UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

GEORGE WEST and BRADY FULLER, Plaintiffs, v. CITY OF SANTA FE, TEXAS and CITY OF HITCHCOCK, TEXAS; Defendants.	Civil Action No. 16-cv-309

PLAINTIFFS' OPPOSITION TO
CITY OF HITCHCOCK'S MOTION TO DISMISS

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NATURE AND STAGE OF PROCEEDING

This case concerns a modern-day debtors' prison operated by the Cities of Hitchcock and Santa Fe under policies that prioritize revenue over the fair administration of justice. When Plaintiff George West appeared in Santa Fe for a hearing ordered by this Court, Hitchcock jailed him solely for failure to pay his fines, without producing him for a hearing or appointing counsel for his defense. Mr. West has asserted damages claims against Hitchcock, and Hitchcock has moved to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

ISSUES TO BE RULED UPON BY THE COURT

Hitchcock has moved to dismiss the complaint for lack of jurisdiction and failure to state a claim. The standard of review for each issue is Rule 8 of the Federal Rules of Civil Procedure, which requires only that Plaintiffs state "simply, concisely, and directly events that, they allege[], entitle[] them to damages from the city." *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (per curiam).

SUMMARY OF ARGUMENT

There is no deficiency in Mr. West's pleadings against Hitchcock. Rooker-Feldman abstention does not bar Mr. West's claims, because his claims do not seek to overturn a state-court judgment. Instead, Mr. West seeks damages because Hitchcock jailed him against his will in violation of his constitutional rights—and he never knowingly, intelligently, or voluntarily waived those rights. And Mr. West has alleged violation of his constitutional rights, resulting from practices so widespread and well-settled that they constitute Hitchcock policy.

ARGUMENT

I. Rooker-Feldman Does Not Bar Mr. West's Claims, Which Concern Execution of a State Court Judgment

Mr. West's claims are not barred by the Rooker-Feldman doctrine, which bars claims seeking to overturn state-court judgments. *Skinner v. Switzer*, 562 U.S. 521, 531–32 (2011). Mr. West does not seek to overturn the state-court judgments against him, which found him guilty and sentenced him to a fine. Instead, Mr. West claims that Hitchcock "violated [his] constitutional rights in the effort to enforce the . . . judgment" by jailing him without a hearing, a claim which is not barred under the Rooker-Feldman doctrine. *Mosley v. Bowie Cnty.*, 275 F. App'x 327, 329 (5th Cir. 2008) (per curiam).

Rooker-Feldman occupies a "narrow ground," and the Supreme Court has applied it only twice: in its two namesake cases, sixty years apart. *Skinner*, 562 U.S. at 531 (citing *Rooker v. Fidelity Trust Co.*, 363 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)). In both cases, the plaintiff lost in state court, complained of an injury caused by the state-court judgment, and asked a federal court to overturn the state-court judgment. *Id.* The Supreme Court held that there was a jurisdictional bar to hearing such cases because 28 U.S.C. § 1257 vests authority to review state-court judgments in the Supreme Court alone. *Id.* at 532. The Supreme Court has taken pains to explain that cases falling outside this fact pattern are not barred by Rooker-Feldman. *Id.* at 531–32. The Court has emphasized, repeatedly, that the doctrine bars only those cases "inviting district court review and rejection of the state court's judgments." *Id.* at 531 (quoting *Exxon Mobil Corp. v. Saudi Basic Inds. Corp.*, 544 U.S.

280, 284 (2005)). *Cf. Houston v. Venneta Queen*, 606 F. App'x 725, 730–31 (5th Cir. 2015) (holding claims barred by Rooker-Feldman because the only relief plaintiff sought was setting aside the state court judgment); *Morris v. Am. Home Mortg. Servicing, Inc.*, 443 F. App'x 22, 24 (5th Cir. 2011) (per curiam) (same).

Critically, Rooker-Feldman does not preclude claims about the constitutionality of rules that govern issuance of judgments, or government practices when enforcing judgments. As the Supreme Court has specified: "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." *Skinner*, 562 U.S. at 532. Nor does Rooker-Feldman "prevent review of [] discretionary executive action taken in enforcing state court judgments." *Brown v. Taylor*, 677 F. App'x 924, 928 (5th Cir. 2017). *Accord Land & Bay Gauging, L.L.C. v. Shor*, 623 F. App'x 674, 680–81 (5th Cir. 2015) (holding Rooker-Feldman does not bar § 1983 conspiracy claims against opposing parties and trial judge in state-court proceeding); *Weaver v. Tex. Capital Bank N.A.*, 660 F.3d 900, 904 (5th Cir. 2011) (per curiam) (holding Rooker-Feldman does not bar declaratory relief describing effect of state court judgment).

