**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF ALABAMA**
**NORTHERN DIVISION**

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|---|---|---|
| ALDARESS CARTER, individually and for a class of all others similarly situated, | ) | |
| Plaintiff; | ) | Civil Action No.: |
| v. | ) | 2:15-cv-555-RCL |
| THE CITY OF MONTGOMERY; BRANCH D. KLOESS; JUDICIAL CORRECTION SERVICES, INC.; CORRECTIONAL HEALTHCARE COMPANIES, INC.; CHC COMPANIES, INC., | ) | |
| Defendants. | ) | |

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**PLAINTIFF'S BRIEF IN OPPOSITION TO JUDICIAL CORRECTION SERVICES' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Private probation company Judicial Correction Services, Inc. ("JCS") contracted with the City of Montgomery to implement a traffic ticket and misdemeanor probation system wholly funded by probationers themselves. The system's only purpose was to collect court debt—and JCS's own hefty fees—from people who lacked sufficient wealth to pay off an entire traffic ticket at once.

JCS positioned itself to be probationers' sole point of contact for all information about their case—warning them, ***Do not contact the Municipal Court***, they will be unable to help you." And it also positioned itself to be the court's sole source of information about probationers' compliance with the terms of their probation. The company then used a mix of threats and obfuscation to extract as much money from probationers as it could before then recommending the revocation of probation of people who finally couldn't pay any more. JCS was obligated under its contract to waive its own fees for indigent probationers. But JCS avoided this hit to its bottom line by hiding this fact from all probationers even when those probationers repeatedly told the company they lacked the means to pay, and by representing that the court would not be able to provide them any relief at all.

As a matter of company policy, JCS probation officers demanded that probationers who were unable to afford more than $40 a month report four or more times as often as people who could pay more. And probationers who could not pay their monthly fines and fees in full were routinely threatened with jail simply for failing to pay, even though jailing for failure to pay is plainly unconstitutional absent a finding that the probationer's nonpayment was willful.

Finally, when a probationer was no longer able to pay at all and JCS was no longer able to collect its monthly fees, JCS would petition the Municipal Court to revoke their probation, still with no mention at all of difficulties the probationer had paying. JCS advocated for probation

revocation (and failed to provide the court with information weighing in the probationer's favor) knowing that the Municipal Court routinely jailed probationers who were behind on payments of their court debt without itself ever inquiring into the probationer's indigency or ability to pay.

For years, both JCS and the City of Montgomery benefited from this scheme, with JCS extracting over $15 million in profit for itself from probationers during the years it was in Montgomery, and somewhat less than that in fines for the City. But JCS's tactics preyed on thousands of Montgomery's poorest residents, and the company, acting under the color of law violated their due process and equal protection rights as well as their rights under Alabama law. JCS's main defense is to point its finger at the Montgomery Municipal Court, and to say that it was simply acting at that court's direction. This Court should reject JCS's attempt to duck responsibility for the effects of the system it created, implemented, and profited from. JCS's motion for summary judgment should be denied.[1]

## FACTUAL BACKGROUND

Mr. Carter's separately filed Omnibus Statement of Facts provides the most complete account of the facts and contains all citations to the evidentiary record. The facts most relevant to ruling on JCS's motion for summary judgment are summarized here. An account of the City of Montgomery's alleged constitutional violations is provided in Plaintiff's opposition to the City's motion for summary judgment.

### A. Montgomery's contract with JCS and the policy of assigning people who could not afford to pay traffic and misdemeanor fines to JCS probation

First in 2009, and then again in 2010, the City of Montgomery contracted to give control

[1] Plaintiff does not oppose JCS's motion of summary judgment on Count 4 (Fourth Amendment), Count 6 (Sixth Amendment), or Count 8 (Eighth Amendment). Accordingly, this brief does not respond to JCS's arguments concerning those claims.

of its misdemeanor and traffic fine probation system to Judicial Correction Services, Inc. ("JCS").[2] The 2010 contract remained in place until July 2014.[3] Montgomery Mayor Todd Strange signed on behalf of the "CITY/COURT OF MONTGOMERY ALABAMA," and the contract bound the City of Montgomery, the City's Municipal Court, and JCS.[4] While JCS was operating its for-profit probation enterprise in Montgomery, it also had contracts to provide similar services to over 100 other municipalities throughout Alabama, using an identical or virtually identical form contract in most cases.[5]

Under the contract, the mayor and JCS agreed that all offenders sentenced to probation in the Montgomery Municipal Court would be supervised by JCS.[6] The contract provided that JCS would not invoice the City or its Municipal Court for its services.[7] Instead, it established a "user-funded" probation system, meaning that JCS made 100% of its revenue solely and directly from fees it collected from the probationers.[8] As compensation to JCS, the contract mandated that: "In consideration for the services provided by JCS, the Court agrees that each Court Order shall provide for the following: (1) Probation fee of $40.00 per month flat fee . . . (2) One time probationer set-up fee of $10.00."[9] These fees paid to JCS were in addition to any underlying fines and court costs the Municipal Court imposed.[10]

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[2] Plaintiff's Omnibus Counter-Statement of Facts in Opposition to Defendants' Motion for Summary Judgment ("Counter-Statement") at ¶ 4, 21. To avoid unnecessary duplication, references to the extensive evidentiary record are contained in the Counter-Statement.

[3] Counter-Statement ¶¶ 22.

[4] Counter-Statement ¶ 21.

[5] Counter-Statement ¶ 1.

[6] Counter-Statement ¶ 8.

[7] Counter-Statement ¶ *12.

[8] Counter-Statement ¶ 12.

[9] Counter-Statement ¶ 13.

[10] Counter-Statement ¶ 18.

The Montgomery Municipal Court has jurisdiction over cases involving defendants charged with criminal misdemeanors and defendants with traffic tickets.[11] It adjudicated approximately 80,000 traffic cases and 8,000 misdemeanor cases each year during the timeframe at issue here.[12] Defendants adjudicated guilty were routinely sentenced to pay fines and court costs.[13] The majority of people assigned to JCS probation in Montgomery went through what JCS referred to as the "window procedure"—that is, at a pay window staffed by a magistrate or clerk rather than a judge.[14] Defendants who pled guilty at the window and could not afford to pay within 30 days were sentenced to JCS probation without seeing a judge and with no indigency determination ever being conducted for them.[15] Other defendants who could not pay their fines but failed to meet all criteria for the administrative window procedure had their cases adjudicated by a municipal judge.[16] When sentencing people to JCS probation, those judges never conducted indigency determinations or waived JCS's monthly fees.[17] All probation orders sentencing defendants to JCS, whether issued in court or at the pay window, contained JCS's bargained-for payment terms: a $10 start-up fee and $40 per month to itself.[18]

Under the JCS-Montgomery system, whether at the window or before a municipal judge, defendants who were wealthy enough to pay their traffic or misdemeanor fines and fees on the spot (or sometimes with a single 30-day extension) of sentencing avoided JCS probation altogether

[11] Counter-Statement ¶ 39.
[12] Counter-Statement ¶ 39.
[13] Counter-Statement ¶ 39.
[14] Counter-Statement ¶ 68. (The implementation of the Window Procedure in Montgomery is described in Plaintiff's opposition to the City's motion for summary judgment.)
[15] Counter-Statement ¶¶ 41, 45.
[16] Counter-Statement ¶ 58.
[17] Counter-Statement ¶ 62, 64.
[18] *See* Counter-Statement ¶ 62.

by paying the court directly.[19] But defendants unable to pay all their fines and fees in that timeframe were routinely placed on JCS's pay-only probation rather than a court-ordered payment plan.[20]

People placed on JCS probation in Montgomery were subjected to a host of liberty deprivations, ranging from monthly fees that impeded their ability to pay off their fines and prolonged their probation terms, to constant threats of arrest and jail, to extra probation conditions not on the probation order.[21] And the only different between debtors subjected to this treatment and debtors who were not was wealth.[22]

JCS's marketing literature confirms that debt collection was the company's chief function in Alabama and its main selling point.[23] Its brochure advertises that with JCS, cities can "collect & successfully close twice as many partial payment cases;"[24] and that "With Judicial Correction Services managing your misdemeanor probation cases, and at no cost to you, you will immediately see: [t]he elimination of partial payment collection. . . ."[25] The brochure features numerous client testimonials emphasizing increased fine collection: "By working with Judicial Correction Services, fine collection has gone up."[26] "Collections are at an all-time high." "JCS has improved

[19] Defendants suggest that Montgomery Municipal Court judges may have occasionally given certain defendants a slightly longer period of time to pay (60 or 90 days) before they had to go on JCS, or offered them non-JCS-supervised probation. But the only evidence to this effect is anecdotal at best, and Defendants do not deny that, as a general policy, municipal defendants who could not pay their ticket in full was placed on JCS probation for collection. Likewise, it is undisputed that *no one* was put on JCS probation if they *could* pay their fine in full. Counter-Statement ¶ 41.

[20] Counter-Statement ¶ 43.

[21] Counter-Statement ¶ 69-81, 88-90.

[22] Counter-Statement ¶ 41.

[23] Counter-Statement ¶ 24-29.

[24] Counter-Statement ¶ 25.

[25] Counter-Statement ¶ 25.

[26] Counter-Statement ¶ 26.

our court operations greatly . . . by the amount of monies collected." "We are now collecting more than 90% of our fines . . . ."[27] And in a page apparently directed at prospective probationers, JCS's brochure suggests that it was legitimate for courts to jail probationers solely for the nonpayment of fines and costs: "Facing possible incarceration due to the inability to pay court fines and costs? At Judicial Correction Services, our staff is available to assist you in court, after . . . all court fines and fees have been set."[28]

**B. JCS's positioning as probationers' sole point of contact about their case, allocation of payments to itself, imposition of its own probation conditions, and threats**

JCS, not the Municipal Court, set the amount each probationer was required to pay each month.[29] JCS typically initially set probationers' monthly payments at a minimum of $140.[30] And each time JCS received a payment from a probationer, JCS had the discretion to decide how much of the payment to put towards the City debt and how much to keep for its own profits.[31] This unfettered discretion gave JCS control over how long people remained on probation. Many probationers could not afford to pay the full amount JCS demanded each month, so they paid what they could (often in cash). For example, Plaintiff Aldaress Carter frequently made payments of just $5 or $10.[32] But the amount of each payment JCS kept varied, with JCS often keeping half of each payment. In some cases, JCS only put money towards the probationer's underlying debt if there was some left over after JCS took its cut.[33] And on the few occasions that Mr. Carter could afford to make a substantial payment towards his fine, JCS often pocketed more than half of the

[27] Counter-Statement ¶ 26.
[28] Counter-Statement ¶ 27.
[29] See Counter-Statement ¶ 61.
[30] See Counter-Statement ¶ 92.
[31] Counter-Statement ¶ 93.
[32] Counter-Statement ¶ 172.
[33] Counter-Statement ¶ 94.

payment (and more than $40):[34] It was to JCS"s advantage to keep probationers from paying their fines off too quickly; as JCS intake officers explained to new probationers, "as long as [you] have a balance $40.00 probation fees will be added to [your] case on a certain date of the month as long as a balance is owed."

At the outset of probation, JCS imposed its own additional conditions of probation and used them to threaten probationers, purely as a device to coerce payment.[35] When a probationer showed up to JCS's office to report, JCS would then give them a "General Conditions of Probation Form."[36] This form duplicated many of the conditions appearing on the probation order, but it also *added* several additional conditions that the Municipal Court order did not impose.[37] The form given to Mr. Carter, for example, included a prohibition on using alcohol or visiting places where "intoxicants" are sold, dispensed, or used; and an agreement to submit to drug and alcohol testing as directed by the JCS probation officer.[38] And at Mr. Carter's initial meeting, JCS employees told him they could drug test him at any time and could show up unannounced at his job.[39] Mr. Carter's probation order said nothing about a prohibition on alcohol or having to submit to drug and alcohol testing, and nothing about probation officers showing up at Mr. Carter's job—JCS alone imposed those conditions.[40]

In addition to imposing extrajudicial probation conditions on probationers, JCS ensured

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[34] See Counter-Statement ¶ 172 (JCS's records of Carter's payments in 2011-12). Since the JCS-Montgomery contract did not specify how payments should be allocated, if Carter could not afford to pay enough to cover JCS's fees one month, JCS would often take more the following month.

[35] Counter-Statement ¶ 158.

[36] Counter-Statement ¶ 74 (comparing Doc. 253-19 and Doc. 253-16.)

[37] Counter-Statement ¶ 74.

[38] Counter-Statement ¶ 74.

[39] Counter-Statement ¶ 159.

[40] Counter-Statement ¶ 74.

that its own employees were probationers' only source of information about their cases.[41] Defendants placed on JCS probation in Montgomery (whether by a judge or through the window procedure) received a JCS-generated document titled "Reporting for Probation."[42] That document advised probationers not to bring less than whatever amount of money JCS calculated was appropriate to their first appointment, named the probation officer or officers assigned to the case, listed the date and time of the first appointment, and provided JCS's office address. It also told probationers that "all questions concerning your case" should be directed to their JCS probation officer, and told probationers: "***Do not contact the Municipal Court***" because "they will be unable to help you."[43]

The contract provided that JCS would not charge its standard monthly probation fee for "indigent cases when determined by the Court." (Doc. 145-1 at 2 - Ex. A, Uniform Standards of Probation Supervision ¶ 5.) But the contract did not provide any explanation of how a probationer might avail himself of that relief. And although JCS emphatically told probationers that all questions concerning their case should be directed to their JCS probation officer—*not* the court—JCS never informed probationers that they were entitled to an indigency determination by the court that could entitle them to remain on probation without paying JCS's fee.

JCS kept probationers in the dark about their right to seek an indigence-based fee waiver even as it collected, recorded, and maintained detailed information about their poverty.[44] When JCS employees met with a new probationer, it was standard practice to ask about the person's employment. If the person said they were unemployed, disabled, or receiving SSI benefits, the

[41] Counter-Statement ¶ 70.
[42] Counter-Statement ¶ 70
[43] Counter-Statement ¶ 70
[44] See Counter-Statement ¶¶ 82-87; Doc. 118-13 (Probation Tracker file of Montgomery probationers with indicia of indigency in their employment notes).)

probation officer would note that in Probation Tracker.[45] And JCS's records show that many hundreds of probationers in Montgomery were unemployed, receiving government benefits, or both.[46] JCS even kept track of which day of the month the probationer or family member (including children) would receive the expected benefits checks, and the expected amount in benefits that person would receive from the government,[47] an act with no discernable purpose other than to facilitate its collection of those need-based funds. Furthermore, in Montgomery and JCS offices throughout Alabama, probation officers say nothing about possible relief for indigent probationers even in cases such as Mr. Carter's, where the probationer repeatedly appeared but was able to afford a payment of only a few dollars or no money at all, and where the probationers told JCS probation officers they had no money and were unable to pay.[48]

Rather than referring probationers to the Municipal Court for an indigency determination or contacting the court themselves, JCS probation officers routinely threatened probationers that they would be arrested or jailed if they failed to pay enough or pay on time. Carter testified that at his very first meeting at the JCS office, his probation officer told him that if he didn't pay, he could go back to jail.[49] The JCS probation officer pointed to the police officer stationed at the JCS office and Mr. Carter they would have him arrested if he did not have money:

> A. "Do you see that police officer right there? You can be going out the door with him. Do you have any money?" "No, ma'am." "Do you want us to revoke your probation?" "No, ma'am." "Well, you can go back to jail if you don't pay."

[45] *Id.*; *see also* Doc. 118-19 at 178-80 (Deposition of Wes Ennis, JCS's regional manager for several cities including Montgomery).

[46] *See* Doc. 118-13 (showing employment status records of many hundreds of probationers listed as "DISABLED VET," "SSI BENEFITS," "SSI AND DISABILITY," "UNEMPLOYED," "UNEMPLOYED—SSI," "UNEMPLOYED-DISABLED," etc.).

[47] *See, e.g.*, *id.* at 1 ("$768.00 – 3RD/MONTHLY – DISABILITY"); *id.* at 5 ("DISABILITY CHECK FOR $606.00 ON THE 1ST OF EACH MONTH); id. at 11 ("RECEIVES AFDC AND SSI FOR HER DAUGHTER – 5TH OF EVERY MONTH).

[48] Counter-Statement ¶ 74.

[49] Counter-Statement ¶ 89 (Carter testimony, Doc. 163-14, Carter Depo. at 92:16-93:12).

