IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MICHAEL POWERS,	::	Case No. C-1-02-605
Plaintiff,	::	(Judge Spiegel)
-vs-	::	INDIVIDUAL AND CLASS MOTION FOR PARTIAL SUMMARY JUDGMENT (Liability Only; Affidavit of Robert B. Newman Attached)
HAMILTON COUNTY PUBLIC DEFENDER COMMISSION, *et al*.	::	
Defendants.	::	

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Now come Plaintiff and the class he represents, through counsel, and respectfully move this Court for an order granting them summary judgment on liability only. The reasons why this motion should be granted are set forth in the accompanying memorandum.

Respectfully submitted,

/s/Robert B. Newman

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Following the severe narrowing of the issues in this case as a result of the Court's partial denial of Defendants' motion for summary judgment on August 23, 2005 (doc. 34), and in light of the class certification contained in the same Order and Plaintiff's other discovery, Plaintiff Powers believes liability in his favor and in favor of the class is now clear. He therefore files this motion urging the Court to find liability on the part of the remaining Defendants (the "County Defendants") as a matter of law, since all Rule 56 criteria have been met with regard to each element of each remaining cause of action under 42 U.S.C. § 1983.

A. PLAINTIFF HAS SATISFIED ALL THE ELEMENTS OF A 1983 CLAIM.

To recover pursuant to 42 U.S.C. § 1983 a plaintiff must prove "(1) deprivation of a right secured by the federal Constitution or laws of the United States, and (2) that the deprivation was caused by a person while acting under color of state law." *Christy v. Randlett*, 932 F.2d 502, 504 (6th Cir. 1991). In addition, when the claim is made "on the basis of a municipal custom or policy, [the plaintiff] must identify the policy, connect the policy to the [municipality] itself and show that the particular injury was incurred because of the execution of that policy." *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364 (6th Cir. 1994). Mr. Powers has satisfied all of these requirements as a matter of law.

1. The Right Not to Be Incarcerated for Debt is a Federal Right Which May be Redressed by a 1983 Action, and Persons Accused of Probation Violations Possess a Federal Right to Counsel to Preserve that Right.

The Supreme Court long ago held that the federal constitution prohibited incarceration for debt of an indigent person and that a hearing was required to establish whether the person could pay the debt and was simply refusing to do so. *Bearden v. Georgia*, 461 U.S. 660 (1983); see U.S. Constitution, Amendment XIII; Ohio Rev. Code § 2947.14. We do not understand the County to argue that this is not a sufficient specific federal right upon which to base a 1983 action. In any event, such an argument would be foreclosed in this Circuit by *Alkire v. Irving*, 330 F.3d 802, 816 (6th Cir. 2003).

As to Mr. Powers' and the class's right to have appointed counsel insist upon an indigency hearing before he was incarcerated for debt, the Court has already decided that issue in favor of Mr. Powers. (R. 34, Order of 8/23/05, at 18).

2. The Court has Already Decided that the County Defendants "Had a Well-Settled Custom or Policy of Not Asking for an Indigency Hearing Before a Probationer is Incarcerated for Failure to Pay a Fine."

This part of the 1983 cause of action is no longer in issue. (*Id*. at 14)

3. The Causal Connection Between the County's Conduct and Mr. Powers' Night in Jail is Too Clear to Require a Trial.

Mr. Powers was sent to jail for debt for one reason only – his Public Defender attorney did not mention, either to him or to the judge, that he had a constitutional and a state statutory right to an indigency hearing. He is not required to demonstrate what would have happened at such a hearing if it had been held. *Fuentes v. Shevin*, 406 U.S. 67, 87 (1972) (the right to be heard "does not depend upon an advance showing that one

will surely prevail at the hearing"); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

B. THERE IS NO DIFFERENCE BETWEEN MR. POWERS AND THE CLASS FOR PURPOSES OF SUMMARY JUDGMENT.

The affidavit of John Weber (doc. 21) as the Court has noted "suggests a pattern exists….[where]..32 cases of incarcerants [were] committed on fines with no record of an indigency finding. The Court agrees that an extrapolation of the results of John Weber's review of court records reasonably indicates that nearly 200 persons were incarcerated on fines without an indigency hearing." slip opinion p. 27-28.

In addition, the transcripts filed with the Court (doc. 22) indicate that public defenders did not request an indigency hearing. In *State of Ohio v. David Scruggs,* No.00-CRB-30018, the Defendant was charged with soliciting someone for bus fare. The public defender, a Ms. Pamela Thompson, entered a no contest plea, and after a finding of guilty, counsel stated that the Defendant was homeless and not working, yet there was no request for an indigency hearing, and the Defendant was fined $100, and committed to jail. In *State of Ohio v.William Ballew* No. 00 CRB 21247, the public defender, Mr. Wong is quoted as saying about his own client, "Stay to pay. Commit him when he gets out…..Commit. Can't afford to pay." And the judge obliges by stating, "Commit on fine." This is repeated in *State of Ohio v. Demetrius Allen* No. 00 CRB 32201 a stay to pay case. Mr. Wong stands by while the Court enters judgment "Commit on all three cases." In *State of Ohio v. Kathy Nevling,* No. 00 CRB 36947 the Defendant was charged with giving a false name to a police officer. She had been locked up overnight,

and in mitigation, the public defender, John Bauer, stated that his client was diagnosed with brain damage and mental retardation, and was on SSI. The defendant was fined $50 and court costs, and the Court ruled, "I am going to commit on $50."

In none of these cases was an indigency hearing held. In none of these cases was an indigency hearing requested.

The only possible inference from these public records is that Mr. Powers' claim is identical to the claims of class members. If he is entitled to summary judgment, so are they.

CONCLUSION

For the forgoing reasons, this motion for summary judgment on behalf of Plaintiff and of the certified class should be granted.

Respectfully submitted,

/s/ Robert B. Newman

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COUNSEL FOR PLAINTIFF

CERTIFICATION

I hereby certify that on _____, 2005 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: David T. Stevenson, 230 E. Ninth St., Suite 4000, Cincinnati, Ohio, 45202.

/s/ Stephen R. Felson