The Fifth Circuit has specifically held that Rooker-Feldman does not bar constitutional challenges, like Mr. West's challenge, to the way the government enforces a judgment to collect debt or an order to jail someone. In *Mosely v. Bowie County*, the Circuit held that Rooker-Feldman did not bar constitutional challenges to the manner in which the government collected debt under a child support order. 275 F. App'x at 329. And in *Brown v. Taylor*, the Circuit held that Rooker-Feldman did not bar constitutional

challenges to the manner in which the government jailed the plaintiff under an involuntary commitment order. 677 F. App'x at 927–28. The same principles dictate that Rooker-Feldman does not bar Mr. West's claims against Hitchcock.

Mr. West's claims do not seek to overturn the state-court judgments issued against him. He does not contest his guilt or his sentence to a fine. Instead, he challenges the constitutionality of Hitchcock municipal policy for executing the judgments against him: the policy of arresting and jailing people, without holding an ability to pay hearing, solely because they miss payments toward their fines. This Court has jurisdiction to hear such claims, which are "addressed to the validity of the [Hitchcock] rule itself," *Exxon Mobil Corp.*, 544 U.S. at 286–87 (quoting *Feldman*, 460 U.S. at 486), and concern "discretionary executive action taken in enforcing state court judgments," *Brown*, 677 F. App'x at 928. Nothing in the underlying judgments against Mr. West required that he be summarily jailed for failure to pay. There is no jurisdictional bar to Mr. West's challenge to the unconstitutional manner in which Hitchcock executed the judgments against him.

II. Mr. West Has Alleged Standing to Seek Relief from Hitchcock

Mr. West alleges that Hitchcock jailed him against his will in violation of his right to an ability to pay hearing and his right to counsel. He has pleaded standing by alleging (1) an injury in fact, (2) a causal connection between the injury and Hitchcock's unlawful conduct, and (3) a likelihood that the injury will be redressed by a favorable ruling. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

A. Mr. West's Incarceration Was An Injury in Fact

Mr. West has a "personal stake" in the outcome of this case, which is the focus of the injury-in-fact requirement. *Id.* All that is required to plead injury in fact is to allege injury that is actual, not hypothetical; and injury that is concrete and particularized, not abstract. *See id.* Mr. West alleges that Hitchcock summarily jailed him for failure to pay his fines. This injury is both actual and concrete. "[I]ncarceration . . . constitutes a concrete injury," *Bond v. United States*, 564 U.S. 211, 217 (2011), as does deprivation of basic sustenance, *see Brown v. Plata*, 563 U.S. 493, 510–11 (2011) (holding that "courts have a responsibility" to remedy such injuries). Mr. West has a personal stake in remedying the fact that he was unconstitutionally jailed.

Hitchcock contends that Mr. West did not suffer an injury because he chose to be locked in jail and waived his constitutional rights. But Mr. West did not agree to waive any rights. The allegations in the complaint indicate that, despite frantic efforts by his attorneys, Mr. West was taken to jail against his will. Am. Compl. ¶¶ 24–34. Hitchcock's own exhibits demonstrate that Mr. West did not sign any piece of paper until after Hitchcock had jailed him on October 11. Hitchcock Mot. to Dismiss (hereinafter "Mot. to Dismiss") Ex. 8, ECF. No 54-8. And even if Mr. West had consensually signed that piece of paper before Hitchcock locked him up, the paper does not purport to waive his right to an ability to pay hearing or his right to appointed counsel. *Id.*