Q. And they referred to the police officer in their office?
A. Yes, sir.
Q. Was he a uniformed police officer?
A. Yes, sir.[50]

This was not a one-time occurrence; probationers' accounts of such treatment are all startlingly similar.[51] A police officer was visible from the JCS office in Montgomery at all times, and Carter and other JCS probationers saw the officer arrest people on the spot when they did not bring enough money.[52] JCS threatened people with jail when they could not make a payment, even when they showed up for appointments.[53] Some probationers feared that they would be jailed if they reported without the minimum amount.[54]

JCS further penalized probationers who weren't paying in full fast enough by increasing the frequency of their mandatory reporting meetings at the JCS office by a factor of four or more.[55] By default, JCS required probationers to attend monthly meetings with probation officers.[56] But if a person had trouble meeting their monthly payments, JCS would make that person report weekly, and sometimes even more frequently.[57] For example, JCS required Carter to report to its offices as

[50] Counter-Statement ¶ 162 (citing Carter depo testimony); ¶ 84 (Probation Tracker records showing JCS told Carter he had only paid $20 so far that month and must pay more, after Carter had disclosed that he could not make a payment that visit because he had a newborn baby and too many bills); ¶ 88 (JCS threatened to begin revocation proceedings if Carter did not "hurry up and pay something").

[51] See, e.g., Counter-Statement ¶ 84 (when Kristy Fugatt could not always pay, JCS told her to come back in four days or an arrest warrant would be issued, despite the fact that she repeatedly kept reporting appointments).

[52] Counter-Statement ¶ 89 (Depo, Doc. 163-14 at 85:5-86:20); ¶ 89 (Christopher Mooney testimony that he saw police arrest a JCS probationer who had told JCS they didn't have the minimum amount).

[53] See Counter-Statement ¶ 84 (when Gina Ray told JCS she could not pay because she had no money, JCS told her she would be jailed if she showed up again without $145) – Ray Doc. 471-1 at 302:13-21.

[54] Counter-Statement ¶ 89.

[55] Counter-Statement ¶ 80.

[56] Counter-Statement ¶ 80.

[57] Counter-Statement ¶ 80.

often as 5 or 6 times a month.[58]

When Carter's first probation started in May 2011, he owed $1101 in fines and costs.[59] By the time JCS petitioned to revoke his probation in December 2012, he had paid a total of $833.[60] Had it not been for JCS's fees, he would have paid off most of his original debt by December 2012.[61] Instead, when his payments slowed down, JCS petitioned to revoke his probation (without ever informing him that he was legally entitled to an indigency determination), which set in motion the chain of events that led to Carter's arrest and, ultimately, his jailing for failure to pay.[62]

**C. JCS Petitions for Revocation and Commutation of fines to days in jail**

When a probationer was unable to stay current on their monthly payments of court fines and JCS fees, JCS would eventually petition the Municipal Court to revoke that person's sentence of probation.[63] JCS started the process by mailing a form titled Petition for Revocation of Probation and Statement of Delinquency Charges, which "respectfully requests that the probation of the Defendant be revoked and that this Honorable Court issue a warrant for the arrest of said Defendant, if necessary . . . ."[64] Neither this document, nor the letter from JCS that accompanies it and states the time and place of the hearing says anything whatsoever about probationers' ability to assert their indigency before the court—or that people cannot be jailed for nonpayment of fines and fees unless their nonpayment is willful.[65]

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[58] Counter-Statement ¶ 172.

[59] See Counter-Statement ¶ 157

[60] Counter-Statement ¶ 172.

[61] Counter-Statement ¶ 172.

[62] Defendants' policies and practices related to the "commutation" of fines to days in jail is discussed in Section IV below.

[63] Counter-Statement ¶¶ 98-113.

[64] Counter-Statement ¶ 98 (Doc. 73-7, JCS-generated Petitions for Revocation, at 41-71.)

[65] Counter-Statement ¶ 98 (Doc. 73-7, JCS-generated Petitions for Revocation, at 41-71.).

JCS prepared its Petitions for Revocation without including any assertion that probationers' failure to pay was willful, and while JCS had evidence in its possession that many probationers simply did not have the funds to pay, yet were doing their best to comply.[66] JCS' standard form Petitions for Revocation—which had identical fields for all probationers—just stated the amount of money probationers owed to the court and to JCS and a list of appointments probationers had allegedly missed, while failing to disclose (1) the actual number of visits probationers did make to the JCS office over the course of their probation; (2) probationers' assertions that they were not paying simply because they had no money to do so, not because they were willfully refusing; and (3) other clear indicia that probationers were doing their best to comply, such as probationers' unscheduled visits to JCS to pay whatever little money they had towards their probationers.[67]

JCS submitted these petitions despite knowing debtors could not afford to make the payments.[68] And JCS employees knew that submitting a document to the Municipal Court advocating for the revocation of a probationer's probation was very likely to lead to a probationer being jailed: once probationers were brought before the Municipal Court based on allegations of non-payment, their sentences were regularly "commuted," meaning that the amount of unpaid fines in the probationer's balance would be converted to days in jail and served at the rate of $50 a day.[69] JCS employees were in the Municipal Court day in and day out, and the practice of jailing probationers without an ability to pay determination was routine.[70] And yet rather than disclosing any details about probationers' attempts to pay, disclosing how many times probationers had in

[66] Counter-Statement ¶ 82-89, 162, 166, 169.
[67] Counter-Statement ¶ 172-73.
[68] Counter-Statement ¶ 82-89, 162, 166, 169.
[69] Counter-Statement ¶ 114.
[70] Counter-Statement ¶ 60 and 127-33.

fact appeared, or relaying information about difficulties they were having raising sufficient funds each month, JCS simply asserted that the probationers had failed to pay and failed to report to at least some scheduled appoints, and should therefore have probation revoked—i.e., be jailed for noncompliance.[71]

Mr. Carter's experience illustrates each of these abuses. Though he was too poor to keep up with his payments to JCS, given the fees added each month, he paid JCS what little money he had.[72] He also repeatedly told JCS probation officers that he did not have any money to pay, and those probation officers therefore knew he was unable to pay his fines and had little money.[73] But though JCS's contract obligated the company to supervise probationers that had been deemed indigent for free, as with all other probationers, JCS withheld this information from Mr. Carter while also telling him that he was to come to JCS rather than the court for all issues relating to his probation because the court "will be unable to help you."[74]

Having created an effective system to trap Mr. Carter and other probationers on full-price probation and conceal from them a means of accessing relief it was contractually obligated to provide—waived fees for indigent probationers—JCS set about extracting as much value for itself as possible. By way of example, JCS collected a total of $833 from Mr. Carter over the course of his probation, $460 for the City and $373 for itself (including the $10 start-up fee).[75]

But despite Mr. Carter's best efforts to pay and his actual payment over time of money totaling over 80% of his underlying fine, JCS—following its standard procedure—purportedly sent

[71] Counter-Statement ¶ 94.
[72] Counter-Statement ¶ 169.
[73] Counter-Statement ¶ 84, 162, 169
[74] Counter-Statement ¶ 70.
[75] Counter-Statement ¶ 172.

to Mr. Carter's address its document titled Petition for Revocation of Probation and Statement of Delinquency of Charges.[76] The form document was not signed by a judge and contained no mention of probationers' rights to an indigency determination.[77] Rather, in form language, it advocated for the revocation of probation and raised the possibility of issuing a warrant for his arrest.[78] As with many other JCS probationers, Mr. Carter did not appear at this hearing.[79] Mr. Carter does not recall receiving notice of the court date—he just recalls going to the JCS office one day and having a probation officer tell him "you're done."[80] Mr. Carter understood that to mean that he had finished his obligation to JCS, not that his probation had been revoked.[81]

The Petition for Revocation contains JCS's assertions concerning the conditions of probation Mr. Carter allegedly violated. As it did with most probationers, JCS made two allegations: that Mr. Carter failed to pay and missed appointments.[82] The document alleges that Carter owed $1,195 to the court and $217 to JCS, a total of $1,412.[83] It also lists dates of 57 appointments he allegedly missed.[84] This effort to paint Mr. Carter in the worst possible light omits any mention that Carter had repeatedly told JCS he was struggling to pay. It also fails to acknowledge that after paying his initial payment of $150 to JCS, Mr. Carter consistently paid at least $20 and as much as $110 in 17 out of the 19 months he was on JCS probation, including the

[76] Counter-Statement ¶ 173.
[77] Counter-Statement ¶ 173.
[78] Counter-Statement ¶ 173.
[79] Counter-Statement ¶ 177.
[80] Counter-Statement ¶ 176.
[81] Counter-Statement ¶ 176.
[82] Counter-Statement ¶173.
[83] Counter-Statement ¶ 173.
[84] Counter-Statement ¶ 173.

final month.[85] Furthermore, it makes no acknowledgement of the fact that Carter *did* appear at JCS's office 66 times over the course of the 19 months he was on JCS probation, an average of almost 3.5 times per month, and over three times the 19 times a probationer who could afford to make full monthly payments would be required to report.[86] Those 66 visits included 22 unscheduled "walk-in" visits, where Carter appeared of his own volition without an appointment simply to pay what he could at the time.[87] The Petition for Revocation likewise fails to note that the only reason Carter was scheduled for over a hundred meetings with his JCS probation officer over the course of his 19-month probation was that he was too poor to pay in full once a month.[88] It certainly doesn't reveal to the court and details of JCS's supervision like how in May 2012, Carter was scheduled to appear eight times: on the 7th, the 9th, the 11th, the 15th, the 22nd, the 25th, the 29th, and the 31st.[89] Despite having to hold down hourly wage job during that period, Carter managed to appear at six of those eight appointments, and to pay $110 that month, the majority of which ($65) JCS allocated to itself rather than Mr. Carter's underlying fines.[90]

A combined monthly breakdown of Mr. Carter's reporting trips to the JCS office and payments to JCS shows his consistent efforts to continue pay at least something every month and to report to JCS even as JCS demanded that he appear at its office weekly or more frequently[91]:

[85] Counter-Statement ¶ 173.
[86] Counter-Statement ¶ 173.
[87] Counter-Statement ¶ 173.
[88] Counter-Statement ¶ 173.
[89] Counter-Statement ¶ 172.
[90] Counter-Statement ¶ 172.
[91] Counter-Statement ¶ 172 (citing Doc. 174-3, Carter Probation Tracker Case Files at ECF pp. 8-10 (appointments) and ECF pp. 10-12 (payments).)

| Month | Completed JCS Appts | Missed JCS Appts | Payments Allocated to City Fines | Payments Allocated to JCS Fees | Total Paid |
|---|---|---|---|---|---|
| 2011 | | | | | |
| June | 1 | 0 | $100 | $50 | $150 |
| July | 1 | 1 | $40 | $20 | $60 |
| August | 1 | 1 | $40 | $60 | $100 |
| Sept. | 3 | 1 | $40 | $20 | $60 |
| Oct. | 3 | 4 | $25 | $15 | $40 |
| Nov. | 4 | 4 | $15 | $15 | $30 |
| Dec. | 4 | 4 | $0 | $0 | $0 |
| 2012 | | | | | |
| Jan. | 5 | 2 | $5 | $13 | $18 |
| Feb. | 4 | 3 | $16 | $14 | $30 |
| March | 4 | 4 | $24 | $21 | $45 |
| April | 5 | 1 | $10 | $10 | $20 |
| May | 6 | 2 | $45 | $65 | $110 |
| June | 3 | 4 | $25 | $10 | $35 |
| July | 5 | 5 | $20 | $20 | $40 |
| August | 2 | 5 | $25 | $10 | $35 |
| Sept. | 5 | 4 | $10 | $10 | $20 |
| Oct. | 4 | 5 | $10 | $10 | $20 |
| Nov. | 3 | 6 | $0 | $0 | $0 |
| Dec. | 3 | 1 | $10 | $10 | $20 |
| **Totals** | **66** | **57** | **$460** | **$373** | **$833** |

On the hearing date JCS had noticed in the Petition for Revocation, JCS presented Mr. Carter's Petition for Revocation to the Municipal Court for the first time.[92] The Municipal Court signed the preprinted form order at the bottom of the Petition for Revocation and issued a warrant for Mr. Carter's arrest.[93]

[92] *Compare* Doc. 163-21 (Carter's unsigned, unstamped Petition for Revocation) with Doc. 253-23 (same document signed by judge and stamped "Defendant Failed to Appear – Issue a Warrant of Arrest.)

[93] *Id.*

The arrest warrant for Mr. Carter's failure to appear at the January 2013 hearing was executed months later, after a police officer ran his license when he was a passenger in a vehicle that had been stopped.[94] Mr. Carter was arrested based on that warrant (which was applied to seven separate cases for which he was on JCS probation), and for warrants for failure to appear to adjudicate three more recent minor traffic offenses.[95] Mr. Carter sat in jail from the Friday night he was arrested until Monday and then appeared in court before Judge Hayes.[96] Judge Hayes said nothing at all about Carter's earlier failure to appear in his court, and commuted Mr. Carter's sentence of fines into jail time, sending him back to jail with no inquiry into his indigency or ability to pay, or into the legitimacy of the allegations in the Petition for Revocation.[97] Judge Hayes issued no written order, but the commutation was reflected on a clerk-generated document called the "jail transcript."[98] Mr. Carter had $200 dollars in fines related to his JCS probation commuted to a jail sentence.[99] He was released after his mother was able to borrow $452 and pay the court.[100] That money combined with $200 in credit for jail time served was sufficient for him to go free.[101]

**D. JCS's departure from Montgomery after extracting $15 million in profits for probationers unable to pay traffic tickets**

By 2014, the year of Mr. Carter's commutation and jailing, JCS and various municipalities including Montgomery were facing federal civil rights litigation over their implementation of JCS's pay-only probation scheme.[102] That year, Montgomery terminated its contract with JCS.

[94] Counter-Statement ¶ 178.
[95] Counter-Statement ¶ 179.
[96] Counter-Statement ¶ 183.
[97] Counter-Statement ¶ 185.
[98] Counter-Statement ¶ 193.
[99] Counter-Statement ¶ 196.
[100] Counter-Statement ¶ 196.
[101] Counter-Statement ¶ 196.
[102] Counter-Statement ¶¶ 211-217.

From 2010 through 2014, JCS amassed $15,514,655 in profits for itself from the $10 startup fees and $40 monthly probation fees it imposed on probationers under its contract with the City, close to a million dollars more than the $14,680,459 it raised for the City itself during the same period.[103]

Fines and Fees Collected by JCS in Montgomery 2010–2014[104]

| Year | City fines | JCS startup fee | JCS monthly probation fee | Total JCS fees |
|---|---|---|---|---|
| 2010 | $2,056,823.80 | $13,830.00 | $1,050,018.00 | $1,063,848.00 |
| 2011 | $4,829,878.45 | $71,600.00 | $4,066,818.00 | $4,138,418.00 |
| 2012 | $3,643,791.76 | $78,400.00 | $4,752,355.00 | $4,830,755.00 |
| 2013 | $3,400,422.06 | $48,150.00 | $4,621,644.00 | $4,669,794.00 |
| 2014 | $749,542.50 | $8,280.00 | $803,560.00 | $811,840.00 |
| totals: | **$14,680,458.57** | $220,260.00 | $15,294,395.00 | **$15,514,655.00** |

## ARGUMENT

### I. The JCS-Montgomery Probation System Discriminated Based on Wealth and Punished People for Their Inability to Pay, in Violation of *Bearden*. (Counts 2 And 10).

Under the JCS-Montgomery probation system, Municipal Court defendants who could not pay their fines off quickly were trapped on pay-only probation with JCS, and were subjected to monthly probation fees and liberty restrictions, including the constant threat of arrest, while those who could pay their entire fines at once escaped those punishments. These practices punished probationers for their poverty and discriminated based on wealth in violation of due process and equal protection under *Bearden*. Viewed in the light most favorable to Plaintiff, the record demonstrates that JCS policies and customs were a moving force behind each of these violations.

#### A. *Bearden*'s legal framework

The hybrid due process–equal protection framework that governs Plaintiff's' wealth

[103] See Counter-Statement ¶ 97 and Ex. 31 (discussing JCS' responses to interrogatories showing breakdown of money collected from 2010-14).

[104] Counter-Statement ¶¶ 97 and Ex. 32 (JCS document breaking down fines and fees it collected over time).

discrimination claims comes from the Supreme Court's opinion in *Bearden v. Georgia*, 461 U.S. 660 (1983). *Bearden* involved a criminal defendant who pled guilty to two felonies. *Id.* at 662. The sentencing court placed him on supervised probation, and imposed as a condition of probation that he pay a fine and restitution. *Id.* If he satisfied the probation conditions—including payment—he would complete probation, and a conviction would not be entered. *Id.* If he did not, he would be convicted. *Id.* The petitioner could not afford to pay, so his probation was revoked. *Id.* at 663.

The Supreme Court granted *certiorari* to decide whether the state could revoke a person's probation for failure to pay a sum of money. The Court first reviewed its prior decisions on the problem of "'equal justice'" for "indigents in [the] criminal justice system." *Id.* at 664 (quotations omitted). These prior decisions included two categories of cases: those in which the Court struck down practices that priced people out of a judicial process,[105] and those in which the Court struck down practices that subjected indigent people to adverse consequences solely because they could not afford payments.[106]

Synthesizing both lines of decisions, *Bearden* explained that these cases involved both "[t]he fairness" of punishing people based on factors over which they have no control, which is normally assessed under due process, *and* the differential treatment of the poor, which is assessed under the rubric of equal protection. Accordingly, the cases do not fit neatly under the rubric of equal protection or due process alone, but invoke both lines of doctrine. *Id.* at 665.

