Willful Violation of the Court's Order

Federal court orders are a serious matter, particularly when they involve enforcing basic constitutional rights in the wake of rampant civil rights violations. *Cooper v. Aaron*, 358 U.S. 1, 22 (1958) (Frankfurter, J., concurring) ("For those in authority thus to defy the law of the land is

profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society.").

After systemic wrongdoing was exposed and enjoined, the City chose to keep the same contract prosecutors, municipal judges, and contract defense attorneys[6] even though all of them had been involved in violations of clearly established federal law and violations of the Rules of Professional Ethics on a daily basis.

It is now clear that Judge Hendley and multiple City officers and bailiffs decided to hold people in criminal contempt summarily with no lawyer and no formal process to determine willfulness—and, further, to *take those people into custody for not being able to pay a $50 fine immediately*.[7] (All of this for allegedly being a few minutes late in a City that refuses to utilize restricted drivers' licenses and that does not fund adequate public transportation.)

In doing so, Judge Hendley and the City (whose employees apparently knew of Judge Hendley's policy for some time and whose officers implemented it) violated a federal injunction prohibiting some of the most serious abuses in our society: widespread jailing of people because of their poverty as part of a pattern of extortion. Judge Hendley's "pay or jail" scheme was what this entire lawsuit was about from the very beginning, and the Defendants have demonstrated remarkable defiance of a federal injunction just months after it was issued by this Court.[8]

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[6] The City was also aware that a contract defense attorney's sworn affidavit submitted to Judge Fuller stating that he met with every inmate prior to their court hearings was explicitly contradicted by numerous sworn declarations submitted by the Plaintiffs in this case.

[7] The Defendants assert that most of the individuals were not actually transported to the City jail but were instead confined to a holding cell.

[8] Through counsel, Judge Hendley now claims that he believed that he was allowed through his "inherent authority" to jail indigent people who could not afford immediately to pay a fine because he claimed this Court's order was somehow limited "to fines and costs for misdemeanors and traffic offenses" and not to people too poor to pay fines for *contempt* offenses. The logic of this assertion is baffling.

To their credit, counsel for the Defendants have been forthcoming in responding to requests for basic information made by Plaintiffs' counsel prior to filing any Motion to Show Cause. The Plaintiffs are still awaiting verified responses to their inquiries, as well as additional information necessary to conduct and complete their investigation. If the Plaintiffs are unable to obtain the information sought from the City, it may be necessary, in order to determine the scope and nature of the violations to which the Defendants have already admitted in general terms, for the Plaintiffs to request:

- Interrogatories relating to basic questions about the events of March 13 and any related policies, practices, or similar incidents.
- Permission to notice depositions of all City employees and agents present for the March 13 violations, as well as any City employees and agents with knowledge of similar incidents in December 2014 or related policies.
- Production of any documents relevant to the violations, including court documents, sign-in sheets, records, and any other documents reflecting the names and contact information of witnesses to the violations of March 13, 2015, or any other similar event. This includes an order to the City to provide the names and contact information of the victims of the violation of this Court's order, if it is in the City's possession, as well as all those held in summary contempt for being supposedly late to court since the entry of this Court's injunction.

See, e.g., United States v. City of Northlake, 942 F.2d 1164, 1170 (7th Cir. 1991) (reversing district court's denial of discovery on possible violations of a consent decree by a municipal government); *Wesley Jessen v. Bausch & Lomb*, 256 F. Supp. 2d 228, 229 (D. Del. 2003) (allowing discovery after prima facie showing of the violation of a court order).

Although the Defendants have already admitted to serious violations of this Court's order and although the institution of contempt proceedings is appropriate because the orders of this Court must be followed, it is prudent for the Plaintiffs to investigate as soon as practicable the full scope of the violations prior to the Plaintiffs determining whether civil contempt sanctions are required to cease ongoing violations of this Court's order.

In any event, the Plaintiffs file this Notice with the Court so that the Court can make its own determination concerning whether to refer the matter to the relevant authorities in order to initiate criminal contempt proceedings to punish the Defendants for blatant violations of this Court's order. *See, e.g.*, *Shillitani v. United States*, 384 U.S. 364, 370 (1966) (explaining that civil contempt seeks to coerce future compliance while criminal contempt seek to punish for past violations); *Skinner v. White*, 505 F.2d 685, 688 (5th Cir. 1974) ("[C]ivil contempt lies for refusal to do a commanded act, while criminal contempt lies for doing some forbidden act.... [C]ivil contempt is conditional, and may be lifted if the contemnor purges himself of the contempt…."); *see also Wyatt ex rel. Rawlins v. Sawyer*, 80 F. Supp. 2d 1275, 1278 (M.D. Ala. 1999) (setting forth procedures to be followed for civil contempt); *see also* 18 U.S.C. § 401(3) (setting forth the court's criminal contempt power); Fed. R. Crim. P. 42 (outlining procedures to be followed for criminal contempt).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that foregoing has been served upon the following by electronic filing and notification through the U.S. District Court for the Middle District of Alabama CM/ECF system, this 2nd day of April, 2015:

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