Despite these allegations, Hitchcock argues that Mr. West waived his rights by signing a piece of paper. The Court should reject this argument for two reasons. As an initial matter, Hitchcock is shoehorning an affirmative defense into the standing

framework, inappropriately attempting to shift the burden from themselves back to Mr. West. *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 614 F. App'x 146, 154 (5th Cir. 2015) (holding it is defendant's burden to demonstrate waiver). *Cf. Leatherman v. Tarrant Cnty.*, 507 U.S. 163, 167–68 (1993) (overturning Fifth Circuit precedent that required heightened pleading from § 1983 plaintiffs to overcome defenses). Mr. West has already satisfied his burden to allege standing in this case. The Court should not require Mr. West to prove even more by negating evidence that Hitchcock has filed, in the context of a motion that is limited to the pleadings, to dispute Mr. West's factual allegations. Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1277 (3d ed. 2017) (warning that "assertion of an affirmative defense by a motion to dismiss under Rule 12 might deprive the plaintiff of an adequate opportunity to present arguments rebutting the defense"). The proper way to resolve this factual dispute is for both parties to file evidence about the purported waiver on a motion for summary judgment, where Defendants would be forced to carry their burden of presenting admissible evidence legally sufficient to sustain a favorable finding on each element of waiver. *Serna*, 614 F. App'x 154 (holding defendant failed to meet its burden to establish waiver); Wright & Miller § 1277 n.4 ("The Fifth Circuit takes the view that an affirmative defense can be raised by a summary judgment motion when that is the first response to the plaintiff's complaint," citing *United States v. Burzynski Cancer Research Inst.*, 819 F.2d 1301, 1307 (5th Cir. 1987)).

Moreover, even if the Court chose to consider Hitchcock's evidence by way of judicial notice,[1] the purported waiver is dated *after* Hitchcock jailed Mr. West against his will. There is no way this piece of paper, standing alone, meets the high standard for waiver of a constitutional right. Effective waiver of a constitutional right requires "the intentional relinquishment or abandonment of a known right or privilege." *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quotation omitted). *See Brady v. United States*, 397 U.S. 742, 748 (1970) (holding waiver requires "sufficient awareness of the relevant circumstances and likely consequences"). "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Coll. Savings Bank*, 527 U.S. at 682 (quotation omitted). *Accord McCamey v. Epps*, 658 F.3d 491, 498 (5th Cir. 2011) ("The Supreme Court has long viewed with suspicion defendants' waivers of their constitutional rights.").

Rather than relying on a signed piece of paper alone, courts must "search the record for a basis upon which to conclude whether [the defendant] had actual knowledge of the existence of the right or privilege, full understanding of its meaning, and *clear comprehension of the consequence of the waiver.*" *United States v. Newell*, 315 F.3d 510, 519 (5th Cir. 2002). *Accord In re Gault*, 387 U.S. 1, 41–42 (1967) (holding waiver of Sixth Amendment right to counsel requires express advisement of the right, confrontation

[1] Judicial notice of court records is appropriate only for "judicial action" and other matters "not subject to reasonable dispute." *Sepulvado v. Jindal*, 739 F.3d 716, 719 n.3 (5th Cir. 2013) (per curiam). Defendants' own citations in their initial motion specify many limitations on judicial notice of court records, the most relevant one being that it is disfavored for facts that are "disputed by the parties." *Papasan v. Allain*, 478 U.S. 265, 269 n.1 (1986). Of course, this purported waiver is in dispute.

with a specific decision, and intentional abandonment of the right); *United States v. Mesquiti*, 854 F.3d 267, 272 (5th Cir. 2017) (requiring understanding of "the consequences of the proceedings, and the practical meaning of the right he is waiving"). The court must make a "case-specific inquiry" into the circumstances surrounding the waiver. *McCamey v. Epps*, 658 F.3d 491, 500 (5th Cir. 2011) (quotation omitted).

The Fifth Circuit takes these requirements seriously. The Circuit has held that waivers of constitutional rights are invalid where, for example, the district court warned a defendant that self-representation was "dangerous," *United States v. Jones*, 421 F.3d 359, (5th Cir. 2005); or "puts you in an awkward position," *United States v. Davis*, 269 F.3d 514, 517 n.1 (5th Cir. 2001); without further explaining the specific disadvantages of waiving the right to counsel. More importantly, the Fifth Circuit has held that there can be no valid waiver of a constitutional right where the defendant was never informed of his rights in the first place. *Winters v. Cook*, 466 F.2d 1393, 1395–96 (5th Cir. 1972) ("Winters had no idea that he could object to the jury composition. Before a waiver can be effective it must be knowingly given. Since Winters had not been informed of the right, his waiver did not encompass its relinquishment.").