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[105] *See, e.g., Griffin v. Illinois*, 351 U.S. at 19-20 (holding that the state must provide a transcript to an indigent defendant where a transcript is "necessary" for "adequate and effective appellate review"); *Douglas v. California*, 372 U.S. 353, 356-357 (1963) (holding that denial of counsel for indigent defendants on direct appeal deprived them of "[a]ny real chance" to show that their appeal had merit, and was therefore unconstitutional); s*ee also Bearden*, 461 U.S. at 664-65 (describing these cases).

[106] *See, e.g., Williams v. Illinois*, 399 U.S. 235 (1970) (holding that the state could not require an indigent person to remain in prison past the statutory maximum solely because he could not pay a fine and restitution); *Tate v. Short*, 401 U.S. 395 (1971) (holding that an indigent defendant could not be imprisoned solely because he could not afford to pay a fine); *see also Bearden*, 399 U.S. at 664-65 (describing these cases).

The Court also reasoned that these hybrid cases cannot be shoehorned into the typical equal protection framework, in which courts select a level of scrutiny based on whether the plaintiff is a member of a protected class such as race, national origin, or gender. *See id.* at 666, 666 n.8. Accordingly, though the parties in *Bearden* "debate[d] vigorously whether strict scrutiny or rational basis [was] the appropriate standard of review," the Court declined to adopt one of the formal tiers of scrutiny that apply under equal protection or due process alone. *Id.* at 665. Instead, the Court prescribed a balancing framework to address both due process and equal protection simultaneously.

*Bearden*'s hybrid analysis "requires a careful inquiry" into "such factors as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, and the existence of alternative means for effectuating the purpose ...." *Id.* at 666-67 (internal brackets and quotation marks removed). Applying this test, the Court held that the state violated due process and equal protection by revoking the petitioner's probation solely because he had not "pa[id] the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure [to pay] or that alternative forms of punishment were inadequate." *Id.* at 665; see *id.* at 672-73 (articulating this holding).[107]

Since *Bearden*, the Supreme Court and numerous lower courts have reaffirmed the use of *Bearden*'s balancing test instead of the formal tiers of scrutiny when the state makes wealth-based classifications that infringe on a person's right to equal treatment in the criminal or quasi-criminal context.[108] This framework applies to Plaintiff's claims.

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[107] Neither JCS nor the City argues that any test other than *Bearden*'s applies here. Nor has either defendant offered any government interest (compelling or legitimate) that justifies their wealth-based discrimination. *See* Doc. 260 at 54-55; *see generally* Doc. 266-1.

[108] *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-27 (1996) (applying the Bearden framework to hold that the state could not bar a mother from appealing the termination of her parental rights because she could not

**B. JCS's violation of probationers' rights over the course of their probation.**

By entering into the contract with JCS, the City of Montgomery adopted a policy and practice of assigning individuals to supervised, "user-funded" probation solely because they were unable to pay court debts. Under the policy, probationers who couldn't pay off their fines within thirty days were charged $40 every month for JCS's collection services. For people who had no choice but to go on supervised probation because they could not pay a fine of a few hundred dollars, it was a substantial amount of money. Carter, for example, ended up paying $373 in JCS fees during the 19 months he was on probation—a full 45% of all the money he paid to JCS went to the company's fees rather than to his underlying debt.[109]

This Court has made clear that "[i]t is not the case that all fees that affect indigents are a violation of equal protection." Doc. 97 at 5. For example, normal "late fees or routine processing fees" do not violate equal protection merely because "their impact may be most visible to those without the means to pay." *Id.*; *see also Rudolph*, 2017 WL 956359 at *8 (mere fact that a fixed fine has a "larger impact on an individual with less money than one with more" was "insufficient to trigger a violation of equal protection"). But JCS's probation fees are not analogous to credit card processing fees or late fees—it's not that they were assessed uniformly and simply had a bigger impact on poorer people.

First, the evidence in the record, construed in the light favorable to Plaintiff, shows that no one who had the means to pay their ticket right away voluntarily chose to go on supervised probation with JCS.[110] So the only people ever assessed JCS fees at all were those who were too

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afford a fee); *Briggs v. Montgomery*, No. CV-18-02684-PHX-EJM, 2019 WL 2515950 (D. Ariz. June 18, 2019); *Thomas v. Haslam*, 303 F. Supp. 3d 585 (M.D. Tenn. 2018); *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758 (M.D. Tenn. 2016).

[109] See Counter-Statement ¶ 172.

[110] Counter-Statement ¶ 36, 41.

poor to pay a ticket.[111] Second and equally importantly, the monthly fees prolonged their probation and hence the deprivation of probationers' liberty: the less money a person could afford to pay each month, the greater the percentage of that payment that went to JCS's fees, rather than her underlying City debt, and the longer JCS could keep her on supervised probation (meaning more fees). It is undisputed that when a JCS probationer finished paying off her fine probation ended.[112] That meant that the more a probationer could afford to pay each month, the less JCS would collect in fees from that person. This gave JCS a perverse incentive. Because JCS had complete discretion over how to allocate payments, JCS was able to keep the poorest probationers on probation for as long as possible.[113] Third, Plaintiff's inability to pay JCS's fees over time led directly to their arrest and jailing. The less someone was able to pay, the more often JCS required them to report and the more likely they were to miss appointments. If not for JCS's probation fees, Carter could have paid off over $800 of his $1101 fine to the City during his 19 months on probation.[114] Instead, as he became increasingly unable to pay and his payments to JCS dwindled down, JCS sought to revoke his probation—even though he was dutifully complying with all the other terms of his probation and had reported to JCS's offices three to six times every month for the entire year—and a warrant was issued for his arrest.[115] JCS's threats that probationers would be arrested if they showed up without the minimum amount made other probationers too afraid to come to their JCS

[111] Counter-Statement ¶ 87.

[112] Counter-Statement ¶ 30.

[113] Counter-Statement ¶ 91-95.

[114] JCS's Petition for Revocation shows Carter owing $1,195 in fines and costs, despite having paid over $800 to JCS while on probation, because they included in that figure a second probation that it had placed on "hold" (non-collection) status from the time Carter was sentenced to it until the time JCS filed its Petition for Revocation. Doc 163-21 (including traffic cases listed on Doc. 253-19, Carter's second JCS Order of Probation).

[115] Counter-Statement ¶ 172, 173.

appointments when they didn't have enough money.[116] In sum, JCS's monthly fees penalized the poorest simply for being poor.

JCS also had a policy of requiring probationers who were having trouble meeting their monthly payments to come back to JCS's office over and over again, sometimes several times a month. For example, in January 2012, Carter reported to JCS's office five times, although he could only afford to pay a total of $18 that month.[117] JCS kept $13 of it for profits and put just $5 towards Carter's underlying court debt.[118]

While payment of fees was the most prominent condition of probation, people assigned to JCS for debt collection were also not allowed to change residences or jobs without "first" getting permission from JCS.[119] But in addition to the conditions listed on JCS's standard form probation order, JCS used a separate document called "General Conditions of Probation" to impose additional conditions—conditions that were *not* on the standard form the company provided to Municipal Courts, and therefore not on the signed probation orders.[120] JCS would go over the "General Conditions" form with each new probationer at their first appointment.[121] Among the extra conditions are (1) a prohibition on drinking alcohol; (2) a prohibition on visiting places where "intoxicants" are sold or used; (3) a prohibition on leaving the state for "any period of time" without prior "permission" from the company; and (4) a requirement that probationers "submit to drug and alcohol testing as directed by the Probation Officer."[122] JCS required probationers to

[116] Counter-Statement ¶ 89.
[117] Counter-Statement ¶ 172.
[118] Counter-Statement ¶ 172.
[119] Counter-Statement ¶ 72, 73.
[120] Counter-Statement ¶ 74, 75.
[121] Counter-Statement ¶ 76.
[122] Counter-Statement ¶ 74, 75.

initial each condition to indicate their promise to comply with them.[123] In addition to the conditions on the form, JCS threatened Carter that his probation officer could show up at his home or workplace and revoke his probation or send him to jail if they needed to.[124] JCS does not even attempt to defend the additional probation conditions it admits to imposing.[125]

These are not minor annoyances—these are significant impositions on peoples' liberty. And by imposing additional probation conditions not in the court order, JCS was violating Alabama law: "All conditions of probation must be incorporated into a court's written order of probation, and a copy thereof must be given to the probationer." Ala. R. Crim. P. 27.1. The Committee comments for this rule explain that "[c]onditions of probation are not to be established by the probation officer." *Id.* This rule applies to municipal probation: "These rules shall govern the practice and procedure in all criminal proceedings in all courts of the State of Alabama, and political subdivisions thereof, except as otherwise provided by court rule." Ala. R. Crim. P. 1.1.

JCS also constantly threatened probationers with arrest and jail for nonpayment. Starting with their very first appointments, JCS led probationers to believe they could be arrested at any time, any place if they did not bring enough money to JCS.[126] A uniformed police officer was stationed by JCS's front door, and JCS employees would routinely point to the officer when threatening that an arrest warrant would be issued.[127]

JCS does not deny that threats of arrest and revocation were a big tool in its collection toolbox. But JCS insists that there is no constitutional prohibition on "accurately" threatening actions that can be taken in response to probation violations, and glibly asserts, with no evidence,

[123] Counter-Statement ¶ 76.
[124] Counter-Statement ¶ 89.
[125] See Doc. 260 at 16 ¶ 44.
[126] Counter-Statement ¶ 84, 89.
[127] Counter-Statement ¶ 89

that its threats "had no effect on" Carter. Doc. 260 at 47. First, there was nothing "accurate" about JCS's threats. It is black-letter law that a probationer cannot lawfully be jailed for nonpayment unless a court determines she had the means to pay. It makes sense that the average person would take a threat of arrest and jail very seriously. JCS had a policy of using threats of arrest to frighten probationers into making payments. And given the substantial evidence showing how uniformly JCS applied that policy, a reasonable jury could conclude that JCS believed the policy was having its intended effect.

None of this treatment was warranted by any penal need. Rather, it was imposed on probationers *solely* because they could not pay their court debt off right away. Because these punishments were imposed on Carter and the members of the putative class only because they had not "pa[id] the imposed fine[s]," and without any evidence or findings that they were "responsible for the failure [to pay]" and that there was not an alternate means of collecting the debt, JCS's conduct violated *Bearden*, 461 U.S. at 665.

Numerous courts have recognized that probation and pre-trial diversion schemes such as JCS's, that imposed fees and liberty infringements, violate due process and equal protection. For example, the Middle District of Tennessee recently held that a for-profit probation system under which people who "cannot afford to pay their fines and costs immediately" were sentenced to "supervised probation and its attendant terms, conditions, and consequences while those who can pay receive only unsupervised probation," violated equal protection. *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758, 775–76 (M.D. Tenn. 2016). The court noted that the probationers' "inability to immediately pay court fines and fees channel[ed] them into PCC-supervised probation, which [brought] with it a set of significant consequences and a host of liberty restrictions." *Id.* at 775 (internal quotations omitted). In contrast, court debtors who could

immediately pay their court costs were "not subject to supervision," "not subject to the terms and conditions of PCC probation and do not constantly face the threat of arrest and detention." *Id*. The court agreed that the plaintiffs had stated an equal protection claims because they were "similarly situated to those offenders who escape PCC's clutches in all respects but one: wealth. They have been found guilty of the same offenses and sentenced to the same fines. Because Plaintiffs . . . cannot afford to pay their fines and costs immediately, they are subject to supervised probation and its attendant terms, conditions, and consequences while those who can pay receive only unsupervised probation." *Id.* at 776.

The District of Arizona recently reached the same conclusion in a decision addressing a pre-trial diversion scheme that discriminated based on ability to pay program fees. *See Briggs v. Montgomery*, No. CV-18-02684-PHX-EJM, 2019 WL 2515950, at *9-12 (D. Ariz. June 18, 2019). Under the scheme in *Briggs*, defendants with the means to pay a program fee were released from supervision after 90 days. 2019 WL 2515950 at *11. In contrast, those unable to pay the fee were subject to the program's terms and liberty restrictions for several months longer, "live[]d in far of the ultimate consequence of being terminated from the program" and being prosecuted, and "ultimately ha[d] to pay more to complete diversion that somebody who had the money to complete diversion faster." *Id.* at *10-11 & n.7. Accordingly, the court held that the plaintiffs had stated a claim for wealth-based discrimination under *Bearden*'s due process-equal protection framework. *Id.* at * 12; *see also Thomas v. Haslam*, 303 F. Supp. 3d 585, 607-19 (M.D. Tenn. 2018) (state's policy of revoking the driver's licenses of people unable to pay court debt due to their financial circumstances constituted disparate treatment on the basis of wealth in violation of *Bearden*). And recently, in *People v. Dueñas*, 30 Cal. App. 5th 1157, 1170–71 (Ct. App. 2019), the California Court of Appeal held that, under *Bearden*, a court may not impose a mandatory fine

on probationers without first determining that the individual is able to pay it. The court reasoned that requiring probationers to pay fine without consideration of ability to pay "punishes indigent defendants in a way that it does not punish wealthy defendants," because a probationer who fulfills all conditions of probation has a right to dismissal of charges, whereas "a probationer [who] cannot afford the mandatory restitution fine, through no fault of his or her own . . . is categorically barred from earning the right to have his or her charges dropped . . . "no matter how completely he or she complies with every other condition of his or her probation." *Id.* at 1170. The court explained, "This result arises solely and exclusively from their poverty." *Id.* at 1171.

JCS engages with none of this case law and instead urges the Court to simply adopt Judge Proctor's reasoning in *Ray*. *See* Doc. 260 at 54. The *Ray* court acknowledged that the record showed that the plaintiffs had been placed on probation "due to their inability to pay fines or court costs." *Ray*, 270 F. Supp. 3d at 1312. The court also reasoned that supervised probation is a "significant imposition on [a defendant's] liberty." *Id.* at 1304. But the court held that the plaintiffs' "equal protection claim does not fall within the scope of *Williams* or *Tate*" because those cases involved *imprisonment* rather than other wealth-based punishments short of jailing. *Id.* at 1312.

Respectfully, that aspect of Judge Proctor's reasoning in *Ray* cannot be reconciled with the extensive body of Supreme Court precedent instructing that the prohibition against disparate treatment based on wealth is *not* limited to cases in which there is actual imprisonment. As this Court has correctly recognized, under *Williams*, *Tate*, and *Bearden*, "punitive action taken solely because of indigence without consideration of the alternatives is unlawful and a violation of due process," even if there is "no actual incarceration." *Rudolph*, 2017 WL 956359 at *5. *See, e.g.*, *James v. Strange*, 407 U.S. 128, 141-42 (1972) (state law that treats criminal justice debtors more harshly than civil debtors violates Equal Protection); *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996)

(applying *Bearden* and holding that poor civil litigant may not because of her poverty be denied appellate review of the revocation of her parental rights); *Mayer v. Chicago*, 404 U.S. 189, 195-96 (1971) (petty offender may not be denied access to appeal afforded others, even for non-jailable offense); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (married couple may not be denied access to divorce based on their inability to pay court costs).[128]

The JCS-Montgomery system similarly violates the Constitution. Here, as in *M.L.B.*, *Mayer*, and *Boddie*, "the nature of the individual interest affected" is significant because JCS's administration of the probation program deprived debtors of substantial liberty interests based solely on their poverty. *See Williams*, 399 U.S. at 260. First, perversely, JCS probation condemned "only . . . those without the requisite resources,"—the very people unable to pay municipal fines—to ultimately pay far more than the people who could afford to pay up front. *Id.* at 242. Even after being sentenced to JCS probation, debtors who could afford to quickly pay off their fines and fees could escape the worst conditions of probation.[129] But this ability to avoid a worse fate was solely "contingent upon one's ability to pay." *Id.* Meanwhile, debtors who were barely able to make their monthly payments, or who fell behind, were exposed to spiraling fees, revocation petitions, plus the relentless threat of arrest and incarceration for weeks or months—solely because they could not "forthwith pay the fine in full." *Tate*, 401 U.S. at 398. This wealth-based deprivation of liberty raises the same grave equal protection concerns as *Williams* and *Tate*.

[128] *Cf. Jones v. Desantis*, No. 19-14551 (11th Cir. Feb. 19, 2020). In *Jones*, the Eleventh Circuit just held that requiring indigent ex-felons to pay all outstanding fines, fees, and restitution as a precondition to re-enfranchisement constituted wealth-based discrimination in violation of the Equal Protection Clause. In finding the scheme unconstitutional under *Griffin* and *Bearden*, the court emphasized that the State's interest in collecting fines from those who genuinely cannot pay is negligible and cannot justify the deprivation of their voting rights.

[129] Counter-Statement ¶¶ 41.

## II. JCS violated probationers' procedural due process rights by failing to inform them that they were entitled to an indigency determination or that a finding of indigency would entitle them to a few waiver. (Count 2)

JCS enhanced its ability to collected fines and fees in Montgomery and took advantage of probationers who could not afford to pay by keeping those probationers in the dark about relief to which they were entitled. This approach took the form of two related policies, both of which deprived Plaintiff of procedural due process.

A probationer cannot be jailed for failure to pay unless a court determines that the probationer was able to pay pay but willfully refused. *Bearden*, 461 U.S. at 665, 672-73. As detailed above, probationers were entitled to an ability-to-pay determination before they could be jailed for not paying fines and fees. In addition, the contract between JCS and Montgomery expressly provided that JCS would waive its monthly fees for indigent probationers.[130] Moreover, JCS's own records show the company obtained and recorded information about the finances of the probationers from whom it was collecting debts, including information about social security benefits, disability, unemployment, and other indicia of poverty.[131]

Due process requires that before depriving a person of a protected interest, a state actor must notify the person of procedures by which they can protect that interest. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978). JCS did not notify probationers that they were entitled to an ability-to-pay determination and that, if they were indigent, they would not have to pay JCS's fees. Nor did JCS notify probationers that they could not legally be jailed for failure to pay if they were indigent. *See, e.g.*, Doc. 262 at 42 (arguing JCS had "no duty to investigate" ability to pay). Instead, JCS continued to collect fees and threaten probationers with arrest. That deprived

[130] Counter-Statement ¶ 18.

[131] Counter-Statement ¶ 82-87.

probationers of their procedural due process rights.

The JCS-City contract expressly provided that JCS would waive its monthly fees for indigent probationers.[132] But substantial evidence shows that JCS had a policy or custom of not informing probationers that (1) they had the right to an indigency determination, and (2) if they were indigent, JCS was contractually obligated not to charge them monthly probation fees. The reason is clear: JCS's sole source of revenue in Montgomery was whatever fees it could collect from probationers. As Judge Proctor noted in *Ray*, JCS had a "financial incentive to not declare defendants indigent," because "under the JCS–City Contract, JCS's financial interests would be harmed by the Municipal Court declaring a probationer indigent, as JCS would be obligated to supervise the defendant's probation for free." *Ray v. Judicial Correction Servs., Inc.*, 270 F. Supp. 3d 1262, 1314 (N.D. Ala. 2017).

JCS does not dispute that Carter and the members of the putative classes had a due process right to indigency determinations, nor does it dispute that they did not in fact receive them. Instead, JCS seeks to deflect all responsibility for providing notice of the right to indigency determinations onto the Municipal Court. But a reasonable jury could conclude from the evidence in the record that JCS prevented probationers from seeking help from the court. JCS's policy was to give every probationer a JCS form document entitled "Reporting for Probation." This document, in addition to instructing probationers to bring the minimum amount of money to their first appointment with JCS, told probationers that "all questions concerning your case" should be directed to the assigned JCS probation officer."[133] "***Do not contact the Municipal Court***," the document warns, "they will be unable to help you."[134]

[132] Counter-Statement ¶ 18.
[133] Counter-Statement ¶ 70.
[134] Counter-Statement ¶ 70.

By keeping probationers in the dark about their rights and directing them not to seek relief from the court, JCS was able to keep the number of probationers designated as indigent suspiciously low—and keep collecting fees from as many as possible.[135] The Judicial Inquiry Commission found that a mere 0.5% of JCS probationers in Montgomery were designated as indigent.[136] This figure is alarmingly low considering that the only people assigned to JCS probation were those who indicated they would not be able to pay a relatively low fine within 30 days—and considering that more than 80% of criminal defendants are indigent.[137] Not only did JCS's practice deprive probationers of their protected property interests—it also extended their time on probation, depriving them of liberty.[138] In this way, probationers were deprived of both a protected property interest *and* their liberty interest in being released from probation.

Second, the evidence in the record shows that JCS had a policy and custom of threatening probationers with arrest and jail for nonpayment—and petitioning to have their probation revoked—without informing them that (1) they were entitled to an ability-to-pay determination under the law; and (2) they could not lawfully be jailed unless a court determined they had the means to pay but willfully refused. Not only did JCS not inform probationers of their right to an ability-to-pay determination, but JCS emphatically *discouraged* them from seeking relief from the court if they couldn't pay. As a result of JCS's failure to provide notice that they were legally

[135] See Ex. 1, Parrish Decl. ¶ 23, and Ex. 10 (Ex. "I" to Parrish Decl.)

[136] Counter-Statement ¶ 86.

[137] The Bureau of Justice Statistics has estimated that over 80 percent of state criminal defendants are indigent. Caroline Wolf Harlow, Defense Counsel in Criminal Cases 1 (2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf.

[138] As explained above, because JCS allocated a large percentage of each payment to its fees, probationers with less financial means could not pay off their debts to the City as quickly as they otherwise would have, and thus were kept on probation longer and ended up paying more in fees. See Counter-Statement ¶ 172 (chart showing JCS keeping substantial portion of Carter's payments), ¶ 97 (chart showing what JCS took in fees and what City took in fines).

entitled to these protections and procedures, probationers lived in fear of having their probation revoked, being arrested, and being put in jail.[139] They were afraid to go to their JCS appointments if they couldn't come up with the minimum payment, out of fear of being arrested on the spot.[140] These were not idle threats; probationers testified that they saw others being arrested for failure to pay at JCS's office.[141] And, of course, Carter and many of the class members ultimately *were* arrested and jailed—all without an ability-to-pay determination.[142]

*Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), is controlling here. There, the Supreme Court held that prior to the deprivation of an interest protected by the Due Process Clause, the governmental entity must provide the person with notice of the procedures they can use to protect that interest. Furthermore, under *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950), notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

JCS provided no notice whatsoever that indigent probationers were entitled to a fee waiver and could not be jailed for failure to pay if they were indigent. JCS certainly does not claim to have provided notice, and in fact repeatedly *disclaims* any duty with respect to ability-to-pay or indigency determinations, contending that it had "no duty to investigate . . . indigency," because (it argues) such determinations were exclusively the Municipal Court's duty. Doc. 260 at 42-43. But as this Court has previously recognized, "That the Municipal Court may inquire does not mean

[139] See Counter-Statement ¶¶ 89, 161, 162, 166, 167.

[140] See Counter-Statement ¶¶ 89, 161, 162, 166, 167.

[141] See Counter-Statement ¶¶ 89, 161

[142] JCS also had a policy of alleging in petitions for revocation and at related proceedings that probationers failed to pay without informing the court that—as JCS probation officers well knew—probationers were *unable* to pay. This policy ultimately led to Plaintiff being jailed for failure to pay. See Section III below.

JCS had no contractual duty, as plaintiffs allege they had. . . . That party 1 may bears no relation on if party 2 must." *McCullough v. City of Montgomery*, No. 2:15-CV-463, 2017 WL 956362, at *11 (M.D. Ala. Mar. 10, 2017). And as explained above, the evidence shows that JCS had positioned itself as the sole point of contact between probationers and the Municipal Court.[143] JCS understood that (1) everyone assigned to JCS had expressed an inability to pay their fines within 30 days; and (2) most people assigned to JCS had never interacted with a court (because they were put on the JCS "payment plan" at the pay window), and thus had no opportunity for an ability-to-pay determination at sentencing.[144] JCS's petitions for revocation characterized going back before the court as a threat, not the opportunity to have an ability-to-pay determination and potentially relief from this punishment.[145]

The Supreme Court, in *City of W. Covina v. Perkins*, 525 U.S. 234, 242 (1999), held that notice may be provided by way of publicly available information such as statutes or other documents accessible to the public. But no such publicly available information existed with respect to the availability of indigency determinations. None of the written documents JCS provided to probationers, such as the Orders of Probation, Terms and Conditions of Probation, delinquency letters, failure to report letters, or notices of violation of probation informed probationers of their right to request an indigency determination. And the petitions for revocation explicitly threatened arrest, revocation, and imposition of "the full sentence."[146] Similarly, the Montgomery Municipal Court provided no public notice of the availability of indigency determinations, and in fact Judge Hayes and the other Municipal Court judges had a policy and practice of *not* informing defendants

[143] *See* Part B of the Facts Section above.
[144] See Counter-Statement ¶¶ 41
[145] See Counter-Statement ¶ 98.
[146] Counter-Statement ¶ 98; Doc. 163-21 at 2.

about the potential availability of such determinations.[147] And most probationers who were assigned to JCS in Montgomery were put on probation at the pay window by a clerk who admittedly, had no authority to do indigency determinations,[148] and never saw a municipal court judge. Then, the first time they reported to JCS, they were instructed not to contact the court.[149] Due to their secrecy, indigency determinations represented exactly the type of "arcane" procedures about which a probationer "could not reasonably be expected to educate himself." *West Covina*, 525 U.S. at 242.

JCS's own records show that the company collected, recorded, and maintained detailed information about probationers' poverty.[150] When JCS met with a new probationer, the JCS employee obtained details about the person's employment. If the individual indicated that she was unemployed, disabled, or receiving SSI benefits, the probation officer would note that in Probation Tracker.[151] In fact, according to JCS's own records, many hundreds of probationers in Montgomery were unemployed or subsisting on government benefits.[152] But instead of informing the probationer that they were entitled to an indigency determination—or notifying the Municipal Court that the person was (or may be) indigent—JCS kept track of which days of the month probationers would receive their expected benefits checks.[153]

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[147] Counter-Statement ¶¶ 61, 64,

[148] Counter-Statement ¶ 45, 48

[149] Counter-Statemetn ¶ 70.

[150] See Counter-Statement ¶¶ 82-87.

[151] *Id.*; *see also* Doc. 118-19 at 178-80 (Deposition of Wes Ennis, JCS's regional manager for several cities including Montgomery).

[152] *See* Doc. 118-13 (showing nearly 3,000 employment status records of probationers listed as "DISABLED VET," "SSI BENEFITS," "SSI AND DISABILITY," "UNEMPLOYED," "UNEMPLOYED—SSI," "UNEMPLOYED-DISABLED," etc.).

[153] *See, e.g.*, *id.* at 1 ("$768.00 – 3RD/MONTHLY – DISABILITY"); *id.* at 5 ("DISABILITY CHECK FOR $606.00 ON THE 1ST OF EACH MONTH); *id.* at 11 ("RECEIVES AFDC AND SSI FOR HER DAUGHTER – 5TH OF EVERY MONTH).

In short, JCS was fully aware that a large number of the probationers under its "supervision" were almost certainly eligible for a fee waiver—*and* that if they were truly unable to pay, they could not lawfully be jailed for nonpayment.[154] But instead of notifying probationers of their right to relief, JCS continued to collect fees. And instead of notifying them that they could not lawfully be jailed if they truly were unable to pay, JCS continued to use threats of arrest, revocation, and jail to collect money. That violated due process.

This Court recently recognized that materially identical threats of arrest without the required notice constitute a procedural due process violation. *Rudolph v. City of Montgomery* involved debtors who, like Plaintiff here, owed money to the City of Montgomery for traffic violations. No. 2:16-CV-57, 2017 WL 956359 (M.D. Ala. Mar. 10, 2017). When debtors failed to pay, the District Attorney (who was tasked with collecting fines on behalf of the City after the City no longer used JCS probation) sent letters "demanding they pay within seven days or face arrest." 2017 WL 956359 at *4. The letters "threaten[ed] deprivation of liberty and demand[ed] payment without providing information on Court dates, alternative payment arrangements, or other forms of process." *Id.* Accordingly, the Court held that, "[g]iven plaintiffs' interests and the nonexistent or minimal [burden] of providing additional process, the alleged policy fails to meet the requirements articulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976)." *Id.*[155]

Under *Mullane*, because JCS provided no notice at all that Plaintiff was entitled to an indigency determination, the Court need not even reach the question of what process was due under

[154] Plaintiff need not prove that JCS had knowledge of any particular probationer's poverty, because due process required that the company notify all probationers of the protections to which they were entitled before charging them fees or threatening to have their probation revoked. But the fact that JCS had information clearly showing that hundreds of probationers were barely getting by makes JCS's failure to provide this notice even more remarkable.

[155] JCS erroneously claims that this Court in *Rudolph* held that "a district attorney's letters to defendants that inform them that they may arrested if they do not pay fines levied against them for wrongdoing are *not* unlawful." Doc. 260 at 47 (emphasis added).

the *Matthews* balancing test to find a due process violation based on the evidence in the record. But if *Matthews* governs, this Court's analysis in *Rudolph* applies here in spades. Carter and the class plainly had a significant property *and* liberty interest in avoiding having to pay JCS's monthly fees, especially since every dollar that went to JCS's profits was a dollar not counted towards their underlying City debt, prolonging their probation and trapping them in a cycle of poverty. Likewise, Plaintiff had a significant liberty interest in avoiding arrest and jail. But, as in *Rudolph*, the burden to JCS of providing the additional process would have been "nonexistent or minimal." 2017 WL 956359 at *4. Accordingly, JCS's practice of failing to notify probationers that they were entitled to fee waivers and indigency determinations violated procedural due process.

## III. JCS committed additional *Bearden* violations by initiating probation revocation procedures that caused probationers to be jailed for nonpayment of fines with no ability-to-pay determination.

For the duration of each probationer's time on probation, JCS violated their liberty interests under *Bearden* by: (1) threatening them with jail for nonpayment, (2) imposing its own probation conditions, (3) demanding that probationers too poor to pay report weekly or more often, and (4) allocating excessive portions of probationers' payments to itself. And JCS violated probationers' rights to procedural due process by concealing from them that (1) they were entitled to an ability-to-pay determination under the law; and (2) they could not lawfully be jailed unless a court determined they had the means to pay but willfully refused.

After using the above methods to extract as much money as possible from the misdemeanor and traffic defendants it supervised on probation, JCS continued its pattern of abuse right up to the end of its relationship with Montgomery's poorest probationers by violating their rights under *Bearden* a final time: by petitioning the Municipal Court for the revocation of their probation, it caused them to be jailed simply because they could not pay the fines and fees JCS sought to collect.

Jailing a probationer for the nonpayment of fines and fees, and with no knowledge that the nonpayment was willful, is the very act that *Bearden* held to be unconstitutional.

JCS's Petitions for Revocation did not simply alert the court that the probationers were not meeting certain conditions of probation and request that the Court asses the probationer's ability to comply—in each case, JCS Petition for Revocation advocated for the full revocation of probation.[156] JCS admits it took this step with no knowledge at all of whether the probationer's nonpayment was willful.[157] In addition, JCS sought to revoke probation without passing on to the Municipal Court genuine indicia of probationers' inability to pay, and after taking affirmative measures to hide from probationers themselves their right to seek an indigency determination from the court that would enable them to have JCS's fees waived.[158] JCS's culpability stems from its withholding from probationers information about their rights, and its withholding from the Municipal Court all information tending to show that probationers were working to comply with the terms of their probation and were not willfully failing to pay.

JCS doesn't deny that Mr. Carter and many other probationers whose probations it sought to revoke were jailed for failure to pay court debt without an ability to pay determination. Instead, JCS argues that the Municipal Court was the sole entity responsible for Mr. Carter's jailing, and that JCS therefore cannot be held liable. But the fact that a court endorses an unconstitutional act does not foreclose the possibility that other defendants' culpable conduct proximately caused the harm as well. *See, e.g. Garmon v. Lumpkin Cty., Ga.*, 878 F.2d 1406, 1410-11 (11th Cir. 1989) (rejecting argument that a magistrate's judicial act broke the causal chain between a law enforcement officer and an illegal arrest). Mr. Carter's jailing for inability to pay was the proximate

[156] Counter-Statement ¶ 98.
[157] Counter-Statement ¶ 85.
[158] Counter-Statement ¶ 85, 98.

result of JCS's culpable conduct as well as the Municipal Court's.

By its own design and pursuant to its contract with the City, JCS became the sole intermediary between the Municipal Court and probationers.[159] JCS probation officers throughout Alabama said that they considered themselves "agents of the court"—and represented themselves as such to debtors.[160] And courts traditionally rely on the testimony of probation officers based on their time-honored role as "neutral information gatherer[s] with loyalties to no one but the court." *United States v. Jackson*, 568 F. App'x 655, 658 (11th Cir. 2014); *see also United States v. Bernardine*, 237 F.3d 1279, 1283 (11th Cir.2001) (probation officer is an "arm of the court" who acts as a "liaison between the sentencing court . . . and the defendant"); *United States v. Washington*, 146 F.3d 219, 223 (4th Cir. 1998). But the facts here show JCS acted not in service of the court's duty not to jail probationers for failure to pay that was not willful, but in its own interests as a for-profit company.