In this case, the record does not support any of the three requirements for valid waiver of a constitutional right. Mr. West was involuntarily jailed *before* ever signing a piece of paper. Moreover, the waiver language in Hitchcock's exhibit makes no reference to the right to an ability to pay hearing or the right to appointed counsel. All Mr. West knew was that, even if he retained pro bono counsel who had demonstrated his poverty with written documentation, he would be continually rearrested until he paid off his debt

by sitting in jail. Hitchcock cannot cite any portion of the "record for a basis upon which to conclude [that Mr. West] had actual knowledge of the existence of the right or privilege, full understanding of its meaning, and *clear comprehension of the consequence of the waiver.*" *Newell*, 315 F.3d at 519.

Mr. West did not waive his constitutional rights. His incarceration by the City of Hitchcock was an injury in fact.

B. Mr. West's Incarceration is Fairly Traceable to the City of Hitchcock

Mr. West has alleged a direct causal connection between his injuries—jail terms under unconstitutional conditions—and Hitchcock policy. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 486–87 (5th Cir. 2016). Mr. West need not show that Hitchcock's actions were the sole contributing factor, or even the last step in the causal chain, resulting in his confinement. *See id.* at 487; *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996) (affirming causation where defendant "*contributes*" to plaintiff's injury). Instead, Mr. West has standing because his injury is "fairly traceable" to Hitchcock's actions. *See Gee*, 837 F.3d at 486–87. Hitchcock implements a Debtors' Prison Policy which directly caused Mr. West to be unconstitutionally jailed. Am. Compl. ¶¶ 170–76.

Hitchcock's argument on causation, that the burden was on Mr. West to avail himself of a nonexistent procedure for asserting inability to pay, is flat wrong. It has been the law for decades that courts must ask about a defendant's ability to pay before jailing him for failure to pay. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). Courts have a constitutional obligation to ask about ability to pay before imposing jail in every single

case. *Id.* Hitchcock's apparent confusion about this point proves Mr. West's allegations that Hitchcock has a municipal policy of ignoring its constitutional obligations under *Bearden*.

Finally, though Mr. West did not choose to be jailed, he would have standing even if he had contributed to his own injury. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (affirming causation where plaintiff "fully expected" defendants' unlawful actions); Wright & Miller, 13A Fed. Prac. & Proc. § 3531.5 & nn. 62–63 ("The voluntary choice to suffer the injury that conferred standing was sufficient. Standing also has been permitted to plaintiffs who could avoid an injury with little effort." (footnotes omitted)). The question is simply whether Mr. West has pleaded facts making his injury fairly traceable to Hitchcock. Accepting his allegations as true, there can be no doubt that Mr. West's injuries are traceable, in substantial part, to Hitchcock's unconstitutional policy. *Accord Sierra Club v. Cedar Point Oil Co.*, 73 F.3d at 558 (affirming causation where defendant "*contributes*" to plaintiff's injury).

C. Relief from this Court Will Likely Redress Mr. West's Injuries

Hitchcock does not dispute that relief from this Court would likely redress Mr. West's injuries. Damages—even nominal damages—will vindicate Mr. West's constitutional rights. *See Williams v. Kaufman Cnty.*, 352 F.3d 994, 1014 (5th Cir. 2003) (holding any violation of constitutional rights is actionable for nominal damages).

Altogether, Mr. West's allegations provide ample support for an inference that he has suffered injury in fact, fairly traceable to Hitchcock and redressable by this Court.

II. Mr. West Has Stated a Claim Against the City of Hitchcock

A municipality is liable under § 1983 when its "official policy" causes a constitutional violation. *Woodard v. Andrus*, 419 F.3d 348, 352–54 (5th Cir. 2005) (holding plaintiff stated a claim against municipality for persistently charging excessive court fees). "Official policy" can result from action or inaction by a municipal policymaker: as described below, Plaintiffs have alleged that Hitchcock's policymakers knew of and acquiesced in customary unconstitutional practices, which incurs liability for the City of Hitchcock.