JCS's Petition for Revocation was a form document that in all cases indicated that JCS "respectfully requests that the probation of Defendant be revoked and that this Honorable Court issue a warrant for the arrest of said defendant, if necessary . . . ."[161] In Mr. Carter's case as in most others, the Petition for Revocation offered two justifications for the revocation: (1) alleged missed appointments, and (2) failure to pay JCS fees and court fines and costs.[162]

*Bearden* squarely prohibits revoking probation when a probationer's failure to pay is non-willful, yet though JCS used the failure to pay as a justification for the revocation of probation, JCS's Petition for Revocation made no allegation whatsoever that the probationer had willfully

[159] Doc. 145-1 at 4.
[160] Doc. 73-9, Kidd Depo. at 269:5-270:3.
[161] Counter-Statement ¶ 98.
[162] Doc. 163-21.

failed to pay. Furthermore, JCS *did* have in its possession—but did not disclose to the court—information indicating that many debtors whose probations it sought to revoke could not afford to make the payments. After all, only people who could not pay their fines and court costs for traffic infractions and other low-level offenses up front were ever sentenced to JCS probation: those who could pay did.[163] And JCS's own records showed that many of the people from whom it was attempting to collect this money were disabled,[164] living on SSI,[165] and/or unemployed.[166] Surely failure to pay by an individual who is subsisting on public benefits cannot be *presumed* to be willful. And like Mr. Carter, many other probationers repeatedly told JCS employees that they didn't have the money.[167] Nonetheless, JCS probation officers first let probationers believe they could face "incarceration due to the inability"—not refusal, but inability—to pay court fines and costs."[168] And then those probation officers submitted Petitions for Revocation advocating for the termination of probation, i.e. jailing, for failure to pay *without ever disclosing* that any probationers had even shown any indicia of being legitimately unable to pay.[169] Carter's case exemplifies this practice: he repeatedly told JCS probation officers he was unable to pay because he lacked the money. And yet rather than referring Mr. Carter to the court for possible relief, JCS submitted a misleading document to the court—his Petition for Revocation alleging failure to pay and the balance owed, with no mention whatsoever of Mr. Carter's professed inability to pay, a circumstance that would completely negate failure to pay as a basis for terminating his

[163] Counter-Statement ¶ 36, May 13, 2009 Nixon email ("numerous citizens are electing to pay their tickets as opposed to going on a payment plan with JCS").
[164] *E.g.*, Doc. 118-13 at ECF pp. 2-10.
[165] *E.g., id.* at 12-20.
[166] E.g., *id.* at 20-46.
[167] Counter-Statement ¶ 84, 169.
[168] Counter-Statement ¶ 27.
[169] Counter-Statement ¶ 98.

probation.[170]

Similarly, JCS advocated for revocation in its Petition for Revocation by simply listing the calendar dates of reporting meetings the probationers had allegedly missed, while failing to present mitigating information that would tend to inform the court that the probationer was making a compelling attempt to comply. In Mr. Carter's case, for example, JCS made no mention that he *had* appeared an average of 3.5 times per month, more than triple the rate he would have had to appear had he been able to pay in full each month, or that he had been scheduled to appear weekly simply because he could not afford to pay the $140 monthly payment JCS demanded all at once.[171] JCS also neglected to mention that Mr. Carter had shown up at least 22 times of his own volition (with no scheduled appointment) to make small payments, a strong sign that he was working to engage with the probation company and meet the financial terms of his Probation Order.[172]

Furthermore, JCS employees knew that submitting a document to the Municipal Court advocating for the revocation of probationer was very likely to lead to a probationer being jailed: The Municipal Court routinely commuted probationers' outstanding finds to jail time, and JCS employees in the court had seen the process repeatedly. Yet JCS still categorically failed to present the Municipal Court with information such as probationers' attempts to pay, total number of meetings attended. The negative effects of this failure to relay information to the Municipal Court were compounded by JCS's earlier efforts to keep probationers unaware of their right to an indigency determination, and to prevent probationers from going to the court themselves to seek

[170] JCS's statement of facts represents that JCS would "refer probationers back to the court if they were having trouble paying their court-ordered fines, costs, and fees. Doc. 260 at 9 ¶ 19. Mr. Carter's experience shows the claim to be untrue: even though he was appearing multiple times a month and making small payments as best he could for almost two years, the only "referral" back to the court he received was a JCS-generated Petition for Revocation advocating for the termination of his probation.

[171] Counter-Statement ¶ 80, 173.

[172] Counter-Statement ¶ 173.

relief.

The reason for JCS's omissions is simple: JCS had a financial interest in supervising the largest number possible of *paying* debtors. Those financial interests would be harmed if the Municipal Court determined debtors were too poor to pay and JCS became unable to collect fees. Each person JCS successfully petitioned to jettison from its rolls after nonpayment was one less person JCS might have to supervise for free. This helped JCS's bottom line—especially if JCS managed to bleed the probationer for several hundred dollars before advocating for revocation. Furthermore, each arrest and jailing bolstered the credibility of JCS's threats and hence the company's ability to pressure even the poorest debtors to pay—or their loved ones to pay on their behalf.[173] These omissions were not the act of probation officer acting in service of the court by presenting a balanced portrait of probationers' efforts to comply with their conditions of probation—they were the act of a self-interested business concerned about its bottom line at the expense of the very people it ostensibly served. As the Supreme Court found, "a scheme injecting a personal interest, financial or otherwise, into the enforcement process may . . . in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980). Here, there are strong signs that JCS's direct financial interest in not managing probationers for free directly led to the jailing of those probationers for the nonpayment of their fines and fees.

JCS argues it had no duty to investigate or determine Mr. Carter's indigency or his willfulness regarding nonpayment of fines and JCS's own fees, supporting this position with a cite to a long list of Alabama and out-of-state authority establishing the principle that the court is responsible for determining indigency, the court must inquire into indigency before a probationer is incarcerated, and that the court must not delegate its own authority to make indigency

[173] Counter-Statement ¶ 132.

determinations to private probation agencies. Doc. 260 at 42-43, n.11. This argument misses the point: Plaintiff agrees that courts cannot jail probationers for failure to pay absent themselves conducting an indigency determination: it was error for the Municipal Court to have done exactly that in this case. Likewise, a court cannot renege on its own responsibility to conduct an indigency determination by delegating the authority to do so to a probation officer or other third party.

JCS had a responsibility to probationers not to conduct a final indigency determination, but simply to *tell* them that they could seek one from the court. And JCS had a responsibility to provide the *court* with a neutral assessment of probationers' efforts to comply with their conditions of probation, rather than simply seeking the revocation of probation of all debtors who found themselves unable to make the payments JCS sought to collect each month. And as discussed in the below section on causation under *Monell*, it is no defense for JCS to simply point at the Municipal Court and say that court's actions absolve JCS of any responsibility for the constitutional harm Mr. Carter and other probationers endured.[174]

[174] JCS argues in passing that Mr. Carter's probation was revoked because he did not show up for his scheduled revocation hearing. (Doc. 260 at 43 (citing the stamp on the Petition for Revocation Order saying "Defendant Failed to Appear; Issue a Warrant of Arrest").) This is incorrect. An arrest warrant for failure to appear was issued for Mr. Carter, but the hearing at which he failed to appear was not a revocation hearing, and the stamped order did not revoke his probation: like every order at the bottom of JCS's form Petition for Revocation, it ordered that a revocation hearing be set "to determine if the [probationer] has violated the terms of his probation," and that notice of *that* hearing be served on the defendant. Doc. 253-23. That step was never taken by JCS or anyone else, and Carter's probation was therefore never officially revoked at all. What *did* happen was that after Carter was picked up on his warrant for failure to appear at the January 30, 2013 hearing, Judge Hayes commuted his sentence of fines related to his JCS probations to jail without an ability to pay determination, strictly because he could not pay his fines on the spot. Counter-Statement ¶ 181-196. JCS petitioned to revoke Carter's probation without ever informing the Municipal Court that Carter repeatedly told probation officers he could not pay. As a result, when Carter appeared before the Municipal Court he was jailed for failing to pay. As Judge Hayes explained, it didn't matter whether a probationer appeared voluntarily for the date sent on his Petition for Revocation or on the jail docket for a commutation hearing: "the end result is the same." Counter-Statement ¶ 117.

## IV. *Monell*: JCS policies and customs caused the violation of probationers' *Bearden* and procedural due process rights.

Because the acts giving rise to JCS's liability for the constitutional harm Carter alleges were all executed as a matter of company policy or custom, the Supreme Court's holding in *Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658 (1978), presents no barrier to liability for JCS in this case.

### A. The JCS practices that gave rise to Carter and other probationers' constitutional claims were all company policy or custom, not isolated actions taken by individual employees.

Under the standard the Supreme Court set forth in *Monell*, 436 U.S. 658 (1978), Mr. Carter must prove that JCS had a policy or a custom that led to the violation of his constitutional rights. *Buckner v. Toro*, 116 F.3d 450, 452 (11th Cir. 1997).[175] To prove a policy or custom, "it is generally necessary to show a persistent and wide-spread practice." *Depew v. City of St. Marys, Georgia*, 787 F.2d 1496, 1499 (11th Cir. 1986). And "actual or constructive knowledge of such customs must be attributed to the governing body" of the entity. *Id.* Circumstantial evidence alone can be sufficient to prove a policy or custom: When one district court granted a defendant's motion for summary judgment in a *Monell* case based on its finding that the there was "little direct evidence" of the defendant's alleged policy, the Eleventh Circuit reversed, holding there "does not have to be any direct evidence, much less more than a little of it, to present a genuine issue of material fact" about the existence of the alleged policy; and stressing that weighing evidence "is the jury's job." *Williams v. DeKalb Cty.*, 327 F. App'x 156, 163 (11th Cir. 2009).

[175] There are compelling arguments against applying the *Monell* liability standard to private entities engaged in traditional government functions. *See, e.g., Shields v. Illinois Dep't of Corr.*, 746 F.3d 782, 790-96 (7th Cir. 2014) (expressing support for many of those arguments and recommending *en banc review*, but bowing to Seventh Circuit precedent applying *Monell*). Plaintiff submits that the holding in *Buckner v. Toro*, 116 F.3d 450 (11th Cir. 1997), applying *Monell* to private actors should be reversed, but acknowledge that it remains Eleventh Circuit precedent. Accordingly Plaintiff will not argue against *Buckner* here, and only raise the issue to preserve it for appeal, if necessary.

Here, the evidence shows that each JCS practice forming the basis for the company's liability for constitutional violations was imposed from the top down, or was so pervasive and uniform that the leadership knew or should have known about it.

First, there is the contract that JCS entered into with the City. The terms of that contract are virtually identical to dozens of other contracts JCS entered into with municipalities throughout the state, and there can be no serious debate that JCS's high-level decision makers were aware of and agreed to its terms.[176]

Likewise, JCS's decision to tell probationers not to seek relief from the court was official policy. JCS's Reporting for Probation form is in its employee manual, and confirms that the message contained on the example from Montgomery was universal. Like Montgomery version, the sample in the manual tells every probationer that all questions should be directed to the JCS probation officer and says: "***Do not contact the Municipal Court***, they will be unable to help you."[177] Courts routinely acknowledge that instructions given to employees in a manual are evidence of a policy. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983) (citing Police Department manual for department policy).

JCS also imposes conditions of probation that are outside the Probation Orders as a matter of company policy. Both the Probation Order and the General Conditions of Probation sheet are form documents, and a direct comparison reveals that the latter imposed the extrajudicial conditions discussed in the *Bearden* section above. And every probationer was directed to initial (and thereby accept) each of the conditions on the form without regard for what conditions the Probation Order itself imposed.[178]

[176] Counter-Statement ¶¶ 1, 21
[177] Counter-Statement ¶ 70; (Doc. 185-1, JCS Manual at ECF p. 25.).
[178] Counter-Statement ¶ 72-72.

Testimony from probation officers and JCS executives also makes it clear that JCS's choice to conceal probationers' right to an indigency determination before the Municipal Court was a uniform policy. JCS policymakers knew the company was obligated to waive its supervision fees for indigent contractors—that term was in its contract.[179] And Colleen Ray, JCS's state manager for the State of Alabama confirmed, JCS would never even suggest that a probationer might be indigent, even based on their "obvious circumstances."[180]

Furthermore, the regular threats that Mr. Carter received from various probation officers in Montgomery provide evidence that he was not the recipient of a stray comment or two by an employee, but rather was experiencing the expression of a custom deeply embedded in the organization.[181] The experiences of other probationers in JCS offices in other parts of the state were much the same with respect to these threats, further evidence that such threats were not isolated incidents.[182]

JCS's practice of making the poorest probationers report weekly rather than monthly was official policy straight from its training manual: probation officers were directed to schedule anyone who paid $40 or less to report weekly.[183]

JCS's practice of allocating the majority of funds probationers paid to itself was also either directed from the top or was sufficiently pervasive to count as a custom: JCS's own financial record show that by 2012, JCS was allocating almost a million dollars a year more of probationers' payments to its own fees than it was to City fines, and that it continued to allocate more to its fees

[179] Counter-Statement ¶ 18.
[180] Counter-Statement ¶ 85.
[181] Counter-Statement ¶ 89, 161, 162, 166, 167.
[182] Counter-Statement ¶ 84.
[183] Doc. 185-1, JCS Training Manual at ECF 73.

than to the underlying fines from then until it was finally forced out of Montgomery two years later.[184] A letter from JCS founder and ex-CEO to Municipal Court judges throughout Alabama likewise indicates that as a matter of policy JCS had worked to benefit itself at the expense of courts (and therefore, by extension, at probationers' expense as well). Mr. Sanders indicated that when he had stopped running the company in 2011, the split between JCS and the cities was 70/30 in favor of the cities, but that after his departure—and without telling its municipal clients throughout the state—JCS internally altered the split from the top down to 50/50 because JCS had become "involved in several lawsuits that have become more expensive than anticipated."[185]

Finally, the Petitions for Revocation JCS issued in Carter's case and in the cases of thousands of other Montgomery probationers all contain the same form language stating: "JCS respectfully requests that the probation of the Defendant be revoked and that this Honorable Court issue a warrant for the arrest of said Defendant, if necessary . . . ."[186] And as discussed at length above, at this stage JCS is not simply requesting a review of the probationers by the court—it is advocating for the termination of probation with the knowledge that have had difficulties paying, and after having taken steps to make probationers fear arrest for nonpayment. Furthermore, virtually without exception these forms simply allege minimal facts about probationers' outstanding balance and alleged failure to report to some of the reporting meetings probation officers had directed the poorest probationers to report at multiple times a month.

**B. JCS policies and customs were a proximate cause of the constitutional deprivations JCS probationers endured.**

Proximate causation with respect to Monell liability adheres to the same rules as proximate causation in the tort context. Plaintiffs do not carry the burden of showing irrefutable evidence in

[184] Counter-Statement ¶ 97.
[185] Counter-Statement ¶ 95.
[186] Counter-Statement ¶ 98, 173.

favor of the defendant's policy or custom foreseeably leading to the injury; they need only provide "sufficient evidence of a 'causal link' between the policy and the injuries to get the case to a jury." *Williams v. DeKalb Cty.*, 327 F. App'x 156, 163–64 (11th Cir. 2009) (reversing district court decision finding "no evidence" of a causal link between the alleged policy and the injury, noting that while the evidence there might not be "overwhelming evidence" it was enough to bring the case to a jury).

JCS attempts to escape liability for the constitutional claims against it by arguing that it was not "the" proximate cause of the harm to Mr. Carter, and that the Municipal Court was the actual moving force behind it.[187] But this argument fails on both the facts and the law. The Municipal Court and JCS are both but-for causes of the constitutional harm at issue here, and tort law has consistently recognized that multiple actors can both be a proximate cause of a single harm. *See, e.g.*, Restatement (Third) of Torts: Phys. & Emot. Harm § 29, cmt. b (2010) ("Multiple factual causes always exist, . . . and multiple proximate causes are often present."). As discussed below, neither the sentencing of defendants to JCS probation nor the Municipal Court's eventual commutation of outstanding fines and costs to days in jail broke the causal chain linking JCS's acts to the liberty deprivations and procedural due process deprivations probationers endured.

***1. The Municipal Court's role in sentencing probationers to JCS probation does not shield JCS itself from liability for the deprivations of constitutional rights those probationers endured.***

JCS argues that even if its probation system in Montgomery discriminated against probationers on the basis of wealth, the company cannot be held liable for its constitutional violations because the company technically did not make "sentencing decisions" and did not "have a voice in . . . the terms of probation." *See* Doc. 260 at 54. JCS cannot avoid liability so easily.

[187] JCS Br. at 39-40.

First, JCS and the City bargained for the terms of the contract they signed that created the unconstitutional system. The monthly probation fees were an express and material term of that contract. Pursuant to Montgomery policy, individuals who could not pay their fine in full within 30 days were assigned to JCS probation. At that point, the terms of the JCS-Montgomery contract kicked in: anyone assigned to JCS probation who did not pay off her fines within one week of sentencing would be charged $40 a month in probation fees. Where a constitutional deprivation "flow[s] directly from, and [is] mandated by," a policy, there can be no "doubt that the policy caused the constitutional deprivation." *Barnes v. Dist. of Columbia*, 793 F. Supp. 2d 260, 291 (D.D.C. 2011). Accordingly, "proof of causation regarding an official policy requires only evidence of the policy statement itself." *Id.*

It is true that the scheme depended on the court's participation in order to function; in recognition of this, JCS required that the mayor sign its standard form contract on behalf of *both* the City *and* the court, and the mayor did so. But the fact that the Municipal Court and its judges also may have contributed to the unconstitutional system does not eliminate JCS's role as a "moving force" in the deprivation of Plaintiff's rights. *Cf. Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 609-10 (6th Cir. 2007) (finding public defender liable for failing to present evidence of clients' indigence despite judge' independent duty to inquire into ability to pay). At any rate, the vast majority of JCS probationers in Montgomery were assigned to JCS not by a judge, but pursuant to the administrative window procedure by a clerk whose authority was tightly scripted and who had no judicial authority. And more importantly, regardless of how a person was put on JCS probation, there was no discretion: the contract mandated that "JCS ***will*** supervise all probated cases sentenced by the Court" and that "each Court Order ***shall*** provide for . . . [a]

Probation fee of $40.00."[188] The probation fees were JCS's sole contracted-for "compensation."[189] Had Montgomery's Municipal Court judges started waiving everyone's probation fees, Montgomery would have been in violation of its contract. And it is undisputed that the form probation orders JCS provided to Montgomery, like the form orders JCS provided to all the cities with which it contracted, mandated payment of JCS's fees.[190] Accordingly, Montgomery's Municipal Court judges did what the contract required them to do.[191]

Second, it goes without saying that JCS was responsible for how it treated probationers once they were on JCS probation. It was JCS—not the Municipal Court—that told probationers the uniformed officer nearby would arrest them if they couldn't bring enough money. It was JCS—not the Municipal Court—that added extra probation conditions in violation of Alabama law; JCS that punished probationers who had trouble paying by mandating that they report every week or every few days; and JCS that allocated large percentages of probationers' small payments to probation fees, thereby extending the time it took for probationers to pay down their fines and increasing its own profits.

***2. The Municipal Court's role in commuting JCS probationers' sentence of fines costs and fees does not shield JCS itself from liability for the jailing of probationers for nonpayment absent an ability-to-pay determination.***

JCS points to the Municipal Court's independent duty to conduct indigency determinations and argues that the court was therefore the only *Monell* policymaker with respect to the denial of indigency determinations and the probationers' eventual jailing for nonpayment through the commutation process. This self-serving either/or framing of the *Monell* question has no basis in

[188] Doc. 145-1 at 2, 4.

[189] *Id.* at 4.

[190] Counter-Statement ¶ __ (ALSO check for JCS SOF concession on this)

[191] At least two judges testified that they never waived probation fees at sentencing and the City has admitted that no indigency determinations were made before defendants were placed on probation. Counter-Statement ¶ 67

law.

The Supreme Court rejected such reasoning in a case where a state trooper had procured a warrant by submitting a legally insufficient supporting affidavit. *Malley v. Briggs*, 475 U.S. 335, 337 (1986). Like JCS's factually deficient Petition for Revocation, which contained insufficient information for the court to make an informed decision to revoke probation as JCS requested, the state trooper's warrant affidavit contained insufficient information to establish probable cause. The district court had found that the judge's decision to issue the warrant broke the "causal chain" between the application and the wrongful arrest. But the Supreme Court rejected that position, concluding that it was "inconsistent with our interpretation of § 1983," which makes defendants "responsible for the natural consequences of [their] actions." *Id.* at 344 n.7. "It is true," the Supreme Court further explained,

> that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this damage by exercising reasonable professional judgment.

*Id.* at 345-46. Following *Malley*, the Eleventh Circuit rejected on the same grounds, a law enforcement officer's contention that "even if he should have known that the affidavit failed to establish probable cause, the magistrate's issuance of the warrant breaks the causal chain between the warrant application and the arrest." *Garmon v. Lumpkin Cty., Ga.*, 878 F.2d 1406, 1410-11 (11th Cir. 1989).

Far from being limited to the narrow question of law enforcement officers' potential liability for warrants, *Malley* has been invoked to hold that a probation department could be held liable for a condition of probation in a court order issued on its recommendation, and for a public defender's failure to seek an indigency determination from a judge. *Warner v. Orange County*

*Dept. of Probation*, 115 F.3d 1068, 1072-74 (2d Cir.1996) (holding that in recommending that the plaintiff be sentenced to an alcohol-treatment program that incorporated religious elements, a probation department could be held liable under § 1983 for violating the plaintiff's First Amendment rights, even though a judge made the sentencing decision); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 609-10 (6th Cir. 2007) (finding public defender liable for failing to present evidence of clients' indigence despite judge' independent duty to inquire into ability to pay).

*Powers* found that under *Malley*, even where a court was the immediate trigger for the plaintiff's injury, the defendant may be proximately liable if the court's actions were foreseeable, and further noted that other circuits had found that liability for the defendant was possible when judicial orders were predicated on the misrepresentation or omission of material facts. 501 F.3d at 609-10. Here, as discussed in Section III above, JCS routinely omitted key facts from its Petition for Revocation and had a strong financial incentive to convince the court to revoke nonpaying probationers rather than find itself supervising them for free.[192]

[192] With respect, though the *Ray* Court cited *Powers*'s language that a judicial act does not sever the chain of liability "if the other state actor misrepresents or omits material facts," that Court did not fully consider what JCS *wasn't* telling that municipal court about probationers' inability to make payments and those probationers' efforts to comply with their conditions of probation. *See Ray v. JCS*, 270 F. Supp. 3d 1262, 1299-1300 (N.D. Ala. 2017). This omission led the *Ray* Court to conclude that those plaintiffs had not shown that JCS instituted a policy or custom that prevented the Municipal Court from performing indigency determinations, or made such determinations less likely. *Id*. But that finding does not address JCS 's advocacy for the revocation of probation despite having information suggesting that many probationers' nonpayment was *not* willful, or its failure to provide the court with a full account of probationers' efforts to comply. In addition, when considering this issue the *Ray* Court did not take into account *Malley*'s conclusion that even if a court has an independent responsibility not to commit legal error, a separate actor can still be liable for its failure to exercise its professional judgment in cases where its actions lead that court astray.

## V. The Court should deny JCS's motion for summary judgment on Plaintiff's state-law claims.

### A. Money Had and Received (Count 12)

JCS's motion for summary judgment on Plaintiff's money-had-and-received claim should be denied. "[T]he standard for a claim of money-had-and-received under Alabama precedent is that the plaintiff must prove facts showing that defendant holds money which, in equity and good conscience, belongs to plaintiff or holds money which was improperly paid to defendant because of mistake or fraud." *Epps Aircraft, Inc. v. Exxon Corp.*, 859 F. Supp. 533, 535–36 (M.D. Ala. 1993), *aff'd*, 30 F.3d 1499 (11th Cir. 1994) (internal quotation marks and emphasis omitted). Viewed in the light most favorable to Plaintiff, the record demonstrates that JCS collected and retained fees from indigent probationers, contrary to the express terms of its contract.[193] As this Court has already explained, "[i]f JCS was collecting money from indigent defendants when they had an obligation not to do so—and an obligation to inquire into indigency—JCS collected money that rightfully belongs to plaintiffs." *McCullough v. City of Montgomery*, No. 2:15-CV-463 (RCL), 2017 WL 956362, at *16 (M.D. Ala. Mar. 10, 2017), *rev'd in part on other grounds*, *McCullough v. Finley*, 907 F.3d 1324 (11th Cir. 2018). The record establishes exactly that.

JCS's own brief demonstrates why JCS's assertion that the voluntary payment doctrine bars Plaintiff's claim fails. As JCS acknowledges, the doctrine only applies when a party "voluntarily pays money" "with full knowledge of all the facts . . ." and upon "proof" of the same. (Doc. 260 at 47, citing *Stone v. Mellon Mortg. Co.*, 771 So.2d 451, 456 (Ala. 2000) (emphasis added)). But there exists no evidence or undisputed fact that any probationers knew JCS was not entitled to charge them fees. There is no evidence that any probationers knew of the JCS-City contract, let alone the specific provision therein prohibiting JCS from imposing their monthly

[193] Plaintiff is not opposing JCS's arguments regarding money had and received on the basis that the fees were not authorized by Alabama law.

probation fees on indigent defendants. As such, JCS's motion should be denied as to Count 12.

**B. False Imprisonment (Count 14)**

Construing the facts in the light most favorable to Plaintiff, a jury could reasonably find JCS liable for false imprisonment in relation to the commutation of fines to days in jail. Under Alabama law, "persons other than those who actually effect an arrest or imprisonment may be so involved with or related to the act or proceeding as instigators or participants therein as to be liable for false imprisonment." *Crown Cent. Petroleum Corp. v. Williams*, 679 So. 2d 651, 654 (Ala. 1996); *see also Helm v. Rainbow City, Alabama*, No. 4:15-CV-01152-ACA, 2019 WL 1326160, at *13 (N.D. Ala. Mar. 25, 2019); *Dolgencorp, Inc. v. Pounders*, 912 So. 2d 523, 528 (Ala. Civ. App. 2005) ("[O]ne who instigates or participates in the unlawful confinement of another is subject to liability to the other for false imprisonment."); Restatement (Second) of Torts § 45A (1965) (same). A defendant may be an "instigator" if she requests or otherwise induces the plaintiff's detention. *See Grant v. Dolgen Corp.*, 738 So. 2d 892, 896 (Ala. Civ. App. 1998); *J.J. Newberry Co. v. Smith*, 149 So. 669, 671 (Ala. 1933); *Standard Oil Co. v. Davis*, 208 Ala. 565, 567 (Ala. 1922). But "a person may be the responsible instigator of [detention] without *expressly* commanding, requesting, or directing it." *Standard Oil Co.*, 208 Ala. at 567 (emphasis). An "instigator' may, for example, be one in a position of authority who is able to intercede to prevent the plaintiff's detention, but does not. *See Helm*, No. 4:15-CV-01152-ACA, 2019 WL 1326160, at *13 ("In the absence of any evidence that [the defendant] played any part in the decision to arrest her, or was able to intercede to prevent the arrest, this claim fails.").

As recounted at length above, JCS's Petition for Revocation withheld information from the Municipal Court regarding probationers' efforts to comply with terms of their probation, omitting the probationers' repeated explanations that they could not afford to pay the ordered fees. That petition advocated for revoking Mr. Carter's probation—that is, send him to jail. It suceeded: On

the basis of JCS's representations, the Municipal Court commuted probationers' fees to jail time. JCS, then, was the instigator of the wrongful detention: It requested, induced, and assisted in the detention, and certainly failed to intercede to prevent that incarceration despite its knowledge of probationers' indigency. Because Plaintiff presses his false imprisonment claim only with respect to post-commutation detention, not detention prior to their commutation hearings, the existence of any arrest warrants has no relevance.

JCS notes that a person is not liable for reporting a suspected crime unless she acts in bad faith. (Doc. 260 at 60-61.) It does not explain the relevance of this doctrine to this claim; JCS did not report probationers for committing crimes. But if bad faith were required here, JCS's contention that there is no evidence is laughable. Bad faith is at the core of JCS's business model. It is the through-line of all its actions in this case. JCS filed misleading petitions to revoke probation when probationers were too poor to pay JCS's fees, and so no longer profitable probationers. Acknowledging probationers' known indigency to the Municipal Courts would have left JCS saddled with probationers, since the company was prohibited from collecting supervision fees from those who could not pay. In other words, JCS would be left with dead weight dragging down its bottom line. To avoid that cost, JCS asked the courts to send people to jail because they were poor. Any reasonable jury could find—and would find—that JCS acted in bad faith.

## VI. JCS is not Entitled to Absolute Quasi-Judicial Immunity or Qualified Immunity.

This Court has already correctly held that, as a private corporation, JCS is not entitled to immunity from constitutional claims. *Chapman v. City of Clanton*, No. 2:15-CV-125 (RCL), 2017 WL 1508182, at *3 (M.D. Ala. Apr. 25, 2017) (noting that these "same arguments have been made, and rejected, in nearly identical circumstances" repeatedly since at least 2014). So have numerous other courts in cases involving constitutional claims against JCS and other for-profit probation

companies. *See, e.g.*, *Woods v. Judicial Correction Servs., Inc.*, No. 2:15-CV-00493-RDP, 2019 WL 2388995, at *11 (N.D. Ala. June 5, 2019); *Brannon v. Etowah Cty. Ct. Referral Prog*, LLC, 325 F.R.D. 399, 423 (N.D. Ala. 2018); *Carden v. Town of Harpersville*, No. 2:15-CV-01381-RDP, 2017 WL 4180858, at *21 (N.D. Ala. Sept. 21, 2017); *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758, 764 (M.D. Tenn. 2016); *Higginbotham v. Judicial Corrections Servs., Inc.*, No. CV-13-BE-740-S, 2014 WL 507448, at *1 (N.D. Ala. Feb. 6, 2014) (noting that JCS "raised many defenses" that had previously been rejected "in a similar case"—including quasi-judicial immunity—and rejecting them as inapplicable). JCS has provided no new reason why it should now be allowed to invoke these defenses and avoid liability.

**A. JCS Cannot Claim Quasi-Judicial Immunity**

Quasi-judicial immunity is only available to individual defendants sued in their individual capacities. *See VanHorn v. Oelschlager*, 502 F.3d 775, 779 (8th Cir. 2007) (collecting cases). Here, Carter has sued JCS as an entity in its official capacity. JCS admits it "perform[s] a function 'traditionally within the exclusive prerogative of the state' and that [it] thereby 'become[s] the functional equivalent of the municipality." Doc. 260 at 38. (citing *Buckner v. Toro*, 116 F.3d 450, 452 (11th Cir. 1997)). A suit against a municipality is a paradigmatic official capacity suit. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (explaining a suit against an *entity*, rather than individuals who work for the entity, is an official capacity suit). And the Supreme Court has clearly held personal immunity defenses are unavailable in official-capacity suits. *See Kentucky v. Graham*, 473 U.S. 159, 167 (1985); *see also Owen v. City of Indep., Mo.*, 445 U.S. 622, 638 (1980) ("[T]here is no tradition of immunity for municipal corporations."). Just as suits against municipalities are official capacity suits, so are suits against private entities performing functions traditionally performed by municipalities. *See Woods v. Judicial Correction Servs., Inc.*, No. 2:15-CV-00493-RDP, 2019 WL 2388995, at *11 (N.D. Ala. June 5, 2019) ("[A] suit against such a

corporate entity is an official capacity suit."); *Carden v. Town of Harpersville*, No. 2:15-CV-01381-RDP, 2017 WL 4180858, at *21 (N.D. Ala. Sept. 21, 2017) ("JCS is not entitled to quasi-judicial immunity for the § 1983 claims presented in this action because those claims are official capacity claims.").[194]

JCS admits it is a corporate entity subject only to *Monell* liability. *See* Doc. 260 at 38. From that premise it inexorably follows that JCS cannot invoke quasi-judicial immunity.

**B. JCS Cannot Claim Qualified Immunity.**

Qualified immunity is also only available to *individual* defendants sued in their *individual* capacities. JCS is neither—it is an *entity* sued in its *official* capacity. This limit on the qualified immunity defense is black-letter law. "In an official-capacity action [personal immunity] defenses are unavailable." *Kentucky v. Graham*, 473 U.S. 159, 167 (1985). JCS does not attempt to argue, nor could it, that it is being sued in its individual capacity. Because JCS fails to meet this threshold requirement, the qualified immunity inquiry can go no further.

The Supreme Court has expressly held that qualified immunity is not available to a municipality. *See Owen v. City of Indep., Mo.*, 445 U.S. 622, 650 (1980). And the Eleventh Circuit has confirmed that qualified immunity is not available to a private entity sued on a municipal liability theory. *See, e.g.*, *Swann v. S. Health Partners, Inc.*, 388 F.3d 834, 836 (11th Cir. 2004), overruled, in part, on other grounds ("[P]rivate entities . . . cannot raise qualified immunity as a

[194] Moreover, *even if* JCS were not barred from raising the defense by virtue of this official-capacity suit, none of the rationales for quasi-judicial immunity would justify extending quasi-judicial immunity to JCS. "Quasi-judicial immunity is a deliberately cabined doctrine that is only extended when it would further the public interest. Here, the public interest would be disserved by immunizing a profit-driven corporation because such immunity would enable the corporation to prioritize pennies over probationers without fear of accountability. The gravity of this risk simply does not accord with the underpinnings of quasi-judicial immunity." *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758, 768 (M.D. Tenn. 2016).

defense").[195] Historical considerations and sound public policy support this this long-settled principle. When the Civil Rights Act was passed, "municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis. In particular, they were routinely sued." *Id.* at 639 (citing *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 687-88 (1978)). Under the Act, *Owen* concluded, "injuries occasioned by a municipality's unconstitutional conduct were . . . meant to be fully redressable." *Id.* at 650.