A. The Hitchcock Police Chief is the City Policymaker for Jail Operations, and the Municipal Judge is the City Policymaker for Municipal Court Administrative Policies

The Hitchcock Police Chief is the City's policymaker with respect to jail operations. City of Hitchcock, Texas Code of Ordinances § 33.01 (granting police chief power to "promulgate all orders, rules and regulations for the government of the police force").[2] The Hitchcock Municipal Judge is also the City's policymaker with respect to Municipal Court administrative policies. Tex. Gov't Code § 30.00023(a) (granting municipal judges power to make and enforce all rules of practice and procedure); Charter of City of Hitchcock, Texas, Art. X, §§ 5, 8 (granting municipal judge "full power" cumulative of powers granted by state law).

[2] Hitchcock has not disputed that the Police Chief is the Hitchcock policymaker for jail operations. Should Hitchcock raise such a dispute in its reply, Plaintiffs request permission to file a surreply.

Contrary to Hitchcock's argument, the City is responsible for actions that the Municipal Judge takes in an administrative capacity. The Fifth Circuit recently upheld a ruling that judges can incur municipal liability for administrative actions that result in municipal policies. *ODonnell v. Harris Cnty.*, 882 F.3d 528, No. 17-20333, slip op. at 7–8 (5th Cir. Feb. 14, 2018). That ruling explicitly distinguished *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992), the primary case on which Hitchcock relies. *ODonnell*, slip op. at 7–8. The key distinction is that, while *Johnson* held that judges cannot incur municipal liability for acts in their judicial capacity, they can incur municipal liability for establishing policies in their administrative capacity. *Id.* In fact, even if a judge does not adopt an explicit administrative policy, the judge's acquiescence in widespread and well-settled administrative practices by court staff results in a custom that incurs liability under *Monell*. *Id.* (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)). The Court should reject Hitchcock's summary argument[3] that municipal judges cannot serve as municipal policymakers.

[3] Hitchcock's motion did not contend that Texas municipal judges fail as municipal policymakers under the test articulated in *McMillian v. Monroe Cnty.*, 520 U.S. 781 (1997), nor should they—the grant of municipal policymaking authority under Tex. Gov't Code § 30.00023(a) is clear enough. Mr. West notes briefly that municipal judges qualify as municipal policymakers under many *McMillian* factors: Hitchcock finances the municipal court, including the municipal jduge's salary. City of Hitchcock, Texas Charter Art. X, § 3. The municipal judge is appointed by the City. *Id.* And municipal judges' jurisdiction is limited to their municipality. Tex. Gov't Code § 29.003. Should Hitchcock raise a *McMillian* argument in its reply, Plaintiffs request the opportunity to brief this argument in a surreply.

B. The City of Hitchcock is Liable for its Debtors Prison Policy

Hitchcock is liable for its Debtors' Prison Policy, under which the Police Chief jails people for failure to pay without a hearing or a lawyer, and the Municipal Judge issues capias pro fine warrants without holding or ordering an ability to pay hearing, knowing that the defendant will be unconstitutionally jailed as a result. Hitchcock is liable for this policy as a "custom"[4]: the "persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Lawson v. Dallas Cnty.*, 286 F.3d 257, 263 (5th Cir. 2002) (quotation omitted).

The amended complaint contains ample allegations supporting the inference that the Debtors' Prison Policy is a Hitchcock "custom." Am. Compl. ¶¶ 170–76. Mr. West has alleged that the Municipal Court issues capias pro fine warrants "automatically" without holding or scheduling an ability to pay hearing. *Id.* ¶¶ 171–72. And Hitchcock law enforcement executes these warrants by jailing people without a hearing, a practice which the Marshal literally described as "how we do it in Galveston County." *Id.* ¶¶ 170, 173–74.

[4] Mr. West has not had the benefit of discovery against the City of Hitchcock. Discovery may reveal that the Debtors' Prison Policy was in fact written and explicitly promulgated by the Municipal Judge (by, for example, instructing clerks to issue capias pro fine warrants automatically upon a missed payment) or the Police Chief (by, for example, instructing officers to execute capias pro fine warrants by jailing people 24 hours for every $100 of fines they owe).

In addition to factual allegations that these practices are common and well-settled, Mr. West has alleged that neither Municipal Court nor Police Department staff arranges for hearings for capias arrestees when the Municipal Judge goes out of town, further supporting the inference that the Debtors' Prison Policy is an unwritten Hitchcock policy. *Id.* ¶¶ 32–33. *See Williams v. Kaufman Cnty.*, 352 F.3d at 1014 (holding custom liability where officers conducted extended detentions under sheriff's "unwritten policy"). Hitchcock's own exhibits demonstrate that this custom is integrated into Police Department and Municipal Court infrastructure, in the form of preprinted "Time Served" paperwork tailor-made for the Police Department to jail defendants in satisfaction of fines without the Municipal Judge's prior approval. Mot. to Dismiss Ex. 8. *See Lawson*, 286 F.3d at 263 (holding custom liability where jail lacked infrastructure to provide paraplegics appropriate medical care). Mr. West alleges that Hitchcock jails dozens of people in this manner each year, Am. Compl. ¶ 175, showing that the Debtors' Prison Policy is persistent and widespread. *See, e.g.*, *Matthias v. Bingley*, 906 F.2d 1047, 1054 (5th Cir. 1990) (holding custom liability where officer remembered following constitutional prescription only "once or twice"); *Flanagan v. City of Dallas*, 48 F. Supp. 3d 941, 953–55 (N.D. Tex. 2014) (holding custom liability for 60 unarmed African-American men killed by Dallas police within 13 years); *Oporto v. City of El Paso*, No. 10-cv-110, 2010 WL 3503457, *6 (W.D. Tex. 2010) (holding custom liability for 32 uses of excessive deadly force by El Paso police within 15 years); *Rivera v. City of San Antonio*, No. 06-cv-235, 2006 WL 3340908, *12 (W.D. Tex. Nov. 15, 2006) (holding

custom liability for 0 disciplinary actions in response to hundreds of excessive force complaints).

Mr. West has also alleged facts amply supporting the inference that both the Municipal Judge and the Police Chief have constructive knowledge, if not actual knowledge, of the Debtors' Prison Policy.[5] The frequency and flagrancy of the policy's application (tailor-made interdepartmental forms), severity and obviousness of the resulting constitutional violations (repeated deprivations of physical liberty), and notoriety of the debtors' prison issue (investigative reporting in national outlets; advisories by the Department of Justice) all give the Municipal Judge and the Police Chief constructive knowledge of the policy. *Id.* ¶ 175. *See Lawson*, 286 F. 3d at 264 (upholding custom liability based on constructive knowledge). Constructive knowledge is attributable to the Municipal Judge and the Police Chief because these practices "occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees." *Oporto*, 2010 WL 3503457 at *9.

Notably, neither the Municipal Judge nor the Police Chief has taken any action to correct these practices. The Municipal Judge could schedule ability to pay hearings before instructing clerks to issue capias pro fine warrants, but he has not done so. The

[5] Hitchcock argues that Mr. West must demonstrate that policymakers acted with deliberate indifference to his constitutional rights. But there is no need to demonstrate deliberate indifference when the custom itself—here, jailing people for debt without an ability to pay hearing—violates the Constitution. *De Luna*, 853 F. Supp. 2d at 641 (citing *James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009)).

Police Chief also has the power to remedy this custom: Hitchcock's capias pro fine warrants direct him to "bring [the Defendant] before the Municipal Court to be dealt with according to law." Mot. to Dismiss Ex. 6. The Police Chief has discretion—in fact, the duty—to execute these warrants in a manner consistent with the Constitution. *In re Foust*, 310 F.3d 849, 855 & n.4 (5th Cir. 2002). Nothing in these warrants authorizes the Police Chief to jail people for failure to pay—he is making the deliberate choice to hold people in jail, without a hearing, until they earn enough jail credit to discharge their debt.[6] Two other district courts have agreed that chief law enforcement officials incur municipal liability for a custom of jailing people under capias pro fine warrants without an ability to pay hearing. *De Luna v. Hidalgo Cnty.*, 853 F. Supp. 2d 623, 641 (S.D. Tex. 2012) ("[T]he Sheriff's Office considers a capias pro fine . . . to be an order to take the defendant into custody until he or she pays the fine . . . . [T]he Court finds . . . [that] the County jails individuals charged with Class C, fine-only offenses who have failed to directly inform the [court] of their inability to pay the assessed fines."); *Doe v. Angelina Cnty.*, 733 F. Supp. 245, 257 (E.D. Tex. 1990) ("[P]laintiff's unconstitutional incarceration was not a deviation from a sound procedure for administering Angelina County's jail. Rather, [] officials acted in accordance with instructions which were seconded by Sheriff Lawrence . . . . The sheriff's acquiescence in unsound and legally