Moreover, qualified immunity's goal of protecting individuals who act in good faith, pursuant to their official duties, from *personal* liability is inapplicable to suits against the entity itself. *See id.* at 654. In suits where "government officers [are] sued in their individual capacities," "immunity serve[s] to insulate them from personal liability for damages." *Id.* at 638 n.18. By contrast, in suits against a municipality or a private entity, like this one, "only the liability of the municipality itself is at issue, not that of its officers," so "any recovery would come from public funds." *Id.* at 638 n.18; *see also McKnight v. Rees*, 88 F.3d 417, 424 (6th Cir. 1996) (rejecting qualified immunity for private prison guards because private companies "act[] for the good of the pocketbook"), aff'd, 521 U.S. 399 (1997).[196] This, in turn, promotes Section 1983's goal of

[195] JCS's citation *Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc.*, 413 F.3d 1163, 1166 (10th Cir. 2005), *see* Doc. 260 at 70, warrants no deference. *Rosewood* held that the private entity defendant before it was *not* entitled qualified immunity. *See id.* at 1169. Moreover, *Rosewood*'s suggestion that there may be some circumstance in which a private entity, rather than a private individual, might be entitled to qualified immunity is contradicted by binding Eleventh Circuit law, *see Swann v. S. Health Partners, Inc.*, 388 F.3d 834, 836 (11th Cir. 2004), and has been endorsed by no other Circuit. *See, e.g.*, *United Pet Supply, Inc. v. City of Chattanooga, Tenn.*, 768 F.3d 464, 481 (6th Cir. 2014) (citing *Rosewood* in its analysis of qualified immunity for individual defendants sued in their individual capacity, and reaffirming, "[T]he Supreme Court very clearly held in *Kentucky v. Graham* that qualified immunity was not an available defense in an official-capacity suit").

[196] Indeed, even if Carter *had* named individual JCS probation officials and sued them in their individual capacity, those individuals would not be entitled to qualified immunity. Qualified immunity for those defendants would be squarely foreclosed by *Richardson v. McNight*, 521 U.S. 399, 413 (1997). The Supreme Court has subsequently explained *Richardson* thus: "[T]he Court emphasized that the particular

deterring future constitutional abuses. *See id.* at 651-52.

Here, JCS stands in the shoes of the municipality. *See* Doc. 260 at 38 (citing *Buckner v. Toro*, 116 F.3d 450, 452 (11th Cir. 1997)). No JCS officer has been named and no personal liability is at issue. Carter has named and seeks recovery only from JCS as an entity. Clear Supreme Court and Eleventh Circuit precedent foreclose qualified immunity.

## VII. Plaintiff's claims are not barred by *Heck v. Humphrey*.

*Heck v. Humphrey* does not apply to this case because Carter and the putative class members are not in custody and do not seek relief that invalidates their conviction. *Morrow v. Fed. Bureau of Prisons*, 610 F.3d 1271, 1272 (11th Cir. 2010). This should be no surprise to JCS: A series of decisions from the Northern District of Alabama have rejected the same meritless *Heck* argument they advance here, including in similar suits against JCS. *See, e.g.*, *Woods v. Judicial Correction Servs., Inc.*, No. 2:15-CV-00493-RDP, 2019 WL 2388995, at *11 n.7 (N.D. Ala. June 5, 2019); *Carden v. Town of Harpersville,* No. 2:15-CV-01381-RDP, 2017 WL 4180858, at *22 (N.D. Ala. Sept. 21, 2017); *Ray v. Judicial Correction Servs., Inc.*, 270 F. Supp. 3d 1262, 1296 (N.D. Ala. 2017); *Brannon v. City of Gadsden*, No. 4:13-CV-1229-VEH, 2015 WL 1040824, at *13 (N.D. Ala. Mar. 10, 2015). Yet JCS tries again.

*Heck* held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can

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circumstances of that case—'a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms'—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under." *Filarsky v. Delia*, 566 U.S. 377, 393 (2012). Even in that hypothetical case, then, brief analysis would reveal JCS officials were not entitled to qualified immunity. In the actual case before this court, JCS as an entity cannot overcome the threshold hurdle to prompt a qualified immunity analysis at all.

demonstrate that the conviction or sentence has already been invalidated." 512 U.S. 447, 487 (1994). The favorable-termination rule ensures that "state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either directly through an injunction compelling speedier release or indirectly through a judicial determination that necessarily implies the unlawfulness of the State's custody." *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) (emphasis in original).

*Heck* poses no obstacle to "purely procedural" challenges like this one. *Harden v. Pataki*, 320 F.3d 1289, 1295 (11th Cir. 2003). In *Heck* itself, the Supreme Court noted it permits "a § 1983 claim for using the wrong procedures, [rather than] for reaching the wrong result," 512 U.S. at 482-83—exactly like Plaintiff's claims here. So long as the relief sought would "render invalid the state procedures" at issue, rather than "necessarily demonstrate the invalidity of confinement or duration," *Heck* is inapplicable. *Wilkinson*, 544 U.S. at 81-82; *see also Spencer v. Kemna*, 523 U.S. 1, 17 (1998) ("If . . . [a] petitioner were to seek damages for using the wrong procedures, not for reaching the wrong result and if that procedural defect did not necessarily imply the invalidity of the [judgment], then *Heck* would have no application all." (internal citations and quotation marks omitted)).

By way of illustration, in *Harden v. Pataki* this Court held that the appellant inmate's § 1983 challenge to extradition procedures were procedural in nature because, if he succeeded in proving his constitutional challenge, he would not prove the invalidity of the conviction and sentence for which he was extradited. 320 F.3d at 1297. *Heck*, then, did not apply. *Id*. at 1297-98. Likewise, in *Powers v. Hamilton Public Defenders*, the Sixth Circuit held *Heck* did not foreclose plaintiff's § 1983 suit about public defenders' practice of not requesting indigency hearings because it questioned "the procedures that led to his incarceration and not the incarceration itself."

501 F.3d at 604-05. "The Public Defender's alleged practice of not requesting indigency hearings has no bearing on Powers's guilt or innocence in failing to pay his court-ordered fine," the court explained. *Id*. at 605; *see also Cain v. City of New Orleans*, 186 F. Supp. 3d 536, 548 (E.D. La. 2016) ("Defendants cannot seriously argue that the facts necessary to support plaintiffs' section 1983 claims (i.e., . . . failing to conduct a sufficient inquiry into the criminal defendants' good-faith ability to pay) contradict or undermine the factual bases for plaintiffs' state-court guilty pleas . . . ."); *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016 (E.D. Mo. 2015), *amended on other grounds by* No. 4:15-CV-00253-AGF, 2015 WL 4232917 (E.D. Mo. July 13, 2015) ("*Heck* is inapplicable . . . because [plaintiffs] do not challenge the fact or duration of their underlying convictions or sentences but only the improper procedures that culminated in their post-judgment incarceration.").

So too, here, Plaintiff does not challenge their underlying convictions or pleas. Success in this suit will not implicate the merits of their underlying cases, suggesting they were innocent of charged wrongdoing. Rather, Plaintiff objects to the procedures by which JCS enforced their probation. *Heck* therefore poses no bar. *See Ray*, 270 F. Supp. 3d at 1296.

Further, to the extent JCS contends *Heck* applies because Plaintiff should resolve his claims through habeas petitions, that argument fails. A habeas action would not allow Plaintiff to vindicate his constitutional rights because "the payment of a restitution or a fine . . . is not the sort of 'significant restraint on liberty' contemplated in the 'custody' requirement of the federal habeas statutes." *Erlandson v. Northglenn Mun. Court*, 528 F.3d 785, 788 (10th Cir. 2008) (gathering cases); *see also Duvallon v. Fla*., 691 F.2d 483, 485 (11th Cir. 1982).So far as any claims implicate the commutations that sent members of the putative class to jail for brief periods, and so far as

Defendants argue—contrary to municipal court judges' testimony[197]—that the commutations were sentences, Heck is inapplicable because Carter and the putative class members were imprisoned for too short a period to seek and receive habeas relief, *Heck* is inapplicable because they were imprisoned for too short a period to seek and receive habeas relief. In *Morrow*, the Eleventh Circuit held that ten days imprisonment was too short a period of confinement for a plaintiff to seek and receive habeas, and therefore *Heck* did not preclude his federal claim. *Morrow*, 610 F.3d at 1272; *see also Teagan v. City of McDonough*, No. 18-11060, 2020 WL 624695, at *7 (11th Cir. 2020) ("It is unclear whether *Heck* would apply here, as the length of imprisonment was so short . . . ."). Here, too, as in other challenges based on similar fine-collection schemes in this district, *Heck* does not apply because "none of the Plaintiffs are currently incarcerated and their prior stints in jail were too fleeting to permit the filing and resolution of a habeas suit." *Ray v. Judicial Corr. Servs.*, No. 2:12-CV-02819-RDP, 2013 WL 5428395, at *8 (N.D. Ala. Sept. 26, 2013); *see also Brannon*, No. 4:13-CV-1229-VEH, 2015 WL 1040824, at *13 ("Defendants have not shown that Plaintiffs, who are no longer in custody, had any realistic access to habeas relief during their period(s) of alleged unlawful, but apparently relatively short, durations of confinement."). The Eleventh Circuit recently cast doubt on "whether *Heck* applies to situations where, as here, a § 1983 plaintiff may no longer seek habeas relief because she is no longer in custody." *Teagan*, No. 18-11060, 2020 WL 624695, at *7. Other circuits have answered in the negative. *See, e.g.*, *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir.); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999); *see also Morrow*, 610 F.3d at 1273 (Anderson, J., concurring); *see also Muhammad v. Close*, 540 U.S. 749, 752 (2004) ("Members of

[197] Doc. 163-4, Westry Depo. at 64:7-66:13 (stating that commuting is not changing a fine sentence to jail time, and that he is not changing the original sentence when he has someone commuted); Doc. 73-2 Hayes Depo at 18:15-20 (stating that commuting does not change the original sentence).

the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement.").

Clearly, *Heck* has no relevance here. This suit challenges the City's probation enforcement procedures on behalf of current and former probationers. It does not contest the substantive merits of criminal judgments or sentences on behalf of inmates who should pursue habeas petitions instead. As such, *Heck* poses no bar.

## VIII. Plaintiff's claims are not barred by *Rooker-Feldman.*

This Court has already correctly held that *Rooker-Feldman* doctrine[198] does not bar Plaintiff's claims because they challenge the broader enforcement scheme by which fines and fees were collected from probationers, not their underlying state court judgments. Doc. 206 at 1 n.1. Neither the City nor JCS points to any record evidence or legal development that disturb the Court's previous reasoning.

### *1. Plaintiff does not ask the Court to overturn final state court judgments*

"*Rooker–Feldman* . . . is a narrow doctrine" that precludes "lower federal courts . . . from exercising appellate jurisdiction over final state-court judgments." *Lance v. Dennis*, 546 U.S. 459, 463-64 (2006). In *Exxon Mobile Corporation v. Saudi Basic Industries Corporation*, the Supreme Court warned that, "[v]ariously interpreted in the lower courts, the doctrine has sometimes been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law." *Exxon Mobil Corp. v. Saudi*

[198] "The *Rooker–Feldman* doctrine takes its name from the only two cases in which [the Supreme Court has] applied this rule to find that a Federal District Court lacked jurisdiction." *Lance v. Dennis*, 546 U.S. 459, 463 (2006) (citing *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923)).

*Basic Indus. Corp*., 544 U.S. 280, 283 (2005).[199] The Court offered a corrective, clarifying, "[t]he *Rooker–Feldman* doctrine . . . is confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id*.

This is not such a case. In denying the City's motion for judgment on the pleadings, this Court held, "Mr. Carter's Section 1983 claims do not challenge the merits of the Municipal Court's decisions nor the bases on which those judgments were reached. These claims challenge only the post-judgment probationary program." Doc. 206 at 1 n.1. Accordingly, *Rooker-Feldman* does not bar Plaintiff's case. *Id*.

The Court also explained that *Thurman v. Judicial Correction Services, Inc*., upon which the City and JCS again rely, "does not bear on [Plaintiff's] claims." *Id*. (citing 760 F. App'x 733 (11th Cir. 2019), *cert. denied*, 139 S. Ct. 2646 (2019) (unpublished)). *Thurman* concerned appellants' arguments that their probation orders were not lawful because they were not signed by a municipal court judge. 760 F. App'x at 736-737. The majority held that it "need not peer into Alabama law to determine whether an order must be signed to be valid because the *Rooker-Feldman* doctrine bars federal courts from adjudicating the validity of state court orders." *Id*. at 737. But, as this Court has already explained, Plaintiff does not challenge the "merits of the Municipal Court's decisions." Doc. 206 at 1 n.1. Instead, he challenges the probation enforcement scheme, which was at most the backdrop, not the subject, of any previous judgments against him. As the Eleventh Circuit has explained, "it is not the factual background of a case but the judgment rendered—that is, the legal and factual issues decided in the state court and at issue in federal

[199] To the extent pre-Exonn Mobile precedent applied Rooker-Feldman beyond its narrow scope, it is no longer controlling law. *See, e.g.*, *Pullins v. Hagins*, No. 3:14-CV-226-J-32-PDB, 2015 WL 1456198, at *6 n.4 (M.D. Fla. Mar. 23, 2015), *aff'd*, 637 F. App'x 571 (11th Cir. 2016); *Boross v. Liberty Life Ins. Co.*, No. 4:10-CV-144, 2011 WL 2945819, at *1 (S.D. Ga. July 21, 2011).

court—that must be under direct attack for *Rooker–Feldman* to bar . . . reconsideration." *Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279, 1286 (11th Cir. 2018).

In short, *Rooker-Feldman* does not bar a challenge to a policy simply because it shapes the process by which states enter or enforce judgments. The Supreme Court is clear that "a state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action." 562 U.S. 521, 532 (2011). "If *Rooker–Feldman* does not bar lower federal court review of the statute governing a state court's judgment, then it surely does not bar lower federal court review of a municipal policy merely because that policy governs some aspect of a state court's administrative practices." *Bairefoot v. City of Beaufort, S.C.*, 312 F. Supp. 3d 503, 514 (D.S.C. 2018).

Accordingly, "the existence of a prior collection-related judgment . . . does not in and of itself trigger application of the *Rooker–Feldman* doctrine" for claims related to debt collection policies and procedures. *Hageman v. Barton*, 817 F.3d 611, 615 (8th Cir. 2016); *see also Woods v. Judicial Correction Servs., Inc.*, No. 2:15-CV-00493-RDP, 2019 WL 2388995, at *11 n.7 (N.D. Ala. June 5, 2019) ("Here, Plaintiff's § 1983 claims do not challenge the probation orders or sentences imposed by the Municipal Court, but instead challenge JCS's policies and practices and request that JCS be required to pay damages."); *Thomas v. Haslam*, 303 F. Supp. 3d 585, 606–07 (M.D. Tenn. 2018) (holding *Rooker-Feldman* does not bar claims because "[w]hat [plaintiffs] have raised is clearly a challenge to the operation of a supplemental statutory mechanism for seeking to coerce or encourage the payment of their debts—not any actual feature of the judgments against them or the debts in and of themselves.").

In a case analogous to this one, the Sixth Circuit held that Rooker-Feldman did not bar the appellant's § 1983 claim challenging the public defender office's practice of failing to ask for an

indigency hearing as a prerequisite for incarceration for unpaid fines. *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 606 (6th Cir. 2007). The Court wrote, "[t]he Rooker-Feldman doctrine has no bearing on [the appellant's] claims because he does not allege that he was deprived of his constitutional rights by the state-court judgment, but rather by the Public Defender's conduct in failing to ask for an indigency hearing as a prerequisite to his incarceration." *Id.* That the claims happened to have some connection to state court judgments did not limit the federal court's jurisdiction.

In a case about illegal debt collection, the Second Circuit recognized that *Rooker-Feldman* posed no obstacle to plaintiffs' challenge to defendants' scheme to obtain default judgments unlawfully. *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 94-95 (2d Cir. 2015). The claims "speak not to the propriety of the state court judgments," the court explained, "but to the fraudulent course of conduct that defendants pursued in obtaining such judgments." *Id*. Here, too, Plaintiff objects to the scheme by which the City and JCS collected fines, not the merits of their underlying state judgments.

Putting aside the substance of Plaintiff's claims, *Rooker-Feldman* cannot preclude any claim on the basis that it seeks to overturn an order commuting fines to jail time, because no such orders exist. Judge Hayes admitted that when he and other municipal court judges converted fines and costs to jail time and incarcerating traffic and misdemeanor defendants, they failed to enter a signed order indicating the nature of the court's ruling, the number of days the defendant would spend in jail, or the amount owed.[200] Instead, a clerk would enter that information on a document referred to as a "jail transcript," which was presented to the jail upon receiving the inmate from court.[201]

[200] Counter-Statement ¶ 124.
[201] Counter-Statement ¶ 124.