[6] Even if Hitchcock's capias pro fine warrants explicitly required the Police Chief to jail people without a hearing until their fines were discharged, the Police Chief would still have the power to remedy the Debtors' Prison Policy. Such a warrant would be facially invalid because it would command a constitutional violation on its face. The Police Chief has a duty to refrain from executing facially invalid warrants. *Brown v. Byer*, 870 F.2d 975, 979 (5th Cir. 1989).

insufficient procedures effectively created a county policy for which the county is liable.").

The foregoing factual allegations support a reasonable inference that the practice of jailing people for failure to pay fines assessed in uncounseled criminal proceedings, without first conducting an ability to pay hearing, is so common and well settled as to constitute a custom attributable to the City of Hitchcock.

C. Mr. West Has Alleged Facts Demonstrating That Hitchcock's Debtors Prison Policy Violated His Constitutional Rights

Mr. West has shown that Hitchcock is liable for violating his rights by alleging "a direct causal link between [Hitchcock's] official policy and the constitutional violation." *Lawson*, 286 F.3d at 263.

1. Mr. West Has Alleged Facts Showing That Hitchcock's Debtors' Prison Policy Violated His Right to an Ability to Pay Hearing

Mr. West alleges that the Debtors' Prison Policy violated his right to an ability to pay hearing. In *Bearden v. Georgia*, the Supreme Court held that the Constitution requires courts to hold an ability to pay hearing before depriving a person of their liberty for failure to pay a fine. 461 U.S. 660 (1983). The Court held that it is "fundamentally unfair" to deprive someone of their liberty solely because they cannot afford to pay a fine, and prescribed specific procedures for determining whether a liberty deprivation would be constitutional. *Id.* at 672–73. First, the court must hold a hearing inquiring into the reasons for failure to pay. *Id.* at 672. If the failure to pay was not willful, the court must consider alternative punishments, such as tailoring the fine to the person's limited resources. *Id*. Jail is permissible only if the court concludes, after an ability to pay

hearing, that all available alternatives are inadequate to satisfy the state's interest in punishment and deterrence.[7] *Id.*

Bearden applies to imprisonment for failure to pay a fine under Texas's capias scheme: "Nothing in the language of the Bearden opinion prevents its application to any given enforcement mechanism." *United States v. Payan*, 992 F.2d 1387, 1396 (5th Cir. 1993); *Doe v. Angelina Cnty.*, 733 F. Supp. 245 (E.D. Tex. 1990) (holding sheriff violated *Bearden* by summarily jailing defendant under capias warrant). The Fifth Circuit has held that *Bearden* requires the court make an affirmative inquiry into the reasons for failure to pay. *United States v. Scales*, 639 F. App'x 233, 240 (5th Cir. 2016) (citing *Payan*, 992 F.2d at 1396). "No court has held that indigent debtors are required to initiate proceedings to request a modification of their financial obligations or otherwise risk imprisonment for nonpayment." *Cain v. City of New Orleans*, No. 15-cv-4479, 2016 WL 2962912, *5 (E.D. La. May 23, 2016) (rejecting argument to the contrary[8] and citing *Scales* and *Payan*); *Angelina Cnty.*, 733 F. Supp. at 245 (holding defendant could not waive his rights under *Bearden* if he was not informed of those rights). In fact, the Fifth

[7] Notably, the Texas legislature has specified that the State has no interest in jailing someone who is unable to pay her Class C misdemeanor fine. Tex. Code Crim. Proc. Art. 45.046(a) (prohibiting jail unless failure to pay is "willful"). Therefore, under *Bearden*, Texas courts never have a legitimate reason to jail someone who failed to pay their fine because they were too poor to pay it.

[8] The one *Bearden* case cited to the contrary was *Garcia v. City of Abilene*, 890 F.2d 773 (5th Cir. 1989) (per curiam). *Garcia* concerned a court that repeatedly attempted to schedule ability to pay hearings, and a plaintiff who persistently refused to appear. *Id.* at 774–75. *Garcia* did not create a duty for the debtor to initiate legal proceedings in order to avoid a jail term. *Accord Cain*, 2016 WL 2962912 at *5.

Circuit recently reiterated that "detainment solely due to a person's indigency" without "meaningful consideration of other possible alternatives" violates the Constitution—regardless of whether detainees affirmatively seek consideration of their ability to pay. *ODonnell v. Harris Cnty.*, 882 F.3d 528, No. 17-20333, slip op. 17–18 (5th Cir. Feb. 14, 2018); *see id.* at 3–6 (describing inadequate hearings where "[a]rrestees are instructed not to speak, and are not offered any opportunity to submit evidence of relative ability to post bond at the scheduled amount"). Here, even worse than the hearings that were ruled inadequate in *ODonnell*, Hitchcock did not hold any hearing whatsoever before jailing Mr. West.

Mr. West has clearly alleged that Hitchcock's Debtors' Prison Policy violated his right to an ability to pay hearing. Under that policy, the Municipal Court issues capias pro fine warrants "automatically" when someone misses a payment, and the Police Department jails people without presenting them to the Court for an ability to pay hearing. Anyone who misses a payment thus faces a jail term for failure to pay, without any judicial inquiry into their reasons for failure to pay or consideration of alternatives to jail time. Hitchcock jailed Mr. West under this policy, which was a violation of his right to an ability to pay hearing under *Bearden v. Georgia*. *DeLuna*, 853 F. Supp. 2d at 648 ("[D]ue process requires a forum in which defendants' reasons for failing to pay are considered before committing them to jail."); *Doe*, 733 F. Supp. at 252–54 ("a government entity that immediately converts a fine into a jail term when a party fails to pay that fine deprives the imprisoned party of liberty without due process of law"). *See ODonnell*, slip op. at 17 (striking down a "custom and practice resulted in detainment

solely due to a person's indigency because the financial conditions for release are [imposed] without any meaningful consideration of other possible alternatives") (citation omitted).

Hitchcock makes three summary and mistaken arguments to the contrary on page 12 of their brief. First, Hitchcock argues that it did not violate *Tate v. Short*, 401 U.S. 395 (1971), a case prohibiting automatic conversion of a fine into jail time without alternatives to immediate payment. Mr. West does not assert a violation of his rights under *Tate v. Short*. Second, Hitchcock argues that "a claimed indigent is obligated to appear and assert his indigence," citing *Sorrells v. Warner*, 21 F.3d 1109 (5th Cir. 1994), a case discussing rights under *Tate v. Short*. Again, Plaintiffs do not assert violation of their rights under *Tate v. Short*. Third, Defendants argue that a "person is not entitled to indigence [sic] hearing before being detained," citing *Pederson v. City of Haltom City*, 108 F. App'x 845, 848 (5th Cir. 2004). *Pederson* does not stand for that proposition. Instead, the court merely observed in dicta that the plaintiff had "not directed us to any cases holding that a person is entitled to an indigency hearing." *Id.* Of course, *Bearden* imposes such a requirement.

In sum, Plaintiffs have alleged that the Debtors' Prison Policy directly violates their right to an ability to pay hearing under *Bearden v. Georgia*.

2. Mr. West Has Alleged Facts Showing That Hitchcock's Debtors' Prison Policy Violated His Right to Counsel

Mr. West has alleged facts showing that the Debtors' Prison Policy violated his right to counsel under the Sixth and Fourteenth Amendments. Am. Compl. ¶¶ 181–84.

Hitchcock has not made any argument to the contrary. Should Hitchcok raise these arguments for the first time in their reply, the Court should either decline to consider these arguments or permit Plaintiffs to file a surreply.

CONCLUSION

For the foregoing reasons, the Court should deny Hitchcock's motion to dismiss in its entirety. In the alternative, Mr. West seeks leave to amend his complaint against Hitchcock.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March, 2018, I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the Court. The system will electronically serve this motion on all counsel of record.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

GEORGE WEST and BRADY FULLER, Plaintiffs, v. CITY OF SANTA FE, TEXAS and CITY OF HITCHCOCK, TEXAS; Defendants.	Civil Action No. 16-cv-309

PROPOSED ORDER

GEORGE HANKS, United States District Judge:

The City of Hitchcock's Motion to Dismiss, ECF No. 54, is denied.

SO ORDERED.

_____
GEORGE HANKS
United States District Judge

Dated:
Galveston County, Texas