Likewise, Plaintiff does not (and could not) seek to overturn probation revocation orders, because the Municipal Court simply did not issue any. JCS describes the orders that appear on the bottom half of every Petition for Revocation of Probation as "revocation order[s]" (Doc. 260 at 43), and repeatedly refers to the proceedings at which those orders were signed as "revocation hearing[s]" (*e.g.*, *id*. at 34, 36, 41, 42, 43, 44, 45, 48, 51, 53). But it is plain from the face of those documents that they were not revocation orders and these were not revocation hearings. The orders stated that "a hearing should be held to determine whether or not the Defendant-Probationer is in violation of the terms of his probation as charged in said Petition." Doc. 163-24 at 2. To that end, the orders contained two directives: first, that "a Revocation Hearing be set . . . to determine if the Defendant-Probationer has violated the terms of his probation and as a result should, therefore, have the period of his probationary sentence revoked and the original sentence of the Court imposed"; and second, that the Petition "and all other relevant documents in the case be served upon the above named Defendant."[202] *Id*. Nowhere does the order in fact revoke probation. Because there were no revocation orders issued by the Montgomery Municipal Court, Plaintiff's challenges to the *procedures* used by JCS to seek revocation cannot be barred by *Rooker-Feldman*.

Nor can Defendants succeed on the argument that Plaintiff seeks to overturn probation orders, because those orders are not final judgments. In Alabama, probation orders are non-final conditions that may be modified, as needed, to address changed circumstances of a defendant's state case. *Rheuark v. State*, 625 So. 2d 1206, 1206–07 (Ala. Crim. App. 1993) (probation order not final or appealable); Ala. R. Crim. P. 27.2 (court may modify probation conditions). As the Supreme Court has made clear, *Rooker–Feldman* only precludes "lower federal courts . . . from

[202] As explained in the footnote at the end of Section III, neither the scheduling of the actual revocation hearing nor the service of the relevant documents ever happened. Instead, an arrest warrant was issued.

exercising appellate jurisdiction over *final* state-court judgments." *Lance*, 546 U.S. at 464 (2006) (emphasis added). It does not bar a federal court from considering claims related to a state court order, like the probation conditions here, that "is not a final or conclusive judgment on the merits." *David Vincent, Inc. v. Broward Cty., Fla.*, 200 F.3d 1325, 1332 (11th Cir. 2000).[203]

Alternatively, if Defendants are correct that probation was revoked, then the probation orders in the background of Plaintiff's claims no longer exist, and thus cannot pose an obstacle under *Rooker-Feldman*. *Rooker-Feldman* does not bar a plaintiff's challenge to a claim simply because it touches on the topic of a non-final judgment "effectively reversed by a superseding order." *Green v. Mattingly*, 585 F.3d 97, 103 (2d Cir. 2009). Where a state court vacates its own judgment, "the basis for the district court's dismissal under *Rooker–Feldman* no longer exists." *Richardson v. Koch Law Firm, P.C.*, 768 F.3d 732, 734 (7th Cir. 2014).

***2. Plaintiff had no reasonable opportunity to raise his challenges in state court***

Even if any of Plaintiff's claims could be construed to challenge the validity of a final Municipal Court order, *Rooker-Feldman* does not bar them because plaintiffs did not have a reasonable opportunity to raise these challenges through the state court system. *Rooker-Feldman* "appl[ies] only where the plaintiff had a reasonable opportunity to raise his federal claim in state proceedings. . . . [A]n issue that a plaintiff had no reasonable opportunity to raise cannot properly be regarded as part of the state case." *Wood v. Orange Cty.*, 715 F.2d 1543, 1547 (11th Cir. 1983); *see also Target Media Partners*, 881 F.3d at 1286-87; *Dale v. Moore*, 121 F.3d 624, 626 (11th Cir. 1997); *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir. 1996). A party might have a *theoretical*

[203] In *Thurman*, plaintiffs argued that the probation orders at issue were not "final judgments subject to *Rooker-Feldman*" because they were not valid. 760 F. App'x at 736. *Thurman* did not consider the possibility that the probation orders at issue there might be valid but non-final, and therefore beyond the narrow scope of *Rooker-Feldman*.

opportunity to raise a claim in state court but, if that opportunity was not reasonably accessible, *Rooker-Feldman* will not pose a bar to his federal case. *Wood*, 715 F.2d at 1547.

For example, in *Biddulph v. Mortham*, the Eleventh Circuit held that because the Florida Supreme Court's authority to grant writs of mandamus permitted review of only a narrow set of cases, "the state mandamus proceeding did not afford [the appellant] the kind of 'reasonable opportunity' to raise his federal claim that would preclude our independent review of that claim." 89 F.3d 1491, 1495 n.1 (11th Cir. 1996); *see also Cox v. Alabama State Bar*, 392 F. Supp. 2d 1295, 1300 (M.D. Ala. 2005) ("Because the Alabama Supreme Court is strictly limited in its authority to grant a writ of mandamus, the state mandamus proceeding did not afford [the plaintiff] the kind of 'reasonable opportunity' to litigate his claim that would preclude this Court's exercise of jurisdiction pursuant to the *Rooker–Feldman* doctrine."). *Wood* held that *Rooker-Feldman* did not strip the federal courts of jurisdiction to hear a claim regarding state judgment that the plaintiffs did not learn about until after the deadline to notice an appeal. 715 F.2d at 1547. Most recently, *Target Media Partners* held that the Supreme Court of Alabama's decision in a relevant state case "could not reasonably—and indeed could not possibly—have considered language in letters sent well after the conclusion of the trial and . . . state court appeal." 881 F.3d at 1287. As a result, *Rooker-Feldman* was not applicable. *Id*.

This exception to *Rooker-Feldman* "typically" applies where "either some action taken by the state court or state court procedures in place have formed the barriers that the litigants are incapable of overcoming in order to present certain claims to the state court." *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 558 (7th Cir. 1999), *accord Seminole Tribe of Fla. v. Fla., Dep't of Revenue*, 917 F. Supp. 2d 1255, 1259 (S.D. Fla. 2013), *aff'd on other grounds*, 750 F.3d 1238 (11th Cir. 2014). Where a plaintiff "[n]ever had a realistic opportunity to raise his federal grounds

in state court," a federal court should not refuse the case. *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 565 (7th Cir. 1986); *see also Simes v. Huckabee*, 354 F.3d 823, 827 (8th Cir. 2004) (*Rooker-Feldman* "may be inapplicable where federal plaintiffs have not been given a reasonable opportunity to raise their federal claims in the state proceedings"); *Sheehan v. Marr*, 207 F.3d 35, 41 (1st Cir. 2000) (*Rooker-Feldman* did not bar claims because "the state's statutory framework for involuntary retirement was inadequately designed to serve as a forum for redressing the disability discrimination allegedly motivating defendants' failure to accommodate [appellant]'s disability and initiation of the retirement process"); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1472 (9th Cir. 1985), *judgment vacated on other grounds*, 477 U.S. 902 (1986) (*Rooker-Feldman* inapplicable where "the complaining party did not have full and fair opportunity to litigate a claim in state court or where the state court demonstrated inability or unwillingness to protect federal rights").

Here, Carter and similarly situated probationers do not challenge the underlying Municipal Court orders that ushered them into JCS's enforcement system. But even if these challenges were "inextricably intertwined" with the judgments, Carter and other members of the prospective class did not have a "reasonable opportunity" to bring these claims in state proceedings for three reasons.

First, the probation orders were not appealable. *Rheuark*, 625 So. 2d at 1206–07 (probation order not appealable). As a result, Plaintiff had no "reasonable opportunity" to bring his claims in state court. *Rooker-Feldman* has no application where a state court order is unappealable. *See Biddulph*, 89 F.3d at 1495 n.1 *Green*, 585 F.3d at 103.[204]

204 In Thurman, "[p]laintiffs d[id] not assert that they did not have a chance to present their claims in state court or that their claims could not have been decided by a state court." 760 Fed. App'x. As a result, the opinion did not address whether the orders were, in fact, appealable as a matter of law. The answer is clearly no.

Second, the Montgomery Municipal Court requires appellants to post a $500.00 bond to appeal each commutation of fines with jail time.[205] Probationers like Carter with multiple cases would be required, then, to post thousands of dollars to have their appeals heard.[206] The court offered no meaningful opportunity for a bond waiver.[207] For any probationer funneled into JCS as a result of her inability to pay court debt—that is, Carter and any member of a putative class—that cost poses an insurmountable barrier to appeal.

Third, the illegal enforcement efforts occurred after the underlying state court judgments that pulled Carter and Class members into the probation system. After the state court order was issued, JCS alone determined how much money each probationer would be required to pay each month and how often the person had to report, increasing the frequency of reporting if a probationer did not bring enough money.[208] After the order was issued, JCS imposed additional conditions of probation nowhere described in the written probationer order.[209] As a result, the state case "could not have reasonably—and indeed could not possibly—have considered" claims arising from those later developments. *Target Media Partners*, 881 F.3d at 1287. *Rooker-Feldman*, then, poses no jurisdictional obstacle. *Id*.

## IX. Plaintiff's claims are not barred by the Statute of Limitations.

Plaintiff's section 1983 claims against JCS are not barred by the statute of limitations. Each of the claims is part of Defendants' larger policy and practice of using supervised probation to collect fines and fees from people without the means to pay them quickly. This scheme involved a number of constitutional violations that jointly contributed to the harms that Plaintiff and the

[205] Counter-Statemetn ¶ 133.
[206] *Id*.
[207] *Id*.
[208] Counter-Statement ¶ 80.
[209] Counter-Statement ¶ 74.

putative class members suffered. As such, all of Carter's claims either accrued during the applicable statute of limitations as a result of his January 2014 arrest and detention, or were directly linked to the timely claims such that they constituted "continuing violations" of the law.

The applicable statute of limitations in § 1983 actions is "the forum state's general or residual statute of limitations for personal injury actions." *Lufkin v. McCallum*, 956 F.2d 1104, 1105 (11th Cir. 1992). In Alabama, the statute of limitations for personal injury actions is two years. *West v. Warden, Comm'r, Ala. DOC*, 869 F.3d 1289, 1298 (11th Cir. 2017). Because Plaintiff filed this action on August 3, 2015, only claims that accrued by August 3, 2013 are timely. The two-year statute of limitations does not begin to run, however, until "the plaintiffs know or should know (1) that they have suffered the injury that forms the basis of their complaint and (2) who has inflicted the injury." *Smith v. Shorstein*, 217 Fed. Appx. 877, 881 (11th Cir. 2007) (citations omitted). The defendant bears the burden of proving the affirmative defense of statute of limitations, "including when his opponent's causes of action accrued." *Wainwright v. Thomas*, No. 2:14-CV-317-WKW, 2014 WL 4925878, at *5 (M.D. Ala. Sept. 30, 2014).

Even if a claim is filed more than two years after the plaintiff knows or should know that he has suffered an injury and who caused it, the court can still find the claim timely under the "continuing violation" doctrine. *See Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003). The continuing violation doctrine "permits a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period." *Robinson v. U.S.*, 327 Fed. Appx. 816, 818 (11th Cir. 2007). For claims involving continuing injury, the cause of action does not accrue until the time that the unlawful conduct ends. *Id.* "The critical distinction in continuing violation analysis…is whether the plaintiff[] complain[s] of the present consequence of a one time violation, which does not extend the limitations period, or the continuation of a violation into the

present, which does." *Lovett*, 327 F.3d at 1183. Thus, claims are within the statute of limitations under the continuing violation theory where "subsequent actions of the defendants are linked together with and follow directly from pre-limitations acts." *Deepwells Estates Inc. v. Incorporated Village of Head of Harbor*, 973 F. Supp. 338, 346 (E.D.N.Y. 1997).

"Two different standards have emerged for discerning ongoing or continuing violations in federal civil rights actions: the 'series-of-related-acts' standard . . . and the 'systematic policy of discrimination' standard." *Beasley v Ala. State Univ.,* 966 F. Supp. 1117, 1129 (M.D. Ala. 1997) (finding that the plaintiff's discrimination claims constituted "continuing violations" where it was alleged that the school had a "pervasive policy" to "disfavor and direct insufficient attention, funds and resources to women's sports"). The series-of-related-acts standard extends a statute of limitations period where discrete acts are "directed against the individual plaintiff" and "at least one event must fall within the limits period." *Id.* To extend the statute of limitations under the systematic policy of discrimination standard, the plaintiff "must establish that the unconstitutional or illegal act was part of a 'standard operating procedure,' a fixed and continuing practice." *Id.* Under either standard, Plaintiff's claims are timely as continuing violations.

*Briggs v. Montgomery* provides useful guidance for applying the continuing violation standards to section 1983 cases. No. CV-18-02684-PHX-EJM, 2019 WL 2515950 (D. Ariz. June 18, 2019). In *Briggs*, the plaintiffs brought a class action alleging that their Fourth and Fourteenth Amendment rights were violated by the defendants' joint operation of a "possession of marijuana diversion program that penalizes the poor because of their poverty." *Id.* at *1. The plaintiffs challenged several aspects of the program's operation, including the additional charges that were levied against participants who took part in the program as an alternative to criminal prosecution. *Id.* The defendants asserted that the claims were time-barred and argued that the statute of

limitations began to run on the date that Briggs entered the diversion program, but the court rejected the challenge under both of the applicable continuing violation standards. *Id.* at *22.

First, the court in *Briggs* determined that the plaintiff had pointed to a "series of related acts," specifically multiple drug tests that he was subject to only because he was unable to pay the program fee, meeting the series-of-related-act standard for a continuing violation. *Id.* Second, the court also found that the plaintiff had alleged "a policy, practice, and/or custom that discriminates against the poor," which constituted a continuing violation under the "systemic policy of discrimination" standard. *Id.* Significantly, the court pointed to the fact that the case was brought as a class action "on behalf of a class of others similarly situated" as evidence that the plaintiff were challenging a widespread practice. *Id.* Finding that the defendant's conduct constituted a continuing violation under either of the two standards, the court determined that "the limitations clock does not begin to tick until the invidious conduct ends." *Id.*

Here, JCS's actions constituted a pattern and practice of continuing violations as part of its broader scheme to pressure probationers into paying fines and fees that they could not afford. JCS and the City used a number of tactics to further this policy, all of which operated together to intimidate and extort money from indigent citizens. Even if some individual violations occurred prior August 3, 2013, they are still timely because they are "part of a pattern or continuing practice out of which the timely-filed incident arose." *Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 800 (11th Cir. 1988) (citing *United Air Lines v. Evans*, 431 U.S. 553 (1977)). *See also Dunn v. Dunn*, 219 F. Supp. 3d 1100 (M.D. Ala. 2016) (applying continuing violations doctrine where plaintiffs "brought suit to terminate an ongoing systemic pattern and practice" of failing to provide prisoners adequate healthcare); *Hutchinson v. Cunningham*, No. 2:17-cv-185-WKW-GMB, 2018 WL 1474906, at *9 (M.D. Ala. Jan. 23, 2018) (finding that continuing violations doctrine applied

to prisoner's Eighth Amendment claims based on complaints that defendants "violated his rights each day they acquiesced in his solitary confinement"); *Deepwells Estates Inc. v. Incorporated Village of Head of Harbor*, 973 F. Supp. 338 (E.D.N.Y. 1997) **(**finding that three separate takings actions by the defendant constituted continuing violations because they "may constitute an over-arching policy of the Village").

The continuing violation doctrine is especially appropriate in section 1983 actions alleging municipal liability claims under *Monell*. By necessity, *Monell* claims require a plaintiff to allege "execution of a government's *policy* or *custom*…[that] inflicts the injury." *Monell v. Dep't of Soc. Servs. of NY*, 436 U.S. 658, 694 (1978) (emphasis added). As the Ninth Circuit has explained, it is tautological that the continuing violation doctrine applies to *Monell* actions because a plaintiff *must* show a continuing violation in order to allege a governmental policy or custom. *Gutowsky v. Cnty of Placer*, 108 F.3d 256, 259 (9th Cir. 1997). "If the continuing violations doctrine were inapplicable to *Monell* actions, it is difficult to ascertain exactly when such claims would accrue." *Id. See also Briggs*, 2019 WL 2515950 (applying this logic to find that plaintiff's Fourth and Fourteenth Amendment claims established a continuing violation and were not barred by the statute of limitations).

The commutation of Carter's fines to days in jail in January 2014 occurred within the two-year statute of limitations and was the direct result of JCS's prior actions, as detailed above. Because JCS can be held liable for harms resulting from Plaintiff's wrongful incarceration, Carter's due process-equal protection claim against JCS related to that jailing is unquestionably timely.

The remainder of Plaintiff's claims against JCS are timely (even if they accrued before the two-year statute of limitations) because they directly relate to Plaintiff's incarceration under

Defendants' extortionate scheme. Thus, the continuing violations doctrine makes these prior claims timely because they are part of the same "pattern or continuing practice" that resulted in his January 2014 arrest and detainment. Roberts, 835 F.2d at 800 (citing United Air Lines v. Evans, 431 U.S. 553 (1977)). This includes Plaintiff's Bearden claim related to JCS's probation system, as well as Plaintiff's procedural due process claim. Because these claims are part and parcel of the Defendants' systematic policy and practice of depriving indigent citizens of their constitutional rights, they are also timely.

**CONCLUSION**

For the foregoing reasons, JCS' motion for summary judgment on Counts 2, 10, 12, and 14 should be denied.

RESPECTFULLY SUBMITTED,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 20th day of February, 2020, I electronically filed the foregoing PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE [PROPOSED] THIRD AMENDED COMPLAINT with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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